In the Supreme Court of the State of Nevada

CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation, Appellant, v. BAHRAM YAHYAVI, an individual, Respondent.	Case No. 80107/Case No. 80821

APPEAL

From the Eighth Judicial District Court
Clark County, Nevada
The Honorable Ronald J. Israel, District Judge
District Court Case No. A-15-718689-C

RESPONDENT BAHRAM YAHYAVI'S APPENDIX
VOLUME 2
PAGES 188-245

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Supreme Court of Nevada on the 25th day of November, 2020. Electronic service of the foregoing document entitled **RESPONDENT BAHRAM YAHYAVI'S APPENDIX** shall be made in accordance with the Master Service List as follows:

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/s/ Kevin T. Strong
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DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, an Individual, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation, Defendant	CASE NO.: A-15-718689-C DEPT. NO.: XXVIII **PLAINTIFF'S TRIAL BRIEF TO EXCLUDE TESTIMONY AND OPINIONS OF DEFENDANT'S RETAINED EXPERT, JOHN E. BAKER, Ph.D., P.E.**

Plaintiff Bahram Yahyavi, by and through his attorneys of record, DENNIS M. PRINCE, ESQ., KEVIN T. STRONG, ESQ. and BRANDON C. VERDE, ESQ. of PRINCE LAW GROUP, hereby submits his *Trial Brief to Exclude Testimony and Opinions of Defendant's Retained Expert, John E. Baker, Ph.D., P.E.*

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This Brief is based upon the pleadings and papers on file in this action, the Points and Authorities set forth herein, and any argument the court may entertain at the time of the hearing.

DATED this 16th day of September, 2019.

Respectfully Submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Trial in this matter commenced on September 9, 2019. Defendant Capriati Construction Corp., Inc. ("Defendant") retained John E. Baker, Ph.D., P.E., an accident reconstructionist and biomechanical engineer to offer opinion testimony in this case. Dr. Baker offers opinions regarding the deceleration of Plaintiff Bahram Yahyavi's ("Plaintiff") vehicle at impact. *See* 7/3/18 Baker report, at p. 4, attached as **Exhibit "1."** Dr. Baker relies on his analysis of the character of the impact to offer his ultimate opinion that "there are no possible hyperflexion mechanisms of injury" based on the levels of deceleration involved in the subject collision. *Id.* This opinion testimony should be excluded because it will not assist the jury. Defendant's counsel acknowledged during his opening statement that Plaintiff was hurt as a result of the subject collision. Defendant's retained medical expert, Howard Tung, M.D., opined that Plaintiff sustained a straining injury to his spinal axis. *See* 8/2/18 Tung report, at p. 13, attached as **Exhibit "2."** Thus, Dr. Baker's opinions will not assist the jury because the speed and/or deceleration of Plaintiff was not a factor in relation to whether Plaintiff was injured as a result of the subject collision.

Further, Dr. Baker's testimony should be excluded because his alleged biomechanical opinions are simply disguised medical causation opinions. Dr. Baker does not have the medical ***qualifications*** to opine as to whether the mechanism of the collision was strong enough to cause injury. Dr. Tung's medical causation opinion further undermines the reliability of Dr. Baker's opinion given the distinctions.

Finally, Dr. Baker's opinions regarding Plaintiff's knee should be excluded because Plaintiff withdrew his right knee injury claim. Dr. Baker's opinions in rebuttal to Plaintiff's retained accident reconstructionist and biomechanical engineer, Timothy S. Leggett, P.E., should also be excluded in their entirety because Plaintiff is not calling Mr. Leggett to testify at trial. Thus, there are no opinions that will be presented at trial for Dr. Baker to rebut.

II.

LEGAL ARGUMENT

Relevance is the cornerstone of trial. In performing its gatekeeper function, the trial court is guided by NRS 48.025(1), which provides that only "relevant evidence" is admissible. In Nevada, only relevant evidence is admissible at trial. Nev. Rev. Stat. 48.025(1). Evidence that is not relevant is not admissible. Nev. Rev. Stat. 48.025(2). "Relevant evidence" is evidence that "has some tendency in reason to establish a proposition material to the case." Nev. Rev. Stat. 48.015; *see also Land Resources Dev. v. Kaiser Aetna*, 100 Nev. 29, 34 (1984). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or if there are considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Nev. Rev. Stat. 48.035; *Uniroyal Goodrich Tire Co.,* 111 Nev. at 320. The determination of whether evidence is relevant and, by implication, whether it is admissible, lies within the sound discretion of the trial judge. *Woods v. State,* 101 Nev. 128 (1985); Nev. Rev. Stat. 48.025.

A district court's decision to allow expert testimony is reviewed for abuse of discretion. *Leavitt v. Siems,* 130 Nev. 503, 509 (2014).

A. Standard of Review for the Admission of Expert Testimony

The Supreme Court of Nevada identified three "overarching requirements" for expert testimony and opinions as the "blueprint for admissibility" pursuant to NRS 50.275. *Higgs v. State*, 126 Nev. 1, 16-17 (2010). The requirements are: **(1) Qualification**: the expert "must be qualified in

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an area of scientific, technical or other specialized knowledge;" **(2) Assistance**: the expert's "specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue;" ***and*** **(3) Limited scope**: the expert's "testimony must be limited to matters within the scope of his or her specialized knowledge." *Id.*; *Hallmark v. Eldridge*, 124 Nev. 492, 498 (2008) (citing Nev. Rev. Stat. 50.275). These factors are no exhaustive. "Courts should consider additional factors that tend to indicate that an expert's opinion is reliable or unreliable." *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1421 (9th Cir. 1998). Nevada trial judges assume the role of a gatekeeper in assessing whether experts satisfy these requirements. *Higgs*, 126 Nev. at 20. "Nevada trial judges [have] wide discretion, within the parameters of NRS 50.275, to fulfill their gatekeeping duties." *Id.* at 17. The determination of the competency of expert testimony, absent a manifest abuse of discretion, will not be disturbed on appeal. *Porter v. State*, 94 Nev. 142, 148 (1978).

The Nevada Supreme Court's ruling in "*Hallmark* stands for the well-established proposition that expert testimony . . . must have sufficient foundation before it is admitted into evidence." *Rish v. Simao*, 132 Nev. ___, 368 P.3d 1203, 1208 (2016). In performing its gatekeeping duties, "the district court *must* first determine that the witness is indeed a qualified expert." *Cramer v. Dep't of Motor Vehicles*, 126 Nev. 388, 395 (2010) (emphasis in original) (citing *Mulder v. State*, 116 Nev. 1, 13 (2000) and *Hallmark*, 124 Nev. at 498)). If qualified, the court must determine if the expert's testimony will assist the trier of fact to understand the evidence or determine a fact at issue in the case. *Hallmark*, 124 Nev. at 500. The proponent of expert testimony bears the burden of proof to show that the expert's testimony is reliable. *State Dep't of Motor Vehicle v. Bremer*, 113 Nev. 805, 808-09 (1997).

B. <u>Dr. Baker's Accident Reconstruction Opinions Will Not Assist the Jury Because Defendant Admitted that Plaintiff was Injured as a Result of the Subject Collision</u>

"An expert's testimony will assist the trier of fact [in understanding the evidence or determining a fact in issue] only when it is relevant and the produce of reliable methodology." *Hallmark*, 124 Nev. at 500. When determining if an expert's methodology is reliable the court should consider, among other things, "...whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) ***based more on particularized facts rather than assumption, conjecture, or generalization.***" *Id.* at 500-01. (emphasis added). Ultimately,

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"...the threshold test for the admissibility of expert testimony turns on whether the expert's specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 243 (1998) (citing Nev. Rev. Stat. 50.275). "[T]he admissibility of such evidence must also satisfy the prerequisites of all relevant evidence, *i.e.*, that its probative value is not substantially outweighed by its prejudicial effect." *Id.*

Dr. Baker offered opinions on both the dynamics of the subject collision and whether Plaintiff could have been injured as a result of those accident dynamics. Specifically, Dr. Baker opined that the deceleration of Plaintiff's vehicle was between 0.55 and 0.70 Gs at impact assuming Plaintiff applied his brakes. *See* **Exhibit "1,"** at p. 3. He further opined that without braking, the forced deceleration of the impact would have been substantially less. *Id.* at p. 4. Based solely on these vehicle dynamics, Dr. Baker opined that "at these levels of deceleration of (.55 to .70 or less), there are no possible hyperflexion mechanisms of injury. *Id.* He further opined that "without direct contact with the forks of other [sic] fixed object, it is unclear how Bahram Yahyavi could have experienced a traumatic head-strike injury or a deformed lower left rib with a possible separation from sternum." *Id.*

Clearly, the relevancy of Dr. Baker's opinions regarding the dynamics of Plaintiff's vehicle at impact is derived from his opinion that Plaintiff could not have sustained any type of injury from the subject collision. In other words, opinions regarding the change in velocity or forces involved in the subject collision will not assist the jury if there is no admissible opinion from a medical expert that Plaintiff was not injured as a result of the subject collision. Such is not the case here. Defendant's retained medical expert, Dr. Tung, who, unlike Dr. Baker, is qualified to offer medical causation opinions, opined that Plaintiff "sustained a straining injury to his spinal axis" as a result of the subject collision. *See* **Exhibit "2,"** at p. 13. A strain to the spinal axis is certainly considered a hyperflexion injury because it is an injury "to the soft tissue structure around the cervical spine." *See* http://www.ncbi.nim.nih.gov/pubmed/15103795 ("Cervical whiplash syndrome, or hyperextension-hyperflexion injury, is a common traumatic injury to the soft tissue structure around the cervical spine") (last checked September 16, 2019). Defendant has already admitted that Plaintiff suffered a neck injury as a result of the subject collision and that certain medical treatment he underwent for his neck injury was reasonable and necessary. Thus, the forces in the subject collision and the speed of Plaintiff's vehicle were a non-factor regarding the contested issue of whether Plaintiff was injured as

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a result of the subject collision. This undermines not only the relevancy of Dr. Baker's accident reconstruction opinions, but also the assistive qualities of the opinions. Dr. Baker's opinions will not assist the jury because they are predicated on the false premise that Plaintiff was not injured as a result of the subject collision. Therefore, Dr. Baker did not rely on the particularized facts of the case, but speculation and conjecture regarding the forces involved in the subject collision and their ability to cause injury. Allowing Dr. Baker to offer these opinions at trial will mislead the jury about a critical issue of fact in the case and prejudice Plaintiff. Nev. Rev. Stat. 48.035. Therefore, Dr. Baker's accident reconstruction opinions should be excluded at trial.

C. Dr. Baker's Biomechanical Opinions are Disguised Medical Causation Opinions that He Lacks the Qualifications to Offer

To determine whether a person is properly qualified to offer expert testimony, a district court should consider whether "(1) the subject matter is distinctly related to some scientific field or profession beyond the average person's knowledge; and (2) the witness has sufficient skill, knowledge, or experience in the area at issue so that the opinion will aid the jury." *Staccato v. Valley Hosp.*, 123 Nev. 526, 533 (2007). In determining if the expert has the required skill, knowledge, or experience, the trial court considers the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training. *Hallmark*, 124 Nev. at 499. "A [medical expert] can testify regarding matters within his or her specialized area of practice, but not as to medical causation unless he or she has obtained the requisite knowledge, skill, experience, or training to identify cause. *Williams v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 518, 521 (2011).

Here, Dr. Baker has unquestionably offered a medical causation opinion that Plaintiff suffered no hyperflexion injuries as a result of the subject collision. Dr. Baker had to offer this opinion to establish the necessity of his accident reconstruction opinions. However, Dr. Baker is not qualified to offer medical causation opinions because he is not a medical doctor. Dr. Baker received a bachelor's degree in mechanical engineering, a master's degree in industrial and systems engineering, and a doctorate in human factors and safety engineering. *See* Baker CV, attached as **Exhibit "3."** Dr. Baker's education history is devoid of any medical school or training. Dr. Baker did not obtain any licensure to practice medicine. His CV is devoid of any evidence of specialized training or practical experience in diagnosing spine injuries and administering treatment for spine injuries. Dr. Baker is

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nothing more than an accident reconstructionist and biomechanical engineer. The Nevada Supreme Court has cited, with approval, to various cases from other jurisdictions that did not allow biomechanical engineers to offer opinions about the causal relationship between an accident and a plaintiff's alleged injuries. *See Rish v. Simao*, 132 Nev. ___, 368 P.3d 1203, 1209 (2016) (citing *Mattek v. White*, 695 So. 2d 942, 943 (Fla. Dist. Ct. App. 1997) (holding that the defendant's expert in accident reconstruction and biomechanical engineering, who was not a medical doctor, was not qualified to opine on the extent of Plaintiff's injury); *Santos v. Nicolos*, 879 N.Y.S.2d 701, 704 (Sup. Ct. 2009) (explaining that biomechanical engineer was not qualified to testify about the causal relationship between an accident and the injuries of the plaintiff *because he was not a medical doctor*)). The unreliability of Dr. Baker's medical causation opinions is further augmented by the fact that Defendant's retained medical expert acknowledged Plaintiff was injured as a result of the subject collision. This underscores the utter lack of qualifications Dr. Baker possesses to offer any type of medical causation opinion. Therefore, Dr. Baker's opinions regarding any mechanism of injury should be excluded because they are medical causation opinions he is not qualified to offer.

D. <u>Dr. Baker's Rebuttal Opinions Should be Excluded Because Plaintiff's Retained Accident Reconstructionist, Timothy S. Leggett, P.E., Will Not Testify at Trial</u>

"The admissibility of expert remittal testimony lies within the sound discretion of the trial court." *Carr v. Paredes*, No. 60318, No. 61301, 2017 Nev. Unpub. LEXIS 56, at *2, 2017 WL 176591 (Nev. Jan. 13, 2017). "Expert rebuttal witnesses are proper if they contradict or rebut the subject matter of the original expert witness." *Id.* at *2-3.

Dr. Baker's December 3, 2018 report contains only opinions in rebuttal to Plaintiff's retained accident reconstructionist and biomechanical engineer, Timothy S. Leggett, P.E. *See* 12/3/18 Baker report, attached as **Exhibit "4."** Plaintiff is not calling Mr. Leggett to testify at the trial of this matter. Therefore, Dr. Baker has no basis to offer any rebuttal opinions to Mr. Leggett at the trial and those opinions should be excluded.

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III.

CONCLUSION

Based on the foregoing facts, law, and analysis, Plaintiff respectfully requests that this Court **GRANT** his Trial Brief to Exclude Testimony and Opinions of Defendant's Retained Expert, John E. Baker, Ph.D., P.E. in its entirety.

DATED this 16th day of September, 2019.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of **PRINCE LAW GROUP**, and that on the 16 day of September, 2019, I caused the foregoing document entitled **PLAINTIFF'S TRIAL BRIEF TO EXCLUDE TESTIMONY AND OPINIONS OF DEFENDANT'S RETAINED EXPERT, JOHN E. BAKER, Ph.D., P.E.** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court E-Filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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EXHIBIT 1

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July 3, 2018

Mr. Mark J. Brown
Senior Staff Attorney
Law Offices of Eric R. Larsen
Subsidiary of The Hartford Financial Services Group, Inc.
750 E. Warm Springs Rd., Ste. 320, Box 19
Las Vegas, NV 89119

Re: Bahram Yahyavi v. Capriati Construction Corp., Inc.
DOI: June 19, 2013

Dear Mr. Brown:

You have requested that I evaluate and opine on a two vehicle collision occurring on June 19, 2103 at approximately 10:25 A.M. on Sahara Avenue 2 feet north of the intersection of Glen Avenue.

As indicated in the State of Nevada Traffic Accident Report #LVMPD-130619-1450 authored by 5316 E. Grimmesey:

where: V1 = 2007 Forklift Truck driven by Joshua Adom Arbuckle

V2 = 2012 Dodge Charger 4-Door driven by Bahram Yahyavi

"V2 was travelling eastbound Sahara, West of the Y intersection at Glen in T2 of 2. V1 was a large construction forklift working on the S/W corner of Sahara/ Glen. This area has active construction in progress. The south side of Sahara has orange pylons lining the south shoulder which continues along to the south side of Glen. The shoulder line by the cones is 18 feet wide. There was a semi-truck with a flatbed trailer parked facing eastbound on Sahara, west of Glen.

In the closed shoulder, V2 was making a right turn along the cone pattern when it was struck by V1. V1 was travelling N/B from the sidewalk though the closed shoulder in front of the semi-truck. The forks of V1 were sticking out approximately 3 feet into T2 about 4 feet off the ground past the cone pattern. V1's forks stuck the right side of V2's windshield.

There were no pre-impact skid marks. V1 was moved prior to my arrival. W1 who is an inspector said he saw V1 driving into the roadway and said the forklift operator didn't see V2 coming. D2 was interviewed at UMC hospital. D2 said he was going east. And was going to turn onto Glen. When he saw the blades coming at him. D2 said the forklift wouldn't stop.

D1 said he was trying to go onto Sahara, to another part of the jobsite and he didn't see V2 coming. D1 was determined to be at fault in the accident and was cited for full attention to driving. D2 was transported for claimed injuries. The AIC was 2 N/S and 13 E/W determined by V1s post-impact tire marks. V1 and V2 were unregistered and did not have proof of insurance."

Presented below are my observations and opinions regarding

CURRICULUM VITAE
Attached

LIST OF VERBAL TESTIMONIES GIVEN IN PREVIOUS 10 YEARS
Attached

FEE SCHEDULE
Attached

DOCUMENTS REVIEWED

1. Retention Letter - June 25, 2018 (1 page).
2. State of Nevada Traffic Accident Report #LVMPD-130619-1450 authored by 5316 Eric Grimmesey (12 pages):
3. Las Vegas Fire and Rescue Pre-Hospital Care Report Summary (3 pages).
4. Deposition transcript of Bahram Yahyavi (62 pages).
5. UMC - reports and records regarding Bahram Yahyavi (23 pages).
6. Deposition transcript of Eric Grimmesey (47 pages).
7. Deposition transcript exhibits of Eric Grimmesey (11 Full page photo exhibits):
8. [43] Accident Scene color photographs.

PRELIMINARY OBSERVATIONS and OPINIONS

1. The State of Nevada Traffic Accident Report indicates that the Point of Rest (POR) of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi was seven feet past the Point of Impact (POI). At the Point of Impact, the Forklift's forks struck the windshield and the right side of the A-pillar. In fact, the forks reportedly initially penetrated into the vehicle travel compartment and penetrated approximately 3 inches past the initial strike into the windshield and exterior of the vehicle. Therefore, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi did not, in fact, travel 7 feet past the initial Point of Impact.

2. Both the passenger's-side A-pillar and the laminated windshield glass of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi are not load-bearing. As loud and violent as it may have appeared to the driver Bahram Yahyavi, the forks' striking, intercepting, or penetrating the A-pillar and laminated glass windshield components caused those components to break, but did not have any influence on the deceleration of the forward movement of the 3962-pound 2012 Dodge Charger.

3. In his deposition transcript (Page 40, Line 25), Bahram Yahyavi stated that he never did brake. However, if the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi traveled 7 feet past the A.I.C. (Area of Initial Contact – or POI), and with the A-pillar and windshield were not able to slow the moving vehicle, all deceleration of the 2012 Dodge Charger 4-Door would have had to be due to braking by the driver. That braking with or without tire friction marks, the deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have been between 0.55 and 0.70 G's. Without braking, the

forced deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi was substantially less.

4. In order to travel 7 feet past the POI, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have had to be travelling at a speed of 5.61 mph with no braking and rolling drivetrain resistance only (as Bahram Yahyavi states), or 12.12 mph with full braking . However, the 2012 Dodge Charger's traveling 7 feet past the POI necessitates the Forklift forks traveled through the entire travel compartment of that vehicle. Neither scenario is consistent with the post-collision position of the forks.

5. Despite the two major technical inconsistencies, at these levels of deceleration of (.55 to .70 or less), there are no possible hyperflexion mechanisms of injury. Without direct contact with the forks of other fixed object, it is unclear how Bahram Yahyavi could have experienced a traumatic head-strike injury or a deformed lower left rib with a possible separation from sternum. Depending on the three-dimensional geometry of the driver with respect to the travel compartment envelope, there can have been incidental direct contact of the knees with the lower dashboard. However this incidental level of contact is not consistent with the sudden changes of direction common in ACL tears. The small laceration inside Bahram Yahyavi's lower lip was most likely due to flying bits of crumbled laminated glass.

These preliminary opinions have been stated to a reasonable degree of Accident Reconstruction, Biomechanics, and Human Factors Engineering certainty.

Given the substantial levels of technical inconsistencies in the State of Nevada Traffic Accident Report and the deposition of Bahram Yahyavi, I request the opportunity to supplement or amend these preliminary observations and opinions on receipt of additional discovery material – specifically including medical reports and records. If you have any questions regarding these preliminary observations and opinions, please do not hesitate to contact me.

Sincerely,

John E. Baker (Signed electronically).

John E. Baker, Ph.D., P.E.

EXHIBIT 2

HOWARD TUNG, M.D.
NEUROSURGERY
DIPLOMATE AMERICAN BOARD OF NEUROLOGICAL SURGERY
CLINICAL PROFESSOR OF NEUROLOGICAL SURGERY
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August 26, 2016

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750 E Warm Springs Rd, Suite 320
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RE: YAHYAVI, Bahram
DOI: June 19, 2013

INDEPENDENT MEDICAL EVALUATION

I had the opportunity to evaluate Mr. Bahram Yahyavi in my office for the purpose of an Independent Medical Evaluation.

HISTORY OF INJURY:

Mr. Bahram Yahyavi indicates he was involved in a motor vehicle accident on June 19, 2013. At that time, he was a restrained driver of a company Dodge Charger vehicle that was struck by a forklift approximately perpendicular to his vehicle. He states the blades of the forklift intruded into the vehicle. The airbags did not deploy. There was no loss of consciousness. It was reported as a work injury.

He was treated in the emergency room at University Medical Center. He recalls having complaints of knee, back and neck pain. He underwent CT scans of the brain, cervical spine, abdomen and pelvis. There were no acute traumatic findings. Degenerative changes were noted in the cervical spine. He underwent chiropractic evaluation and treatment the following day by Donna Callaway, D.C. and received a couple of weeks of chiropractic treatment. He underwent occupational evaluation at Occupational Health and Wellness, as well as medical evaluation by Dipti Shah, M.D. He underwent an orthopaedic spine evaluation by Archie Perry, M.D. in September of 2013 and was referred for a cervical MRI study in October of 2013.

He underwent a number of injections by Joseph Schifini, M.D. over the next several months. He indicates he did not receive any significant benefit from these injections. He also underwent further physical therapy in the summer of 2014 a Kelly Hawkins Physical Therapy. More recently, he states that he has been referred for pain management with Christopher Fisher, M.D. and last year was evaluated at Mattsmith Physical Therapy, as well as underwent permanent impairment evaluation by David Oliveri, M.D.

CURRENT SYMPTOMATOLOGY:

Mr. Yahyavi endorses current symptoms of headache, primarily in the suboccipital area. This can radiate to the top of his head. He states that these occur on an intermittent, but daily basis. He rates his headache 4-5 on a scale of 10.

Mr. Yahyavi complains of cervical neck pain on a constant and daily basis. This involves primarily the top and posterior shoulder areas. It does not go below the scapula level.

He states he has occasional symptoms involving his left arm. This can involve his forearm and third, fourth and fifth fingers of his left hand. He denies any right arm symptoms.

He denies any midback pain. He denies any low back pain.

PAST TRAUMA:

He denies a history of prior trauma or previous cervical neck pain prior to the subject motor vehicle accident.

PAST MEDICAL HISTORY:

He has a history of hypertension. He denies a history of diabetes.

PAST SURGICAL HISTORY:

He has undergone a right knee arthroscopy.

MEDICATIONS:

He utilizes lisinopril and tramadol.

ALLERGIES:

No known allergies.

SOCIAL HISTORY:

Occupation: Sales Manager for a car business.

MEDICAL RECORD REVIEW:

06/19/13 State of Nevada Traffic Accident Report.

06/19/13 Transport to Hospital, Las Vegas Fire and Rescue.

06/19/13 **Emergency Room Record,** Joshua Parker, M.D., University Medical Center. Patient was the restrained driver of a vehicle going about 10 mph when it struck a fork lift's blades. This was not a head on, but more of a T-bone where he drove into the blades at a perpendicular type of angle. The patient thinks he hit his head, but EMS reported that passenger compartment intrusion was very minimal. Airbags were not deployed. The patient was not ambulatory on the scene. He denies loss of consciousness. He complains of a headache and some back pain. He does not have any radiation of the back pain. EMS reported patient's blood sugar is 144. Diagnosis: 1) Musculoskeletal strain. 2) MVA. Patient treated and released in stable condition.

06/19/13 **CT Brain without Contrast,** Jimmy Shih, M.D., University Medical Center. Impression: No acute intracranial pathology.

06/19/13 **CT Cervical Spine without Contrast,** Jimmy Shih, M.D., University Medical Center. Impression: No traumatic injury to the cervical spine seen. Degenerative changes as above.

06/19/13 **CT Abdomen and Pelvis,** Pejman Motarjem, M.D., University Medical Center. Impression: 1) No acute intra-abdominal or intrapelvic process. 2) Probably a small hemangloma involving segment 8 in the liver. Nonemergent contrast enhanced MRI recommended.

06/19/13 **Chest X-ray,** Jimmy Shih, M.D., University Medical Center. Impression: Unremarkable trauma portable chest.

06/19/13 **X-ray Left Humerus,** Jimmy Shih, M.D., University Medical Center. Impression: No acute fracture seen.

06/24/13 **Initial Chiropractic Evaluation,** Donna Callaway, D.C., Downtown Neck and Back Clinic. Patient states that he was involved in a MVA on 06/19/13. He was the restrained driver of a Dodge Charger and was involved in a side impact collision in which his vehicle was struck by a fork lift on the front passenger side. He cannot remember if he had any loss of consciousness, but reports of blurry vision for about two minutes. He reports his vehicle was moving. He did not anticipate the collision. His head position was forward. He reports having both hands on the steering wheel. He reports a slight forward body lean. His head rest in the down position. His seat was not altered or broken after the impact. The patient reports he hit both of his knees on the dash. The airbags did not deploy. Diagnosis: 1) Cervical spine s/s with cervical segmental dysfunction. 2) Cervical radiculitis/neuritis. 3) Posttraumatic headaches. 4) Thoracic spine s/s with thoracic segmental dysfunction. 5) Lumbar spine s/s with lumbar segmental dysfunction. 6) Right knee s/s. 7) Left knee s/s. 8) Muscle spasm. 9) Insomnia secondary to pain. 10) Left knee abrasion. Plan: Chiropractic therapy.

06/24/13-07/03/13 **Chiropractic Progress Notes,** Donna Callaway, D.C., Downtown Neck and Back Clinic. Patient has completed 7 therapy sessions. Plan: Continue chiropractic care.

06/25/13 **Urgent Care,** Radar Medical Group/University Urgent Care. Patient seen for right knee pain, back pain, and neck pain from MVA on 06/19/13. Plan: Lortab, Ibuprofen, Flexeril.

06/27/13 **Employers Report of Industrial Injury or Occupational Disease.** Chapman Dodge.

07/08/13 **Initial Consultation,** Maangelica Goodstein, PAC., Center for Occupational Health and Wellness. Diagnosis: 1) Cervical muscle strain. 2) Scapular muscle strain. 3) Head injury, resolved. Plan: Duexis, stretching, heat, cervical collar, modified work status.

07/15/13 **Internal Medicine Evaluation,** Dipti Shah, M.D. Diagnosis: 1) S/P MVA. 2) Acute, traumatic cervical, thoracic, lumbar strain. 3) Acute, traumatic cervical, thoracic, lumbar muscle spasm. 4) Acute, traumatic cervicogenic headaches. 5) Insomnia. Plan: Flexeril, Lortab, stop Motrin due to history of ulcers, obtain records, MRI cervical spine.

07/18/13 **Progress Notes,** Victor Klausner, D.O., Center for Occupational Health and Wellness. Patient has pain over the base of his neck radiating to the left trapezius with intermittent headaches. He has intermittent episodes of dizziness without nausea or vomiting. CT cervical spine shows DDD, osteoarthritis and foraminal stenosis at C5/7. Plan: HEP, Lodine, PT, stop soft collar.

