

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID GARVEY, M.D., AN
INDIVIDUAL,

Petitioner,

vs.

THE FOURTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF ELKO; AND THE
HONORABLE KRISTON N. HILL,
DISTRICT JUDGE,

Respondents,

and

DIANE SCHWARTZ, INDIVIDUALLY
AND AS SPECIAL ADMINISTRATOR
OF THE ESTATE OF DOUGLAS R.
SCHWARTZ,

Real Party in Interest.

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***APPENDIX OF REAL PARTY IN INTEREST
VOLUME 3, (Nos. 262-279)***

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1 CASE NO. CV-C-17-439
2 IN THE FOURTH JUDICIAL DISTRICT COURT
3 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA
4 BEFORE THE HONORABLE KRISTON N. HILL
5 DISTRICT JUDGE, PRESIDING
6 DIANE SCHWARTZ, individually and)
7 as Special Administrator of the)
8 Estate of DOUGLAS R. SCHWARTZ,)
9 deceased,)
10 PLAINTIFF,)
11 vs.)
12 DAVID GARVEY, M.D., an individual;)
13 BARRY BARTLETT, an individual)
14 (Formerly identified as BARRY RN);)
15 CRUM, STEFANKO & JONES LTD, dba)
16 Ruby Crest Emergency Medicine;)
17 PHC-ELKO INC., dba NORTHEASTERN)
18 NEVADA REGIONAL HOSPITAL, a)
19 domestic corporation duly)
20 authorized to conduct business in)
21 the State of Nevada; REACH AIR)
22 MEDICAL SERVICES, LLC; DOES I)
23 through X; ROE BUSINESS ENTITIES XI)
24 through XX, inclusive,)
25 DEFENDANTS.)

19 REPORTER'S TRANSCRIPT
20 OF
21 HEARING

22 DATED FRIDAY, OCTOBER 15, 2021
23 ELKO, NEVADA
24
25 REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

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1 MS. BUYS: Yes. That's correct, your Honor. 7
2 THE COURT: Are you the only one here for Ruby
3 Crest?
4 MS. BUYS: Yes, your Honor.
5 THE COURT: Thank you.
6 For NNRH we have Jennifer Ries-Buntain, Tyson
7 Dobbs, Trent Earl.
8 For Reach Air, we have James Burton and Austin
9 Westerby?
10 MR. WESTERBERG: Westerberg.
11 THE COURT: I'm sorry?
12 MR. WESTERBERG: Westerberg.
13 THE COURT: Okay. And then for the limited
14 purposes of the sanctions hearing, on behalf of Lewis
15 Brisbois we have Kent Robinson.
16 And for Dr. Garvey, Alice...
17 MS. MERCADO: Mercado.
18 THE COURT: Mercado. Okay. Did I miss
19 anybody? Do we have any preliminary matters that we
20 need to address before we get going?
21 MS. RIES-BUNTAIN: Yes, your Honor. There is
22 a development that I'd like to address the Court,
23 please.
24 THE COURT REPORTER: Can I have your name,
25 please.

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1 ELKO, NEVADA; FRIDAY, OCTOBER 15, 2021
2 9:01 A.M.
3 PROCEEDINGS
4 * * * * *
5 THE COURT: The clerk will place this on the
6 record. This is Case No. CV-C-17-439. Diana Schwartz,
7 individual and as special administrator of the estate
8 of Douglas R. Schwartz, deceased, plaintiff. Defendant
9 David Garvey, Dr. David Garvey, Ruby Crest Medicine,
10 NNRH, Reach Air. This is the date and time set for
11 hearing on the pending motions.
12 Are the parties ready to proceed?
13 MR. CLAGGETT: Yes, your Honor.
14 THE COURT: Okay. We have here for the
15 plaintiffs Shirley Blazich, Sean Claggett, Micah
16 Echols, Geordan Logan is appearing via Zoom for
17 Dr. Garvey.
18 We have Keith Weaver, Alice Bestick, Alice
19 Mexicano?
20 MS. MERCADO: Mercado, your Honor.
21 THE COURT: Mercado. Thank you.
22 For Ruby Crest we have Charlotte Buys.
23 MS. BUYS: Yes, your Honor.
24 THE COURT: And I don't see Ms. Hueth here.
25 She's usually here; is that correct?

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1 MS. RIES-BUNTAIN: Sure. Your Honor, Jennifer
2 Ries-Buntain on behalf of NNRH, Northeastern Nevada
3 Regional Hospital. Probably the easier way to refer to
4 the hospital today given the length of that initial
5 name.
6 Your Honor, we received word this morning that
7 the Nevada Supreme Court has invited a response to the
8 request for a writ that was filed by Dr. Garvey
9 relating to the motion for summary judgment on the
10 trauma cap. The Court has asked for a response from
11 the parties that are at issue.
12 And in light of that, your Honor, I'm
13 requesting that this Court hear argument first today on
14 NNRH's motion for summary judgment on the trauma cap
15 only because that is now ripe for ruling in light of
16 what the Supreme Court is doing, and it will be
17 addressed in the response that we plan to file to the
18 Supreme Court that's due within 30 days.
19 And, your Honor, it also may lead to
20 settlement depending on what this Court's ruling may
21 be.
22 We also request, and I believe this second
23 request will be added by all of the defendants, a stay
24 pursuant to N.R.A.P. 8. This Court can grant a stay.
25 If this Court does not grant a stay, we will be

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1 requesting one from the Supreme Court. And, your
2 Honor, I believe I covered it, but if there's anything
3 else that the other parties would like to add, I would
4 invite them to. And I'm prepared for argument right
5 now on the motion on the trauma cap.

6 THE COURT: Go ahead, Mr. Echols.

7 MR. ECHOLS: Your Honor, I want to address
8 this writ issue. So the important thing with a writ
9 petition, there is no divestiture of jurisdiction as
10 there would be an appeal. So it's kind of just hanging
11 out there.

12 We've seen no motion for stay. We would
13 strongly oppose a motion for stay. In order to -- for
14 anyone to file a motion for stay in the Supreme Court
15 according to N.R.A.P 8(a), they have to first file a
16 motion for stay in this Court. This Court can't
17 evaluate the stay factors without a written motion. We
18 don't have that. And so, number one, we oppose the
19 stay. And the fact that the Supreme Court is ordering
20 an answer, that's really preliminary. The Supreme
21 Court can do whatever they want.

22 Recently I had a case that was on a writ
23 petition. We fully briefed, argued. And then they
24 said, Hey, we don't want to intervene. Perfectly fine
25 for the Court to do. So what the Supreme Court is

11

1 But the ruling on the trauma cap, they're
2 coming into this way too late. And really the way we
3 see that their writ petition was designed to try to
4 move the trial. There is nothing to prevent this trial
5 from going forward.

6 THE COURT: Okay.

7 MR. CLAGGETT: Your Honor, to address your --
8 is this on?

9 THE COURT: Mr. Claggett, you're going to have
10 to come up here.

11 MR. CLAGGETT: Okay.

12 THE COURT: I'm not certain those mics are
13 working.

14 MR. CLAGGETT: Okay.

15 THE COURT: They often don't.

16 MR. CLAGGETT: From -- and Mr. Echols speaks
17 to the appellate issues. As far as the trial issues,
18 I'll speak to that question because I think it's
19 important.

20 Regardless of whether the trauma cap applies
21 or doesn't apply in this case doesn't impact what we're
22 going to ask for from the jury. It doesn't impact what
23 we're going to -- the evaluation of the case at all. A
24 trauma cap will be something posttrial that you would
25 resolve anyway. You just -- if you were wrong and the

10

1 doing is really irrelevant to what happens here.

2 THE COURT: Two things, Mr. Echols. Is it
3 your position the defendant's motion, oral motion is
4 not sufficient?

5 MR. ECHOLS: I don't believe it is.

6 Especially if they're going to ask for emergency
7 relief. Because under NRAP 27(e) it says they have to
8 articulate all grounds for a stay here in this court
9 before they go to the Supreme Court. And all they've
10 asked for is just a blanket stay.

11 THE COURT: And two, just as a practical
12 matter, don't you think that issue needs to be decided
13 before we go to trial? And the reason my thought
14 process behind that is if the Supreme Court says that
15 I'm wrong and that trauma cap does apply, I don't think
16 that really gives plaintiff any reason to go to trial.

17 MR. ECHOLS: I don't think it needs to be
18 resolved. I don't think it's even prudent to wait on
19 the Supreme Court. Sometimes writ petitions take
20 several years. And, you know, what will end up
21 happening is the trial goes forward on the firm
22 setting. Their writ petition, in all likelihood, will
23 become moot. And if they are still aggrieved with the
24 final judgment, then they can just add that to their
25 appeal.

12

1 Supreme Court says we think it should apply, then it's
2 just -- remits down, and you basically go and say,
3 Okay, it's 50,000, even though you got whatever you
4 got. That's the way it works.

5 This type of issue will be resolved on a
6 posttrial motion anyways. Just like the med mal cap.
7 The jury may give us millions and millions in pain and
8 suffering. But the med mal cap, as unconstitutional as
9 I believe it to be, is what it is. So there is a
10 posttrial motion to reduce.

