

1 injury at C-3/4 or C-4/5 cause occipital headaches.
2 Have?

3 Your answer is:

4 "No. Because the occipital nerve comes of the
5 C-2/3 or the third occipital nerve. And so that's
6 above the level of where the C-3 -4 and C-4 -5 nerve
7 comes out. [Audio skips].

8 "Okay. Would C-3 -4 and -4 -5, the injuries
9 that are alleged in this case cause the headache
10 pattern that you see drawn on this pain diagram?"

11 Your answer is:

12 "No. It would be more C-2-3 above that level."

13 Do you remember that testimony?

14 A Yes.

15 Q Right?

16 A Yes.

17 Q Are you aware that your colleague and codefend [sic]
18 expert in this case, Dr. Wang has testified that occipital
19 pain is often caused by radiation from a pain generating site
20 in the cervical spine at some of the same levels that
21 Mr. Simao's treating physicians diagnosed injuries in. Are
22 you aware of that?

23 A No.

24 Q Okay. You were an expert for the defense in a case
25 named Shultz versus Young. Correct?

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1 A Yes.

2 Q We referred to those depositions a couple of times

3 here today. Correct?

4 A Yes.

5 Q My firm represented the plaintiff Marjory Shultz in

6 that case. Correct?

7 A I think so. I don't recall exactly.

8 Q Well, one of the injuries that Ms. Shultz 'doctors

9 diagnosed her with and performed surgery on was an injury to

10 the C-4 -5 and C-5 discs. Correct?

11 A I don't recall.

12 Q Well, let me see if I can refresh your memory.

13 MR. EGLET: May I approach, Your Honor?

14 THE COURT: Yes.

15 BY MR. EGLET:

16 Q I'm showing you your reports from that case and

17 here's your initial report. See where I've highlighted there

18 on your report the levels of the cervical spine that we're

19 discussing. Do you see that, Doctor?

20 A Yes.

21 Q So in fact her doctors had diagnosed her with disc

22 disruption injuries at the C-4 -5 and the C-5 -6 levels.

23 Correct?

24 A Correct.

25 Q And you were hired by the defense as an expert in

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1 that case. Correct?

2 A Correct.

3 Q And your deposition was taken in that case.
4 Correct?

5 A Yes.

6 Q Your deposition was taken by one of my young
7 partners, Brad Meyers [phonetic]. You remember Brad, right?

8 A Yes.

9 Q Okay. Now Volume II -- you have that in front of
10 you -- of your deposition was taken nine months ago on June
11 22nd, 2010. Correct?

12 A Correct.

13 Q Let's see what your testimony under oath at that
14 time regarding the relationship between occipital pain and
15 neck pain injury was, shall we?

16 A Sure.

17 Q Turn to Volume II, page 54 of the Shultz deposition
18 starting on line 19.

19 MR. EGLET: And could you bring up slide 80 please,
20 Brendan.

21 BY MR. EGLET:

22 Q You let me know when you're at that line.

23 A Oh, it's up here right.

24 Q It's there too, yeah. All right, so you testified
25 in Shultz deposition under oath the following:

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1 "Q You state in your report she complained of
2 neck pain in July of 2004, 2005 -- well, 2004,
3 2005 -- April of 2005, but it's not true. It
4 doesn't say neck pain anywhere, true?"

5 Your answer was:

6 "The region again is what I was focused on
7 because the head is attached to the upper part of
8 the neck so when she complains of occipital
9 neuralgia, she's complaining of pain in the upper
10 part of her neck."

11 That was your testimony, correct?

12 A Yes.

13 Q And in this case the injuries were to C-4/5 and C-
14 5/6. Correct, Doctor?

15 A I don't remember where they were.

16 Q Well, I just showed you your IME report, didn't I?
17 And didn't that indicate that that was the level of injuries
18 to the discs from her doctors? Those are the levels you were
19 looking at. Correct?

20 A Correct.

21 MR. EGLET: Next slide please, Brendan.

22 BY MR. EGLET:

23 Q You were asked in this deposition:

24 "Okay. But occipital neuralgia is a headache
25 that emanates from the neck, right?"

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1 "A Right it's the neck.

2 "Q But she doesn't complain of neck pain.
3 She complains of headaches? And the doctor writes
4 occipital, right?

5 "A Occipital, right.

6 Q The word neck pain doesn't appear on these
7 documents, do you agree with that?"
8 And your answer is:

9 "Well, let me tell you first of all, this is an
10 internal medicine doctor, he's not a specialized
11 headache specialist; he's not a spine specialist.

12 "Q Of course."
13 And you go on and say:

14 "So he may be explaining something different
15 than what a specialist might explain so based on my
16 experience, based on what I'm telling you, based on
17 my experience with patients who have the similar
18 symptoms, the neck component or the region of the
19 upper part of the neck is part of where these
20 headaches and tension is coming from."

21 MR. EGLET: Next slide, Brendan.

22 BY MR. EGLET:

23 "Q Would you agree that it's not documented
24 specifically that she has neck pain before the
25 accident. Okay. You agree with that?

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1 "A No.

2 "Q Okay. It's documented occipital
3 neuralgia, right?

4 "A Yes.

5 "Q Can you show me a record where it says
6 neck pain?

7 "A Well, again, it's about the region.
8 That was your testimony in that case. Correct,
9 Doctor?

10 A Correct.

11 Q So in that case, where the plaintiff in the accident
12 has a C-5/6 or C-4/5, C-5/6 disc injury according to her
13 treating doctors and no history of specific neck pain before
14 the motor vehicle accident but complaints of occipital pain
15 you testified that the occipital pain before the accident was
16 related to her neck. Didn't you?

17 A Yes.

18 MR. EGLET: Thank you, Your Honor.

19 THE COURT: This may be a good opportunity for a short
20 break.

21 [Court Admonishes Jury]

22 [Recess]

23 THE MARSHAL: Please be seated. Please remain seated.

24 THE COURT: Okay. We're back in session. Will counsel
25 stipulate to the presence of the jury?

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1 MR. ROGERS: Yes. Yes, Your Honor.

2 MR. WALL: Yes, Your Honor.

3 THE COURT: Mr. Eglet, I wasn't sure if you were finished
4 in your examination.

5 MR. EGLET: I'm sorry. Yes. Your Honor, I was. I pass
6 the witness.

7 THE COURT: Okay. Mr. Rogers?

8 MR. ROGERS: Thank you.

9 REDIRECT EXAMINATION

10 BY MR. ROGERS:

11 Q Okay. Dr. Fish, I don't want to over-legalize
12 medicine -- after you've gone through everything that you have
13 with Plaintiff's counsel, the question remains, is there
14 evidence of a traumatic injury that were fused in the
15 Plaintiff's neck?

16 A No.

17 Q You were pointed to testimony that you'd given in
18 unrelated cases. And there were suggestions of inconsistency.
19 Let's focus on one of those. I believe it was Gilbert
20 [phonetic]. Are there material differences between the
21 parties in Gilbert and the parties in this case, such that
22 your testimony in Gilbert is not consistent with this one?

23 A I'm not sure what you mean by parties. You mean --

24 Q Well, in that case, you were asked to offer
25 testimony about injuries being claimed by the Plaintiff. I

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1 believe that was the case, which you worked with Plaintiff's
2 counsel on.

3 A Correct.

4 Q But were there differences in that case? I'd say
5 the Plaintiff in that case and the Plaintiff in this one, such
6 that any differences of opinion that you might have had aren't
7 material.

8 A I don't remember much about the case completely, but
9 I do remember that her airbags deployed.

10 MR. EGLET: Objection, Your Honor. May we approach?

11 THE COURT: Yes.

12 [Bench Conference Not Transcribed, Indiscernible]

13 BY MR. ROGERS:

14 Q All right. Now, Dr. Fish, getting back to the
15 comparison between this case and the Gilbert case, and taking
16 into consideration only the injuries that were being claimed
17 by the Plaintiff's cases and taking nothing else into account,
18 are there differences in so far as the gate theory applies?

19 A Yes.

20 Q Okay. And do those differences, then -- pardon me --
21 -- change your opinion in this case? You were cross-examined
22 on your opinions in Gilbert and in this case. Has your
23 opinion about the gate theory changed?

24 A No.

25 Q If you would, just briefly tell the jury again what

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1 the gate theory is.

2 MR. EGLET: Asked and answered, Your Honor.

3 MR. ROGERS: This is -- it wasn't addressed today and I
4 don't --

5 MR. EGLET: Objection. It was asked and answered last
6 Thursday, Your Honor. I move -- the same testimony.

7 THE COURT: It was. I think the jury's --

8 MR. EGLET: He spent 10 minutes explaining it.

9 THE COURT: -- been listening pretty closely. Sustained.

10 BY MR. ROGERS:

11 Q Now, next, as to Schultz [phonetic], I think the
12 questions there related namely to the masking phenomenon. Am
13 I correct?

14 A I don't -- I don't know. I don't remember the
15 masking.

16 Q Okay. And it -- and it -- then again, it might have
17 been discography because that was another issue that was
18 touched upon in the cross-examination. But let's turn to that
19 question. Here, the Plaintiff is asked whether discography is
20 100 percent reliable. And your answer is --

21 A It's not 100 percent reliable.

22 Q And as I understand it, discography is somewhat
23 controversial.

24 MR. EGLET: Objection, leading.

25 THE COURT: Sustained.

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1 MR. ROGERS: Your Honor, I thought that's what the
2 question --

3 THE COURT: I think you can probably rephrase it.

4 BY MR. ROGERS:

5 Q Okay. Is there controversy in the medical field
6 regarding discography?

7 A Yes.

8 Q Okay. Now, let's separate the spine -- lumbar, and
9 low back and cervical, meaning the neck. Is there controversy
10 in the medical field about lumbar discography?

11 A Yes.

12 Q And is there more or less controversy about
13 discography in the cervical spine of the neck?

14 A More.

15 Q Okay. And does that have something to do with
16 unreliability of the test?

17 MR. EGLET: Objection, leading.

18 THE COURT: Overruled.

19 MR. ROGERS: Go ahead?

20 THE COURT: Yes.

21 MR. ROGERS: Thank you.

22 THE WITNESS: Say it -- say it again.

23 BY MR. ROGERS:

24 Q You -- does the heightened controversy in the
25 medical field regarding cervical discography have something to

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1 do with the test's reliability?

2 A Yes.

3 Q Okay. Is cervical discography more or less reliable
4 than lumbar discography?

5 MR. EGLET: Objection, asked and answered. He just asked
6 and answered that question.

7 THE COURT: I don't recall that. Overruled.

8 THE WITNESS: Less reliable.

9 BY MR. ROGERS:

10 Q Okay. You were asked if you do cervical discography
11 at UCLA. You testified that you do.

12 A Yes.

13 Q Have you noticed a change over the years in the
14 incidence of its use -- in other words, how often it's
15 ordered?

16 A Yes.

17 Q What's the change?

18 A It's ordered less.

19 Q Okay. Is it ordered less because of this
20 reliability question?

21 A That may be part of it. Yes.

22 Q Now, in this case, the jury is going to be charged
23 with making decisions about whether this accident caused an
24 injury. Ultimately, we understand that your opinion is that
25 no injury was caused by the accident, C3-4, C4-5.

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1 But something was brought out in the direct exam --
2 or pardon me, the cross-exam. That is that the Plaintiff
3 doesn't have any documented records of neck pain for this
4 accident. Now, knowing that, Doctor, how is it that you can
5 reach an opinion to a medical probability that this accident
6 didn't cause the pain that he complained of following this
7 accident?

8 A Well, it's based on multiple factors. It's based on
9 the actual -- looking at the images of the MRI. It's looking
10 at the discogram and the results of the discogram. It's
11 looking at the pattern of pain. It's looking at the notes
12 that were taken of the events that happened and it's knowing
13 about the accident itself.

14 MR. EGLET: Objection, move to strike.

15 THE COURT: The jury will disregard the witness's last
16 phrase.

17 MR. EGLET: Your Honor, may we approach?

18 THE COURT: Yes.

19 [Bench Conference Begins]

20 MR. EGLET: [Indiscernible] motion on the record, outside
21 the presence?

22 UNIDENTIFIED SPEAKER: [Indiscernible] motion now.
23 That's it.

24 THE COURT: Okay. Go ahead.

25 MR. ROGERS: Shall we finish him, and then give the

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1 motion?

2 UNIDENTIFIED SPEAKER: Not at the rate he's going.

3 UNIDENTIFIED SPEAKER: Not at the rate he's going.

4 MR. ROGERS: [Indiscernible] that's just about it.

5 THE COURT: What's left?

6 MR. ROGERS: That's just about it is what I mean, Your
7 Honor.

8 UNIDENTIFIED SPEAKER: Well, what does that mean? One
9 question? [Indiscernible].

10 MR. ROGERS: Well, I guess if he can't finish this
11 answer, then I can look at my notes briefly [indiscernible].

12 THE COURT: Why don't you take a moment to do that.

13 MR. ROGERS: Thank you.

14 {Bench Conference Ends}

15 MR. ROGERS: Okay, Doctor. That's all I have. Thank
16 you.

17 THE WITNESS: Okay.

18 THE COURT: Ladies and gentlemen of the jury, there's
19 something we need to discuss outside your presence as a matter
20 of law, so I'm going to ask that you take about a 10-minute
21 break. And I need to give you your obligation not to discuss
22 this case, form, or express any opinion or do any research.

23 [Jury Out]

24 THE COURT: Outside the jury's presence, Mr. Wall --

25 MR. WALL: I think the doctor can be excused. The -- we

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1 don't have any more recross, Your Honor.

2 THE COURT: Very well.

3 MR. ROGERS: You're done.

4 THE WITNESS: Thank you.

5 MR. WALL: Judge, we have requested the sidebar
6 outside --

7 THE COURT: Thank you.

8 MR. WALL: -- of the presence of the jury and I want to
9 make a record on a request that we have, that we have talked
10 about at the bench today, prior to that last question and
11 answer from Dr. Fish and that we talked about on Friday. And
12 that's this issue of minor impact. You know the history.
13 There was -- an original motion in limine specifically sought
14 to preclude the Defendant from raising a minor impact defense.

15 The whole defense -- we said in the motion the
16 Defense must be precluded from commenting upon the dynamics of
17 the motor vehicle crash and from arguing, suggesting or
18 insinuating at trial that the crash was a minor-impact or low-
19 impact collision and not significant to cause -- enough to
20 cause Mr. Simao's injuries. It was based on the clear law,
21 saying that this biomechanical opinion has to be made by a
22 qualified expert and Defense had none.

23 So you can't argue or have your witnesses try to
24 establish that the motor vehicle accident was somehow too
25 minor to cause the injuries he suffered.

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1 We also asked in the motion to limit the testimony
2 of Dr. Fish regarding any minor-impact or biomechanical
3 opinion and to preclude admission of the vehicle photos or
4 damage estimates, all for the exact same reason, because the
5 only reason they'd be relevant is to set up a minor-impact
6 argument, that this vehicle accident was too minor to cause
7 Mr. Simao's injuries without any expert testimony, without any
8 testimony whatsoever, that would actually justify that
9 conclusion. The Court granted the motion.

10 The order said, specifically, it is hereby ordered
11 that Plaintiff's request to preclude Defendant from raising a
12 minor- or low-impact defense is granted. The order also said
13 neither Dr. Fish nor any other Defense expert shall opine
14 regarding biomechanics or the nature of the impact of the
15 subject crash at trial. It also said it's further ordered
16 that Plaintiff's request to exclude the property damage photos
17 and repair invoices is granted.

18 I would submit to the Court it doesn't get a whole
19 lot clearer than that. At the 2.67 conference on March 10th
20 of this year, it was clear that this was an issue for the
21 Defense. Mr. Rogers appeared to be under the impression that
22 the order from the Court was only that the Defendant can't
23 argue a minor impact couldn't cause injury, but not that the
24 evidence of this accident being minor was excluded.

25 I don't know how you glean that from the papers, and

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1 the order and the hearing, but that was his understanding
2 before trial. So we had the discussion on the record, outside
3 the presence, on March 18th, 2011. Mr. Rogers was here.
4 Mr. Poulsenberg [phonetic] was here.

5 Again, the Court made it clear that any evidence of
6 a minor impact defense, to set up any argument that this motor
7 vehicle accident was too minor to cause the injury is
8 precluded. They asked, well, can we say minor impact in
9 opening and you said no. They said, can we say tap in
10 opening, and you said no.

11 And at that point, we also argue that the motion
12 itself and the order were very clear about what the Court
13 precluded. Then began the systematic violations of the
14 Court's order and I'm only talking about minor impact, not any
15 other violations of any other court orders. In the opening,
16 on page 63 of the transcript, Mr. Rogers minimized the
17 potential impact of the motor vehicle accident, sought to
18 introduce evidence from the Defendant's deposition regarding
19 the nature of the motor vehicle accident on page 64, said he
20 will get to describe the motor -- Ms. Rich [phonetic] will be
21 -- will get to describe the motor vehicle accident and we're
22 very much looking forward to our opportunity to do that on
23 page 65.

24 During the cross-examination of Dr. Rosler, this
25 question -- did you know anything about what happened to Jenny

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1 Rish and her passengers in the accident? That was March 22nd,
2 page 84 of the transcript. The only possible purpose of that
3 is to raise some argument that, since she wasn't hurt, the
4 impact must not have been severe enough to cause an injury to
5 my client. We objected. It was sustained.

6 The examination of Dr. Fish last Thursday -- during
7 the voir dire portion when we asked him whether he understood
8 the orders in this case, he was apparently unaware of all of
9 them, specifically the issue of minor impact. During the
10 cross-examination of Dr. McNulty, a question whether he knows
11 whether or not Ms. Rish was injured in the motor vehicle
12 accident -- that's the transcript of March 25th on page four.

13 THE COURT: Who did he pose that question to, Mr. Wall?

14 MR. WALL: Dr. McNulty. Again, the only purpose is to
15 raise some minor impact defense. The objection, which was
16 immediate, was sustained. During the cross-examination of Dr.
17 Grover, same day, last Friday, the question whether he knows
18 whether or not the Defendant, Jenny Rish, was injured in the
19 accident -- again, I think it's on page 140, but I'm not sure.
20 Again, the only purpose is to raise a minor-impact defense.

21 There's no other potential relevance about whether
22 the Defendant, or anyone in her car, was injured in the
23 accident. The objection was sustained. There was a
24 discussion on the record before we left yesterday regarding --
25 or before we left on Friday, regarding this issue again. I

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1 made a record that I thought that, at some point, progressive
2 sanctions would be necessary.

3 And if it -- if it occurred again, the same
4 violation of the same court order, that we would seek a
5 progressive sanction. Dr. Fish, in his cross-examination,
6 tried to distinguish the Gilbert case by saying, well, yes, in
7 that very significant motor vehicle accident, and
8 distinguished it from this one.

9 Just a moment ago, his opinion as to why there is no
10 causation -- or he has an opinion that there's no causation of
11 Mr. Simao's injuries from this accident, among the things he
12 listed were the MRIs -- that's fine -- the pattern of pain --
13 that's fine -- the events that occurred -- I don't know what
14 that means.

15 And then he said, and then knowing about the
16 accident itself, which again, raises the issue that the
17 Defense and Dr. Fish continue to try to maintain, without any
18 expert testimony, that this was a minor impact, not sufficient
19 enough to cause Mr. Simao's injuries. So we're asking for
20 that progressive sanction now. Frankly, in reviewing the case
21 law, I think that it would not be inappropriate for us, at
22 this point, to strike the answer.

23 But what we're going to ask for, instead, is an
24 intermediate sanction of a special jury instruction in the way
25 of an adverse inference, or a rebuttable or irrebuttable

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1 presumption instruction. And the standard that the Nevada
2 Supreme Court has looked at from Bass Davis [phonetic], in
3 reviewing a court's adverse inference instruction or
4 presumption instruction, is as follows.

5 If the Trial Court, in rendering its discretionary
6 ruling on whether to give an adverse inference instruction,
7 has examined the relevant facts, applied a proper standard of
8 law and utilizing a demonstratively rational process, reached
9 a conclusion that a reasonable judge could reach, then
10 affirmance is appropriate.

11 And the standard for what action to take comes from
12 the Young case, Young v. Ribeiro [phonetic], the 1990 case
13 where the Supreme Court upheld the ultimate sanction of
14 dismissing a complaint for repeated violations. In that case,
15 it was discovery violations, but the standard from Young
16 applies also in lesser sanctions.

17 And there's -- factors for the Court to consider
18 before either taking an action as extreme as striking the
19 answer or some lesser sanction such as a burden or a
20 presumption instruction are the following. One of the factors
21 is the degree of willfulness of the violation of the Court's
22 order. There have been so many warnings in this case and a
23 complete failure to not only instruct Dr. Fish, but to abide
24 by the Court's order in the questions asked of the treating
25 physicians.

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1 This is a clear continuing violation, based on the
2 questions that were asked of not only Dr. Fish, but
3 Dr. Rosler, Dr. McNulty and Dr. Grover. And for those three,
4 it was the exact same question that was objected to each time.
5 Another factor is the extent to which the non-offending party
6 would be prejudiced by a lesser sanction. At this point, the
7 bell has been rung so many times that just directing the jury
8 to disregard it at this point is insufficient.

9 Would a lesser sanction of an irrebuttable
10 presumption be appropriate? That is what we are suggesting to
11 the Court in lieu of striking the answer. Another factor is
12 the severity of the sanction, relative to the severity of the
13 abuse. If we're talking about striking the answer, it would
14 need to be a very significant discovery abuse.

15 But it's also relevant here because the next factor
16 is the feasibility or fairness of an alternative, less severe
17 sanction than actually striking the answer. The sanction
18 should fit the violation, based on the case law that's come
19 down -- Foster [phonetic], the Goodyear case. The whole issue
20 here is, they're trying to say this is a minor impact when
21 there's no evidence to support that it was too minor to cause
22 my client's injuries, no evidence, no expert evidence, no
23 evidence whatsoever.

24 So the sanction of an irrebuttable presumption, an
25 instruction to the jury that there is an irrebuttable

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1 presumption that the motor vehicle accident was sufficient to
2 cause the type of injury claimed to have been suffered by the
3 Plaintiff fits the violation. It would allow the jury to
4 irrebuttably presume the very fact that they have no
5 admissible evidence to contest.

6 One of the other factors under Young is a policy
7 favoring adjudication of the merits. And I -- and I
8 absolutely recognize this. So we're not asking, at this
9 point, to strike the answer. But again, they have zero
10 admissible evidence. They have zero evidence whatsoever to
11 support this theory of minor impact.

12 So the Court wouldn't be taking away their ability
13 to do anything that they would otherwise be able to do,
14 because they have no evidence to foster this minor-impact
15 defense. Another factor is whether the sanctions unfairly
16 penalize a party for the misconduct of his attorney. I would
17 focus on the word unfairly. Here, again, they're not being
18 precluded from doing anything that they would ordinarily have
19 the ability to do because they don't have any evidence that
20 ties minor impact to the injuries.

21 So it's not unfairly penalizing them at all. All
22 it's doing is telling the jury that this argument that they
23 persist in trying to make, forgetting the fact that they have
24 no evidence of it, but that the Court has clearly and
25 repeatedly precluded them from doing, is to tell the jury that

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1 there is an irrebuttable presumption that the nature of this
2 particular motor vehicle accident would be sufficient to cause
3 the injuries suffered by Mr. Simao.

4 They still have the right to argue whether it did in
5 this case. They still have the right to argue whatever they
6 want about the treatment being reasonable and necessary, which
7 is the focus of their case. But it just prevents them from
8 continuing to violate a court order by raising a minor-impact
9 defense when they have no evidence to support it. That would
10 be our request at this point, but if it continues, we're not
11 stating for the record that we wouldn't argue to strike the
12 answer at some future time.

13 THE COURT: Mr. Rogers?

14 MR. ROGERS: Thank you, Your Honor. The Defense would
15 request the opportunity to brief this. It appears that
16 Plaintiff came prepared for this argument in a fashion that
17 the Defense is not prepared off the cuff. It seems that this
18 is, at a minimum, an excessive remedy for something that Your
19 Honor observed. You know that Defense -- neither Jenny Rish
20 nor counsel -- attempted in any fashion to elicit testimony
21 about the accident. I think everybody here knows this. And
22 there truly was no game being played at all.

23 I did everything I could to steer him right to the
24 medicine. And that was -- well, you saw the consequence. I
25 do believe that this is a harsh remedy and I'd ask, at a

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1 minimum, for the opportunity to be able to brief it because
2 Jenny Rish will be charged with quite a sanction for something
3 that I don't think she -- and I know that I had anything to do
4 with.

5 THE COURT: Let me ask you something, Mr. Rogers, and
6 that is this. I mean, you've been here the whole time. You
7 know perfectly well what this witness testified to.

8 MR. ROGERS: Yes.

9 THE COURT: You were here when he was admonished. What
10 do you think is an appropriate sanction, given his willful
11 violation of the Court's orders?

12 MR. ROGERS: Well, that's a question I'd truly appreciate
13 the opportunity of being able to brief. I didn't know that
14 this would be coming today. I didn't know that the Defense
15 would be facing a motion such as this today. And I'm,
16 frankly, not clear on all the available sanctions. I simply
17 suggest that an irrebuttable presumption on something as vague
18 as cause of the Plaintiff's alleged injury, which covers a
19 wide array of conditions -- he isn't simply claiming what
20 injury; he's claiming several -- that it seems that there's a
21 remedy that better fits Dr. Fish's testimony than that.

22 And I've made assurances to you and to Plaintiff's
23 counsel that I am meeting with the witnesses that we're
24 calling and advising them of the Court's orders. The problem
25 is that the medicine in this case is something that really

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1 should be brought to the jury's attention.

2 And striking witnesses seems too much, particularly
3 when, for example, Dr. Fish's testimony stands on its own
4 without any comment about the accident because he was talking
5 about the diagnostics, and the clinical presentation and
6 things that are strictly limited to the medicine. And I think
7 you saw that it was -- a thing that he seemed to be able to
8 separate was the accident and the medicine. I can meet with
9 Dr. Wong [phonetic], who is testifying tomorrow, and tell him,
10 do not make this mistake. Keep the accident separate.

11 The Court has ordered that the accident is out, that
12 any evidence of this accident, you're not to comment on it.
13 And if there's a further violation even after that, we can
14 revisit it. I don't anticipate there will be. But I know
15 you're not looking forward. You're looking back right now at
16 Dr. Fish. And on that question, all I can say is, I would
17 like the opportunity to brief it before the Court makes a
18 decision on -- a ruling on the motion.

19 THE COURT: Okay.

20 MR. WALL: A couple things, Judge -- first of all, to say
21 that they didn't have some inkling that this would occur --
22 that's why I made the record I did Friday afternoon.
23 Secondly, with great respect to Mr. Rogers, to say that
24 neither he nor his client elicit any of this is absolutely
25 incorrect.

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1 He's the one who asked Dr. McNulty, are you aware of
2 whether or not the Defendant was injured in this accident?
3 Objection, sustained, discussion at the bench about why it
4 isn't coming in, because it's minor impact and there's an
5 order in place. Asked the same question. Actually, Dr.
6 Rosler was first -- same thing. Asked the same questions of
7 Dr. McNulty, I would say, within five minutes of the beginning
8 of cross-examination, the exact same question, objection,
9 discussion at the bench, minor impact, sustained.

10 Hours later, same day, the same question asked of
11 Dr. Grover on cross, exactly the same issue. Did he elicit it
12 from Dr. Fish today? I can't say it's the same as what he did
13 last week. But to say that at no time did he elicit any
14 response for the violations that I've talked about is
15 incorrect.

16 Finally, an irrebuttable presumption -- that means
17 the jury can presume that this accident could be or is
18 sufficient enough to cause the type of injury that my client
19 suffered. It's not a rebuttable presumption because there is
20 no evidence to be able to rebut it. It just means that they
21 can't continue to raise this issue of minor impact, that the
22 accident was too minor to cause his injuries because they're
23 not allowed to.

24 There's no evidence to support it. There's no law
25 that supports it. There's no expert that supports it. So in

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1 -- if it was a rebuttable presumption, if you said, you know
2 what, ladies and gentlemen, there's a rebuttable presumption
3 that the accident was significant to cause the type of
4 injuries that Mr. Simao suffered, that opens the door to them
5 to be able to try to rebut it by having their client say well,
6 you know, it was just a tap, or to have Dr. Fish say, well, it
7 seems like it was just a tap, according to Ms. Rish.

8 So that's why it's an irrebuttable presumption.
9 They can't rebut it. That's what your motion -- that's what
10 your order was, that they can't rebut it. They can't even
11 raise it. Now that they've thrown it out there, and they've
12 thrown it out there recently with Dr. Fish, which is why it
13 needs to be addressed right now with the jury, is the jury
14 needs to be instructed that there is an irrebuttable
15 presumption that the accident in question was sufficient to
16 cause the type of injury that Mr. Simao complains of.

17 Did it cause that injury? That's still an open
18 question, so causation is -- we're not getting an instruction
19 on causation, just to eliminate this minor-impact defense.

20 THE COURT: Something --

21 MR. ROGERS: If I may.

22 THE COURT: -- further, Mr. Rogers?

23 MR. ROGERS: If I may, right. I limited my comments to
24 Dr. Fish's testimony. The testimony or questioning of the
25 other witnesses really was borne of something that I'm afraid

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1 the Court is unpersuaded by, and that is that the Defense has
2 stated from the outset that we're not sure where we stop.

3 We know that we can't say minor impact and we know
4 we can't say tap, but what we can say is something that I know
5 that this has been not well received by the Court. But that's
6 the truth. We haven't ever commented on anything relating to
7 the severity of the impact, and that's why Dr. Grover's
8 testimony seems such a moment to the Defense because he, in
9 our view, characterized the impact in a fashion that it seemed
10 the Court wouldn't allow.

11 But whether we can say, for example, as we did in
12 opening statement, that the accident occurred in stop-and-go-
13 traffic, we just don't know where we're allowed to go and
14 where we're not allowed to go. There was no intention at any
15 point to violate the Court's order. It was simply trying to
16 figure out where it ends.

17 And that's what the point of the opening was. And
18 as to the questions asked of Drs. McNulty, and Grover and
19 Rosler, one of the questions, actually, that we intended to
20 ask, but the objection was brought, was whether the doctor was
21 aware that the Plaintiff drove from the scene. I was never
22 aware that, that might be a problem, that, that might offend
23 or violate the Court's order.

24 I was going to ask that -- the doctor next, did you
25 know that Jenny Rish drove from the scene? Those were the

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1 words that I was going to speak, but as soon as I said Jenny
2 Rish, the objection came. Not knowing that -- whether Jenny
3 Rish drove from the scene might violate this order, the
4 problem is this. There's an order on a motion, striking the
5 Defense that a minor impact can't cause injury.

6 Now, that much, I do understand. I get that that's
7 the Court's order. But can we describe the facts of the
8 accident? And I -- and if we can, I don't know where to stop.
9 I don't know whether I can say Jenny Rish drove from the
10 scene, as we've said. I don't know whether I can say or have
11 Jenny Rish testify that this is what happened, that this is
12 how I arrived at the scene and this is what I was doing five
13 minutes before. I just don't know what I can and can't do.

14 There is no intent here to violate the order. It
15 truly is a problem of not knowing. So if we have a clear
16 order saying, listen, you can't say this and you can't say
17 that, I won't. I won't ask another witness, were you aware
18 that Jenny Rish wasn't injured, were you aware that she drove
19 from the scene. I just don't know what it is of those
20 questions that I'm not permitted to ask a witness.

21 And I don't say this to frustrate you. I can tell
22 that you seem unpersuaded by it, and for that, I'm sorry. But
23 the truth is, I am not clear.

24 THE COURT: Well, you know, these -- I'm sorry. Were you
25 finished --

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1 MR. ROGERS: I am.

2 THE COURT: -- Mr. Rogers?

3 MR. ROGERS: I am.

4 THE COURT: These pre-trial motions in limine were
5 extensively briefed and argued. And I don't have the
6 particular motion in limine in front of me, the one that
7 precluded Defense from arguing that this was a minor impact,
8 and also that, furthermore, that this minor impact couldn't
9 possibly have caused the injuries to Plaintiff, that Plaintiff
10 sustained.

11 But the point of the matter was that Defense had no
12 witness who could testify that this was a minor impact and no
13 witness who could testify that this was a minor impact that
14 could not have caused the injuries to Plaintiff, that
15 Plaintiff sustained. Defense simply didn't have any witnesses
16 to so testify. That's why the motion in limine was granted.

17 MR. ROGERS: Okay. No --

18 THE COURT: You know, I think --

19 MR. ROGERS: -- expert witness, I think it was, Your
20 Honor.

21 THE COURT: Right. No expert witness, which is --

22 MR. ROGERS: Right.

23 THE COURT: -- what would be required to, you know, come
24 to those conclusions. That's exactly what would be required.
25 So you know, you're right. You know, I'm not persuaded by

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1 that argument. We've heard it before and it's not persuasive.
2 I think the motion should be granted.

3 Trying to think of a sanction that's suitable -- I
4 don't know what other sanction the Court could impose.
5 Plaintiff is not asking that the answer be stricken.
6 Plaintiff's not even asking that the entire testimony of Dr.
7 Fish be stricken. Plaintiff's asking for an irrebuttable
8 presumption. And I think, reviewing the factors laid out in
9 the Bass Davis case, that, that's an appropriate sanction, so
10 the motion is granted.

11 MR. ROGERS: And again, Your Honor, may I -- may I brief
12 that, but before a final decision --

13 MR. EGLET: Your Honor, we --

14 MR. ROGERS: -- is reached

15 MR. EGLET: This bell has got to be unring right now with
16 this jury and we cannot wait. If he wants to file a brief
17 after that fact -- but the Court's ruled.

18 THE COURT: I've made -- I've made my ruling.

19 MR. EGLET: We can draft this, based on Mr. Wall's
20 research. And I think he basically said it out loud a minute
21 ago, that the -- and we can draft this instruction for the
22 Court to give as soon as the jury comes back.

23 THE COURT: Well, then, I wish you would because I wasn't
24 able to draft it in my own mind at this particular moment.
25 It's late in the afternoon. Let's take a five-minute break.

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1 MR. WALL: Thank you, Your Honor.

2 MR. EGLET: Thank you, Your Honor.

3 [Recess]

4 [Outside the Presence of the Jury]

5 THE COURT: Okay. Outside the jury's presence.

6 Mr. Wall.

7 MR. WALL: Judge, I crafted an instruction that reads as
8 follows.

9 "The Defendant has, on numerous occasions,
10 attempted to introduce evidence that the accident of
11 April 15, 2005, was somehow too minor to cause the
12 injuries complained of. This type of evidence has
13 previously been precluded by this court. In view of
14 that, this court instructs the members of the jury
15 that there is an irrebuttable presumption that the
16 motor vehicle accident of April 15, 2005 was
17 sufficient to cause the type of injuries sustained
18 by the Plaintiff. Whether it proximately caused
19 those injuries remains a question for the jury to
20 determine."

21 And if you need it to see what's stricken --

22 THE COURT: Mr. Rogers.

23 MR. ROGERS: I have proposed revisions. First, that the
24 prefatory paragraph, everything up to this Court instructs the
25 members of the jury, not be provided in this instruction.

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1 THE COURT: So the instruction would read how?

2 MR. ROGERS: It begins this court instructs the members
3 of the jury that this is an irrebuttable presumption that the
4 motor vehicle accident of April 15, 2005 was sufficient to
5 potentially cause the type of injuries sustained by the
6 Plaintiff. Whether it proximately caused those injuries
7 remains a question for the jury to determine.

8 THE COURT: So is that language you read just now the
9 same language as Mr. Wall's, only without the preceding
10 statements?

11 MR. ROGERS: Yes, except for one word, and that is
12 sufficient to cause is the way the Plaintiff wrote it. The
13 way the defense suggested it is sufficient to potentially
14 cause.

15 MR. WALL: My position is that that last sentence that
16 says whether it actually caused or proximately caused the
17 injuries is the question for the jury, which is the -- a
18 question for the jury to determine, which takes away the idea
19 that the Court is telling them that this crash caused these
20 injuries.

21 As for the initial part, I think the jury needs to
22 know why, in light of the fact that this has been raised on a
23 number of occasions, why the Court is giving them this
24 instruction at this point in time. And that's why I prefaced
25 it with the language that I did.

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1 Do you want to see it?

2 THE COURT: Please.

3 MR. WALL: May I approach, Your Honor?

4 THE COURT: Yes. If I can read your writing.

5 MR. ROGERS: When you're done with that, Your Honor, I

6 have a couple of points I'd like to add.