09/16/13 **Orthopedic Consultation,** Archie Perry, M.D., Desert Orthopedic Center. Diagnosis: 1) Neck and cervical strain. 2) C6/7 auto fusion, preexisting. 3) Cervical spondylosis, preexisting, but previously asymptomatic. 4) Left greater than right upper extremity radicular symptoms. Plan: MRI cervical spine, modified work status.

09/24/13 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Diagnosis: Right knee ACL tear and mild arthritis. Plan: MRI right knee.

10/01/13 **MRI Cervical Spine without Contrast,** P. Valiveti, M.D., Desert Radiologists. Impression: 1) Straightening and minimal reversal of the normal cervical lordosis with multilevel discogenic disease and multilevel uncovertebral degenerative changes throughout the cervical spine. 2) See above for detail regarding each level. 3) Multilevel facet arthrosis, with severe right sided facet arthrosis C7/T1.

10/06/13 **Emergency Room Record,** Matthew Stofferahn, M.D., Summerlin Hospital Medical Center. Patient seen for headache. All testing was negative. He is treated and released in stable condition.

10/06/13 **CT Brain without Contrast,** Hubert Chin, M.D., Summerlin Hospital Medical Center. Impression: Normal CT of the brain.

10/14/13 **Progress Notes,** Archie Perry, M.D., Desert Orthopedic Center. In the ER, he was found to have significantly high BP and he was started on 2 medications. He has noted progressive increase in his neck pain, left arm pain and numbness, as well as occipital and frontal headaches associated with these painful episodes. Plan: Injections, EMG study.

10/15/13 **Cardiac Notes,** Anil Fotedar, M.D., Heart Center of Nevada. Patient seen for hypertension and possible hypertensive heart disease.

11/11/13 **Office Visit,** Archie Perry, M.D., Desert Orthopedic Center. His hypertension may be related to his pain symptoms. Plan: EMG study.

11/25/13 **Consultation,** Joseph Schifini, M.D., Las Vegas Surgery Center. Diagnosis: 1) Multilevel cervical disc osteophyte complexes. 2) Multilevel cervical DDD. 3) Subjective bilateral upper extremity radiculitis, left greater than right. Plan: Staged left C7/T1, followed possibly by C6/7 and possibly C5/6 transforaminal selective ESI, continue current medication regimen.

12/09/13 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: Staged first left C7/T1 transforaminal selective ESI under fluoroscopic guidance. No complications.

12/09/13 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: Staged second left C6/7 transforaminal selective ESI under fluoroscopic guidance. No complications.

12/09/13 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: 1) Staged third left C5/6 transforaminal selective ESI under fluoroscopic guidance. 2) Intravenous conscious sedation with Versed. No complications.

12/10/13 **MRI Right Knee without Contrast,** Jimmy Wang, M.D., Desert Radiologists. Impression: Findings consistent with a chronic ACL tear with subsequent scarring the intercondylar notch. 2) Peripheral vertical tear of the posterior horn of the medial meniscus extending to the posterior body segment, known to be associated with a chronic ACL tear.

12/17/13 **Progress Notes,** Joseph Schifini, M.D., Las Vegas Surgery Center. After injections patient noted 20% long term relief of his neck pain, but no relief of his bilateral shoulder pain. Plan: Injections, continue medications.

12/17/13 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Diagnosis: Right knee ACL tear and mild arthritis, medial meniscus tear. Plan: Right knee arthroscopy, preop clearance.

01/02/14 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: 1) Left C6/7 transforaminal selective ESI under fluoroscopic guidance. 2) Intravenous conscious sedation with Versed. No complications.

01/02/14 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: Right C6/7 transforaminal selective ESI under fluoroscopic guidance. No complications.

01/07/14 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Patient seen for preop. Diagnosis: Right knee ACL tear and mild arthritis, medial meniscus tear. Plan: Right knee arthroscopy, Norco.

01/07/14 **Chest X-ray,** Frank Hsu, M.D., Desert Radiologists. Impression: Right upper lobe pulmonary nodule. Appearance is nonspecific. Recommend correlation with prior chest radiographs if available. If none are available, chest CT is recommended.

01/08/14 **Progress Notes,** Anil Fotedar, M.D., Heart Center of Nevada. Patient seen for preop. EKG is normal. Patient is cleared from a cardiac standpoint.

01/09/14 **Operative Report,** Michael Miao, M.D., Institute of Orthopedic Surgery. Procedure: Right knee arthroscopic assisted ACL reconstruction, AT allograft, arthroscopic partial medial meniscectomy. No complications.

01/10/14 **Physical Therapy Evaluation,** Jared Morasco, PT., Mattsmith Physical Therapy. Diagnosis: 1) Sprain cruciate ligament, knee. 2) Joint pain, left leg. Plan: PT for right knee.

01/10/14-
07/07/14 **Physical Therapy Discharge Summary,** Jared Morasco, PT., Mattsmith Physical Therapy. Patient has completed 18 therapy sessions. Patient has no new complaints. Overall condition is improving. Patient is discharged from PT.

01/17/14 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Patient notes improvement in his symptoms with PT. He has diffuse palpable tenderness. Plan: Ibuprofen, PT.

01/30/14 **EMG/NCV Study,** Leo Germin, M.D., Clinical Neurology Specialists. Impression: 1) Moderate in severity CTS on the left. 2) No evidence for CTS on the right. 3) Moderate in severity ulnar neuropathy at the elbow on the right. 4) No evidence for ulnar neuropathy at the elbow on the left. 5) Needle examination deferred due to inability of this individual to wait for the test and will be performed on the follow up visit.

02/04/14 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Patient notes improvement with PT. Knee is good. He is having a lot of back problems, cannot sit. He now complains of calf pain at end of appointment. Plan: Continue PT, Doppler, consider aspiration of the knee done today.

02/04/14 **EMG/NCV Study,** Leo Germin, M.D., Clinical Neurology Specialists. Impression: 1) No evidence for overt axonal loss C5 through T1 radiculopathy bilaterally. 2) Moderate in severity CTS on the left. 3) Moderate in severity ulnar neuropathy at the elbow on the right. 4) No evidence for ulnar neuropathy at the elbow on the left.

03/04/14 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Patient notes that his symptoms have improved. He missed PT for two weeks due to kidney stone. Plan: PT, will reassess effusion and consider aspiration, modified work status.

03/17/14 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Patient notes that last injections gave him moderate relief of his symptoms. He continues to complain of neck pain that radiates to the left shoulder. Plan: C3/4 transforaminal injection.

04/01/14 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Patient notes that his symptoms are unchanged. Plan: Aspiration followed by injection done today, PT.

04/07/14 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: 1) Left C3/4 transforaminal selective ESI under fluoroscopic guidance. 2) Intravenous conscious sedation with Versed. No complications.

04/07/14 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: Right C3/4 transforaminal selective ESI under fluoroscopic guidance. No complications.

06/09/14 **Progress Notes,** Archie Perry, M.D., Desert Orthopedic Center. Last injections gave him about 2 weeks of significant pain relief, however, now his pain is starting to come back. Plan: PT.

06/10/14 **Progress Notes,** Joseph Schifini, M.D. I will address the C5/6 level.

06/25/14 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Patient continues to have clicking and pain with sports/activities. He has pain while walking upstairs, getting up. PT has not been approved. Plan: Continue HEP, no work restrictions.

06/30/14-09/02/14 **Physical Therapy Progress Notes,** Andy Hutchison, PT., Kelly Hawkins Physical Therapy. Patient has completed 24 therapy sessions. He has achieved some short term improvement in his symptoms, but no long term improvements. He has completed all his therapy sessions. Plan: Will wait for further plan of care.

07/07/14 **Progress Notes,** Archie Perry, M.D., Desert Orthopedic Center. Patient has had significant relief of symptoms with manual traction with PT. Plan: Home mechanical traction, surgery at C3/4 and C6/7.

07/10/14 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: Right C5/6 transforaminal selective ESI under fluoroscopic guidance. No complications.

07/10/14 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: 1) Left C5/6 transforaminal selective ESI under fluoroscopic guidance. 2) Intravenous conscious sedation with Versed. No complications.

08/11/14 **Progress Notes,** Archie Perry, M.D., Desert Orthopedic Center. Patient states that overall his neck pain is the same. Plan: Home traction unit, surgical intervention.

08/19/14 **Office Visit,** Michael Miao, M.D., Desert Orthopedic Center. Patient continues to have clicking and pain with sports and activities. He has a hard time walking. He can't squat or kneel down. Plan: Continue HEP, no work restrictions.

09/22/14 **Progress Notes,** Archie Perry, M.D., Desert Orthopedic Center. Patient notes continued neck pain as well as intermittent arm pain and paresthesias. Plan: Facet injections at the C5/6, C6/7 and C7/T1 levels, no work restrictions.

10/14/14 **Progress Notes,** Joseph Schifini, M.D. Patient continues to have evidence of mechanical neck pain. Plan: Left C5-T1 medial branch facet joint nerve blocks.

10/23/14 **Procedure Report,** Joseph Schifini, M.D., Las Vegas Surgery Center. Procedure: 1) Left C5, C6, C7, T1 medial branch facet joint nerve injection under fluoroscopic guidance. 2) Intravenous conscious sedation with Versed. No complications.

11/10/14 **Progress Notes,** Archie Perry, M.D., Desert Orthopedic Center. Patient had 50% improved pain relief after last injection. Plan: Surgical intervention, modified work status.

12/03/14 **Consultation,** Christopher Fisher, M.D., Nevada Spine Clinic. Diagnosis: 1) Cervical pain with mechanical axial symptoms, rule out facet mediated pain. 2) Cervical s/s with myofascial pain. Plan: Flexeril, Tramadol, ice/heat, weight loss, HEP, light work duty, tens therapy.

01/26/15 **Operative Report,** Christopher Fisher, M.D., Smoke Ranch Surgery Center. Procedure: Left C4, C5, C6 and C7 medial branch blocks. No complications.

02/04/15 **Progress Notes,** Christopher Fisher, M.D., Nevada Spine Clinic. Patient had significant relief from last injection before it wore off. Plan: Flexeril, Tramadol, HEP, ice/heat, light work duty, tens unit.

02/11/15 **Progress Notes,** Christopher Fisher, M.D., Nevada Spine Clinic. He has pain that occasionally radiates down the left arm, worse with sitting for prolonged periods of time, associated with decreases side range of motion. Plan: MBB at C4-7, Flexeril, Tramadol, HEP, ice/heat, light work duty, tens unit.

03/02/15 **Operative Report,** Christopher Fisher, M.D., Smoke Ranch Surgery Center. Procedure: Left C4, C5, C6 and C7 medial branch blocks. No complications.

03/11/15 **Progress Notes,** Christopher Fisher, M.D., Nevada Spine Clinic, He had injection with no improvement in symptoms. Plan: Flexeril, Tramadol, ice/heat, weight loss, HEP, tens unit, light work duty.

03/27/15 **Functional Capacity Evaluation,** Doug Ellis, PT., Matt Smith Physical Therapy. There were inconsistencies in his presentation, as well as noted self-limiting pain behaviors. There does exist the probability of a less than maximum effort. The results of this functional capacity evaluation have been determined to be unreliable and invalid.

04/01/15 **Progress Notes,** Christopher Fisher, M.D., Nevada Spine Clinic. Patient seen for left cervical pain and upper back pain. Plan: Flexeril, Tramadol, ice/heat, weight loss, HEP, tens unit, light work duty.

04/08/15 **Progress Notes,** Christopher Fisher, M.D., Nevada Spine Clinic. Patient seen for left cervical pain and upper back pain. Plan: Flexeril, Tramadol, ice/heat, weight loss, HEP, tens unit, light work duty.

04/23/15 **Permanent Impairment Evaluation,** David Oliveri, M.D. Diagnosis: 1) Cervical spine pain of likely motion segment origin with intermittent left upper extremity radicular symptomatology. 2) Upper thoracic spine pain, likely a referral from the cervical spine. 3) Right knee internal derangement S/P ACL reconstruction and partial medial meniscectomy. P/S: Yes. Apportionment is not indicated. AMA impairment rating: 12% WPI. 8% cervical spine, 0% thoracic spine, 4% right knee.

06/30/15 **Photographs of accident scene and damaged vehicle.**

Miscellaneous Medical:
Duplicate medical records.
Labs.

Miscellaneous Nonmedical:
Correspondence from Associated Risk Management.
Income tax returns.
Wage calculation form for claims agents use.

Depositions:
05/03/16, deposition of Bahram Yahyavi, 89 pages.

Legal:
Defendants second supplement to early case conference production of documents and witness list.
Plaintiff's disclosure of documents, witnesses.
Defendant's first supplement to early case conference production of documents and witness list.
Plaintiff's reply to defendant's first set of admissions to plaintiff Bahram Yahyavi.
Before the appeals officer.

Billing:
Account financial History.
HCPNV, $18.00
Photocopies, $9.72
Heart Center of Nevada, $400.00
Victor Klausner, D.O., 0 balance
Nick Zarkes, M.D., 0 balance
David Oliveri, M.D., 0 balance
Nevada CVS Pharmacy, $544.29
Clinical Neurology Specialists, $3850.00
Desert Radiologists, 0 balance
Nevada Spine Clinic, 0 balance
Downtown Neck and Back Clinic, $1775.00
Radar Medical Group, $722.25
Shadow ER Physicians, $1531.00
Summerlin Hospital Medical Center, $2989.00

EMP of Clark, $665.55
Pacific Anesthesia Consultants, $150.00
Kelly Hawkins PT, 0 balance
Kinex Medical Company, 0 balance
Mattsmith PT., 0 balance
Joseph Schifini, M.D., 0 balance
Chynoweth Hill Leavitt, summary of billing
University Medical Center, $5904.20
Nevada Auto Network Self Insured Group, $109,126.06, amount paid to date for claims.

GENERAL PHYSICAL EXAM:

GENERAL:	The patient is a well-nourished, well-developed male.

NEUROLOGIC:

Mental status:	Awake, alert, and oriented x4.
Cranial nerves II-XII:	Within normal limits.
Cerebellar exam:	Normal.
Gait:	Intact.
Heel/toe walk:	Normal. There is no ataxia noted.

CERVICAL EXAM:

INSPECTION:	There is normal cervical lordosis without scars, deformities, lists, or cutaneous abnormalities.
TENDERNESS:	Mildly tender to palpation diffusely in the posterior cervical spine.
SPASM:	There is no palpable spasm.

RANGE OF MOTION:

Flexion:	60° (with chin failing chest by 1 fingerbreadth)
Extension:	30°
Right rotation:	70°
Left rotation:	60°
Right bending:	30°
Left bending:	30°

*He complains of increased pain with range of motion in all planes.

LUMBAR EXAM:

INSPECTION:	There is normal lumbar lordosis without scars, deformities, lists, or cutaneous abnormalities.
TENDERNESS:	There is no tenderness noted.
SPASM:	There is no spasm palpated.

RANGE OF MOTION:

Flexion:	60°* (with fingertips touching his toes)
Extension:	40°*
Right rotation:	70°
Left rotation:	70°
Right bending:	30°
Left bending:	30°

*He complains of neck pain with flexion and extension of the lumbar spine.

LOWER EXTREMITY EXAM:

There is good range of motion in the knee bilaterally. He complains of some mildly increased pain with range of motion on the right knee.

MOTOR EXAM:

UPPER EXTREMITIES:	RIGHT	LEFT
Deltoids	5/5	5/5
Biceps	5/5	5/5
Triceps	5/5	5/5
Wrist Extension	5/5	5/5
Wrist Flexion	5/5	5/5
Hand grip	5/5	5/5
Intrinsics	5/5	5/5
LOWER EXTREMITIES:		
Iliopsoas	5/5	5/5
Quadriceps	5/5	5/5
Adductor	5/5	5/5
Hamstring	5/5	5/5
Dorsi flexion	5/5	5/5
Plantar flexion	5/5	5/5
EHL	5/5	5/5

REFLEXES:

UPPER EXTREMITIES:	RIGHT	LEFT
Biceps	2+	2+
Triceps	2+	2+
Wrists	1-2+	1-2+
LOWER EXTREMITIES:		
Knees	1+	2+
Ankles	2+	2+

SENSATION:

Intact to pinprick and light touch.

SPECIAL TESTING:

STRAIGHT LEG RAISE:	Negative in the sitting and lying positions.
HOFFMANN SIGN:	Negative bilaterally.
CLONUS:	Negative bilaterally.
BABINSKI SIGN:	Negative bilaterally.
FOOT DROP:	No foot drop is noted.
SPURLING MANEUVER:	Negative bilaterally.

IMPRESSION:

1. **History of motor vehicle accident on 06/19/2013.**
2. **Cervical neck pain.**
3. **Cervical spondylosis.**
4. **Status post right knee arthroscopy, 01/09/2014.**

DISCUSSION:

After review of the medical records provided, case materials, and examination of the patient, I would provide the following opinions within a reasonable degree of medical probability:

Mr. Yahyavi was involved in a motor vehicle accident on June 19, 2013. He received reasonable medical evaluation and treatment in the emergency room at University Medical Center and subsequent chiropractic treatment and medical evaluation. Within a reasonable degree of medical probability, Mr. Yahyavi sustained a straining injury to his spinal axis. Within a reasonable degree of medical probability, Mr. Yahyavi reached the level of maximal medical improvement with regards to his cervical spine by the end of summer 2014. Mr. Yahyavi has undergone radiologic imaging with CT scan and MRI studies of the cervical spine. Cervical spondylosis/degenerative changes are noted throughout the cervical spine and Mr. Yahyavi is noted to have degenerative interbody fusion at the C6-C7 level. These degenerative findings more likely than not, were present and preexisted the subject motor vehicle accident of June 19, 2013.

Mr. Yahyavi currently endorses cervical symptomatology with primarily axial cervical neck pain. Mr. Yahyavi did demonstrate signs of symptom magnification, as noted in his Functional Capacity Examination, where he provided less than maximal effort and unreliable/invalid results for his Functional Capacity Evaluation participating only on a limited basis.

Mr. Yahyavi underwent a number of cervical injections by Dr. Schifini and the medical records, as well as Mr. Yahyavi, indicates he did not receive any significant benefit from these injections. Within a reasonable degree of medical probability, the cervical injections were reasonable through the end of summer 2014. Mr. Yahyavi is not a good surgical candidate for any surgery to the cervical spine. His symptoms are one of primarily axial cervical neck pain. There is evidence for unreliability in Mr. Yahyavi's functional capacity testing, which raises the concern of symptom magnification. Nerve conduction/EMG studies were absent for any cervical radiculopathy, although it was positive for carpal tunnel syndrome on the left.

Mr. Yahyavi's current subjective cervical symptomatology is best treated with medical supportive care, including that of a regular home exercise and stretching program, judicious use of nonsteroidal anti-inflammatory agents, and judicious activity. I would attempt to avoid the use of chronic narcotics. Cervical surgery is not recommended. Should surgery be contemplated or completed in the future, this would be unrelated to the subject motor vehicle accident and most substantially related to Mr. Yahyavi's preexisting degenerative cervical spine disease/spondylosis. Mr. Yahyavi is not disabled from work.

I hope this helps to answer some of the questions at hand. Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

Howard Tung

Howard Tung, M.D.
HT/cj

EXHIBIT 3

JOHN E. BAKER, PH.D., P.E., LLC

FORENSIC ENGINEER

7380 SOUTH EASTERN AVENUE
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(702) 334-9033 (OFFICE)
(866) 611-9909 (FAX)

EMAIL:JEBAKERPHD@GMAIL.COM

CURRICULUM VITAE

March 1, 2018

FORENSIC SPECIALIZATIONS

- **ACCIDENT RECONSTRUCTION**
  Motor Vehicles (incl. Low-speed Collision Analyses), Pedestrian, Product
- **INJURY RECONSTRUCTION**
  Biomechanics, Mechanisms of Injury, Impact Kinematics, Sharp/ Blunt Force Trauma
- **HUMAN FACTORS & ERGONOMICS**
  Human Perception-Reaction, Impending Impact Zone, Safe Product Design, Anthropometrics, Environments, Aging, Vision, Warnings, Lighting, Sound

EDUCATION

Ph.D. **Human Factors and Safety Engineering – w/emphasis in Biomechanics, Stress Physiology**
Sponsored by Fellowship from National Institute for Occupational Safety & Health (NIOSH)
Dept. of Industrial & Systems Engineering; North Carolina State University; Raleigh, North Carolina

M.S. **Industrial & Systems Engineering – w/ emphasis in Human Factors Engineering**
Dept. of Industrial & Systems Engineering; San Jose State University; San Jose, California

B.S. **Mechanical Engineering**
Dept. of Mechanical Engineering; Loyola University of Los Angeles; Los Angeles, California

CONSULTING EXPERIENCE

Forensic Engineering Consulting

More than 25 years of forensic engineering consulting, litigation support, and expert witness testimony for law firms and insurance companies nationwide. Provided accident reconstructions and expert witness consulting on over **5000 technical cases** in litigation involving Motor Vehicles (60%), Premises (30%), Products, Recreation and Occupational (10%). Performed analyses of mechanics of the accident, associated Impact Biomechanics, Mechanisms of Injury, and Kinematics. Determined relationship of claimed injuries to accident mechanics. Utilized computerized methodologies for motor vehicle accident analysis, simulation, animation, and reconstruction. Evaluated low-speed accidents for mechanics and potential mechanism of injury. Evaluated reported premises hazards and surfaces on which falls and other incidents have occurred. Evaluated Human Factors issues including warnings, lighting, perception-reaction processes, Impending Impact Zone, product designs, and others. Provided two- and three dimensional static and dynamic trial exhibits. Plaintiff/ Defendant client-attorney split: 50/50. Provided verbal testimony as an **Expert Witness in 250+ depositions, 130+ district, state, and federal court trials, and 20+ arbitrations.**

Industrial Consulting

Concurrent with above Forensic/ Litigation Support Consulting Activity: More than 12 years of Human Factors, Safety, and Industrial/ Systems Engineering and product design consulting experience to more than 80 large, medium, and small companies in the manufacturing, automotive, defense, aerospace, electronics, computer, construction, distribution, utility, and other industries. Clients have included General Motors, IBM, EDS, Rockwell, SDC, Lockheed, Shell Oil, Garrett AiResearch, Hughes Aircraft Division, Hughes Helicopters, Systems Development Corporation, Gateway Housing Group, Inc. and numerous others.

CERTIFICATIONS/ LICENSES

Registered Professional Engineer (P.E.) - State of California; No. I-4012 (Since 1986)
General "B" Building Contractor's License - State of California; No. 485381 (Currently inactive)
International Muay Thai Judge - WBC, WMC, WCK in USA, China, Mexico, and Thailand
Professional Kickboxing and Muay Thai Judge - Nevada State Athletic Commission (2009 to present)

COURT TESTIMONY & QUALIFICATION

Federal Court Qualified
District Court Qualified in NV, MT, TX
Superior Court Qualified in CA, IL
Municipal Court Qualified in NV, CA
Criminal Court Qualified in NV, CA, FL
International Court Qualified in Turkey

DAUBERT CHALLENGE

Darren and Michele Watson v. Wal-Mart Stores, Inc., Louisville Ladder Group, Emerson Electric Co., et al. Federal Court Case No. 2:06-CV-00198-JCM-GWF. A Daubert Challenge was made by opposing defense counsel regarding the validity and admissibility of Plaintiff's expert Baker's analysis and testimony. Baker demonstrated that the methodology and reasoning utilized were both scientifically valid, repeatable, and could be reliably applied to the facts of the case. Courts denied the Defense' Daubert Challenge and upheld use of Baker's expert testimony.

TECHNICAL WRITING/ PUBLICATIONS

More than 35 technical writings/ publications within the fields of Human Factors, Accident and Injury Reconstruction, Biomechanics, Safety Engineering, Occupational Safety & Health, and Industrial Engineering.

COURSES TAUGHT and FACULTY APPOINTMENTS

CLE Instructor: Approved for Continuing Legal Education for Law Firms in NV.
Course Taught: Special Topics in Accident Reconstruction, Biomechanics, Human Factors

Instructor: Forensic and Litigation Support Consulting.
Course Taught: Roles, responsibilities, ethics, and procedures regarding the practice of Forensic and Litigation Support Consulting for Subject Matter Experts

Asst. Professor: U.S.C., Dept. of Industrial & Systems Engineering.
Courses Taught: Human Factors I and II; Work Analysis and Design/ Biomechanics (Grad and Undergrad). Chairman: Ph.D. Candidate Screening Comm. Faculty Advisor: Alpha Pi Mu

Lecturer: San Jose State University, Dept. of Industrial & Systems Engineering.
Courses Taught: Human Factors I and II (Graduate), Computer Science (Graduate), Statistics.
Chairman: University Student Affairs Committee

ACTIVE PROFESSIONAL AFFILIATIONS

Human Factors and Ergonomics Society (HFES)
Society of Automotive Engineers (SAE)
National Association of Professional Accident Reconstruction Specialists (NAPARS)

SECURITY CLEARANCES (Past)

Secret Clearance from U.S. Dept. of Defense (DISCO)
"Q" Clearance from U.S. Dept. of Energy

CONTINUING EDUCATION and TRAINING (Typical)

Typical addtional coursework in Accident & Injury Reconstruction has included: *"Reconstruction of Low Speed Collisions"* at Texas A&M; *"Advanced Traffic Accident Reconstruction"*, *"Biomechanics of Accidents"*, and *"Accident Injury: Biomechanics & Prevention"* at UCSD School of Medicine; *"Advanced Traffic Collision Reconstruction"*, *"Traffic Accident Scene Documentation"*, *"Damaged Vehicle Inspection Methodologies"* at National Institute of Forensic Studies, Orange, CA and others.

EXHIBIT 4

John E. Baker, Ph.D., P.E.
FORENSIC ENGINEER

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December 3, 2018

Mr. Mark J. Brown
Senior Staff Attorney
Law Offices of Eric R. Larsen
Subsidiary of The Hartford Financial Services Group, Inc.
750 E. Warm Springs Rd., Ste. 320, Box 19
Las Vegas, NV 89119

Re: Bahram Yahyavi v. Capriati Construction Corp., Inc. - Supplemental Report
DOI: June 19, 2013

Dear Mr. Brown:

You have requested that I evaluate and opine on the additional discovery file material that have been provided (listed below). You have also requested that I opine on the rebuttal report produced by Tim S. Leggett, P. Eng. P.E. from Forensic Dynamics, Inc.

Presented below are my supplemental opinions regarding Tim S. Leggett, P. Eng. P.E.'s rebuttal report.

BACKGROUND

You will recall that the subject matter concerned a two vehicle collision occurring on June 19, 2103 at approximately 10:25 A.M. on Sahara Avenue 2 feet north of the intersection of Glen Avenue. As indicated in the State of Nevada Traffic Accident Report #LVMPD-130619-1450 authored by 5316 E. Grimmesey:

where: V1 = 2007 Taylor "Big Red" T200 Forklift Truck driven by Joshua A. Arbuckle; Mfg. Serial Number = SBB 34043

V2 = 2012 Dodge Charger 4-Door driven by Bahram Yahyavi; VIN = 2C3CDXBG2CH211466

"V2 was travelling eastbound Sahara, West of the Y intersection at Glen in T2 of 2. V1 was a large construction forklift working on the S/W corner of Sahara/ Glen. This area has active construction in progress. The south side of Sahara has orange pylons lining the south shoulder which continues along to the south side of Glen. The shoulder line by the cones is 18 feet wide. There was a semi-truck with a flatbed trailer parked facing eastbound on Sahara, west of Glen.

In the closed shoulder, V2 was making a right turn along the cone pattern when it was struck by V1. V1 was travelling N/B from the sidewalk though the closed shoulder in front of the semi-truck. The forks of V1 were sticking out approximately 3 feet into T2 about 4 feet off the ground past the cone pattern. V1's forks stuck the right side of V2's windshield.

There were no pre-impact skid marks. V1 was moved prior to my arrival. W1 who is an inspector said he saw V1 driving into the roadway and said the forklift operator didn't see V2 coming. D2 was interviewed at UMC hospital. D2 said he was going east. And was going to turn onto Glen. When he saw the blades coming at him. D2 said the forklift wouldn't stop.

D1 said he was trying to go onto Sahara, to another part of the jobsite and he didn't see V2 coming. D1 was determined to be at fault in the accident and was cited for full attention to driving. D2 was transported for claimed injuries. The AIC was 2 N/S and 13 E/W determined by V1s post-impact tire marks. V1 and V2 were unregistered and did not have proof of insurance."