11 But at least the posttrial issues, they're not
12 trial issues. So there would be no reason from a trial
13 perspective to continue anything regardless of what the
14 Supreme Court does or doesn't do on a writ. It doesn't
15 make any difference. And I think Mr. Echols knows the
16 pulse much better than me, and I'll rest on that.

17 THE COURT: Anybody else want to be heard on
18 this issue?

19 MS. RIES-BUNTAIN: Just in brief response,
20 your Honor. Your Honor is correct that this would
21 affect the rulings of this Court in terms of evidence
22 let in. As one example in the opposition to our motion
23 for summary judgment on the trauma cap, plaintiff's
24 counsel advocates introducing evidence of reckless
25 conduct. We have filed motions in limine on that.

13

1 If that evidence is let in at the trial and
2 then this issue with the Supreme Court is overturned
3 and it is ruled upon without needing to consider that
4 issue, that would create real problems for the
5 procedure of this case.

6 In addition, your Honor, as to filing a
7 written response, we found out this morning. So we --
8 we haven't had time to file a written response. I'm
9 sure that if we had a minute to even read it, I haven't
10 even read it, I saw the first page, we could give the
11 Court -- we could take a half an hour recess and give
12 the Court oral reasons, other reasons why we need to
13 continue the trial. But we just have not been afforded
14 that opportunity given the timing.

15 Thank you, your Honor.

16 THE COURT: Anybody else want to be heard on
17 that? Has anybody had an opportunity to read?

18 MR. CLAGGETT: What that's --

19 MR. ROBISON: No, your Honor.

20 THE COURT: -- the order from the Supreme
21 Court?

22 MR. WEAVER: I just got it by text. This is
23 Keith Weaver for Dr. Garvey. And basically what it
24 says, I can provide a copy to the Court if you would
25 like. I just have it by text as well. It was filed by

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1 And if they have an appeal right under Pan vs.
2 District Court, the Nevada Supreme Court case says they
3 lose writ petition rights. And that's what I was
4 talking about when their writ would become moot.

5 If they want to raise trauma cap issues in the
6 final judgment, they can do that. But there's no
7 reason to slow down the machinery of this case because
8 of this order. The order does not require a stay.
9 That's a separate analysis.

10 And the 28 days the Supreme Court has ordered
11 that can be extended because we're not under any
12 emergency with the Supreme Court. Very routinely they
13 grant 30-day extensions of time, which we would need
14 because we would be in the middle of trial.

15 So there's -- you know, the writ -- the writ
16 petition is really a red herring. They haven't lost
17 any rights. If they want to present additional reasons
18 why they think they should have a stay later, we can
19 respond to those at that time.

20 MS. BUYS: Thank you so much, your Honor.
21 This is Charlotte Buys on behalf of defendant Ruby
22 Crest. I just wanted to join in the previous argument
23 of defense counsel, and also just note this issue
24 permeates a lot of the motions that were set for today
25 for the pretrial motions. For example, plaintiff's

14

1 the Nevada Supreme Court late yesterday.

2 It said that the real party in interest has 28
3 days to oppose the Court's consideration of it so -- if
4 they so choose, which obviously they will. And then
5 the respondent has 14 days to reply.

6 So any way you look at it, the Nevada Supreme
7 Court will not be able to disposition this issue before
8 trial. Even if they were to file an opposition with
9 the Nevada Supreme Court today to the writ to be
10 formally accepted, we're not going to have an
11 opportunity to have that reply on file within 14 days
12 and then the Nevada Supreme Court's disposition in the
13 case before then.

14 So obviously all the defendants join the stay,
15 the oral stay request until we can have, if need be, a
16 written request to stay the trial for -- for those
17 reasons.

18 Thank you, your Honor.

19 THE COURT: Thank you, Mr. Weaver.

20 MR. ECHOLS: Your Honor, I just want to
21 briefly reply to that.

22 So the point I was making before is still
23 applicable to what Mr. Weaver said. Once there is a
24 final judgment of the case, the judgment on the jury's
25 verdict, they then have appeal rights.

16

1 Motion in Limine No. 2 to preclude evidence of the
2 accident, the argument that the defense made is that
3 trauma cap -- it's relevant to the trauma cap and
4 whether the plaintiff suffered traumatic injuries. So,
5 therefore, we would also request a stay at this time.

6 THE COURT: So is it your position that this
7 motion hearing should be continued as well?

8 MS. BUYS: Yes, your Honor.

9 THE COURT: In its entirety?

10 MS. BUYS: Yes, your Honor. I just want to
11 join in the stay that Ms. Ries-Buntain had made as
12 well.

13 THE COURT: Okay.

14 MS. BUYS: Thank you such.

15 MS. RIES-BUNTAIN: Yes, your Honor. And, your
16 Honor, just to be clear I was requesting a stay for all
17 proceedings but for my motion on the trauma cap.

18 MR. BURTON: And, your Honor, Reach joins in
19 the question for a stay in light of the Nevada Supreme
20 Court's actions this morning. But we would still like
21 to hear our motion for summary judgment because we
22 think that that's something that needs to be resolved,
23 and we're here today to argue. I think the motions in
24 limine can be continued, but we would request the Court
25 hear argument on our motion for summary judgment.

(4) Pages 13 - 16

17

1 THE COURT REPORTER: Can I have your name?
2 MR. BURTON: James Burton.
3 THE COURT: Well, certainly the one thing
4 that's not covered is the sanctions motion.
5 So we're going to go forward at the very least
6 with that today. You brought a lot of the other extra
7 attorneys here to argue that motion. We're going to
8 proceed on that while I consider the motion to continue
9 and the stay.
10 Go ahead. Mr. Claggett, correct, your motion?
11 MR. CLAGGETT: Yes.
12 Your Honor, as a practical matter I think that
13 it's important that we are able to swear in Mr. Weaver
14 as part of this evidentiary hearing for the type of
15 sanctions we're asking for. I think it is prudent that
16 we conduct some form of evidentiary hearing. And
17 getting the testimony of Mr. Weaver I think is
18 critical.
19 There are exceptions to the attorney-client
20 privilege that include the crime fraud exception.
21 Mr. Weaver has committed a fraud upon this Court, and
22 we believe he's committed a crime.
23 That being the case, any privilege that may
24 have existed between himself and the experts under
25 rules of civil procedure would not pertain in this

19

1 THE COURT: If you want to have a seat.
2 Please state your name and spell your name.
3 THE WITNESS: Keith Weaver. K-E-I-T-H.
4 W-E-A-V-E-R.
5 THE COURT: Thank you, Mr. Weaver.
6 Go ahead, Mr. Claggett.
7 MR. CLAGGETT: Thank you.
8 DIRECT EXAMINATION
9 BY MR. CLAGGETT:
10 Q. Mr. Weaver, can you explain to the Court how
11 long you've been an attorney?
12 A. Thirty-two years.
13 Q. And during that 32 years have you primarily
14 practiced in the area of medical malpractice defense?
15 A. Generally, yes.
16 Q. Okay. And over the last decade that has been
17 your exclusive practice?
18 A. Yes, sir.
19 Q. And during the course of your practice has it
20 become your routine practice to draft reports for
21 expert witnesses in these proceedings?
22 A. Not necessarily.
23 Q. On how many occasions over the last ten years
24 have you authored reports for your experts?
25 MR. ROBISON: Your Honor, may I interpose an

18

1 case.
2 Additionally NRCP 26(b)(4)(C)(ii) and (iii)
3 apply in making it clear that there is no privilege as
4 it relates to their firm drafting a document because it
5 goes to identifying the factual data that the party's
6 attorney provided and that the expert considered in
7 forming the opinions to be expressed, or identify
8 assumptions that the party's attorney provided and that
9 the expert relied on in forming the opinions to be
10 expressed. We would have preferred to have all of the
11 experts here to testify as well regarding the fraud
12 that was committed upon ourselves and the Court in the
13 drafting of these fake and fraudulent expert reports.
14 But at a bare minimum, Mr. Weaver is here, and
15 we believe he should take the stand to start this
16 proceeding.
17 THE COURT: Mr. Weaver.
18 MR. WEAVER: Testify, your Honor?
19 THE COURT: Yes.
20 If you please come forward. Raise your right
21 hand to be worn.
22 KEITH WEAVER,
23 having been first duly sworn to testify to the truth,
24 the whole truth and nothing but the truth, was examined
25 and testified as follows:

20

1 objection. As I understood the Court's September 30
2 order, there are four questions that had to be answered
3 in this hearing. And none of the questions the Court
4 wants answered is included in counsel's dialogue with
5 my client.
6 THE COURT REPORTER: Can I have your name?
7 MR. ROBISON: Kent Robinson for Lewis
8 Brisbois.
9 THE COURT: Mr. Claggett.
10 MR. CLAGGETT: Your Honor, I'm laying a
11 foundation for his pattern and practice and that he
12 formed this web that this had been an ongoing issue.
13 And that's all I'm doing is just laying a foundation
14 that this is his pattern and practice to draft expert
15 reports.
16 THE COURT: I'll allow it. But I don't -- I
17 don't want this hearing --
18 MR. CLAGGETT: It's going to go quick, Judge.
19 I mean, I have your order right in front of me, and I'm
20 going to those questions.
21 THE COURT: That makes two of us.
22 MR. CLAGGETT: Yes.
23 THE COURT: Okay.
24 MR. CLAGGETT: I'm very cognizant of that,
25 Judge. I'm going to honor that.