7 THE COURT: Sure. Okay. Mr. Rogers.

8 MR. ROGERS: Thank you. The suggestion from the defense

9 that the instruction begin with this court and go forward from

10 there --

11 THE COURT: No, it proposes the Defendant has --

12 MR. ROGERS: I'm sorry?

13 MR. WALL: It's --

14 MR. ROGERS: Oh, no. Remember, I said the defense

15 objects to that prefatory paragraph --

16 THE COURT: Right.

17 MR. ROGERS: And has requested that the instruction read

18 from the words this court.

19 THE COURT: Uh-huh, okay.

20 MR. ROGERS: And however, what the defense is suggesting

21 that that instruction be supplied to the jury along with all

22 the other instructions. The sanction that the Court is

23 entering is substantial. And reading it now with that

24 prefatory paragraph to the jury is far more substantial and

25 prejudicial to the defense than the simple instruction would

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1 be along with -- provided along with all the other
2 instructions to be given to the jury.

3 And I guess an admonition charging the defense right
4 now as it reads would truly be devastating to Jenny Rish's
5 case. It might very well end the case for her, and I think
6 that would be excessive.

7 THE COURT: Mr. Wall.

8 MR. WALL: I think Mr. Rogers is partly correct. I think
9 that when we give the instructions to the jury at the close of
10 the case, that it should only -- it shouldn't have that
11 prefatory language and it should probably begin from this
12 court or even right in that area. We're talking about nearly,
13 maybe more than, a half a dozen violations of this particular
14 order alone. The last thing they heard was a rush to the
15 bench after Dr. Fish testified that one of the reasons there's
16 no causation is knowing about the accident itself. He's told
17 them that the knows about the accident, and the accident
18 itself is insufficient to cause the injuries that Mr. Simao
19 complains of. And because that has been clearly precluded by
20 the Court, I got to tell you, Mr. Eglet and I begged him at
21 the bench not to ask the question, because we knew that Dr.
22 Fish would go beyond where he was supposed to go. Actually,
23 this was, I guess, recross. So it came out again on recross.

24 But for the repeated violations, I think the first
25 part of that instruction -- they need to know why they're

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1 getting this instruction at this point in time, especially
2 with the last thing they heard.

3 THE COURT: Well, did you have something further,
4 Mr. Rogers?

5 MR. ROGERS: Yeah. It's just the fact that these
6 instructions, when they're read to the jury, come along with a
7 form instruction that tells them that they're to consider all
8 of those instructions and the laws equally and not to
9 prioritize one over the other.

10 Here, reading this instruction out of order and at
11 this point in time, would be -- as I said earlier, would
12 simply devastate the defense.

13 MR. EGLET: This is -- well, the defense has duck this
14 hole. Whether it devastates them or not, I don't know. I
15 think that's an over-exaggeration of the situation -- of this
16 instruction. But these instructions are curative -- this is a
17 curative instruction, Your Honor. Curative instructions are
18 given during the trial when the curative instruction needs to
19 be given. That's why it has to be given now. It has to be
20 given to this jury before we just, you know, go on to the end
21 of the trial and all this is forgotten about and this is
22 drilled into their head, all these, you know, violations.
23 It's got to be done now. It has to be done now, so that it
24 actually cures the problem and they understand, and they now
25 look at this case, from this point forward with that

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1 understanding. It is imperative that this instruction be
2 given now, Your Honor.

3 THE COURT: Well, I think the instruction does have to be
4 given now. It is a curative instruction. And I'm only
5 inclined to make a minor change to it, frankly, Mr. Wall. The
6 language that you've got here reads "The Defendant has, on
7 numerous occasions, attempted to introduce evidence that the
8 accident of April 15, 2005 was, somehow, too minor to cause
9 the injuries complained of." I'm inclined to remove the
10 somehow. I think it's sort of argument. But the rest of the
11 instruction, I'm inclined to leave it intact.

12 I agree with counsel that when the jury gets all of
13 the rest of the instructions, this instruction needs to be
14 pared down just to the cite to the irrebuttable presumption
15 language. So it will have to be refined.

16 MR. WALL: That's fine, Judge. What's the last sentence
17 that's written there?

18 THE COURT: Whether it proximately caused those injuries
19 remains a question for the jury to determine.

20 MR. WALL: Probably after that should say under further
21 instruction from the Court.

22 THE COURT: Do you agree, Mr. Rogers?

23 MR. ROGERS: No. I mean that's confusing.

24 MR. WALL: All right. We'll take it out.

25 [Counsel Confer]

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1 THE COURT: Anything else or can we bring our panel in?
2 MR. EGLET: Bring them in.
3 MR. ROGERS: No.
4 THE COURT: What have we got after this?
5 MR. EGLET: We've got Dr. Arita waiting in the hall.
6 We're ready to put him on right -- Your Honor, as soon as you
7 read the instruction.
8 MR. WALL: We won't--
9 MR. EGLET: In fact, we can have him on the stand.
10 MR. WALL: We won't finish him.
11 MR. EGLET: We won't finish him today. We're going to
12 have to bring him back on Wednesday. They have Dr. Wong
13 tomorrow. So we're going to bring him back on Wednesday and
14 finish him.
15 THE COURT: Will we finish Wong tomorrow?
16 MR. EGLET: Yeah, we'll finish Wong tomorrow. Well, I
17 mean unless -- look, I haven't met Dr. Wong, but I can't
18 imagine -- my review of his depositions is he's not like Dr.
19 Fish. Let me just put it that way.
20 THE COURT: We're not going to try to do more than Dr.
21 Wong though, are we?
22 MR. EGLET: No, just Dr. Wong.
23 THE COURT: Okay. All right. Let me see if I can find
24 where my bailiff went.
25 [Pause]

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1 [Jury In]

2 THE COURT: Please be seated, ladies and gentlemen.

3 Counsel stipulate to the presence of the jury?

4 MR. ROGERS: Yes, Your Honor.

5 MR. WALL: Yes, Your Honor.

6 THE COURT: Ladies and gentlemen of the jury, first of
7 all, I want to apologize on behalf of the Court and counsel
8 for the delay. There were some things we had to discuss
9 outside your presence.

10 Furthermore, ladies and gentlemen of the jury, the
11 Defendant has, on numerous occasions, attempted to introduce
12 evidence that the accident of April 15, 2005 was too minor to
13 cause the injuries complained of. This type of evidence has
14 previously been precluded by this court.

15 In view of that, this court instructs the members of
16 the jury that there is an irrebuttable presumption that the
17 motor vehicle accident of April 15, 2005 was sufficient to
18 cause the type of injuries sustained by the Plaintiff.
19 Whether it proximately caused those injuries remains a
20 question for the jury to determine.

21 THE COURT: Okay. Who's the next witness, Mr. Wall?

22 MR. WALL: Your Honor, it's Dr. Arita.

23 THE COURT: Very well.

24 We'll ask you to stand. Raise your right hand to be
25 sworn by Madame Clerk. Over here, doctor.

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1 DR. ADAM ARITA, PLAINTIFFS' WITNESS, SWORN

2 THE CLERK: Please be seated. State and spell your name
3 for the record.

4 THE WITNESS: Adam Arita, A-r-i-t-a.

5 DIRECT EXAMINATION

6 BY MR. WALL:

7 Q It's Dr. Arita, is that correct?

8 A Yes.

9 Q Doctor, would you please tell the jury the type of
10 specialty of medicine that you practice?

11 A I'm an anesthesiologist, and I also have
12 subspecialty training in pain management.

13 Q Describe for us your educational background.

14 A I completed medical training at University of
15 Southern California, which is known as the Tech School of
16 Medicine, and then followed that with my anesthesiology
17 residency at Los Angeles County USC Medical Center. And then
18 I also went and did a pain fellowship, which was an additional
19 year at University of Massachusetts, in Worcester,
20 Massachusetts.

21 Q Are you board certified?

22 A Yes, in both --

23 Q In both areas?

24 A -- anesthesiology and pain management.

25 Q All right. What does it mean to be board certified?

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1 A It means you've completed the instruction, as in
2 residency and fellowship training, and you've also taken an
3 examination and passed that to achieve that certification.

4 Q And you said you're board certified in both
5 anesthesia and pain management?

6 A That's correct.

7 Q What's the difference?

8 A Anesthesiology is a four-year residency program.
9 And when you complete that residency, you do have some
10 experience in pain management but you don't have the same
11 degree of specialty as far as the number of patients you see,
12 the number of procedures you do in that specific field. So
13 most people that practice pain management these days have done
14 an additional year of training beyond the residency training,
15 and then take the examination to satisfy the requirements.

16 Q Do you belong to any professional memberships or
17 organizations?

18 A Yes. I belong to the American Society of
19 Anesthesiologists and the Society of Cardiovascular
20 Anesthesiologists.

21 Q You have hospital privileges in town then?

22 A Yes, at all the hospitals in Las Vegas.

23 MR. WALL: Your Honor, I offer Dr. Arita at this point.
24 I qualify him as an expert in the area of anesthesiology and
25 pain management.

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1 THE COURT: Any objection?

2 MR. ROGERS: No, Your Honor.

3 THE COURT: So ordered.

4 BY MR. WALL:

5 Q Doctor, could you characterize for us your current
6 practice?

7 A I primarily practice anesthesia as in being in the
8 operating room and putting patients asleep for surgery. I
9 specialize in cardiac anesthesia and neuroanesthesia.

10 Q So for heart type surgeries and neurosurgery?

11 A Right, which would be either brain or spine.

12 Q All right. Have you had an opportunity in the past
13 to practice anesthesiology as a pain management specialist
14 here in Las Vegas?

15 A Yes, I have. I did full-time pain management for
16 Southwest Medical Associates.

17 Q And during what period of time was that?

18 A That was from 2006 to 2007, from the months I
19 believe of July through August.

20 Q When you were with Southwest Medical Associates as a
21 pain management specialist, what type of clinical problems did
22 you ordinarily evaluate and treat on a regular basis?

23 A Lots of spine pathologies, as in pain from the low
24 back or neck, as well as abdominal and other musculoskeletal
25 type of problems from rheumatitis [sic] -- or I'm sorry --

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1 arthritis and other kinds of rheumatological disorders.

2 Q Now while you were at Southwest Medical, did you
3 have an opportunity to provide care and treatment to my
4 client, Mr. Simao?

5 A Yes, I did.

6 Q And how did he come under your care?

7 A I first met the patient when we were at a surgery
8 center to perform a specific procedure, known as a selective
9 nerve root block.

10 Q Did Southwest Medical Associates, at that time, have
11 a specific pain management center?

12 A Yes, they did.

13 Q And is that where you worked at that time?

14 A Yes.

15 Q All right. When you first met him, do you remember
16 when that was?

17 A Yes, it's October 3rd, 2006.

18 Q And that was your first encounter with Mr. Simao, is
19 that right?

20 A That's correct.

21 Q What were the circumstances surrounding his first
22 encounter with you on October 3rd, 2006?

23 A He had a neck and arm pain problem on the left side,
24 which we elected to perform a left selective nerve root block
25 of the Cervical 4 nerve.

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1 Q Now before that date, before October 3rd, 2006, had
2 you had the opportunity to interview or obtain a medical
3 history for Mr. Simao?

4 A No, I hadn't.

5 Q Before October 3rd, 2006, did you have the
6 opportunity to perform a physical examination on him?

7 A No, I didn't.

8 Q Before your initial encounter with Mr. Simao on that
9 date, did you have the opportunity to formulate a differential
10 diagnosis for the symptoms being evaluated and treated on that
11 date at Southwest Medical?

12 A No, I didn't.

13 Q I'm sorry?

14 A I did not.

15 Q What's a differential diagnosis by the way?

16 A It's when you list a few of the potential different
17 reasons why a person has that said problem that you're seeing
18 them for. It could be an explanation on why the pain in the
19 neck and arm exists.

20 Q You're trying to rule certain things out medically?

21 A Yes.

22 Q Okay. So when you initially met him on October 3rd,
23 2006, was it based on your recommendation that he undergo a
24 repeat cervical injection?

25 A No, it was not.

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1 Q Can you explain for the members of the jury how it
2 is that he came to see you on October 3rd, 2006 for an
3 invasive cervical spine injection without you having had the
4 opportunity to interview him, obtain a medical history from
5 him, examine him, or formulate your own clinical impressions
6 of him, or make any formal recommendations for what his pain
7 management treatment should be?

8 A It was practice at Southwest Medical Associates to
9 have midlevel providers, such as physician assistants or nurse
10 practitioners, evaluate some of the patients in the clinic
11 first, and then for them to formulate a specific plan with the
12 supervision of one of the physicians in the clinic to have
13 procedures or medications. So in this particular instance,
14 Doug Young was the physician assistant who specifically
15 referred this patient for this procedure on the day that I saw
16 this patient on October 3rd, 2006.

17 Q So what is a physician's assistant?

18 A He is a medical provider that has completed about
19 two years of education and is able to assist physicians, as in
20 prescribe certain medication within a certain scope of
21 practice and to evaluate patients for certain types of
22 procedures, as these types of procedures are.

23 Q So nurses, physician's assistants, are those the
24 kind of providers that you described as midlevel providers?

25 A Yes.

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1 Q Are they supposed to act independently in their
2 evaluation and treatment of patients at Southwest Medical?

3 A No, they are supervised by physicians.

4 Q Do they have sort of a sponsor, a physician sponsor?

5 A Yes.

6 Q And even though they have this sponsor and under --
7 are under constant supervision by a physician as you've
8 described, were patients at Southwest Medical always seen and
9 evaluated by that physician sponsor or a supervising physician
10 every time they went to Southwest Medical?

11 A No, not unless there was a question or a concern
12 about that patient specifically that required the physician to
13 see or intervene in that patient's care.

14 Q All right. So what did you do for Mr. Simao on
15 October 3rd, 2006 other than the injection?

16 A I basically confirmed that he had the specific
17 procedure scheduled and made sure he had no further questions
18 about the procedure before I did it.

19 Q And was that by having access to his prior medical
20 records?

21 A Yes.

22 Q All right. In terms of those prior records, when
23 did Mr. Simao initially present for evaluation at Southwest
24 Medical after his motor vehicle accident in April of 2005?

25 A I believe it was three hours after the accident on

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1 April 15th, 2005.

2 Q Okay. To your right there is a screen that has a
3 medical record that is page 1 of Exhibit 18. Does that
4 correlate with the time and date that he first appeared at
5 Southwest Medical after the accident?

6 A Yes.

7 Q And what was his chief complaint to the urgent care
8 clinic at Southwest Medical on that date?

9 A Neck, back, and shoulder pain.

10 Q And what history was obtained from him at that time?

11 A That he had been involved in a motor vehicle
12 accident, and that he was the driver of a large van that was
13 rear ended at an unknown speed, nearly stopped on the freeway.
14 And he had a flexion extension movement of his head, which
15 caused him to strike the back of his head on a cage inside of
16 the work van.

17 Q What's a flexion -- or hyper flexion and extension
18 --

19 A It may be more easily understood as a whiplash
20 injury.

21 Q And he presented with complaints at that time
22 regarding his -- what parts of his body?

23 A The back of his head, neck, shoulder, and left
24 elbow.

25 Q If -- based on that record, if someone had told the

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1 jury that he didn't suffer any neck pain after this accident,
2 would that be a correct statement based on the records?

3 A No, it would not.

4 Q And what significant findings were documented on
5 Mr. Simao's physical examination on that date?

6 A He had scalp tenderness to palpation in the midline
7 of his occipital area. He had no palpable deformity. He had
8 midline cervical spine tenderness at about C6, and no
9 trapezius pain noted. And he had a full range of motion of
10 his neck.

11 Q Okay. That screen that's to your right, have you
12 used that before? You can actually, with your finger or with
13 the -- I guess with your finger, you can actually write on
14 it --

15 A Okay.

16 Q -- and erase it if you need to. Where is the mid
17 occipital area? Can you demonstrate for us?

18 A Would you like me to demonstrate on that model?

19 Q Absolutely.

20 MR. WALL: Can -- may he step down here?

21 THE COURT: Yes.

22 MR. WALL: All right.

23 THE WITNESS: This is a model of the spine. And
24 basically, just so we have orientation, this is the top, the
25 head, and this is the bottom, the lower back. And there are

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1 basically seven cervical vertebrae here. There's 12 thoracic
2 vertebrae, and then there's five lumbar. So that's how it's
3 divided up.

4 At the top here, this is just a portion of the back
5 of the head, which would be considered the occiput. So that's
6 the occipital area of the head.

7 BY MR. WALL:

8 Q Immediately above the cervical spine?

9 A That's correct.

10 Q Thank you. You may have a seat. So based on the
11 records, were x-rays obtained on the first date, April 15th,
12 2005?

13 A Yes. X-rays of the cervical spine, the left elbow,
14 and the left forearm were noted having no fractures, just
15 displacement.

16 Q All right. So they x-rayed his neck, his left elbow
17 and forearm, and found no fractures, is that right?

18 A Correct, yes.

19 Q And that was a normal I guess what you'd call a
20 plain film x-ray?

21 A Yes.

22 Q Would plain film x-rays rule out any soft tissue
23 injuries to those parts of the body?

24 A No, it would not.

25 Q Why not?

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1 A Because this is for the bones that have
2 calcification. So that's what appears on the plain x-rays,
3 whereas soft tissue injuries would not appear on this type of
4 imaging study.

5 Q Now you told us a little bit about the results of
6 those x-rays. Do you see page 3 of Exhibit 18 to your right?

7 A Yes.

8 Q And what does it say was the result of those x-rays?

9 A No evidence of cervical spine fracture.

10 Q So, essentially, they ruled out a fracture, a broken
11 bone, at that point, is that right?

12 A Yes.

13 Q Now does a normal plain film cervical spine x-ray
14 performed within hours of a patient involved in a motor
15 vehicle accident, and presenting with neck pain, does that
16 rule out an injury to the cervical spine?

17 A No, it does not.

18 Q Why not?

19 A Because you will not see these kinds of injuries, as
20 in a torn ligament or a herniated disc, on a plain x-ray.

21 Q So what was the clinical assessment of Mr. Simao's
22 injuries after his evaluation at the urgent care on the date
23 of the accident, April 15th, 2005?

24 A They believed he had a left elbow sprain and a
25 contusion of his scalp.

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1 MR. WALL: Page 2, please.

2 BY MR. WALL:

3 Q A contusion of his scalp?

4 A Yes. It's a bruise, basically.

5 Q A bruise on the --

6 A The back of the head in the scalp.

7 Q If someone had told this jury that Mr. Simao didn't
8 have any abrasions or contusions as a result of this accident,
9 based on that record, would that statement be incorrect?

10 A It'd be incorrect.

11 Q What's meant by a sprain or a strain?

12 A A sprain or a strain is basically when you have a
13 soft tissue injury that results in like muscle tearing,
14 ligaments tearing but generally is not thought to be something
15 that won't heal. That's what we consider a sprain or a
16 strain. So a bruise would be considered something along those
17 lines.

18 Q Now does an initial diagnosis of cervical sprain or
19 strain rule out the possibility of a more significant disc or
20 facet injury to the cervical spine?

21 A No, it doesn't.

22 Q Why not?

23 A Because you would not be able to see that either on
24 these plain x-rays during the injury, or you would not be able
25 to recognize that just based on somebody's symptoms of having

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1 pain in that specified area. You can't say for absolute
2 certainty that it doesn't exist.

3 Q Let me ask you this. In your experience, are
4 traumatically injured patients ultimately that -- that are
5 ultimately diagnosed with some sort of cervical disc injury
6 almost always originally diagnosed in the emergency room as
7 having some sort of cervical sprain or strain?

8 A Yes, it's very common to have that diagnosis.

9 Q All right. So on the day of the accident, April
10 15th, 2005, what was recommended as treatment for the injuries
11 that Mr. Simao sustained in that --

12 A They recommended that ibuprofen and something called
13 cyclobenzaprin be prescribed, and that the patient would come
14 back if there were any other problems, basically.

15 Q All right. Did they place him -- it says the
16 patient was placed in a left upper extremity sling. So that's
17 -- his left arm was placed in a sling?

18 A Yes.

19 Q Ibuprofen, what's ibuprofen?

20 A It's a non-steroidal anti-inflammatory drug. And
21 basically, that helps decrease the mediators of inflammation.
22 So it would be something like an aspirin. So it helps kind of
23 treat the symptoms of having a bruise.

24 Q And what's Flexural?

25 A It's a muscle relaxant. And it's basically thought

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1 to work similar to like a cyclic antidepressant, and it
2 relaxes muscles. That's basically how they think it works.

3 Q Now does the record from April 15th, 2005 indicate
4 whether Mr. Simao was seen by a physician during that visit?

5 A No, the patient was seen by a medical assistant and
6 a physician assistant.

7 Q I asked you about a nurse and physician's assistant.
8 What's a medical assistant?

9 A It's a person that helps bring in a patient to the
10 waiting room, usually take their vital signs, and maybe take
11 the chief reason why they came to that particular setting.

12 MR. WALL: Page 8, please.

13 BY MR. WALL:

14 Q Do you know when Mr. Simao was next evaluated at
15 Southwest Medical?

16 A It looks like May 4th, 2005.

17 Q And what was his chief complaint at that time?

18 A Check up on headaches, motor vehicle accident on
19 April 2005.

20 Q All right. What additional history was obtained
21 from Mr. Simao during that visit?

22 A He was seen as a follow-up from his accident, and
23 that he was rear-ended, and that he had a head bang against
24 the wall of a cargo van while he's driving. And he was
25 evaluated by that first visit with a cervical spine x-ray,

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1 which was negative, and that he was complaining of occipital
2 head pain that felt like it was inside of his head and he the
3 pressure like sensation. And he also mentioned that he had a
4 history of migraine headaches.

5 Q Does the record suggest whether or not Mr. Simao
6 indicated that the migraine pain that he had before the
7 accident was the same as the pain he was having on May 4th,
8 2005?

9 A It had the impression that this was different than
10 his original migraine headache, that he was having this deep
11 pressure pain that was at the back of his head, not
12 necessarily the same kind of pulsing pain that he might have
13 from a migraine.

14 Q All right, thank you.

15 MR. WALL: Page 9, please Brennan.

16 BY MR. WALL:

17 Q What positive findings were documented on Mr.
18 Simao's examination on that date, May 4, 2005?

19 A He had positive tenderness to sensation over the
20 occipital scalp area, and that --

21 Q The -- go ahead. I'm sorry.

22 A -- that there were palpable masses and no defects
23 over the scalp or skull.

24 Q The occipital area is the same place. We're talking
25 back -- about the same place where the contusion was?

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1 A Yes.

2 Q And these portions of the cervical spine that are
3 ultimately involved in this case are in close proximity to the
4 occipital bone in the skull?

5 A Yes.

6 Q What is referred pain?

7 A That's when you have pain that is felt in a
8 different part of the body that your problem may be located
9 at. For example, if you had a herniated disc, you may have
10 some pain in your neck where that disc is herniated, but it
11 may be causing pressure on a nerve. And that pressure on the
12 nerve is felt like in the arm or the hand, somewhere distant
13 from the site of where the actual injury is. So referred
14 pain, referring to another part of the body as opposed to the
15 part that the pain is actually located in.

16 Q So can an injury to the cervical spine, as you've
17 described, whether it be a simple sprain or strain, or a more
18 significant disc or facet injury, present clinically as
19 referred pain to the occipital or suboccipital area?

20 A It can. So a pain can start from the back of the
21 neck and it can go up towards the head or the occiput.

22 Q And how does that happen?

23 A By this mechanism of what we term referred pain. So
24 pain may actually originate in a different part than you
25 actually feel the pain located at.

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1 Q All right. What was the clinical assessment of Mr.
2 Simao on May 4th, 2005?

3 A That he was involved in a motor vehicle accident
4 with a potential closed head trauma.

5 Q All right. Now what does that signal to a physician
6 when they see post motor vehicle accident, potential closed
7 head trauma?

8 A That can indicate that there is concern enough that
9 there may be a bleed or some kind of blood clot formed inside
10 of the head, which can be life threatening.

11 Q Now when you talked a minute ago about a
12 differential diagnosis, trying to rule certain things out, do
13 you try to rule out the most serious life threatening ones
14 first?

15 A Yes.

16 Q Okay. And is a closed head trauma a potentially
17 life threatening complication?

18 A Yes.

19 Q So would it have been prudent at that point for the
20 providers at Southwest Medical to get right on that issue and
21 try to rule out any intracranial bleed or any type of closed
22 head trauma?

23 A Yes.

24 Q Okay. What are the consequences of intracranial
25 bleeds or closed head trauma, especially if it's not addressed

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1 at this point?

2 A Well, a person can suffer death, or they could have
3 a serious nerve problem after having such a thing unrecognized
4 and untreated.

5 Q Can the same whiplash or hyper-flexion and extension
6 mechanism of injury that you talked about before also cause --
7 well, can it cause head trauma?

8 A Well, what we're talking about is two separate
9 things. A flexion extension type of injury can result in the
10 cervical problems that we've talked a little bit about. But
11 the problem with the bleed in the brain is a separate type of
12 problem that wouldn't necessarily result directly from the
13 flexion extension but could happen with an actual blow to the
14 head like he had with the cage --

15 Q Right. So it's not --

16 A -- contacting his skull.

17 Q It's not the actual bending of the neck. That might
18 cause a cervical injury.

19 A Correct.

20 Q But bending of the neck and a whiplash and banging
21 it against something would -- could potentially cause that
22 trauma, is that right?

23 MR. ROGERS: Your Honor, this raises the same objections
24 we already addressed with Dr. Grover.

25 THE COURT: Would counsel approach, please?

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1 [Bench Conference Begins]

2 MR. ROGERS: The Court has already ruled on whether
3 comments about the accident can be made, and counsel is up
4 here making it seem and characterizing it as a serious
5 condition, and banging and whipping, and doing things that the
6 Court is not permitting the defense to address.

7 MR. WALL: Our defense is that there is a treatment on
8 the head, trauma, during May of 2005. And the reason I
9 addressed the head trauma is because he banged his head and
10 had a contusion on the back of his scalp. I addressed that
11 first [indiscernible] CT scan of his brain, an MRI of his
12 brain. That's why we're addressing why the doctors
13 [indiscernible] addressed that first in May of 2005.

14 MR. ROGERS: The why isn't the concern. It's the how.
15 It's the words that they're using to characterize this event
16 now that are opening the door to cross-examination about it.

17 MR. WALL: But I'm about to elicit from him
18 [indiscernible] all those tests came back [indiscernible].

19 THE COURT: All right. I'm going to overrule the
20 objection as posed, but I think it would have been sustained
21 had it been leading, objection leading. Proceed on that
22 basis.

23 MR. WALL: All right, thank you.

24 [Bench Conference Ends]

25 ///

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1 BY MR. WALL:

2 Q So based on the possibility that they have some
3 closed injury, what diagnostic test was ordered the further
4 evaluate that potential closed head trauma?

5 A A CT of the head.

6 Q And what's a CT?

7 A It's a computerized tomography which is something
8 that can reproduce, by imaging of the brain, what is inside.
9 So if there was a bleed, it would show up differently on that
10 particular study than if it were normal brain.

11 Q Now on May 4th, 2005, who at Southwest Medical
12 actually saw Mr. Simao?

13 A It was a physician assistant, Brett Hill [phonetic].

14 Q And is there any documentation suggesting that he
15 was seen by a physician, a doctor on May 4th, 2005?

16 A No.

17 Q What were the results of that CT scan done May 4th
18 or May 5th, 2005?

19 A It was normal scan without -- yeah.

20 Q Which suggests --

21 A Without a bleed.

22 Q Which suggests what?

23 A That there wasn't a bleed. There wasn't a
24 hemorrhage or some kind of life threatening type problem that
25 existed.

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1 Q Well, other than ruling out some intracranial source
2 of his symptoms, did the negative CT scan of his brain
3 clinically help in identifying the source of his occipital
4 pain?

5 A No.

6 Q All right. When would he -- when was he seen next
7 at Southwest Medical?

8 A It was May 12th, 2005.

9 Q All right. And that was at an urgent care, right?

10 A Yes.

11 Q What were his documented symptoms at that time?

12 A Headache, numbness of the upper lip, and nose, and
13 involved in a motor vehicle accident on April 15, 2005.

14 Q On that date, did he still describe the pressure
15 sensation in his occipital head?

16 A Yes, he did.

17 Q And that was after being involved in the motor
18 vehicle accident?

19 A Yes.

20 Q Based on your review of the records up to this
21 point, May 12th, 2005, would it be your opinion that his
22 documented symptoms were present on an ongoing basis since the
23 time of the accident?

24 A Yes.

25 Q And the portion of his -- under the subjective

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1 description, what did the patient describe specifically?

2 A Pressure scalp radiating to side at times.

3 Q And what does that suggest to you? How do you
4 interpret that documented symptom?

5 A It could mean that there were referred type pains
6 from the back of his head to the side of his head or neck.

7 Q So I guess we're talking about the occipital area to
8 the side?

9 A Yes.

10 Q And how would you interpret the documented physical
11 examination done that date, May 12th, 2005?

12 A It could be either something originating at the back
13 of the neck, as in a cervical problem, or it could mean that
14 the headache was going forward from the back of the head into
15 the side of his neck.

16 Q Now the actual examination that was done on that
17 date, what type of examination was it?

18 A It was a focused examination as in it wasn't a
19 complete physical.

20 Q What's the difference?

21 A When you have a focused physical examination, you
22 just look for the very specific things that might rule in or
23 rule out a problem, or for the specific purpose of that visit.
24 So you may not do a head to toe physical examination, as in
25 doing a rectal exam or do a full neurological exam, but you

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1 might look at some specific things. Like they documented the
2 chest, the neural exam, and the HENT exam, but they didn't do
3 like a rectal, for example.

4 Q Well, does the record suggest that there was a
5 physical examination of his neck or spine at that time, May
6 12th, 2005?

7 A They documented that the neck was supple with a full
8 range of motion and was non-tender, but there was nothing
9 detailed about the specifics of the cervical nerves.

10 Q Now is there also a description of a tension type
11 headache --

12 A Yes.

13 Q -- in the assessment?

14 A Yes.

15 Q At that point, they had a negative CT scan of the
16 brain, is that right?

17 A Yes.

18 Q Can a tension type occipital headache be caused by
19 an injury to the cervical spine?

20 A It can be.

21 Q And would you explain to us how that could be?

22 A It could be, as we discussed earlier, about a
23 referred type of pain problem.

24 Q All right. So what further diagnostic evaluation
25 was ordered from Mr. Simao's persistent and ongoing symptoms

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1 since the motor vehicle accident on that date, May 12th, 2005?

2 A They ordered what's called an MRI.

3 Q All right. Of what?

4 A The brain.

5 Q And what is an MRI of the brain?

6 A Stands for magnetic resonance image.

7 Q And what are they looking for?

8 A They're looking for intracranial lesions, as in a
9 tumor, a brain tumor. Or it can be blood also. But usually,
10 we've already looked at that particular problem as a
11 potential, but it might show something more subtle, a smaller
12 bleed, one that you wouldn't see on the CT scan.

13 Q As of this date, what medications did Mr. Simao
14 remain on for his ongoing symptoms?

15 A He was on Fiorinal, which is Butalbital, and he was
16 on amitriptyline and ibuprofen and the Flexural.

17 Q Okay. Ibuprofen is the anti-inflammatory?

18 A Correct.

19 Q And Flexural is still the muscle relaxant type
20 medicine?

21 A That's correct.

22 Q Is there any documentation that on this date, May
23 12th, 2005, Mr. Simao was evaluated by a physician?

24 A No, he was seen by a physician assistant.

25 Q And what was the reason that he would be referred?

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1 Is it just the possible -- something inside his brain, that
2 that's why he'd be referred for an MRI of his brain?

3 A Yes.

4 Q And again, is this one of those things, an
5 intracranial lesion, that would be part of a differential
6 diagnosis?

7 A Yes.

8 Q Why would that be a focus at that point, if someone
9 saw his medical file, that there might be concern about?

10 A Well, a brain tumor, if it's recognized earlier, can
11 be much more treatable than when it's grown past a certain
12 stage that can't be treated any long. So I mean if that were
13 an intracranial lesion, you'd want to find it as soon as you
14 possibly could. And if it was a bleed, another reason to find
15 it early would be, obviously, if there were ongoing bleed or
16 the -- or that blood clot were growing, it could cause more
17 damage.

18 Q Could an intracranial lesion, if present, have been
19 caused by trauma from an accident?

20 A Well, it depends on what kind of lesion we're
21 talking about. If it's a solid lesion, as a brain tumor, no,
22 it wouldn't be caused by an accident. But if it were
23 bleeding, as in a clot of some type, then yes, it could have
24 been potentially caused by the accident.

25 Q So at Southwest Medical, they're at least justified

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1 in trying to rule that out after the accident as part of their
2 differential diagnosis?

3 A Yes.

4 Q All right. The next presentation by Mr. Simao to
5 Southwest Medical was on May 26th, 2005, is that right?

6 A Yes.

7 Q And were the results of that MRI on his brain
8 discussed with him at that time?

9 A Yes.

10 Q And who did he meet with on that date? Does the
11 record --

12 A It was Brett Hill, the physician assistant.

13 Q And what were the results of that MRI of his brain?

14 A It was normal.

15 Q All right. On this date, other than documenting
16 that he had a history of migraine headaches, experienced a
17 change in the intensity and character of those headaches after
18 the accident, did Mr. Hill document any pertinent history with
19 respect to Mr. Simao's symptoms on that date?

20 A Well, it did state that he had a headache intensity
21 that had changed, and that it was more frequent than it was
22 before the accident.

23 Q Does the record suggest that Mr. Hill performed any
24 examination or any lab work by Mr. Simao on that date, May
25 26th?

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1 A It looks like they primarily discussed the results.
2 And other than the documented vital signs that were taken,
3 nothing further examination wise was performed on that visit.

4 Q So as of this date, May 26th, 2005, they had done x-
5 rays of the neck and the head, is that right?

6 A Yes.

7 Q CT scan of the head?

8 A Yes.

9 Q And MRI of the brain?

10 A Yes.

11 Q And all of those had essentially come back what?

12 A Normal.

13 Q All right.

14 A Negative.

15 Q And so, what did Mr. Hill recommend to Mr. Simao on
16 May 26th, 2005?

17 A He will continue the medications, as needed, for his
18 migraine headaches. He will schedule a routine follow up in
19 the next six months. And that no further lab work was
20 required.

21 Q Now our -- Motrin is the same thing as ibuprofen,
22 right?

23 A Yes.

24 Q Are Motrin and Flexural normally used to treat
25 migraine headaches?

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1 A No.

2 Q Are they more commonly used to treat something else?

3 A Yes.

4 Q What?

5 A Sprains, strains, tension type headaches.

6 Q All right. And again, on May 26th, 2005, is there
7 any evidence to suggest that Mr. Simao saw a physician at
8 Southwest Medical on that date?

9 A No.

10 Q All right. After your review of Mr. Simao's initial
11 post motor vehicle accident and evaluation at Southwest
12 Medical, do you agree with the assessment of his midlevel
13 medical providers that he sustained an injury to his neck as a
14 result of the April 15th, 2005 motor vehicle accident?

15 A Yes.

16 Q And would you characterize for us the documentation
17 Mr. Simao's symptomatic presentation to those midlevel medical
18 providers during that period of May of 2005?

19 A Well, I think they did the appropriate thing by
20 ruling out the most urgent thing that we could worry about at
21 that point, which he has some kind of a bleed in his head that
22 could be life threatening. So that was appropriately done.
23 But they left all the potential other reasons for why he might
24 have had neck pain unworked up or wasn't further evaluated at
25 that point.

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1 Q Did he appear to consistently complain of occipital
2 pain during that period?

3 A Yes.

4 Q And those things that they tried to rule out, are
5 any of those inconsistent with him having neck pain in May of
6 2005?

7 A No.

8 Q All right. Why is that? Can you explain that for
9 us?

10 A Well, they felt that a lot of these things were
11 temporary, that, you know, a strain or sprain, and therefore,
12 it should get better in six months. That's what they were
13 thinking at that time. So they told him, basically, you know,
14 we'll see you back in six months after everything, hopefully,
15 will be healed.

16 Q Now the different pain generators in the cervical
17 spine, can -- how do they -- how can they present? What kinds
18 of different things would they present and maybe were
19 presented to the midlevel providers during this period, in May
20 of 2005?

21 A Well, there could have been facet or disc injury at
22 the time, but it wouldn't necessarily be something obvious to
23 somebody that wasn't a doctor. Some of these things they did
24 as midlevel providers were to rule out the most important
25 thing, like these life threatening things. But going the next

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1 step may not be something they're familiar with or as
2 comfortable in doing at that particular time.

3 Q Well, in ruling out some of those more serious head
4 things that they tried to rule out with the CT scan and the
5 MRI, after his initial presentation to Southwest Medical with
6 neck pain and being diagnosed with a neck sprain or strain
7 after his April 15th, 2005 motor vehicle accidents --
8 accident, do the medical records for May of 2005 indicate or
9 document whether his midlevel medical providers asked him
10 whether he had neck pain or if his neck pain had resolved
11 following the accident?