DOCUMENTS CURRENTLY REVIEWED

1. Rebuttal Report by Tim S. Leggett, P. Eng. P.E. of Forensic Dynamics, Inc. (15 pages + 8 pages of CV attachments).
2. Deposition transcript of Sargeant Robert Stauffer (45 pages).
3. Deposition transcript of Ch2M Inspector Wade Langsev (57 pages).
4. Deposition transcript of Forklift Driver Joshua A. Arbuckle (174 pages).
5. Deposition Exhibits of Forklift Driver Joshua A. Arbuckle (8 pages of photographs).
6. Defendant's Ninth Supplement to Early Case Conference Production of Documents and Witness List (9 pages + 38 pages of color scene photographs).
7. Videotaped deposition of Job Site Inspector Wade Langsev (57 pages).

DOCUMENTS PREVIOUSLY REVIEWED

1. Retention Letter - June 25, 2018 (1 page).
2. State of Nevada Traffic Accident Report #LVMPD-130619-1450 authored by 5316 Eric Grimmesey (12 pages):
3. Las Vegas Fire and Rescue Pre-Hospital Care Report Summary (3 pages).
4. Deposition transcript of Bahram Yahyavi (89 pages).
5. UMC - reports and records regarding Bahram Yahyavi (23 pages).
6. Deposition transcript of Eric Grimmesey (47 pages).
7. Deposition transcript exhibits of Eric Grimmesey (11 Full page photo exhibits):
8. [43] Accident Scene color photographs.

LIST OF LEGGETT REBUTTAL OPINIONS

Tim S. Leggett, P. Eng. P.E.'s Rebuttal opinions to John E. Baker, Ph.D.., P.E.'s original report included the following:

1. *Tim S. Leggett, P. Eng. P.E.: "In paragraph number 1 of his Preliminary Observations and Opinions, Dr. Baker indicated he was sceptical of the post-impact travel distance of 7 feet documented by the investigating officers. The 7 feet measurement was estimated by Officer Grimmesey, who indicated during his deposition that it was an "eyeball measurement relative to the unrelated tire marks. Thus, the 7 feet of post-impact travel clearly would have been irrelevant and incorrect. It follows that any calculations based on the 7 foot estimation would be erroneous and based on flawed methodology."*

2. *Tim S. Leggett, P. Eng. P.E.: "In paragraph 2 of his Preliminary Observations and Opinions, Dr. Baker indicated the right side A-pillar and front windshield of the Dodge were not "Load-bearing." He went on to conclude the damages sustained to these structures would "not have any influence on the deceleration of the forward movement of the 3962 -pound 2012 Dodge Charger." This is an incorrect statement on the part of Dr. Baker. The A-pillars, windshield and roof of the Dodge Charger would all have been structural components, as they would be on any vehicle. As structural components, their deformation indicates energy absorption which would have been directly related to the impact speed of the Dodge, in the same manner the crush on a front bumper collision would absorb energy and be indicative of the severity of an impact. The crush sustained*

by a vehicle during a collision is directly related to the change in speed or delta-v experienced by a vehicle during a collision. The speed change or delta-v experienced by a vehicles is generally used to quantify the severity of an impact. In this case, while there is limited controlled crash testing available as reference points for the specific damage profile of the Dodge with crush concentrated at the right front A-pillar, there are numbers roof drop tests, rollover tests and heavy-vehicle under-ride tests all of which pertain to the energy absorption of the structures Dr. Baker suggested would not be relevant in this case."

3. **Most Significantly:**

Tim S. Leggett, P. Eng. P.E.: "For example, Figure 8 below shows a view of a vehicle which underwent underride testing with a commercial vehicle and at 28 mph (4). While this vehicle sustained much greater crush than the subject Dodge, the results of the testing confirm that contrary to Dr. Baker's opinion, the Apillar, roof and windshield are all designed as structural members which absorb collision energy. In terms of the speed of the Dodge at impact, it was noted that the Dodge's front airbags did not deploy; taking into account an average speed change threshold of 16 mph for passenger vehicles (5), Mr. Yahyavi would certainly have been traveling at less than 16 mph at the time of impact. In the undersigned's opinion, the delta-v sustained by the Dodge would have been 10 mph or less."

(Continued on following page ...)

Tim S. Leggett, P. Eng. P.E.: **Produced Exemplar Collision**

'78 Chevette Before and After 28 mph (45 kmh) Impact

Figure 8: A photograph depicting damages sustained to front pillars, roof and windshield of sustained during a 28 mph crash test where the vehicle came to a stop under a semi-trailer after these structures absorbed the energy of the impact (4)..

4. *Tim S. Leggett, P. Eng. P.E.: "It was noted that Dr. Baker also failed to take into account the significant mass disparity between the vehicles where the forklift would necessarily have weighed more than its 120,000 lbs capacity (3). This means it would have been more than 30 times heavier than the Dodge. The undersigned performed simulations using a collision simulation software package known as PC Crash (6) which confirmed the Dodge would not have caused the forklift to rotate, but rather the Dodge would have rotated slightly clockwise in response to the impact at its right front A-pillar, forward of the center of gravity, and its it's forward motion would indeed have been arrested by the forklift. With the Dodge's delta-v being 10 mph or less, Mr. Yahyavi would most likely have been traveling at 10 mph or less at the time of the collision."*

5. *Tim S. Leggett, P. Eng. P.E.: "In paragraphs 3 and 4 of his Preliminary Observations and Opinions, Dr. Baker provided opinions regarding the likely speed of the Dodge Charger based on the Dodge Charger traveling at the unrelated post-impact travel distance of 7 feet estimated by the police. He also erroneously assumed the impact with the forklift caused no delta-v for the Dodge. Dr. Baker calculated a speed range of 5.61 to 12.12 mph for the Dodge, depending on whether or not the Dodge traveled 7 feet to rest with Mr. Yahyavi actively braking (the maximum speed) or not braking."*

6. *Tim S. Leggett, P. Eng. P.E.: "In paragraph 5 of his Preliminary Observations and Opinions, Dr. Baker went on to opine to provide Biomechanical opinions regarding a lack of injury mechanism for Mr. Yahyavi. Dr. Baker indicated there would have been no opportunity for direct contact with the forks of the forklift. The undersigned is nota Biomechanical expert; however, it is clear that Dr. Baker has misinterpreted the physical evidence, including the damage profile of the Dodge and post-impact dynamics of the collision. By failing to acknowledge that the forks penetrated the area of the driver's space directly in front of Mr. Yahyavi's head, Dr. Baker artificially removed the mechanism for head injury which clearly would have existed. In terms of the forks not making contact with the left side of Mr. Yahyavi's body, the undersigned agrees this likely was not the case; however, the potential for a left rib injury would certainly have been possible as Mr. Yahyavi's body slid down his seat and he was compressed under the steering column as he described."*

7. *Tim S. Leggett, P. Eng. P.E.: "The motion of Mr. Yahyavi's body would have been governed by Newtonian physics after the subject impact. As his vehicle experienced a rearward speed change, Mr. Yahyavi's body would have continued to move forward relative to his seat (i.e., directly toward the penetrating forklift forks). This forward*

motion to the seat would have occurred regardless of whether or not he was wearing his seatbelt as seatbelts allow the body to decelerate with a provided amount of slack; had the pre-tensioners failed to fire (similar to the airbags not deploying), Mr. Yahyavi's seatbelt would have provided sufficient slack for his head and upper body to travel back and forth due to equal and opposite impact forces between his head and the forks."

SUMMARY of LEGGETT's REBUTTAL OPINIONS

In his August 20, 2018 written report on the subject collision, Tim S. Leggett, P. Eng. P.E. has included the above-listed seven [7] paragraphs in rebuttal opposition to the preliminary opinions offered in John E. Baker, Ph.D., P.E.'s in the original July 3, 2018 report.

In fact, it was noted in these readings that there were three primary themes in Tim S. Leggett, P. Eng. P.E.'s seven rebuttal paragraphs. They included the following:

1. Tim S. Leggett, P. Eng. P.E.'s Rebuttal Theme 1:

   That there was a substantial instantaneous speed loss (i.e., Delta V) experienced by the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi when his right-side A-pillar and windshield struck the exposed ends of the forks on the front of the 2007 Forklift Truck driven by Joshua Adom Arbuckle.

2. Tim S. Leggett, P. Eng. P.E.'s Rebuttal Theme 2:

   The aforementioned substantial instantaneous speed loss (i.e., Delta V) experienced by the 2012 Dodge Charger 4-Door forcibly moved driver Bahram Yahyavi violently forward causing his tissues to be displaced out of their own elastic ranges causing injury.

3. Tim S. Leggett, P. Eng. P.E.'s Rebuttal Theme 3.

   That John E. Baker, Ph.D., P.E.'s original July 3, 2018 report relies on a police distance eyeball estimate, and is therefore flawed and incorrect.

BAKER REBUTTAL OBSERVATIONS and OPINIONS

1. In his rebuttal report, Tim S. Leggett, P. Eng. P.E. opined the following regarding the original report produced by John E. Baker, Ph.D., P.E.:

Tim S. Leggett, P. Eng. P.E.: "In paragraphs 3 and 4 of his Preliminary Observations and Opinions, Dr. Baker provided opinions regarding the likely speed of the Dodge Charger based on the Dodge Charger traveling at the unrelated post-impact travel distance of 7 feet estimated by the police. He also erroneously assumed the impact with the forklift caused no delta-v for the Dodge. Dr. Baker calculated a speed range of 5.61 to 12.12 mph for the Dodge, depending on whether or not the Dodge traveled 7 feet to rest with Mr. Yahyavi actively braking (the maximum speed) or not braking."

John E. Baker, Ph.D., P.E. Response:
Tim S. Leggett, P. Eng. P.E. has mis-read and mis-cited the words of my previous original report. In fact, I have stated the exact opposite of Tim S. Leggett, P. Eng. P.E.'s citation. A more careful and objective reading of my previous preliminary written report will demonstrate that the following were previously written words:

John E. Baker, Ph.D., P.E.: The State of Nevada Traffic Accident Report indicates that the Point of Rest (POR) of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi was seven feet past the Point of Impact (POI). At the Point of Impact, the Forklift's forks struck the windshield and the right side of the A-pillar. ***In fact, the forks reportedly initially penetrated into the vehicle travel compartment and penetrated approximately 3 inches past the initial strike into the windshield and exterior of the vehicle. Therefore, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi did not, in fact, travel 7 feet past the initial Point of Impact.***

and...

John E. Baker, Ph.D., P.E.: In order to travel 7 feet past the POI, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have had to be travelling at a speed of 5.61 mph with no braking and rolling drivetrain resistance only (as Bahram Yahyavi states), or 12.12 mph with full braking. However, the 2012 Dodge Charger's traveling 7 feet past the POI necessitates the Forklift forks traveled through the entire travel compartment of that vehicle. ***Neither scenario is consistent with the post-collision position of the forks.***

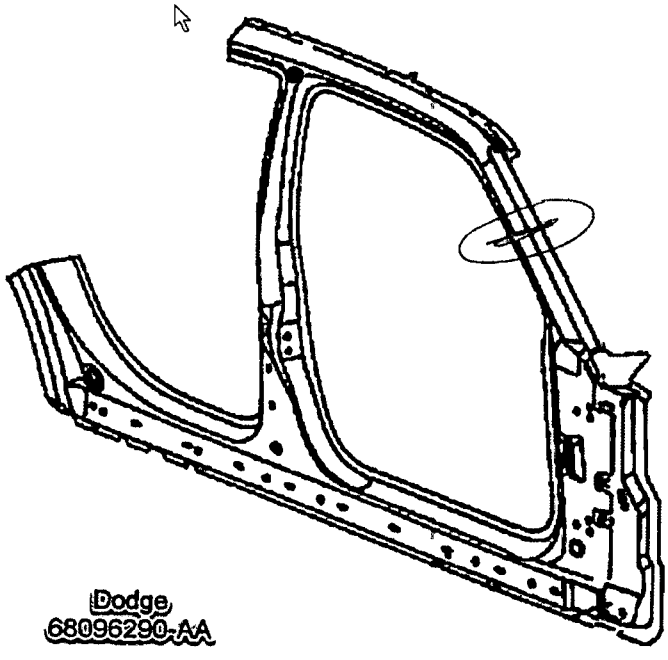
In layman's terms:

From physical evidence, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi cannot have possibly traveled 7 feet past the initial point of contact with the end of the fork on the 2007 Taylor "Big Red" T200 Forklift Truck driven by Joshua A. Arbuckle.

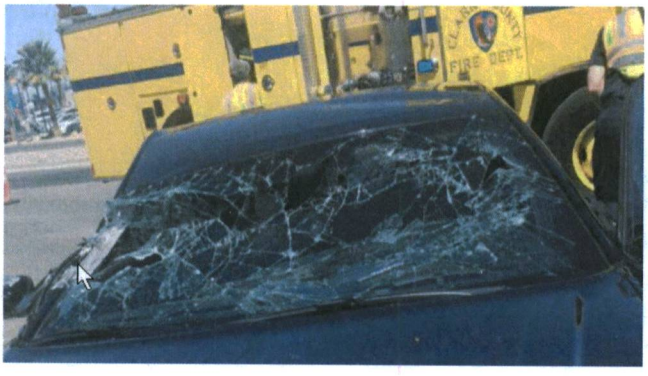
2. In his assessment of the damage to the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi, Tim S. Leggett, P. Eng. P.E. stated:

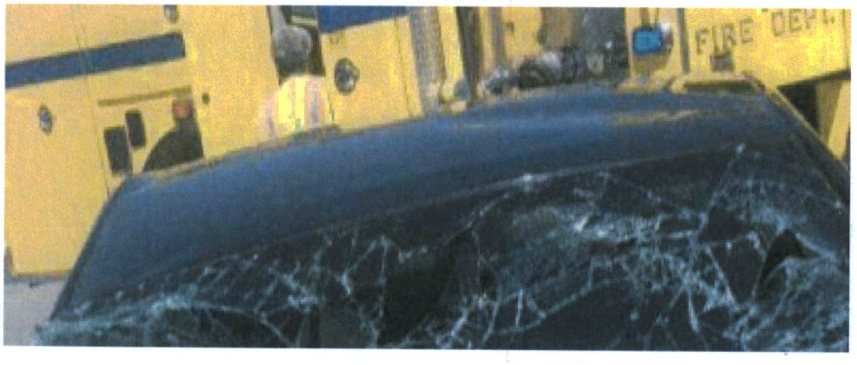
> *"The right A-pillar was deformed, with a kink due to direct contact with the left fork, which caused a rearward and downward displacement."*

In fact, I agree that the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi had a ***"...kink..."*** in the right front passenger's side A-pillar – Dodge Part Number 68096290-AA after the collision with one of the two (2) 1 inch x 7 inch rectangular cross section ends of the forks on the 2007 Taylor "Big Red" T200 Forklift Truck driven by Joshua A. Arbuckle.



I also agree with Tim S. Leggett, P. Eng. P.E.'s that the size, shape, one-piece nature, and metal material of this 68096290-AA Dodge part (See attached diagram below) – referred to as a "Panel. Body Side Aperature Outer Front Right" allowed force to be referred rearward from the ***"...kink ..."*** to the sheet metal roof causing modest referred bending. (See below).





3. In a line-by-line evaluation of Tim S. Leggett, P. Eng. P.E.'s 15-page report – including the seven rebuttal paragraphs specifically regarding John E. Baker, Ph.D., P.E.'s original report, it was also apparent that there was a technical foundation that he used for the foundation of his opinions in an attempt to justify a substantial collision deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi – and therefore a similarly-substantial, injury-provoking Delta V.

   In his rebuttal report Tim S. Leggett, P. Eng. P.E. vaguely described that Delta V as follows:

   > *"With the Dodge's delta-v being 10 mph or less, Mr. Yahyavi would most likely have been traveling at 10 mph or less at the time of the collision."*

   Tim S. Leggett, P. Eng. P.E.'s has offered this non-descriptive and vague assessment for the subject "Delta V being less than 10 mph" – despite the fact that Bahram Yahyavi's seat belt did not engage as a result of the collision, and that Bahram Yahyavi claims that he never applied the brakes. However, at no time does Tim S. Leggett, P. Eng. P.E. ever specify what his own evaluation of the Delta V in the subject collision actually IS – only that Baker is wrong, the collision speed and Delta V are both below 10 mph, and that Bahram Yahyavi without his seat belt could/should have been injured .

   In fact, I only agree with the two statements by Tim S. Leggett, P. Eng. P.E. regarding the fact that the impact speed and Delta V were less than 10 mph – in that 0, 1, and 2 mph are all less than 10 mph.

4. In forming the basis of his technical speed assessment and damage opinions and disagreements with John E. Baker, Ph.D., P.E., Tim S. Leggett, P. Eng. P.E. relied on a comparison of the subject collision and a December 1984 staged collision in which the A-pillar, glass windshield, and roof of a 1978 Chevrolet Chevette were all catastrophically destroyed. This destruction of this 1978 Chevrolet Chevette test vehicle occurred in a staged collision in which that vehicle was driven underneath **the middle of a 40-foot side frame rail of a 40-foot semi-trailer at a 65-degree angle.**

   Tim S. Leggett, P. Eng. P.E. has extracted this incredibly inappropriate damage comparison from an article located in the ***1994 Accident Reconstruction Journal*** entitled

"Underride Vehicle Crash Damage" by Bruce D. Wakefield and James E. Cothern, Volume 6, No.6, November/ December 1994 pages 34 to 38.

In that 1994 article, a crash study was conducted in 1984 by the Institute for Safety Analysis regarding semi-trailer under ride collisions. In those staged side under ride collisions, four 1970's vehicles were driven underneath the middle of a side rail of a 48,000-pound, 1972 Monon 40-foot box trailer. One of the four test vehicles was the 1978 Chevrolet Chevette that Tim S. Leggett, P. Eng. P.E.'s cites as a point of damage comparison for the subject collision. In that staged collision, as stated. the 1978 Chevrolet Chevette was driven at a speed of 28 mph underneath the middle of the side frame rail of 40-foot box semi-trailer at a 65-degree angle.

On the other hand, the subject collision involves direct compression damage by the ENDS of the two forks of the 2007 Forklift Truck driven by Joshua A. Arbuckle Arbuckle to an approximate maximum 3 to maximum 4 -inch width ***"...kink..."*** (Tim S. Leggett, P. Eng. P.E. written report) to the right side A-pillar and partially to the adjacent right-side door rim to a total maximum depth of approximately 2 to maximum 3 inches, and to the glass windshield of the 3962-pound curb weight, 2012 Dodge Charger 4-Door driven by Bahram Yahyavi.

Tim S. Leggett, P. Eng. P.E. has somehow also seen fit to compare that 1984 vehicle semi-trailer under ride staged collision to the subject collision involving the 2012 Dodge Charger 4-Door's collision into the distal ends of two forks on the 2007 Taylor "Big Red" T200 Forklift Truck driven by Joshua A. Arbuckle . In fact, in that staged under ride collision, the 2112.4 pound curb weight 1978 Chevrolet Chevette sustained total damage to the drivers-side A-pillar was structurally destroyed – with damage extending rearward several feet and well into the B-pillar. There was also damage to the right side A-pillar which does not appear clearly, and the roof has been crumpled and displaced rearward several feet.

In fact, the contacting 40-foot long side rail surface in this 1984 staged under ride collision was surface was not remotely substantially-similar to the collision with two 1-inch by 7-inch rectangular cross-section fork ENDS spaced 3 inches apart – one of them striking only windshield glass which is designed to crumble. In fact, the vehicles, circumstance, nature, amount, and location of damage, contact surfaces, angle of approach, height of contact, level of penetration, and incoming approach speed of the 1978 Chevrolet Chevette staged 1984 collision that Tim S. Leggett, P. Eng. P.E. relied

on as the root basis for his 7 rebuttal opinions were not remotely substantially-similar to those in the subject collision. The use of this unlike staged collision to form the basis of an unknown Delta V is inappropriate.

For reference, the entire ***1994 Accident Reconstruction Journal*** article entitled *"Underride Vehicle Crash Damage"* by Bruce D. Wakefield and James E. Cothern, is included in its entirety in the Appendix.

(And notably, the conduct of these staged semi-trailer under ride collisions in 1984 and earlier were undoubtedly encouraged by the continued national notoriety of actress Jayne Mansfield's 1967 crash some years earlier. In that fatal collision at age 34, Jayne Mansfield's 1966 Buick Electra 225 crashed at high speed into the rear of a tractor-trailer that had slowed behind a truck spraying mosquito fogger shrouded in an insecticide fog.)

5. On page 42 Line 12 of Bahram Yahyavi's deposition transcript, Bahram Yahyavi testified that he had his seat belt on at the time of this collision. This was confirmed by Joshua A. Arbuckle on Page 170 Line 9 of his deposition transcript, and later in the Las Vegas Fire and Rescue Pre-Hospital Care Report Summary. Bahram Yahyavi's deposition testimony continued stating that as a result of the on the collision, that he went forward, hit his head, and then went underneath the vehicle [sic] and that his foot was kind of twisted under. He then clarified that his body went underneath the steering column, but that he stayed in his seat belt with his right foot on the gas pedal.

However, in Tim S. Leggett, P. Eng. P.E.'s justification of the existence of a higher speed loss and complex mechanisms of injury to Bahram Yahyavi's in the subject collision, he has apparently accepted the description of Bahram Yahyavi's ability to have his body travel forward underneath the steering column while still having his seat belt on.

> *"Potential for a left rib injury would certainly have been possible as Mr. Yahyavi's body slid down his seat and he was compressed under the steering column as he described."*

However, I do not agree with Tim S. Leggett, P. Eng. P.E.'s position which is technically and biomechanically invalid. If there were enough deceleration in the subject collision to cause an engagement of the shoulder belt's inertial locking mechanism – i.e., greater than 0.7 G's or at 22.54 f/s^2 – after a minor spool out and belt stretch, Bahram

Yahyavi's forward movement and sliding down the seat would have been restricted from travelling appreciably further. This engagement would have occurred at collision speeds at the inferred 5 and 10 mph.

Moreover, having a curb weight exceeding 100,000 pounds, the 2007 Taylor "Big Red" T200 Forklift Truck driven by Joshua A. Arbuckle will not accept kinetic energy from the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi, and could be considered as a rigid barrier. However, it is only the 1-inch by 7-inch tapered distal ends of the two rigid forks – separated by 3 inches of space – that form the rigid barrier in this subject collision. The right fork end pierced through the windshield glass which is designed to crumble. This penetration would have had no effect on the forward speed of the approx. 4000-pound 2012 Dodge Charger 4-Door driven by Bahram Yahyavi. The left fork end kinked the exterior A-pillar. Given the rigidity of this fork surface, the time of kink penetration into the non-load bearing (i.e., non-frame level structure) A-pillar would have been between approximately 0.1 to 0.2 seconds. The shoulder belt would have engaged when the whole vehicle deceleration exceeded 0.7 G's. If the shoulder belt did not engage fully, it meant that the level of the collision speed was so low as to not exceed 0.70 G in deceleration. There would have therefore been minimal forced occupant movement.

Tim S. Leggett, P. Eng. P.E.'s apparently tries to have it both ways – i.e., that the Delta V was sufficient (under 10 mph) so that there was substantial forced movement by Bahram Yahyavi's head and body, but that his seat belt did not engage and allowed his body to move freely underneath the steering column. I disagree with these opinions.

Moreover, and consistent with my disagreement, Officer Robert Stauffer has testified in his deposition that Bahram Yahyavi was not incapacitated by the subject collision, and that the injury code "C" for Bahram Yahyavi's injuries as stated in the State of Nevada Traffic Accident Report are subject and that *"Claimed injuries are not visible injuries"* and, in fact, are subjective.

6. As previously stated, the aforementioned components are NON-load bearing in the Accident Reconstruction sense of the word – and with respect to the calculation of horizontal crush damage. These components do, in fact, help support the roof and enclose the glass windshield in place. However, by no means can the A-pillar be

considered to be rigidly bearing the weight of the 3962 pound 2012 Dodge Charger 4-Door plus occupant driver Bahram Yahyavi.

7. Notably, if the damaged A-pillar were at the same stiffness as the vehicle's front end of the Class 5 with A = 266.08 lb/inch and B = 108.92 lb/in^2 (where in reality it is only a small fraction of the front end stiffness), the Barrier Equivalent Velocity (BEV) of this direct contact damage to the A-Pillar would be only a maximum of 1.714 mph.

   However, if the damaged A-pillar were assigned a more realistic stiffness for the actual nature and type of component on the Class 5 with A = 137.00 lb/inch and B = 95.00 lb/in^2, then the Barrier Equivalent Velocity (BEV) of this direct contact damage to the A-Pillar would be only a maximum of 1.276 mph. This latter calculation is consistent with the ***"...kink..."*** damage to the A-pillar and the referred (non-contact) bending damage to the roof.

8. In his written rebuttal report, Tim S. Leggett, P. Eng. P.E. made virtually no mention of the technical specifications of the 2007 Taylor "Big Red" T200 Forklift Truck driven by Joshua A. Arbuckle. In fact, the contacting surface of this fork lift were the two 1 inch by 7 inch ENDS of the two parallel 99-inch forks (heel to tip) placed approximately 3 inches apart. One of these fork ends the struck glass windshield. Again, the impact into the windshield glass did not affect or slow down, the speed of the 3962-pound 2012 Dodge Charger 4-Door driven by Bahram Yahyavi.

9. It may help understanding the lack of deceleration that the 2012 Dodge Charger 4-Door experienced as a result of its impact into the ends of two 1-inch x 7-inch steel surfaces that are separated by approximately 3 inches of space – one of which impacted a rolled, three-piece, sheet metal sheet metal tube and door rim, and the other into windshield glass – by envisioning the compression of these two fork ends into the two damaged surfaces and deciding whether the approx. 4000-pound 2012 Dodge Charger 4-Door driven by Bahram Yahyavi vehicle would actually move before the components failed and the demonstrated the damage seen in the subject collision.

OVERALL IMPRESSION

It should be obvious that merely poking a very rigid 1-inch by 7-inch solid steel rectangular cross-section tapered fork surface into a metal A-pillar forming a ***"... kink ..."***, and also poking the other firm steel rectangular cross-section tapered fork surface located 3 inches away into wind shield glass designed to crumble into small pieces will have little to no effect on slowing or stopping the approximately 4000-pound (plus another approx. 200 pounds for occupant and fluids) 2012 Dodge Charger 4-Door driven by Bahram Yahyavi.

Accordingly, there would have been little to no forced motions or mechanisms of injury applied to driver occupant Bahram Yahyavi's head and body.

These supplemental opinions have been stated to a reasonable degree of Accident Reconstruction, Biomechanics, and Human Factors Engineering certainty. I request the opportunity to supplement or amend these preliminary observations and opinions on receipt of additional discovery material.

If you have any questions regarding these preliminary observations and opinions, please do not hesitate to contact me.