21

1 THE WITNESS: The answer to that is I
2 sometimes have. I wouldn't say that I regularly do or
3 even exclusively do. And I certainly wouldn't say that
4 I do it more frequently than any of my defense medical
5 colleagues.
6 BY MR. CLAGGETT:
7 Q. Okay. Did -- did you draft the expert reports
8 in this case for your -- for your expert?
9 MR. ROBISON: Same objection, your Honor.
10 It's beyond the scope of this Court's order.
11 MS. MERCADO: Your Honor, Alice Mercado. I
12 join in that objection. I too have your order in front
13 of me, and there's four questions on there. And one of
14 the things that I really focused on in your order is
15 that this is not going to get into privilege. It's not
16 going to get into work product. There's four questions
17 that need to be asked. And so I would join in that
18 objection.
19 MR. CLAGGETT: Your Honor, foundationally the
20 issue is whether or not because they objected during
21 discovery and thwarted our opportunity to ask the
22 experts if they drafted it, foundationally we need to
23 establish that he, in fact, did draft them. I believe
24 the evidence is clear on that. But he's under oath,
25 and I'd like his testimony that he, in fact, did draft

23

1 in his report and Dr. Sloane.
2 Q. And did you direct your associate to draft
3 those reports?
4 A. I don't know if I directed her to draft those
5 reports, but she certainly did so under my authority,
6 yes.
7 Q. Okay. And when those reports were drafted,
8 you then sent -- your office sent those to the experts
9 for review?
10 A. Yes. If -- if -- whatever the sequence is
11 that experts send their reports to us which, of course,
12 is common or we participate in the drafting of the
13 reports including certainly the fact patterns and
14 chronologies that are involved. We exchange those
15 reports. We exchange those drafts with our experts as
16 is customary.
17 Q. When you -- did you -- did you personally
18 review those draft reports that your office drafted
19 prior to sending them to the doctors?
20 A. I don't recall. But whether I personally
21 reviewed them before Ms. Bestick sent them, they would
22 still ultimately be my responsibility, but I don't
23 recall whether I personally reviewed them or not, sir.
24 Q. Okay. When these reports were drafted by your
25 firm, how many -- let me ask you this. And Ms. Bestick

22

1 those reports.
2 THE COURT: Go ahead.
3 MR. CLAGGETT: I think that that's reasonable.
4 THE COURT: Objection overruled.
5 THE WITNESS: The answer to that is I
6 personally did not. I believe that at least some of
7 the experts' reports were drafted by my colleague
8 including under my direction that the previous
9 representations to the Court by you and Ms. Blazich
10 that we drafted all of them is untrue.
11 BY MR. CLAGGETT:
12 Q. Okay. Which of the expert reports in this
13 case -- and who -- what is the name of the attorney
14 that drafted the reports?
15 A. I think -- well, the attorney's name who
16 drafted either the reports or was substantially
17 involved in the reports is Alissa Bestick. And the
18 reports that are not, as you claim to have been drafted
19 by us to the Court, are Dr. Gomez, which we did not
20 draft any of his reports other than perhaps our
21 reviewing and editing. I believe we drafted
22 substantially and participated in Dr. Barcay's initial
23 report but not his rebuttal report.
24 I believe we were substantially involved in
25 Dr. Wachtel's participation and substantial involvement

24

1 is her name?
2 A. Yes.
3 Q. Is she here today?
4 A. Yes, she is.
5 Q. And how long has she been practicing law?
6 A. I think close to five years.
7 Q. Okay. And has she been at your firm the whole
8 time?
9 A. I think she worked with Shirley Blazich, maybe
10 under her direction.
11 Q. Okay. And then after that I don't know her
12 history. I'm just asking.
13 A. I believe the rest of the time with us, yes.
14 Thankfully.
15 Q. Okay. And is this practice of drafting expert
16 reports something that you've taught her to do as well?
17 A. Well, I don't know if I taught her to do it.
18 She may have learned it at Alverson Taylor because it's
19 absolutely the norm in the community, as you know.
20 MR. ROBISON: Your Honor, may I interpose an
21 objection? I really apologize for interrupting.
22 As you know, we specially appeared, asked to
23 continue so that we could do research and investigation
24 into some of the issues that were raised at the
25 September 9th hearing which had multitude of

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1 accusations.
2 We then got your order. And we prepared for
3 today to answer those four questions without
4 jeopardizing the privilege. And we had 48 hours to
5 submit to you and counsel exhibits. But in light of
6 the four questions, we didn't present exhibits because
7 the answers were so simple and easy to answer. I'm not
8 ready for this, your Honor. We didn't bring reports.
9 We didn't prepare ourselves to address reports. We
10 prepared ourselves just to address this Honorable
11 Court's four questions.
12 And so I'd like to lodge that objection and
13 ask that the Court curtail this examination
14 accordingly. Thank you.
15 THE COURT: Mr. Claggett.
16 MR. CLAGGETT: Your Honor, I'll --
17 THE COURT: Very specific.
18 MR. CLAGGETT: I'll get to it now here, Judge.
19 BY MR. CLAGGETT:
20 Q. So when did you draft the expert reports? And
21 when I say "you", I'm referring to you and/or your
22 associate.
23 A. I don't recall. I'm not prepared to answer
24 those questions. I didn't even know I would be asked
25 them. But I would say that as a general proposition,

1 exactly what the Court addressed.
2 In your order you said we're not going to
3 allow this examination to jeopardize the
4 attorney-client privilege. And we're not going to
5 allow the examination to jeopardize the work-product
6 privilege. And now going beyond just the question when
7 was the original document that had bilateral flail
8 chest filed has been answered. To go beyond that, your
9 Honor, again is intruding into the privilege and
10 putting us in the position we're not prepared to go
11 beyond the four questions that you've asked.
12 MR. CLAGGETT: Your Honor, the very next
13 question that you want answered is when did Lewis
14 Brisbois become aware that the word "bilateral" had
15 been added in error. To understand that foundationally
16 you must understand when it was first put in and who
17 put it in.
18 MR. ROBISON: Your Honor.
19 MR. CLAGGETT: Meaning if the doctor told him,
20 yes, there's a bilateral flail chest, that's one thing.
21 If Lewis Brisbois put it in there, that's another
22 thing.
23 MR. ROBISON: Your Honor, in that event I can
24 present one piece of evidence that answers his
25 questions which will exonerate my clients based on what

1 like is the custom in the community of defense counsel,
2 it's usually within 30 days, give or take, of the
3 disclosure date of them.
4 Q. Okay. Well, the first question the judge
5 asked, because I'm trying to get on target here, and I
6 just heard your counsel say that you're prepared to
7 answer it, so let's try that again.
8 When were the original documents with the
9 bilateral flail chest language filed? When did you
10 file them?
11 A. So the specific answer to that Court's
12 question is July 21st, 2020. And it's Dr. Barcay's
13 declaration attached to the partial motion for summary
14 judgment.
15 Q. And when did you draft -- and, again, when I'm
16 saying "you", you and/or your associate, draft that
17 declaration?
18 A. I believe that it was a participatory process
19 probably within a couple weeks of that.
20 Q. When you say participatory process, did
21 Dr. Barcay tell you that Douglas Schwartz suffered a
22 bilateral flail chest and that's why that ended up in
23 the report?
24 MR. ROBISON: Again, your Honor, excuse the
25 interruption. Going beyond the question is just

1 he just said. But I didn't have it marked 48 hours
2 beforehand because I didn't think we're going to get
3 behind the questions.
4 I have an email from Dr. Barcay in November of
5 2019 where Dr. Barcay tells the lawyers for the first
6 time that Mr. Schwartz had a bilateral flail chest.
7 And if I can present that to you without waiving any
8 privileges, he will be pleased to know that it wasn't
9 my client's idea. It was Dr. Barcay's.
10 THE COURT: Mr. Claggett.
11 MR. CLAGGETT: I've not seen that. And
12 because we don't know who drafted the reports, because
13 they obstructed the discovery on this topic, there is
14 no privilege as to who drafted a report.
15 And as far as authenticating that email, I
16 would want metadata on it because, with all due
17 respect, I don't trust Lewis Brisbois' firm, nor do I
18 trust --
19 THE COURT: Mr. Claggett.
20 MR. CLAGGETT: I'm just being --
21 THE COURT: We're not --
22 MR. CLAGGETT: Your Honor, I've been all over
23 the country with this firm. We've had their answers
24 struck in multiple jurisdictions for destroying and
25 altering evidence.