12 A No, they didn't.

13 Q Is it possible you, in reviewing these records, or
14 any other physician, to tell by the -- as of May of 2005, at
15 Southwest Medical, whether or not Mr. Hill or any other
16 midlevel medical provider obtained any history with respect to
17 his neck symptoms during this time period?

18 A No.

19 Q Is it a patient's responsibility to convey all of
20 his problems and symptoms to his medical providers without
21 being asked or prompted?

22 A No.

23 Q Why not?

24 A Because patients don't all have medical training to
25 know what specific things they should be worried about. And

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1 things that may be prompted by a physician or somebody that's
2 experienced in these kinds of problems would rule out or ask
3 specific questions to determine whether those were problems or
4 not. And that's not something a patient would necessarily
5 know how to do.

6 Q What is the patient's responsibility?

7 A To just show up for a visit and try to present the
8 information that they have available to them the best they
9 can.

10 Q Was it the responsibility of Mr. Simao's medical
11 providers to ask and document follow up questions with regard
12 to his initial presentation with neck pain and neck strain?

13 A Well, I believe that they didn't go any further with
14 that, but that didn't mean it didn't exist. And so, it's --
15 it would be a responsibility if it were documented in the
16 beginning that he did have this problem and it needed to be
17 addressed and it didn't get followed up. But I don't see that
18 they really fully recognized it as a problem other than it
19 being resulting from the injury, from the accident.

20 Q Let me ask it this way. In May of 2005, based on
21 the Southwest Medical records, did his midlevel providers ever
22 document that his neck pain had resolved?

23 A No.

24 Q Did they ever document even an absence of neck pain
25 during this period?

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1 A No.

2 Q Is that something that you would have done as a
3 medical doctor?

4 A Yes, because I have this special training, but not
5 necessarily these midlevel providers.

6 Q All right. Let me ask you this. Is it possible for
7 pain at one site to mask or trivialize pain in another site in
8 the body?

9 A Yes. I believe you're referring to the gate control
10 theory.

11 Q We've heard a little bit about the gate theory of
12 pain. What is it?

13 A It's basically that when you have a certain pain
14 problem, and that is the most intense pain, it will cover up
15 areas that may be less painful. So there is a gate that
16 controls which way the pain can go. One will be let in. The
17 other one won't be. So if there's another pain problem that's
18 less severe at a certain time, it wouldn't necessarily be
19 recognized, because that gate would be closed to that area.

20 Q Would the gate theory of pain be one explanation for
21 Mr. Simao not complaining of neck pain during the evaluation
22 of his head injuries in May of 2005?

23 A It's possible, because his head pain could have been
24 much more severe than the neck pain.

25 Q All right. So as of May 26th, 2005, they told him

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1 follow up, as needed, in the next six months. That's what you
2 told us is in the record?

3 A Yes.

4 Q Was it reasonable for Mr. Simao to take the advice
5 of his midlevel medical providers on that date and continue to
6 try to treat his symptoms, as needed, at home, with Motrin and
7 Flexural, and return, as needed, in six months?

8 A Yes.

9 Q Do you expect patients to take and follow the advice
10 of their medical providers?

11 A Yes, I do.

12 Q Was it reasonable for Mr. Simao to take that advice
13 even if he remained symptomatic during that period of up to
14 six months?

15 A Yes.

16 Q Why?

17 A Because he may have felt that it would have gotten
18 better, and that he had waited to the point where he was told
19 that was the normal expectation, to wait six months. And then
20 when that time was getting close, then he would be saying yes,
21 it's either getting better or no, it's not.

22 Q When was he next seen at Southwest Medical?

23 A Looks like April 6th, 2005 -- or I'm sorry --
24 October 6th, 2005.

25 Q And what was he seen for at that time?

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1 A He was -- as a follow up. And -- let me review this
2 real quick. He --

3 Q Look to your right.

4 A It's a follow up for his neck and shoulder pain and
5 headaches.

6 Q And what history was obtained from him at that time?

7 A He states that the pain was getting worse in the
8 last few months, and they were more frequent. And he was also
9 having nausea and vomiting with the headaches. And it says it
10 started with a tightness in his left shoulder and radiated up
11 into his neck. And then he developed a full migraine headache
12 after that.

13 Q It started in his left shoulder and radiated up into
14 his neck?

15 A Yes.

16 Q If someone had told this jury that on October 6th,
17 2005, if he didn't have neck pain, he didn't complain of neck
18 pain, based on your review of the record, is that correct or
19 not?

20 A That's not correct.

21 MR. WALL: Judge, I know it's near 5:00. Whenever you --

22 THE COURT: Really a good time to break for the evening.
23 It's my understanding that this witness can't return tomorrow,
24 because of scheduling issues?

25 MR. WALL: That's correct, Judge.

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1 THE COURT: So we'll have to make arrangements to have --
2 ask him to come back at a later point in time. Just so the
3 jury is not confused tomorrow when we hear from another
4 witness, we haven't finished with this witness yet.

5 So I remind you of your ongoing obligation.

6 Actually, could I ask counsel to approach for a
7 moment, please?

8 MR. WALL: Sure.

9 MR. WALL: Can the doctor step down now?

10 THE COURT: Yeah. With that understanding, doctor, if
11 you'd be so kind to return on another day. You'll be advised
12 by counsel.

13 THE WITNESS: Okay.

14 THE COURT: Thank you.

15 [Bench Conference Begins]

16 THE COURT: I wanted to talk to you about this issue
17 before I excuse the [indiscernible].

18 MR. EGLET: Yeah. There was a noise going on when you
19 were reading the instruction.

20 THE COURT: There was?

21 MR. EGLET: Yeah, there was some paper being shuffled and
22 stuff. And so, I couldn't hear part of it either. So I think
23 you probably need to read the instruction again. That's what
24 they're talking about.

25 MR. ROGERS: I would object to that.

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1 THE COURT: You've got a jury who's saying they didn't
2 hear. We told this jury they're entitled to hear all the
3 evidence. They're entitled to everything in this case. This
4 juror is entitled to hear that. So I --

5 MR. ROGERS: We do not [indiscernible].

6 MR. EGLET: Yeah, [indiscernible] instruction.

7 MR. ROGERS: I object to it again.

8 [Bench Conference Ends]

9 THE COURT: Ladies and gentlemen of the jury, there was a
10 question submitted by one of you which reads:

11 I'm sorry, Judge Walsh. I didn't hear everything
12 that you said to the jury after we came back from the
13 discussion of law. Thank you.

14 I'm going to ask that this be marked as Court's
15 Exhibit next in order.

16 It's my understanding there may have been some
17 noise. So I'll try to speak a little louder. What I read to
18 you was as follows.^^

19 "The Defendant has, on numerous occasions,
20 attempted to introduce evidence that the accident of
21 April 15, 2005, was too minor to cause the injuries
22 complained of. This type of evidence has previously
23 been precluded by this court. In view of that, this
24 court instructs the members of the jury that there
25 is an irrebuttable presumption that the motor

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1 vehicle accident of April 15, 2005 was sufficient to
2 cause the type of injuries sustained by the
3 Plaintiff. Whether it proximately caused those
4 injuries remains a question for the jury to
5 determine."

6 [Court Admonishes Jury]

7 THE COURT: You may be excused for the evening. Please
8 return tomorrow promptly at 1:00. Thank you.

9 [Proceedings Concluded at 4:53 p.m.]
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1 ATTEST: I do hereby certify that I have truly and correctly
2 transcribed the audio/video recording in the above-entitled
3 case to the best of my ability.
4
5

6 Dianna Aldom

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10 Alexandra MacDonald

11 ALEXANDRA MACDONALD, Transcriber
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13

14 Erica L Van Ostrand

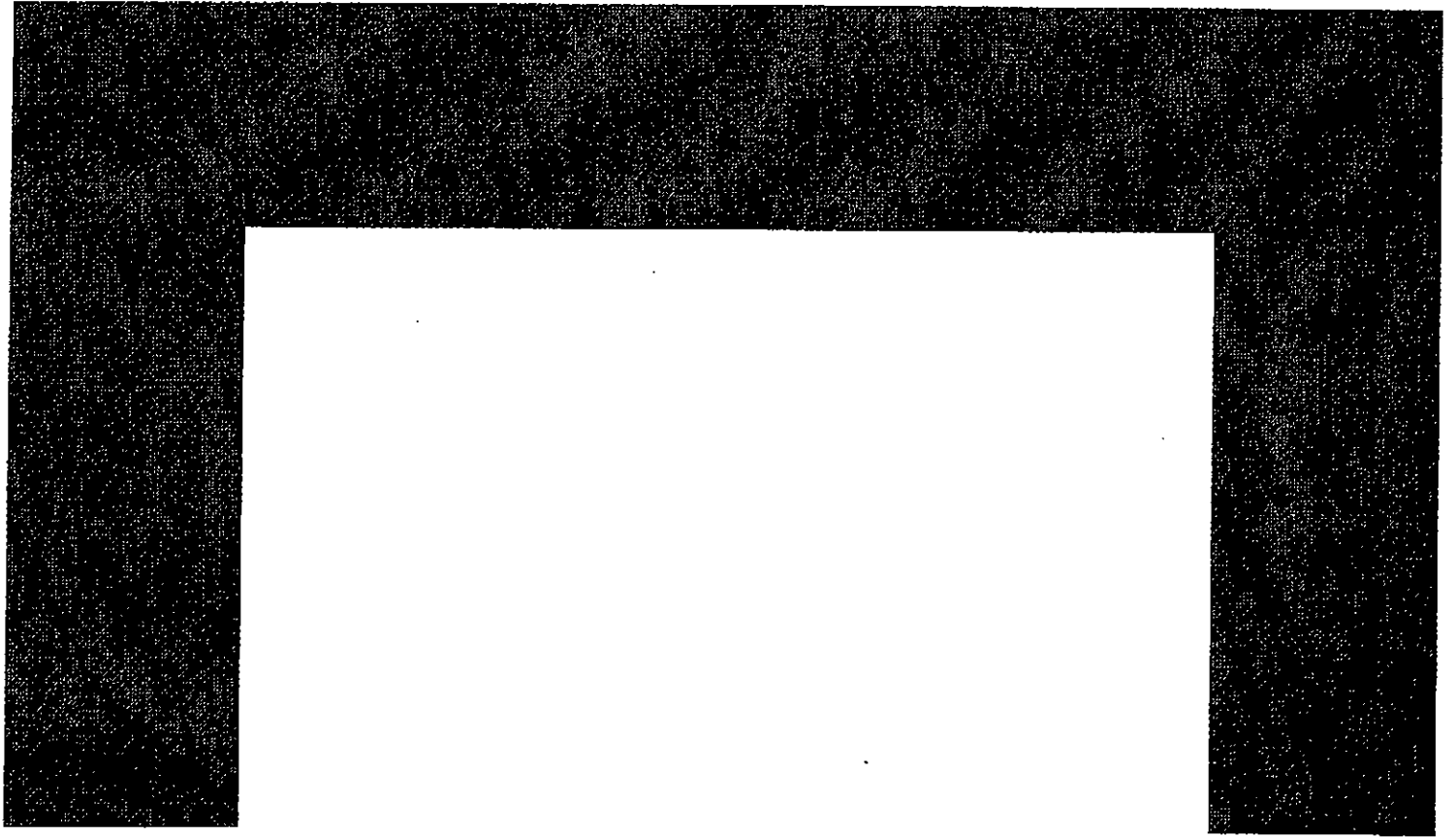
15 ERICA L. VAN OSTRAND, Transcriber
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18 Antoinette M Franks

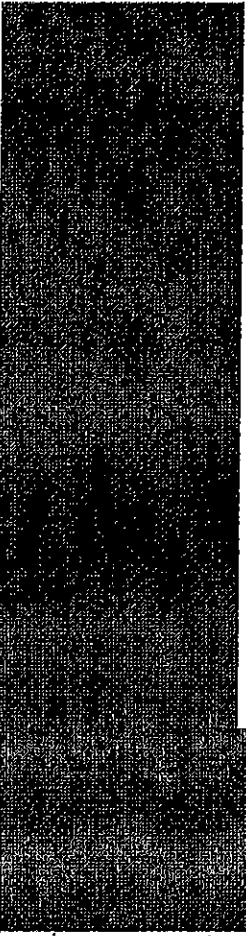
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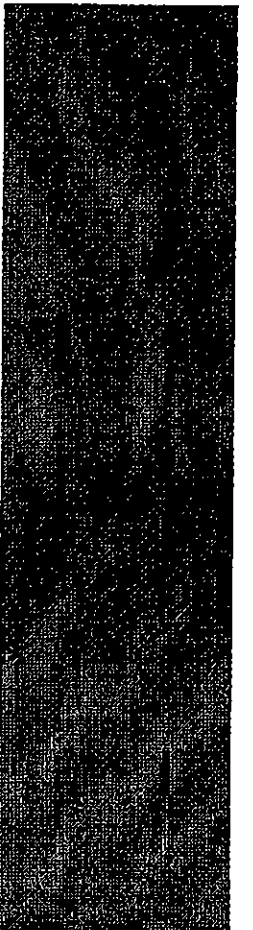
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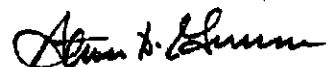
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04/04/2011 09:00:40 AM2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
CLERK OF THE COURT5 CHERYL A. SIMAO and
6 WILLIAM J. SIMAO,

7 Plaintiffs,

CASE NO. A-539455

8 v.

DEPT. X

9 JAMES RISH, LINDA RISH
and JENNY RISH,

10 Defendants.

11
12 BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

13 TUESDAY, MARCH 29, 2011

14 REPORTER'S TRANSCRIPT
15 TRIAL TO THE JURY
DAY 7 - VOLUME 1

16 APPEARANCES:

17 For the Plaintiffs: DAVID T. WALL, ESQ.
18 ROBERT M. ADAMS, ESQ.
19 ROBERT T. EGLET, ESQ.
Mainor Eglet20 For the Defendants BRYAN W. LEWIS, ESQ.
21 James and Linda Rish: Lewis and Associates, LLC22 For the Defendant STEVEN M. ROGERS, ESQ.
23 Jenny Rish: CHARLES A. MICHALEK, ESQ.
24 Hutchison & Steffen, LLC

25 RECORDED BY: VICTORIA BOYD, COURT RECORDER

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TABLE OF CONTENTSPageMarch 29, 2011Trial to the JuryPlaintiffs' Witness(es):

None

Defendants' Witness(es):

Jeffrey Wong, M.D..... 12

Jeffrey Wong, M.D..... 33

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EXHIBITS1
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25PagePLAINTIFF'S:

Exhibit(s) 59..... 9
Exhibit(s) 167,..... 138

DEFENDANT'S:

None

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TUESDAY, MARCH 29, 2011 AT 12:51 P.M.

[Outside the Presence of the Jury]

THE MARSHAL: [Audio begins] -- the Honorable Jessie Walsh presiding.

THE COURT: Afternoon.

MR. WALL: Afternoon.

THE COURT: Okay. Something outside the presence of the jury.

MR. ROGERS: Only this, there's no argument on it -- at least nothing I'm prepared for. This is a courtesy copy of a trial brief that the Defense is filing entitled trial brief regarding exclusion of future surgery for failure to disclose computation of future damages under N.R.C.P. 16(1)(a)(1)(c).

THE COURT: Thank you. Anything else?

MR. ADAMS: We have one issue outside the presence, but I can't find Mr. Eglet, Your Honor. Perhaps we can do it during the break after the direct and we begin our cross.

THE COURT: Sure. Why not. Is our witness here?

MR. ROGERS: Yes.

MR. ADAMS: You know what, we're going to need Eglet. I'm going to find him, Your Honor.

(Counsel and Marshal confer)

MR. EGLET: Sorry, Your Honor. I was in the bathroom with Judge Gonzales.

THE COURT: Quite all right. I can see how a person

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1 would get carried away.

2 MR. WALL: Was that on the record?

3 THE COURT: I hope not. I guess there's something
4 outside the presence of the jury, Mr. Eglet?

5 MR. EGLET: Actually, Your Honor, we don't need -- we
6 need the witness here for the second part, but not for the
7 first part. I have a motion to make outside the presence of
8 the witness, please.

9 THE COURT: Would you be so kind then, sir, to wait in
10 the hallway?

11 THE WITNESS: Sure.

12 MR. EGLET: This will only take a second and then you can
13 bring him back in, Your Honor. I'm sorry. Where's Mr.
14 Rogers?

15 MR. ROGERS: I'm here.

16 MR. EGLET: Oh, you squatted down, I couldn't see you.
17 Your Honor -- what exhibit number is it, Robert?

18 MR. ADAMS: Fifty-nine.

19 MR. EGLET: At this time, we would ask that the Court
20 take judicial notice of Plaintiff's Exhibit 59, which is the
21 life expectancy table. As the Court knows, this is a
22 federally published document regarding life expectancy of
23 people in the United States. It includes people who are
24 completely healthy to people who are going to die tomorrow of
25 cancer, a broad spectrum, so it's an average for the entire

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1 population taking all manner of people into consideration.
2 And it is a record that is appropriate for the Court to take
3 judicial note of. I know this Court has taken judicial notice
4 of it many times, in fact I don't think I know of a District
5 Court down here who hasn't take judicial notice of this
6 document and I'd ask -- we'd ask the Court to take judicial
7 notice of it and it be admitted as an exhibit.

8 MR. ADAMS: Fifty-nine.

9 MR. EGLET: Fifty-nine?

10 MR. ADAMS: Yeah and it was provided to them.

11 MR. EGLET: And it's been provided to them.

12 MR. ROGERS: Yeah, if you could pull it up. I'd like to
13 see --

14 MR. EGLET: It was provided in Dr. Smith's report as
15 well.

16 THE COURT: I thought this was the subject of a motion in
17 limine. Do you remember, Mr. Wall?

18 MR. WALL: Actually, it wasn't. I'm not sure why it
19 wasn't. It may have been part of an original stipulation,
20 then we did the motion, then we had to redo the stipulation.

21 MR. EGLET: Normally we would -- you know, if there
22 wasn't a stipulation, you know, a lot of times we wouldn't
23 have to bother with the judicial notice because we would be
24 putting all of our case on first, but it's my intention to use
25 this document in my cross-examination of Doctor -- is it Wang

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1 or Wong?

2 MR. ROGERS: Wong.

3 MR. EGLET: Wong -- Dr. Wong, and so I'm going to need it
4 today.

5 MR. WALL: It was also discussed at the 267 conference on
6 March 10th and I think Mr. Rogers indicated that that day --
7 that later that day he would take a look. He didn't think he
8 had a problem with it. I don't want to put words in your
9 mouth, but --

10 THE COURT: I thought there was -- at some point there
11 was a stipulated --

12 MR. WALL: Yeah, I don't think this was in it.

13 THE COURT: -- motions in limine?

14 MR. WALL: I don't think this was in it.

15 MR. ROGERS: No. What we'd like to do, Your Honor, is --
16 the document itself states that it's unpublished data and I'd
17 like to compare it to the published data that the Court
18 generally does take judicial notice of. It may be the same, I
19 just don't know right now.

20 THE COURT: What do you mean, Mr. Rogers?

21 MR. ROGERS: That -- I've actually just had it pulled up
22 -- do you have this on your monitor up there?

23 THE COURT: Yes.

24 MR. ROGERS: And the highlighted portion states --

25 THE COURT: Yes.

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1 MR. ROGERS: -- the source is the US National Center for
2 Health Statistics unpublished data.

3 MR. EGLET: Yeah, that's the data it's based on, not the
4 document. The document is published. The data it's based on
5 is not published.

6 MR. ADAMS: Because it comes from Medicare and Medicaid.

7 MR. EGLET: It comes from Medicare, Medicaid and all
8 kinds of other government sources.

9 MR. ROGERS: I simply want to ensure that it's the same
10 as the document that the Court generally does take judicial
11 notice of and then we would --

12 MR. EGLET: Well, I need the document today, so I'm
13 moving right now for the Court to take judicial notice of it.

14 THE COURT: I think the US National Center for Health
15 Statistics is probably a reliable source. The motion is
16 granted.

17 MR. ROGERS: I'm sorry, Your Honor, I didn't hear that?

18 THE COURT: I said I think the US National Center for
19 Health Statistics is a reliable source and the Court is
20 inclined to grant the motion.

21 MR. ROGERS: Okay.

22 MR. EGLET: And --

23 THE COURT: Pretty typically used frankly.

24 MR. EGLET: We would move for admission of Exhibit 59 at
25 this time, Your Honor.

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1 THE COURT: Any objection to 59 being admitted?
2 MR. ROGERS: Only the objections already stated.
3 THE COURT: Noted for the record. The item will be
4 admitted.
5 [Plaintiff's Exhibit 59 Received]
6 MR. ROGERS: All right.
7 MR. EGLET: Now we can bring Dr. Wong in Your Honor.
8 THE COURT: You know, there's still the issue -- the
9 Clerk keeps reminding me every day that you guys still haven't
10 moved admission of these exhibits in front of the jury's
11 presence.
12 MR. EGLET: Well, it doesn't have to be in front of the
13 jury, does it, to --
14 THE COURT: Well, how else do they know? And any way, we
15 haven't done it on the record, even if it hasn't been in their
16 presence.
17 MR. EGLET: Do you want us to do it in front of the jury
18 or do you want us to do it --
19 THE COURT: The Clerk wants it in front of the jury.
20 MR. EGLET: Okay. We can do that before the examination
21 starts then if that's what the Court wants.
22 MR. ROGERS: Which documents are we talking about?
23 MR. EGLET: Exhibits.
24 THE COURT: Exhibits.
25 MR. EGLET: The ones we've stipulated into evidence.

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1 THE COURT: Looks like 1 through 58 stipulated to by the
2 parties and 64 admitted into evidence today -- I thought that
3 was 59?

4 MR. EGLET: Fifty-nine.

5 MR. ADAMS: We had 64 and 65 already admitted as well.

6 MR. ROGERS: With the proviso that the Defense has
7 disputed causation reasonableness and necessity, other than
8 that the documents are stipulated to.

9 MR. ADAMS: What do you mean by reasonableness? You mean
10 necessary and related to the accident, right?

11 MR. ROGERS: True.

12 MR. ADAMS: Not the reasonableness of the value of the
13 bills?

14 MR. ROGERS: Okay.

15 MR. ADAMS: You stipulated to that, right?

16 MR. ROGERS: Okay. Okay.

17 MR. ADAMS: So I guess we'll do it in front of the jury.

18 THE COURT: That's a good idea, Mr. Adams.

19 [Counsel Confer]

20 MR. EGLET: Yes, Your Honor, did you want me to begin?

21 THE COURT: Oh.

22 MR. EGLET: I had asked to --

23 THE COURT: You're examining him --

24 MR. EGLET: Yeah, I wanted to basically -- so we didn't
25 -- hopefully didn't have the same problems that we did with --

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1 even though we did this with Dr. Fish as well, I wanted to go
2 through the -- what --

3 THE COURT: Please go ahead. I didn't know whether the
4 Bailiff had gone to bring the jury panel in or not?

5 THE MARSHAL: No, I didn't.

6 THE COURT: So please proceed.

7 MR. EGLET: Your Honor, I would request permission to go
8 through like we did with Dr. Fish, the Court's rulings on the
9 motion in limine to make sure that this witness fully
10 understands what he can and cannot say in front of this jury.

11 THE COURT: Sure.

12 MR. ROGERS: Your Honor, if it would speed things up, we
13 -- Dr. Wong has already covered the transcript of that
14 exchange between Plaintiff's counsel and Dr. Fish. We can go
15 through it again if you'd like, but he's acquainted with it.

16 MR. EGLET: I appreciate Mr. Rogers' representation. He
17 also made the same representations that he had spoken to Dr.
18 Fish about what he could and couldn't say in front of this
19 jury and that didn't seem to talk -- stop Dr. Fish from
20 violating court order after court order. I want to make sure
21 on the record with this particular witness, Your Honor.

22 THE COURT: This is an entirely different witness, but I
23 think you're entitled to question him.

24 MR. EGLET: Thank you.

25 DOCTOR JEFFREY WONG, DEFENDANT'S WITNESS

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VOIR DIRE EXAMINATION

BY MR. EGLET:

Q Doctor -- is it Dr. Wong as opposed to Dr. Wang? I want to make sure I pronounce your name right, sir?

A It's pronounced Wong.

Q Good afternoon, Dr. Wong. I'm Robert Eglet. I don't think we've met before, have we?

A I don't believe so.

Q You understand that there were a number of pretrial rulings by the Judge in this case as to what could be and could not be mentioned to the -- to or in front of the jury in this case?

A Yes.

Q Okay. I want to go through each of these with you and make sure you understand and that you are not to mention, infer, insinuate, rely on or speak about in any way any of these items, okay? do you understand that?

A Yes.

Q The first one is that -- the fact that Mr. Simao pulled a muscle in his low back 23 to 24 years ago while moving a keg of beer in California -- at California Beverage Company. Do you understand that you can't speak about that, talk about it, refer to it? Do you understand that?

A Yes.

Q Okay. The second thing is a motor vehicle accident

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1 that Mr. Simao was involved in 25 years ago, wherein he was
2 pulling a boat with his pickup truck and another vehicle hit
3 the boat and knocked it off the trailer. Do you understand
4 you can't refer to that accident, you can't insinuate he was
5 injured in any way in that accident, do you understand that?

6 A Yes.

7 Q Okay. You cannot refer to any prior or subsequent
8 injuries and accidents, including but not limited to a motor
9 vehicle -- motorcycle accident that Mr. Simao had in 2003 and
10 a motor vehicle accident he had in 2008. Do you understand
11 that?

12 A Yes.

13 Q Okay. You cannot refer to those accidents or state,
14 imply, infer or suggest that he was injured at those times.
15 Do you understand that?

16 A Yes.

17 Q Okay. You cannot refer to any unrelated medical
18 conditions with the exception of a mouth tumor. Now these
19 unrelated medical conditions include, but are not limited to,
20 high blood pressure, allergies, colds, flu and high
21 cholesterol. Do you understand that?

22 A Yes.

23 Q Okay. You cannot suggest or infer or insinuate that
24 Mr. Simao in any way misused prescription medications. Do you
25 understand that?

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1 A Yes.

2 Q You cannot state, infer, suggest, imply, insinuate
3 in any way that Mr. Simao is a symptom magnifier, a
4 malingerer, is -- or is manifesting any secondary gain motives
5 in this case. Do you understand that?

6 A Yes.

7 Q Anything to do with secondary gain you cannot
8 mention or state that, do you understand that?

9 A Yes.

10 Q Okay. You cannot suggest that this case is attorney
11 driven or is a medical buildup case. Do you understand what
12 that means?

13 A I'm not sure what medical buildup means.

14 Q Well, medical buildup -- in other words, suggest
15 that any of the medical providers or the attorneys had Mr.
16 Simao engage in various medical treatment in order to buildup
17 the case. Do you understand that?

18 A Yes.

19 Q Okay. You cannot mention any collateral sources,
20 any health insurance, auto insurance or the fact Medicare,
21 Medicaid or the fact that any of his treating physicians may
22 or may not be treating him on a lien. Do you understand that?

23 A Yes.

24 Q Okay. You cannot mention the sub rosa video or
25 anything that occurred in the sub rosa video or talk about

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1 anything you viewed in the sub rosa video, the video of
2 Mr. Simao. Do you understand that?

3 A Yes.

4 Q You cannot rely on that video in any way for any of
5 your opinions in this case. Do you understand that?

6 A Yes.

7 Q You cannot talk about, suggest, insinuate or rely
8 upon any of the photographs of the vehicles involved in the
9 April 15th, 2005 motor vehicle accident. Do you understand
10 that?

11 A Yes.

12 Q Okay. You cannot talk about or state anything or
13 rely upon the accident report that the highway patrol officer
14 filled out on the day of the accident or any opinions of the
15 highway patrol officer in the accident report. Do you
16 understand that?

17 A Yes.

18 Q Okay. You cannot rely on or talk about or suggest
19 or state anything about any property damage estimates of
20 either of the vehicles involved in the accident at issue. Do
21 you understand that?

22 A Yes.

23 Q You cannot discuss, mention, insinuate, suggest,
24 infer or in any way talk about the nature of the impact of
25 this subject collision. Do you understand that?

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1 A Yes.

2 Q Okay. You could say you understand it was a rear-
3 end collision, but you cannot talk about or infer that it was
4 minor or a tap or a low speed or insignificant or anything
5 like that. Do you understand that?

6 A Yes.

7 Q Okay. You cannot talk or mention anything about any
8 alleged federal investigation regarding any doctors or lawyers
9 here in Las Vegas. Do you understand that?

10 A Yes.

11 Q Okay. You cannot say or suggest or insinuate or
12 infer that you are an independent medical examiner. Do you
13 understand that?

14 A I'm sorry, I don't quite understand that.

15 Q You cannot state, infer, suggest that you are an
16 independent medical examiner. You are a Defense medical
17 examiner. Do you understand that?

18 A Yes.

19 Q Okay. You cannot -- and this is a problem that came
20 up with Dr. Fish, you cannot suggest, insinuate, or state that
21 -- or talk about any ruling made by the Court regarding the --
22 these motions. In other words, for example, if you're asked a
23 question you can't state well, I can't answer that question
24 based on the Court's rulings or I can't answer that question
25 based on what you told me before I testified today or I can't

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1 answer that question based on parties' stipulations. You
2 can't suggest in any way that -- what the Court's rulings were
3 or were not in this case. You just have to answer the
4 questions without doing that. Do you understand that?

5 A I understand the statement you just made. If my
6 answer -- I guess if you ask me a question and it's fairly
7 specific and it -- the answer would be one of those, do I just
8 say I don't think I can answer that?

9 Q I can promise you that I won't answer -- ask any of
10 those questions, okay, that will require you to ask -- answer
11 with any -- in any of these ways. Do you understand that?

12 A Yes.

13 Q Okay. I can't speak for Mr. Rogers, but I don't
14 believe he will either. And if you think you need to -- you
15 cannot violate a court order, so if you need to -- if you feel
16 like you can't answer the question without violating one of
17 these court orders, I'm not sure what the Court wants you to
18 do?

19 THE COURT: I guess he could ask if he could take a brief
20 break and speak to counsel.

21 MR. EGLET: Okay.

22 THE COURT: It might be the best way to handle it.

23 THE WITNESS: I'm sorry, do I address that to you or to
24 you?

25 ///

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1 BY MR. EGLET:

2 Q To the Court.

3 A Thank you.

4 Q You are also precluded from offering any opinions
5 regarding biomechanics or the nature of the impact of this
6 April 15th, 2005 collision. Do you understand that?

7 A Yes.

8 Q You can't talk about what kind of forces were
9 imparted or body or anything like that. Do you understand
10 that?

11 A Yes.

12 Q Do you understand what leading questions are?

13 A I believe it's when you ask a question when you sort
14 of expect the answer?

15 Q Well, it -- where you suggest the answer, quite
16 frankly. Leading questions require a yes or no response. Do
17 you understand that?

18 A Okay.

19 Q When you're asked a leading question, you have to
20 give a yes or no response. You don't get to explain. Counsel
21 can redirect you and have -- and ask you open-ended questions
22 after you're cross-examined. If on cross-examination you're
23 asked leading questions that are yes or no responses. Do you
24 understand that?

25 A Okay.

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1 Q Are you going to abide by that?

2 A I will do everything possible to abide by that.

3 Q Okay.

4 THE COURT: Perhaps you could give an example of a
5 leading question?

6 MR. EGLET: Sure.

7 BY MR. EGLET:

8 Q All right. This would be an example of a leading
9 question, Doctor. Isn't it true that Dr. McNulty recommended
10 Mr. Simao for a C-3/4, C-4/5 fusion, correct?

11 A The answer would be yes or no.

12 Q Yes, no or correct, right? Okay. Understand?

13 A Yes, I believe so.

14 Q Okay.

15 MR. ROGERS: A couple of things, yes. First, the Defense
16 request now the list of witnesses who will be testifying
17 tomorrow. And second, there was the question that was brought
18 up in the motion in which the Court ordered the exclusion of
19 the Senate investigation. The Defense requested that if any
20 questions will be asked of Dr. Wong regarding the stipulation
21 and decision that was entered into in the state of California,
22 that those questions and foundation be laid outside the
23 presence. Defense would again request that now.

24 THE COURT: Any objection to that?

25 MR. EGLET: Yeah, I do have an objection to that.

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1 There's no ruling excluding that information.

2 THE COURT: I can't recall precisely because it's been so
3 many weeks since we heard these motions in limine argued. I
4 know that that specific item was brought up in the Plaintiff's
5 opposition, so --

6 MR. EGLET: That wasn't part of the motion, though.

7 THE COURT: It was not really the subject of the motion.
8 The subject of the motion was the Senate investigation --

9 MR. EGLET: Correct.

10 THE COURT: -- which the Court granted the request to
11 preclude it. It was dismissed anyway, I think, wasn't it?

12 MR. WALL: It was never dismissed. It just never went
13 anywhere.

14 MR. EGLET: The Senate investigation part, the Court kept
15 out. The California incident that we showed our offer of
16 proof to in the supplemental opposition to their motion -- we
17 did supplemental oppositions and reply, is that what it was
18 called? Supplemental reply after Dr. Wong was deposed. And
19 in the supplemental opposition we laid out our -- essentially
20 our offer of proof and all of the foundation for the good
21 faith basis to ask questions regarding the California
22 proceedings as a specific instance of conduct under 48-085, I
23 think -- or 50-085.

24 MR. ROGERS: The Defendant -- oh, I'm sorry.

25 MR. EGLET: But that's my understanding.

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1 MR. ROGERS: The Defendant's response to that position
2 was, however, that the language contained within the
3 stipulation decision establishes that there was no bias and
4 that was the point that the Plaintiff wanted to introduce the
5 evidence for, is that it established a conflict of interest or
6 a -- or dishonest conduct.

7 We said look, they need to lay foundation if they're
8 going to enter into this line of questioning, so that the
9 Court can determine whether this investigation and this
10 stipulation reflects at all on the matters that the Plaintiff
11 proposes it does. And that's why we requested that the
12 foundational matters be handled outside the presence. It's a
13 -- it's just too prejudicial to bring it up when it might be
14 nothing at all.

15 MR. EGLET: Well, it isn't just nothing at all and we can
16 lay the foundation. We've got the documents to lay the
17 foundation with this witness. And so I don't -- there's no
18 reason to do this outside the presence. This wasn't part of
19 his motion -- it was never part of his motion. If he wanted a
20 motion on this, he should have brought a motion on this. He
21 knows that this came up in opposition -- in our supplemental
22 opposition to the motion on the Senate investigation.

23 Counsel should have brought a motion on this; there
24 was no motion brought. We're not required to give away our
25 cross-examination before we cross-examine him in front of the

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1 jury, which is what he's asking us to do.

2 THE COURT: Well, I understand that, but the trouble that
3 I'm having is I'm trying to recall and recollect exactly what
4 Mr. Rogers asked for and exactly what the opposition stated,
5 Mr. Wall, and then I'm trying to recall -- specifically what
6 the Court ordered.

7 MR. ROGERS: I can give you a recap of it. The motion
8 was a motion to exclude a Senate investigation -- a US Senate
9 investigation. And the opposition to that motion attached
10 something that was unrelated to the US Senate investigation
11 and it was a State of California investigation. And the Court
12 agreed to dismiss the -- any evidence of the Senate
13 investigation, which was dropped or abandoned.

14 There's been no order relating to the State of
15 California investigation and that was what we discussed with
16 you at the hearing and I said listen, if they intend to bring
17 this in, they need to lay the foundation before they spring it
18 on Dr. Wong in front of the jury, because it may not at all
19 stand for the propositions that they claim it does, because of
20 the language within the stipulation, which says there's no
21 evidence of any bias in Dr. Wong's research as a result of
22 this disclosure. And that's the whole point, is that we go
23 ahead and address that now, and if the Court finds that it is
24 relevant to what they claim it's relevant too, then they can
25 bring it up.

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1 MR. EGLET: The stipulation order does not say what
2 counsel is representing to this Court it says, okay? The
3 stipulation order entered into by -- this is a stipulation
4 decision and order from the Fair Political Practices
5 Commission for the State of California and it provides that it
6 is stipulated and agreed -- and Dr. Wong agreed to this.
7 First of all, he was charged with three counts of violating
8 the fair -- violating the -- if I can just find this -- it's
9 California Code of Regulations and it's the Fair Political
10 Practices Act, I believe, but anyway he stipulated and agreed
11 that he violated the Political Reform Act. He stipulated and
12 agreed that he violated the Political -- are you looking for
13 something, Counsel?