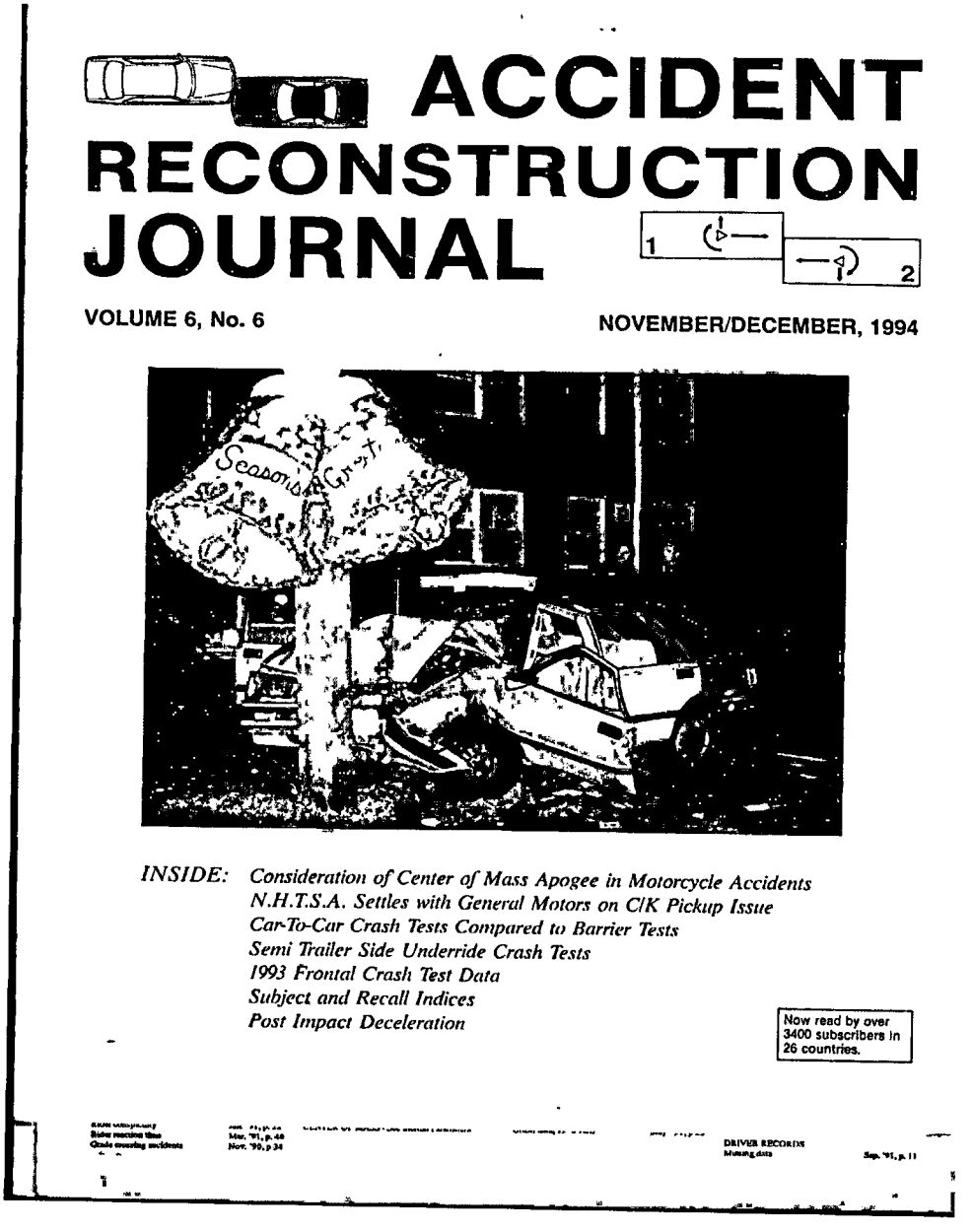
Sincerely,

John E. Baker (Signed electronically).

John E. Baker, Ph.D., P.E.

APPENDIX

The article from which Tim S. Leggett, P. Eng. P.E.'s has made this inappropriate damage comparison was located in the *1994 Accident Reconstruction Journal* article entitled *"Underride Vehicle Crash Damage"* by Bruce D. Wakefield and James E. Cothern, Volume 6, No.6, November/ December 1994 pages 34 to 38.



ACCIDENT RECONSTRUCTION JOURNAL

VOLUME 6, No. 6 NOVEMBER/DECEMBER, 1994

INSIDE: *Consideration of Center of Mass Apogee in Motorcycle Accidents*
N.H.T.S.A. Settles with General Motors on C/K Pickup Issue
Car-To-Car Crash Tests Compared to Barrier Tests
Semi Trailer Side Underride Crash Tests
1993 Frontal Crash Test Data
Subject and Recall Indices
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UNDERRIDE VEHICLE CRASH DAMAGE

by Bruce D. Wakefield and James E. Cothern

In order to demonstrate and quantify the damage severity of an underride collision at moderate speeds, The Instutute for Safety Analysis conducted four crash tests in December 1984 involving four seperate automobiles driven into the trailer portion of a combination vehicle which was stationary and and parked at nearly a right angle across the roadway. The tests were conducted at a local drag strip.

The test vehicles were:

Vehicle number one -- 1979 Chevrolet Chevette 4-door
Vehicle number two -- 1972 Toyota Corona Mark II 2-door hardtop
Vehicle number three -- 1978 Oldsmobile Cutlass Supreme 2-door
Vehicle number four -- 1978 Oldsmobile Cutlass Supreme 2-door

The stationary target unit, Vehicle number five, was an eighteen wheel semi-tractor trailer. The tractor was a Mack conventional and the trailer was 1972 Monon forty-foot box trailer. The trailer had a gross vehicle weight rating of 48,000 pounds, but was not loaded.

The impact area on Vehicle five was the driver side between the third and fourth axles. In this area, the trailer side was 46 inches from the ground, while the undercarriage structure was 43 inches from the ground. The impact angle between the vehicle longitudinal axes was approximately 65 degrees. The impact speeds were determined by the use of a calibrated Decati Elocctronics, Inc., radar gun.

During each of the tests, the top surfaces of the hood and/or front

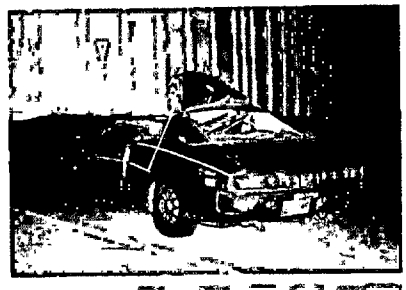
Tractor-Trailer Target Vehicle at Test Configuration

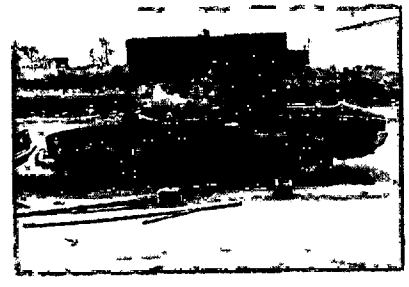
'78 Chevette Before and After 28 mph (45 kmh) Impact

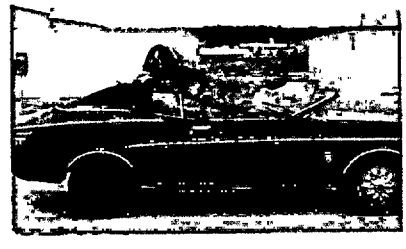
fenders on all four vehicles contacted the undercarriage of Vehicle five due to pitch up of the front ends during the initial phase of the collision. Each of the four bullet vehicles showed some deformation on the undercarriage structure as evidenced by the separation between the doors and rear quarter panels at the beltline. The two Oldsmobiles both left roadway gouges as the underside of their rear bumpers contacted the road during impact.

The precrash and post crash vehicle photographs show clearly the severity of intrusion experienced in low to moderate speed underride collisions. From an accident reconstruction standpoint, these four crash tests can serve as a useful tool in estimating similar underride collisions in which direct contact does not involve the automobile structure below the beltline and where the roof system is properly constructed.

Table One shows automobile dimensions and test data. Crush







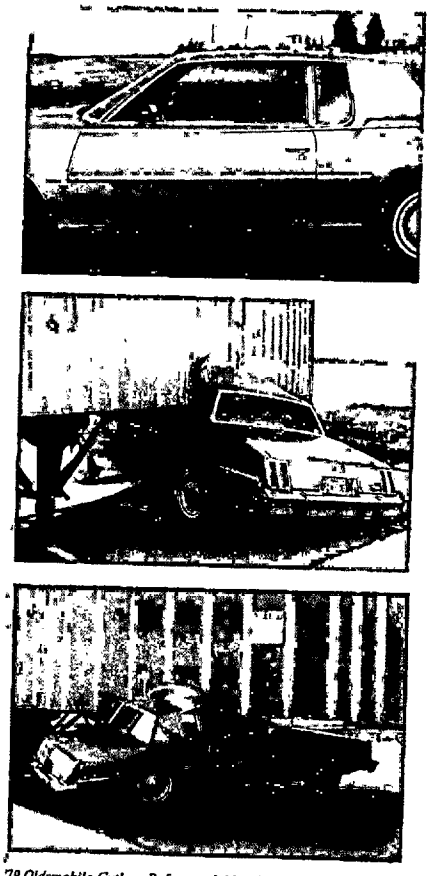
'72 Toyota Corona After 28 mph (45 kmh) Impact

damage was measured at the roof at its junctions with the A-pillars. The semi-trailer experienced only superficial damage even after all four tests.

Table Two shows the calculations for the available crush energy, E_c, and the approximate energy dissipation for each inch of average rearward residual deformation, E_c/in. Further, if we treat Vehicle number five as a non-yielding barrier, i.e., it absorbs no energy, and include energy dissipation from ground contact during impact, A and B stiffness coefficients can be calculated. Subsequent testing showed that impacts of about 1 mph with the windshield header contacting a fixed barrier produced permanent vehicle damage.

Utilizing Cambell's formula:

$$V = b_0 + b_1 * C_{AVE} \quad \text{(for a non-yielding barrier)}$$



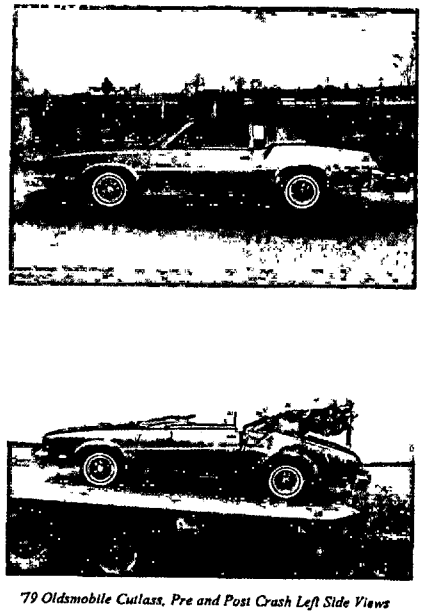
'79 Oldsmobile Cutlass Before and After 16 mph (26 kmh) Impact

TABLE ONE - Vehicle Dimensions and Test Results

	Veh. 1 Chevette	Veh. 2 Corona	Veh. 3 Cutlass	Veh. 4 Cutlass
Test Weight	2109 lbs. 957 kg.	2266 lbs. 1029 kg.	3457 lbs. 1568 kg.	3307 lbs. 1500 kg.
Beltline Height	36 inches 91 cm	37 inches 94 cm	36.75 inches 93 cm	36.75 inches 93 cm
Impact Speed	28 mph 41 ft/sec 45 kmh	28 mph 41 ft/sec 45 kmh	16 mph 23.5 ft/sec 26 kmh	27 mph 39.6 ft/sec 43 kmh
Damage Width	47 inches 119 cm	44 inches 112 cm	54 inches 137 cm	54 inches 137 cm
Roof Deformation				
At left A-pillar, C_1	30"/76 cm	47"/119 cm	44"/112 cm	62"/157 cm
At left A-pillar, C_2	12.6"/32 cm	32.3"/82 cm	6.5"/17 cm	62"/157 cm
Average	21.3"/54 cm	39.6"/101 cm	25.3"/64 cm	62"/157 cm

TABLE TWO - Energy Dissipated by Collisions

	Veh. 1 Chevette	Veh. 2 Corona	Veh. 3 Cutlass	Veh. 4 Cutlass
E_c	55055 ft*lb	59148 ft*lb	29645 ft*lb	80527 ft*lb
E_c per inch	2621 ft*lb/in	1494 ft*lb/in	1172 ft*lb/in	1299 ft*lb/in



'79 Oldsmobile Cutlass, Pre and Post Crash Left Side Views

and using b_0 = 17.6 in./sec, b_1 can be calculated from the data in Table One.

Once and are computed, the CRASH stiffness coefficients can then be calculated:

$$A = W * b_0 * b_1 / (g * L)$$

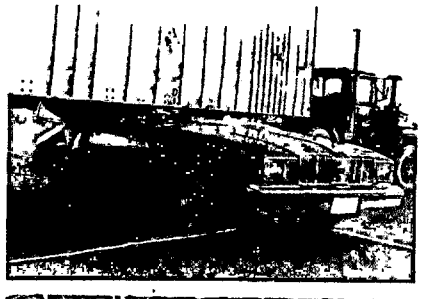
$$B = W * b_1^2 / (g * L)$$

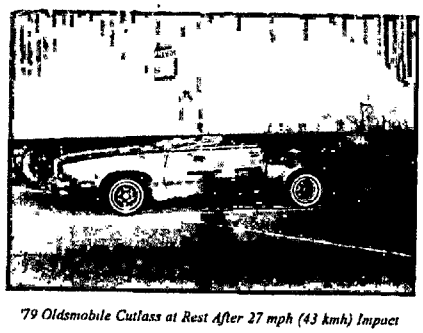
Where: W = vehicle weight, pounds
g = gravitational constant, 386.4 in/sec^2
L = damage width, inches

The stiffness coefficients can be used in the EdCrash or LARM II computer programs to calculate to a reasonable degree underride energy dissipation. In as much as the underride crash information is not as broad-based as other crash configuations, so caution should be exercised when relating other vehicle types with those in this article.

Metric conversions were inserted by the editor.

The authors are interested in expanding their truck underride test data base and would like to hear from those persons who have done similar testing. Regular and high-speed videotape covering the crashes for the two Oldsmobiles as well as photographs of all four vehicles, are available The authors may be contacted by writing The Institute for Safety Analysis, 7826 Airpark Drive, Gaithersburg, Maryland 20879, or by telephone at 301/948-0602.





'79 Oldsmobile Cutlass at Rest After 27 mph (43 kmh) Impact

PRELIMINARY OBSERVATIONS and OPINIONS - Previously Submitted by John E. Baker, Ph.D., P.E.'s

1. The State of Nevada Traffic Accident Report indicates that the Point of Rest (POR) of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi was seven feet past the Point of Impact (POI). At the Point of Impact, the Forklift's forks struck the windshield and the right side of the A-pillar. In fact, the forks reportedly initially penetrated into the vehicle travel compartment and penetrated approximately 3 inches past the initial strike into the windshield and exterior of the vehicle. Therefore, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi did not, in fact, travel 7 feet past the initial Point of Impact.

2. Both the passenger's-side A-pillar and the laminated windshield glass of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi are not load-bearing. As loud and violent as it may have appeared to the driver Bahram Yahyavi, the forks' striking, intercepting, or penetrating the A-pillar and laminated glass windshield components caused those components to break, but did not have any influence on the deceleration of the forward movement of the 3962-pound 2012 Dodge Charger.

3. In his deposition transcript (Page 40, Line 25), Bahram Yahyavi stated that he never did brake. However, if the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi traveled 7 feet past the A.I.C. (Area of Initial Contact – or POI), and with the A-pillar and windshield were not able to slow the moving vehicle, all deceleration of the 2012 Dodge Charger 4-Door would have had to be due to braking by the driver. That braking with or without tire friction marks, the deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have been between 0.55 and 0.70 G's. Without braking, the forced deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi was substantially less.

4. In order to travel 7 feet past the POI, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have had to be travelling at a speed of 5.61 mph with no braking and rolling drive train resistance only (as Bahram Yahyavi states), or 12.12 mph with full braking . However, the 2012 Dodge Charger's traveling 7 feet past the POI necessitates the Forklift forks traveled through the entire travel compartment of that vehicle. Neither scenario is consistent with the post-collision position of the forks.

5. Despite the two major technical inconsistencies, at these levels of deceleration of (.55 to .70 or less), there are no possible hyper flexion mechanisms of injury. Without direct

contact with the forks of other fixed object, it is unclear how Bahram Yahyavi could have experienced a traumatic head-strike injury or a deformed lower left rib with a possible separation from sternum. Depending on the three-dimensional geometry of the driver with respect to the travel compartment envelope, there can have been incidental direct contact of the knees with the lower dashboard. However this incidental level of contact is not consistent with the sudden changes of direction common in ACL tears. The small laceration inside Bahram Yahyavi's lower lip was most likely due to flying bits of crumbled laminated glass.

7

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP INC. Defendant.	CASE#: A-15-718689-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL
DISTRICT COURT JUDGE
TUESDAY, SEPTEMBER 24, 2019

RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL - DAY 12
HOWARD TUNG (CROSS-EXAMINATION, RECROSS EXAMINATION, AND JUROR QUESTION/ANSWER)

APPEARANCES:

For the Plaintiff: DENNIS M. PRINCE, ESQ.
KEVIN T. STRONG, ESQ.

For the Defendant: MARK JAMES BROWN, ESQ.
DAVID S. KAHN, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

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FOR THE PLAINTIFF	MARKED	RECEIVED
None		

FOR THE DEFENDANT	MARKED	RECEIVED
None		

Las Vegas, Nevada, Tuesday, September 24, 2019

[Designated testimony begins at 11:05 a.m.]

THE MARSHAL: Please rise for the jury.

[Jury in at 11:05 a.m.]

[Inside the presence of the jury]

THE COURT: Please be seated. The parties acknowledge the presence of the jury?

MR. PRINCE: We do, Judge.

MR. KAHN: Yes, Your Honor.

MR. PRINCE: We were in the --

THE COURT: All right. Go ahead.

MR. PRINCE: -- cross-examination of Dr. Tung.

THE COURT: Dr. Tung.

THE CLERK: Please remain standing. Raise your right hand.

DR. HOWARD TUNG, DEFENDANT'S WITNESS, SWORN

THE CLERK: Please be seated. Please state your name, again, for the record.

THE WITNESS: Howard Tung, T-U-N-G.

THE CLERK: Thank you.

CROSS-EXAMINATION

BY MR. PRINCE:

Q Dr. Tung, good morning. Did you fly in from San Diego this morning?

A Yes.

Q Today? And in addition, you're charging $10,000 to be here today for your time, right?

A Yes.

Q You also charged $10,000 to be here on Friday, correct?

A Yes.

Q And you've also charged approximately 20,000 or so for the work you did on the case up until Friday?

A Yes.

Q All right. So you've made at least $40,000 plus on this case so far, correct?

A Correct.

Q Now, there was a discussion that you and I had. You claimed that you have an office in Nevada. Do you remember that discussion?

A Yes.

Q Well, I wanted to satisfy myself of this issue, so I went to the Nevada State Board of Medical Examiners --

A Yes.

Q -- and the only office they identify is a 4510 Executive Drive, Suite 125, San Diego, California. So if someone wanted to look you up in Nevada, they're going to direct you to your San Diego office, right?

A Yeah, and then we would give them --

Q Right.

A -- address in Nevada.

Q Right.

A The 2410 --

Q Yeah, but you don't list the --

A -- Fire Mesa --

Q -- you don't list the Nevada --

A -- Boulevard, which I mentioned.

Q Excuse me. I'm --

A I was finishing my answer.

THE COURT: Go ahead. Finish your answer.

THE WITNESS: If you don't want me to finish, I can stop.

THE COURT: No, go ahead.

THE WITNESS: Okay. So as I said, you call that number, they would give you the address of -- we would make an appointment and give you the address of the --

MR. PRINCE: All right.

THE WITNESS: -- Nevada address.

MR. PRINCE: Very good.

THE WITNESS: It's now on Buffalo. It used to be on 2410 Fire Mesa.

MR. PRINCE: Yeah.

BY MR. PRINCE:

Q But I mean, the State of Nevada, if they want to send you something, they send it to California, not Nevada?

A That's the address that they would send it to.

Q Very good.

A Sure.

Q Okay. We're going to go back --

A It's not uncommon.
Q Yeah. We're going to go back now and talk and kind of recap for a moment.
THE WITNESS: Thank you.
THE MARSHAL: You're welcome.
MR. PRINCE: One second. We're loading something now. Very good.
BY MR. PRINCE:
Q We talked last week that you agree that my client was injured in this collision of June 19th, 2013, correct?
A I think that was asked and answered, yes.
Q Right. You also testified that my client suffered neck and related symptoms as a result of this motor vehicle collision, correct?
A I also think that was asked and answered, yes.
Q And you testified also -- I'm summarizing so we can catch up, because we had other witnesses yesterday -- that 14 months, or to the end of August 2014 of care was reasonable, appropriate, to treat the symptoms and injuries suffered in this motor vehicle collision, correct? That's what you said?
A I think that was asked and answered.
Q So I'm --
A Yes.
Q -- correct in summarizing that, right?
A I believe I answered the question, yes.
Q Okay. And the treatment was reasonable and appropriate. It

also included the injections on the surgical consultations, correct? Because that was during the 14-month period.

A There are more surgical consultations, but if you're applying the 14-month period, yes.

Q Okay.

A Asked and answered.

Q I'm implying that.

A Yes. Thank you.

Q That's what I'm exactly saying. What I want to do -- okay. You also talked about degeneration; do you remember that? With Mr. Kahn on Friday, you talked about degeneration?

A Yes.

Q Degeneration is a fact of life, correct?

A It occurs, yes.

Q Right. And in fact, someone in their -- either male or female, someone in their 50s, you're going to expect to see degeneration in their spine, correct?

A Yes.

Q And don't you agree that degeneration, generally speaking, is asymptomatic, meaning there's no symptoms or problems associated with it?

A Well, since you're using the word generally and then you're not being specific about the question, can it occur, the answer is yes.

Q Yeah.

A I mean, because you're being non-specific.

Q Right. And you can have -- don't you agree that you don't treat degeneration unless it's symptomatic, correct? If there's no symptoms, there's no need for treatment; don't you agree?

A That would be correct.

Q Right. And you agree that trauma can cause a disc that's degenerated to become symptomatic and be painful, correct?

A That's possible.

Q Okay. And trauma can aggravate pre-existing degeneration, causing symptoms and requiring treatment, correct?

A Also possible.

Q Okay. Now, what I want to do is kind of compare the 14 months before this collision with the 14 months after, okay? So I want to -- June 19th, 2013 is our start date, okay? The date of collision, okay? You have that in mind? I want you to have that in your mind.

A Yeah, I didn't know that was a question. I'm sorry. It sounded like a statement, so yes.

Q Okay.

A If it's a question, then the answer is yes.

Q That's the date of this collision, right?

A Yes.

Q Okay. And 14 months, that's the time period that you said it was reasonable for Mr. Yahyavi to have symptoms and require medical treatment, up through the end of August 2014, right?

A Yes.

Q Okay. So I want to look at -- how the 14 months before

looked, and how the 14 months after looks, okay?

A Sure.

Q Very good. In the 14 months before, which would be May 2012 forward, there was no reported neck complaints in any documents or records you see, correct?

A Yes.

Q There are no reported arm complaints, correct?

A Yes.

Q There were no exam findings concerning the neck or the arm, correct?

A Yes.

Q There was no pain medications during that period of time, correct?

A Yes.

Q There was no physical therapy, chiropractic treatment during that 14 months, correct?

A Yes.

Q There were no MRIs during that 14 months, correct?

A Yes.

Q There was no pain management treatment or recommendation, correct?

A Yes.

Q There was no surgery recommendation, or even a surgery consult for his spine or anything, correct, of any kind?

A Yes.

Q He was working full-time as a sales manager at Chapman Dodge?

A Yes.

Q And he was earning approximately $160,000 per year?

A I don't know.

Q Okay. Let me show you.

A I think that's correct.

Q Okay.

A I'll just say yes. That's fine. If you say it's correct, I believe you.

Q Okay. Okay. Now, I want to compare the 14 months afterward, okay? So the date of this collision, my client was transported by ambulance from the scene of this motor vehicle accident, correct?

A Yes.

Q Okay. And I want to look at that record for a moment. It's part of Exhibit number 85.

MR. PRINCE: I'm sorry, 160. Excuse me. And if we could go to the history -- the narrative history section. And actually pull up -- actually, above that, the Glasgow Coma, pick up that first. From there down.

BY MR. PRINCE:

Q Okay. I want to start at the top where the emergency medical personnel on-site. They gave Mr. Yahyavi a Glasgow Coma score of 13 or less. Do you see that?

A Yes.

Q From a neurological perspective, that's a significant finding made in the field by emergency medical personnel, correct?

A You would have to define significant, but it's -- normal would be 15, but we consider 13 and 15 having a mild injury, yes.

Q He --

A A mild head injury.

Q He reported a head strike; didn't he?

A It was reported.

Q He also -- well, he had evidence of -- he had a laceration of his lip, too, right? On the inside of his lip.

A I'm not going to argue with you, but people get lacerations of their lip and don't have a head injury. So one doesn't imply, if you will, but it's fine. I'm not going to disagree with the record.

Q It says, patient reports he was driving, a forklift pulled out in front of him. States he hit his head on something. He now has forehead, rear head, neck, left -- he's giving that information at the scene, right?

A I believe --

Q According to this document?

A -- that to be true according to the document.

Q Right. And he also talks about having an altered, right, consciousness level. He can't answer questions. He's too altered to provide them his address and insurance information, right?

A It says so.

Q Right. And so from a neurosurgeon standpoint, that's potentially a significant finding, right? Just in the field that that's why

there was a full trauma activation, right?

A That would be one reason. There are other reasons, too, but it's -- yeah.

Q That was reason enough in this case, right?

A I'm assuming so, because he was.

Q Right. Now, after he left the scene, he didn't just go to the emergency room.

MR. PRINCE: Go back now to the PowerPoint.

BY MR. PRINCE:

Q Okay. So there was a full trauma activation at a level one trauma center, right?

A Yes.

Q Okay. My client reported after that, severe neck pain to his medical care provider during that 14 months, right?

A After that, yes.

Q After the collision, he also reported left -- he had left arm complaints, correct?

A It's kind of intermittent in that 14 month period.

Q He reported left arm complaints, correct?

A He had intermittent -- it was intermittent.

Q Did he report left arm complaints? I'm just asking you yes or no.

A I think -- well, I think it's vague. It's your time -- if you want to go through every record, and you can show me a record that says it, and there are other records that says he doesn't. So then I need to know,

at what time frame are you asking. I said intermittent. I'm trying to be agreeable with you, sir.

Q Okay.

A It's intermittent.

Q Okay.

A And in fact, towards the end, it's not mentioned that much.

Q Okay. My client, also in that 14 months, underwent many physical therapy visits, correct?

A I'm not going to argue over the word many, but he had physical therapy.

Q Okay. He also underwent numerous chiropractic treatments?

A Again, I'm not going to argue over the word numerous. He had chiropractic visits.

Q Okay. He had x-rays, CT scans, and MRIs in that 14 month window; didn't he?

A Yes.

Q He had pain management, correct?

A Yes.

Q He had a surgical evaluation, correct?

A Yes.

Q Do you know he was forced to resign being a sales manager and had to drop down to being a salesman because he couldn't perform that job? Are you aware of that?

MR. KAHN: Objection as to the word forced. Lacks foundation.

MR. PRINCE: Well, I'm asking him if he knows. My client feels he was forced.

THE COURT: If he knows.

BY MR. PRINCE:

Q Do you know?

A No.

Q Are you aware that my client had to resign being a sales manager so he could go -- because of his injuries and the necessity for his medical treatment?

A I'm aware he stopped working in 2016 in the September/October time frame. I'm not sure of the circumstances of why he stopped working. I do believe that the medical records support that he was -- that he was defined as permanent and stationary at a level of maximum medical improvement in April of '15, and he continued to work following that time frame for over a year.

Q No, that's not my question.

A And that he was --

Q No, no. My question --

A And that he stopped --

THE COURT: Counsel, let him answer.

THE WITNESS: And that he stopped working in the September/October time frame of 2016. I am uncertain of the circumstances of why he stopped working. So I'm sure that there may be circumstances, and I won't argue with you if you say he stopped, or I'm not sure of the term forced. I've never seen the term forced. So I -- it

could have been voluntary. I don't know.

MR. PRINCE: Okay.

BY MR. PRINCE:

Q Did you not understand my question, Doctor? Let me restate it for you. Because I'm talking in the 14 months. I'm not talking in two-thousand -- and later. I'm talking about up to the summer of 2014, okay? That's the time frame I'm talking about.

A Okay.

Q That's why we have this here so we're clear on the time frame. My client was forced to leave his position as sales manager at the end of June 2013 and become a salesman at a different dealership so he could deal with his injuries and go for his medical care, because he wasn't able to be at the dealership during the time that they needed him. Were you aware of that? That's all I'm asking.

A I don't understand the question as phrased. I guess I don't understand the word forced.

Q He couldn't do the job anymore of being a sales manager at his old job; were you aware of that?

A I'm not sure that defines the term forced. What do you mean by forced?

Q Okay.

A I don't understand the question as phrased. I would answer it if I understood the question. I don't understand the question as worded.

Q That's fine. Were you aware that he could no longer do the

job of being a sales manager and had to go be a salesman? Were you aware of that? He had to change dealerships. Were you aware of that?

A No.

Q Okay. And were you aware of the income loss -- substantial income loss in that 14 months?

A No.

Q Okay. Now, I want to then talk about -- well, I want to do a summary of all the medical care that he got in that 14 months. One ambulance ride, ER, the trauma visit, nine x-rays, CTs, MRI, 21 doctor visits, 30 chiro/physical therapy visits, two acupuncture treatments, and nine spinal injections. That's the treatment he was dealing with in 2014, which you think is reasonable, in your mind?

A Yes.

Q Up through the end of August 2014, yes?