29

1 THE COURT: Well, it's not happening today.
2 MR. CLAGGETT: I understand it's not happening
3 today. But that representation from this counsel I
4 have no reason to doubt that he's seen an email that he
5 believes to be true and accurate. I don't believe it.
6 We require metadata. If they want to show us that,
7 fine. Give us the metadata.
8 MR. ROBISON: This is exactly what we tried to
9 prevent, your Honor. And our motion for clarification
10 is to have this hearing disintegrate in the finger
11 pointing name calling that's happening right now. We
12 have an email, and he says I don't trust them, so,
13 therefore, I want metadata.
14 There is -- this is getting way beyond the
15 scope of your questions, your Honor. I respectfully
16 request that it proceed as you ordered.
17 MR. CLAGGETT: Your Honor.
18 THE COURT: Mr. Claggett.
19 MR. CLAGGETT: Your Honor.
20 THE COURT: What I'm interested in and what
21 concerns me is that your firm was lead to believe that
22 there was a bilateral flail chest.
23 MR. CLAGGETT: And we had to hire experts and
24 spend a bunch of money to defeat that.
25 THE COURT: Correct.

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1 privilege here.
2 The rules are clear that if this lawyer --
3 it's under 26 that we've gone over it, and we can go
4 over it again and again. If the expert based any of
5 his opinions on what counsel's telling him, it's not
6 privilege. The expert doesn't get to gain information
7 that's going -- I can get back to the rule. Let me get
8 back to it here, your Honor.
9 MR. ROBISON: Your Honor, the rule is simple.
10 What is not privileged by the work-product doctrine are
11 facts given to the expert, are assumptions given to the
12 expert, and compensation. Those are the only three
13 things that are Rule 26 that don't have privilege.
14 MR. CLAGGETT: I mean, it's -- yeah, it's
15 right there. Identify -- it says -- I'll read the
16 whole rule for the record.
17 Trial preparation protection. This is
18 NRCP 26(b)(4)(C).
19 "Trial Preparation Protection For
20 Communications Between a Party's Attorney and
21 Expert Witnesses. Rule 26(b)(3) protects
22 communications between the party's attorney and
23 any witness required to provide a report under
24 Rule 16.1(a), 16.2(d) or (e) or 16.205(d) or
25 (e), regardless of the form of the

30

1 MR. CLAGGETT: Yes.
2 THE COURT: And I want to know when it was
3 disclosed to you that that was not correct --
4 MR. CLAGGETT: Okay.
5 THE COURT: -- and what -- what your firm had
6 to do --
7 MR. CLAGGETT: We -- I can get into that.
8 THE COURT: -- in the meantime?
9 BY MR. CLAGGETT:
10 Q. Can we -- since now we've been disclosed this
11 information of an email supposedly in November of 2019,
12 some eight or nine months before this declaration was
13 drafted, I'd like to ask, and I don't think this is
14 privileged so I think it's fine. But my question would
15 be after you received that email, what did you do to
16 confirm that the medical records supported that
17 statement in the email.
18 A. The --
19 Am I allowed to talk about the email?
20 MR. ROBISON: Your Honor, may he be allowed to
21 talk about the email with the stipulation that that's
22 not going to waive any of the privileges of work
23 product?
24 MR. CLAGGETT: I don't -- I don't -- first of
25 all I don't agree with the premise that there is a

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1 communications, except to the extent that the
2 communications:
3 "(i) is related to the compensation for the
4 expert study or testimony;
5 "(ii) identify facts or data that the
6 party's attorney provided and that the expert
7 considered in forming the opinions to be
8 expressed; or
9 "identify assumptions that the party's
10 attorney provided and that the expert relied on
11 in forming the opinions to be expressed."
12 So to the extent that really what (ii) and
13 (iii) are talking about apply there is no privilege.
14 And so what needs to be -- that's what I'm trying to
15 lay the foundation for.
16 I'm not asking for the substance of a
17 conversation that Mr. Weaver had with the expert here.
18 My question was, what did he do before putting that
19 into a pleading to confirm that it was an accurate
20 statement.
21 Because under our rules of civil procedure you
22 have an obligation to do investigation to be sure what
23 you're putting in the pleadings are true and accurate.
24 And this was not a little issue. This was bilateral
25 flail chest causing serious threat to life, thus trauma

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1 cap applies. And this mistake wasn't made by just one
2 doctor. This mistake was made by both doctors that we
3 now have testimony that their firm drafted the reports
4 for. That coincidence is amazing. So that's what I'm
5 wanting to get here today.

6 THE COURT: What was your question again,
7 Mr. Claggett?

8 MR. CLAGGETT: My question is: After you
9 received this email in November of 2019 from
10 Dr. Barcay, what did you do to ensure that the -- his
11 statement was truthful and accurate?

12 MR. ROBISON: Yeah. That is absolutely work
13 product. He's getting into the mechanisms, and
14 thinkings, and strategies of his defense counsel, his
15 adversary in this matter. That's why we have work
16 product protection to protect the thought process
17 strategically. And from an advocacy standpoint, that
18 is protected material.

19 And what he read from Rule 26 is spot on.
20 He's going beyond the facts related to the expert.
21 He's going into an analysis of this attorney's work in
22 this case which is work product.

23 THE COURT: Sustained.

24 Mr. Claggett, I want to know --

25 MR. CLAGGETT: All right.

35

1 Q. Did your associate draft that document?

2 A. No.

3 Q. Did Dr. Barcay draft that document?

4 A. Yes, he did. We may have been involved in --
5 in some part of that. But Dr. Barcay drafted his reply
6 declaration to the best of my recollection.

7 Q. And at that time there was no mention of a
8 bilateral flail chest. The word "bilateral" had been
9 removed?

10 A. That's correct.

11 Q. And it was removed, but you didn't inform us
12 that, in fact, that was not the opinion -- you didn't
13 remove the opinion from the first declaration, and the
14 position of the motion that it was a bilateral flail
15 chest, did you?

16 A. I totally don't understand that question. I'm
17 sorry.

18 Q. On August 26, 2020, Dr. Barcay does a second
19 declaration. And the word "bilateral" is not found
20 within the document; correct?

21 A. Correct.

22 Q. That was taken out -- did -- was that taken
23 out -- do you know why that was taken out? You filed
24 the declaration with the Court. Do you know why?

25 A. I do not know why.

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1 THE COURT: -- when Lewis Brisbois became
2 aware that bilateral --

3 MR. CLAGGETT: Okay.

4 THE COURT: -- was incorrect.

5 BY MR. CLAGGETT:

6 Q. When did you learn that that was a mistake?

7 A. March 6, 2021.

8 Q. So it took you eight months to realize that
9 was wrong?

10 A. Yes, sir.

11 Q. Okay. And when did you inform our firm that
12 it was wrong?

13 A. Well, your firm knew it was wrong per your
14 firm's position. But I informed your firm on April 2nd
15 through a document by Dr. Barcay.

16 Q. Let me just -- so your testimony here under
17 oath today is that it was March when you realized it?

18 A. Yes, sir. The day -- the day after the
19 hearing on the motion for summary judgment.

20 Q. Are you aware that on August 26, 2020,
21 Dr. Barcay submitted a second declaration in this
22 matter?

23 A. Yes, I am.

24 Q. And you drafted that, didn't you?

25 A. No.

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1 Q. Never asked him why?

2 A. I don't know. There were discussions with
3 Dr. Barcay about what Dr. Womack's position was, where
4 Dr. Womack with regard to bilateral flail chest said
5 that Dr. Barcay didn't understand what the definition
6 of flail chest was. Just as your experts Dr. Lineback
7 and Dr. Womack vehemently disagree and say it's
8 mutually exclusive between the two of them what the
9 definition of bilateral flail chest is.

10 Dr. Womack said Dr. Barcay did not understand
11 what the definition of flail chest was. And that's why
12 he got it wrong saying it was bilateral flail chest.
13 So we certainly made Dr. Barcay aware of what
14 Dr. Womack's position was. We followed up with
15 Dr. Barcay about what Dr. Womack's position was. And
16 our understanding was just --

17 MR. ROBISON: Stop, stop. May I object? I
18 don't want him going into his understanding, your
19 Honor. I hope you appreciate that would be work
20 product.

21 THE COURT: Mr. Claggett.

22 MR. CLAGGETT: That was a really long answer,
23 so I don't know what his understanding as to what he
24 was going to say.