14 MR. ROGERS: Are you concerned?

15 MR. EGLET: Yeah, I am concerned that you're looking at
16 our desk. Do you need something?

17 MR. ROGERS: Talk to the Judge.

18 MR. EGLET: He stipulated and agreed that he violated the
19 Political Reform Act by failing to disclose certain economic
20 interests in Form 700U, filed in conjunction with the research
21 projects at the University of California Los Angeles in
22 violation of Government Code Section 87300, three counts. He
23 agreed -- essentially pled to all three counts and then the
24 counts are described in each incident. And he agreed to the
25 issuance of the decision and order from the California Fair

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1 Political Practices Commission and agreed to pay fine as a
2 result of this.

3 And so what happened -- what they found -- what the
4 counts were is that he signed under perjury -- under penalty
5 of perjury these 700U forms and he -- they were false. He did
6 not fill them out correctly, he filled them out falsely, and
7 he signed them under penalty of perjury. And that's what the
8 three counts were based on and that's what he pled to
9 essentially and agreed to in this decision.

10 THE COURT: Well, let me ask you a couple of questions
11 because I recall this issue -- I recall reading the briefs and
12 I recall listening carefully to the arguments and I wasn't at
13 all clear at the time, and I'm still not clear now, whether
14 these are two entirely separate issues or whether they're sort
15 of interconnected.

16 MR. ROGERS: They are two different --

17 MR. WALL: Well, here's how it came about. They filed a
18 motion to keep out Senate investigation. The United States
19 Senate, there's a letter from a senator from Iowa, Senator
20 Grassley saying I have these concerns about people taking
21 money from medical device companies and --

22 MR. EGLET: Your Honor, if we're going to have this
23 discussion, I really don't want it in front of the witness,
24 quite frankly, because we're just telegraphing to him exactly
25 what's going to happen and that's not fair to us. I'd ask he

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1 be dismissed from the stand.

2 THE COURT: Would you wait in the hallway, please?

3 THE WITNESS: Whatever you'd like.

4 THE COURT: Thank you.

5 MR. WALL: And then we continued the briefing for his
6 deposition. After his deposition, we each filed a -- I filed
7 a supplemental opposition to the motion regarding the Senate
8 investigation; Mr. Rogers filed a supplemental reply. In that
9 supplement opposition I laid out look, there's this Senate
10 investigation and it investigates ties between researchers at
11 public universities taking money from medical device companies
12 and not reporting it and then doing research for those
13 companies under the imprimatur -- the label of the university.

14 The supplemental reply said look -- and we attached,
15 by the way, in the supplemental opposition all the documents
16 that support this administrative prosecution that Mr. Eglet
17 just referred to. So all of the documents, the offer of proof
18 is there. So it can't be an issue of whether we have a good
19 faith belief that this occurred because it's all public record
20 from the State of California and we attached that, gave it to
21 them, gave it to you.

22 Their response was no, no, no, this is completely
23 separate. There was a Senate investigation, nothing happened
24 as a result of the Senate investigation and then there was
25 this California issue. And when we came before the Court I

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1 actually said, you know, that's -- it's good to know and there
2 was some argument between the parallels -- about the parallels
3 between a Senate investigation that didn't go anywhere and the
4 federal investigation here that's always brought up, that --
5 for all of the treatment providers in this case went nowhere
6 and has no relevance to them.

7 And on that basis, the Court kept out evidence of
8 the Senate investigation because it didn't go anywhere. Was
9 the Senate investigation and the articles in newspapers, in
10 the Wall Street Journal, in California papers part of the
11 impetus of what started the California one? To tell you the
12 truth, I don't know, but it doesn't matter because we're not
13 bringing in that initial Senate investigation, what the Senate
14 did.

15 What the State of California did, in their
16 administrative proceeding, taking Dr. Wong to task, entering
17 into a stipulation with him, that he violated three separate
18 counts where he failed to report that he had a financial
19 interest in these companies that came to him and said do some
20 research for us and he has to report that to the University.
21 I have a conflict because I own 18,000 shares of stock, or
22 whatever it is, and he failed to do that.

23 And so for those three counts that were outlined, he
24 stipulated that those were true, good faith basis to bring it
25 up, he stipulated that it was a violation of the Political

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1 Reform Act in California, good faith basis to bring it up as a
2 specific instance of conduct, and he agreed to a fine in the
3 amount of -- I believe it was \$10,500. We brought all that to
4 the Court. We argued all of that. I laid all of that out in
5 the brief, I laid it out in argument and the Court said look,
6 the Senate investigation is out, and that's all the motion
7 asked for and that's my ruling. I don't have a transcript of
8 that particular hearing to know whether, but I believe Mr.
9 Rogers when he says that he requested some ability to do
10 something outside the presence with Dr. Wong, but our offer of
11 proof is there and it wasn't part of the Court's order to the
12 best of my memory and that's where it all is.

13 So in terms of your question, are they separate?
14 They're the same subject matter, but they are probably two
15 separate things. One may be -- have been a precursor to the
16 other, but it doesn't matter. We're not going to say the
17 words Senate investigation, we're not going to bring up
18 Senator Grassley, we're not going to bring up his letter,
19 which also implicated probably a dozen other physicians by
20 name. What we are going to go into is what this witness
21 agreed to in his stipulation with the California
22 administrative authorities.

23 THE COURT: And your position is that it goes to
24 credibility?

25 MR. WALL: Absolutely goes to credibility because on

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1 three separate occasions he admits that he signed a form and
2 did not disclose that he had a financial interest in the
3 companies that came to him asking him to do research and the
4 stipulation itself lays out the procedure that he's supposed
5 to follow. There's a conflict of interest committee at UCLA
6 and he is to present this to them and say yes, I -- they paid
7 me 100 grand or I own an interest in their company because
8 they gave it to me to pay me for some past research, so I have
9 a -- I have an incentive in doing research for them to make it
10 come out good because I own a piece of that company -- a major
11 piece of that company that they gave me, essentially that's
12 the financial interest. That's the evidence of bias.

13 THE COURT: And the money went directly to Dr. Wong and
14 not to the department, correct?

15 MR. WALL: Yes -- you mean the money for that particular
16 research project?

17 THE COURT: Yes.

18 MR. WALL: It probably -- I don't know if it went 100
19 percent to him.

20 MR. EGLET: The stocks and the money went to him.

21 MR. WALL: What he had before, when he had a financial
22 interest, that went to him. That went to him absolutely.

23 THE COURT: And he failed to report it to the department?

24 MR. WALL: And he agreed that he failed to report it.

25 MR. EGLET: He signed the document under penalty of

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1 perjury and the document was false -- documents, three times.

2 THE COURT: Mr. Rogers?

3 MR. ROGERS: Yeah, Your Honor's questions are getting to
4 the heart of the matter and it is clear that Plaintiff's
5 counsel doesn't understand what happened at all. That's why
6 they attached a State of California investigation report to
7 their opposition to a motion to exclude a US Senate
8 investigation. And they don't know what they're saying right
9 now, they don't have those answers, that's why we get Dr. Wong
10 on the stand to explain answers to question like you
11 presented, where did this money go to, was there a finding of
12 misconduct, of misrepresenting, of bias or of --

13 MR. EGLET: The stipulation says all of that.

14 MR. ROGERS: -- conflict of interest. Well, the decision
15 that we gave the Court in the briefing states that there's no
16 evidence of any bias.

17 THE COURT: And I don't know how anybody can conclude
18 that.

19 MR. ROGERS: It has to do with research. The question
20 is, is there a conflict of interest that affected your
21 neutrality on the research. That's what the investigation was
22 -- what the decision it appears to be, but without Dr. Wong
23 we're all guessing. We're sort of dancing around this point.
24 What the decision --

25 THE COURT: I don't see how we're guessing if there's a

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1 stipulation that he specifically entered into and he paid a
2 specific fine, I don't see that that calls for speculation.

3 MR. ROGERS: Well, the speculation is whether it goes to
4 what the Plaintiff claims it goes to. If, for example,
5 there's an administrative omission and there's a penalty for
6 this omission, well it's one thing to pay that, it's a
7 different thing to say that you did something that affected
8 the neutrality of your research or that reflects on your
9 honesty. And what they're offering this evidence for is prior
10 bad acts. I don't know that it goes to that proposition.

11 MR. EGLET: He's mixing apples and oranges here, because
12 what he's talking about is there's two different dishonesty --
13 there's two different issues of dishonesty here. The
14 dishonesty in three separate instances is he filled out this
15 form that he's required to fill out when he's getting a grant
16 -- grant money from one of these medical device companies to
17 do research on, okay?

18 The form is, he has to fill out and he has to state
19 whether he has a financial interest in these companies. He
20 has to sign -- complete and sign that form under penalty of
21 perjury. And in each of these instances he had a financial
22 interest in those companies. He had been provided money
23 beforehand from them or he had actually owned and had been
24 provided stocks and stock options by these companies -- they
25 had given them to him.

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1 And on the form he indicated he did not have a
2 financial interest. And so that was the three counts. Those
3 were the counts that he was charged with, those are what he
4 pled to in the agreement, that's what he was found essentially
5 guilty of, this administrative -- administratively. Now what
6 Counsel is talking about is well, UCLA did an independent --
7 after the fact, they did an independent -- they had an
8 independent committee determine whether -- whether him
9 receiving this money from these device companies -- whether
10 that impacted his research. In other words, the research he
11 actually did, was that tainted or false, did he do something,
12 was something quite not right, did it look where he got paid
13 by them and his research findings were false.

14 Those are two different issues and that's what he's
15 talking about. It still -- it doesn't mitigate in any way the
16 fact that three times, under penalty of perjury, he lied on
17 these forms.

18 THE COURT: Perhaps not, but there's no reason why he
19 can't go into it on re-examination of the witness. I think
20 it's all fair game, frankly. I think it goes directly to the
21 credibility and I think Mr. Rogers is entitled to explore what
22 UCLA found and the fact that they didn't issue sanctions
23 against his witness.

24 Anything else we need to address?

25 MR. ROGERS: Simply who the witnesses are tomorrow?

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1 THE COURT: Oh.
2 MR. EGLET: Arita and Smith.
3 MR. ROGERS: All right. Let's call Dr. Wong.
4 MR. EGLET: As far as we know in that order, yeah.
5 MR. ROGERS: Ready.
6 THE COURT: We're ready.
7 [Pause]
8 [Within the Presence of the Jury]
9 THE COURT: Please be seated, ladies and gentlemen.
10 Will counsel stipulate to the presence of the jury?
11 MR. ROGERS: Yes, Your Honor.
12 MR. WALL: Yes, Your Honor.
13 THE COURT: Very well. We have a new witness. Would he
14 please stand, raise his right hand, and be sworn by Madame
15 Clerk?
16 DR. JEFFREY C. WANG, DEFENDANT'S WITNESS, SWORN
17 THE CLERK: Thank you. Please be seated. State and
18 spell your name for the record.
19 THE WITNESS: My name is -- first name is Jeffrey,
20 J-e-f-f-r-e-y. Middle name is Chun, C-h-u-n. Last name is
21 Wang. It's spelled W-a-n-g.
22 THE COURT: Whenever you're ready, Mr. Rogers.
23 MR. ROGERS: Thank you, Your Honor.
24 ///
25 ///

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DIRECT EXAMINATION

BY MR. WALL:

Q Okay, Dr. Wang. Let's start off with giving the jury a little understanding of your background. Where were you born and raised?

A Well, I was born in Mitchell, South Dakota, but I moved -- my family moved to West Virginia, a town called Fairmont, when I was about three or four. And I grew up there until I left for college.

Q And where did you go to college?

A I went to Stanford University.

Q What did you study there?

A Biological sciences.

Q Okay. And after completing your degree there, where did you go next?

A I went to medical school at the University of Pittsburgh School of Medicine.

Q All right. And did you graduate there with honors?

A Yes.

Q Okay. Just cross-checking your CV as we go. I understand you won a Hewlett Packard top medical graduate award there.

A Yes.

Q What is that?

A It's an award given to I guess the top medical grads

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1 in my class.

2 Q Okay. What did you do after completing medical
3 school?

4 A I performed a orthopedic surgery residency at the
5 University of California, Los Angeles.

6 Q And after you completed your residency, where did
7 you go?

8 A I did a spine and spinal cord fellowship and -- at
9 Case Western Reserve University. It's located in Cleveland,
10 Ohio.

11 Q Why Case Western?

12 A Well, at the time, the fellowship director was a man
13 called Henry Bowman, who was probably the most famous spine
14 surgeon. He, unfortunately, passed away last year. But it
15 was considered the top fellowship in the country.

16 Q All right. And after you finished your fellowship,
17 what did you do?

18 A Then I went back to UCLA, the University of
19 California, Los Angeles, for a job.

20 Q And you went into academics?

21 A Yes.

22 Q Okay. Now I understand that, at UCLA, you're a
23 practitioner as well as an academic. But why go into
24 academics?

25 A Well, the traditional route is either academics

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1 versus private practice. I've always enjoyed academics,
2 because I enjoy teaching. I enjoy doing research. It's very
3 difficult to do research if you're in private practice. And
4 that attracted me a great deal. And it had a lot of things
5 that I think you're kind of missing when you go into private
6 practice.

7 Q Okay. And you've been at UCLA ever since you
8 completed your fellowship?

9 A That's correct.

10 Q And I see that you're no longer a -- an assistant
11 professor. You're a full professor now. What's the
12 difference?

13 A Well, that's the academic rank. When you're hired,
14 you typically come on as an assistant professor. You have
15 eight years to get tenure. At that point -- at which point,
16 you become an associate professor. And then you have eight
17 years to make the rank of full professor.

18 Q Okay. Then you've moved up those two ranks then?

19 A That's correct.

20 Q How long did it take you to get those two
21 promotions?

22 A I believe I became an associate professor five or
23 six years after I started. And then I became a full professor
24 probably four or five years after that.

25 Q How long ago was that?

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1 A I believe it was 2008.

2 Q All right. And you teach in what departments there?

3 A Well, I have an appointment in the Department of
4 Orthopedic Surgery. I also have an appointment in the
5 Department of Neurosurgery.

6 Q All right. And are you the only one in the
7 Department of Orthopedic Surgery who is also a full professor
8 in the Department of Neurosurgery?

9 A Yes.

10 Q I see you also work with the Department of
11 Biomedical Engineering. What is that?

12 A Biomedical Engineering is kind of a new department
13 at UCLA. It kind of combines the mechanics of engineering
14 with the biology of medicine. They're trying to encourage
15 sort of new developments within the engineering aspects of
16 medical treatments. So we have a relatively new department.
17 I work with that department in the sense that I mentor
18 graduate students or master students. I have some
19 undergraduates who are seeking their degree in that area that
20 work in our laboratory.

21 Q And are you also involved in the development and
22 research, I should say, production of hardware, things like
23 that that go in the spine?

24 A Yes. I've designed several spinal implants that are
25 used in surgery today.

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1 Q And I see. Doctor, that you're the division chief
2 currently of the spine service at UCLA?

3 A That's correct.

4 Q Do you hold any other titles there?

5 A Well, I'm the acting chairman for our department
6 when our chairman is out of town or when he's unavailable.

7 Q Okay. Now in addition to your teaching duties and
8 the spine work that you do at the UCLA Hospital, do you also
9 work in any trauma centers?

10 A Well, UCLA is a trauma center. We have the new --
11 well, it opened in 2009. We have the Westwood Hospital. It's
12 called the Ronald Reagan Hospital. It's a level one trauma
13 center, meaning it takes all the major traumas.

14 We also cover UCLA Santa Monica Orthopedic Hospital,
15 which is about five or six miles away from that Westwood
16 campus. And that's a level three trauma center. We also
17 cover the spine trauma at the Veterans Administration Hospital
18 in West Los Angeles, which is in Westwood. It's very close to
19 the Westwood campus. And we also cover trauma at the
20 orthopedic hospital. It has a downtown facility. And we --
21 our department just took over the Olive View County Hospital.

22 Q Okay. And do you treat people who have sustained
23 traumatic spine injuries in those trauma centers?

24 A I do.

25 Q Okay. I discussed some of your qualifications with

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1 the jury in opening statement, and I want to go through some
2 of the honors that you received. I understand that just last
3 year you were awarded the American Academy of Orthopedic
4 Surgery Achievement Award.

5 A That's correct.

6 Q Do you sit on any boards?

7 A I'm on the board of directors for the North American
8 Spine Society. It's commonly called NASS.

9 Q Right. Several of the doctors who have come through
10 have talked about NASS. And what -- do you sit on any
11 particular boards?

12 A Well, I'm on the board of directors for NASS. I'm -
13 - my specific title is I'm the chairman of the Continuing
14 Medical Kit Education Committee. I'm also on the board of
15 directors for the Cervical Spine Research Society.

16 Q Okay. Do you have any other boards that you sit on?

17 A Well, I just finished a three-year term on the AO
18 Spine International Board. My specific title was I was the
19 chairman of the education -- Global Education Committee.

20 Q And what areas do you cover? You said it was
21 international. It's --

22 A Well, the AO Spine is a non-for-profit foundation.
23 It's based in Switzerland. It essentially has about \$40
24 million a year that it has to spend on education throughout
25 the world. In my role, for the past three years, I've been in

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1 charge of education. So we've had to develop programs for
2 spine surgery education throughout the world. There's four
3 regions. There's North America, Latin American, Asia Pacific,
4 Europe, and the Middle East. So I guess there's five regions
5 now. But we developed educational content. We developed a
6 core curriculum. We've put on international courses
7 throughout the world. And that was essentially my role. I
8 had to oversee all of that.

9 Q Okay. I see as well that you've got roughly 200
10 publications and that you're a keynote speaker in all these
11 countries that you've just listed for issues involving spine
12 treatment.

13 A That's correct. I've been invited to be the keynote
14 speaker at several national and international meetings.

15 Q All right. And you're board certified in orthopedic
16 surgery?

17 A Yes.

18 Q You passed the boards the first time?

19 A Yes.

20 Q And in addition to teaching medical students there,
21 do you also teach doctors in the community, such as the
22 doctors who've come here and testified, the doctors who've
23 treated the Plaintiff?

24 A Yeah, as part of my educational activity --

25 MR. EGLET: Your Honor, I'm going to object. May we

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1 approach?

2 THE COURT: Sure.

3 [Bench Conference Begins]

4 MR. EGLET: The evidence that he's taught any of the
5 doctors that testified for -- the Plaintiff's treating
6 physicians in this case. And that's what his question
7 implied, that he's taught these doctors. He may have taught
8 another doctor, but he hasn't taught these doctors.

9 THE COURT: Is that what you meant?

10 MR. ROGERS: I said such as these doctors,
11 [indiscernible] doctors, such as --

12 THE COURT: You need to clarify.

13 MR. EGLET: He needs to clarify.

14 THE COURT: Sustain the objection for clarification.

15 MR. ROGERS: Okay.

16 [Bench Conference Ends]

17 MR. EGLET: Objection sustained, Your Honor?

18 THE COURT: For purposes of clarification, yes.

19 BY MR. ROGERS:

20 Q Okay. The clarifying is whether you've taught the
21 Plaintiff's treating physicians in this case. Have you met
22 Drs. Grover or McNulty at any of the conventions at which you
23 were speaking?

24 A I chaired a spine course in Park City, Utah the
25 first week of February. After one of my sessions that I

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1 moderated, Dr. Grover actually came up and introduced himself
2 to me. And that was really the first time that I can recall
3 meeting him.

4 Q Okay. Have you met Dr. McNulty?

5 A I've met him once when he was at UCLA, and I've seen
6 some of his patients. But I don't recall meeting him on more
7 than that one time.

8 Q Okay. Now my earlier question was whether you teach
9 doctors in the community in addition to medical students at
10 UCLA. I guess Park City would be an example of just such a
11 teaching.

12 MR. EGLET: Your Honor, objection. The witness testified
13 he moderated. He didn't teach.

14 THE COURT: I'll sustain the objection. I think the jury
15 is following along pretty closely.

16 MR. ROGERS: Okay.

17 BY MR. ROGERS:

18 Q Well, the answer then is do you teachers in the
19 community spine techniques and treatments?

20 A Absolutely. I've chaired and taught at several
21 courses throughout the world, talking about spine techniques,
22 indications for surgery. I've run for the past five or --
23 actually, I think it's about seven years -- a cadaver based
24 course in St. Louis, teaching spinal surgery techniques.
25 We've done it every year.

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1 I currently chair the American Academy in Orthopedic
2 Surgery cadaver course, which happens yearly in the fall. And
3 this year I'm one of the cochairmen. And there's a variety of
4 other educational events that I teach to the community
5 physicians throughout the world.

6 Q All right. Now in this case, you're serving as a
7 medical expert. Had you served as a medical expert in any
8 situation aside from a medical legal case?

9 A Well, I guess outside of medical legal cases, I've
10 reviewed cases for the Medical Board of California. It's not
11 necessarily involved with a lawsuit. It's typically involved
12 when a patient brings a complaints against the doctor who's
13 licensed in the state of California. If they have a spine
14 case, they will send -- they will give me a call and ask me to
15 review the case and give my opinions on it. Those are not
16 always associated with lawsuits. They can be. I've also
17 reviewed cases for surgeons who have been questioned by the
18 medical board in the state of Texas. And I'm currently
19 reviewing a physician in the state of Washington State, where
20 the hospital is trying to consider removing his privileges and
21 I'm sort of giving some expert testimony on that.

22 Q All right. And how about in any other areas. We've
23 covered the medical boards in the various states. We'll be
24 getting into this medical legal case. But have you been asked
25 to offer medical expert advice on any other areas?

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1 A Well, I do a lot of grant reviews. Those are
2 typically not associated with any medical legal cases. But
3 I've reviewed grants for the NIH, the National Institute of
4 Health. I've reviewed grants for Singapore. Singapore has, I
5 think, a country grant that they give out to certain research
6 projects, and we have to evaluate the research. We have to
7 decide --

8 [Feedback]

9 MR. ROGERS: Give me just a moment. I'm sorry.

10 MR. EGLET: Do you have your cell phone on. Doctor?

11 THE WITNESS: I do not.

12 THE COURT: It's not me, I can assure you.

13 BY MR. ROGERS:

14 Q Okay. I'm sorry for the interruption. You were
15 talking about grant research review.

16 A Yeah. I sit on many grant panels. We review the
17 research, decide which of the questions are most burning,
18 applicable clinical questions that are in spine surgery today,
19 and try to prioritize the grants, as well as try to understand
20 the quality of the research applications.

21 Q All right. Now in medical expert situations, you've
22 served as an expert in other medical legal cases such as this
23 one.

24 A Yes.

25 Q Okay. How many times have you been in trial?

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1 A Counting this one?

2 Q Yes.

3 A Four.

4 Q All right. How much do you charge per hour for your
5 medical expert work?

6 A I typically charge about \$1000 a hour.

7 Q And is that more or less than what you charge for
8 your work while working for UCLA?

9 A Well, if I were home doing surgery, I would make
10 more than that.

11 Q All right. How much are you charging to be here
12 today?

13 A I typically charge \$12,000 for the day.

14 Q Is that money paid directly to you?

15 A No, it's paid to my department.

16 Q If you're earning more at work at UCLA, why do you
17 get involved in medical expert work?

18 A Well, I find it interesting. I mean it's part of my
19 inquisitive nature. I run a basic science laboratory. We do
20 a lot of clinical research as well as basic science. I teach
21 residents and fellows. I find it fascinating. I feel like
22 it's a learning experience. I also want to see what's going
23 on in the community, because, obviously, I practice at UCLA.
24 So I don't often see or interact with the community physicians
25 in my daily workday. And I can sort of see what's going on in

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1 the community. I think it's particularly pertinent, since I'm
2 asked to review cases on surgeons from the medical board of
3 California or even other states. I think it's important for me
4 to try to be on top of things as much as possible.

5 Q Okay. And how do you approach a forensic review
6 like you've done in this case?

7 A Well, in this case, I basically review all the
8 records that are made available to me. I try to review
9 everything that's sent to me. Anything contained in the
10 medical records, in general. It could be depositions or any
11 types of reports. I try to examine the patient and try to ask
12 them questions on my own to try and get some direct feedback.
13 And I kind of take everything together and formulate my
14 opinions.

15 Q All right.

16 MR. ROGERS: Now at this time the defense offers Dr. Wang
17 as an expert in orthopedic and neurosurgery.

18 THE COURT: Any objection?

19 MR. EGLET: No objection, Your Honor.

20 THE COURT: So ordered.

21 BY MR. ROGERS:

22 Q All right. Doctor, let's start with your medical
23 opinion --

24 MR. EGLET: I'm sorry. The offer was what areas?

25 MR. ROGERS: Orthopedic and neurosurgery.

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1 MR. EGLET: May we approach, Your Honor?

2 THE COURT: Sure.

3 [Bench Conference Begins]

4 MR. EGLET: Dr. Wang is not a neurosurgeon. He's an
5 orthopedic spine surgeon, okay. And he did not do a residency
6 in neurosurgery.

7 THE COURT: He didn't. He --

8 MR. EGLET: Yeah. So I would object to the neurosurgery.
9 An orthopedic spine surgeon, yes, but not neurosurgery.

10 MR. ROGERS: He talked about he's a professor in both of
11 those departments, a full professor at UCLA.

12 MR. EGLET: That doesn't mean he's an expert in
13 neurosurgery. He didn't do a neurosurgical residency. He
14 can't --

15 MR. ROGERS: They're two -- they approach the spine from
16 two different methods. So --

17 THE COURT: He [indiscernible] about the spine surgeon.
18 I think you adequately laid foundation with respect to that
19 specialty. But we didn't hear very much --

20 MR. EGLET: And none of his reports in this case go to
21 neurosurgery anyway. It's all with -- in spine surgery. All
22 his opinions in the reports are orthopedic spine surgery, and
23 it's not neurosurgery. So I don't see --

24 MR. ROGERS: You know, he's not going to getting into
25 brain surgery in this case if that's the point of concern.

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1 MR. EGLET: It doesn't matter. He's not a neurosurgeon.

2 THE COURT: Then why'd you move to so qualify him?

3 MR. ROGERS: Simply because he appeared to qualify by
4 virtue of his full professorship in both departments at UCLA.

5 THE COURT: So do you want to restate your motion?

6 MR. ROGERS: We're just requesting for the admission of
7 the expert as an expert in those two areas.

8 THE COURT: So do you want to restate or would you rather
9 that I suggest that he can give testimony with respect to the
10 orthopedic --

11 MR. ROGERS: Okay. I'll restate it.

12 THE COURT: -- specialty.

13 MR. ROGERS: Okay.

14 [Bench Conference Ends]

15 MR. ROGERS: All right. We move to admit Dr. Wang as an
16 expert in orthopedic surgery, in particular, in orthopedic
17 spine surgery.

18 THE COURT: Any --

19 MR. EGLET: No objection, Your Honor.

20 THE COURT: So ordered.

21 BY MR. ROGERS:

22 Q Okay. Doctor, let's start with your opinions in this
23 case. And then we'll get into the details of it. First, did
24 the car accident of April 15, 2005 cause a traumatic disc
25 injury at C3/4, C4/5, the levels that were fused?

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1 A I do not believe the accident caused a traumatic
2 disc injury.

3 Q Okay. Is there any evidence of a traumatic injury
4 at those two levels that were fused?

5 A I see no evidence based on all the imaging studies
6 that I've reviewed in this case.

7 Q Okay. Did the Plaintiff injure his cervical spine
8 in any way in this accident?

9 A Well, I think he may, at most, have had a cervical
10 strain.

11 Q What do you base that one?

12 A Well, on the day of the accident he was seen by a
13 physician's assistant at, I believe, an urgent care facility.
14 And it's documented that he had complaints of some neck pain
15 at that time.

16 Q Okay. So you relied then on the records supplied by
17 that urgent care center?

18 A That's correct.

19 Q All right. What care in your opinion was reasonable
20 and necessary and related to this accident?

21 A Well, I believe the initial visit on the day of the
22 incident when he was seen at the urgent care facility. And I
23 believe he was seen three or four times up to the end of May
24 of 2005. And I think, at that point, I would probably relate
25 those symptoms to the accident.

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1 Q And are the opinions you've just given to a
2 reasonable degree of medical probability?

3 A Yes.

4 Q All right. In addition to the record that you just
5 referenced from the date of the incident, where the
6 physician's assistant noted an assessment of a cervical
7 sprain, you reviewed the remaining three or four records of
8 the next month-and-a-half at Southwest Medical?

9 A Yes.

10 Q Okay. What did those records show you about the
11 Plaintiff's assessment of cervical sprain?

12 A Well, during those visits I did not see any signs of
13 neck pain or reported neck pain. At the first and second
14 visit following the incident -- I believe the first one was
15 three weeks following the incident. The other one was
16 probably a week or so later. I see that the physician's
17 assistant had done a focused exam on the neck, and they found
18 that the neck was supple with a full range of motion, which
19 would indicate the neck was normal.

20 Q Okay. Now at that first visit, the Plaintiff also
21 complained of left elbow pain and an x-ray was taken. Was
22 there any evidence of ongoing left elbow problems after the
23 date of the incident?

24 A I don't recall seeing any problems with the left
25 elbow. I -- after the incident. I do recall that on the day

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1 of the incident, when the patient was seen in the urgent care
2 facility, there was a complaint of some left elbow pain. I
3 believe there was maybe some bruising over the posterior
4 scalp.

5 Q Okay, good. That's another and I think the final
6 assessment there. And that was the bruising there. And the
7 Plaintiff, of course, complained of headaches. What is your
8 opinion regarding the accident and those headaches?

9 A Well, it appeared that the patient had a history of
10 headaches. It seemed that the patient may have struck his
11 head during the incident. So -- and I believe he reported
12 that he thought the headaches were increased. At least he was
13 treated or worked up for those headaches on the first couple
14 visits following the incident.

15 Q Okay. The headaches then in that period of time
16 shortly after the accident, at Southwest Medical Associates,
17 in your opinion, are those related to the accident as well?

18 A Well, there's a past history of headaches, but, you
19 know, it's -- I think it's reasonable for those visits right
20 after the accident to say that those visits were related as
21 far as the need for those visits. I think it's reasonable to
22 relate that to the accident.

23 Q Okay. Now is there any suggestion that the
24 Plaintiff complained of neck pain after the date of the
25 incident, for the next roughly five months?

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1 A Yeah. The only documentation I see is the day of
2 the incident where it's documented that he had reports of neck
3 pain. The following visits, I don't see any reports of neck
4 pain until October of 2005, which is five or six months
5 following the incident.

6 Q And during that course, those five or six months,
7 you saw that exams were performed on the neck?

8 A Well, there were exams performed I think within
9 three to five weeks following the incident up through, I
10 believe, the end of May of 2005.

11 Q Okay. Now, hypothetically, if the Plaintiff claims
12 that he had consistent neck pain following this accident, and
13 that the PA who examined him failed to report it, would that
14 change your opinion regarding the neck condition that might
15 have been caused by this accident, or case or considered that
16 maybe in an x-ray [sic]?

17 A I don't think that would change my overall opinions.
18 If they didn't document that the patient reported neck pain,
19 there is documentation that they did a neck exam, which was
20 normal on two of the visits following the accident. But even
21 if they didn't document that the patient was reporting neck
22 pain, I don't really see any visits after the end of May until
23 October of that year.

24 Q Okay. Now what if there were no gaps, let's say,
25 hypothetically. The Plaintiff claims that he reported neck

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1 pain to the physician's assistant, which wasn't written down
2 in the report. And in addition, there are no gaps in
3 treatment. Would that potentially change your opinion about
4 whether something more than a sprain was caused by this
5 accident?

6 A I'm sorry. So the question is if the patient had
7 pain consistently from the time of the accident.

8 Q Yes, and there are no gaps in treatment.

9 A I think that would change my opinion. That's much
10 more consistent with some type of traumatically induced
11 injury. Typically, you have the symptoms at the onset right
12 around the time of the incident, and there's consistent
13 symptoms from that time.

14 Q Okay. Now in your experience, do patients who have
15 sustained a traumatic disc injury not treat for three weeks
16 immediately after the accident as the Plaintiff in this case?

17 MR. EGLET: Objection, vague as to the level of the
18 nature of the disc injury, Your Honor.

19 THE COURT: Ask you to clarify, please.

20 BY MR. ROGERS:

21 Q In your experience, is it typical for a patient who
22 has sustained a traumatic internal disc disruption at C3/4 and
23 C4/5, that such a patient would stop treating the day after
24 the accident for three weeks?

25 MR. EGLET: Your Honor, may we approach?

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1 THE COURT: Sure.

2 [Bench Conference Begins]

3 MR. EGLET: This question is still vague and ambiguous
4 because there are all different levels as the testimony -- the
5 evidence has been. There have been -- there are all different
6 levels of internal disc disruption. You have a mild a more
7 mild internal disc disruption or you have more severe internal
8 disc disruption. So there's no clarification here as to what
9 that is with respect to this witness. We went through the
10 same thing with Dr. Fish. He's giving these very broad
11 strokes about, you know, injuries to the spine or disc -- you
12 know, disc injuries. And then I ask him to clarify and he'll
13 ask -- objection, and all he did was add internal disc
14 disruption and specified the specific level. It still doesn't
15 focus what we're talking about, which is this specific
16 patient. So he's asking for a broad stroke with the gambit of
17 patients, whatever they are, that he treats. And we still
18 haven't even laid the foundation for what type of patients he
19 treats. We don't even know if he treats patients who come in
20 with internal disc disruption or if he treats patients just --
21 that just come in with structural injuries in the trauma
22 center to their spine. So there's no foundation. And the
23 question is so vague and broad and ambiguous that it doesn't
24 [indiscernible] concept of this this case.

25 Also, what he has seen with his other patients I

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1 don't think is relevant to this particular Plaintiff. It's
2 not relevant what some other case or multiple cases he may
3 have that he's treated of other people is not relevant to this
4 case. What's relevant is this patient. This patient is not a
5 statistic. He's an individual.

6 THE COURT: Mr. Rogers.

7 MR. ROGERS: Yeah. Actually, we've been referring to
8 expertise on a presentation basis throughout this trial of how
9 does this symptom [indiscernible] present. If this is a
10 traumatic injury, how does it typically present? This isn't
11 any different from the questions that have been asked and
12 answered throughout this trial. Counsel has pointed out
13 [indiscernible] he might be able to cross-examine him on, but
14 the foundation is there, clearly. He's been accepted as an
15 expert [indiscernible]. He's performed surgery on all types
16 of conditions to the spine. And the question is narrowly
17 limited, because it's exactly the condition that Plaintiff
18 claims in this case.

19 MR. EGLET: The foundation is not the witness'
20 qualifications. The foundation is with respect to the
21 specific type of injuries we have here. There's been no
22 foundation about that. And second of all, it's not relevant
23 as to what other people -- other -- you know, what other
24 patients he's -- he has worked on, because we don't -- we
25 can't [indiscernible]. You're comparing apples to oranges.

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1 We don't know what the extent of that disc disruption. We
2 don't know if it was a full blown herniation. We don't know
3 if there was a nerve impingement. We don't know if there was
4 cord impingement. None of those things happened here. We
5 didn't have a full blow herniation. We don't have any cord
6 impingement. We don't have any nerve impingement. That's
7 been the testimony. This is simply a tear in the disc. So
8 it's completely different. It's way overbroad and it's not
9 focused here. It's the same thing that happened with Dr.
10 Fish.

11 THE COURT: I'm going to sustain the objection.

12 [Bench Conference Ends]

13 BY MR. ROGERS:

14 Q Doctor, you've reviewed all the records in this
15 case, and you understand what injury it is that the Plaintiff
16 claims was caused by this accident, correct?

17 A I believe so.

18 Q My question then that I asked just a moment ago was
19 what is the typical presentation of a patient who
20 traumatically injures those two levels as the Plaintiff
21 claims? And does that typical presentation include not
22 treating for three weeks following the date of the incident?

23 MR. EGLET: Same objection, Your Honor.

24 THE COURT: Same ruling. Sustain the objection.

25 ///

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1 BY MR. ROGERS:

2 Q In addition to the three week gap in treatment
3 following the date of the incident, you've mentioned that the
4 Plaintiff stop treating for four-and-a-half months after
5 treating for roughly a month to a month-and-a-half. In
6 patients who you've treated for traumatic injury to C3/4 and
7 C4/5, in particular, the kinds of injuries that the Plaintiff
8 is claiming in this case, is it typical for a patient to stop
9 treating?

10 MR. EGLET: Same objection, Your Honor.

11 THE COURT: Same ruling. Sustained.

12 BY MR. ROGERS:

13 Q Well, let's get to the Plaintiff's injury claim and
14 then we'll come back to these questions. All right. Doctor?
15 In this case, Dr. Fish testified that the structure
16 surrounding the disc are like a coffee table to a house, that
17 it's not likely that you would sustain damage to that coffee
18 table unless there is -- from an outside force unless there's
19 evidence of damage as well to the surrounding structures,
20 walls, windows, roof, things like that. Is that, in your
21 opinion, an apt analogy as it relates to traumatic injury to
22 the spine disc?