A Yes.

Q Very good. Now, I want to compare -- do a comparison of what happens after August 30, 2014, okay?

A Sure.

Q Okay.

MR. KAHN: Your Honor, just for the record, I'm going to object to the demonstrative as lacking a foundation from a witness, all the details of the treatment in that time frame.

MR. PRINCE: He just agreed to every one, except the income loss.

THE COURT: It's just demonstrative, and --

MR. KAHN: Okay.

THE COURT: -- you had a picture of it, so it's overruled.

MR. PRINCE: Okay.

BY MR. PRINCE:

Q So let's -- now you're saying everything in your mind, everything is cut off as of -- in your analysis, as of August 30, 2014, correct?

A Or thereabouts, yeah.

Q Okay. Great.

A Yes.

Q From September 1st, 2014, to the present, there's been persistent neck and arm symptoms reported, correct?

A Yeah. Yes.

Q Since September 1st, 2014, there's been more physical therapy treatment, correct? Since that date?

A Yes, but what timeframe? So just any time afterward?

Q Yes.

A Okay. Yes. Anytime afterward, there's been what you're saying.

Q Yeah. He's had more chiropractic treatment?

A As you said, any time after this time, he had some of that treatment.

Q He's had it, right?

A He's had some treatment, sure.

Q Right. He's had more injections after September 1st, 2014,

correct?

A The question is phrased any time after that timeframe, he had some.

Q Right. He's had more x-rays, CT scans, and MRI's, correct?

A As I stated, as you are asking the question, any time after September 1st or that --

Q Yeah.

A -- thereabouts, yes.

Q Okay. He's also had -- taken more -- been prescribed and taken more medication since September 1st, 2014, correct?

A I believe he takes medications, yes.

Q Right. And he was determined to have a permanent impairment to his cervical spine after September 1st, 2014, correct?

A He was declared permanent and stationary at a level of maximum improvement. I believe it was -- for the cervical spine, I believe it was an eight percent impairment.

Q Right, and he had a five level --

A In April of 2015.

Q Right, and he had a five level fusion surgery in January 2018, correct?

A Many years later, he ended up having surgery.

Q I'm just asking if he had it. That's a yes or no.

A I'm giving a correct answer and letting you know, many years later, he had a cervical fusion, yes.

Q Okay. All right. He suffered a C5 nerve injury associated

with that five level neck fusion, correct?

A He had a complication following his surgery, yes.

Q Right. His income is now zero because he's disabled from working. You've learned that, right?

A I don't know that his income is zero. I would assume if you're disabled, you would get disability, and then therefore, your income would not be zero.

MR. PRINCE: Objection. Move to strike. Absolutely move to strike that, Your Honor, from the record, and admonish the witness not to talk about --

THE COURT: Sustained.

MR. PRINCE: -- any monies received.

THE COURT: Doctor, please refrain from discussing any of that. The jury is admonished not to discuss or even consider disability.

MR. KAHN: Your Honor, I would indicate that anything about his income, I think, is beyond the scope of this witness and went beyond direct.

MR. PRINCE: No.

THE COURT: I tend to agree --

MR. PRINCE: Well, I'm not talking about that.

THE COURT: -- unless he knows --

MR. PRINCE: Meaning he's disabled, right?

THE COURT: Unless he knows.

MR. PRINCE: Yeah. He's been declared --

BY MR. PRINCE:

Q There's physicians who have determined that he's been permanently disabled from working, correct? Correct?

A I don't know. I'm confused. I thought I answered the question before. If you want to read that question back, you said you thought his income was zero, and I disagree with you. I do not know that his income is zero.

Q Okay. And he's now had a spinal cord stimulator planned, right?

A I don't know that it's planned. I saw a recommendation. I don't know that it's planned. I don't know that he has a surgical date. I don't know that he's had an evaluation for it. I don't know. I saw a recommendation for that. As generally, I would say when one -- first of all, I don't think he's a good candidate for a spinal cord stimulator, and I don't know that it's planned.

Q Okay. So are you aware that Dr. Schifini testified in this case that he has planned for the placement of a permanent spinal cord stimulator with Dr. Thalgott? Are you aware of that, who is also a spine surgeon?

A As I said --

Q I'm asking you if you're aware. That's just yes or no.

A Oh. The answer is no.

Q Okay. Are you aware that he's gone through a pre-psychological clearance for the spinal cord stimulator? Are you aware of that?

A I don't know. I don't believe I have a psychological

evaluation --

Q Okay.

A -- of that. I think I read --

Q Okay.

A I think I have read that, yes.

Q Okay.

A You are correct.

Q Okay. Now, since September 1st, 2014, five years, my client has undergone 60 doctor visits, 107 physical therapy/chiropractic visits, eight x-rays, CT scans, MRI, 17 spinal injections, one spinal fusion surgery, and one planned spinal cord stimulator to a cervical spine.

MR. KAHN: Your Honor, Defendant, again, objects and indicates that this is not simply demonstrative. It's required to go through evidence, and also --

THE COURT: Counsel, approach.

MR. KAHN: -- I just requested all these be marked for the record.

THE COURT: Counsel, approach.

[Sidebar begins at 11:26 a.m.]

MR. KAHN: I understand the Court's ruling, but I'd like to make sure all of these are going to get marked for the record. That's all.

THE COURT: And I --

MR. PRINCE: He's told you five times he has screenshots.

THE COURT: You saw me ask Judy that anytime there's anything put up there, it's a screenshot.

MR. KAHN: Okay.

THE COURT: He could, in the old days, put this up and write down 60 doctor visits.

MR. KAHN: Right.

THE COURT: Seven, 107, whatever. This is modern day version.

MR. KAHN: That's fine.

THE COURT: And so it's only demonstrative. It doesn't go back.

MR. KAHN: Okay.

THE COURT: It's admissible as --

MR. KAHN: All right.

THE COURT: -- demonstrative.

MR. PRINCE: Is the objection overruled, Judge?

THE COURT: Yes.

[Sidebar ends at 11:27 a.m.]

THE COURT: Objection overruled.

MR. PRINCE: Thank you.

THE COURT: We will make those our Court's exhibits.

MR. PRINCE: Very good.

BY MR. PRINCE:

Q Now, you're not arguing that he had all of those visits and that treatment, are you, after September 1st, 2014? That he actually underwent it.

A Yeah. The time frame is a bit vague. Yes, he had those, but

the majority of all that occurred after 2016 -- in mid-2016. I would say 95 percent of all that occurred after -- if not 98 percent occurred after mid-2016, and then you would -- well, there's an obvious question, but I'm not going to ask it.

MR. PRINCE: Your Honor, move to strike that as completely non-responsive by the witness. I had no question pending.

THE COURT: The --

MR. PRINCE: Again, I just only asked him if he had any argument that that's the treatment he underwent. That was a yes or no.

MR. KAHN: I think he was responding to a question, Your Honor.

THE COURT: Well, I think he was responding until the end. So, Doctor, refrain from making comments.

THE WITNESS: I apologize, sir.

MR. PRINCE: Very good.

BY MR. PRINCE:

Q So you're not arguing that my client -- you're not saying he didn't undergo that treatment, right? You're not making that statement? He did undergo that treatment?

A No. I guess it's vague. The answer is no, I'm not arguing.

Q Right.

A It's just vague, 24 to present.

Q Very good.

A 2014 to present.

Q Exactly. Because in 2012 and early 2013, he wasn't doing

any of these things, right? Before this collision, he wasn't undergoing any treatment that looked anything remotely like this, right?

A I think --

Q Before this collision, correct?

A Yes.

Q Now, I want to talk about symptoms as of August 2014, okay?

A Sure.

Q Very good. I'm going to show a document on -- we kind of went through this already. I'm going to show you a record. This is an August 11th, 2014 record. It's part of Exhibit Number 91, Desert Orthopedic. And it's the record from Dr. Archie Perry who's also a spine surgeon, okay?

A Yes.

Q And it says, the patient was seen in the office today for his follow-up of the cervical spine injury. The patient states that overall, his neck feels -- still feels the same, even given the physical therapy and injections. It says, the patient has also stated that he saw Dr. Peter Lok for acupuncture trial, which did not give him any relief, and actually aggravated some of his symptoms. The patient has also discussed with his family about the possible use of surgical intervention. At this time, he is still apprehensive, but is starting to lean towards this as he does believe the symptoms are becoming so persistent that he may need to do something to get rid of them, given his pathology." Did I read that correctly?

A You're a good reader. Yes.
Q Thank you.
A You're welcome.
Q I was a public school kid from Las Vegas, Nevada, but --
A That's wonderful.
Q It is. It is wonderful. So as of August, within the time period of you saying he's injured and seeking treatment, August 11, 2014, he's reporting symptoms and experiencing symptoms caused by this trauma, correct, given your dates?
A Well, I think the first part of that is correct. He's having symptoms. I think that, as I stated, I allowed treatment through August 2014.
Q Right, so --
A I think that you're describing causation, but as I said, thereabouts, if you read my report, it says -- I believe it says mid-summer.
Q Oh, no. You said end of summer. That's why I --
A End of summer. End of summer. I apologize.
Q Oh, I'm using --
A End of summer. So --
Q I'm using your words.
A Right. Okay. Thank you. So end of summer because --
Q Well, hang on. That's good.
A Okay.
THE COURT: Let him finish. Are you done?

THE WITNESS: No, I wasn't, but I can be if --

THE COURT: Go ahead. Finish.

THE WITNESS: Okay. Thank you. So because end of summer, because as you know, this patient has degenerative spine disease, and I believe it's ongoing and progressive. And so there is an overlap, and there is a layer. And so one doesn't just say, oh this completely -- people don't walk in and say, oh, I've got a sign, oh geez, now it's 100 percent degenerative.

So there's an overlap, and so there's a timeframe where I thought in my review of the medical records that whatever was occurring related to the accident here in question became kind of trivial, and that the most substantial part of that then was the degenerative spine disease, and that occurred at the end of summer -- using my words -- the end of summer of 2014.

MR. PRINCE: Okay.

BY MR. PRINCE:

Q So earlier you said the treatment and the symptoms he was experiencing up through the end of summer 2014, you indicated earlier, was caused by this collision of June 19, 2013. You said that earlier today, when we got started, correct?

A I agree. I'm --

Q Okay, then --

A I'm explaining my answer.

Q I'm using your time frame.

A Thank you.

Q So --
A End of summer.
Q The symptoms as of -- this is not the end. This is the early part of August.
A Okay.
Q He is reporting ongoing persistent symptoms, right?
A That's what --
Q And being treated in the office for a cervical spine injury, according to Dr. Perry, correct?
A According to Dr. Perry.
Q Right. Well, let's look at his symptoms as of September 2014, okay? September 22nd, 2014, it says the patient returns today. Last seen on August 11th. Since then, he notes persistent neck pain, as well as intermittent arm and paresthesia. Do you see that?
A I do see it.
Q Okay. So the symptoms remain the same, right?
A Well, no, they're not the same. They're --
Q They're persistent neck and arm --
A They're waxing and waning.
Q He says --
A But --
Q -- persistent neck, as well as intermittent arm pain, including paresthesia. Do you see that?
A I --
Q Persistent means ongoing, right?

A I see that.

Q Okay. So let's see if we're clear then. So I want to compare these two things. So the August 11th, 2014, visit where he states his overall neck still feels the same even with physical therapy and injections, and they're discussing surgery on August 11th in the summer of 2014, right?

A Correct.

Q And then -- so on the right-hand side, where we're showing the September 22nd, 2014 visit, he says he's got persistent neck pain, as well as intermittent arm and paresthesia. So you're saying on the left, it's related and on the right, now, September 22nd, nothing is related? They're unrelated to each other, right? Those symptoms.

A As a --

MR. KAHN: I'm going to object. That's a compound and unintelligible question as phrased.

THE COURT: Doctor, do you understand the question?

THE WITNESS: No, because he's --

THE COURT: All right. Rephrase.

BY MR. PRINCE:

Q So isn't it true that under your analysis, all the symptoms from the August 11th, 2014 visit, you believe those are traumatically caused by this motor vehicle collision because that's the time period you gave us, right?

A That's incorrect, and I gave a verbal answer --

Q Right.

A -- of why that's incorrect.

Q But that's not what you said in your report; did you? Did you?

A No. I said -- as I said, I chose a time where I thought that the contribution, if you will, of the -- or a portion and/or contribution was trivial, and at that point in time, I think it was primarily degenerative, and that was the most substantial cause. And if we look at the medical records and were to study them, the time frame after this, there's very little treatment, and in fact, he's declared permanent and stationary, not by me, but by one of your experts --

Q But that doesn't mean he's asymptomatic. Just because he's permanent and stationary does not mean he's --

A He did not -- he was at a level of "permanent stationary" or maximum medical improvement.

Q Well, the good news is --

A And what treatment did he get in between.

THE COURT: Mr. Prince, don't interrupt him.

THE WITNESS: Yeah. What treatment did he get in between this time that I said, the summer -- the end of summer, which is September 21st or 22nd anyway. Okay. So you're arguing over a day. You want to talk about specific days. And all I'm saying is that the treatment between that and the time that the medical records say he was at a level of maximum medical improvement, and that's another three and five -- four months -- five months -- is another seven months, there's very little treatment that occurs.

MR. PRINCE: Okay.

THE WITNESS: So the answer is, if you want to talk about specific words, I'm not going to argue over the exact words in this document.

MR. PRINCE: Okay.

THE WITNESS: And I'm going to agree with you what the exact words say. Thank you.

MR. PRINCE: Are you done?

THE WITNESS: Thank you.

MR. PRINCE: I'm ready for my next question.

THE WITNESS: Thank you.

BY MR. PRINCE:

Q You testified that all of the treatment through the end of August 2014 was accident related, correct?

A That's correct.

Q Including symptoms, correct? You gave us the date?

A Yes.

Q Right. You said, within a reasonable degree of probability, the cervical injections were reasonable through the end of summer 2014. You chose those words, right?

A I did.

Q Very good. So when we get to September 22nd, 2014, it's your opinion now that anything after that September forward, the accident played no role, none at all, correct?

A It's not -- correct.

Q Okay.
A It's not a substantial factor.
Q Right.
A And I don't know --
Q At that point, it's all in your mind --
A And I don't know --
Q Excuse me. I wasn't finished --
A I was going to finish my --
Q Excuse me. I wasn't finished with my question.
A Well, I was answering the question before that.
THE COURT: Let him answer the question.
THE WITNESS: And I don't know in 2014, when the end of summer exactly was. I mean, we would have to look it up, but it's usually around the 21st of September. So this visit, you could include, if you wanted to, but -- or you don't have to. I'll leave it up to our friendly people here.
MR. PRINCE: Okay.
BY MR. PRINCE:
Q Now, you -- I want to put another statement on the board, the monitor. Let's talk about it. Mr. Yahyavi developed some --
MR. KAHN: Your Honor, I'm going to object --
BY MR. PRINCE:
Q -- radicular symptoms which --
MR. KAHN: -- if this is from the report.
THE COURT: Wait. Counsel, approach.

MR. KAHN: Can we take this off the screen, please?

MR. PRINCE: Why?

THE COURT: Yes.

[Sidebar begins at 11:38 a.m.]

MR. KAHN: I thought the Court's order was his reports don't come in. Now he's putting reports --

MR. PRINCE: It's a statement by him. I'm not putting up a report.

MR. KAHN: Now he's putting report quotes in front of the jury.

THE COURT: If that's his report --

MR. PRINCE: Yeah.

THE COURT: Reports don't come in.

MR. PRINCE: But I can say, isn't it true you said this.

THE COURT: You can ask them, isn't it true, show it to him --

MR. PRINCE: Yeah.

THE COURT: -- but it doesn't go up, and it's not --

MR. PRINCE: Well, I'm not showing the report. I'm just showing --

MR. KAHN: Well, I'm going to show the rest of the report if this is going to go in front of the jury.

THE COURT: It doesn't go up, understand?

MR. PRINCE: Yes.

THE COURT: All right.

MR. KAHN: Thank you, Your Honor.

[Sidebar ends at 11:38 a.m.]

THE COURT: Objection is sustained.

MR. PRINCE: Okay.

BY MR. PRINCE:

Q Isn't it true you stated in your August 2nd, 2018 report, that Mr. Yahyavi developed some radicular symptom which only began years following the motor vehicle condition, and are causally unrelated to the subject motor vehicle collision? Didn't you say that?

A Which report are we talking about?

Q August 2nd, 2018.

A Well, I think you're going to have to read the paragraph --

Q No, I'm just --

A -- to be --

Q Hang on.

A -- to have it in context. But --

Q Excuse me, Doctor. I'm just asking, did you make that statement; yes or no?

MR. KAHN: Objection. Asked and answered. He's saying you need the full paragraph for context.

THE COURT: Sustained.

BY MR. PRINCE:

Q It says, his surgical treatment completed is causally unrelated to the subject motor vehicle collision over four and a half years. It does appear that Mr. Yahyavi developed some radicular symptoms, which only began years following the subject motor vehicle accident, and are

causally unrelated to the motor vehicle accident, and are most substantially related to his ongoing and progressive degenerative cervical spine disease spondylosis.

A Which Mr. Yahyavi has --

Q Okay.

A -- experience for years.

Q Okay. Now, I'm only talking about the onset of radicular symptoms, okay?

A Sure.

Q Let's talk about that.

A Let's talk about it.

Q Radicular symptoms means symptoms, which could be pain, numbness, paresthesia going into one of the extremities, either your arms or legs --

A It could be.

Q -- depending on where it's coming from, right?

A It could be.

Q Right. And you -- that's usually caused by some type of nerve irritation of some form or another?

A That's one possibility.

Q Right. It doesn't necessarily mean someone has to have a radiculopathy. You can have radicular or radiating symptoms without a clinical radiculopathy, correct?

A You can.

Q Okay. So you said they did not -- they only began years

following the subject motor vehicle collision, the radicular symptoms, right, that's what you said?

A Yes.

Q Okay. Let's look at -- I'm showing you the record of the chiropractor, which is the first visit following this collision --

A Sure.

Q -- June 24th, 2013. It says he reports of radiation type of pain in the left arm below the elbow. Do you see that?

A Yes.

Q And the chiropractor also diagnosed him with a radicular problem that day, correct?

A Well, a chiropractor is a chiropractor. But the answer is radiation type. And as you know, that in April of 2015, that while he had radiation type of symptoms, they were non-verifiable. And what I'm referring to really is that the radiculopathy became more verifiable because of the progression of degenerative cervical spine diseases.

Q Okay.

A And that is evidenced by number one, the progression of the MRI studies, as we talked about. And also, that he had EMG nerve conduction study, which did not verify in February of 2014 radiculopathy --

MR. PRINCE: Your Honor, we're going to move to strike as nonresponsive.

THE WITNESS: and was later verified years later --

BY MR. PRINCE:

Q Yeah. Well --

A -- in 2017, as a radiculopathy. And then after that, he had surgery.

Q Okay. You said he didn't -- the radicular symptoms developed only -- only began years following, correct? Those were your words, correct?

A Okay.

Q The chiropractor documented that Mr. Yahyavi reported the first visit radiating type of symptoms into the left arm, correct?

A Yes.

Q He never had any of those symptoms in any medical record in the left arm ever before this motor vehicle collision that you've seen, correct?

A You asked, and I answered yes.

Q Right. This is Dr. Fisher who saw him in December of 2014 -- this is actually Dr. Perry, excuse me, September 16th, 2013. And it's purporting intermittent left greater than right upper extremity pain and paresthesia. That item number three, that's a radicular symptom, isn't it? Pain and paresthesia into the left arm is a radicular symptom, correct?

A It can be.

Q Right. That's within three months of this collision, correct? Not years; three months?

A I said it can be.

Q At the next visit with Dr. Fisher, who's also a pain physician

who gives him injections, it says, describing his symptoms. He says, the patient describes the pain as nagging and dull. Occasionally, it radiates down the left arm. Worse with sitting for prolonged periods of time. Associated with decrease side range of motion. Do you see that?

A Yes.

Q That is a form -- radiating down the left arm is a radicular symptom, correct?

A It can be.

Q Right. And this was being reported December 2014, about a year and a half after the collision, correct?

A The date of that is?

Q December 3rd, 2014.

A Occasionally, yes.

Q Okay. Dr. Oliveri, he evaluates him April 23rd, 2015, just shy of two years as part of a permanent impairment. He's talking about neck and upper back pain. He said he reports constant neck pain that will shoot from the neck into the upper back. He also reports intermittent shooting pain at the left upper arm and forearm, with numbness into the small finger on the left side. Do you see that?

A Yes.

Q That is a radicular symptom, correct, that's documented --

A It's a --

Q -- by Dr. Oliveri, the rating physician.

A It's -- yeah. But it's non-verifiable.

Q Okay.

A So in other words, it's a --

Q So --

A -- it's a subjective symptom, but --

Q Yeah.

A -- it doesn't have any verification.

Q Well, he's never had it before, right? So if somehow five days after the collision he starts reporting pain in the -- problems in his left arm that he never had before, and you're saying that's unverifiable, unrelated?

A It's a different question.

Q Okay.

A It is non-verifiable, and Dr. Oliveri stated so in his report. I mean, he rated him that way. I do those ratings.

Q And so November 30, 2016, Dr. Su, neck pain radiating to the arms. Do you see that?

A I need to see the whole document.

Q I'm just showing you the reason for the appointment is neck pain --

A I don't recall the document, so can I just see the whole document and see if it's a document that I recall, or not?

Q I just want to look at the reason for the appointment. That's all I --

A I just wanted to see the whole document. That's -- if I'm not allowed to, then I don't -- I'm not going to argue with what the word says.

Q Would it help -- would --

A I can read it.

Q -- would it make -- yeah, I'll show it to you if you feel like you need --

THE COURT: Show him the document.

THE WITNESS: No, I just --

BY MR. PRINCE:

Q -- you need to see the whole thing.

THE COURT: What exhibit number?

THE WITNESS: I was just asking to see it.

MR. PRINCE: It's exhibit -- behind you, it's Exhibit 100.

MR. KAHN: Your Honor, I don't think we've told the witness this, but the exhibits are behind him.

MR. PRINCE: Yeah. Well, I'm going to show the whole thing. It's fine. We're good. I'm going to show you -- yeah, Bates number 590. Let's just go ahead and put it up.

THE WITNESS: Yeah. Neck pain, primarily axial nature. That's what I thought it said. So what would --

BY MR. PRINCE:

Q Well, hang on. I haven't -- I'm going to ask a question.

A Oh, I'm just reading it.

Q I'm going to ask a question.

A I was -- I'm sorry, I meant -- I was reading it to myself. I shouldn't have read it out loud. I apologize.

Q It says neck pain, primarily axial nature. This is chronic,

worsening complaint. The pain started since 2013. The characteristic is aching, throbbing, shooting, sharp, nagging, associated numbness, and tingling. That means into the extremity, right? Right?

A So he has some, but it's primarily axial in nature. I'm not going to argue with what it says. I mean, I think it -- I think it reads very clearly. Neck pain, primarily axial in nature. And he has some shooting, nagging, numbness --

Q Right.

A -- that --

Q I'm just showing you -- the reason for me even showing you this is because you said that these radicular symptoms only began years following the motor vehicle collision. And I showed you a record from the first day, from three months, from six months, from a year later, and ongoing he's had reported symptoms into the left arm, correct?

A No, that's not correct, because what I said is I said it appears.

Q No. It said -- you said developed some radicular symptoms, which only began following the subject motor vehicle accident, and are causally unrelated. You said years following.

A I said --

Q You said years following.

A Well, I think we read it. But I said it does appear that Mr. Yahyavi developed some radicular symptoms, which only began years following the subject --

Q Right.

A -- motor vehicle accident.

Q I --

A So I didn't talk about --

Q The chiropractor --

A I didn't talk about the frequency or anything, okay. So you can take the words for what they are. This document it says that it's primarily axial neck pain. It doesn't say there's any radiculopathy in fact. And you're making an assumption, in fact, that because he's got radiating pains, that that's radiculopathy. A lot of people have radiating pains to the arms that isn't radicular.

Q Okay.

A So -- and that's why it's non-verifiable, as Dr. Oliveri said in April of '15. I mean, that's the medicine.

Q All right. Now, he also reported to Dr. Schifini in 2013, he also had pain and numbness into the hands and arms, left greater than right, right? This would've been Dr. Schifini in 2013, neck pain with occasional headaches, numbness in both hands and arms, left greater than right, including all fingers. Do you see that?

MR. KAHN: Sorry, I don't think there's a date on this yet, Your Honor.

MR. PRINCE: I'm only showing just a part of the records. I wanted just to show the symptoms. I'm not intending to show the records.

THE COURT: Go ahead.

MR. KAHN: But counsel referenced the date of loss. That's not the date of this record.

MR. PRINCE: Oh, I understand that.

MR. KAHN: That's the only date on here.

MR. PRINCE: That's true.

THE COURT: What exhibit is it?

MR. PRINCE: Exhibit 92.

THE COURT: It's admitted, so --

MR. PRINCE: It is admitted. It's Bate number 336. It's just the chief complaint.

BY MR. PRINCE:

Q I'm saying to you that's -- from November 25th, 2013, five months after this collision, he is reporting to Dr. Schifini that he has not only neck pain, but symptoms into the both right and left arm, left worse than the right, correct? That's what he's reporting?

A Again, I can't tell by this document. You've mentioned the date. I don't see the whole document. I --

Q I'm just saying that's what's reported as a chief complaint. That's all I'm asking you.

A I don't know the date of this document.

Q I'm not asking you about the date. That's the chief complaint, correct?

MR. KAHN: Your Honor, I would ask that the witness be allowed to pull the document from behind him in --

MR. PRINCE: I'll show it to him.

MR. KAHN: -- in the binders if he's going to be asked about it.

MR. PRINCE: Okay.

THE COURT: That's fine.

MR. PRINCE: It's part of the --

MR. KAHN: It should be tab 92.

BY MR. PRINCE:

Q It's Exhibit 92, 336 -- Bate number 336. I'm going to put it -- I'll put it on the monitor for you if you prefer that.

A It might be faster.

Q Perfect. In the bottom, the date -- it says date of dictation, November 25th, 2013, six months after the collision. Okay. And then his chief complaint that day, six months later, was neck pain with occasional headaches, numbness in both hands and arms, left greater than right, including all fingers. Do you see that?

A You know, I -- I just feel more comfortable because I'm answering questions --

Q I'm just asking did he report the complaint?

A -- seeing the document.

Q I'm just asking did he report the complaint? That's all I'm asking.

A Am I allowed to see the document? I don't want to -- I don't want to hold up the -- I don't want to --

THE COURT: Go ahead. Look at the document. Pull the document. It's behind you.

THE WITNESS: Okay. Thank you.

UNIDENTIFIED SPEAKER: It's either in binder one or two.

THE WITNESS: Binder -- I got one and two here. Okay.
UNIDENTIFIED SPEAKER: You're looking for Exhibit 90 --
THE WITNESS: What's the exhibit number?
MR. KAHN: 92.
THE COURT: Exhibit 92.
MR. PRINCE: Uh-huh. Bate number 336.
BY MR. PRINCE:
Q And all I want you to do is look at it, and then I'll ask you a question.
[Witness reviews document]
A Okay.
Q Okay. And so that was one of the symptoms he reported, was a radicular symptom into the arms, correct, on November 25th, 2013? That's yes or no.
A Subjective symptoms he reported, yes.
Q Right. And that's not years later; that's within six months, correct?
A Well, the date of the dictation was 11/25/13. Yes.
Q Okay. And the impression was subjective bilateral upper extremity radiculitis, left greater than right. Radiculitis means some type of nerve irritation, correct?
A Yes. But --
Q Okay.
A -- it's subjective. I think the key word is subjective.
Q Well, all pain symptoms are subjective, right?

A Right. But radiculopathy --

Q No, the symptoms -- I'm talking about symptoms.

A -- can be verified, and there are reasons. So, you know, I mean -- I mean, as a surgeon, that means -- that means a lot. I mean, for instance, if people just come in and say oh, I've got arm pain, we don't operate on them. You just -- you even pointed that out; you have to have correlation, et cetera. So if someone just says I have arm pain and they've got a normal MRI, they wouldn't need surgery.

Q Okay.

A So it's an important point. Even --

Q Okay.

A -- Dr. Schifini, I think believed --

Q Right.

A -- is trying to make that point.