25 MR. ROBISON: That's the point. His

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1 understanding is work product, and I object.
2 THE COURT: Sustained.
3 BY MR. CLAGGETT:
4 Q. The -- so you get -- you get this August 26th,
5 2020, declaration. Now, you moved for summary judgment
6 against my client for the trauma cap. And your expert
7 removes the word bilateral flail chest from his report,
8 correct?
9 A. Yes. I answered that.
10 Q. And you -- when -- did you contact us to let
11 us know that your expert and your motion contained a
12 false premise?
13 A. I've answered that as well, sir. I -- you
14 learned of it from us on April 2nd. So the answer is,
15 no, I did not contact you after Dr. Barcay's reply
16 declaration and/or our reply.
17 Q. Why did you wait August, September, October,
18 November, December, January, February, March, nine
19 months to tell us?
20 A. I waited because I did not understand that it
21 was no longer Dr. Barcay's -- or that it was not
22 Dr. Barcay's opinion that that -- or whether there was
23 flail, bilateral flail chest.
24 Q. Why didn't you -- you had two declarations
25 back all the way in August of 2020, and you knew that

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1 THE WITNESS: Fair enough, but his question
2 was about my understanding.
3 MR. ROBISON: My bad. I should have objected.
4 BY MR. CLAGGETT:
5 Q. I don't think I asked for your understanding.
6 I'm asking that -- not whether you understood something
7 or not. But you had the two declarations in August of
8 2020?
9 A. Yes, sir. I had the -- Dr. Barcay's initial
10 declaration and I had his reply declaration. Yes, I
11 did.
12 Q. Did -- without getting into the substance of
13 it, did you receive email communications with
14 Dr. Barcay between the first declaration and the second
15 declaration?
16 A. Yes. There were certainly communications
17 about between --
18 MR. ROBISON: He just asked -- excuse me.
19 Objection. He just asked whether there was
20 communications. That's a yes or no.
21 THE WITNESS: Yes.
22 BY MR. CLAGGETT:
23 Q. Let me move forward to when you say you found
24 out. A letter was drafted in April of 2021, correct?
25 A. Yes, sir.

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1 wasn't his opinion. Or at least he had removed it from
2 his opinion at that time from the record.
3 MR. ROBISON: Objection. That was triple
4 compound. One at a time, your Honor.
5 BY MR. CLAGGETT:
6 Q. You knew in August of 2020 that he had changed
7 his opinion from bilateral flail chest and removed that
8 from the declaration, second declaration?
9 A. Absolutely incorrect. Just -- I'll say this
10 again. Just as your expert Dr. Lineback says, your
11 expert Dr. Womack is absolutely incorrect with regard
12 to the definition of bilateral flail chest or flail
13 chest at all.
14 All I understood from Dr. Barcay is that he
15 did not have in his reply declaration that there was
16 bilateral flail chest. I did not have an understanding
17 that --
18 MR. ROBISON: Objection. Excuse me. You're
19 going into your understanding.
20 I would like to object on our work product.
21 May I admonish my client?
22 THE COURT: Please.
23 MR. ROBISON: Sir, please do not disclose your
24 understanding. It is not relevant to these hearings
25 under the Court's order.

40

1 Q. That letter was drafted by your firm to your
2 firm; correct?
3 A. I believe so. Either -- either Dr. Barcay
4 drafted it and we made sure it was exactly what we were
5 then understanding is correct. Or we drafted it for
6 his input and approval, yes.
7 Q. When -- do you recall -- do you recall whether
8 or not Dr. Barcay was the one that reached out to your
9 firm to inform you of the error, or whether it was your
10 firm that reached out to him?
11 A. I do recall that.
12 Q. How did that work?
13 A. I reached out to Dr. Barcay to -- to say to
14 him that Ms. Blazich very aggressively at the hearing
15 challenged his opinion about bilateral flail chest and
16 that he needed to be prepared in his deposition to
17 fully respond to why that was his opinion.
18 And then his response was basically, What are
19 you talking about. And I sent him his declaration.
20 And that's when I learned for the first time that he
21 had a question about what -- indeed, whether that was
22 or at least was still his opinion.
23 Q. And so you draft a letter that it was
24 purportedly a letter that he drafted and sent to your
25 office; correct?

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1 A. Well, it's not -- it's not to be purportedly.
2 It was to make sure that we were well ahead of his
3 deposition rather than waiting until his deposition.
4 Making it clear that he believed that it was an error
5 what he put in his initial declaration, so that if
6 there needed to be time to prepare for those questions
7 or just so that there was no question in his deposition
8 whether that would be coming out for the first time.
9 Q. Well, it wasn't well ahead of his deposition.
10 His deposition was on April 15, 2021, correct?
11 A. Yeah. So it was two weeks ahead of his
12 deposition.
13 Q. So this mistake was made some nine months
14 before, and you had concerns that he was going to be --
15 lose credibility at his deposition if he doesn't fix
16 this problem. So you called and asked him to modify
17 his report and send a letter saying that he wants to
18 change it. Is that how that worked?
19 MR. ROBISON: Objection. Compound. Four
20 questions.
21 THE COURT: Are you testifying, Mr. Claggett?
22 MR. CLAGGETT: I'll fix it, Judge.
23 THE COURT: Thank you.
24 BY MR. CLAGGETT:
25 Q. You called him in anticipation of the

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1 MR. ROBISON: Objection. There's no question.
2 THE WITNESS: I don't recall.
3 BY MR. CLAGGETT:
4 Q. So you speak to -- fair enough. You had a
5 conversation with Dr. Barcay in which you told him that
6 Ms. Blazich is going to go after him on the bilateral
7 flail chest at deposition, correct?
8 A. In essence. What -- what I said is I was
9 surprised at -- essentially surprised at the hearing on
10 the motion for summary judgment how vigorously
11 bilateral flail chest was being challenged. I did not
12 know that that was an issue being challenged. And
13 other than the whole issue about flail chest at all.
14 And I told him that I expected in his
15 deposition Ms. Blazich would certainly make an issue of
16 not just flail chest, which is a very contested issue
17 in the case, but bilateral flail chest as well.
18 Q. But you knew that when we filed our opposition
19 all the way back in August 17th, 2020?
20 A. Knew what?
21 Q. You knew that we were going to be attacking
22 this issue of bilateral flail chest?
23 A. Well, along with 75 other issues of
24 contention, yes.
25 But as I also said before, even in

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1 deposition; correct?
2 A. Well, I was -- no. I -- that's incorrect.
3 Q. Did you call him two weeks, roughly two weeks
4 before the deposition?
5 A. I don't know if I did or not.
6 Q. How closely to -- did you talk to him within a
7 day or so of the drafting of the April 2nd, 2021,
8 letter?
9 A. I don't know whether I did or not.
10 Q. You spoke to him before the April 2nd, 2021,
11 letter though; correct?
12 A. Yes. I spoke to him on -- as I said, I spoke
13 to him on March 6th.
14 Q. Did you speak to him between March 6th and
15 April 2nd?
16 A. I believe I did, yes.
17 Q. Okay. Well, you have some recollection. So
18 when was it?
19 A. I don't recall. I know we had discussions
20 between March 6th and April 2nd. But I don't recall
21 the exact dates.
22 Q. How many discussions did you have with him?
23 A. I don't recall.
24 Q. How long did those discussions last?
25 A. I don't recall. We were in a period --

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1 Dr. Womack's declaration, as you know, when he said he
2 disputes bilateral flail chest by Dr. Barcay, he simply
3 said he did not -- that it's because Dr. Barcay didn't
4 understand what the definition of flail chest is. Just
5 like your experts each say the other one doesn't --
6 MR. CLAGGETT: I'm going to now move to
7 strike.
8 Because you keep saying that and you're just
9 making that up.
10 I'm going to move to strike his testimony.
11 He's saying that my experts are disagreeing on this
12 topic in a way that is incorrect and misrepresents the
13 facts of the case. So I'm asking to strike his
14 testimony.
15 His lawyer wants him to answer yes or no. I'd
16 like him to answer yes or no to some of these questions
17 too.
18 MR. ROBISON: Well, you opened the door,
19 counsel.
20 MR. CLAGGETT: Well, then I'll live with it
21 then too. But if I'm moving to strike because he's
22 being nonresponsive, his own attorney is moving to
23 strike as nonresponsive.
24 MR. ROBISON: I am?
25 MR. CLAGGETT: Yeah. You've instructed him to

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1 stop talking numerous times because it's not responsive
2 to my question.
3 MR. ROBISON: Well, his own counsel is not
4 moving to strike, your Honor.
5 THE COURT: We're not striking anybody's
6 testimony.
7 Mr. Claggett, make your point, please.
8 MR. CLAGGETT: Thank you, Judge.
9 BY MR. CLAGGETT:
10 Q. Why did your firm draft the letter on
11 April 2nd, 2021, versus having him just send an email?
12 A. What do you mean just sending an email?
13 Q. Why did you -- I'm trying to understand why
14 your firm would draft a letter for an expert making it
15 look like it came from an expert only to give it back
16 to yourself. Why did you do that?
17 A. As opposed to what?
18 Q. As opposed to a communication coming from the
19 other party telling you to do something. Like I think
20 happens all the time?
21 A. It was a supplemental report so that we were
22 making it clear, and Dr. Barcay was making it clear,
23 that it was a mistake. If I simply would have -- which
24 I don't know where you're -- what you're assuming I
25 would have not done, which, I guess, is nothing.