23 MR. EGLET: Your Honor, objection, vague and ambiguous as
24 to what traumatic injury means. The same objection we just
25 argued.

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1 THE COURT: Counsel approach, please.

2 [Bench Conference Begins]

3 MR. EGLET: Once again, what are we talking about here?
4 Are we talking about a disc like it's been completely blown
5 out? Are we talking about a simple internal disc disruption
6 where you have an annular tear? It's so vague and ambiguous,
7 and that's the problem with Dr. Fish's testimony. That's why
8 the other physicians came in and literally laughed at it when
9 we gave that example, because you talked about -- remember
10 Drs. Grover and Dr. McNulty. There's a spectrum, a scale of
11 injury. So he's painting this with this broad stroke that,
12 well, if there's disc disruption, if there's injury to the
13 disc. Well, yeah, you can have those kind of structures
14 destroyed if it's -- you know, if you completely obliterate
15 everything there, you can wipe out the disc. But when you
16 have a tear, it's a spectrum. And again, so the objection is
17 it's vague, overbroad, ambiguous, and the same as the other
18 objection.

19 MR. ROGERS: Your Honor, this time [indiscernible]
20 prefaced the question with the fact that the doctor has
21 reviewed all of the medical records and he is limiting his
22 opinion to the injuries that the Plaintiff has claimed as a
23 result --

24 MR. EGLET: No.

25 MR. ROGERS: -- of this incident.

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In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

Electronically Filed
Aug 14 2012 04:10 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

JENNY RISH,

Appellant,

vs.

WILLIAM JAY SIMAO, individually, and
CHERYL ANN SIMAO, individually and as
husband and wife,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JESSIE WALSH, District Judge
District Court Case No. A539455

**APPELLANT'S APPENDIX
VOLUME 10
PAGES 2180-2430**

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TABLE OF CONTENTS TO APPENDIX

Tab	Document	Date	Vol.	Pages
01	Complaint	04/13/07	1	01-08
02	Summons (Jenny Rish)	08/10/07	1	09-11
03	Summons (James Rish)	08/28/07	1	12-15
04	Summons (Linda Rish)	08/28/07	1	16-19
05	Notice of Association of Counsel	09/27/07	1	20-22
06	Defendant Jenny Rish's Answer to Plaintiff's Complaint	03/21/08	1	23-26
07	Demand for Jury Trial	03/21/08	1	27-29
08	Scheduling Order	06/11/08	1	30-33
09	Order Setting Civil Jury Trial	08/18/08	1	34-38
10	Stipulation and Order to Extend Discovery	05/06/09	1	39-43
11	Notice of Entry of Order to Extend Discovery	05/08/09	1	44-50
12	Amended Scheduling Order	06/10/09	1	51-54
13	Order Setting Civil Jury Trial	08/28/09	1	55-59
14	Stipulation and Order to Continue Trial Date	03/31/10	1	60-62
15	Notice of Entry of Order to Continue Trial Date	04/02/10	1	63-67
16	Notice of Association of Counsel	04/02/10	1	68-71
17	Order Setting Civil Jury Trial	12/15/10	1	72-75
18	Stipulation and Order to Continue Trial Date	12/22/10	1	76-78
19	Notice of Entry of Order to Continue Trial Date	01/04/11	1	79-83
20	Defendant Jenny Rish's Motion in Limine to Limit the Testimony of Plaintiff's Treating Physicians	01/06/11	1	84-91
21	Defendants' Motion in Limine to Preclude Plaintiffs' Medical Providers and Experts from Testifying Regarding New or Undisclosed Medical Treatment and Opinions	01/06/11	1	92-101
22	Defendant Jenny Rish's Motion to Exclude the Report and Opinions Plaintiff's Accident Reconstruction Expert, David Ingebretsen	01/06/11	1	102-114

23	Plaintiff's Omnibus Motion in Limine	01/07/11	1	115-173
24	Defendant Jenny Rish's Opposition to Plaintiffs' Omnibus Motion in Limine	02/04/11	1	174-211
25	Plaintiffs' Opposition to Defendant Jenny Rish's Motion in Limine Enforcing the Abolition of the Treating Physician Rule	02/04/11	1	212-217
26	Plaintiffs' Opposition to Defendant's Motion in Limine to Preclude Plaintiffs' Medical Providers and Experts from Testifying Regarding New or Undisclosed Medical Treatment and Opinions	02/04/11	1	218-223
27	Plaintiffs' Opposition to Defendant Jenny Rish's Motion to Exclude the Report and Opinions of Plaintiff's Accident Reconstruction Expert, David Ingebretsen	02/04/11	1	224-244
28	Defendant Jenny Rish's Reply in Support of Motion to Exclude the Report and Opinions of Plaintiff's Accident Reconstruction Expert, David Ingebretsen	02/08/11	1	245-250
29	Defendant Jenny Rish's Reply in Support of Motion in Limine to Limit the Testimony of Plaintiff's Treating Physicians	02/08/11	2	251-256
30	Defendant Jenny Rish's Reply in Support of Motion in Limine to Preclude Plaintiffs' Medical Providers and Experts from Testifying Regarding New or Undisclosed Medical Treatment and Opinions	02/08/11	2	257-262
31	Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Omnibus Motion in Limine	02/11/11	2	263-306
32	Plaintiff's Motion to Exclude Sub Rosa Video	02/14/11	2	307-313
33	Transcript of Hearings on Motion	02/15/11	2	314-390
34	Plaintiff's Motion in Limine to (1) Preclude Defendant from Raising a "Minor" or "Low Impact" Defense; (2) Limit the Trial Testimony of Defendant's Expert David Fish M.D. and; (3) Exclude Evidence of Property Damage	02/17/11	2	391-441
35	Defendant Jenny Rish's Opposition to Plaintiff's Motion to Exclude Sub Rosa Video	02/18/11	2	442-454
36	Transcript of Hearing	02/22/11	3	455-505
37	Order Regarding Plaintiff's Motion to Allow the Plaintiff's to Present a Jury Questionnaire Prior to Voir Dire	02/25/11	3	506-508

38	Defendant Jenny Rish's Opposition to Plaintiff's Motion in Limine to Preclude Defendant from Raising a "Minor" or "Low Impact" Defense; Limit the trial Testimony of Defendant's Expert David Fish M.D. and; Exclude Evidence or Property Damage	02/25/11	3	509-517
39	Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Exclude Sub Rosa Video	02/27/11	3	518-522
40	Transcript of Hearing	03/01/11	3	523-550
41	Plaintiffs' Second Omnibus Motion in Limine	03/02/11	3	551-562
42	Defendant's Opposition to Plaintiffs' Second Omnibus Motion in Limine	03/04/11	3	563-567
43	Transcript of Hearing on Omnibus Motion in Limine	03/08/11	3	568-586
44	Notice of Entry of Order Re: EDCR 2.47	03/10/11	3	587-593
45	Order Regarding Plaintiffs' Omnibus Motion in Limine	03/11/11	3	594-597
46	Order Regarding Plaintiff's Motion in Limine to (1) Preclude Defendant from Raising a "Minor" or "Low Impact" Defense; (2) Limit the Trial Testimony of Defendant's Expert David Fish M.D. and; (3) Exclude Evidence of Property Damage	03/14/11	3	598-600
47	Notice of Association of Counsel	03/14/11	3	601-603
48	Trial Transcript	03/14/11	3	604-705
			4	706-753
49	Trial Transcript	03/15/11	4	754-935
50	Trial Transcript	03/16/11	5	936-1102
51	Trial Transcript	03/17/11	5	1103-1186
			6	1187-1256
52	Trial Transcript	03/18/11	6	1257-1408
53	Notice of Entry of Order Regarding Plaintiffs' Omnibus Motion in Limine	03/18/11	6	1409-1415
54	Trial Brief in Support of Oral Motion for Mistrial	03/18/11	6	1416-1419
55	Trial Brief on Percipient Testimony Regarding the Accident	03/18/11	6	1420-1427
56	Trial Transcript	03/21/11	7	1428-1520

57	Trial Transcript	03/22/11	7	1521-1662
58	Plaintiffs' Opposition to Defendant's Trial Brief in Support of Oral Motion for Mistrial	03/22/11	7	1663-1677
59	Receipt of Copy of Plaintiffs' Opposition to Defendant's Trial Brief in Support of Oral Motion for Mistrial	03/22/11	8	1678-1680
60	Order Granting Motion to Exclude Traffic Accident Report and Investigating Officer's Conclusions	03/22/11	8	1681-1683
61	Order Regarding Plaintiffs' Second Omnibus Motion in Limine	03/22/11	8	1684-1687
62	Order Granting Motion to Exclude Life Care Expert, Kathleen Hartman, R.N.	03/22/11	8	1688-1690
63	Order Granting Motion to Exclude Witnesses from Testifying Regarding the Credibility or Veracity of Other Witnesses	03/22/11	8	1691-1693
64	Order Granting Motion to Exclude Graphic and Lurid Video of Surgery	03/22/11	8	1694-1696
65	Order Granting Motion to Exclude Duplicative and Cumulative Testimony	03/22/11	8	1697-1699
66	Order Granting Motion to Exclude Plaintiff's Accident Reconstructionist/Biomechanical Expert David Ingebretsen	03/22/11	8	1700-1702
67	Order Granting Motion to Exclude Argument of Case During Voir Dire	03/22/11	8	1703-1705
68	Order Granting Motion to Exclude Plaintiff's Economist, Stan Smith, for Lack of Foundation to Offer Expert Economist Opinion	03/22/11	8	1706-1708
69	Trial Transcript	03/23/11	8	1709-1856
70	Trial Transcript	03/24/11	8	1857-1928
			9	1929-2023
71	Plaintiffs' Amended Pre-Trial Memorandum	03/24/11	9	2024-2042
72	Trial Transcript	03/25/11	9	2043-2179
			10	2180-2212
73	Notice of Entry of Order Regarding Plaintiffs' Second Omnibus Motion in Limine	03/25/11	10	2213-2220
74	Trial Transcript	03/28/11	10	2221-2372

75	Trial Transcript	03/29/11	10	2373-2430
			11	2431-2549
76	Trial Brief Regarding Exclusion of Future Surgery for Failure to Disclose Computation of Future Damages Under NRCP 16.1(a)	03/29/11	11	2550-2555
77	Trial Transcript	03/30/11	11	2556-2681
			12	2682-2758
78	Trial Transcript	03/31/11	12	2759-2900
79	Stipulation and Order for Dismissal With Prejudice	03/31/11	12	2901-2904
80	Trial Transcript	04/01/11	13	2905-2936
81	Minutes of Hearing on Prove-up of Damages	04/01/11	13	2937-2938
82	Plaintiffs' Confidential Trial Brief	04/01/11	13	2939-3155
			14	3156-3223
83	Plaintiffs' First Supplement to Their Confidential Trial Brief to Exclude Unqualified Testimony of Defendant's Medical Expert, Dr. Fish	04/01/11	14	3224-3282
84	Plaintiffs' Second Supplement to Their Confidential Trial Brief to Permit Dr. Grover to testify with Regard to all Issues Raised During his Deposition	04/01/11	14	3283-3352
85	Plaintiffs' Third Supplement to Their Confidential Trial Brief; There is No Surprise to the Defense Regarding Evidence of a Spinal Stimulator	04/01/11	14	3353-3406
86	Plaintiffs' Fourth Supplement to Their Confidential Trial Brief Regarding Cross Examination of Dr. Wang	04/01/11	15	3407-3414
87	Plaintiffs' Fifth Supplement to Their Confidential Trial Brief to Permit Stan Smith, Ph.D., to Testify Regarding, Evidence Made Known to Him During Trial	04/01/11	15	3415-3531
88	Stipulation and Order to Modify Briefing Schedule	04/21/11	15	3532-3535
89	Defendant's Response in Opposition to Plaintiff's Request for Attorney Fees	04/22/11	15	3536-3552
90	Defendant's Amended Response in Opposition to Plaintiffs' Request for Attorney Fees	04/22/11	15	3553-3569
91	Plaintiffs' Brief in Favor of an Award of Attorney's Fees Following Default Judgment	04/22/11	15	3570-3624

92	Stipulation and Order to Modify Briefing Schedule	04/22/11	15	3625-3627
93	Decision and Order Regarding Plaintiffs' Motion to Strike Defendant's Answer	04/22/11	16	3628-3662
94	Notice of Entry of Order to Modify Briefing Schedule	04/25/11	16	3663-3669
95	Notice of Entry of Order to Modify Briefing Schedule	04/26/11	16	3670-3674
96	Notice of Entry of Order Regarding Motion to Strike	04/26/11	16	3675-3714
97	Plaintiffs' Memorandum of Costs and Disbursements	04/26/11	16	3715-3807
98	Minutes of Hearing Regarding Status Check	04/28/11	16	3808-3809
99	Judgment	04/28/11	16	3810-3812
100	Defendant's Motion to Retax Costs	04/29/11	16	3813-3816
101	Notice of Entry of Judgment	05/03/11	16	3817-3822
102	Stipulation and Order to Stay Execution of Judgment	05/06/11	16	3823-3825
103	Notice of Entry of Order to Stay Execution of Judgment	05/09/11	16	3826-3830
104	Plaintiffs' Opposition to Defendant's Motion to Retax Costs	05/16/11	16	3831-3851
105	Defendant's Motion for New Trial	05/16/11	17	3852-4102
			18	4103-4144
106	Certificate of Service	05/17/11	18	4145-4147
107	Subpoena Duces Tecum (Dr. Rosler)	05/18/11	18	4148-4153
108	Plaintiffs' Motion for Attorneys' Fees	05/25/11	18	4154-4285
109	Defendant's Reply to Opposition to Motion to Retax Costs	05/26/11	18	4286-4290
110	Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jan-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time	05/26/11	18	4291-4305
111	Notice of Appeal	05/31/11	19	4306-4354
112	Case Appeal Statement	05/31/11	19	4355-4359
113	Judgment	06/01/11	19	4360-4373
114	Defendant's Opposition to Motion to Quash	06/01/11	19	4374-4378
115	Minutes of Hearing Regarding Motion to Retax	06/02/11	19	4379-4380
116	Notice of Entry of Judgment	06/02/11	19	4381-4397

117	Plaintiffs' Reply to Defendant's Opposition to Motion to Quash Defendants' Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Spine Institute on Order Shortening Time	06/06/11	19	4398-4405
118	Transcript of Hearing Regarding Motion to Quash	06/07/11	19	4406-4411
119	Defendant's Opposition to Motion for Attorney Fees	06/13/11	19	4412-4419
120	Order Denying Defendant's Motion to Retax Costs	06/16/11	19	4420-4422
121	Notice of Entry of Order Denying Motion to Retax Costs	06/16/11	19	4423-4429
122	Plaintiffs' Opposition to Defendant's Motion for New Trial	06/24/11	19	4430-4556
			20	4557-4690
123	Amended Notice of Appeal	06/27/11	20	4691-4711
124	Amended Case Appeal Statement	06/27/11	20	4712-4716
125	Defendant's Motion to Compel Production of Documents	07/06/11	20	4717-4721
126	Receipt of Appeal Bond	07/06/11	20	4722-4723
127	Defendant's Reply to Opposition to Motion for New Trial	07/14/11	20	4724-4740
128	Plaintiffs' Reply to Defendant's Opposition to Motion for Attorneys' Fees	07/14/11	20	4741-4748
129	Minutes of Hearings on Motions	07/21/11	20	4749-4751
130	Order Granting Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time	07/25/11	20	4752-4754
131	Notice of Entry of Order Granting Motion to Quash	07/25/11	20	4755-4761
132	Plaintiffs' Opposition to Defendant's Motion to Compel Production of Documents	07/26/11	20	4762-4779
133	Minutes of Hearing on Motion to Compel	08/11/11	20	4780-4781
134	Order Denying Defendant's Motion for New Trial	08/24/11	20	4782-4784
135	Notice of Entry of Order Denying Defendant's Motion for New Trial	08/25/11	20	4785-4791
136	Order Denying Defendant's Motion to Compel Production of Documents	09/01/11	20	4792-4794
137	Notice of Entry of Order Denying Defendant's Motion to Compel Production of Documents	09/02/11	20	4795-4800
138	Second Amended Notice of Appeal	09/14/11	21	4801-4811

139	Second Amended Case Appeal Statement	09/14/11	21	4812-4816
140	Order Granting Plaintiffs' Motion for Attorney's Fees	09/14/11	21	4817-4819
141	Notice of Entry of Order Granting Plaintiffs' Motion for Attorney's Fees	09/15/11	21	4820-4825
142	Final Judgment	09/23/11	21	4826-4829
143	Notice of Entry of Final Judgment	09/30/11	21	4830-4836
144	Notice of Posting Supersedeas Bond	09/30/11	21	4837-4845
145	Request for Transcripts	10/03/11	21	4846-4848
146	Third Amended Notice of Appeal	10/10/11	21	4849-4864
147	Third Amended Case Appeal Statement	10/10/11	21	4865-4869
148	Portion of Jury Trial - Day 6 (Bench Conferences)	03/21/11	21	4870-4883
149	Portion of Jury Trial - Day 7 (Bench Conferences)	03/22/11	21	4884-4900
150	Portion of Jury Trial - Day 8 (Bench Conferences)	03/23/11	21	4901-4920
151	Portion of Jury Trial - Day 9 (Bench Conferences)	03/24/11	21	4921-4957
152	Portion of Jury Trial - Day 10 (Bench Conferences)	03/25/11	21	4958-4998
153	Portion of Jury Trial - Day 11 (Bench Conferences)	03/28/11	21	4999-5016
154	Portion of Jury Trial - Day 12 (Bench Conferences)	03/29/11	22	5017-5056
155	Portion of Jury Trial - Day 13 (Bench Conferences)	03/30/11	22	5057-5089
156	Portion of Jury Trial - Day 14 (Bench Conferences)	03/31/11	22	5090-5105

1 MR. ROGERS: -- exploring.

2 MR. EGLET: No.

3 MR. ROGERS: It's the plate or a cage or a --

4 MR. EGLET: I'll tell you what he's getting -- what he's
5 opening up here, because now we're going to have to go into
6 the fact that -- if this is allowed, we're going to have to go
7 into the fact is 6'6" tall. Okay. And his head is well above
8 any headrest or cushion in this vehicle. So now we're going
9 to start getting into all this stuff that the Court has
10 excluded. And that's this -- he's doing exactly what I said
11 he was going to try to do. He's trying to get into the
12 mechanism of injury. He's talking about cushions, whether
13 there's a headrest. All of that is excluded, and now we start
14 having to have testimony about how tall is your client, what's
15 the height of the headrest, all of this stuff that's been
16 excluded, because there's no testimony -- there no expertise
17 in this case on whether the force of this accident was not
18 sufficient enough to cause his injuries. And that's the only
19 reason for this line of testimony. That's what he's going to
20 get into. I'm going to ask the Court to instruct Mr. Rogers
21 to stop doing that. He's trying to get around the Court's
22 order.

23 MR. ROGERS: That's not at all where I'm going. The
24 question isn't about force. The question is how far did it
25 flex.

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1 MR. EGLET: It doesn't matter.

2 MR. ROGERS: That's all.

3 MR. EGLET: It doesn't matter.

4 THE COURT: But you're adding stuff into this trial that
5 the jury hasn't heard anything about. I just --

6 MR. ROGERS: Until Dr. Grover introduced this.

7 THE COURT: They hadn't heard about it until you
8 [indiscernible].

9 MR. EGLET: He didn't introduce it. It's in the medical
10 records that our client hit his head on a metal cage behind
11 the seat. It's all over the medical records.

12 THE COURT: That's what I understood.

13 MR. EGLET: Every witness has testified about it.

14 MR. ROGERS: But then Doctor --

15 THE COURT: Sustain the objection.

16 MR. ROGERS: Can I explore then the question that he's
17 introduced about hyper-flexion and extension?

18 THE COURT: Yeah, I think you can.

19 MR. ROGERS: In other words --

20 MR. EGLET: Well, wait a minute. I want an -- wait. I
21 want an offer of proof, because I believe what he's going to
22 try to do is going into the issue of -- well, because this is
23 what his question is going to be. Well, if there was a
24 cushion back there, that would prevent his head from --

25 MR. ROGERS: I won't say cushion.

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1 MR. EGLET: -- extending -- or headrest or whatever
2 the --

3 MR. ROGERS: I won't say headrest.

4 MR. EGLET: -- or anything back there on the seat. See,
5 he's -- I won't say this. I won't say that. Well, is there
6 anything that would prevent that from hyperextending. We're
7 getting into the mechanism of injury, Your Honor.

8 MR. ROGERS: The question is the space.

9 MR. EGLET: He's get- -- the space. It's the same thing.
10 There's no expert testimony here that they have to establish
11 that -- it doesn't matter whether there was -- what space was
12 there, because there's no link. There's no expert testimony
13 they had that said well, if there's only three inches, that
14 couldn't cause a hyperextension flexion injury, therefore, he
15 couldn't have had these injuries. They can't link it up.

16 MR. ROGERS: I didn't catch that.

17 MR. EGLET: They can't link it up, and that's the point.

18 THE COURT: Well, he can examine this witness' statement
19 about the hyper-flexion, however the witness --

20 MR. EGLET: But he can't examine him on how much space
21 was there --

22 THE COURT: Well, no, he can't.

23 MR. EGLET: -- whether he could have -- okay.

24 THE COURT: And --

25 MR. EGLET: That's --

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1 MR. ROGERS: Where the extension is.

2 THE COURT: And the other thing is this witness
3 presumably -- actually, apparently hasn't seen this thing.
4 He's only read about it from the reports. So you can't ask
5 him questions that are beyond his knowledge. He wasn't there
6 in the car when this person was --

7 MR. EGLET: He hasn't inspected this car.

8 THE COURT: -- hit.

9 MR. EGLET: He doesn't know any of this stuff.

10 THE COURT: So, you know, let's not have questions posed
11 to him that he can't answer because he's not seen the thing.
12 I don't want him speculating.

13 MR. ROGERS: Okay. Now the question that becomes, if I
14 am allowed to inquire about his testimony to this jury, that
15 there was a hyperextension, then the only method to do that is
16 to ask him okay, if it's a hyperextension, how far was the
17 extension if --

18 MR. EGLET: There you go.

19 THE COURT: You know, it seems like Mr. Eglet may be
20 correct, and you are trying to now get into areas that aren't
21 appropriate for the examination for this witness. So carry on
22 the best you can.

23 [End Bench Conference]

24 MR. EGLET: Objection sustained for the record, Your
25 Honor?

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1 THE COURT: Yes. Yes, it was.

2 BY MR. ROGERS:

3 Q You know the Plaintiff wasn't transported by
4 ambulance.

5 A Yes, sir.

6 Q You know that Jenny Rish --

7 MR. EGLET: Objection, Your Honor.

8 BY MR. ROGERS:

9 Q -- was lifted from the scene.

10 THE COURT: Sustained.

11 MR. EGLET: Your Honor, move to strike --

12 THE COURT: Sustained.

13 MR. EGLET: -- and ask Mr. Rogers to be admonished for
14 violating another court order.

15 THE COURT: The jury will disregard Mr. Rogers' last
16 question regarding Ms. Rish.

17 BY MR. ROGERS:

18 Q Is it fair to say, Doctor, that your causation
19 opinion is not based on any particular facts about the
20 accident itself?

21 A It's based on the facts as far as I know them about
22 the accident.

23 Q As far as you know them is what you've learned from
24 the Plaintiff.

25 A And my review of the records, which is history

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1 obtained from the Plaintiff also by other practitioners,
2 including the Southwest Medical Associates nurse practitioner
3 or physician assistant.

4 Q Now onto those Southwest Medical records. When I
5 took your deposition back in April of 2009, you had not, at
6 that time, examined any of the records that you've discussed
7 today, correct?

8 A That's correct.

9 Q When did you review them?

10 A Oh, I reviewed them over the course of this last
11 week. I think I started reviewing them last week because I
12 was supposed to testify on Friday of last week. And then I
13 was asked to testify on Monday of this week, then I was asked
14 to be available today. So I started reviewing them, I think,
15 last week sometime.

16 Q All right. And they were supplied to you by
17 Plaintiff's counsel?

18 A Yes, sir.

19 Q And you met with Plaintiff's counsel to prepare for
20 this examination today?

21 A I did, yes.

22 Q We discussed some of the Plaintiff's
23 characterization of Dr. Fish's testimony. I'm going to ask
24 you some questions that were posed to Dr. McNulty. If Dr.
25 McNulty testified that the likelihood of traumatic cervical

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1 disc injury from this car accident is diminished if the
2 Plaintiff did complain of neck symptoms for four-and-a-half to
3 five following the accident, would you agree or disagree with
4 him?

5 A I don't disagree.

6 Q Okay. Also, with regard to the cervical
7 discography, you agree that there are concerns regarding the
8 reliability of this study?

9 A Yes.

10 Q Dr. McNulty testified that in his hands, he has an
11 85 to 90 percent success rate on this two-level cervical
12 fusion for this, performed on the Plaintiff. Do you have that
13 same success rate?

14 A Yes, I believe that most people who have this
15 operation, in my experience and in my hands, and I believe in,
16 frankly, most other technically competent hands, have good
17 outcomes.

18 Q However, if the surgery is performed at levels that
19 are not injured, that success rate wouldn't be obtainable.

20 A I think that's a reasonable statement.

21 Q In your recent review of the Southwest Medical
22 records close in time to the date of the incident, you
23 observed that the Plaintiff did not complain of neck pain
24 following the date of the incident, correct?

25 A My review revealed that at the date of the incident

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1 he complained of neck pain, some occipital pain, or back of
2 the head pain, and shoulder blade pain. And I don't see a
3 history of complaints for many months thereafter. That is
4 correct.

5 Q And what was it then that led you to tell this jury
6 that you believe that the symptoms persisted when the medical
7 records don't support that?

8 MR. EGLET: I'm going to object to the characterization
9 of argumentative that the medical records support that.

10 THE COURT: Ask you to rephrase that. I think that's an
11 ultimate finding for the jury.

12 BY MR. ROGERS:

13 Q You don't see complaints of neck pain in those
14 medical records from the date of the incident up until October
15 6th, correct?

16 A Not specifically documented as neck pain. That is
17 correct.

18 Q And yet, you told the jury that you believe that
19 those symptoms persisted.

20 A I do.

21 Q And what would lead you to say that when the records
22 don't support it?

23 A Yeah, I'd be happy to explain that. I believe that
24 absolutely, because Mr. Simao complained of neck pain
25 immediately after the accident. He followed up periodically

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1 with the nurse practitioners, but really was told by the nurse
2 practitioner, after initial evaluation of the scans of the
3 head, you can take some muscle relaxants and pain -- but you
4 really don't need to come back and see us for six months.

5 So they ruled out an acutely unstable problem such
6 as an -- something going on intracranially, such as a head
7 injury. They said you know, you're having pain, but just see
8 us back in six months if you're not getting better, which is
9 not an unreasonable approach in a clinical setting. But he
10 had acute onset of neck pain. He followed up periodically,
11 and I believe the nurse practitioners or physician assistants
12 that saw him documented and his -- that he's having an
13 alteration in the perce- -- in his migraine headaches,
14 increased intensity, different type of intensity of migraine.
15 And I think they concentrated on that. And I believe that's
16 how they documented his condition.

17 They actually treated for his neck pain, because
18 they continued to prescribe for him ibuprofen and muscle
19 relaxants, which were never prescribed to him before, and
20 those are not medications that are prescribed ordinarily, as
21 far as I know, for migraine headaches. But they are
22 medications that are prescribed for patients that have neck
23 injuries such as Mr. Simao experienced and that which he
24 complained of immediately afterwards. So I believe that he
25 had these ongoing problems. He may very well have complained

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1 about them to the practitioner. But they're not clearly
2 documented in the record to that effect. But it's clear that
3 he was continuing to be treated for that based on the
4 medications that were prescribed. So it's my belief that he
5 was having two concurrent ongoing problems, but it's not
6 clearly documented like that in the record. And that's not
7 necessarily uncommon.

8 Q So this belief is based on a belief that there was
9 an omission in those records?

10 A You could say that.

11 Q And when he was discharged from treatment or -- yes,
12 a month-and-a-half after the accident with no medication, just
13 over-the-counter Tylenol, that wouldn't seem to support this
14 medication for neck sprain and pain that you've described.

15 MR. EGLET: Objection, argumentative.

16 THE COURT: Sustained. Ask you to rephrase it.

17 MR. ROGERS: Your Honor, there's something I'd like to
18 ask the witness, but I -- can we approach?

19 [Begin Bench Conference]

20 MR. ROGERS: All right. Dr. Grover has now test- --

21 MR. EGLET: Sorry, I can't hear you.

22 MR. ROGERS: Dr. Grover has now testified that he has
23 roughly, I don't know, 18- or \$20,000 in charges in this case,
24 and I want to inquire not only of the amount he's charging to
25 be here, but also the amount of those charges.

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1 THE COURT: What charges?

2 MR. EGLET: What charges?

3 MR. ROGERS: For his treatment in the case.

4 MR. EGLET: Well, that's -- the amount of his charges for
5 the treatment, there's no issue on that. If you want to ask
6 him how much he's charging for his testimony or how much he
7 charged me to be with me last night, that's fine. But the
8 charges for his treatment has already been established as
9 customary and reasonable. And they have not presented or
10 identified any witness to dispute that his -- that any of our
11 medical treaters' charges are customary and reasonable. So
12 it's irrelevant.

13 UNIDENTIFIED SPEAKER: Well, you're not challenging that.

14 MR. ROGERS: It's not about the reasonableness. It's
15 about the extent of his charges in this case. That's it.

16 MR. EGLET: No.

17 THE COURT: It's in --

18 MR. EGLET: You -- no.

19 THE COURT: It's in evidence, isn't it? And by the way,
20 I think we have to make a record. We still haven't done that.

21 MR. EGLET: Yeah, but the point is is they --

22 MR. ROGERS: Make a record of what?

23 THE COURT: Of those items being admitted --

24 MR. EGLET: What's in evidence.

25 THE COURT: -- and it needs to be in front of the jury.

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1 MR. EGLET: They agreed pretrial that the charges were
2 customary and reasonable. So whatever his charges are -- he -
3 - are not -- I mean they don't have anybody to dispute that
4 they're not customary and reasonable. So the only reason to
5 bring this up is that they're not -- is for him to try to
6 argue they're not customary and reasonable, which they agreed
7 to.

8 THE COURT: Well, I think -- you know, it sounds to me
9 like some of what you proposed may be appropriate for closing
10 argument depending on what your witnesses say with respect to
11 those medical expenses. But I think you're entitled to
12 examine him regarding time and preparation and expense.

13 MR. EGLET: Yeah, the -- he can do that --

14 THE COURT: -- monies being paid in order to give him
15 time.

16 MR. ROGERS: Okay.

17 [End Bench Conference]

18 BY MR. ROGERS:

19 Q These groups that you were earlier asked about the
20 charges on, you own each one of those groups, correct?

21 A Yes.

22 Q Newport, Nevada Spine Center.

23 A Well, they're all part of our comprehensive spine
24 clinic. It's a -- we have a comprehensive center for patients
25 that have spinal disorders. That includes imaging with MRI

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1 scanning and our ability to provide injection -- site specific
2 injection.

3 Q My question was simply whether you owned them.

4 A Yes.

5 Q Now when you and I last discussed this case, I asked
6 you about the Plaintiff's ability to work, and you said that
7 he could probably work in a clerical position. When did you
8 learn that he worked in the carpet and floor cleaning
9 business?

10 A He documented that I think in his initial
11 evaluation.

12 Q So when you said he could probably work in a
13 clerical position, did you mean that it was your
14 understanding, after meeting with the Plaintiff, that he was
15 unable to perform heavy lifting?

16 A No. No. I don't think that he had a condition that
17 would make it not possible for him to lift heavy things or
18 perform cleaning functions.

19 MR. EGLET: Can we approach, Your Honor?

20 THE COURT: Yes.

21 [Begin Bench Conference]

22 MR. EGLET: See, this is the problem of not using a
23 deposition properly, which is what counsel is doing, is when
24 you want to try to impeach a witness with a deposition, you
25 have to provide the witness with the original copy and then

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1 actually read from the deposition.

2 Now what Mr. Rogers just did is completely lied to
3 this jury and misrepresent what the testimony was in the
4 deposition, because here's the question and the answer.

5 "Question: Let's start" -- this is Dr. Grover's
6 deposition.

7 "Let's start with was he able to work when he
8 came to see you in March of 2008.

9 "It depends on the type of work that he would
10 be doing. I certainly felt that he was able to
11 walk, move around. He was complaining of pain in
12 his neck, left shoulder blade area, and he felt
13 that, at times, it was quite significant and
14 unbearable to him. But he was able to talk, walk,
15 speak, move his arms and legs. He could certainly
16 work in some capacity in all likelihood.

17 "Question: I don't mean in a generic sense. I
18 mean was this patient a -- unable to do his work?

19 "I do not know. I don't know what work he was
20 doing. I do not have a reference to that in the
21 chart."

22 So there was no testimony that he could only do
23 clerical work as counsel has represented.

24 MR. ROGERS: If you would allow me to go get the
25 transcript.

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1 THE COURT: Sure.

2 MR. ROGERS: I don't have it in my notes, but --

3 THE COURT: Sure.

4 [Pause]

5 MR. ROGERS: Okay. If he wanted to return to work, I
6 would not tell him, necessarily, not to, but I would certainly
7 probably have advised him not to perform strenuous activities
8 that resulted in prolonged posturing or strain on his neck or
9 his back. But you know, he could work in some capacity. He
10 could probably perform a clerical position.

11 I mean that's -- I don't use the word clerical.

12 MR. EGLET: That wasn't --

13 MR. ROGERS: That was his word.

14 MR. EGLET: That wasn't the question. The question was
15 he [indiscernible] --

16 MR. ROGERS: Yeah.

17 MR. EGLET: -- would he even be able to do any of these
18 things. The answer was not that. The answer was I would
19 advise him to get a -- not that he couldn't do it, but that I
20 would --

21 THE COURT: Uh-huh.

22 MR. EGLET: -- advise him is totally different.

23 MR. ROGERS: You know what, I don't --

24 THE COURT: Yeah. And it's been so long now I don't know
25 if the jury even remembers the question. But I think you need

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1 to clarify. Why don't I have you up here, because you
2 eventually finish [indiscernible] this witness.

3 MR. EGLET: This is -- would be a question for McNulty.
4 He didn't do the surgery. They're asking him is there a video
5 of the surgery [indiscernible].

6 THE COURT: Uh-huh.

7 MR. EGLET: That should have been of Dr. McNulty.

8 THE COURT: This came -- I think it came after McNulty
9 was gone.

10 MR. EGLET: Probably. But he didn't do the surgery, so
11 he wouldn't be able to answer that question.

12 THE COURT: Okay. What about this one?

13 Mr. Rogers.

14 MR. ROGERS: That's fine.

15 THE COURT: All right.

16 MR. EGLET: So what's going to happen now?

17 THE COURT: I think this needs to be clarified. I think
18 you --

19 MR. ROGERS: Okay.

20 THE COURT: -- need to try and clarify.

21 [End Bench Conference]

22 BY MR. ROGERS:

23 Q All right, Doctor, is it fair to say that you didn't
24 have a clear understanding of the Plaintiff's job description
25 when you first met him?

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1 A Yeah, probably so. I don't think I -- when I first
2 met him, I mean I was evaluating him as a treating physician,
3 taking into account his symptoms and his complaints and his
4 problems, and I evaluated him as a doctor and as a clinician.

5 Q When the Plaintiff presented to your office, were
6 you aware that he had undergone injections over the course of
7 roughly 14 to 16 months before seeing him?

8 A Yes, I was.

9 Q All right. Were those injections diagnostic?

10 A Well, at the time that I saw him I hadn't seen all
11 the reports of the injections. He had represented to me and
12 to my physician assistant, David Downey, who took the history
13 from him, that he had undergone some injection therapy, and he
14 had been recommended for surgery by Dr. McNulty. So at the
15 time that I saw him, I can't tell you that I knew about all
16 the specifics about the injection treatment that he had
17 undergone.

18 Q Well, but you didn't order up those records then to
19 get a better idea of how he responded to those injections?

20 A No. I wouldn't have necessarily ordered those up,
21 because he had represented he had undergone some injections.
22 He had told me that he had been recommended for surgery. I
23 looked at the imaging studies that were available to me, and I
24 recommended that he undergo further diagnostic assessment
25 prior to my giving him any treatment recommendations.