Q Okay. And so Dr. -- all right. I'm showing you the note from Dr. Kaplan, his initial on August 11, 2017. He reports to Dr. Kaplan neck pain, numbness, and tingling, right? He's reporting ongoing radicular type symptoms when he sees Dr. Kaplan at the first visit, August 11th, 2017, correct?

A Yes.

Q And he says the consultation is for cervical radiculitis, correct? That means some kind of nerve irritation of some type, correct?

A Sure. This is August 2017.

Q Yeah.

A Yeah.

Q Yeah. I'm showing you --
A Yes.
Q He was actually diagnosed --
A Yeah, I got it.
Q -- by the chiropractor with radiculitis on the very first visit, correct?
A Yes.
Q Okay. So let's look at part of Exhibit 87, Bate number 193. This is from Dr. Calloway, the chiropractor, several days following this collision. Okay. Number two, do you see that?
A Yes. And actually, I have it as --
Q Cervical --
A -- Exhibit 86, but that's fine. I don't know if that's important for the Court.
Q And I'm showing you that the date of service, June 24th, five days after this collision, he was diagnosed with cervical radiculitis neuritis. Do you see that?
A Sure.
Q That's the same diagnosis that Dr. Kaplan wrote down in August of 2017, correct, cervical radiculitis?
A Sure.
Q Okay. So it wasn't years later; it was within five days, a physician licensed in the State of Nevada, documented a radicular problem, correct?
A You'd have to define radicular. He's got radiculitis. It's not

radicular related to the cervical spine I don't think.

Q Okay. He had never had a diagnosis of cervical radiculitis ever before this motor vehicle collision, correct?

A I do not see it.

Q Right. Now --

MR. PRINCE: Your Honor, I'm going to -- this might be a good point that we could break.

THE COURT: Counsel, approach.

MR. PRINCE: You know, I can -- I've got five minutes. Unless you want me to stop now, I can keep going for a minute.

THE COURT: Just approach.

[Sidebar begins at 11:56 a.m.]

THE COURT: So you have five, ten minutes. And how much --

MR. PRINCE: Oh no, I'm not done. I'm just saying I'm at a good breaking point if you wanted to stop for lunch. If you want to keep going --

THE COURT: How long do you have?

MR. PRINCE: Probably 30 minutes, 40 minutes.

MR. KAHN: If we take that as an hour, I probably have 10 to 15 minutes, maybe half an hour at the most, depending on what he asks after the lunch.

THE COURT: All right. So --

MR. KAHN: But if he gets into new stuff after lunch --

THE COURT: -- two hours. All right. So let's go ahead and

take a break and come back after lunch.

MR. PRINCE: Okay. Thanks.

[Sidebar ends at 11:57 a.m.]

THE COURT: All right. Ladies and gentlemen, we're going to take our lunch recess now.

During this recess, you're admonished do not talk or converse amongst yourselves, or with anyone else on any subject connected with this trial, or read, watch, or listen to any report of or commentary on the trial, or any person connected with this trial by any medium of information, including without limitation newspapers, television, radio, or internet. Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you. We'll see you at ten after 1.

[Jury out at 11:58 a.m.]

[Outside the presence of the jury]

THE COURT: So after Dr. Tung, who do we have?

MR. KAHN: The Plaintiff.

THE COURT: Okay.

MR. KAHN: And that'll be our day.

THE COURT: And that'll be until the end of the day, I'm sure. Okay. Thank you.

[Recess at 12:00 p.m., recommencing at 1:12 pm.]

[Matters continue]

[Designated testimony begins at 1:17 p.m.]

CONTINUED CROSS-EXAMINATION

BY MR. PRINCE:

Q Okay. Dr. Tung, good afternoon. Did you, after the lunch break were you with the Defense counsel, Mr. Khan and the other members of the team?

A I was.

Q Yeah. What document did you review during the break?

A We didn't review anything. I was told specifically not to talk about the case, and that's what we didn't do.

Q Very good. All right. I want to talk about the EMG nerve conduction studies, okay?

A Sure.

Q Okay. You agree that EMG nerve conduction studies, that's just additional information, it's part of the overall clinical picture, it's not conclusive as to anything, generally speaking?

A It's objective. When you say "not conclusive" --

Q Yeah.

A -- you have to explain that better. I think that it is conclusive for certain things, and like radiculopathy it's conclusive --

Q Conclusive?

A -- and it's --

Q It doesn't mean a person has symptoms, just because there's a finding on an EMG, correct?

MR. KAHN: Your Honor, I don't know if the witness finished his full answer --

THE COURT: Did you finish?

MR. KAHN: -- to the last question.

THE WITNESS: I wasn't, because, there are many findings, so it's vague. First of all the question is vague and non-specific. But if one were to say, you know, you have carpal tunnel, median neuropathy --

BY MR. PRINCE:

Q Okay.

A -- and to your point you might not have symptoms even though it's positive, but --

Q Right.

A -- it goes to correlating, if you will.

Q Agreed, with the clinical correlation, so --

A You agree. Hey, we agree on something.

Q What's that?

A I said, you agree with me, you said.

Q I don't know, to what?

A You just said, agreed, and I said --

Q Oh, on the clinical --

A -- you agree me.

Q -- correlation. Oh, yeah. I totally agree, yeah, your clinical correlation.

Do you agree that an EMG nerve conduction study is just a diagnostic test, correct?

A It's a diagnostic test. Yes, sir.

Q Right. And clinical correlation, I mean a large component of

that is the patient history, right?

A A component, when you say large, I mean, this looks like you're saying it, you're representing it as it looks like half, I'm not certain that it's half.

Q Well, what is it?

A Well, I don't know, I don't know -- first of all I'm not -- I might not use all these things, this is your interpretation of what may go into clinical correlation. I don't agree necessarily with all these things, nor would I agree with --

Q Oh, okay.

A -- the pie chart of it, because in every individual situation something may be important than another thing. For instance, patient history and patient's relative symptoms may depend on a number of factors which can include past issues, present issues. It can include someone relaying symptoms that could be minimized --

Q What question right --

A -- or exaggerated --

Q -- now do you think you're answering?

A I'm answering -- well, you were asking about --

Q No. I never even asked --

A -- this clinical correlation.

Q -- the question yet. I haven't asked the question yet.

A Okay. Then what -- you're having me look at a graph, or a pie chart --

Q No, no. I put it up there, but I haven't asked you a question

yet.

A You said, is patient history a major component, and I said, it would depend on the clinical situation.

Q Okay. So do you agree that physician examination findings are also important, as part of the clinical correlation analysis?

A It can be important, yes.

Q Response to treatment, whether they get better with time, or better with certain types of therapy, regardless of what area of medicine we're talking about. Responsive treatment is also part of the clinical correlation --

A It is.

Q -- discussion, right?

A It's something that it can, but it varies.

Q Right.

A And it can vary.

Q Diagnostic imaging, x-ray, MRI, CT, that's part of the puzzle, right? Part of the --

A It's --

Q -- diagnostic puzzle, it's a piece of the overall information?

A Yes. It's part of the puzzle --

Q Okay.

A -- and this puzzle does not necessarily represent -- is not representative of, in other words, the ratio of your puzzle might be different than every different situation.

Q Okay.

A That's why I'm having trouble answering your questions.
Q Well, I --
A You put a representation up here that may not be true.
Q Well, there's been four other doctors up here that agreed with that, so I mean, I guess you don't agree; that's okay.
A I'm not saying --
Q I'm not asking if you agree with --
A I'm not telling you about the categories. You have a representation in a pie chart which implies certain percentages, at least how I look at it, 360 degrees, and I'm just telling you it could depend. So if you want to ask me in the hypothetical are these factors, I'm going to say, yes, or if you're going to ask --
Q Why --
A -- go ahead.
Q Why don't you wait until I ask? If you give me that courtesy I'll let you have an answer, but let ask my question, okay? I understand, you disagree with everything with it right now, but I just want to know, patient history is a component, regardless of what percentage you assign to it, by the clinical correlation analysis, right?
A Correct.
Q Examination findings, right?
A Correct.
Q Responsive treatment is one piece of the overall informational analysis, right?
A Correct.

Q Diagnostic imaging CT, MRI, right?
A Correct.
Q Other testing which could include injections, right? That's one type of --
A One type.
Q One type, but also EMG nerve conduction study, that's one type of other diagnostic testing, right?
A It's more information.
Q Right. And in fact you described that when we took a deposition of you in 2016, about EMGs, you said, it's just additional information, that's how you characterize EMG/NCV, you call that additional information, right?
A I really can't answer the question.
Q Okay.
A If you're pulling out one line from something three years ago --
Q Okay.
A -- and didn't give me any context --
Q All right.
A -- it think it's a little unfair.
Q Right. And you can't just look at an EMG, NCB finding, and say, yes, that establishes a diagnosis. It's one piece of information that you have to use along with all of the other clinical information, including history, SAM findings, other imaging, response to treatment, et cetera, correct?

A It's a piece of information. I --
Q Okay.
A -- I agree --
Q Great.
A -- with.
Q Now, for example, there can be false positives of EMG/NCVs, correct?
A In every test there are false positives, and false negatives, yes.
Q Right. And so I'm talking about, specifically, the EMG/NCV, there can be false positives, correct?
A There can be.
Q Right. And for example in this case, the EMG, the two early EMG/NCV testing suggested carpal tunnel syndrome for Mr. Yahyavi, correct?
A The early one in --
Q 2014?
A Yes.
Q Okay. No one ever established a diagnosis of carpal tunnel, did they?
A I don't know. I don't think so.
Q Now you reviewed comprehensively all of these records, correct?
A I reviewed the records that I reviewed, yes.
Q Right. And one of the things that you do as a neurosurgeon,

and all neurosurgeons are trained this way, is, hey, I want to know where the source or the symptoms is coming from. For example, I'm not going to do a neck surgery, if I think the problem is something in the wrist, caused by carpal tunnel, right? You want to differentiate those things?

A Correct.

Q And so the one way you differentiate is like, all right, I see an EMG/NCV test that says no radiculopathy. It doesn't say anything about radiculopathy, but it says -- or suggests carpal tunnel syndrome, but clinically the person doesn't have it, because they're not complaining of signs, symptoms, and there's no exam findings to support that diagnosis, correct?

A Well, I'm going to break that up because it's multiple parts. First of all, exam findings, no one documented exam findings of no carpal tunnel in the early notes, or in my review of the records, number one. Number two, is that you relayed that there had been mention of radiculopathy, they actually said there was no radiculopathy, and there was, you know, from C5 to T1, I think the February 4th one actually mentions that. Thirdly, it is a piece of information.

Q Right. In this case, no one ever diagnosed Mr. Yahyavi with carpal tunnel syndrome, correct?

A Correct.

Q Right. And you, a neurological surgeon, when you -- even after you evaluated him in 2016 you never came to the conclusion or the impression that he suffered from carpal tunnel syndrome, correct?

A I didn't write that, yes.

Q But see that's not -- that was not one of your opinions, or diagnosis of Mr. Yahyavi, correct?

A I did not diagnose him with carpal tunnel syndrome.

Q Right. So even though the EMG/NCV said he had it, clinically having presented with his complaints, exam findings and all the other piece of the puzzle he didn't seem to have that, correct?

A The EMG says he has -- it's possibly consistent, but he didn't have symptoms of it, so --

Q Right. So he didn't have symptoms of it, correct?

A Sure.

Q Some people, there might be evidence of radiculopathy on an EMG, but they have no symptoms consistent with a radiculopathy from a certain level; correct, you've seen that also?

A That can happen.

Q Right, okay. All right. Now you saw Mr. Yahyavi in August of 2016, correct?

A Yes.

Q Okay. And that was the one and only time you met with him, correct?

A Yes.

Q You have no independent recall of that meeting, do you?

A Not independently.

Q Right. So the only thing you're relying on is what's in your chart?

A Yes.

Q Okay. Like for example, you don't -- Mr. Yahyavi's back there in the courtroom, you don't -- he doesn't look familiar to you?

A Well, he does look familiar to me now.

Q Yeah. But you don't remember your encounter with him, fair?

A I don't remember?

Q Your encounter with him, your discussions with him?

A I don't have an independent recollection, but --

Q Okay.

A -- I mean, he looks familiar to me.

Q Now you knew from speaking to him that he was in the automotive business, correct? Automobile sales?

A So I wrote down here he told me, he -- and I wrote it down, because I have it in my chart here, he said car business, sales manager.

Q Okay. Now let's break this down a second. You never received any records of any kind that Mr. Yahyavi before June of 2013 missed work because of any physical complaint of neck pain, back pain, anything like that, correct?

A I don't have records of that.

Q And in fact there is no record him ever having any workplace restrictions before June of 2013, correct?

A That's correct.

Q There's no limitations placed on his job duty or performance before June of 2013, correct?

A Correct.

Q And you never reviewed his employment file, correct?
A Not that I -- not that I recall.
Q Okay. There was never any evidence of like a workplace injury, while working at anywhere when he lived in Las Vegas, four or five years before this, right; nothing like that?
A Before this, no.
Q Okay. Now were you aware that he was working, five, six days a week at the time this collision occurred, up to 60 or more hours per week?
A No. Other than -- yeah, I've read his deposition, so I mean --
Q Yeah.
A -- he relayed that in his deposition.
Q Yeah.
MR. PRINCE: Let's bring up the earnings' chart.
BY MR. PRINCE:
Q In 2011, while working at John Hauser's, his first full year there he earned $104,643 and in 2012, the full year before this injury occurred, he earned almost $160,000; do you see that?
A I see it.
Q Right. But after this collision occurred his income goes significantly down every year, until he's now -- 2017, he's no longer earning an income at the dealership.
MR. KAHN: Your Honor, this exceeds the scope of the expert's testimony --
MR. PRINCE: No, I'm talking for job performance --

MR. KAHN: -- on direct and his designation.

MR. PRINCE: -- and disability. This goes to the job performance and disability.

THE COURT: Well --

MR. KAHN: I don't --

MR. PRINCE: What he --

THE COURT: Would counsel approach?

[Sidebar begins at 1:29]

THE COURT: How is that related to his testimony -- expert testimony?

MR. PRINCE: Because he says he's not disabled from working. And so, I'm going to explore that.

THE COURT: That was in one of his reports?

MR. PRINCE: Yes.

THE COURT: So that's his opinion?

MR. KAHN: Yeah, well, he says related to this case. Yes.

MR. PRINCE: Right.

THE COURT: All right.

MR. KAHN: But he didn't have any testimony about dollars and cents.

THE COURT: Well, he's going to say I don't know, I assume.

MR. KAHN: That's what he's going to say.

THE COURT: And that's what he's going to say.

MR. PRINCE: He said on direct --

MR. PRINCE: Okay. I just [indiscernible].

THE COURT: All right.

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

THE COURT: The objection's overruled.

MR. PRINCE: Thank you.

THE COURT: Go ahead.

THE WITNESS: Well, then, should I answer the question?

MR. PRINCE: I'm going to ask you -- I'm going to ask a new question, so the jury has it firm in their mind.

THE WITNESS: Yes.

BY MR. PRINCE:

Q With regard to this issue, his -- he's earned $159,714 the year before this collision occurred. Okay?

A Yes.

Q Working up to six days a week, more than 60 hours per week?

A Is that 159 related to the 2011 or 2012 -- is it the year between 2011 and 2012? I don't know how you graphed this. I'm just asking.

Q Oh, you want me to show you? Oh, I --

A Well, I'm just saying --

Q -- I would be happy to.

A -- is it 2012 -- the 129 refers to which year, the 2012 -- what he earned in the calendar year 2012 or is it academic year, June to June or September to September? It's a January to January year, right?

Q I'm sorry. I didn't understand what an academic year was.

A Well, I mean, academic is fiscal. An academic year would be

like a fiscal year. Usually it's like July to July.

Q I guess not a normal -- I guess I'll -- an average --

A And this --

Q -- worker would earn money would be in a calendar year, January --

A Okay. That's --

Q -- through December.

A I just wanted to clarify, sir. I'm just asking. So it's January -- don't get mad for asking. It's --

Q Oh, I'm not.

A -- January to --

Q I just want to --

A -- January to December. So you're -- so I just want to understand. So 2012 --

Q Yeah.

A -- January to December 2012, he earned 159?

Q Yeah. If you'll let me just show you.

A Okay. I agree.

Q Exhibit Number 114, Bate number 1327. I want to show you the document so you're comfortable with what I'm -- where I'm getting it from.

MR. PRINCE: 1327.

BY MR. PRINCE:

Q This is the payroll. This is just through mid-December 2011. You see the year to date earnings, $104,643. Do you see that?

A I see that, sir.

Q Okay. Very good. And at the end of -- let's go to 1353. At the period ending this next year, February -- excuse me -- December 15, 2012, the gross -- the year to date pay was $159,714 just through mid-December of the year immediately before the crash.

A Okay. So it's the calendar year 2012. I got it. Thank you, sir.

Q Right. And so -- but now you're aware that every year after that, he had a decline in his income from his pre-accident earnings of almost $160,000 per year?

A I have to see the graph again.

Q Yeah.

MR. PRINCE: Show the graph.

BY MR. PRINCE:

Q Yeah. He never -- he lost, if you're looking at 2013, 100 and --

A So, it actually didn't go down every year. Your statement of it declined every year is incorrect.

Q Okay. So, it -- I mean, it declined from what it was in 2012?

A It declined between -- yeah, it --

Q Yeah.

A -- declined to 114. And then it actually went up in 2014.

Q Right.

A And then it stayed the same until 2015. It looks like there's a drop --

Q Uh-huh.

A -- after 2015, which I would expect since I know he stopped

working in -- around that time frame. I think --

Q Yeah.

A -- it was in --

Q Yeah.

A -- '16. But it --

Q And so my point is --

A -- it didn't decline. It's about the same. I mean, it's pretty close considering he's in sales. I mean, I don't think you could earn the exact same amount, right? That would be almost an impossibility. It looks pretty constant --

Q Oh, okay.

A -- for --

Q But he feels that --

A -- between '13, '14 --

Q He feels --

A -- and '15.

Q Respectfully, he feels that's a loss from 160,000. You could see his point in that, right? If he couldn't perform his job -- he's going to hundreds of doctor's visits, physical therapy visits. He was going to none before this happened. You could see how he might construe this as a loss for him every year, right?

A I don't know how he would construe it. It looks like he did very well in 2011, 2012. But even after the doesn't, it looks like he did better than he did in 2011, at least according to the graph you're showing me.

Q Right. It looks like he was still working, working through it, right?

A He's working.

Q Yeah.

A I mean, he's --

Q His income --

A -- and -- and --

Q -- never reached --

A -- the numbers are about the same. I'm just telling you what the graph means to me. The numbers look about the same.

Q Okay. So you're look -- that means nothing to you, the fact that he's almost had a -- at least $30,000 per year or more income loss from where he was at in 2012, that means nothing to you?

A I didn't say that. You asked me did it decline every year, and I said that's not true.

Q Compared to --

A It looks like it stayed the --

Q -- 2012 it did, right?

A It didn't decline every year.

Q Okay.

A It declined from 2012, 2013, and then it actually --

Q Okay.

A -- went up.

Q Right. What I want to do now is, since we're talking about this, and you're in 2016 -- that's when you saw him, right?

A Yes. We --
Q Okay.
A -- established that.
Q And you -- and, Doctor, when you saw him, Mr. Yahyavi told you -- he complained of constant cervical spine pain, correct?
A Yes. He told me -- this is what he told me -- I can read it -- "Complains of cervical neck pain on a constant and daily basis."
Q Okay. You did not rate or score his pain levels, did you, for his cervical spine?
A I actually did rate it. I didn't put it in the chart. But it's 6 to 7 on a scale of 10.
Q No. I'm asking about your report. I don't -- I don't know --
A I understand it. But I have it handwritten. If you want to see it, I'm happy to show it to you. It says --
Q Well, no one's ever --
A -- six --
Q -- seen it. I'm looking at your -- the report that you submitted --
A Okay.
Q -- to the Court.
A The report -- if you want me to talk about the report, I didn't rate it, but I wrote -- I handwrote it. I didn't dictate it.
Q Okay. Oh, so you made an error?
A I don't think it's an error. I said he had constant and daily. I'm not trying to misrepresent anything.

Q That's -- well, you'd put that into the severe category, right? If it's constant, 6 out of 7 pain daily, constant, that would be severe?

MR. KAHN: Objection to the term severe as being vague.

MR. PRINCE: No, it's used -- it's used --

THE COURT: Well, he's asking --

MR. PRINCE: -- in medicine.

THE COURT: -- the question at this point.

THE WITNESS: Yeah, I'm not sure how one would rate mild, moderate, and severe. If you look at the happy face, I don't -- I think it's -- 8, 9, 10 is more the severe. So -- but it's kind of a subjective thing.

MR. PRINCE: Okay.

THE WITNESS: So you want to -- I mean, I don't know. But it's 6 to 7 on a scale of 10. That's what he -- and that's what he told me.

MR. PRINCE: Okay.

THE WITNESS: I can't verify it or not verify it. That's what he told me.

BY MR. PRINCE:

Q Well, pain by its nature is unverifiable, right? You have to rely upon what people are telling you --

A You have --

Q -- in every field of medicine?

A You have to rely on what that person is and how they rate it.

Q Right. And with regard to -- he also reported symptoms in his left arm, correct?

A Occasional --

Q The same thing --
A -- yes.
Q -- he told the chiropractor, the same thing he told Dr. Perry, the same thing he told Dr. Schifini, the same thing he told Dr. Oliveri, right?
A I don't know if it's the same thing, but he told me that.
Q Okay. Radiating radicular symptoms, right?
A Occasional. I wrote it down.
Q Yeah, you sure did.
Now, you understood that you're doing a forensic, detailed evaluation of Mr. Yahyavi, right?
A I did a forensic evaluation.
Q Right. And you understand that a thorough history is critical to your overall evaluation, right?
A History is critical of any medical evaluation.
Q I'm talking about a detailed history.
A Well, you'd have to describe what you mean by detail. The history is important --
Q Well, what you described to me as --
A -- in -- in the --
Q -- a neurosurgeon.
A -- the evaluation.
Q What do you feel is a detailed history in a forensic setting when you're talking about someone who's claiming a chronic injury, potential need for surgery, and lots of limitations with daily activities and

other aspects of life?

A Well, as you have pointed out, this type of evaluation's a little bit different, and I think my evaluation is as detailed as anybody else's evaluation. But I am limited. In other words, sometimes I don't get the records until afterward.

Q I'm not talking about records. I'm talking about your --

A I understand --

Q -- history --

A -- what you're saying.

THE COURT: Let him finish.

MR. PRINCE: He's --

THE WITNESS: And I don't --

MR. PRINCE: But, Your Honor, he's nonresponsive. He's not answering the question.

THE COURT: Overruled.

THE WITNESS: So when you say detailed history, and I have been limited. And I don't recall if this is what occurred in this. But I actually am limited. I get a bunch of rules that say, you can't ask about X, Y, Z. Sometimes people won't answer past medical history. There are objections, if you will, that occur in this type of scenario that I don't have any control over. I -- so did you -- did I take a history? The answer is yes.

MR. PRINCE: Okay. I want to stop the --

THE WITNESS: Did I -- do you --

MR. PRINCE: Pause there.

THE WITNESS: Right. Okay. Thank you.

MR. PRINCE: I'm going to pause you there.

BY MR. PRINCE:

Q There's no order limiting anything for you to do as part of your evaluation in this case, correct?

A I don't --

Q In this case. I'm only --

A I don't --

Q -- talking about this case, Doctor. This specific case.

A I don't know. I don't recall.

Q Okay. So you don't have that in your file? You have your chart with you. You don't have any order of the court limiting what you can do in this case, right? Let's be very clear.

A I don't see anything --

Q Right.

A -- to that effect.

Q Very good. So you meet with Mr. Yahyavi. He comes there and you take a history directly from him, right?

A I did.

Q You can ask him, how are you feeling? What are your limitations? How are you doing at work? Do you have any limitations at work? How do the symptoms affect your sleep? Those type -- those are things you could obtain directly from the person you're examining? In this case, Mr. Yahyavi, correct?

A I could.

Q Yeah. And one statement you make in -- in the -- your report is, Mr. Yahyavi is not disabled from work. Do you see that?

A Yes.

Q Okay. Now, in your report of August 26, 2016, about a month before he stops working, you don't document any difficulties or limitations he has with activities of daily living, do you?

A He didn't relay them to me.

Q Did you ask?

A I don't recall. I mean --

Q That's not important?

A I don't recall if I --

Q But you're trying to be --

A -- specifically said --

Q -- thorough, and I want to know -- you understood he's making [sic] an injury that's chronic in nature, potentially surgical. Did you ask him any -- and document in your report specifically what his limitations were with his activities of daily living?

A He didn't tell me --

Q No.

A -- and I didn't report it. But he didn't tell me.

Q No.

A I can only report what he tells me.

Q Well, that's not true. You can dictate whatever you want. He has no control of what you --

A Well --

Q -- document.
A -- I wouldn't --
Q He could tell you many things that you may not document --
A Well, first of all --
Q -- right? Excuse me. Let me finish my question.
A Okay.
Q Isn't it true that there's many things that he could tell you that you don't document? Right? And that happened in this case?
A No. The answer's no. That's wrong.
Q Oh, okay.
A The second answer is, no, I wouldn't say something that -- that he didn't tell me. I wouldn't -- I don't -- necessarily would say that. I don't --
Q Oh.
A -- think I would say that.
Q Okay. Well, I've got your report here --
A Okay.
Q -- and you didn't document what his constant pain levels were, did you?
MR. KAHN: Objection, Your Honor. I think that's asked and answered.
MR. PRINCE: No. Because he's talking --
MR. KAHN: He did testify to that.
MR. PRINCE: -- that he wouldn't do it.
THE COURT: Overruled. I don't --

THE WITNESS: I said it's 6 to 7.

BY MR. PRINCE:

Q No. The point I'm making is, he told you something that you did not document, correct?

A You know what -- yes.

Q Right. So he could have been telling you many things about his work life limitations that you just simply didn't document, correct?

A No. That's incorrect.

Q Okay. Well --

A And what --

Q Well --

A -- many things? I don't know.

Q Okay.

A So --

Q Did you document if he was having any difficulties at work? Did you document that?

A No.

Q Did you document how his pain levels were affecting the quality of his life?

A No. He didn't tell me.

Well -- okay. I want to compare something. You agree that chronic pain can affect activities of daily living, right?

A Of course it's possible.

Q And that's one of the things as a rating physician, you need to understand that, is how is your pain affecting you? How is your

medical diagnosis -- how is it affecting your function level, the quality of your life, your ability to work, those sort of things, right?

A Well, there's a lot of subjectivity to that. There's some -- sometimes --

Q Well, of course.

A -- psychological --

Q It's someone's life.

A -- aspects to that as well.

Q It's somebody's life, right? How are you --

A There are a lot of psychological aspects. This patient had a functional capacity exam that did document -- that did document his work level. And they found it to be unreliable. And, in fact, it's what are the common causes of that? Exaggeration of symptoms?

Q Oh, now he's an exaggerator. Oh, you're now saying he's an exaggerator?

A I'm not saying -- I'm saying that the functional capacity exam --

Q Okay.

A -- was unreliable --

Q Okay.

A -- and showed --

Q I'm not asking you that.

A -- insincerity of effort.

Q Okay.

A So how does one document that, and what does that mean?

Q Okay. All right.
A I know what it means.
Q Okay. Let's look at Exhibit Number 92, Bate page 579. We're going to -- I'm going to show you the rating physician's documentation --
A Perfect.
Q -- from 2015. Okay?
A Perfect.
Q Yeah. And let's compare your notes to his notes.
A Okay.
Q And look --
MR. PRINCE: I want to -- pull number one.
BY MR. PRINCE:
Q It says, at the present time, the exam reports the following ongoing symptoms that he relates to the subject accident. Number one, he describes his neck and upper back pain. But then he goes down and talks about, reports difficulties with his activities of daily living. I reviewed each of these activities with him. He talks about bathing and self-care; he talks about difficulty with physical activity; sitting, the limit -- how it causes increased neck or back pain; walking for -- how it causes increased upper back or neck pain; climbing stairs; he talks about it affects his concentration, traveling, sexual activity; he talks about it's more difficult to go on test drives.
You don't document anything like that, do you?
A He was given 8 percent.
Q No. I'm not on that.