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1 THE COURT: It's obviously attached to the
2 motion. I don't have it in front of me.
3 MR. CLAGGETT: Yeah. So it's -- it's on
4 page -- if you're looking electronically, it's
5 page 159.
6 BY MR. CLAGGETT:
7 Q. But in this you literally created a letterhead
8 for him, correct?
9 A. I don't think. No, we wouldn't have created a
10 letterhead for him. We simply would have sent to him,
11 in essence, I don't remember exactly, but probably an
12 email.
13 MR. CLAGGETT: May I approach, Judge?
14 THE WITNESS: Sure.
15 MR. CLAGGETT: So I can show your Honor.
16 THE COURT: Show his counsel.
17 MR. ROBISON: Your Honor, it's irrelevant.
18 The question was when did my client notify plaintiff's
19 counsel of Barcay's mistake. It's established beyond
20 any question and conceded April 2nd, 2021. That's the
21 issue. That's what you asked for. He's got the answer
22 more than ten times.
23 MR. CLAGGETT: It's the matter -- your Honor,
24 it's -- the issue -- this is not an issue -- it's not
25 just that issue though. This is an issue of this all

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1 If I alternatively would have sent an email to
2 Ms. Blazich saying Dr. Barcay ahead of his deposition
3 is making it clear he made an error, I'm not sure what
4 the alternative would have been to do what we did
5 besides on Dr. Barcay's behalf correcting the mistake
6 ahead of time.
7 Q. Would it be -- I'm trying to understand why
8 it, your firm, felt it necessary to draft a letter that
9 made it look like it came from Dr. Barcay?
10 A. Well, it's simple. We wanted to -- whether it
11 was coming directly from Dr. Barcay or whether we were
12 assisting Dr. Barcay with it, we simply wanted to make
13 sure that it was clear that it was a supplemental
14 report, that it was going to all parties, and that he
15 was advising that the bilateral flail chest was a
16 mistake. And also in there that he would be prepared
17 in his deposition to address them.
18 MR. CLAGGETT: Your Honor, this letter is
19 attached as our Exhibit 7 to this motion. I'm pulling
20 it up right now.
21 This letter that you drafted up, and you do
22 have Exhibit 7 there, your Honor.
23 THE COURT: Attached to the motion, not in
24 front of me I don't.
25 MR. CLAGGETT: What, excuse me?

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1 being fabricate by this firm. They turn around and
2 they draft this letter. And in this letter, Judge, is
3 a letterhead that looks like it comes from Dr. Barcay.
4 They made it look that way.
5 Reason being is that their firm had drafted
6 the report. There was a mistake in the report.
7 They're saying there's some email I haven't seen.
8 So say Dr. Barcay originally says that.
9 Correcting that mistake was at the direction of their
10 firm, not the doctor. The doctor is not catching this
11 mistake. Their firm is catching the mistake.
12 And what they do is they literally create
13 letterhead for the doctor to make it look like it's a
14 letter that's coming from the doctor to correct the
15 mistake.
16 MR. ROBISON: Your Honor.
17 MR. CLAGGETT: They drafted this. They --
18 this is not a -- your Honor, I don't know how many
19 times in your career, but I can tell you in my career
20 not one time have I created a letterhead for somebody
21 else to draft a letter to make it look like it came
22 from them when I was, in fact, me drafting it.
23 What very simply could have happened is and
24 what would have been normal would have been that
25 Mr. Weaver draft a letter on his letterhead and say,

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1 Dr. Barcay, it's come to our attention that you may
2 have an error in your report. We would like you to
3 look at this and tell us if you agree or disagree.
4 Please confirm in writing. Or give me a call to
5 discuss. Something.

6 This letter being created, put on -- making it
7 look like it's Dr. Barcay's letterhead, this was done
8 to make it look like -- I mean, let's -- I just want to
9 read the substance of this so you can appreciate what
10 that says.

11 "Dear Mr. Weaver" --

12 Now Mr. Weaver is writing this letter. So
13 Mr. Weaver is drafting a letter to make it look like
14 it's coming to him from the expert.

15 "Dear Mr. Weaver, you have advised me that
16 at my deposition scheduled for April 15, 2021,
17 I will have an opportunity to offer supplement
18 opinions I formed relating to the depositions
19 and rebuttal reports of plaintiff experts
20 provided to me after my rebuttal expert report
21 in this case. However, even before then, I
22 would like to correct an inadvertent error in
23 my declaration relating to the motion for
24 summary judgment. I stated bilateral flail
25 segment when it should have been right flail

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1 Your Honor, I --

2 BY MR. CLAGGETT:

3 Q. So two months later on June 22nd, 2021, you
4 recall drafting a letter for Dr. Wachtel.

5 A. I --

6 MR. ROBISON: Your Honor, that's completely
7 beyond the scope of your order. I object.

8 MR. CLAGGETT: It goes to -- the same mistake
9 is made in Wachtel's report as in our case. They say,
10 both say "bilateral". And they did the same thing with
11 Wachtel's as they did with Barcay. They drafted a
12 letter to make it appear as if they're -- Dr. Wachtel
13 realized he made a mistake in June, June 22nd, 2021.

14 MR. ROBISON: I'm not sure how many issues or
15 topics or doctors or experts we're going to address
16 today. I'm here as special counsel for Lewis Brisbois
17 to answer this Honorable Court's questions with sworn
18 testimony and reliable evidence. And I hope this
19 hearing is confined to that.

20 I'm not prepared to go beyond the confines of
21 your order, your Honor.

22 MR. CLAGGETT: There's multiple experts that
23 had the same false opinion.

24 THE COURT: Are those experts going to testify
25 today?

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1 segment or flail segment.

2 "I corrected my error in the second
3 declaration and in my initial and rebuttal
4 expert reports.

5 "Thank you."

6 THE COURT: Mr. Claggett, I hear you saying
7 that Mr. Weaver knew or should have known at least in
8 August of --

9 MR. CLAGGETT: Right. And in --

10 THE COURT: -- 2020 that this was an error.
11 He didn't inform your firm until April. I'm failing to
12 see how Mr. Weaver acted fraudulently and/or
13 intentionally. The fact remains though that this error
14 was made, either by Mr. Weaver or the expert, and it
15 costs your clients money.

16 MR. CLAGGETT: Tons of money and tons of
17 resources. And if you look at this letter that was
18 drafted by Mr. Weaver --

19 MR. ROBISON: Your Honor, can we finish
20 interrogation and argue after the testimony has been
21 presented to you?

22 THE COURT: Yes.

23 MR. CLAGGETT: Well, the last question was how
24 much we've been damaged, and he's not going to know
25 that.

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1 MR. CLAGGETT: They're not here, and we don't
2 have subpoena power over them. But they're
3 Mr. Weaver's experts. And he's already testified that
4 he drafted the report for both of these experts, both
5 Wachtel and Barcay.

6 THE COURT: Mr. Claggett, without those
7 experts here to testify as to what their opinion was,
8 when they changed that opinion, why they changed that
9 opinion ...

10 MR. CLAGGETT: I'm laying the foundation. The
11 whole point is that we have another -- the same issue
12 with a different expert. Mr. Weaver waits an
13 additional 2 1/2 months.

14 MR. ROBISON: Your Honor, he's arguing --

15 MR. CLAGGETT: -- to tell us about that issue
16 with the other expert.

17 MR. ROBISON: He's arguing matters that are
18 not before you.

19 (Multiple speaker cross-talk)

20 MR. ROBISON: It's very simple that, and
21 September 9th, your Honor, this Honorable Court entered
22 an order from the bench saying we're going to have an
23 evidentiary hearing on October 15th, the only date I
24 have available. And you used the term "evidentiary".

25 Counsel had the right to go and get all the

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1 doctors or whatever and present this evidence. He's
2 provided me with no notice that that he's presenting
3 evidence. Now here's arguing stuff that's not even
4 covered by your order.
5 MR. CLAGGETT: Your Honor, I have no way to
6 subpoena their experts to come here. And they know
7 that. They're outside the subpoena power that I have.
8 I don't have the ability to get their experts
9 to show up to an evidentiary hearing. So that's why
10 Mr. Weaver is here testifying. I don't have the
11 ability to get their experts. I'll certainly have the
12 ability at trial to cross-examine their experts on the
13 fact that this lawyer drafted the reports and they
14 didn't. And that it had errors in it. And that they
15 didn't catch it. And it goes to their sloppiness and
16 reliability for sure.
17 But you wanted to know when they put us on
18 notice of the mistake. I got done doing Dr. Barcay.
19 Dr. Wachtel has the same exact problems in his report,
20 and we weren't notified. I mean, I just want to ask
21 him the date that we were notified was June 22nd, 2021,
22 that Dr. Wachtel also admitted that he was inaccurate
23 and was wrong about bilateral flail chest. I think
24 that is a fair question to answer your question when we
25 were put on notice of the error.

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1 because you hate our firm, of creating false evidence.
2 We didn't put it on Dr. Barcay's letterhead as you keep
3 representing to the Court.
4 We didn't put it on Dr. Wachtel's. I don't
5 recall whether we asked Dr. Wachtel to make the
6 correction himself or whether we contacted -- otherwise
7 contacted Dr. Wachtel. What we cared about was making
8 the correction.
9 Q. Why did you wait an additional ten weeks to
10 make the final correction to the error?
11 A. Well, I think -- I think the obvious reason is
12 because you obviously knew from Dr. Barcay that it was
13 an error.
14 So in the abundance of caution so that there
15 wouldn't be a question at Dr. Wachtel's how come it
16 wasn't corrected before, we corrected it before. We
17 certainly didn't feel that we needed to put you on
18 notice of an error because you already were aware that
19 it was an error.
20 Q. We only knew it was an error according to
21 Dr. Barcay. We didn't realize that Dr. Wachtel was
22 going to accept that it was an error.
23 MR. ROBISON: That's testimony. It's not even
24 a question. Objection.
25 THE COURT: Sustained.