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1 Q Right. And you ordered the selective nerve root
2 blocks, but the question is why order them if they might been
3 done before?

4 A Because I would not necessarily rely upon that
5 information done before, because I'll tell you frankly, I rely
6 significantly upon the technical expertise of people that I
7 trust and know to do what they're doing. Now he may have very
8 well have been treating with some very competent people, but
9 I'm not familiar with their capabilities. And in my practice,
10 in our practice, when we're evaluating somebody who has
11 complicated longstanding pain and he's looking for answers, I
12 would rely upon more specific diagnostic assessment, you know,
13 with people that I know, people that I am familiar with, and
14 with whom -- and the capability of whom I'm comfortable with.

15 Q Okay. In addition ordering the selective nerve
16 root block, you ordered an EMG, but it was never done.

17 A That's correct.

18 Q You also suggested possible facet blocks, and those
19 were never done.

20 A Yes, that is correct.

21 Q Now as you looked at those diagnostic studies that
22 the Plaintiff brought with him, the MRI, and the MRI that you
23 got from your company, Newport. You didn't see any findings on
24 there of a condition that can be caused only by trauma such as
25 a car accident, correct?

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1 A That's correct.

2 Q In fact, the MRI appeared to show findings that are
3 common for people the Plaintiff's age, aside from that
4 congenital or arthritic problem, what you've been calling the
5 facet condition.

6 A I think that's correct.

7 Q That facet condition wasn't caused by trauma.

8 A No.

9 Q You didn't see any evidence of nerve compression on
10 those studies.

11 A That's correct, I did not.

12 Q At the second visit, when the Plaintiff returned to
13 you, you again ordered that EMGG, but again, it wasn't done,
14 is that right?

15 A That's correct.

16 Q And with regard to the selective nerve root block
17 that Dr. Rosler performed, I believe his testimony was that
18 there were some questions about whether it was diagnostic.
19 You ordered the discogram to make certain.

20 A I did order the discogram, that's correct.

21 Q Okay. And as we've discussed, there are potentials
22 for false positives on these discograms.

23 A Yes.

24 Q Particularly, if, as Plaintiff counsel pointed out,
25 the dye did not make it to the nucleus and, instead, was

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1 injected into the annulus, you would have a false positive.

2 A Possibly. But I believe the suggestion was that the
3 false positive would have been at C5/6, which is where I
4 believe the allegation was, that it may not have been
5 appropriately injected. And in fact, that was negative. But
6 that's neither here nor there. I share your concern and
7 recognize the possibility of false positives and false
8 negatives in discography, as in many other diagnostic studies
9 that we rely upon to evaluate patients.

10 Q Do you remember having a discussion with the
11 Plaintiff in which you expressed concern that he might have an
12 inflated expectation of surgery?

13 A You know, this was several years ago. I can't
14 recall specifically my discussion. You know, when I was asked
15 to get involved with the case, I was asked do you remember Mr.
16 Simao, and initially I said no, I do not. But after reviewing
17 the chart, and especially after seeing Mr. Simao here, I do
18 have a recollection of him and my discussion with him at that
19 time. And I think I probably did have a discussion with him
20 about reasonable expectations of outcome for surgery and my
21 concerns that he may not get as much pain relief as he
22 anticipates and expects and what he would want and we or a
23 treating physician would want for him. I probably did have
24 that discussion with him, as I have with many patients.

25 Q Now you agree that the conditions with which you've

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1 diagnosed the Plaintiff can be caused without a car accident.

2 A Yes, I do.

3 Q All right. And because this is something that we're
4 discussing with the providers and experts who are being called
5 to the stand, what are your charges for appearing here today?

6 A My charges are -- I've been -- are \$5,000 to be
7 available for half of a day, and I believe I've charged \$5,000
8 for me to review all of the medical records and to have been
9 available on the previous Monday and Friday, for which I've
10 been rescheduled today. So I've been paid \$10,000.

11 Q So did you charge something in addition to meet with
12 Plaintiff's counsel last not?

13 A No, I have not.

14 Q Doctor, give me one moment to look through this, and
15 I think I'm done.

16 [Pause]

17 MR. ROGERS: Yes, thank you.

18 THE COURT: Redirect.

19 MR. EGLET: Briefly, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. EGLET:

22 Q Doctor, the facet findings on the MRI studies, were
23 they symptomatic before the April 15th, 2005 motor vehicle
24 accident? In other words, were his facet joints causing Mr.
25 Simao any pain or problems before the accident?

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1 A No, I don't believe so.

2 Q And can age-related facet issues which are non-
3 symptomatic, can they be caused to become symptomatic as a
4 result of a traumatic event like a car accident?

5 A Yes.

6 Q Okay. The EMG studies and the facet blocks which
7 were noted in your records that counsel just brought up, and
8 he pointed out that they were not done, did the fact that the
9 EMG studies and the facet blocks were not completed make any
10 difference in your final diagnosis in this case?

11 A No.

12 Q Why not?

13 A Because the results of the EMGs would not have
14 changed my opinion as it relates to my final diagnosis of him,
15 which was based on the selective nerve root blocks and the
16 results of the CT discography. The EMG we sometimes use to
17 try to map out a cervical radiculopathy, identification of
18 nerve root irritation originating either from the cervical
19 spine or some concurrent peripheral nerve root entrapment,
20 pinched nerve somewhere else in the arm in addition to or
21 separate to the neck. It's another diagnostic study that we
22 use. And most of these studies, we at least -- I mean we
23 don't really use in isolation as the diagnostic study upon
24 which we base treatment. We really put all of the studies
25 together and try to get a picture to put the puzzle together

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1 in a complicated case like this. So I suggested that we get
2 some electrodiagnostic studies. And I noted that, and they
3 were not eventually done. Would I like to have them to be
4 done? Well, I had recommended them to be done, so I think I
5 had obviously felt that they might help me. But they didn't -
6 - they wouldn't have changed my ultimate diagnosis of his
7 problem, which was that he had a cervical disc problem at C3/4
8 and C4/5.

9 Q Now, counsel talked to you about the fact that these
10 conditions in Mr. Simao's cervical spine can be caused without
11 a car accident. Do you recall that testimony?

12 A Yes.

13 Q Okay. Now is there any evidence or documentation
14 that Mr. Simao was having any pain or problems with his
15 cervical spine and his neck before the April 15, 2005 motor
16 vehicle crash?

17 A No.

18 Q Okay. And is there any other event that you've seen
19 that would be more causally suggestive of his pain complaints,
20 the disc disruption, other than the April 15th, 2005 motor
21 vehicle wreck?

22 A No.

23 Q Thank you.

24 THE COURT: Any follow up, Mr. Rogers?

25 MR. ROGERS: No, thank you, Your Honor.

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1 THE COURT: Okay. There's one question submitted by one
2 of the jurors, Doctor. I wanted to read it into the record
3 and give you an opportunity to answer it. It reads is it
4 possible -- no, that's the -- the first evaluation stated
5 Plaintiff said he had lower back pain. What caused that pain?
6 Was there any treatment?

7 THE WITNESS: I think he also mentioned some lower back
8 discomfort when he saw me. And you know, he may have had a
9 soft tissue injury to his lower back, and he had some low back
10 complaints, and we made a note of it. But it wasn't enough of
11 a problem for us to do any further investigation of. It was,
12 again, representative probably of a bit of a soft tissue
13 strain that gradually resolved, because it wasn't something
14 that he had recurring complaints of, which -- as opposed to
15 his neck, which continued to be a source of significant pain
16 for him.

17 THE COURT: Any follow up questions by counsel?

18 MR. EGLET: No, Your Honor.

19 MR. ROGERS: No, thank you, Your Honor.

20 THE COURT: Then I'll ask this be marked as Court's
21 Exhibit next in order.

22 There was another question submitted, but it really
23 relates to the testimony of a witness that's already been
24 excused. So I'll ask that it be marked as Court's Exhibit
25 next in order.

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1 With the thanks of the Court, Doctor, you may be
2 excused.

3 THE WITNESS: Thank you.

4 THE COURT: May I see counsel at the bench for a moment?

5 [End Bench Conference]

6 THE COURT: I know we discussed this issue. I want to
7 discuss with you the possibility of -- if we were to be able
8 to make Tuesday and Thursday available all day, is that
9 something you would like and what to do?

10 MR. EGLET: Yes.

11 MR. ROGERS: Yes.

12 THE COURT: I need to clear it with them and make sure
13 that they can all do it.

14 MR. ROGERS: Yes, [indiscernible].

15 THE COURT: Okay. Well, then let's get [indiscernible]
16 before I clear the [indiscernible].

17 MR. WALL: What about --

18 THE COURT: I don't know how it affects your witness, but
19 --

20 MR. WALL: Is there about --

21 THE COURT: We would have no -- you would have from 9:00
22 to noon.

23 MR. WALL: Potentially, Friday, if we get there, can they
24 move Jerry's calendar somewhere else?

25 THE COURT: Say again?

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1 MR. WALL: What about potentially Friday? Can they move
2 Jerry's calendar somewhere else?

3 THE COURT: You guys want to call Jerry and ask, but I'm
4 not -- I can't get in the middle of that. He's got this
5 courtroom Friday morning.

6 MR. WALL: I -- okay.

7 THE COURT: If he's amenable to moving it, then we could
8 do that too. All right.

9 MR. WALL: Okay.

10 MR. EGLET: And if you're going to dismiss the jury, can
11 we have [indiscernible]. My understanding is you've
12 instructed counsel that Dr. Fish has got be here Monday at
13 1:00, right?

14 MR. ROGERS: I have a text on my phone. I'll go check
15 it.

16 THE COURT: Okay.

17 MR. WALL: But there's one other matter that I'd like to
18 have heard outside the presence.

19 THE COURT: I hope it's not going to be lengthy, because
20 I need to get out of her pretty quickly.

21 MR. WALL: I'd say my portion would be 60 seconds or
22 less.

23 THE COURT: Okay, good. I'll hold you to it.

24 [End Bench Conference]

25 THE COURT: Ladies and gentlemen of the jury, there was

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1 one question that was submitted has more to do with scheduling
2 issues, and I wanted to address it with all of you. The
3 question was is it possible to come in early and or stay later
4 to reduce the amount of days we have to be here next week?
5 And the answer to that depends on this -- availability of the
6 rest of you, because I can potentially make Tuesday and
7 Thursday available to you. It would be an all day, 9:00 to
8 noon, Tuesday and Thursday in -- 1:00 to 5:00 in the afternoon
9 if you all are available to be able to do that. Are you? See
10 some of you shaking your heads no, some yes. Okay. It's not
11 feasible?

12 MALE JUROR: Not really, no.

13 THE COURT: Okay. The answer is no then. What about
14 Friday morning? Is Friday morning feasible?

15 MALE JUROR: I could do Friday?

16 FEMALE JUROR: For 9 a.m., the whole day?

17 THE COURT: The whole day Friday.

18 FEMALE JUROR: No. I can't because I'm working in the
19 morning and coming here in the afternoon.

20 THE COURT: Can't do it. All right. It was worth a try.
21 With the thanks of the Court then, reminding you of your
22 obligation not to talk about this case with anyone, not to
23 form or express any opinion, not to do any independent
24 research on any subject connected with this case. Thank you.
25 Have a nice evening. We'll see you Monday at 1:00.

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1 FEMALE JUROR: At 1:00?

2 THE COURT: At 1:00, please.

3 [Jury Out]

4 [Outside the Presence of the Jury]

5 THE COURT: Okay. Outside the presence of the jurors.

6 Mr. Wall.

7 MR. WALL: Judge, there was just one matter that I wanted
8 on the record. Despite the ruling of the Court, despite the
9 arguments we've had outside the presence on the issue of minor
10 impact, in opening statement and with each and every witness
11 so far, there's been a question which leads to a conclusion or
12 an argument about minor impact, whether the Defendant was
13 injured in -- whether the doctor knows whether the Defendant
14 was injured in the accident, which could only potentially be
15 relevant to some argument that the accident was too minor to
16 have caused injury, because she wasn't injured.

17 Each time we've objected. Each time the Court has
18 sustained the objection. I would look for, frankly, some
19 guidance from the Court on what we can do from here out,
20 because it -- I can only assume that it will continue to
21 occur. And so, I don't know whether a progressive sanction
22 that we'd ask for, that there would be a warning from the
23 Court about before this should happen again. But those are my
24 concerns, and I don't know what other potential relevance
25 there could be to asking a treating physician whether he's

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1 aware of whether or not the Defendant was injured in the
2 accident.

3 THE COURT: Mr. Rogers.

4 MR. ROGERS: Okay. Dr. Grover, as the transcript will
5 show, did say that this accident presented a significant
6 mechanism of injury. In fact, he said that more than once. I
7 know that Plaintiff's counsel said at the bench that that was
8 a generic discussion about hyperextension and flexion. It was
9 not. We can get this transcript and review it when we return.
10 That was the import of the discussion today.

11 But in a bigger sense, the problem is that these
12 doctors are all coming in and describing an impact of
13 sufficient force that it caused the Plaintiff to strike his
14 head on a metal cage. The defense has heard the order from
15 the Court that we cannot use two terms, minor impact and tap.
16 Beyond that, there really is no limitation that we're aware of
17 except that the doctors can get up and call it severe or
18 substantial. And the defense is, of course, entitled to
19 cross-examine that representation.

20 Now never once in this trial has anyone violated the
21 Court's order. Minor impact and tap have never once been
22 uttered.

23 THE COURT: Mr. Wall.

24 MR. WALL: Well, Judge, that wasn't the order. I mean
25 you told them specifically when Mr. Polsenberg asked you if

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1 they could use the words minor impact and tap when they asked
2 you. Based on your order, can I say minor impact? You said
3 no. Can I say tap? You said no.

4 As we discussed a week ago -- I'm not sure -- the
5 motion precluded any argument, any testimony suggesting or
6 supporting a minor impact defense, because they had no expert
7 to say that this accident could not or would not have caused
8 the injuries complained of. It was a global prohibition of
9 arguing or trying to elicit evidence to support an argument of
10 a minor impact defense. The order itself says that their
11 request -- our request to preclude Defendant from raising a
12 minor or low impact defense is granted.

13 So we've gone around about this on a number of
14 occasions. And Dr. Rosler -- all the doctors, all they've
15 done is testify to what's in the medical records describing
16 the accident, so --

17 THE COURT: Well, you know, I --

18 MR. WALL: The next -- we're going to ask for something
19 significantly more in terms of a sanction the next time it
20 comes up. And I don't know -- I would prefer and I think the
21 case law suggests that you should have an opportunity to
22 address it outside the presence before there's a more
23 significant progressive sanction. But I think we're in the
24 area, certainly, at this point of a progressive sanction.

25 THE COURT: I think you're right, and I think that the

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1 defense is on notice. I think the order is very clear. I
2 think it clearly has been violated. I was really surprised to
3 hear a question posed of this witness regarding Ms. Rish when
4 the Court sustained a previous question regarding Ms. Rish of
5 another witness and ruled that that was not relevant. So I
6 was really surprised to hear that very same question posed as
7 to Ms. Rish. Yes, I realize she was in the accident, but
8 she's not the reason why we're here.

9 MR. ROGERS: Well --

10 THE COURT: Whether she was injured is not the reason
11 we're here in this trial. So I don't know. It does seem to
12 be at this point to be deliberate, Mr. Rogers. And so, I'm
13 inclined to agree that you're on notice. The Court will
14 consider progressive sanctions. I don't know what they will
15 be. I hope there won't have to be any assessed. But I don't
16 know what else to do to try to get you to comply with the
17 Court's previous orders.

18 MR. ROGERS: Well, you'll recall, Your Honor, that when
19 Mr. Polsenberg came to discuss this, that he and Plaintiff's
20 counsel and -- were stating listen, we're not clear. The
21 Plaintiff's attorney said well, we are. And the defense said
22 well, we're not. We don't know where we have to go because of
23 this. And --

24 THE COURT: Then I suggest you reread the order. It's
25 pretty clear. It's in black and white, as you said the other

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1 day, or Mr. Michalek said the other day. It's in black and
2 white. It's pretty darn clear.

3 Anything else we need to address?

4 MR. WALL: I don't believe so, Your Honor, other than the
5 fact that Dr. Fish will be here at 1:00 on Monday.

6 THE COURT: I hope he is. See you then.

7 MR. WALL: Thank you.

8 [Proceedings Concluded at 4:38 p.m.]
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1 ATTEST: I do hereby certify that I have truly and correctly
2 transcribed the audio/video recording in the above-entitled
3 case to the best of my ability.
4
5
6

7 Stephanie McMeel

8 STEPHANIE MCMEEL, Transcriber
9
10

11 Kelley Grijalva

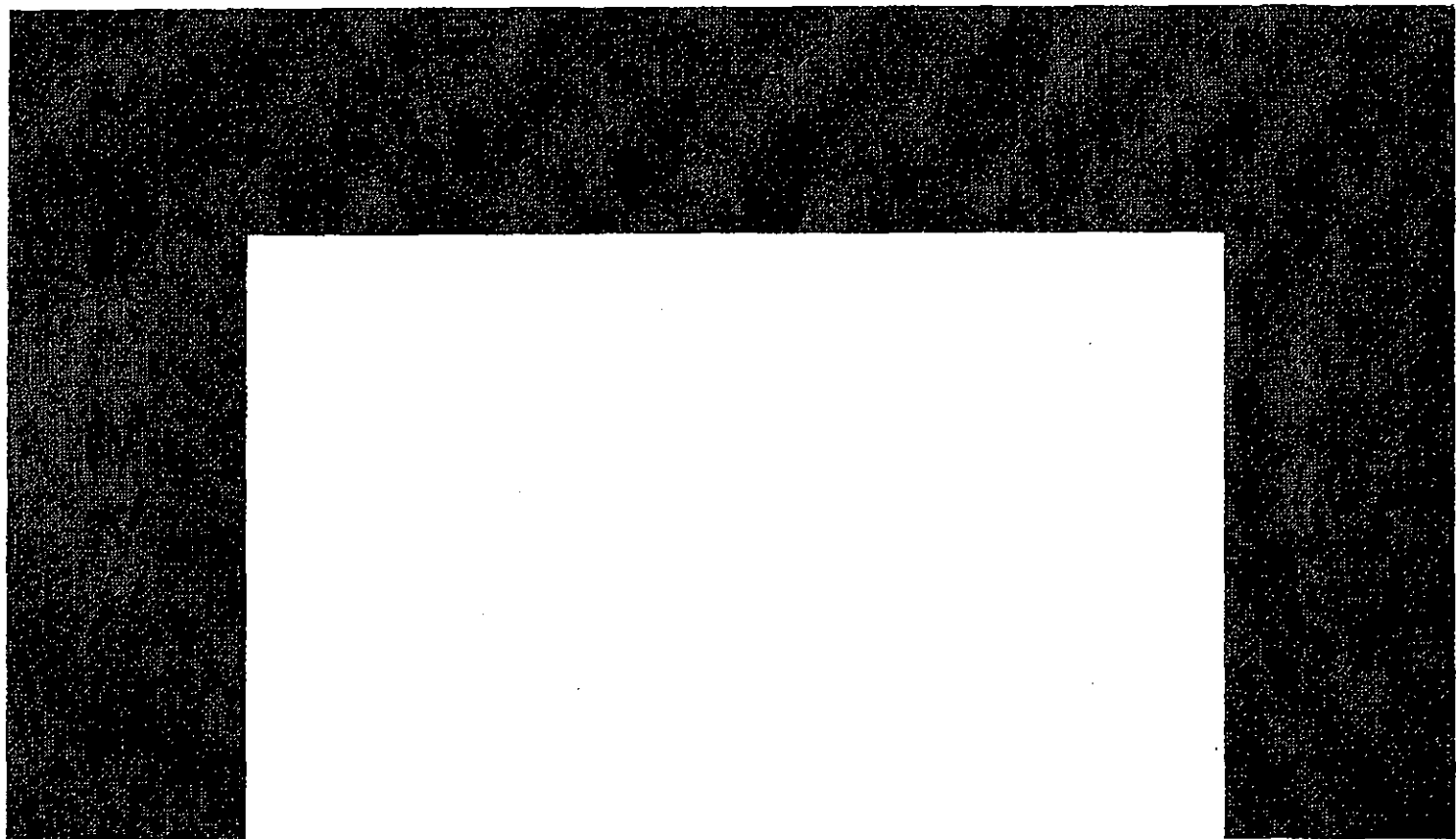
12 KELLEY A. GRIJALVA, Transcriber
13
14

15 Antoinette M. Franks

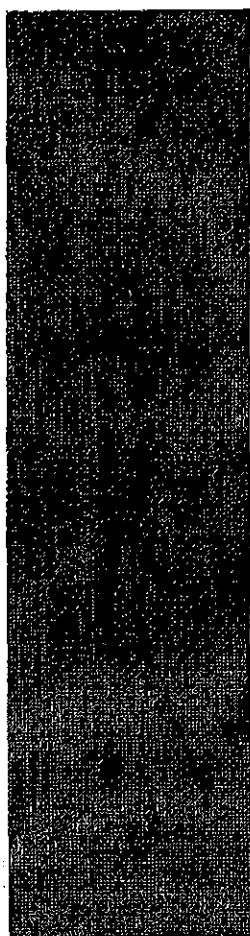
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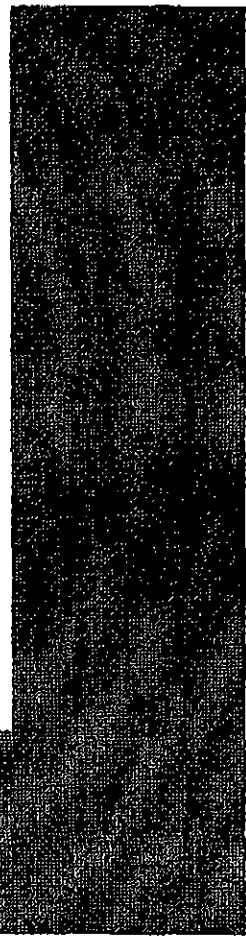
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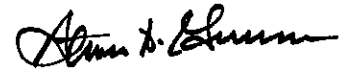
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CLERK OF THE COURT

1 **NEO**

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3 Nevada Bar No. 3402

4 DAVID T. WALL, ESQ.

5 Nevada Bar No. 2805

6 ROBERT M. ADAMS, ESQ.

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24 *Attorneys for Plaintiffs*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

25 WILLIAM JAY SIMAO, individually and
26 CHERYL ANN SIMAO, individually, and as
27 husband and wife,

Plaintiffs,

v.

28 JENNY RISH; JAMES RISH; LINDA RISH;
DOES I through V; and ROE CORPORATIONS I
through V, inclusive,

Defendants.

CASE NO.: A539455

DEPT. NO.: X

NOTICE OF ENTRY OF ORDER


MAINOR EGLET

002214

1 PLEASE TAKE NOTICE that an Order Regarding Plaintiffs' Second Omnibus
2 Motion in Limine was entered in the above-entitled matter on

3
4 DATED this 25th day of March, 2011.

5 MAINOR EGLET

6  #11727

7
8 ROBERT T. EGLET, ESQ.

9 Nevada Bar No. 3402

10 DAVID T. WALL, ESQ.

11 Nevada Bar No. 2805

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16 Attorneys for Plaintiffs

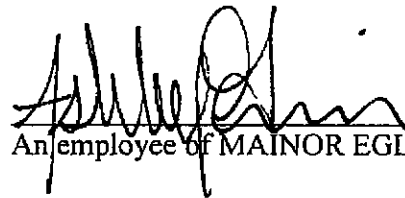
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MAINOR EGLET

002215

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 25 day of March, 2011, a copy of the above and foregoing NOTICE OF ENTRY OF ORDER was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

Stephen H. Rogers, Esq.
**ROGERS, MASTRANGELO,
CARVALHO & MITCHELL**
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendants


An employee of MAINOR EGLET

MAINOR EGLET

002216

EXHIBIT "1"

1 **ORDR**

2 **ROBERT T. EGLET, ESQ.**

3 Nevada Bar No. 3402

4 **DAVID T. WALL, ESQ.**

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18 Las Vegas, Nevada 89102

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21 *Attorneys for Plaintiffs*

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 WILLIAM JAY SIMAO, individually and
25 CHERYL ANN SIMAO, individually, and as
26 husband and wife,

27 Plaintiffs,

28 v.

29 JENNY RISH; JAMES RISH; LINDA RISH;
30 DOES I through V; and ROE CORPORATIONS I
31 through V, inclusive,

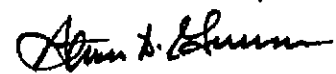
32 Defendants.

CASE NO.: A539455

DEPT. NO.: X

ORDER REGARDING PLAINTIFFS'
SECOND OMNIBUS MOTION IN
LIMINE

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CLERK OF THE COURT

This Honorable Court, having read the pleadings and papers on file herein regarding the

MAINOR EGLET

002218

1 Plaintiffs' Second Omnibus Motion in Limine, the parties appearing before the Court on March
2 8, 2011 for hearing, and good cause appearing therefore, the Court rules upon the Plaintiffs'
3 Motion as follows:

4 **IT IS HEREBY ORDERED** that Plaintiffs' request to exclude Plaintiffs' prior and
5 subsequent unrelated accidents, injuries and medical conditions and prior and subsequent claims
6 or lawsuits is hereby **GRANTED in part and DENIED in part**. Any and all evidence relating
7 to Plaintiffs' lawsuit concerning their home is excluded. However, William's diagnosis of a non-
8 cancerous tumor may be admitted for the limited purpose to show emotional distress.
9

10 **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude hypothetical medical
11 conditions is hereby **GRANTED** as written.
12

13 **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude evidence of the
14 absence of medical records for any period of time prior to the accident is hereby **GRANTED**.
15

16 **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude any reference to an
17 alleged federal grand jury investigation into doctors and lawyers in Las Vegas is hereby
18 **GRANTED**.
19

20 **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude reference to attorney
21 advertising is hereby **GRANTED**. However, if during voir dire members of the venire volunteer
22 information on the subject of attorney advertising based upon questions in the Jury
23

24 ///

25 ///

26 ///

27 ///

28 ///


1 Questionnaire, the subject of attorney advertising may be inquired into during voir dire.

2 DATED this 22 day of March, 2011.

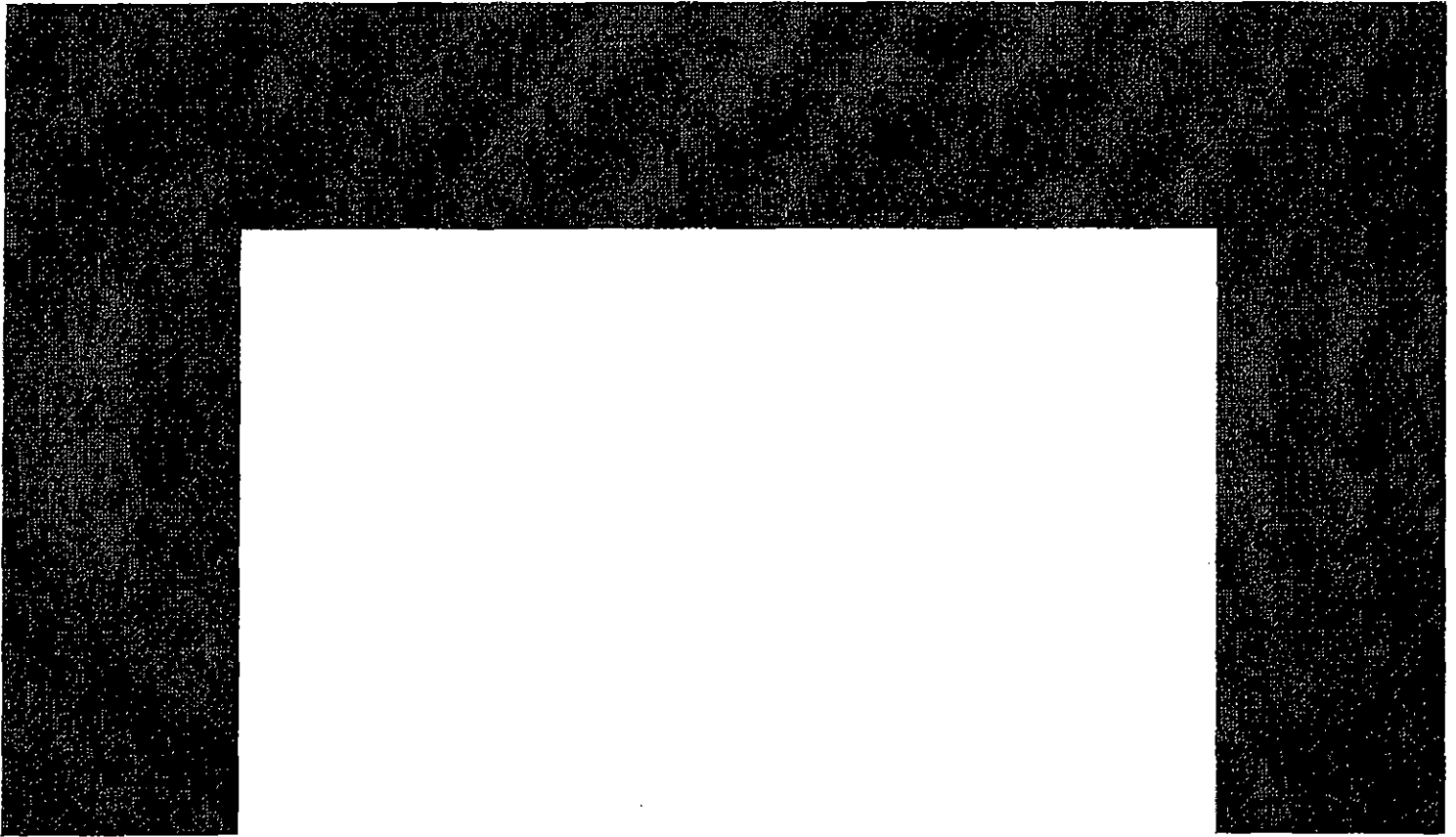
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5 DISTRICT COURT JUDGE g

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7 Respectfully submitted by:

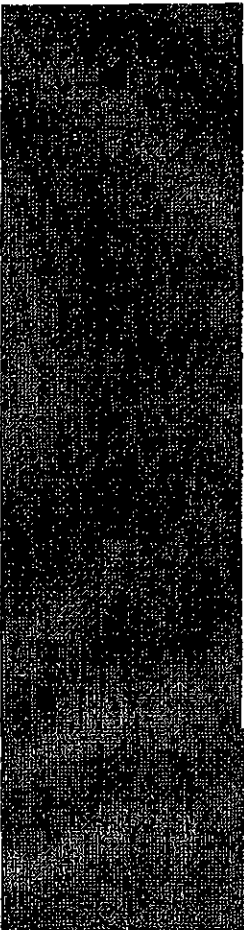
8 MAINOR EGLET

9
10 
11 BRADLEY J. MYERS, ESQ.
12 Nevada Bar No. 8857
13 400 South Fourth Street, Suite 600
14 Las Vegas, Nevada 89101
15 Attorney for Plaintiffs
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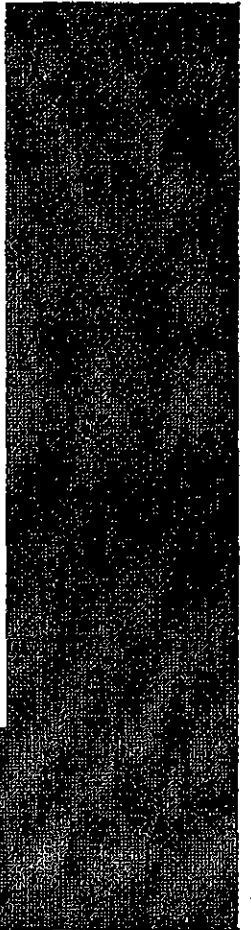
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DISTRICT COURT

CLARK COUNTY, NEVADA


CLERK OF THE COURTCHERYL A. SIMAO and
WILLIAM J. SIMAO,

Plaintiffs,

v.

JAMES RISH, LINDA RISH
and JENNY RISH,

Defendants.

CASE NO. A-539455

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, MARCH 28, 2011

REPORTER'S TRANSCRIPT
TRIAL TO THE JURY
DAY 6 - VOLUME 1

APPEARANCES:

For the Plaintiffs: DAVID T. WALL, ESQ.
ROBERT M. ADAMS, ESQ.
ROBERT T. EGLET, ESQ.
Mainor EgletFor the Defendants BRYAN W. LEWIS, ESQ.
James and Linda Rish: Lewis and Associates, LLCFor the Defendant STEVEN M. ROGERS, ESQ.
Jenny Rish: CHARLES A. MICHALEK, ESQ.
Hutchison & Steffen, LLC

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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002222

CLERK OF THE COURT

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TABLE OF CONTENTS

	<u>Page</u>
<u>March 28, 2011</u>	
<u>Trial to the Jury</u>	
<u>Plaintiffs' Witness(es):</u>	
Adam Arita, M.D.	114
<u>Defendants' Witness(es):</u>	
David Eli Fish, M.D.	30

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1 MONDAY, MARCH 28, 2011 AT 12:42 P.M.

2 [Outside the Presence of the Jury]

3 THE MARSHAL: Please remain in order. Department X is
4 now in session.

5 THE COURT: Good afternoon. Please be seated. Okay,
6 we're outside the jury's presence for the purpose of making a
7 record I understand, Mr. Rogers.

8 MR. ROGERS: Yes, Your Honor. Thank you for giving us
9 this time. We had a discussion on Friday about the
10 Defendant's concerns that Dr. Grover said something during his
11 exam that suggested that this was a substantial impact and the
12 Defense inquired about its rights to cross-examine that
13 characterization and I want to read in the record, we got the
14 daily, and I brought a couple copies for you and for
15 Plaintiff's counsel, just starting right there.

16 It's on page 97, starting at line 12. And if you'd
17 like, I can read it aloud or we can just read it to ourselves.

18 THE COURT: Did you say beginning at line 12?

19 MR. ROGERS: Well, line 12 is the question. The
20 testimony that caused the concern begins on line 21.

21 THE COURT: Right.

22 MR. ROGERS: Where it reads, Dr. Grover testified, well
23 because Mr. Simao presented with a significant mechanism of
24 injury where he had acute onset of pain after hitting the back
25 of his head on the metal cage and was -- must have been

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1 significantly symptomatic, including symptoms of headaches
2 that they felt that they needed to get a scan of his head and
3 his brain. This was the testimony that I was referring to
4 when I suggested that the Plaintiff had opened the door
5 characterizing this accident as a significant or substantial
6 mechanism of injuries.

7 I believe it was Your Honor's and Plaintiff's
8 counsel's recollection that when he used that term, he wasn't
9 referring to this accident specifically. But I can't recall
10 what the recollection was.

11 THE COURT: Well, I never thought that. That's not what
12 I thought and the record does say significant mechanism of
13 injury.

14 MR. ROGERS: Yes. Right and my position then is the same
15 as it was on Friday that this testimony was in relation to the
16 specific accident, he was characterizing the nature of this
17 accident and that by doing so the Defense had a right to
18 cross-examine on that characterization.

19 THE COURT: And you think this opened the door to what?

20 MR. ROGERS: Well, by characterizing the accident as a
21 significant mechanism of injury, it opens the door to the
22 questions that we've been discussing throughout the trial
23 which is can the Defense now rebut that characterization with
24 testimony of the facts relating to the accident that suggest
25 it wasn't significant.

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1 THE COURT: So that I am clear and I understand what
2 you're saying, so you think significant mechanism of injury
3 means what? What do you think that means?

4 MR. ROGERS: That it was a significant impact. A

5 THE COURT: Oh.

6 MR. ROGERS: And then he goes into the facts of the
7 accident stating that the Plaintiff -- quoting him, hitting
8 the back of his head on a metal cage. Your Honor's been
9 concerned that the Defense is trying to violate the order
10 prohibiting the use of the phrase minor impact and the term
11 tap. Our position is that by characterizing this accident as
12 Dr. Grover did, that he has opened the door to even those
13 terms.

14 THE COURT: Okay, Mr. Eglet.

15 MR. EGLET: Yeah, well it's, you know, Mr. Rogers wants
16 to pick two words out of a sentence and leaves out the context
17 of the question. Now let's look at the question because
18 that's what's important here. Now back -- this is the
19 question starting on page, line 12.

20 "Q Now back to the treatment he was receiving
21 at Southwest Medical by these physicians assistants
22 in April and May, we're talking about April and May
23 2005, actually April/May through the summer, most of
24 the fall, and at Southwest Medical Associates, was
25 it --

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1 This is what's key.

2 -- was it appropriate for Mr. Simao's midlevel
3 medical providers at Southwest Medical to obtain
4 diagnostic imaging studies of his head and brain to
5 rule out intracranial regions?

6 "A Yes, I think it was appropriate.