A He was given --
Q No, no.
A -- 8 percent at this.
Q I'm --
A And I --
Q Excuse me?
A I didn't -- I don't --
Q You're here to do a forensic evaluation --
A Yes.
Q -- in court, telling this jury that my client is not disabled from working --
A He's not.
Q -- and -- I wasn't done with my question.
A Oh, I -- you just said he's not.
Q No, no, no.
THE COURT: And --
MR. PRINCE: No, no, no.
THE COURT: Finish your question.
MR. PRINCE: Let me finish my question, please.
BY MR. PRINCE:
Q You're here in this courtroom talking about your expert opinion, your evaluation of him, saying he's not disabled from working, that this is all related to degeneration, not trauma. So you don't document any of these things in your report, correct? That's a yes-or-no question.

A It's not -- I don't have that in my report. I have it in his report.
Q No, no. I'm talking --
A And --
Q -- about you --
A And --
Q I'm talking you individually --
MR. KAHN: Your Honor --
BY MR. PRINCE:
Q -- as part of a history --
MR. KAHN: -- he listened --
THE COURT: All right.
MR. KAHN: -- to the question. I'd ask that he be --
THE WITNESS: And --
MR. KAHN: -- allowed to answer.
THE COURT: Answer the --
THE WITNESS: And --
THE COURT: -- question.
THE WITNESS: And this time frame is different than my time frame by more than a year. And there are --
MR. PRINCE: Oh, even more important.
THE WITNESS: And there -- yeah, by more than a year. 2015 --
MR. PRINCE: Yeah.
THE COURT: Counsel --
THE WITNESS: -- 2016.

MR. PRINCE: Yes.

THE COURT: -- don't comment.

MR. KAHN: Can he be allowed to answer?

THE COURT: Let him finish the answer.

THE WITNESS: And there are events that occurred in between this. For instance, there's an exacerbation that had occurred. For instance, he had an MRI. So things had -- things are -- can be different.

BY MR. PRINCE:

Q Okay. My question is this: You didn't document any of these difficulties he's having with working, daily living anywhere in your report, correct?

A That's correct.

Q Okay. You didn't document anything -- any aspects regarding his work, work abilities, how work was affecting his symptoms, you don't document that at all, do you?

A No. He didn't tell me.

Q The fact of the matter is, you didn't ask?

A I don't recall.

Q So you can't tell this jury you asked him, can you?

A I can't say I didn't ask. I can't say I did ask. I don't recall.

Q So you can't say one way or the other?

A I don't recall.

Q All right. You have it --

A But he didn't --

Q You don't have it --
A He didn't --
Q -- in your notes, do you?
A He didn't tell me. That I can say.
Q I guess if you don't ask, you don't know, right?
A Is that --
Q That's why a thorough history --
A Is that a question?
Q That is a question. And that's why a thorough history's important, right?
A Well, first of all, I'm not certain that's a question. But first of all, I do know things, from the records, that --
Q Okay.
A -- weren't asked. So the first part of that question is wrong. Okay?
Q Okay.
A So -- and the second part of that question, I can't recall the --
Q Okay.
A -- because it was a compound question.
MR. PRINCE: I want to look at page 586 of Dr. Oliveri's report. This is nonorganic findings. It's an exhibit. It's part of Exhibit Number 9 -- Exhibit Number 89. Excuse me. 98. Bate number 586. So it's already in the -- in the --
UNIDENTIFIED SPEAKER: Okay.
MR. PRINCE: It's in.

UNIDENTIFIED SPEAKER: Thank you.

MR. PRINCE: Yep.

BY MR. PRINCE:

Q It says, I acknowledge that the FCE listed was invalid. However, for the purpose of this rating, the examinee presents in a valid fashion. Do you see that?

A I see it.

Q It did not affect the rating, correct, the FCE? There may be many reasons why the FCE might be invalid, right?

A So I'm going to answer the first part of that question; did not affect the rating. This would not affect the rating because when one does an AMA impairment using the AMA 5th edition guides, which was what he used, okay, the FCE and that rating is not based necessarily on pain. You can add actually three percent for pain complaints, which he didn't do. Okay?

Q Yeah.

A And, in fact, he gave a partial permanent disability. The word partial tells you it's not total; it's partial. And for the cervical spine, this report actually states what's 8 percent.

So the FCE has nothing to do with what sort of partial, permanent disability. It's not included. Okay?

Q Fair enough.

A So --

Q I'm only saying he -- Dr. Oliveri was --

A So this -- so you're pointing at -- to something that has

nothing to do with the assignment of the partial, permanent disability. And, by definition, if you are partially disabled, you're not totally disabled. And, in fact, they had 8 percent.

And I will point out that the records, even before this rating, indicate he had no work restrictions. I mean, no work restrictions. It's in the record.

Q He was working though. We showed you his earnings. He was working and doing --

A In 2014?

Q Yes.

A He was working.

Q And '15. Going to doctor's visits in --

A He had no --

Q -- pain, right?

A He had no work restrictions. It's in the record.

Q Okay. Now, some people, if they're living in --

A We could show it.

Q -- severe --

MR. PRINCE: Move to strike, Your Honor. Argumentative. I didn't --

THE COURT: I didn't hear what he said.

MR. PRINCE: I was -- yeah. He was done answering and I started to ask a question --

THE WITNESS: Okay. I'm sorry.

MR. PRINCE: Are you ready for my next question?

THE WITNESS: I said I was sorry.

MR. PRINCE: All right.

BY MR. PRINCE:

Q And Dr. Oliveri obviously considered the FCE that you claim to be invalid, right?

A I don't claim it to be invalid. It is invalid.

Q Right.

A There is no claim. The report says it's unreliable and invalid.

Q Yeah.

A That's not a claim on my part. That is in the medical record. I presume the medical records to be true and valid.

Q Okay. Good.

A This is valid. So that's not a claim on my part. If you are thinking that I'm saying that there's something in this report or in a report that doesn't exist, okay. But that's not true. Okay? It says it's unreliable and invalid.

And then, as someone who utilizes this type of information, there are certain reasons why people have invalid, unreliable functional capacity exams. We can go through that, if you'd like.

Q Just let me know when you're done.

A I'm done.

Q Good. Dr. Oliveri considered the FCE, right?

A I would assume he did.

Q And said he presented in a valid fashion, correct?

A I --

MR. KAHN: I'm going to object. That's not what it says, Your Honor.

MR. PRINCE: It does say that. It says exactly that.

BY MR. PRINCE:

Q Did I read that correctly?

MR. KAHN: Your Honor, he --

BY MR. PRINCE:

Q Presents in a valid fashion.

MR. KAHN: May we approach?

THE COURT: Approach.

[Sidebar begins at 1:50 p.m.]

MR. KAHN: The part he's reading talks about the FCE was invalid. But now Dr. Oliveri's saying he presents in the present tense --

MR. PRINCE: Okay. Well --

MR. KAHN: -- as except --

MR. PRINCE: -- that's not even an objection.

MR. KAHN: The -- it is an objection. The --

MR. PRINCE: It is not.

MR. KAHN: The words used by counsel --

MR. PRINCE: The --

MR. KAHN: -- indicated that it was past tense, which is not --

MR. PRINCE: No, it's not.

MR. KAHN: -- does not track what --

MR. PRINCE: He said he presents with -- in an invalid fashion.

MR. KAHN: I'd ask that he rephrase it. Let's just --

MR. PRINCE: No. I'm not --

THE COURT: All right.

MR. PRINCE: -- rephrasing anything.

THE COURT: Well, the first time you said it, you didn't quote. So quote it.

MR. PRINCE: I said he looked -- he reviewed the FCE, he considered it, and then he said he presented in a valid fashion for the purposes of the impairment.

MR. KAHN: No. You said for purposes of the FCE. That was the --

THE COURT: All right.

MR. KAHN: -- implication.

MR. PRINCE: No. No.

THE COURT: I think it was something else.

All right. Just restate it again.

MR. KAHN: Yeah. You just don't like it.

[Sidebar ends at 1:52 p.m.]

BY MR. PRINCE:

Q Okay. Dr. Oliveri acknowledged in April of 2015, as a rating physician appointed in the state of Nevada, that he presented in a valid fashion, right?

A For the purposes of that rating --

Q Yes.

A -- he presented in a valid fashion.

Q Okay.
A That's what it says.
Q That same rating physician, Dr. David Oliveri, a physical medicine and rehabilitation expert, he's also determined to be Mr. -- determined Mr. Yahyavi is vocationally disabled? You're aware of that, correct? This same doctor.
A At this point in time, sure.
Q Right. Okay.
A But he wasn't then, and he worked for -- after that.
Q Right. Now, you'd agree that Mr. Yahyavi is now in a much different position, clinically speaking, after his five-level cervical spine surgery?
A It's obvious. Of course.
Q Right. And you've never reexamined Mr. Yahyavi after his surgery, correct?
A The answer is correct. I was never given an opportunity to re-examine him.
Q But you've never asked, right?
A I don't believe that -- the answer's -- you're correct. I have not asked.
Q Right. And with -- in Mr. Yahyavi's case, you agree he suffered a significant nerve injury in connection with that surgery?
A He had complications, yes.
Q Right. And a C5 neuropraxic injury to the C5 nerve, that is a known complication from a posterior, when you come in from the back,

multilevel surgical procedure, correct?

A It can occur.

Q Right. It's in the literature, correct?

A It can occur.

Q Right. And in this case, you don't doubt the accuracy of the records that he did, in fact, suffer a neuropraxic injury, correct?

A No, I don't doubt it.

Q Right. And that further affected his left arm, correct?

A It's of his left arm, yes.

Q Right. That type of an injury, the C5 nerve injury, it's -- the C5 nerve is actually a higher risk of injury in connection with a posterior procedure than other nerve roots, correct?

A Well, in that any surgery any nerve root can get injured. But the neurapraxia specific to C5 is -- well, first of all, it can occur in an anterior surgery as well. So, I mean, you know --

Q There's an increased risk in posterior surgeries, right?

A The C5 nerve root is at risk either for anterior or posterior. It's not necessarily --

Q Okay.

A -- you know, one or the other.

Q Fair enough. It's at a higher risk than other nerves?

A I think it would depend on the situation.

Q Okay.

A It just would depend. But it -- they're -- all nerves are at risk. But, yes, the C5 --

Q Even --

A -- neurapraxia is -- has been described.

Q Right. And even if you're doing your level best, meaning even in meeting and exceeding the standards of care, the risk of a complication of an injury to the C5 nerve root, that still could happen, right? Even if the surgery is done perfectly?

A Absolutely. I've never held out that Dr. Kaplan did anything wrong in the surgery.

Q Okay.

A In fact, I don't think he did anything wrong in the surgery.

Q Got it. Now, sometimes instead of calling it C5 neurapraxia, they call it a C5 palsy, right? Sometimes some people call it a C -- a palsy?

A We can use that term.

Q Okay. And I just -- I've seen in the literature it referred not only as neurapraxia but also palsy. It's -- it's synonymous?

A I think the two can be interchanged --

Q Right. And you agree, by --

A -- to some degree.

Q Okay. You agree, by definition, a palsy is a form of paralysis?

A Well, that's why if we're going to be careful about it -- so palsy is not -- there are different types of palsy or degrees of palsy, and that's why the word neurapraxia may be more correct. But I didn't want to get really drilled down on the definitions. Okay?

Let's just say he -- that C5 weakness has been described. And the weakness can be quite severe, meaning paralysis, or it could just be weakness.

Q Wait. Well, loss of -- or limited function of the left arm, right?

A Well, that's that --

Q It can -- it can affect the function and use of the arm, correct?

A It would be very specifically the deltoid --

Q The deltoid?

A -- not the arm.

Q Right. And you're aware in this case that he does have atrophy in and around the deltoid area associated with that C5 nerve injury?

A I think he has a C5 neurapraxia, as you have called it --

Q Right.

A -- and he has symptoms related to that.

Q Ongoing, correct?

A Well, interestingly enough, the majority of them get better, if you've read the literature and you've read the papers. It sounds like you've tried to educate yourself. And so the majority of those do get better, and they get better with time. Do some persist? Yes. The majority get better.

Q In this case, Dr. Kaplan, who is also a board certified neurosurgeon, said he didn't make a full recovery as a result of the C5 neurapraxia. You have no reason to disagree with that, do you?

A No. I think he pointed it out. And I haven't seen him. So

I don't disagree.

Q Now, by January 2018, don't you agree that all the medical records document that Mr. Yahyavi consistently reported neck symptoms?

A Yes. I think --

Q Okay.

A -- that he is getting worse over time between '16 and --

Q Yeah.

A -- before his surgery. I think he did get worse in that time period.

Q No. I'm actually talking about he -- did he consistently report symptoms? He started reporting neck symptoms in the ambulance ride, correct?

A Yes.

Q And he's reported neck symptom from the ambulance ride all the way through 2019 in the neck, right?

A Well --

Q In every visit you've reviewed?

A Yes.

Q Okay. So that's consistent reporting of significant neck pain, correct?

A Of neck pain.

Q Right. There's also been consistent reporting of, at a minimum, intermittent symptoms into the arm, correct, at a minimum?

A Well, I'm not sure at a minimum. I mean, he has some

occasional or intermittent symptoms. There are some reports that says he doesn't have any neck pain -- I mean any arm pain. In fact, some say it's only axial pain.

Q Okay.

A So, you know, I mean, I guess you could paint it anyway you want to paint it.

Q Right. And so by January 2018, don't you agree that Mr. Yahyavi, he's exhausted all forms of conservative care?

A What was the date? I --

Q By January 2018. And he's exhausted all forms of conservative care? He's tried physical therapy, chiropractic treatment, medications, multiple rounds of injections. And remains significantly symptomatic, right?

A Yes.

Q Okay. And don't you agree that Dr. Kaplan, he was reasonable in offering surgery as an alternative to Mr. Yahyavi?

A Yes, I don't think I've ever criticized that.

Q Right.

A I think that -- that he progressed over that time period, and I -- you know, I mean -- we disagree on why he progressed. I understand that. But I never -- he elected to have surgery in January of 2018. And I thought --

Q Okay.

A -- it was -- at that point, it was reasonable.

Q Okay.

MR. PRINCE: Let's go ahead and put the PowerPoint up.

BY MR. PRINCE:

Q Now, I want to compare your qualifications with Dr. Kaplan. Okay?

A You want to compare them?

Q Yeah.

A Let's go. Let's do it.

Q Let's do it. Dartmouth College. You got a bachelor's degree at Dartmouth College, right?

A Sure.

Q Dr. Kaplan got a Dartmouth -- a degree from the same school, a bachelor's degree?

A Perfect. He's -- that's correct.

Q You went to Dartmouth Medical School?

A Yep.

Q He went to Harvard Medical School? You -- you would agree that Harvard Medical School is a wonderful medical institution?

A I think Dartmouth a wonderful medical --

Q Oh, no. I'm --

A -- institution.

Q -- not discounting yours. I'm saying you have to agree that Harvard is a fantastic medical school, right?

A Yeah. I have no problem with it.

Q And you did your neurosurgical residency at USC --

A Yes.

Q -- University of Southern California, right?
A Uh-huh.
Q And Dr. Kaplan did his residency, neurological surgery, at Washington University in St. Louis?
A Right.
Q To many people here on the West Coast, they don't always know -- they're not as familiar with Washington University as maybe if you lived in the Midwest or the East. But don't you agree Washington University is one of the -- considered one of the finest medical schools and research centers in the world?
A Yeah. In fact, I was recruited to be attending there, when I finished my residency, at Washington University St. Louis by the chair. I'm a few years older than Dr. Kaplan. The other thing is I did graduate -- do college and med school in seven years, and I think Dr. Kaplan took an extra -- he did nine years, not the eight. He took an extra year somewhere in there, according to, you know, his CV that I think I've seen.
Q Yeah.
A But, yeah. But that's a fine institution.
Q But that's a --
A To your -- answer your question, it's a fine institution. I have no problem with that.
Q It's a great school, right? It's a great institution?
A It's a fine institution.
Q Right.
A I have nothing --

Q You're board certified in neurological surgery and so is he? So your -- your --

A Oh, that's great. He's --

Q -- credentials are --

A -- board certified. That's wonderful.

Q Right. And I guess the point of that is Dr. Kaplan, he relates he did a full records review, the same records you reviewed, he treated the patient, did surgery on the patient, continues to participate in his care, and he relates all the need for treatment and the need for surgery to this motor collision?

A So the --

Q You just have a difference of opinion, don't you? It doesn't make him wrong; it just means you have a difference of opinion?

A So the first part of that, that he did a full record review, I don't know of all -- what -- the records reviewed. I did read a report, and I have seen -- well, I don't know up to this point in time. But I know that at that point in time, I had seen more records than Dr. Kaplan. So, I mean, I can point out the report. And so when you say he did a full record review --

Q Yeah.

A -- I think he probably did a full records of what he had. I don't think, you know, anything like that.

Q Okay.

A And --

Q And so my question is --

A -- I do think --

Q -- his opinion's --

A I was going --

Q -- just different than yours?

MR. KAHN: Your Honor, he's -- can he answer a question, please?

THE COURT: Counsel, approach.

[Sidebar begins at 2:00 p.m.]

THE COURT: You know, I've given him great latitude as an expert. He's -- obviously you're going to get to redirect. I think he is going way far afield.

MR. KAHN: Okay. Tell him to answer yes and no then.

MR. PRINCE: Tell him.

MR. KAHN: Then I'll do it on --

MR. PRINCE: I want you to --

THE COURT: I mean, I think --

MR. KAHN I want you to instruct the witness. I'm asking you to.

THE COURT: -- you should -- I think all experts should be given latitude, but my God, we're two hours into it again.

MR. KAHN: Just remember, he -- counsel didn't want me to say a word in my case, so I didn't, so --

THE COURT: I know. And you did perfect. I'm just saying I don't know if we should take a break --

MR. PRINCE: No.

THE COURT: -- so you can say, please --

MR. PRINCE: Just admonish him right now and, say, Doctor, let's --

MR. KAHN: I can use a break at some point. He hasn't even had --

THE COURT: All right. I don't need to admonish.

MR. PRINCE: If you want to --

THE COURT: -- him.

MR. PRINCE: -- take a break, then take a break.

THE COURT: I don't think it's --

[Sidebar ends at 2:01 p.m.]

THE COURT: The objection is overruled. Just please answer yes or no.

THE WITNESS: What was the question before I answer yes or no.

MR. PRINCE: I want to give you a --

THE COURT: Good point.

MR. PRINCE: -- good question.

BY MR. PRINCE:

Q It was reasonable for Mr. Yahyavi to follow the advice and recommendation of Mr. Kaplan, who's also board certified in neurological surgery, who went to Harvard and trained at Washington University, right? Reasonable.

A Yeah. I assume that they talked about the risks and benefits of surgery, et cetera.

Q And I'm talking about Mr. Yahyavi's decision to undergo surgery. You agree that was reasonable by him?

A Yeah, I think his clinical course changed, and I think that there was a reason for that.

Q Yeah. And with regard to -- you're just saying it was reasonable to have the -- medically reasonable for Dr. Kaplan to recommend the surgery and undergo the surgery?

A I said so.

Q Okay. Your problem is, I just don't -- you just don't think it's related at all to the motor vehicle collision; it's all related to degeneration, right? That -- that's your opinion?

A Yeah. First of all, it's not my problem. So I disagree with that part of that question. It's my opinion --

Q Oh.

A -- that the medical records --

Q Okay.

A -- would -- I mean, I was asked, you know, what my opinion was within a reasonable degree of medical probability, that when this patient who had this accident back in June of '13 and now had a surgery four years afterward, you know, one of my -- one of my opinions was that the surgery was reasonable, but it was not causally related to this accident four years ago. And I gave -- I said over and over what my reasons are for that.

Q Okay.

A If someone disagrees with that or they didn't have all the

information, and maybe that's why they don't -- that's why they disagree with me. I don't know why they disagree.

Q Because the jury will remember what Dr. Kaplan testified to and they'll compare it with what you said? Yes?

A They might do that.

Q Yeah. And so -- now, after the surgery -- and obviously Mr. Yahyavi -- the neuropraxic injury, you never author in your report and impose any workplace restrictions, you never talk about functional limitations and how it may affect his ability to work or not work, right? You don't ever comment on that again?

A How would I comment on that, sir. I didn't -- you pointed very aptly that I never reexamined him after the -- January of 2018. I don't know how I would be able to do that.

Q So fair enough. So the question is, you're not here saying that he's not vocationally disabled because you haven't examined him, so you're not in a position to say one way or the other.

A Well, I --

Q Is that -- is that a fair statement? Yes or no.

A No, it's not. What I would tell you is that the ability to work is -- depends on a number of factors. Okay? One, it depends on --

Q I'm only asking -- you've never said -- you've never commented on it again? That's what I'm trying to bring up. I'm not asking you to do it now. In any -- none of your reports after the surgery do you comment on his ability to return to work or not return to work, correct? You never comment on it?

A Well, using your words --

Q I'm talking about your words.

A I know. But using your words, I'm going to give you the answer utilizing your words. Using your words, in my very first report or second report you said I said the patient's able to work. And despite all this information that I've received, that initial opinion never changed. He is --

Q You never --

A -- able to work, in my opinion. Okay?

Q So you never --

A And so I'm not sure that I needed to comment. And you said I have to live by what I wrote. And I said, my opinions have not changed.

So the fact is that he was able to work when I saw him in 2016 despite getting worse from -- what I believe on a degenerative basis -- and I have reasons for that -- and despite having surgery and a neurapraxia, because I have -- I've had patients that had this type of surgery, okay, and they continued to work. So don't confuse impairment, which is what -- if you lose a finger, for instance, that's impairment -- and then disability, which is -- has other connotations.

Q Oh.

A And disability and being able to work often depends on work motivation -- I mean, there are just a lot of things -- aspects of --

Q You've never addressed them, have you? You've never addressed any of those --

A I didn't --

Q -- things?
A I didn't address them. I just said he was able to work.
Q You've never addressed --
A I don't know that --
Q -- any of those --
A -- I needed to.
Q -- factors, correct? Am I correct or not, that you've never addressed --
A My report says --
Q -- any of those factors?
A -- he's able to work, and I believe he is still able and continues to be able to work in some capacity.
Q You've never --
A That's what my report says.
Q You've never commented on any of it, correct, afterwards?
A That's -- I did -- yeah --
Q For example --
A -- because my opinion never changed.
Q For example, you read all of Dr. Oliveri's reports, correct?
A I've read them.
Q And you saw that Dr. Oliveri determined that he's vocationally disabled from working? The rating physician had made that determination?
A That's his opinion.
Q You never address it in any of your opinions in your report,

correct? You never discuss it?

A That's incorrect. I said he was --

Q Show me a page --

A I --

Q -- and a line --

A Okay. Sure.

Q -- where you discuss Dr. Oliveri's reports and analysis about returning back to work.

A No. I didn't -- I don't --

Q Show me -- show me that.

A I don't do it -- I don't do it in that -- in that sense how you want to see it. Okay? And I'm sorry that it wasn't written in a form that you like. But I put -- in the very first report, I put --

Q No, I'm not asking about that.

A -- Mr. Yahyavi is not disabled from work. And when I received Dr. Oliveri's records, I wrote, it didn't change my opinion.

Q Okay.

A So do we have a difference of opinion? We probably do.

Q I'm not asking that. But --

A You asked me earlier. And we probably --

Q My question is --

A -- have a difference of opinion.

Q My question is, you don't discuss in any detail, analyze Dr. Oliveri's opinion about Mr. Yahyavi not being able to go back to work, and you don't have -- provide any discussion or analysis in any of

your reports about the ability or the lack of ability to go back to work, correct?

A That's incorrect. I just told you why.

Q You just said --

A I just said --

Q -- my opinions haven't changed?

A You just asked me. Inability to go back to work or ability. I just said, I wrote in my very first report he's not disabled from work, and I wrote in every other subsequent report my opinions did not change. I think that answers your question.

Q Okay. But you did not discuss --

A Okay.

Q -- Dr. Oliveri's opinions in any of your reports, correct? Discuss it?

A I didn't.

MR. KAHN: Objection, Your Honor. Asked and answered.

THE COURT: Overruled.

THE WITNESS: I think the -- I think that my reports list his records, which I reviewed, and I said I reviewed his records, and I said they did not change my opinion.

BY MR. PRINCE:

Q Okay. You don't think you need to see Mr. Yahyavi to determine, after he had his surgery, the neuropraxic event and ongoing issues with his arm, you don't think it would have the right thing to do --

A I --

Q -- to go ahead and reassess him if you, quote, unquote, "maintain" that opinion?

MR. KAHN: Your Honor, can we approach?

THE COURT: Yes.

[Sidebar begins at 2:08 p.m.]

MR. KAHN: Counsel's now implying the ability to do a second IME --

MR. PRINCE: Oh, you can.

MR. KAHN: -- which is not a given.

MR. PRINCE: Yes, you can.

MR. KAHN: Now, I'm --

THE COURT: It's not a --

MR. KAHN: -- going to have to ask him --

THE COURT: -- given --

MR. KAHN: -- about it.

THE COURT: -- but --

MR. PRINCE: Yes, you can. You can request --

THE COURT: -- you know, yes, it --

MR. PRINCE: -- a --

MR. KAHN: It's not --

THE COURT: -- it is possible.

MR. PRINCE: Yeah. Absolutely. You can do them. You can re-examine.

THE COURT: Yeah. But --

MR. PRINCE: Absolutely.

THE COURT: -- it was never inquired into.

MR. KAHN: Okay. I'll take it on -- I'll take it on redirect that way.

THE COURT: All right.

[Sidebar ends at 2:09 p.m.]

BY MR. PRINCE:

Q Show me a letter in your file where you said to Mr. Kahn, these team of attorneys over here, that you requested to examine Mr. Yahyavi after his surgery. Show it to us.

A So Mr. --

Q I'm just asking if you could show it to us.

A Oh. No. I -- you --

Q Okay.

A -- already asked me. So what I --

Q Yeah.

A What I --

Q Yeah. Then you answered my question.

Now, you said earlier in your examination that a spinal cord stimulator in your mind was not appropriate for Mr. Yahyavi, correct.

A I don't think it's going to help.

Q That's fine. Now -- but you agree that a spinal cord stimulator is an option to treat somebody who's got ongoing symptoms following a fusion surgery with neuropathic pain?

A It's a limited option when someone has laminectomy, because, you know -- you understand how this works. I'm going to

explain it, if I can.

Q Well, I'm --

A Or should I --

Q -- I'm not asking you --

A -- just answer --

Q I'm not asking you --

A -- your question?

Q -- to explain anything. I'm just asking you to follow my questions.

A It's a limited option because of the type of surgery he had posteriorly.

Q Okay.

A Not to say it can't be done. It's quite difficult, and the results aren't quite as good as if you hadn't had a laminectomy.

Q Okay. I want you to stay with me and my question. If you don't understand the question, Doctor, just please let me know, and I'll rephrase it so you -- it's clear in your mind.

Don't you agree that a spinal cord stimulator is an option for relieving pain that is of a neuropathic origin?

A In certain instances, sure.

Q Uh-huh. Don't you agree neuropathic means something affecting the nerve -- one of the nerves? Correct?

A That is one way of looking at it. It's kind of primitive, but, yes. Let's go with it.

Q And Mr. Yahyavi has neuropathic pain and symptoms,

doesn't he?

A Well, that's a little bit different. I'm not sure that it's a neuropathic as much as related to pain symptomology.

Q Okay.

A I mean, he might have a -- well, first of all, he could have a failed neck syndrome, which is chronic pain, someone who had surgery and continues --

Q Oh, he does have that.

A -- continues to have pain.

Q He does have it. He's been diagnosed with that, right?

A I -- that's how I would diagnose him.

Q Well, that's how --

A That --

Q -- Dr. Schifini diagnosed him.

A Okay. Great. I didn't -- I couldn't recall if he actually wrote those exact words.

Q Yeah. And I'm going to show you here in a second.

A Okay.

Q And don't you agree the spinal cord stimulator is common in a failed cervical or lumbar surgery syndrome with radicular symptoms?

A No, they're not common.

Q Right. Don't you --

A It's --

Q -- agree that there --

A It's not common.

Q Don't you agree there's -- that a spinal cord stimulator is indicated as an option where you have failed cervical or lumbar surgery syndrome with radicular symptoms?

A It's a possibility.

Q It's an option?

A It's an option in -- in the appropriate circumstance.

Q Right. And --

THE COURT: All right. We mise well take a short recess. We've been going an hour.

Ladies and Gentlemen, during this recess, you're once again admonished, do not talk or converse amongst yourselves or with anyone else on any subject connected with this trial, or read, watch, or listen to any report of or commentary on the trial, or any person connected with this trial, by any medium of information, including, without limitation, newspapers, television, radio, or Internet. Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

We're in recess.