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1 MR. ROBISON: The question was when were they
2 put on notice that bilateral flail chest was an error.
3 MR. CLAGGETT: Right.
4 MS. BLAZICH: And that's been covered --
5 THE COURT: -- extensively.
6 MR. ROBISON: Thank you.
7 MR. CLAGGETT: As to one expert, not to both.
8 But if they have multiple experts they're going to have
9 one say, oh, it's a mistake, but I'm going to still
10 move forward with the other expert. They haven't
11 corrected the error to anybody.
12 They're just playing a different hand. They
13 didn't fully correct this to us until June 22nd, 2021.
14 THE COURT: Is that correct, Mr. Weaver?
15 THE WITNESS: I don't know what, what the date
16 is. I don't even -- I wasn't prepared to be talking
17 about Dr. Wachtel. I thought we were talking about
18 what was in the order. But if that was the date of
19 Dr. Wachtel's notification, I don't dispute it.
20 BY MR. CLAGGETT:
21 Q. And did that -- did Dr. Wachtel's correction
22 happen the same way as Dr. Barcay where you drafted --
23 your firm drafted the letter and put it on what
24 appeared to be his letterhead?
25 A. Well, first of all we -- you keep accusing us,

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1 BY MR. CLAGGETT:
2 Q. Let me get back to my timeline here.
3 THE COURT: We need to get this moving. If I
4 decide not to stay this, we have a lot of things to
5 hear today.
6 MR. CLAGGETT: Okay. Last question.
7 BY MR. CLAGGETT:
8 Q. You allowed the motion for summary judgment on
9 trauma cap to go forward without correcting this
10 mistake; correct?
11 A. Yes, sir.
12 MR. CLAGGETT: All right. I pass the witness,
13 Judge.
14 THE COURT: Thank you.
15 CROSS-EXAMINATION
16 MR. ROBISON: May it please your Honor.
17 BY MR. ROBISON:
18 Q. Mr. Weaver, very succinctly, when was the
19 first document filed in this matter which used the term
20 "bilateral flail chest"?
21 A. July 21st, 2020.
22 Q. And what document was that term referred?
23 A. In Dr. Barcay's declaration.
24 Q. And it is true, is it not, sir, that you
25 received an email in November of 2019 at which

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1 Dr. Barcay, not your firm, used the term "bilateral
2 flail chest"?
3 A. Yes, sir.
4 Q. And that contributed to the inclusion of that
5 phrase in his declaration and in your motion?
6 A. Yes, sir.
7 Q. That motion was opposed?
8 A. Yes, sir.
9 Q. By Mr. Claggett's firm?
10 A. Yes.
11 Q. And to that opposition was there an expert
12 witness declaration?
13 A. Yes.
14 Q. And who was that expert?
15 A. Dr. Womack.
16 Q. Did that expert, Dr. Womack, tell you in his
17 opinion that Dr. Barcay misinterpreted the medical
18 records?
19 A. In his declaration, yes.
20 Q. And did he say that neither the CT scan nor
21 the autopsy made any mention of bilateral flail chest?
22 A. Yes.
23 Q. And did they dispute the representation that
24 Mr. Schwartz has a bilateral flail chest?
25 A. Yes.

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1 March 5th when there was a hearing before this
2 Honorable Court on the motion for partial summary
3 judgment, did you believe that Mr. Barcay had lied?
4 A. No, sir.
5 Q. What did you hear with regard to Dr. Barcay's
6 statement of bilateral chest flail at the hearing on
7 March 5th, 2021?
8 A. I heard what Ms. Blazich was either saying
9 very directly or was implying that Dr. Barcay was
10 lying.
11 Q. They already knew?
12 A. Yes.
13 Q. And they argued from the lectern that Barcay
14 lied?
15 A. Yes, sir.
16 Q. They already knew for all that time, didn't
17 they?
18 A. According to them, yes, sir.
19 MR. CLAGGETT: Objection. Leading.
20 BY MR. ROBISON:
21 Q. Did you perceive that they knew when they
22 filed their opposition that --
23 MR. CLAGGETT: Objection.
24 Q. -- doctor --
25 MR. CLAGGETT: Can I get a ruling on the prior

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1 Q. Did they, according to you, know that they
2 thought Dr. Barcay was wrong?
3 A. Yes.
4 Q. Did you file a reply to that opposition?
5 A. Yes.
6 Q. Did that reply have attached to it another
7 declaration by Dr. Barcay?
8 A. Yes, it did.
9 Q. Did it have the term in it "bilateral flail
10 chest"?
11 A. No.
12 Q. Did that cause you to believe that there was
13 not a bilateral flail chest?
14 A. No.
15 Q. Do you know the difference between a flail
16 chest and bilateral flail chest?
17 A. Only generally what the experts say.
18 Q. Isn't that the heart of the contention in the
19 beginning of this motion, whether it was bilateral
20 flail chest or flail chest segment?
21 A. Yes.
22 Q. And that was disputed between the two parties?
23 A. Yes, sir.
24 Q. Now, from the time you filed the motion for
25 partial summary judgment on July 21st, 2020, until

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1 leading?
2 THE COURT: Mr. Robison; do you want to be
3 heard?
4 MR. ROBISON: I'll withdraw the question.
5 There was no answer.
6 BY MR. ROBISON:
7 Q. In the opposition to which Dr. Womack's sworn
8 testimony was attached, did that cause you to want to
9 notify plaintiff's counsel that Dr. Womack disagreed
10 with Dr. Barcay?
11 A. No, sir.
12 Q. And in your experience as an attorney and in
13 med mal cases, do you ever see plaintiff's experts and
14 defense's experts agree on everything?
15 A. No. In fact, in this case plaintiff's experts
16 don't even agree on everything.
17 MR. CLAGGETT: Objection, nonresponsive.
18 BY MR. ROBISON:
19 Q. Did the plaintiff's experts in this case
20 agree?
21 A. Absolutely not.
22 THE COURT: Hold on.
23 BY MR. ROBISON:
24 Q. Is it then --
25 MR. CLAGGETT: I'm moving to strike because

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1 he's being nonresponsive to the question.
2 MR. ROBISON: I'll rephrase. I'll withdraw
3 the question and try it again.
4 THE COURT: Thank you.
5 BY MR. ROBISON:
6 Q. Do in your experience medical experts
7 typically disagree from party to party?
8 A. Yes. That's the nature of the medical
9 malpractice case.
10 Q. And it's not precise science, is it, with
11 expert opinions?
12 A. No, sir.
13 Q. And it's an opinion, and they disagree?
14 A. Yes, sir.
15 Q. In this case have the plaintiff's experts
16 disagreed?
17 A. Absolutely.
18 Q. Have you accused them of presenting fraud to
19 this Court or defrauding this Court because their own
20 experts disagree?
21 A. You mean with each other?
22 Q. Yes, sir.
23 A. No, sir.
24 Q. Have you ever disputed the expert opinions
25 presented by the plaintiffs in this case?

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1 initial affidavit?
2 A. No, sir.
3 Q. And you first learned about that on March 6th,
4 2021?
5 A. Yes, sir.
6 Q. Now, how many experts are involved in this
7 case, sir?
8 A. I believe 22 or upwards of 25.
9 Q. Are experts in medical malpractice cases,
10 typically, expensive items of evidence?
11 A. Yes, sir.
12 Q. And in this case with regard to how much was
13 expended by plaintiffs to disprove or become aware of
14 Dr. Barcay's mistake, wasn't that mistake disclosed on
15 August 17th, 2020, in their opposition?
16 A. Yes, sir.
17 Q. Mr. Weaver, have you ever had any intent to
18 mislead this Court with fraudulent testimony?
19 A. Absolutely not.
20 Q. Do you value your ticket, your license to
21 practice law?
22 A. Yes, sir. And my reputation.
23 Q. And do you value the blessing and opportunity
24 and privilege we have to stand at a lectern and present
25 to a Court?

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1 A. Yes, sir.
2 Q. Have you accused those experts or these
3 attorneys of defrauding this Court because their
4 experts are wrong?
5 A. No, sir.
6 Q. Do you think they're committing fraud?
7 A. I just think that they're wrong.
8 Q. April 2nd you sent a letter out to counsel?
9 A. Yes, sir.
10 Q. You're aware under Rule 26 you have a duty to
11 supplement expert witness reports?
12 A. Yes, sir.
13 Q. Did you do that?
14 A. We believe we were, yes.
15 Q. Before the deposition?
16 A. Yes, sir.
17 Q. And why did you do it before the deposition?
18 Do you think that you're ethically required to do that?
19 A. I don't know if I'm ethically required to do
20 it, but I wanted to have it on the table that we were
21 aware this was going to be a hotly disputed issue in
22 Dr. Barcay's deposition and to give notice ahead of
23 time that Dr. Barcay made a mistake.
24 Q. From July 21st, 2020, until March 6th, 2021,
25 did Dr. Barcay ever tell you that he was wrong in that

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1 A. Yes.
2 Q. Would you do anything to deceive this Court to
3 jeopardize that privilege, sir?
4 A. No, sir.
5 MR. ROBISON: Thank you, your Honor.
6 THE COURT: Thank you.
7 Any brief redirect?
8 MR. CLAGGETT: Briefly.
9 THE COURT: Briefly.
10 REDIRECT EXAMINATION
11 BY MR. CLAGGETT:
12 Q. On the April 2nd, 2021, letter that your firm
13 drafted on behalf of Dr. Barcay, did you -- and I
14 believe this door was opened on the questions that were
15 just asked. Did you have discussions with Dr. Barcay
16 that he had told you all the way back, according to
17 your letter, at the time that he filed his supplemental
18 declaration that he was no longer of the opinion of a
19 bilateral flail chest?
20 A. I didn't understand that question.
21 Q. In the letter -- I'll get -- let me just get
22 to it here.
23 Your letter that is on Dr. Barcay's letterhead
24 dated April 2nd, 2021, addressed to you. The last
25 sentence "I corrected my error in the second

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1 declaration in my initial and rebuttal expert reports."