7 "Q And why is that?

8 And you have to read the entire sentence.

9 "A Well, because Mr. Simao presented with a
10 significant mechanism of injury where he had acute
11 onset of pain after hitting the back of his head on
12 a metal cage and was -- must have been significantly
13 symptomatic, including symptoms of headache, et
14 cetera."

15 So what this answer is is in specific request to do
16 you think it was appropriate for them to order an MRI of his
17 brain. Yes, the guy had just hit his head on a metal cage
18 after being rear-ended.

19 Now, where did that came [sic] from? That came from
20 the history provided by the patient to the doctor that he hit
21 the back of his head on the metal cage behind his seat in the
22 accident and it came from the medical records where he had
23 provided the same history on the day of the accident to
24 Southwest Medical. And if you look at the cross-examination
25 by Mr. Rogers, that clearly comes up, on page 1 -- where's the

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1 page?

2 MR. ADAMS: 134.

3 MR. EGLET: 134.

4 MR. ADAMS: There's a copy of it for you.

5 THE COURT: I don't have that, Mr. Eglet.

6 MR. EGLET: If I may approach, Your Honor?

7 THE COURT: Yes.

8 MR. EGLET: Starting on line 7, it says and this is the
9 answer.

10 "A Yeah, well what I mean by significant
11 mechanism of injury and I believe that I was trying
12 to communicate by that is that the patient had pain
13 in his neck which is not unplausibly [sic] and is
14 commonly caused by that type of injury. So it was
15 significant because he had an injury. As far as I
16 aware where he was -- the restrained driver in a
17 vehicle that was rear ended. His neck in all
18 likelihood hyperextended back, he hit the back of
19 his head on the metal plate and his neck probably
20 went forward. So I believe that's significant and
21 that that was -- that can cause neck pain.

22 "Q And your understanding is from where?

23 "A That understanding is based upon the
24 history that was provided to me by the patient,
25 that's documented within my medical records and the

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1 history that was provided to the urgent care that I
2 reviewed, the medical records of -- from the
3 physician's assistant that took that history."

4 Now there is no dispute on that history in this
5 case. In fact, it was documented at urgent care on April
6 15th, 2005 that he had a contusion to the back of his head
7 caused by this. So he wasn't talking about it and nowhere in
8 here does it imply he's talking about the speed of the cars or
9 how big a crash this was or anything else. He's specifically
10 talking about the fact that he understands it was a rear end
11 accident. He understands from the history of the patient as
12 well as the history provided on the day of the accident that
13 the patient's head went back and hit this metal cage or plate
14 or whatever we want to refer to it behind his seat. That's
15 it. Nothing further.

16 And so when he used the term well because Mr. Simao
17 presented with a significant mechanism of injury where he had
18 acute onset of pain after hitting the back of his head on a
19 metal cage, that was in response to the question I posed to
20 him, do you think it was appropriate for Southwest Medical to
21 order an MRI of his brain at that point in time. And that's
22 all it was, Your Honor. It did not in any way, shape or form
23 open the door as Plaintiff keeps trying to do violating Court
24 order after Court order --

25 MR. ADAMS: Defendants keep trying to do.

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1 MR. EGLET: Defendants keep trying to do, violating Court
2 order after Court order in trying to get this information in
3 this Court as excluded.

4 THE COURT: It's interesting because page 134 describes
5 how Defense counsel was permitted to cross-examine on this
6 issue of significant mechanism of injury.

7 MR. ROGERS: Well, that is when we approached. It was
8 over objection that we began that cross-examination where I
9 said okay, you've characterized this accident as a significant
10 mechanism of injury, doctor. Tell us what you know about this
11 accident. And then there was an objection and we approached
12 and --

13 MR. EGLET: That's not what happened. I can read the
14 transcript right here. The objection wasn't until he asked
15 was there a cushion or a headrest behind him. That's when the
16 objection came. So he's misrepresenting yet again the record,
17 Your Honor. I've got it right here if you'd like to look at
18 it.

19 THE COURT: Well, and see we only have bits and pieces.
20 I've been only handed three pages of it and there's something
21 that transpired between these pages but I guess my only point
22 is Mr. Rogers indicates he wasn't permitted to cross-examine
23 the witness based on his testimony regarding significant
24 mechanism of injury, but page 134 belies that representation.

25 MR. ROGERS: The question was asked but the response was

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1 limited by the objection. Where, for example, the doctor
2 testified, okay, there's a substantial or significant
3 mechanism of injury and then there is a significant
4 hyperextension and flexion. I was beginning to question well,
5 okay, tell me what you know about that. How far was this
6 hyperextension which you've characterized as you have? And
7 that's when we approached for the sidebar. And the problem
8 here is that --

9 MR. EGLET: That's not true. The record clearly belies
10 that.

11 THE COURT: Please let Mr. Roger finish. Please let him
12 finish.

13 MR. ROGERS: Thank you. I don't have that entire record
14 in front of me but that's how I recall it, that we were
15 brought up in response to this question about whether his neck
16 hyperextended, I asked whether there was a cushion or anything
17 there to prevent that hyperextension. The Plaintiff objected
18 and that's where I remember us approaching. And you were
19 saying look, it looks like you're getting into questions about
20 the severity of this impact. The Defendant's position was
21 that Dr. Grover made that an issue by testifying as he did
22 that this was a significant mechanism of injury. And I simply
23 wanted to make that record that it is my position, it was on
24 Friday and still is, that Dr. Grover did open the door. And
25 on that basis, the Defense requests the right to cross-examine

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1 or examine other witnesses about this mechanism of injury
2 which Dr. Grover characterized as significant.

3 THE COURT: Well, two things. Two things I'd like to say
4 before I hear from Mr. Eglet. The first is it looks like your
5 objection and the bench conference comes before your cross-
6 examination on the significant mechanism of injury. And the
7 second thing is you keep saying substantial or significant but
8 I don't see the word substantial anywhere here in the three
9 pages of transcript testimony I've been given to review.

10 MR. ROGERS: I see significant. I don't see substantial
11 in those pages either.

12 THE COURT: Okay. Mr. Eglet.

13 MR. EGLET: Yes, Your Honor, if I may approach. Do you
14 have page 135?

15 THE COURT: I don't have that.

16 MR. EGLET: Here's page 135. Just to make the record
17 clear, you will note on 135, you'll see at the bottom of 134,
18 after the answer I just discussed, that counsel then goes on
19 to ask another question about striking his head on the cage
20 and one is a plate, saying one is a cage and one is a plate.
21 The doctor says, well, whether it was a cage or a plate, it's
22 some metal surface that he hit his head. Then he asks what's
23 your understanding as to whether it is cushioned or there's a
24 headrest. The Court will note that is where the objection
25 came. That is where the objection, you sustained the

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1 objection. He then asks the same exact question again. I
2 made the same objection again. The Court sustained it again.
3 Then he tried to clarify, go through the Court's objection and
4 clarify to the doctor what the question was about. I objected
5 again. At that point, you had us approach.

6 So his representation of the record is completely
7 false as to what happened here. He was in fact allowed to
8 cross-examine on what the doctor meant by significant
9 mechanism of injury. The doctor answered that. He talked
10 about the fact that in the history the client provided him as
11 well as the history he had gotten from reviewing the day of
12 the accident records from Southwest Medical, it indicated that
13 the client had hit his head on a cage, metal cage behind his
14 seat and in fact it was documented in the records that there
15 was a contusion. It was at that point that Mr. Rogers then
16 went beyond, well beyond that and tried to get into well was
17 there a cushion behind him and that's when we had the
18 discussion, you know, my client's six feet six inches tall.
19 Are we going to get into measurements of the headrest and all
20 this. All this stuff on the mechanism of injury because
21 there's no experts on this that the Court excluded properly.
22 And you wanted to get into the distance between the headrest,
23 if there was a headrest, the back of the seat and the metal
24 plate which nobody has measured. And that's why because
25 there's no expert testimony on this, there's no foundation for

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1 any of this and the reason the Court and its basis for the
2 Court's pretrial rulings in this case. It's undisputed in
3 this case that he hit his head on a metal cage behind his
4 seat. Nobody's disputed that.

5 THE COURT: Anything else, Mr. Rogers?

6 MR. ROGERS: Yeah, just that the concern is that if there
7 is no expert testimony, it's because the Plaintiff withdrew
8 their expert. And bringing up the term significant mechanism
9 of injury certainly opens the door to at a minimum cross-
10 examination on his understanding of that mechanism. Mechanism
11 isn't a term generally employed by medical doctors. Mechanism
12 is a term that's generally employed by biomechanical or
13 biomedical engineers. That's the problem with this testimony.

14 THE COURT: Well, I wonder if that's really the case that
15 you don't often hear a doctor use the term significant
16 mechanism of injury? Is that really the case? I don't know.

17 MR. ROGERS: Well, we haven't heard anyone other than Dr.
18 Grover use that term.

19 THE COURT: Looks to me like the word significant
20 mechanism have more to do with injury than they have to do
21 with impact. I don't see him using them in relation to an
22 impact as it relates to the impact of the accident. I think
23 you've made your record.

24 MR. ROGERS: All right.

25 THE COURT: Do we need to bring our jury panel in now?

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1 MR. EGLET: Your Honor, I would like to again briefly
2 take this witness on voir dire outside the presence. I want
3 -- actually want the Court to instruct this witness. I mean
4 he is not an idiot. He's a medical doctor with a -- he's a
5 Fellowship trained pain management medical doctor. He's
6 obviously not stupid. He's been through years and years and
7 years of schooling and taken many, many tests to get where he
8 is. So for him to play these games to think that well the
9 Court says I can't, for example, this is just one example, I
10 can't discuss or offer any opinion as to whether I think the
11 surgery that was recommended or done on Mr. Simao was
12 reasonable and necessary. And then he takes that to mean that
13 any question with the word surgery in it, he can't answer.
14 That's ridiculous. It's insane.

15 And where we got stuck at the end of the day last
16 time was he refused to answer the question that isn't it true
17 that there was no intervening act between the time of the
18 accident and today's date that caused Mr. Simao's neck
19 injuries? And he has testified, he has provided that in fact
20 and that's why the Court ruled that way that in fact there was
21 no mechanism. He can't testify to reasonable degree of
22 medical probability that there was any event, mechanism of
23 injury, between the time of the accident to today's date that
24 could have caused his neck injury. And he throws up his hands
25 and says I can't answer that question trying to imply to this

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1 jury that there is some intervening act. I want this witness
2 admonished by the Court to stop the games and answer the
3 questions.

4 THE COURT: Well you know, Mr. Eglet, it's interesting
5 because that very description you gave of what that witness
6 did is in my view a violation of one of the previous orders
7 that the Court imposed.

8 MR. EGLET: It is.

9 THE COURT: And frankly I'm a little surprised the
10 witness was willing to return today given what transpired the
11 other day. Mr. Rogers.

12 MR. ROGERS: Yeah, I asked him if he would and he came
13 with a great deal of difficulty actually. I am concerned that
14 Plaintiff's counsel misunderstands the extent of Dr. Fish's
15 experience in these matters and I told him, listen you need to
16 be responsive to these questions to the best of your ability.
17 Listen to the question and cooperate with counsel and he
18 earnestly said look, I am trying to but it's just difficult
19 for me to get my brain around all this. And after meeting
20 with him, I'm confident that he's going to be able to give
21 this testimony and that we can get him done with in fairly
22 short order.

23 MR. EGLET: Your Honor, that is just hogwash. I have
24 read 12 depositions on this expert witness. Okay. This guy
25 is a master at not answering questions. That's what he does

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1 over and over and not just depositions from my firm. I'm
2 talking about depositions all over Nevada, all over
3 California. He is a master manipulator at trying not to
4 answer questions, refusing to answer questions, feigning that
5 he doesn't understand the question. It is so patently obvious
6 when you read his depositions that that's what he's doing.
7 And I can tell you from the experience of the attorneys in my
8 office who have taken his deposition and I could provide
9 affidavits or sworn testimony to this Court, that's exactly
10 what this witness does. He is the epitome of an expert
11 witness who comes in and tries to play games and not answer
12 the questions.

13 So he may very well have said those things to
14 Mr. Rogers. I don't doubt Mr. Rogers when he says that that's
15 what this man said to him. But it is a lie. Pure and simple.
16 He knows exactly what he's doing and unless he's admonished by
17 the Court, he's going to continue to do the same thing.

18 THE COURT: I don't know that even an admonishment by the
19 Court is going to yield any effect because of the way that he
20 failed to comply with some of the Court orders.

21 I'm curious about a couple of things. Number one, I
22 don't know what he did in those other trials. I don't know
23 what his style as you've described it. I can tell you that as
24 I listened to his answers, I found him to be evasive to say
25 the least. I don't know how the jury perceived him. Does

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1 anybody have a copy, speaking of trial transcript, of the
2 examination outside the presence of the jury, the voir dire
3 examination of him? Do you have that? Do you have those
4 questions and answers?

5 MR. EGLET: Yeah, we do.

6 MR. ROGERS: We haven't had a voir dire of him.

7 MR. EGLET: Yes, we did. I voir dired him outside the
8 presence -- before the jury.

9 MR. ROGERS: Oh, on the orders.

10 MR. EGLET: Yes.

11 THE COURT: Because I think if we were to review that,
12 there's more than one instance of an order that he's violated.
13 And that was the same day he gave the testimony. So that's
14 the concern that the Court has. Also, I'm also curious to
15 know whether since he claimed not to know what the previous
16 Court orders were, I'm wondering and he was given a list, I
17 wonder if he's re-reviewed that list in anticipation of
18 today's testimony?

19 MR. ROGERS: No, actually I met with him in anticipation.
20 I haven't received the list yet but --

21 MR. EGLET: You can provide your own list. You know what
22 happened at the motions in limine.

23 MR. ROGERS: But I thought we had an agreement that,
24 maybe I'm mistaken, but we were going to get that list of the
25 orders. Is that not so?

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1 MR. EGLET: That list of the orders has other things on
2 it that's our work product. May I approach, Your Honor?

3 THE COURT: Yes.

4 MR. EGLET: This is a transcript of the voir dire.

5 THE COURT: You know, I guess one of the things I'm
6 concerned about Dr. Fish's testimony is that in being evasive
7 or in saying to the jury I can't talk about this because of
8 the stipulation pretrial between counsel, it seems to me that
9 he's deliberately trying to confuse the jury or mislead them
10 or think that somehow we're trying to hide things from the
11 jury. That's some of the concerns that I have, Mr. Rogers.

12 MR. ROGERS: Can we bring him in then and admonish him
13 that he's not to say those things?

14 THE COURT: I would agree with that. I'd like him to
15 come in and have the Court admonish him, Your Honor.

16 THE COURT: Here's where I was headed I suppose. It's on
17 page 28 of this transcript I've been given and it's line 6.

18 "Q Okay. You cannot refer or imply or make
19 any statements to the jury that well I can't talk
20 about this or I can't say this or I can't mention
21 this because the Court has ruled in pretrial motions
22 or something to that effect, I can't say this. Do
23 you understand that?

24 "A I understand that."

25 But that's exactly what he did when he testified the

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1 other day. He told the jury I can't answer that question
2 based on stipulations between counsel pretrial or words to
3 that effect. That's a loose recollection but it's a pretty
4 accurate one I think if you were to look at the transcript.

5 So what specific areas is this witness to be
6 instructed on? Because we went through about 30 or 40 minutes
7 of this.

8 MR. EGLET: Well, I would like the Court to instruct him
9 on that. I'd like the Court to instruct him, Your Honor, that
10 just -- that he's not permitted to give an opinion regarding
11 whether surgery was reasonable and necessary. But the fact
12 that surgery -- the word surgery happens to be in a question
13 doesn't mean he can't answer the question, you know, and
14 that's the games he's playing.

15 The fact that he can't -- that the Court has ruled
16 as a matter of law based on his own expert opinions that there
17 was no intervening act that caused the injury to my client's
18 neck after the motor vehicle accident, then he must answer
19 that question yes, there's no intervening act that caused the
20 injury to your client's neck following this accident to
21 today's date. And for him to throw his arms up like he did
22 and say I can't answer that question and imply to this jury
23 that there is an intervening act is a clear violation of the
24 Court's order.

25 MR. ROGERS: I think I have a simple solution to this

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1 one.

2 THE COURT: Love to hear that.

3 MR. ROGERS: Yes. That's to tell Dr. Fish that if a
4 question is asked and no objection is made, you are to answer
5 it. And the fact that the word surgery might be in the
6 question is immaterial. Unless you're instructed not to
7 answer it, answer it. And on this other question about
8 intervening acts, that the question be phrased you can't
9 state, doctor, to a reasonable degree of medical probability
10 that there are any intervening acts and he must answer that
11 question honestly. I've already advised him, he's been
12 advised by the Court as well about these orders. I think that
13 those two admonitions should serve the Court's purpose.

14 MR. EGLET: I don't need to use the term reasonable
15 medical probability. This witness' opinion was that there was
16 no intervening act that caused my client's neck pain period.
17 That was the question and answer in the deposition, reasonable
18 degree of medical probability wasn't used. Okay.

19 THE COURT: How did he answer that question when you
20 posed it to him in trial? Did he say I can't answer that
21 question?

22 MR. EGLET: He says, threw his arms up like this, and
23 goes I can't answer that question. That's what he did. He
24 gave this big expression, rolled his eyes, looked at the jury,
25 I was looking right at him, he says I can't answer that

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1 question. I'm not allowed to answer that question. So that's
2 my point. That's what he's left this jury with and we need to
3 straighten that out right away on cross-examination.
4 Otherwise, this jury is left with the impression that there's
5 some event out there that's being hidden from them that they
6 don't know about that caused or could have caused my client's
7 injuries and he specifically said it didn't. So to play these
8 games, he's got to stop playing these games.

9 Now, I would ask for one more admonition on answer
10 the question. That means answer the questions yes or no.
11 Because all I have asked in every single question is a leading
12 question. Every one of them. And every one of them I will
13 ask will be leading.

14 THE COURT: Can we bring Dr. Fish in?

15 MR. ROGERS: He's in the hallway, yes.

16 THE COURT: Well, is there something else you wanted to
17 discuss?

18 MR. ROGERS: No, nothing. I mean we'll have to address
19 each question as it comes. I did look over the cross-
20 examination and there were some questions that I would argue
21 didn't -- weren't necessarily yes and no questions. But 99
22 percent of the time on this cross, I imagine that Mr. Eglet's
23 going to be correct and that it's going to call for a yes or
24 no answer. I don't know that because I haven't heard his
25 questions but he's done enough cross that that should be the

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1 way it's phrased.

2 THE COURT: Good afternoon. So, Dr. Fish, we appreciate
3 you accommodating the trial schedule.

4 MR. FISH: Sure.

5 THE COURT: There were a couple of things that I wanted
6 to go over with you before we bring the jury back in and the
7 first is -- probably has to do with the fact that most of the
8 questions that I would expect Mr. Eglet or Mr. Wall to ask you
9 would be leading questions meaning they require generally
10 speaking a yes or no response. I would expect that if there's
11 -- if Mr. Rogers thinks that a question is objectionable, I
12 imagine he won't hesitate to object. And I think you could
13 probably take your cue from him. But I was concerned in
14 listening to some of the testimony that was given last time
15 you were here, particularly when you responded to one of Mr.
16 Eglet's leading questions that you couldn't answer the
17 question having to do with intervening acts. I was concerned
18 that the jury is being confused or misled by your response to
19 that question. Because just the fact that the word surgery
20 was included in the question doesn't mean that you can't
21 answer the question. What you were prohibited from answering
22 were giving your opinions as to whether the surgery was
23 necessary or not.

24 And I was also concerned about the very fact that
25 you told the jury in answer to one of the questions posed I

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1 think by Mr. Eglet that you couldn't answer the question
2 because of stipulations entered into between counsel pretrial.
3 And first of all, they weren't stipulations entered into
4 counsel pretrial. They were pretrial motions in limine argued
5 by counsel after extensive briefing and the Court did a lot of
6 preparation in getting ready to hear those motions. And
7 there's on page 28 of this transcript that I've got, when you
8 were examined by Mr. Eglet, line 6, says:

9 "Q Okay, you cannot refer or imply or make any
10 statements to the jury that --

11 "A Well, I can't talk about this or I can't
12 say this or I can't mention this because the court
13 has ruled in pretrial motions or something to that
14 effect.

15 "Q You understand that?

16 "A I understand that."

17 So I'm concerned that your answers may very well be
18 misleading this jury or trying to confuse them. I hope you
19 can comply with the Court's previous orders. Do you have a
20 list of those orders?

21 MR. FISH: Not in front of me.

22 THE COURT: You've spoken with Mr. Rogers about them,
23 however?

24 MR. FISH: Yes.

25 THE COURT: So is it clear in your mind what those

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1 pretrial orders were?

2 MR. FISH: I think so.

3 THE COURT: Counsel want to follow up with anything?

4 MR. EGLET: Yes, Your Honor. Doctor, you understand that
5 the Court has ruled as a matter of law quite frankly based on
6 what you said and based on what Dr. Wong said in both your
7 reports and your -- Dr. Wong, I never can figure out how to
8 pronounce his name but both in your pretrial reports and in
9 your deposition testimony that as a matter of law, there was
10 no intervening act between the time of this motor vehicle
11 accident and today's date that could have caused Mr. Simao's
12 neck injuries. Do you understand that?

13 MR. FISH: Yes, I understand that.

14 MR. EGLET: So when I ask you that question, isn't it
15 true that there is no intervening act between the time of this
16 motor vehicle accident and the time of today that could have
17 caused his injuries to his neck, what is the answer to that
18 question?

19 MR. FISH: I haven't looked at all the data on that. I
20 can't give you an answer but I would say --

21 MR. EGLET: No, no.

22 MR. FISH: -- no, there was no intervening --
23 intervention that I'm aware of.

24 MR. EGLET: You can't qualify it. Okay. You don't get
25 to leave -- that's part of one of the motions in limine we

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1 went over that the Judge said you can't say. You can't talk
2 about well, there -- you can't suggest that there may be
3 records out there that you haven't seen or the jury hasn't
4 seen. That's one of the Court orders. You can't do that. So
5 you can't make this qualifying statement that I don't know, I
6 haven't seen all the records. The only answer is yes, I
7 agree. Do you understand?

8 MR. FISH: Well, not really if I'm aware of --

9 MR. EGLET: Well, are you going to answer that way? If
10 you don't, you're going to be stricken as an expert in this
11 case and you know what that will do to your career?

12 MR. ROGERS: Oh, wow, Your Honor, number one, allow Mr.
13 Eglet --

14 MR. EGLET: Do you know what that will do to your career
15 as an expert?

16 MR. ROGERS: Pardon me. Allow the witness to respond.

17 THE COURT: Yeah.

18 MR. ROGERS: These challenges are not appropriate. Dr.
19 Fish needs clarification, that's one thing. But not to be
20 threatened professionally or otherwise.

21 THE COURT: No, I don't know the that's a threat but I
22 don't know that it's necessarily appropriate for this purpose
23 that we're here for today at this moment.

24 MR. EGLET: Do you understand what a leading question is?
25 We've gone over this.

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1 MR. FISH: Yes, I understand what a leading question is.

2 MR. EGLET: So do you understand the Court is not going
3 to allow you to suggest or speculate that there may not be
4 records out there that you haven't seen or somebody else
5 hasn't seen that may show that there was some intervening act.
6 Do you understand that?

7 MR. FISH: Yes, I understand that.

8 MR. EGLET: So when you're asked the question, isn't it
9 true that there is no intervening act between the time of this
10 motor vehicle accident and today's date that could have caused
11 these neck injuries to my client, what is your answer?

12 MR. FISH: Not that I'm aware of, no.

13 THE COURT: The thing that concerns me, Dr. Fish, is
14 there aren't any -- there isn't any information out there that
15 reflects an intervening act. And so your answer concerns me
16 because it's going to mislead this jury into thinking
17 something has been kept from them. Do you see what I mean?

18 MR. FISH: I see what you --

19 THE COURT: And there aren't any other --

20 MR. EGLET: There are none, Your Honor.

21 THE COURT: Is there any data out there that suggests
22 there was some intervening act because the Court's not aware
23 of any.

24 MR. EGLET: There's no intervening act that anybody has
25 said that could have caused -- that anybody has offered an

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1 expert opinion could have caused these injuries.

2 MR. ROGERS: That actually -- just to refresh the Court's
3 memory on the motion, the Plaintiff filed a motion to exclude
4 any prior and subsequent incidents citing Morris Gotto.

5 THE COURT: Unrelated incidences, right?

6 MR. ROGERS: Right and the Defense to that or the
7 opposition to that motion was that the Defense doesn't have
8 the burden of proof. And so needn't establish everything to a
9 probability. The Plaintiff took the opposite position and
10 said, no, Morris Gotto requires everything that's said by any
11 doctor to be stated to a probability. The Court sided with
12 the Plaintiff and on that basis a prior and a subsequent
13 accident were excluded from evidence. That I believe is where
14 Dr. Fish is going when he says look, I know about these things
15 but I don't understand the law of it. Okay, if I can't
16 mention them, I won't. That's all it is. It's a simple I
17 guess misstep between law and medicine. But now that the
18 doctor understands that his answer to that question posed by
19 Plaintiff's counsel is a simple yes or no, I don't foresee a
20 problem.

21 THE COURT: Mr. Wall.

22 MR. WALL: Judge, I was here and argued the motion and
23 essentially there was not a disagreement from the Defense that
24 a medical condition or an incident that was unrelated has no
25 relevance. That was essentially agreed. There has never been

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1 a medical record from any subsequent accident. There has
2 never been to my knowledge even a statement by either Dr. Fish
3 or Dr. Wong that any post April 15th, 2005 incident caused any
4 injury complained of. Enough. So if the contention is that
5 the doctor is standing on some belief that some post Jenny
6 Rish April 15th, 2005 incident could have caused this and I'm
7 just not allowed to say what it is, there is nothing that
8 relates to that. There isn't even a medical record from any
9 subsequent accident. None at all. There isn't even a
10 contention in his deposition that any subsequent accident or a
11 subsequent incident caused anything complained of in this
12 case. His testimony was there is nothing. And the state of
13 the record is there is nothing.

14 MR. ROGERS: I think we might be belaboring this point.
15 The Court's already entered an order on it. I was simply
16 using that as a way to explain to Dr. Fish, look, as a matter
17 of law, this Court has made a decision that those unrelated or
18 prior and subsequent incidents are excluded. And so when
19 you're asked, doctor, that you're not aware of any subsequent
20 incidents, any incidents following this car accident that
21 caused neck injury, his answer is simply no, I'm not. I'm
22 trying to comply with the Court's order in other words and
23 just explain it to Dr. Fish on the stand.

24 THE COURT: Right. Well and I think it's -- your points
25 are well taken and I hope also well taken by Dr. Fish. It

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1 seems to me, my experience hearing trials and listening to
2 jurors afterwards is that jurors don't like it when a witness
3 doesn't answer a question directly. Jurors don't like evasive
4 answers. They want an answer to the question posed. And most
5 of these questions posed by counsel in cross-examination call
6 for yes or no responses. I think probably enough said.

7 MR. ROGERS: Okay.

8 THE COURT: Can we bring our jury panel in now?

9 MR. ROGERS: Very good.

10 THE COURT: We need to make a record of those exhibits in
11 front of the jury at some point.

12 [Counsel Confer with Clerk]

13 [Jury In]

14 THE MARSHAL: Please remain seated.

15 THE COURT: Would have been here sooner but I got locked
16 out. All right. Good afternoon, ladies and gentlemen. I
17 locked myself out on both. Good afternoon, ladies and
18 gentlemen of the jury. Thank you for returning. We
19 appreciate your patience. Would counsel stipulate to the
20 presence of the jury?

21 MR. ROGERS: Yes, Your Honor.

22 MR. WALL: Yes, Your Honor.

23 THE COURT: What's going on over here, Mr. Eglet.

24 MR. EGLET: Sorry, Your Honor.

25 THE COURT: All right.

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1 [Counsel Confer with Clerk]

2 MR. EGLET: May I approach the witness, Your Honor.

3 THE COURT: Yes, but you know, since it's a new day, let's re-
4 swear the witness, Madame Clerk.

5 DAVID ELI FISH, DEFENDANT'S WITNESS, SWORN

6 THE CLERK: Thank you. Please be seated. State and
7 spell your name for the record.

8 THE WITNESS: David Eli Fish, D-a-v-i-d E-l-i F-i-s-h.

9 THE COURT: Whenever you're ready, Mr. Eglet. Yes.

10 CROSS-EXAMINATION

11 BY MR. EGLET:

12 Q Doctor, I'm going to show you some depositions
13 transcripts. I'm going to lay them out here -- This is the
14 Marjory Shultz [phonetic] case, Volume I. Marjory Shultz,
15 Volume II. Simao deposition in this case. Gilbert
16 deposition. Bardella [phonetic] deposition. And the Lemon
17 deposition. They've got big signs on there so you can tell
18 which deposition is which. Really easy. Okay?

19 A Okay.

20 Q All right. Now, Doctor, I want to review some of
21 the deposition -- excuse me, some of the testimony you gave
22 here in court under oath last Thursday.

23 MR. EGLET: And if you could bring up slide one please
24 Brendan.

25 ///

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1 BY MR. EGLET:

2 Q And you have a monitor there on your right and you
3 can see this. Last week on Thursday, in your trial testimony
4 you were asked a question:

5 "Q Okay, if a patient is noncompliant, often
6 times it will be documented in their medical
7 records. Correct, Doctor?"

8 And your answer was no. Would you please go to Shultz
9 Volume I, page 137, lines 24 and 25, and page 138, lines 1 and
10 2.

11 A 137?

12 Q 137.

13 A It doesn't -- Volume I doesn't go that high.

14 [Counsel Confer]

15 BY MR. EGLET:

16 Q Volume II. Excuse me. 137 Volume II. 137, 124 to
17 125; 138, 1 to 2. At the time of your deposition testimony in
18 the Shultz versus Young [phonetic] case you were asked the
19 following question and gave the following answer, Doctor.

20 "Q If a patient is noncompliant, that often
21 times will be documented in their medical records if
22 they are noncompliant, right?"

23 And your answer was yes at that time, correct?

24 A Correct.

25 Q All right. Now also last week you stated --

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1 MR. EGLET: Go to slide three please, Brendan.

2 BY MR. EGLET:

3 Q -- in your court testimony that:

4 "Q An internal disk destruction can be caused
5 by a traumatic event. Correct?"

6 And your answer was:

7 "A No, I disagree with that."

8 Would you go to the same deposition transcript,
9 Shultz II, page 69, look at lines 7 to 10. And in that
10 deposition you were asked:

11 "Q You would agree that trauma could cause
12 injury to a person's disk in their neck and back.
13 Right?"

14 And your answer was yes. Correct?

15 A Correct.

16 Q And go to page 78 of that same deposition, lines 2
17 through 4.

18 MR. EGLET: Brendan, next slide.

19 BY MR. EGLET:

20 Q And in that testimony you were asked: "A person can
21 injure their disks in a traumatic event, right?"

22 And your answer was yes. Correct?

23 A Correct.

24 Q Okay. Now let's go back to your trial testimony of
25 last week.

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1 MR. EGLET: This is slide 6, Brendan.

2 BY MR. EGLET:

3 Q And I want to review testimony you gave. Okay.

4 "Q And you've also seen these defense medical
5 physicians who have conducted these defense medical
6 examination of your patients disagree with you on
7 what caused the patient's particular problem.
8 Correct?

9 "A It happens, yes.

10 "Q It has happened, hasn't it?"

11 You testified under oath:

12 "A I'm sure it did.

13 "Q In the past that that has happened,
14 correct Doctor?

15 "A I'm sure it did.

16 "Q Okay, now that didn't make you wrong as
17 the treating physician in all those, did it?"

18 And your answer is:

19 "I don't know. It's depends on the situation."

20 That was your testimony last week, correct?

21 A Correct.

22 Q Now let's go to Shultz, same deposition again, and
23 look starting on page 135, line 20 and reading up to the
24 bottom there onto the next page. Look that up. In that
25 deposition you testified under oath:

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1 "Q Have you seen where defense medical
2 examiners may have disagreed with some of the
3 opinions that you have regarding the treatment of
4 your patient?

5 "A I don't know if I've actually remember
6 seeing it but I'm sure it's happened.

7 "Q Okay. You've seen physicians disagree on
8 diagnoses before, correct?

9 "A Yes.

10 "Q And sometimes physicians disagree on
11 appropriate treatment plan for a patient, correct?

12 "A Yes.

13 "Q You have and you have seen -- have you had
14 a doctor disagree with you regarding your diagnosis
15 and your treatment plan?

16 "A Yes.

17 "Q Okay. That didn't make you wrong in all
18 of those occasions, did it?"

19 And at that time under oath you answered no to that
20 question. Correct?

21 A Correct.

22 Q All right. Now you believe that Dr. Rosler to be a
23 competent pain management physician, correct?

24 A Yes.

25 Q You believe Dr. Arita to be a competent pain

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1 management physician, correct?

2 A Yes.

3 Q Dr. Rosler and Dr. Arita are board certified,
4 fellowship trained in pain management. Correct?

5 A Yes.

6 Q And Dr. Rosler and Dr. Arita are well trained, well
7 respected, well thought of, excellent pain management
8 physicians in this community. Correct?

9 A Yes.

10 Q You, in fact, have referred a patient to Dr. Rosler
11 in the past, haven't you?

12 A Yes.

13 Q Okay. Now, Drs. McNulty [phonetic], Rosler, Grover
14 are all treating physicians of Mr. Simao and have given
15 testimony or documented conclusions in this matter. Correct?

16 A Yes.

17 Q Okay. And all of these physicians are well
18 respected in their subspecialty fields in our community here
19 in Clark County. Correct?

20 A Yes.

21 Q And you don't believe that any of these treating
22 physicians would inaccurately document their medical records
23 of Mr. Simao, correct? Okay. And you don't believe that any
24 of these treating physicians would give false testimony when
25 expressing their conclusions regarding the injuries Mr. Simao

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1 has sustained in the April 15th, 2005, motor vehicle
2 accident. Correct?

3 A Correct.

4 Q Okay. Mr. Simao's primary treating physicians have
5 documented and testified to the fact that his cervical spine
6 injuries were directly and causally related to the April 15th,
7 2005, motor vehicle accident. Correct?

8 A Correct.

9 Q Okay. Now you were hired by the defense in this
10 case. Correct?

11 A Correct.

12 Q You were not hired by me or my firm, correct?

13 A Correct.

14 Q You were not retained by the judge, correct?

15 A Correct.

16 Q You're being paid by defense counsel, correct?

17 A Correct.

18 Q You're being paid by defense counsel to review the
19 medical records, correct?

20 A Correct.

21 Q You're being paid by defense counsel to write a
22 report -- several reports in this case. Correct?

23 A Correct.

24 Q You're being paid by defense counsel for your time
25 to prepare for and testify at trial. Correct?

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1 A Correct.

2 Q You were not independently selected to review these
3 records or write a record. Correct?

4 A I thought it was independently --

5 Q You were not independently selected to review these
6 records and write this report, were you Doctor?

7 A Correct.

8 Q You weren't selected by me or anyone from my office
9 together with defense counsel. Correct?

10 A Correct.

11 Q You were selected by, hired by, and paid by defense
12 counsel, correct?

13 A Correct.

14 Q Now you've been asked to render opinions in this
15 case as to causation by the defense. Correct?

16 A Correct.

17 Q Okay. You would agree that trauma can cause a disk
18 injury. Correct?

19 A Correct.

20 Q You would agree that this April 15, 2005, motor
21 vehicle accident did cause trauma to my client's body.
22 Correct?

23 A Correct.

24 Q You agree that history is a critical component in
25 determining causation. Correct?

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1 A Correct.

2 Q Okay. You were aware my client has no history of
3 any neck pain before this April 15, 2005, motor vehicle
4 accident. Correct?

5 A Correct.

6 Q Okay. Before the April 15th, 2005, motor vehicle
7 accident he never had any complaints of radicular symptoms.
8 Correct?

9 A Correct.

10 Q Okay. You are aware that there is no other
11 documentation of my client ever having any other neck pain,
12 even minor neck pain, on any other single day in his entire
13 life before this April 15th, 2000 [sic], motor vehicle
14 accident. Correct?

15 A As a documented report?

16 Q Correct.

17 A Correct.

18 Q Okay. So for the 17,175 days that Mr. Simao had
19 been alive before the April 15, 2005, motor vehicle accident,
20 he had zero documented days of neck pain. Correct?

21 A Correct.

22 Q Okay. And before the April 15, 2005, motor vehicle
23 accident, Mr. Simao was never diagnosed with the need for
24 spine surgery of any kind. Correct?

25 A Correct.

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1 Q Before the motor vehicle accident he was never
2 referred to a spine surgeon to consultation. Correct?