THE MARSHAL: Ten minutes, folks. Please rise for the jury.

[Jury out at 12:19 p.m.]

[Recess taken from 2:14 p.m. to 2:23 p.m.]

[Outside the presence of the jury]

THE COURT: Anything outside the presence?

MR. PRINCE: No. I'm ready, Judge.

MR. KAHN: No, Your Honor.

THE COURT: Okay.

THE MARSHAL: Please rise for the jury.

[Jury in at 2:24 p.m.]

[Inside the presence of the jury.]

THE COURT: Please be seated. Parties acknowledge the presence of the jury?

MR. PRINCE: Yes.

MR. KAHN: Yes, Your Honor.

THE COURT: Proceed.

MR. PRINCE: Okay.

CROSS-EXAMINATION CONTINUED

BY MR. PRINCE:

Q Doctor, I just have a few more questions. I'm almost done. Why don't we go to part of Exhibit Number 92? It's the records of Dr. Joseph Schifini as the pain management physician from June 11th, 2019 bate number 325. And this would be the first indications. Do you see the first one is cervical post fusion syndrome?

A Yes, sir.

Q Okay. That's consistent with your own diagnosis of failed cervical spine surgery syndrome?

A Yes.

Q Okay. And I also want to go to -- let's go to 334.

MR. PRINCE: That's where it's a report by Dr. Schifini in the middle Greg where it says, specifically I discussed with him the possibility of undergoing a spinal cord stimulator. The kind of central

paragraph. More than that. Go down towards where it says, I advised, all the way to the end. Okay.

BY MR. PRINCE:

Q I know there's a lot of text there, but in short, are you on page 334?

A Yes, sir.

Q Okay. They've recommended -- Dr. Schifini, Dr. Thalgott, Dr. Kaplan and as well as Dr. Oliveri, have all recommended spinal cord stimulator as an option to help relieve some symptoms of Mr. Yahyavi. You're aware of that?

A Well, I know that he had a recommendation. I'm not sure they all recommended it. I don't -- I think Kaplan says he's going to talk with him about it.

Q He did. We -- Dr. Kaplan --

A I think he's just agreeing with Dr. Schifini.

Q Well, Dr. Thalgott is the one who recommended --

A Or Thalgott and he's agreeing with Thalgott. You mentioned Dr. Kaplan, but he's had a recommendation for it. I don't disagree.

Q I can show you the records from Dr. Kaplan where he discusses spinal cord --

A He says he discussed --

Q -- and he discussed that with the jury.

A Okay.

Q And so my question is to you --

A Okay.

Q -- that is an option for helping to relieve symptoms Mr. Yahyavi's experiencing and hopefully improve his level of function and the quality of his life?

A I've said it's an option. I would not recommend it personally, but I have said it.

Q And in this case the reason I'm showing you this, it's -- Dr. Schifini is discussing the implantation of a spinal cord stimulator and discussing why a trial is not an option. Did you see that? It says, he is not a candidate for a trial due to the posterior cervical surgery as previously undergone.

A Which is exactly why he's not a great candidate for a spinal cord stimulator. I mean, when you say an option, I mean one percent option, 90 -- I mean, I'm not disagreeing with you. It can be considered.

Q Okay.

A But now when you want to clinically correlate this and say well, wait a second. The patient had a posterior cervical surgery, he's had a laminectomy. There are people that still would do a trial, okay. Dr. Schifini's opinion obviously is that hey, I don't think the trial's going to help us determine, but some people would still try it okay. Some people would do a trial.

Q Okay.

A So as you say, there are many ways to kind of skin the cat so to speak, but I'm not disagreeing with what he wrote here.

Q Okay. So you're saying that it would be reasonable as an option, is that what you're saying?

A It would be reasonable as an option and for the very reason he thinks the trial won't really help is the same reason why I'm saying it's not really good even just for putting in the stimulator, because basically now we're just doing a therapeutic trial, which means he's going to put it in, see if it works. If it doesn't work, take it out. I mean, generally a trial is less invasive than a permanent implantation.

And you could still put in the lead by surgery and still have it come out and trial it, so you don't have to have the battery implantation. So that's -- you know, that's when I say a trial is usually done. Dr. Schifini in his report feels a trial's not going to be that helpful. That's his opinion.

Q Okay. And they're scheduling to have now the stimulator, but --

A I'm not --

Q -- actually --

A I'm unaware that they're scheduling it.

Q Oh, Mr. Yahyavi testified to that, that they're --

A Oh, I'm unaware.

Q Okay. Fair enough. But in your report actually you didn't say that was an option. You in fact used the word, a spinal cord stimulator would be excessive, that's your word, right?

A I did. I think that the -- well, I was asked to give an opinion within a reasonable degree of medical probability. I think that less than 50 percent would work. So it's not a medical probability; it's going to work.

Q No. You use the word, should surgery for a cervical spinal

neurostimulator be contemplated or completed, this is deemed excessive.

A As it relates to the subject's motor vehicle accident.

Q No. Forget the motor vehicle, I'm just talking about his medical condition.

A Can you point -- can I see that?

Q It's your report.

A I know, can you tell me -- direct -- which one is it? I have six that's why.

Q June 12th, 2019.

A Yeah. I said deemed excessive and causally unrelated.

Q Yeah. So two things. The first is, it's just in your mind medically, excessive, that's your term?

A Right.

Q But it's actually a reasonable option given his medical condition at this point? That's his only real significant medical option, right?

A No.

Q Oh, he's not a candidate for any more surgery, right?

A No.

Q Okay. And here you say --

A But you said medical option.

Q Well, medical option, he could take supporting medication, anti-inflammatory, gabapentin like he's on, opioid plus muscle relaxer, whatever might be appropriate for him, right?

A It's the most appropriate.

Q Right. And that's really -- other than the spinal cord stimulator the only thing he would have would be, to improve his level of function and quality of his life I guess would just be medication, right?

A Right.

Q Nothing else?

A That's correct.

Q Okay. So without a spinal cord stimulator, assuming it works, he would actually suffer more, right? His suffering would be greater if he didn't have the spinal cord stimulator?

A Well, just like -- and it says --

Q Right?

A Just like in this report I said, he did not appear to be a surgical candidate. He's actually not as good as he was before the surgery than now. You said he has a neuropraxia, number one. And number two is that assuming it works, which is your words, but the question you asked, assuming it works and the assumption it's going to work less than 50 percent. So I don't think -- I think that it's not a good idea. And I think it would be excessive in my opinion.

Q Okay.

A And I --

Q Well, Doctor --

A And additionally I said it's not even going to be causally related to the accident, because the surgery, he's having it because of failed neck syndrome and the surgery that was completed is causally

unrelated to the subject motor vehicle accident. It's most substantially related to ongoing progressive degenerative cervical spine disease.

Q Okay. Well, Doctors Kaplan, Oliveri, Schifini all testified all feel that a spinal cord stimulator is reasonable and appropriate to help improve his symptoms, improve his level of function and improve the quality of life. You're saying you just disagree with them, right?

A I disagree. And let's just hope he doesn't have another complication like he did with his original surgery and he's in even a worse place than he is now and knowing that the results are probably less -- well, I believe within a reasonable degree of medical probability, less than 50 percent.

Q Okay.

A Particularly without a trial.

Q Well, without a spinal cord stimulator and just having to be depending upon medications, actually Mr. Yahyavi will suffer more, right? Because he won't have the option of the stimulator to help improve his symptoms and improve the quality of his life, right?

A Incorrect. First of all, more and more than what? Relative to what? So more and if he actually has a surgery and he's worse off than he's actually not more. He would have been better off had he not had surgery.

Q Well, all three --

A But I mean, that's what surgeons do. We have to make -- help people make surgical decisions. And in other words --

Q Well, Dr. Kaplan --

A -- you have to understand the risks and the benefits and that you could be worse. And that by experience and understanding the literature we can help direct patients to make hopefully reasonable, good decisions about surgery. Does it always work out, no. Did this work out for Mr. Yahyavi? I don't think it worked out, okay. Did he have a complication? Yes. Did Dr. Kaplan want him to have a complication? No. Was it reasonable? Yes, the surgery.

Q You can't --

A So these are things that we have to help patients try to understand, but at the end of the day, it's a risk benefit analysis and in my opinion it would be excessive. I don't believe that there's a very good chance he is going to have any benefit. Is it an option? Some people think it's an option. Based on my training and experience, having people who've had laminectomies --

MR. PRINCE: Your Honor, move to strike. Nonresponsive, Judge. We had this lengthy discussion.

THE COURT: All right.

MR. PRINCE: He's just going on and on advocating.

THE COURT: Yeah. That's enough. All right. Sustained. Move on.

MR. PRINCE: All right.

BY MR. PRINCE:

Q You can't afford to look at the outcome of a surgery, can you and say well, because of the outcome, because the person actually didn't improve or worsen that surgery wasn't indicated in the first place. You

can't use hindsight on whether it was a reasonable recommendation for surgery, correct?

A That's right.

MR. PRINCE: Check my notes, Judge.

BY MR. PRINCE:

Q You use the term maximum medical improvement, remember that?

A I did.

Q And --

A I do.

Q And maximum medical improvement doesn't mean someone's pain free, correct?

A Correct.

Q Doesn't mean that they will not require further care in the future, correct?

A Can't predict it.

Q When looking at x-rays or MRIs, you don't make a surgical decision just by looking at an x-ray or an MRI, unless there's like a fracture, or subluxation, or something obvious like that, right?

A You use it in combination with --

Q With all the other factors, correct?

A -- other information.

Q Right. Part of the clinical correlation process, correct?

A Yeah.

Q All right. You talked about lordosis with Mr. Kahn with the

curvature of the spine. Some people just may have a natural straightening of that, right?

A Could, yes.

Q Some people it could be positional?

A Yes, I guess. But --

Q Or could be related to a spasm --

A Could be --

Q -- or any combination of any of that, right?

A Could be anything.

Q Right. Don't you agree that like a straightening of the lordotic curve or the lordosis to occur, that's a relatively -- it's a very soft finding?

A No. In this particular instance it would not be and here's the reason. Is because there are other degenerative changes that explain, I mean that's the medicine. I mean, you have to kind of put the picture together.

Q Okay. Well, there's no --

A But all those other things that you mentioned are correct.

Q Okay. So I want to finish with this. You read the Southwest medical records in detail, correct?

A Yeah, I read them.

Q They were supplied to you?

A Yeah. They were supplied to me.

Q Yes. And there's nothing in there that Mr. Yahyavi needed any work restrictions, correct?

A That's correct.
Q There was never any physical limitation imposed on him for any neck related problems, correct?
A Correct.
Q Never any treatment plan for neck -- alleged neck symptoms, correct?
A Yes.
Q Never any recommendations or for him to lifting restrictions, workplace restrictions, disability, time off work, nothing like that before this, correct?
A Yes.
Q After this accident there was time off, he was -- there was workplace restriction imposed upon him, right?
A Well --
Q After this collusion.
A I think the question's vague as to time. What -- like after --
Q For a year, more than a year.
A Well, afterward there are no restrictions after the accident. There were several notes that say no work restrictions.
Q I thought there --
A But at a later time yes. Restrictions then were imposed, but for some point --
Q They took him off work for the first couple of weeks, right? There's workplace restrictions that don't go to work.
A There are other notes that --

Q I'm only asking right after the accident --
A Well, you didn't say that. That's why I asked. It was vague as to time. So there are times after the accident where there are notes that say there are no work restrictions. So I'm just asking you what timeframe are you asking me to answer the question with?
Q Well, Doc, none of the records in any -- from Southwest Medical document any limitations in Mr. Yahyavi's life, correct?
A And now we're talking before the accident because yeah.
Q Correct, before.
A Southwest was all before. Yeah. I agree with you.
Q No work -- no activities of daily living limitations, right?
A I've already agreed with you sir.
Q All right. He was skiing, working full-time?
A Yeah. He had -- in fact he had an accident going skiing.
Q Right. So he's functionally doing well, right?
A There are no work restrictions, I agree.
Q And things change after this collision, right, for him?
A There are changes that occurred, yes. After the surgery too.
Q Okay.
MR. PRINCE: Thank you, Your Honor. No additional questions.
THE COURT: Redirect.
MR. PRINCE: Oh, you know what? I just need to finish up one area.
BY MR. PRINCE:

Q Don't you agree -- and I'm sorry. With regard to the injury to Mr. Yahyavi's neck, he had some kind of flexion extension type of an injury of some form, right?

A I think he had a straining injury, yes.

Q Yeah. Would naturally be caused by some kind of forward, backward or rotational motion, right?

A Could, yes.

Q That in your mind as a neurosurgeon, that would be the most likely explanation for the injury to his spine, right?

A Yes.

Q Thank you.

[Designation of testimony concluded at 2:39 p.m.]

[Redirect Examination by Mr. Kahn]

[Designation of testimony begins at 2:51 p.m.]

THE COURT: Recross?

RECROSS-EXAMINATION

BY MR. PRINCE:

Q So let's make sure we're clear. Is it your testimony -- well, strike that. You're not saying that Mr. Yahyavi had symptomatic discs in October 2011, are you?

A Well, he had neck pain. He had degenerative cervical spine disease.

Q But that doesn't mean that the disc degeneration is causing neck pain, right? You can't say one is causing the other without more information, wouldn't you agree with that?

A Well, we know it's degenerative spine disease, which includes degenerative disc --

Q Uh-huh.

A -- osteophytes, you know, et cetera.

Q Those are things you see on x-rays?

A Facet hypertrophy. So, I mean I don't know of those three things or multiple things that are ingulfed in degenerative cervical spine disease or cervical spondylosis, what exactly it was, then I would agree with you, sir.

Q But it also could be a muscular issue, right?

A It could have been.

Q Yeah.

A That means he had a muscular issue for several years. It's a little unusual.

Q Well, you're saying he had a muscular issue for 14 months, right?

A I think he had --

Q That's what you're saying?

A Sure.

Q Yeah. Well, I want to make sure that you're being fair. Okay. When you reviewed the Southwest medical records, you -- strike that. Let me back up a second.

When you review medical records, you pull out of them what you think is clinically important to you, right?

A I don't know how to answer that.

Q When you summarize them. When you summarize them.
A I review the records and I report what I think is important I guess.
Q Yeah. Yeah, yeah. What you have here is you have this -- you do this thing called a medical records review, right? You kind of do a chronology. You kind of summarize the various medical records, right?
A Yes, sir.
Q Well, you don't do it all yourself. You have somebody that helps you, yeah?
A I have assistants.
Q Yeah. So you pay someone to help you do this chronology, right?
A Well, I don't know anyone who works for free, but yes.
Q Okay. And so what you'd want to make sure is you're doing is you're documenting things that are accurate from the notes, right? In a fair and unbiased way.
A Yes, sir.
Q Okay. Do you have your December 13, 2018 report?
A December 13th, right?
Q Yes.
A Yes, sir.
Q Yes. Okay. Let's first look at the October 25th, 2011, your summary of that. You write, patient presents complaining of neck pain for the last several years. That what you write, don't you?
A Yes.

Q But that's really -- that was really a -- the reason for the visit was for a follow up for his labs, right? That was really the reason for the visit?

A I guess, I mean --

Q Well, that's what the record says, right?

A Okay.

Q And in addition to that, let's look at the neck. P2110 of Exhibit 156. The neck exam. Keep your report in mind. It says that the findings on exam were supple with full range of motion, mild discomfort of palpation, no palpable muscle spasms, do you see that?

A Yes.

Q In your note of October 25th, 2011, you don't document that he has full pain free range of motion, do you, in your summary?

A No. A summary is not meant to be a reiteration of the medical records.

Q But you didn't even pull out that significant -- that's significant finding. You didn't even document that, did you?

A I'd refer to the document. If the reader wants to go to the original document, which I list, but basically, I don't think I'm misrepresenting anything.

Q Right.

A I wrote that the patient presents complaining of neck pain for the last several years. I think we've highlighted that many, many times over.

Q Okay.

A I don't think there's anything at issue.

Q Okay. Well, the reason for doing a medical chronology review is so that you can look back and look at, hey, what's medically significant in my analysis of these medical records that support your opinion, right?

A Well --

Q Isn't that true? That's one of the reasons.

A It could be. But let me just say, the medical record review is not meant to be the medical records.

Q Right.

A It's a review of the records.

Q But you didn't even document that significant finding, full pain free range of motion, no muscle. You don't document it in your report, correct? That's a yes or no?

A Correct.

Q Okay, fair enough. Now, let's go to the November 1st, 2012 of your report. Tell me when you're there.

A I have it.

Q You write down your summary of that notice, impression, hypertension, essential, hyper triglycerides and impaired fasting glucose, do you see that? That's what you wrote?

A Right.

Q So that was your summary of that note, correct?

A Sure.

Q Okay. Let's look at the actual record.

A Okay.
Q 2106.
MR. PRINCE: Show me the subjective. Subjective.
BY MR. PRINCE:
Q It says, 50 year old male presents to discuss lab results, states that he is feeling well without any physical complaints. Do you see that?
A I do.
Q You don't document that in your summary of that note, do you?
A I don't document subjective complaints almost anywhere. I mean, I wrote --
Q Yes, you --
A If we go down to the bottom --
Q Excuse me. Hang on.
A -- it's going to say what it has. You're arguing about my --
Q Yeah. I'm arguing about your summary, yes.
A -- summary, and I just explained --
Q Yes.
A -- to you, this is not meant to be the medical record. It's meant to be a review and that's what a review is.
Q When you documented the October 25th, 2011 report, you said he has neck complaints for last several years. You documented that, correct?
A Correct.

Q Because that favored the Defense, right?
A Incorrect. He got --
Q Okay. Now --
A -- a cervical spine x-ray that day. Why'd he --
Q Well, now --
A So we have to understand why he got a cervical spine x-ray that day.
Q Okay.
A Okay. So why don't I --
Q Let's look at --
A Okay. Let's go forward.
Q Now, when he says he's feeling well and has no physical complaints, you don't even document that at all and you're note, do you?
A It's not in my medical record review.
Q Right. Right. In addition to that, where it's talking about the musculoskeletal and neurologic exam that he has no persistent muscular pain, no extremity numbness or paresthesia or weakness, you don't document that either, do you, as part of your summary, correct?
A No. We're been through --
Q Am I correct?
A We've been through these records. The answer is, no.
Q You don't document that. So to a reader of your records, it would be like those things didn't exist, right?
A That's not true.
Q Now, one of the things that patients do is when they go to an

office, they fill out intake forms, which could include pain diagrams, right?

A Sometimes.

Q That's not a substitute for a comprehensive history and physical exam by the physician, correct?

A Well, it's not a substitute, but it's as you said, it's information as we've been saying, this is all information.

Q Yeah. And so by reason of your training and experience, you may ask some additional questions, hey, have you experienced other symptoms, right?

A One could.

Q Right. That's part of a detailed history. That's why it's so important, right?

A One could.

Q Right. And the chiropractor in this case, he did elicit -- or excuse me, she did additional medical history in the form of symptoms into the left arm on the first visit, correct?

A He wrote that.

Q Right. And then following the exam, diagnosed cervical radiculitis, right?

A He wrote that.

Q Right. And then Dr. Perry, who took over the care in September of 2013, he talked about -- we talked earlier about ongoing neck and left arm symptoms, right? With Dr. Perry, correct?

A Yes.

Q And if we even look at his October 14th, 2013 note, Bate Number 289, where it says, systematically, and this is four months post collision. "Systematically has noted progressive increase in its symptoms, including neck pain, left arm pain and numbness, as well as occipital and frontal headaches, do you see that?

A Yes.

Q That was consistent in Dr. Perry's records, correct? Neck and left arm systems, right?

A Yeah.

Q Right. And in fact, the neck pain and the left arm pain is what the basis upon with Dr. Perry recommended a spinal fusion surgery in July of 2014, correct?

A I don't know why he recommended surgery --

Q Well, let's look at it.

A -- because --

Q Let's look at it.

A -- I don't think the injections supported it.

Q Okay.

A And I think he came to a different conclusion --

Q Let's look at what Dr. Perry said.

A -- after this point in time.

MR. PRINCE: And I want to look at 294 of Exhibit 92, under diagnosis all the way through the second last paragraph.

BY MR. PRINCE:

Q And his diagnoses was neck pain, left greater than right arm

pain, do you see that?

A I do.

Q And then he talks about, Dr. Perry and I do believe the patient would benefit from a surgical intervention directed at a level C3, 4 and C6, 7 as previously discussed, given these have been identified positively as pain generators. Do you see that?

A I see that.

Q That's the basis upon which he made a surgical recommendation to Mr. Yahyavi, correct?

A Well, I think it's incorrect conclusion, number one. Number two --

Q Well, that's what he said. I'm just asking that he said it.

A He didn't say that. The P.A. is writing this, obviously, because they said, Dr. Perry and I, number one. Number two is that I don't think that the pain generators were identified.

Q He says --

A And number three is that it's hard to fuse a level that's already fused. Recall C6, C7 is an auto fuse. And so it's hard to do a fusion on a level that's already fused and why would you do a fused level, right?

So I think that --

Q No, it says -- there must be --

A So there might be --

Q Excuse me.

THE COURT: All right. Let him finish.

MR. PRINCE: Well, Your Honor, I'm moving to strike because it's argumentative and he's beyond the scope of my question. This is what we talked about the bench and you've admonished him before about it.

THE COURT: Yeah. Doctor, please, just answer the questions. We'll get done much quicker.

THE WITNESS: Yes.

BY MR. PRINCE:

Q Dr. Perry recommended a two level fusion, correct?

A It says that. Yes, sir.

Q To address neck and arm symptoms.

A That's what it says.

Q Now, I want to talk about pain levels, okay? Okay?

A Sure. I thought we talked about it. I'm not sure we talked about this again.

Q Yeah. I want to talk about pain levels from that. Now in Dr. Perry's records, we're just going to -- I'm going to go through these quickly so we can look at the consistency of them. Look at Dr. Perry's initial note, September 16th, 2013, Bate Number 286.

And it says over the past three months, he has had some mild improvement and currently rates his pain as a 6 or 7 on a scale of zero to 10, do you see that?

A Yes, sir.

Q The 6 to 7 out of 10, that's the same that he reported to at the time of your visit in 2016, correct?

A That's correct.

Q When he went to see Dr. Fisher in December of 2014, that's what he rated his pain levels. Bate Number 530 of Exhibit Number 96. You see it says severity of the pain, he has a 7 circled?

A Yes, sir.

Q Okay. Same as when he reported it to you, correct?

A Yes.

Q Let's look at Dr. Oliveri in April of 2015. Bate Number 580 of Exhibit Number 98 under numeric pain scale. It's anywhere typically ranging between 6 to 7, all up to an 8 out of 10, correct?

A Correct. So he's --

Q So it's consistent with what he reported to Dr. Perry September 2013, what he reported to Dr. Fisher, December 2014, Dr. Oliveri in April 2015, correct?

A Yeah. His subjective symptoms of pain --

Q Remain the same?

A His subjective symptoms are pain 6 to 7. As you said, I can't diagnose it or --

Q Right.

A -- he's the only one that feels it.

Q And I want to look at November 2016. Dr. Su, the other interventional pain management doctor. Exhibit 100, Bate Number 590 under subjective.

It says, the patient's VAS score, that's visual analog score, that's what that means?

A Yes.
Q Is currently 6 to 7 out of 10. Average 6 to 8 out of 10, you see that?
A Yeah.
Q That's been the same since 2013 after this motor vehicle collision, correct?
A The reports you showed are the same.
Q Right. And if we look at -- I want to show you a chiropractic visit from June of 2017. Dr. Bahoora, 934 from June 20th, 2017 -- excuse me, June 22nd, 2017. If you go to the bottom. Says, Mr. Yahyavi reported pain in the right cervical and left cervical region. He states the discomfort ranges between 5 to 7 on a scale of 10, 10 being the worst. Do you see that?
A Yes, sir.
Q That is the same reporting of pain from right after the accident through 2014, 2015, 2016 and now 2017, correct?
A The reports are showing it's the same thing.
Q Right. It's consistent. There's no progressive worsening of the pain symptoms because the scoring is virtually the same, right?
A Well, it's neck pain. We were talking radiculopathy earlier. But the neck pain hasn't changed.
Q We're talking about neck pain also. We were talking about neck pain and he's describing his pain being anywhere between 5 to 7, 6 to 8. That's all in that range, correct?
A I was admonished to just answer the question, so the answer

is, yes.

Q Okay.

A But these don't talk about radiculopathy.

Q We've talked about the arm symptoms, right? We've already done that, right?

A I think we've talked about it a lot.

Q Right. So the point is, so you talk about progressive degeneration. The symptoms didn't progress, the pain levels remain the same and the scoring at every interval, 2013, '14, '15, '16 and '17, right? I just read your records from those dates.

A So now I'm going to ask you to clarify, when you say symptoms, are you talking neck pain or radiculopathy? Because radiculopathy is different.

Q I'm talking about -- I'm talking about neck pain.

A Okay. Well, I'm not disagreeing with you then.

Q You said there was progressive --

THE COURT: All right.

THE WITNESS: I agree with you.

BY MR. PRINCE:

Q So when you say there's progressive changes and that he's getting worse with time, his symptoms were 5 to 7, 6 to 8 from right after this motor vehicle collision up until the time of surgery, correct? That's the same scoring?

A The neck pain looks like it was, you know, at least the ones that you chose and picked out showed the same.

MR. PRINCE: No additional questions. Thank you.

[Further Redirect Examination by Mr. Kahn]

THE COURT: Questions from the jury? Go ahead, write them down. Put your juror number.

THE MARSHAL: You don't have to put your name on there, just your juror number.

THE COURT: Just your -- I think we have another one too.

THE MARSHAL: Is there another one?

THE COURT: Right? You have another one? No?

[Sidebar begins at 3:28 p.m.]

MR. PRINCE: That's fine.

THE COURT: Any objection? You need to put it on the record.

MR. KAHN: No.

THE COURT: All right. No objection from both.

MR. KAHN: Sorry. No objection, Your Honor.

[Sidebar ends at 3:28 p.m.]

THE COURT: Doctor, during your IME of Mr. Yahyavi, I can't pronounce it. I apologize. What did the range of motion show in his neck and left arm? Please remind us the date of that exam.

THE WITNESS: Okay. The date of the medical exam was August 26th, 2016. And he complained of some minor tenderness to palpation. Palpated, he told me he had some pain in the back of the neck.

MR. PRINCE: Your Honor, object and move to strike. That

wasn't responsive to the question.

THE WITNESS: I was just --

THE COURT: I'm going to sustain that.

THE WITNESS: Okay. That he had --

THE COURT: That was a pretty simple one.

THE WITNESS: Okay.

THE COURT: Range of motion.

THE WITNESS: The range of motion, flexion of 60 degrees, extension of 30 degrees, right rotation 70 degrees, left rotation 60 degrees, right and left bending, 30 degrees.

MR. PRINCE: Well, that wasn't all of it.

THE COURT: Is there more in the report?

MR. KAHN: I'm sorry. Can you repeat those five numbers again just so we have them? If that's okay.

THE COURT: Follow up on that question?

MR. PRINCE: Yes.

FURTHER RECROSS-EXAMINATION

BY MR. PRINCE:

Q He had less than full range of motion, correct?

A That wasn't the question. The question he said very simply he said, what was the range of motion and I answered the question.

Q No. I'm asking you --

A And I was going to read the whole cervical exam and I was admonished not to.

Q Well, because that wasn't the question, doctor.

A Okay.

Q So just follow with me for a minute. I want to make sure you're with me.

A Well --

Q No.

A I didn't want to overstep, I guess.

MR. PRINCE: Your Honor, please instruct the witness to stop the commentary.

THE COURT: Doctor, that question was, did you document the range of motion. I'm allowing follow up from both of the attorneys regarding that question. What is your question?

BY MR. PRINCE:

Q Doctor, there was a limit of the range of motion of the cervical spine, correct? It wasn't full range of motion?

A That's correct.

Q He also complained of increased pain and range of motion on every plain, meaning forward, backward, to the side, correct?

A That's correct.

Q Okay.

MR. PRINCE: Thank you.

THE COURT: Follow up from the Defense?

MR. KAHN: Yeah.

[Further Redirect Examination by Mr. Kahn]

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THE COURT: Thank you. There was no other questions, right? Thank you, doctor. You may step down.

THE WITNESS: Okay. Thank you.

[Designated testimony concludes at 3:31 p.m.]

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

Jessica B. Cahill

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