2 A. Yes.

3 Q. Is it your testimony under oath here today
4 that you had no prior conversations with this doctor
5 that he had corrected this mistake as early as the
6 summer of 2020?

7 A. If I'm understanding your question
8 correctly --

9 MR. ROBISON: Your Honor, please, I don't --
10 that's unintelligible, and more than that it's
11 compound.

12 THE COURT: Please rephrase.

13 BY MR. CLAGGETT:

14 Q. You -- the last sentence of this letter of
15 April 2nd, 2021, states "I corrected my error in the
16 second declaration." And you understand that second
17 declaration was filed in, I believe, July of 2020?

18 A. I think August of 2020. But, yes, I
19 understand what you're talking about.

20 Q. Okay. So he's telling you in this letter that
21 he corrected this mistake in August of 2020, correct?

22 A. Yes.

23 Q. And he says further, "I did it in my initial
24 and rebuttal expert reports"?

25 A. Yes.

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1 gave to us all these -- the second declaration, the
2 initial report where he removed bilateral flail chest,
3 but you left the initial declaration, correct, with
4 bilateral flail chest in it?

5 A. Yes. I have answered that multiple times and
6 I've explained multiple times that there was global
7 disputes including between your own experts about the
8 definition of flail chest.

9 What I understood the issue was, including
10 from Dr. Wachtel, is whether Dr. Barcay knew what the
11 definition of bilateral flail chest or flail chest at
12 all. Which Dr. Barcay responded in his reply
13 declaration why he believed he knew what flail chest
14 was and why he disagreed with what Dr. Womack's
15 definition was. Who disagrees with your expert
16 Dr. Lineback's definition.

17 So there has always in this case, including
18 between your experts, been significant dispute about
19 flail chest and the definition of flail chest. That's
20 what I understood all of it to be pertaining to.

21 Q. You never corrected your pleadings before the
22 Court to remove the argument of bilateral flail chest?

23 MR. ROBISON: Objection. Errata was filed,
24 and counsel knows an errata was filed.

25 THE COURT: Mr. Claggett.

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1 Q. And those were all produced prior to you
2 putting us on notice of the mistake?

3 A. Correct.

4 Q. My question is: This letter suggests there
5 was communications between and you Dr. Barcay as early
6 as August of 2020 that his report contained an error,
7 true?

8 A. That is what it suggests. And I did not ever
9 have any conversations with Dr. Barcay where he led me
10 to believe or told me that his initial declaration was
11 in error. I didn't learn that until March 6th.

12 Q. So your testimony under oath here today as an
13 officer of the Court and as a witness sworn in is that
14 your expert says in this letter "I corrected my mistake
15 back on August 2020," and you as the lawyer didn't know
16 that he had made a catastrophic mistake in his report?

17 A. I -- I didn't believe it to be a catastrophic
18 report. I didn't believe it to be or understand it to
19 be an error. I didn't believe that he himself believed
20 he had made an error until March 6th when we discussed
21 the fact that he didn't recall or didn't understand
22 and, at least any longer, that it was his opinion it
23 was bilateral flail chest. That was the first time I
24 knew that it was not his opinion.

25 Q. But you filed with the Court and with -- and

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1 MR. CLAGGETT: I may have that -- is that
2 wrong? There was an errata.

3 MS. BLAZICH: The day after the depo.

4 BY MR. CLAGGETT:

5 Q. Oh, the day after the deposition was done you
6 filed an errata?

7 A. Yes.

8 Q. Okay. Prior to the deposition being taken you
9 had not filed any errata with the Court; correct?

10 A. That's true.

11 Q. When --

12 MR. CLAGGETT: The Court's indulgence.

13 BY MR. CLAGGETT:

14 Q. You were aware that prior to that errata being
15 filed that the Court had already issued a preliminary
16 ruling on the motion on the trauma cap, correct?

17 A. Absolutely not.

18 Q. Are you aware that there was a preliminary
19 ruling prior to the declaration being filed?

20 A. I'm sorry?

21 Q. Are you aware that there was a preliminary
22 ruling on the trauma cap prior to the declaration being
23 filed?

24 A. I don't know what you're talking about. What
25 declaration?

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1 MR. CLAGGETT: Your Honor, can Ms. Blazich
2 help with this procedure?
3 THE COURT: No. This is your motion.
4 MR. CLAGGETT: Okay. So I'm going to just --
5 do you mind if I stand here and get my facts.
6 THE COURT: Yes. You need to confer with her
7 and get it together because we're moving on here very
8 shortly.
9 MR. CLAGGETT: So what I meant to say, to get
10 this right, is you had ruled from the bench to deny the
11 motion, but we did not have a written order.
12 BY MR. CLAGGETT:
13 Q. And between those two times is when the errata
14 was filed?
15 A. I have no idea what you're talking about. And
16 I think that's totally wrong. If the Court ruled from
17 the bench on March 5th the MSJ was denied, I missed it.
18 Q. It was the following hearing.
19 A. I -- I have no idea.
20 Q. It doesn't matter.
21 A. I have no idea what you're talking about. But
22 all I can say is -- well, I have no idea what you're
23 talking about.
24 Q. The -- you knew as a result of the initial
25 motion for summary judgment that we retained an expert

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1 Q. And did he say I have to own it?
2 A. Yes, sir.
3 MR. ROBISON: Nothing --
4 MR. CLAGGETT: What was that last question?
5 I'm sorry. I didn't hear it.
6 THE COURT: Mr. Robison, what was your last
7 question?
8 MR. ROBISON: Repeat the question.
9 THE COURT: What was your last question?
10 BY MR. ROBISON:
11 Q. Did he say he had owned that.
12 A. Yes.
13 MR. ROBISON: Thank you.
14 MR. CLAGGETT: What was the word "own?"
15 MR. ROBISON: Own. I have to own that. Like
16 owning up to not --
17 MR. CLAGGETT: Okay. I'm sorry. I
18 understand. I just didn't hear you.
19 THE COURT: Thank you, Mr. Weaver.
20 THE WITNESS: Thank you, your Honor.
21 THE COURT: Mr. Claggett, your next witness.
22 MR. CLAGGETT: Your Honor, to answer your last
23 question it's just we have -- I can make argument as
24 far as what all the work we had to do as a result of
25 this.

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1 to rebut it; correct?
2 A. Yes. Ms. Blazich has vehemently denied that,
3 but that's been our assumption.
4 Q. All right. No further questions.
5 MR. ROBISON: It will be brief.
6 THE COURT: Okay.
7 RECCROSS-EXAMINATION
8 BY MR. ROBISON:
9 Q. Mr. Weaver, after the hearing on the motion
10 for partial summary judgment that occurred on
11 March 5th, 2021, you made contact with Dr. Barcay the
12 next day?
13 A. Yes, sir.
14 Q. Did you send him that original declaration?
15 A. I don't believe so.
16 Q. Did you show him a declaration that contained
17 the words bilateral flail chest?
18 A. Yes, sir.
19 Q. And was that his declaration?
20 A. Yes, sir.
21 Q. And did he say to you, Whose declaration is
22 this?
23 A. Yes, sir.
24 Q. What did you tell him?
25 A. Yours.

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1 THE COURT: I think an affidavit would
2 probably be more appropriate.
3 MR. CLAGGETT: We can file that.
4 THE COURT: Any argument then?
5 MR. ROBISON: Your Honor, do we get to present
6 evidence?
7 THE COURT: Absolutely.
8 MR. CLAGGETT: Yes.
9 THE COURT: Thank you.
10 MR. ROBISON: I'd like to call Mr. Claggett,
11 please.
12 THE COURT: Are you -- are you done presenting
13 your evidence?
14 MR. CLAGGETT: I am.
15 THE COURT: Okay. Mr. Robison.
16 MR. ROBISON: I'd like to call Mr. Claggett to
17 the stand.
18 THE COURT: Mr. Claggett -- Or, excuse me
19 Ms. Blazich?
20 MS. BLAZICH: You said to him.
21 MR. CLAGGETT: You want me on the stand?
22 MR. ROBISON: I do.
23 THE COURT: Oh.
24 \\\
25 \\\