3 A Correct.

4 Q Nor a pain management physician. Correct?

5 A He was treated to headaches, for pain.

6 Q Was he ever submitted to a pain management physician
7 who specializes in spine, like you do, before this motor
8 vehicle accident?

9 A Correct. He was not.

10 Q All right. Before this motor vehicle accident he
11 was never even recommended to an MRI of his neck. Correct?

12 A Correct.

13 Q Or even a CT scan of his neck, correct?

14 A Correct.

15 Q Or even an x-ray of his neck correct?

16 A Correct.

17 Q And before this motor vehicle accident Mr. Simao had
18 never been diagnosed for any disk injuries in his neck.
19 Correct?

20 A Correct.

21 Q And before this motor vehicle accident, no physician
22 every diagnosed him with a condition that would require a
23 spinal cord stimulator. Correct?

24 A Well, spinal cord stimulators are used for
25 headaches.

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1 Q Did anyone recommend a spinal cord stimulator for
2 his pre-accident headaches?

3 A No.

4 Q So the answer to the question is yes, right? The
5 previous question.

6 A And say it again.

7 Q Before this motor vehicle accident, no physician
8 ever recommended Mr. Simao for a spinal cord stimulator.

9 Correct?

10 A Correct.

11 Q You're aware that my client had documented neck pain
12 after the April 15th, 2005, motor vehicle accident. Correct?

13 A Correct.

14 Q Okay. You're also aware that my client had
15 documented radicular symptoms after the April 15th, 2005,
16 motor vehicle accident. Correct?

17 A Correct.

18 Q Okay. And the pain in his neck and radicular
19 symptoms were all documented to have started after the motor
20 vehicle accident. Correct?

21 A Correct.

22 Q Dr. McNulty concludes that Mr. Simao suffered a disk
23 destruction at the C-3 -4 and the C-4 -5 levels. Correct?

24 A Correct.

25 Q So does Dr. Grover, correct?

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1 A Correct.

2 Q Do does Dr. Rosler correct?

3 A Correct.

4 Q Dr. McNulty, Dr. Grover, Dr. Rosler have all stated

5 that the cause of Mr. Simao's neck injuries was the April 15th

6 '05 motor vehicle accident. Correct?

7 A Correct.

8 Q Following his treatment and diagnosis of Mr. Simao,

9 Dr. McNulty deemed him an appropriate candidate for surgery.

10 Correct?

11 A Correct.

12 Q Okay. So did Dr. Grover, correct?

13 A Correct.

14 Q Dr. McNulty is board certified and fellowship

15 trained in spine surgery. Correct?

16 A Correct.

17 Q So is Dr. Grover. Correct?

18 A Correct.

19 Q You're not. Correct?

20 A Correct.

21 Q Okay. You agree Dr. McNulty, Dr. Grover, and Dr.

22 Rosler are well respected in their subspecialty fields,

23 correct?

24 A Correct.

25 Q You disagree with their conclusions regarding

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1 Mr. Simao's injuries, right?

2 A Correct.

3 Q But physicians sometimes disagree, correct?

4 A Correct.

5 Q Okay. But Dr. McNulty, Dr. Grover, and Dr. Rosler

6 are Mr. Simao's treating physicians. Correct?

7 A Correct.

8 Q You're not. Correct?

9 A Correct.

10 Q You were hired by defense in this case. Correct?

11 A Correct.

12 Q You met with Mr. Simao one time for less than 45

13 minutes. Correct?

14 A Correct.

15 Q In fact you flew here to Las Vegas to meet with him,

16 didn't you?

17 A Yes.

18 Q Okay. And you met with him at the same time in the

19 same room that Dr. Wong [phonetic] did, didn't you?

20 A Yes.

21 Q Okay. And you came in and asked him four or five

22 questions, and then you left and Dr. Wong completed the

23 examination. Correct?

24 A I asked him more than four or five questions, so no,

25 that's not correct.

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1 Q Okay. So you asked him more than four or five
2 questions. Dr. Wong completed the examination, correct?

3 A I'm not sure what you mean by --

4 Q You did not do a physical examination of Mr. Simao
5 when you saw him in this case, did you Doctor?

6 A That is absolutely not correct.

7 Q Okay. Doctor, there was no intervening traumatic
8 event that caused Mr. Simao's neck injuries from the time of
9 the April 15th, 2005, crash to the present. Correct.

10 MR. ROGERS: Your Honor, I'm going to object to that as
11 vague because neck injuries assumes the very fact in dispute.

12 MR. EGLET: Your Honor, it is a very specific question.

13 THE COURT: Could you repeat it please?

14 MR. EGLET: There was no intervening traumatic event that
15 caused Mr. Simao's neck injuries from the time of the April
16 15th, '05 crash to the present, correct?

17 MR. ROGERS: Same objection, Your Honor.

18 THE COURT: Overruled, the objection. You may answer the
19 question.

20 BY MR. EGLET:

21 Q Correct?

22 A Correct.

23 Q Now, you've been doing medical examinations for a
24 number of years correct?

25 A Yes.

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1 Q You are aware that defense counsel has the power of
2 subpoena correct?

3 A Yes.

4 Q You know that defense counsel can subpoena past
5 medical records, employment files, and other data of the
6 injured plaintiff to investigate any previous injuries or
7 medical treatment they have received. Correct?

8 A Correct.

9 Q Mr. Rogers and the Rogers, Mastrangelo, Carvalho and
10 Mitchell law firm has hired you in a number of other cases
11 they were defending. Correct?

12 A Correct.

13 Q Okay. So you have worked with Mr. Rogers and his
14 firm in the past, correct?

15 A Yes.

16 Q You were aware that Mr. Rogers and his law firm are
17 outstanding lawyers. Correct?

18 A Correct.

19 Q Mr. Rogers and his law firm is one of the best
20 defense firms in the state, aren't they?

21 A I wouldn't know.

22 Q You've worked with a number of defense firms in this
23 state, haven't you?

24 A I've worked with a few, yes.

25 Q These guys are good, aren't they?

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1 A Yes.

2 Q They know how to investigate someone's previous
3 medical history, don't they?

4 A I think so.

5 Q They know how to get previous medical records if
6 they exist, don't they?

7 A I think so.

8 Q Your experience with Mr. Rogers and his law firm is
9 that when you ask this firm for records, if those records
10 exist, they provide those reports to you. Correct?

11 A Yes.

12 Q Okay. Now, Mr. Simao --

13 MR. EGLET: And I'm going to start putting the exhibits
14 up, Brendan.

15 And you can look at the screen to your right so we
16 can get through this.

17 These exhibits are all in evidence, Your Honor.

18 BY MR. EGLET:

19 Q Mr. Simao was seen for medical evaluation and
20 treatment approximately three hours and 15 minutes after being
21 involved in a rear-end motor vehicle crash on April 15, 2005.
22 Correct?

23 A Correct.

24 Q He complained of neck pain at that time -- at that
25 initial evaluation. Correct?

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1 A Correct.

2 Q He also complained of pain to the occipital part of
3 his head correct?

4 A Yes. Correct.

5 Q He also complained of left shoulder pain, correct?

6 A Left -- oh, yes. Correct..

7 Q At the time of his initial evaluation on April 15th,
8 '05, it was documented that Mr. Simao had midline cervical
9 spine tenderness. Correct?

10 A Correct.

11 Q Mr. Simao was diagnosed with left elbow sprain on
12 that date. Correct?

13 A Correct.

14 Q Mr. Simao was diagnosed with a neck sprain on the
15 date of the accident, correct?

16 A Correct.

17 Q Mr. Simao was treated for his left elbow and neck
18 sprain with prescriptions for Ibuprofen and Flexeril on that
19 day, correct?

20 A Correct.

21 Q And after his medical evaluation on April 15, 2005,
22 Mr. Simao was told to return to the clinic or seek primary
23 care follow-up if he was not improving in the next week to ten
24 days. Correct?

25 A Correct.

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1 Q Mr. Simao was never seen by a physician during his
2 evaluation on April 15, 2005, was he?

3 A I don't know.

4 Q He was seen by a physician's assistant, not a
5 doctor. Correct?

6 A That's who signed the note, yes.

7 Q Okay. Mr. Simao was never seen by a physician at
8 Southwest Medical during the course of treatment he received
9 there after this motor vehicle accident until December 21st,
10 2005, when he was seen by Dr. Teem Sigh [phonetic], correct?

11 A I don't know.

12 Q That's what the records show. Do you have any
13 reason to dispute that?

14 A In my experience, when you have a physician
15 assistant there's always a physician who oversees that. So --

16 Q He was not -- there's no indication in any of those
17 records that this was actually ever seen by a physician,
18 correct?

19 A Correct.

20 Q Now, Mr. Simao's clinical assessment by the physical
21 assistant who evaluated him on May 4th, 2005, was status post
22 motor vehicle accident with potential closed head trauma.
23 Correct?

24 A Correct.

25 Q And the physician's assistant, Mr. Hill, referred

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1 Mr. Simao for a head CT scan on May 4th, 2005. Correct?

2 A Correct.

3 Q Mr. Hill, in his written referral to radiology for a
4 CT scan of Mr. Simao's head documented that he was having
5 recurrent occipital pain. Correct?

6 A Correct.

7 Q Mr. Simao was reevaluated at the urgent care center
8 of Southwest Medical on May 12th of 2005. Correct?

9 A Correct.

10 Q Mr. Simao at that time was referred for an MRI for
11 his head. Correct?

12 A Correct.

13 Q One of the reasons for the referral of Mr. Simao for
14 an MRI of his head on May 12 was to look for a possible
15 intracranial lesion. Correct?

16 A Correct.

17 Q Intracranial lesions can result in significant
18 neurological problems or even death. Correct?

19 A Correct.

20 Q And the plan for -- strike that. When Mr. Simao
21 returned to Southwest Medical on May 26th, '05, he was told
22 that the results of the MRI of his head and brain were
23 normal. Correct?

24 A Correct.

25 Q And the plan for Mr. Simao on May 26th, 2005, was to

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1 continue his current medications as needed and to schedule a
2 routine follow-up as needed in the next six months. Correct?

3 A For his migraine headaches, correct.

4 Q Mr. Simao did not wait six months before being
5 reevaluated at Southwest Medical. Correct?

6 A Correct.

7 Q It was a little over four months when he was next
8 seen at Southwest Medical on October 6th, 2005. Correct?

9 A Correct.

10 Q And the documented reasons for his visit at that
11 time was to check up on his neck, shoulder pain, and
12 headaches. Correct?

13 A Correct.

14 Q Mr. Simao was referred for a repeat cervical spine
15 x-ray in October, 2005, by Mr. Hill. Correct?

16 A Correct.

17 Q Another set of x-rays of the cervical spine were
18 performed in order to evaluate potential clinical problems of
19 Mr. Simao's cervical spine. Correct?

20 A Correct.

21 Q Mr. Simao was seen at southwest Medical On December
22 21st, '05, for neck and left shoulder pain. Correct?

23 A Correct.

24 Q And this is the first time he was actually seen by a
25 physician at Southwest Medical. Correct?

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1 A I don't know.

2 Q As documented in the records, that's correct.

3 A As documented in the reports, correct.

4 Q His evaluating physician at that time documented
5 that Mr. Simao had been complaining of neck and shoulder pain
6 off and on for the past several months. Correct?

7 A Correct.

8 Q Okay. The clinical assessment of Mr. Simao's
9 physician on December 21st, '05, was on-going trapezial
10 discomfort which he believed to be a muscle strain. Correct?

11 A Correct.

12 Q And you are aware that Dr. Rosler, Dr. McNulty, and
13 Dr. Grover testified in this court that patients with cervical
14 disk injuries are almost always initially diagnosed as having
15 a sprain or strain. Correct?

16 A Correct.

17 Q Okay. Do you agree with Drs. Rosler, McNulty, and
18 Grover that patients with cervical disk injuries are almost
19 always initially diagnosed as having a sprain or strain as the
20 initial working diagnosis? Yes or no.

21 A Yes.

22 Q Okay. Mr. Simao was recommended for physical
23 therapy on December 21st, 2005. Correct?

24 A Yes.

25 Q When the physician's assistant, Mr. Hill,

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1 reevaluated Mr. Simao on March 9th, 2006, he documented no
2 improvement through a series of treatments with both
3 chiropractic and physical therapy. Correct?

4 A Correct.

5 Q Mr. Hill documented that Mr. Simao's complaint of
6 discomfort radiating to his left shoulder, with numbness, with
7 range of motion of his neck and his shoulder. Correct?

8 A Correct.

9 Q On March 9th, 2006, Mr. Hill diagnosed Mr. Simao
10 with episodic tension headaches. Correct?

11 A Correct.

12 Q He also diagnosed him with migraine headaches at the
13 time as well. Correct?

14 A Correct.

15 Q And Mr. Hill also diagnosed him with cervalgia.
16 Cervalgia -- how do I say that?

17 A You said it right.

18 Q Cervalgia with left upper extremity radiculopathy on
19 March 9th, 2006. Correct?

20 A Correct.

21 Q Mr. Hill ordered on MRI of Mr. Simao's cervical
22 spine due to the chronicity of his neck pain with left upper
23 extremity radiculopathy with no improvement with conservative
24 treatment. Correct?

25 A Correct.

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1 Q Mr. Hill referred Mr. Simao for an orthopedic
2 evaluation on March 30th, 2006, because of a clinical
3 assessment of bulging disc at C-4 -5 and cervalgia with left
4 upper extremity radiculopathy. Correct?

5 A Correct.

6 Q Dr. McNulty performed his initial orthopedic spine
7 evaluation on Mr. Simao a little more than one year after his
8 motor vehicle accident. Correct?

9 A Correct.

10 Q This was the first time Mr. Simao was seen by a
11 spine specialist. Correct?

12 A Correct.

13 Q Dr. McNulty documented Mr. Simao having a one-year
14 history of posterior cervical thoracic spine -- thoracic pain
15 with occipital radiation and trapezial radiation and bilateral
16 para scapular radiation with left upper extremity paresthesia
17 on April 18th, 2006. Correct?

18 A Correct.

19 Q Now you would agree that people's pain can be made
20 worse as a result of surgery. Correct?

21 A Yes.

22 Q Okay. And people's pain can stay the same as a
23 result of surgery. Correct?

24 A Yes.

25 Q There's no guarantees with surgery. Correct?

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1 A Well, when we --

2 Q No guarantees with spine surgery, is there, Doctor?

3 A No, there's not, if you put it that way.

4 Q All right. You would agree that degenerative

5 changes in the spine is another way of saying age-related

6 changes. Correct?

7 A Correct.

8 Q Okay. Age-related changes can and normally do occur

9 in the spine as we get older. Correct?

10 A Correct.

11 Q And it's fair to say that if you were to take a

12 hundred nonsymptomatic people who are 40 years old that you

13 randomly selected and do MRIs on their spine, pretty much all

14 of these people are going to have age-related changes in their

15 spine seen on MRI. Correct?

16 A They may, correct.

17 Q You would agree that asymptomatic degenerative disc

18 disease can become symptomatic as a result of a traumatic

19 event. Correct?

20 A No.

21 Q Would you turn please to Shultz, Volume II

22 deposition.

23 MR. EGLET: Slide 25 please, Brendan.

24 BY MR. EGLET:

25 Q And it's Volume II, page 1 -- 19, lines 3 through

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1 7. You testified in your deposition in this case, nine months
2 ago:

3 "Q You agree with the statement that usually
4 patients with pre-existing degenerative disease can
5 aggravate that from a whiplash type injury or a car
6 accident injury."

7 You said that's possible. Correct?

8 A Correct.

9 Q Okay. So asymptomatic degenerative disc disease can
10 become symptomatic when a person is subjected to a traumatic
11 event. Correct?

12 A No.

13 Q Okay. Would you go to your Shultz transcript?

14 A Uh-huh. What page?

15 Q Volume I of Shultz this time, not volume II?

16 A Okay.

17 Q And take a look at page 67, starting on lines 23.

18 MR. EGLET: Put up slide 27 please, Brendan.

19 BY MR. EGLET:

20 Q At the time of your deposition in this case you were
21 asked, quote:

22 Q Can asymptomatic degenerative disc disease
23 become symptomatic when a person is subjected to a
24 traumatic event?

25 Your answer was:

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1 "Right, in a hypothetical it could. But,
2 again, the difficult is divining where the pain is
3 actually coming from, whether it's truly a disc.
4 That's when we're having troubles with it we don't
5 always know if for that disc even though it's
6 degenerative that disc actually becomes the pain
7 component when trauma is applied to it."

8 So you stated that hypothetically it could occur.
9 Correct?

10 A Correct.

11 Q All right.

12 MR. ROGERS: Hold up -- I don't -- just a moment. I
13 don't have a page 67.

14 THE WITNESS: Volume I, not II.

15 [Counsel Confer]

16 BY MR. EGLET:

17 Q And when symptomatic -- strike that. And when
18 asymptomatic degenerative discs become symptomatic as a result
19 of trauma or traumatic event, one of the symptoms can be axial
20 pain. Correct?

21 A Correct.

22 Q Okay. You are a member of ISIS, the International
23 Spine Intervention Society. Correct?

24 A Correct.

25 Q And you were familiar with ISIS's guidelines and

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1 criteria for pain management doctors. Correct?

2 A I am familiar, correct.

3 Q It's right here right?

4 A I am familiar with that, correct.

5 Q Okay. Me too. Now ISIS publishes this text for
6 pain management physicians -- specialists, titled Practice
7 Guidelines: Spinal Diagnostic And Treatment Procedures.

8 Right?

9 A Correct.

10 Q Okay. In your practice you perform epidural blocks,
11 selected nerve root blocks, and facet blocks. Correct?

12 A Correct.

13 Q And ISIS set forths [sic] guidelines for pain
14 management physicians when performing and interpreting
15 epidural blocks, selected nerve root blocks, facet blocks and
16 discography. Correct?

17 A Correct.

18 Q Okay. And you abide by the guidelines and
19 recommendations of ISIS in your practice. Correct?

20 A No.

21 Q All right. If you turn please to Shultz Volume I of
22 your deposition, page 47, lines 7 through 14.

23 MR. EGLET: Bring up that slide please, Brendan.

24 BY MR. EGLET:

25 Q This is where your testimony was in Shultz I.

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1 "Q Do you abide by the recommendations of
2 ISIS in your practice?

3 "A For the most part, yes. They are very
4 simple standards of care or I'm very -- simple
5 recommendations so it's kind of hard to stray from
6 those because they're so well written if you will,
7 that they do give some good information.

8 "Q But are they 100 percent correct?

9 "A No. In other words I follow fully 100
10 percent ISIS because there are some components of
11 that that you may not agree with. It could be the
12 volume of medication, it could be the type of
13 medication."

14 Did I read that correctly.

15 A Yes.

16 Q All right. Now your answer would be the same with
17 respect to the recommendations of the North American Spine
18 Society. Correct? You follow their guidelines as well.
19 Correct?

20 A Correct.

21 Q Okay. Not only do you do certain procedures to try
22 to reduce pain but you do certain procedures to diagnose the
23 etiology of that pain. Correct?

24 A Correct.

25 Q Okay. And part of what you do would be provocative

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1 discography. Correct?

2 A Correct.

3 Q And you do discography in all levels of the spine.
4 Correct?

5 A Yes.

6 Q You do discography in the cervical spine. Correct?

7 A Yes.

8 Q And you do those on a regular and frequent basis.
9 Correct?

10 A Yes.

11 Q Okay. And that's part of your task as a pain
12 management specialist. Correct?

13 A Yes.

14 Q And the purpose of discography is to try to either
15 rule in or rule out discogenic origin of pain. Correct?

16 A Correct.

17 Q Okay.

18 MR. EGLET: And go to slide 44.

19 BY MR. EGLET:

20 Q You testified in the Varvello [phonetic] case -- and
21 we brought this up last Thursday -- you were asked:

22 "And you were familiar with the gold standard
23 for diagnosing internal disruption, would you agree
24 with me that according to the North American Spine
25 Society is discography?"

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1 And your answer at that time was, "Correct."

2 Correct, Doctor?

3 A Correct.

4 Q Now when discography is done correctly, the person
5 that is reporting the pain doesn't know what level is being
6 pressurized when he's asked do you feel concordant pain.

7 Correct?

8 A Correct.

9 Q Okay. There was a discography performed in this
10 case in August of 2008 by Dr. Rosler. Correct?

11 A Correct.

12 Q And Dr. Rosler wouldn't tell the patient at what
13 levels he's injecting. Correct?

14 A Correct.

15 Q You don't tell the patient what level you're
16 injecting. Correct?

17 A Correct.

18 Q You've never done that, right?

19 A No.

20 Q Okay. And you had no reason to believe that Dr.
21 Rosler would tell Mr. Simao what levels he's injecting.

22 Correct?

23 A Correct.

24 Q And the result, according to Dr. Rosler was positive
25 at C-3 -4 and C-4 -5 from the diskography. Correct?

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1 A Correct.

2 Q And there was no indication the discography wasn't

3 properly performed. Correct?

4 A There was no indication at the time, correct.

5 Q There was no false positive documented by Dr.

6 Rosler. Correct?

7 A Documented by Dr. Rosler, correct.

8 Q Discography at specific levels with concord ant pain

9 is consistent with those levels being pain generators.

10 Correct?

11 A Can you say the question again? I'm not sure --

12 Q Discography with specific levels, with concordant

13 pain is consistent with those levels being pain generators.

14 Correct?

15 A That's a harder one to answer.

16 Q Go to --

17 A A --

18 Q No. It's a yes or no answer.

19 THE COURT: Mr. Rogers will have an opportunity to follow

20 up.

21 BY MR. EGLET:

22 Q Go to Volume I of Shultz, please.

23 A Uh-huh.

24 Q Okay. Go to page 59, please. And if you could read

25 lines 24 and 25 and then go on to page 60, lines 1 through 16

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1 and read those to yourself.

2 A Okay.

3 Q Have you read that?

4 A Yes.

5 Q So you would agree that discography findings or
6 discography at specific levels with concordant pain is
7 consistent with those levels? Being pain generators, correct?

8 A That's just a difficult --

9 Q Is it yes?

10 A It's not just yes or no, that's the thing. That's
11 the difficult with disco grams.

12 Q If a pain generator -- if a discography is positive
13 for concordant pain at a specific level, that is one of the
14 indicators, along with other diagnostic tests that that disc
15 may be a pain generator. Correct?

16 A It may be one of the indicators.

17 Q All right. Very good. Now the discography findings
18 and procedures by Dr. Rosler was performed within the
19 guidelines and protocols set forth by ISIS practice guidelines
20 and the North American Spine Society in this case. Correct?

21 A Well, the guidelines recommend one to three --

22 Q Yes or no. It's a yes or no question, Doctor.
23 Would you like me to read it back?

24 A No.

25 Q Okay. Can you answer it yes or no?

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1 A Yes. I was say no.

2 Q Okay. Could you go to the Simao deposition in front
3 of you please?

4 A Yes.

5 Q And on page 45 read lines 12 through 14 please?

6 A What was that page again?

7 Q Forty five. Isn't it true you were asked the
8 following question and gave the following answer in this case
9 in your deposition:

10 "Q Do you have any reasonable lead that the
11 procedure was not properly performed?"

12 And your answer was no. Correct?

13 A Correct.

14 Q Now go to page 50 of the same deposition and look at
15 lines 8 through 12. Isn't it true that you were asked the
16 following question:

17 " Dr. Rosler testified in his deposition
18 that the procedure he used followed the guidelines
19 from ISIS. Do you agree with that or disagree?

20 "A I have no reason to disagree that he
21 didn't follow a guideline but like any guideline
22 it's a guide. I mean, it's not the standard care;
23 it's not the way everyone does it. Everyone has a
24 little different component of performing a
25 discogram."

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1 So that was your testimony in your deposition in
2 this case. Is that correct, doctor.

3 A Correct.

4 Q Okay. So the discography findings and the
5 procedures performed by Dr. Rosler were performed within the
6 guidelines and protocols as set forth by ISIS and the spine
7 society in this case. Correct?

8 A You know --

9 Q It's a yes or no answer?

10 A I would say no.

11 Q Okay. Now you have no reason to believe that
12 Dr. Rosler did anything other than follow the guidelines from
13 ISIS during that procedure. Correct?

14 A Correct.

15 Q Okay. You have performed discograms on patients
16 involved in litigation, haven't you?

17 A Yes.

18 Q Okay. Your colleague and co-expert in this case,
19 Dr. Wang, he's a spine surgeon. Correct?

20 A Yes.

21 Q And he performed anterior and posterior fusions.
22 Correct?

23 A Yes.

24 Q And when he does that he removed the actual disc.
25 Correct?

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1 A Yes.

2 Q And so his goal in performing those surgeries is to
3 try to reduce a person's pain level. Correct?

4 A That's one of his goals, yes.

5 Q And before he does those surgeries he wants to
6 identify what disc or discs are causing the person's pain.
7 Correct?

8 A Yes.

9 Q Okay. He wants to make sure he performs the surgery
10 at the correct level. Correct?

11 A Yes.

12 Q And one of the tools he uses to do that is
13 discography. Correct?

14 A Yes.

15 Q Okay. Now, Doctor, in your practice you see
16 patients who have multiple injuries going on -- issues of
17 primary and secondary pain. Correct?

18 A Yes.

19 Q Okay. And you have heard of a cause of primary pain
20 and then secondary pain. Correct?

21 A Yes.

22 Q Okay. And you have seen, when the main focus of a
23 pain generator is addressed and treated and all of a sudden
24 the secondary pain generator becomes apparent where it had
25 been thought of symptomatic previously. Correct?

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1 A Correct.

2 Q Okay. And you recall being an expert in a case

3 named Gilbert v Shanker [phonetic]. You remember that? You

4 have the Gilbert deposition up there in front of you.

5 A Yes.

6 Q You were hired by the plaintiff's lawyer in that

7 case, Brooke Hammond [phonetic]. Correct?

8 A Yes.

9 Q And you gave a deposition in that case. Correct?

10 A Yes.

11 Q Are you aware in a shortly after your deposition

12 that Brooke Hammond and her client hired me to try that case

13 for them?

14 A Yes.

15 Q Okay. All right. Let's look and see what your

16 testimony under oath was in that case regarding the Gate

17 theory of pain and secondary pain complaints having delayed

18 onsets whether you were hired as an expert for the plaintiff.

19 Take a look at your Gilbert deposition and turn to page 21,

20 please.

21 MR. EGLET: Slide 70 please, Brendan.

22 BY MR. EGLET:

23 Q And I'm going to start on line 5, okay, and read

24 through this.

25 A Okay.

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1 MR. ROGERS: Your Honor, before publishing leaning
2 to the jury there needs to be a proper use of the deposition.
3 I'm not sure what the cross-examination is. The doctor --

4 MR. EGLET: I'm impeaching him on his prior trial
5 testimony, Your Honor.

6 THE COURT: Would counsel approach, please.

7 [Bench Conference Begins]

8 THE COURT: [Indiscernible].

9 MR. EGLET: No, there is. I'm impeaching him -- I'm --
10 hang on a second. Is the slide still up? I'm impeaching him
11 on the testimony he gave last Thursday: "The pain in my
12 client's neck couldn't have had a delayed onset. It could not
13 have been over shadowed by his head pain." And that's what
14 this is. This is a direct contradiction of that.

15 THE COURT: Did you ask him a specific question before
16 you go to this?

17 MR. EGLET: I don't have to. He's already testified to
18 this on direct. I'm simply -- identifying the deposition --
19 I'm simply showing him where he testified differently than he
20 testified in his trial testimony last week. The jury's
21 already heard his testimony. I can go back to it and impeach
22 him. There's no requirement that I repeat the testimony.

23 THE COURT: Mr. Rogers?

24 MR. ROGERS: I think it's a mistake, and I think if he's
25 going to use this as an impeachment tool then he has to get

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1 the testimony out first.

2 MR. EGLET: The testimony's already out. Okay. Just
3 before there's a four-day delay -- a three-day delay
4 [indiscernible] my cross-examination by this witness doesn't
5 mean I have to repeat his direct testimony. He testified. If
6 I [indiscernible] examined him and finished him on Thursday I
7 could have gone right into this because he just testified
8 without having him reading the testimony. But it's just as if
9 this had occurred right after wards. There's no requirement
10 that I read the testimony. He's wrong. I've been on this a
11 long time. I know I have used depositions.

12 THE COURT: Is there any objection? [Indiscernible].

13 [Bench Conference Ends]

14 BY MR. EGLET:

15 Q All right, Doctor. So page 21 of Gilbert. Are you
16 there?

17 A Yes, sir.

18 Q All right. Starting on line 5. Let's read this.
19 These are the questions posed to you by the defense attorney
20 in this case. Okay.

21 "Q Did you ever get a determination as to
22 when there was a determination of whether she
23 started complaining of right shoulder pain, right
24 arm pain."

25 Your answer is:

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1 "It seemed that the right extremity arm and
2 shoulder pain came much later.

3 "Q When you say much later, a few months? A
4 year?

5 "A To me it seemed like months nine months.

6 "Q Okay. Now the right shoulder pain, I
7 listed down what I think you said and I don't recall
8 if you said the right pain in the arm of shoulder
9 area was related to the accident. Is it?"

10 And your answer is:

11 "The right shoulder pain to me, I think in
12 medical probability came from the accident as she
13 struck her chest against the air bag. While she may
14 not have complained of it right away I think with
15 all the medical issues that were going on in this
16 developed once she was aware of it much like her
17 back which she had complained of but it was not as
18 well addressed."

19 MR. EGLET: And the next slide, Brendan.

20 BY MR. EGLET:

21 Q Okay.

22 "Now you just kind of brought it up as
23 something she said she wasn't aware of it. Explain
24 that to me."

25 And you testified:

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1 "I think some of the issues that she was
2 dealing with initially remember a lot graver than
3 the issue dealing with initially were a lot greater
4 than the issue of her shoulder at that time. In
5 other words the knee, the DVT and the shoulder on
6 the left seemed to overshadow her ability to kind of
7 focus on some of her other areas of pain. And I
8 think until those were addressed and treated, that's
9 when she started to kind of focus on the fact that
10 she still had pain in other areas that hasn't been
11 addressed."

12 MR. EGLET: Let's go to the next slide, Brendan, in
13 this testimony.

14 BY MR. EGLET:

15 "Q Is there some kind of theory or some kind
16 of -- strike that. I think I know what you're
17 describing. Is that something described as primary
18 versus secondary pain?"

19 And your answer is:

20 ~~"I've heard that described too. I don't know~~
21 if that's how I would describe it. But a lot of
22 times in the patient population that I see the main
23 focus of the pain generator, once that's taken care
24 of all of a sudden you kind of see the forth forest
25 for the trees, you know, and so things kind of open

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1 up and you start seeing the other areas that haven't
2 been noticed before.

3 "Q And that's what you believe happened with
4 Ms. Gilbert."

5 And your answer is:

6 "Dr. -- Surfastini [phonetic]'s a doctor,
7 right?

8 "A Yes.

9 "Q Dr. Surfastini, no. His concern about her
10 left shoulder was that she never complained of it.
11 But if you look at the records, she was complaining
12 of extremity and arm pain and the shoulder is
13 obviously connected to the arm so I think when you
14 look at it back, look at it, they started looking at
15 her elbow, her humerus, her other areas, until they
16 found that the shoulder was the source of the pain.
17 So yes, there's like a primary and a secondary
18 pain."

19 MR. EGLET: Let's go to the next slide, Brendan.

20 BY MR. EGLET:

21 "Q Is it typical for physicians to focus on
22 primary complaints instead of, you know, list out
23 ever thousand and one thing that you can possibly
24 think of that is hurting you at this moment?"

25 Your answer is: "All the time."

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1 MR. EGLET: Next slide, Brendan.

2 BY MR. EGLET:

3 "Q Can you say to a reasonable degree of
4 medical probability that the surgical procedure done
5 on the left shoulder was the result of the motor
6 vehicle accident?"

7 And your answer was yes. Correct?

8 A Correct.

9 Q The surgery on the left shoulder that wasn't
10 complained of for nine months after the accident. Correct?

11 A I don't know the specifics other than --

12 Q Well, let's look some more.

13 MR. EGLET: Next slide, Brendan.

14 BY MR. EGLET:

15 "Q Okay. Now let's move onto the right
16 shoulder. I think you described she did have some
17 right shoulder pain and that she didn't recognize
18 the pain right away because she was dealing with
19 some other issues. Correct?

20 "A Correct."

21 MR. EGLET: Next slide.

22 BY MR. EGLET:

23 Q Okay. That's the end of that. So Doctor, in
24 Gilbert, where you were an expert for the plaintiff, and where
25 there was a delay of nine months of complaints of shoulder

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1 pain from the day of the motor vehicle accident, you causally
2 related that shoulder injury, including the surgery, to the
3 motor vehicle accident, didn't you?

4 A In this --

5 Q Yes or no?

6 A I was --

7 Q Didn't you?

8 A I'm going to answer.

9 Q It's a yes or no response.

10 A Well, in this very significant accident, yes.

11 Q Yes. Yes, you did. Okay.

12 MR. EGLET: And move for strike everything but yes, Your
13 Honor.

14 THE COURT: The jury will disregard the witness's
15 statement, anything other than yes.

16 BY MR. EGLET:

17 Q You also related Ms. Gilbert's back to the motor
18 vehicle accident which she initially complained of but it was
19 not well addressed for months initially. Correct?

20 A Correct.

21 Q Okay. And you testified that her other injuries
22 over shadowed her ability to focus on her other areas of
23 pain. Correct?

24 A Correct.

25 Q All right, Doctor. Mr. Simao complained of

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1 occipital pain when he was evaluated at Southwest Medical on
2 April 15 and May 4th, 2005. Correct?

3 A Correct.

4 Q And on May 4th, 2005, it was documented that
5 Mr. Simao had tenderness to palpation over his occiput .
6 Correct?

7 A Correct.

8 Q Occipital pain can be caused by radiation from a
9 cervical spine pain generator. Correct?

10 A C-2 -3, correct.

11 Q Your testimony is only C-2 -3. Is that correct?
12 That's what you testified to last week. I want to confirm
13 that. Your testimony is that for it to be a pain generator
14 from the cervical spine it can only be from the C-2 -3 level.
15 Correct?

16 A Typically it's from the C-2 -3 --

17 Q Now wait a minute. Is it typically or is it only
18 from that level? Because you said only a minute ago. Which
19 is it, Doctor, typically or only?

20 A The C-2 -3 innervates the back of the head and up --

21 Q I understand that.

22 A -- but there's always variations in --

23 Q Oh, there's always variations. Let's talk about --

24 A So when you say only it's hard for me to say --

25 Q I didn't say only. You said only, Doctor. That

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1 wasn't my word. You're the one who says it only emanates from
2 the C-2. So are you saying now, well, no, there's other times
3 it may be other levels? Is that what you're saying?

4 A It's typically, most consistently with C-2 -3.

5 Q Okay. All right. Now you're aware that Dr. Rosler,
6 Dr. McNulty, and Dr. Grover testified in front of this jury
7 that occipital pain can be caused by radiation from a pain
8 generating site in the cervical spine below the C-2 -3 level.
9 Correct?

10 A Correct.

11 Q Okay. And you don't agree with their testimony.

12 A It's not typical.

13 Q Okay. Now, Dr. McNulty and Dr. Grover and
14 Dr. Rosler also testified in front of this jury that occipital
15 pain can also be caused by occipital neuralgia. Were you
16 aware of this testimony?

17 A Yes.

18 Q Okay. You agree with them that occipital pain can
19 be caused by occipital neuralgia?

20 A Yes.

21 Q Okay. Let's review your testimony regarding this
22 issue of occipital pain from last Thursday.

23 A Okay.

24 Q And see what you said.

25 MR. EGLET: Slide 77 please, Brendan.

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1 BY MR. EGLET:

2 Q Okay. So you testified last Thursday at trial in
3 response to Mr. Rogers' questions:

4 "Q An issue that's been brought up today is
5 -- and through this trial is occipital point pain or
6 occipital headaches is occipital pain the same as
7 neck pain?

8 "A No. It's different.

9 "Q Okay. If you would describe the
10 difference.

11 "A When you talk about occipital pain it's
12 basically the back of the head.

13 "Q Can you stand up and show the jurors."

14 And you stood up. Remember that? And you showed
15 them the back of your head. And he said:

16 "And show them the back of my head. The back
17 of the head as opposed to the neck which is more of
18 the component below the head. There's a distinct
19 difference between the two."

20 MR. EGLET: Let's go to slide 78 please, Brendan.

21 BY MR. EGLET:

22 Q Continuing on in your testimony from last week.

23 "Q All right. The focus of the plaintiff's
24 injury claim is that the car accident caused disc
25 disruption as C-3/4 and C-4/5. Would a traumatic

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