

1 when he did have a headache or his neck hurt or anything like
2 that.

3 Q Were there more good days or bad days?

4 A More bad days.

5 Q Did he appear to you to be getting better?

6 A No.

7 Q Did he continue to work?

8 A Yes.

9 Q Did you accompany to a lot of the procedures that
10 we've seen the records of, the injections and things like
11 that?

12 A Yes.

13 Q Okay. When you went with him, were you present when
14 the doctors talked to him?

15 A At some of the visits.

16 Q Okay. Based on your observations, did Bill do the
17 things that his doctors asked him to do?

18 A Yes, he did.

19 Q Did he go to all the physical therapy sessions?

20 A Yes.

21 Q Did the continuing pain from this end of 2005 to say
22 end of 2008, continue to affect his personality the way that
23 you described?

24 A It did.

25 Q Did it affect the relationship between the two of

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1 you?

2 A Yes, it did.

3 Q Can you describe how.

4 A When you live a person who has chronic pain, they
5 tend to think about their pain all the time. And so that
6 leaves little room to have a relationship with the person that
7 you're having a relationship with. So the focus would be on
8 Bill instead of the two of us. So it made things hard.

9 Q What if anything did you do about that?

10 A I did my best when he was upset or would get angry
11 or frustrated to leave so that he could, you know, just kind
12 of be by himself and -- cause I knew that he wasn't upset at
13 me. He was upset because he was in pain and not feeling well.

14 Q Now, were these personality traits different
15 from the way he had been before the accident?

16 A Yes. They were.

17 Q And you said from the end of 2005 and 2006, 2007,
18 2008, did he continue to work?

19 A Yes, he did.

20 Q All right. At that point, was it his business, the
21 family's business?

22 A Yes, it was.

23 Q Did your son help out a lot at work?

24 A He did.

25 Q Was he taking pain medications at least some of the

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1 time during that period?

2 A He was when he was able. If he was driving, he
3 wouldn't be able to take something. So when he was able to
4 take medicine, he did.

5 Q How did they affect him besides that?

6 A It would affect his ability to be able to
7 concentrate, to think things through.

8 Q Was that a problem at work for him?

9 A It would be a problem at work, yes.

10 Q Were there times when he wanted to discontinue the
11 pain medicine?

12 A Yes. They had prescribed something called Lyrica.
13 And it would really affect his ability to think. Things that
14 he could do on a normal basis everyday without concentrating
15 too much on, he actually couldn't do when he took that.

16 Q Did he stop taking that?

17 A He did.

18 Q Now, during this period of time -- actually the end
19 of 2007, the evidence has been that he had gone through and
20 seen Dr. McNulty. He had gone through the pain management
21 with Southwest Medical and had come back to Dr. McNulty and
22 near the end of 2007, Dr. McNulty testified about the meeting
23 he had with Bill saying he's a surgical candidate at that
24 point. Were you present at that meeting?

25 A I was.

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1 Q Okay. Did you and Bill discuss after that meeting
2 or during it, I guess, but around that time, end of 2007,
3 whether he should go forward with the fusion surgery that Dr.
4 McNulty had recommended?

5 A We did. And Bill was afraid to have surgery and
6 wanted to avoid it any way he could.

7 Q Why was he afraid?

8 A Cause you don't know what your outcome will be. And
9 having that done is a major surgery.

10 Q Did he want to get a second opinion?

11 A Definitely.

12 Q Did you think that was a good idea?

13 A Yes, I did.

14 Q All right. Is that when you saw Dr. Grover and then
15 Dr. Rosler?

16 A Yes.

17 Q Now, the testimony has been that in, I think, it was
18 April of -- March or April of 2008, you saw Dr. Grover. And
19 then he was sent to Dr. Rosler for an injection. And then in
20 about August of 2008, the discography. And then shortly
21 thereafter, he went back to Dr. Grover. Were you with him
22 when he met with Dr. Grover after all that testing had been
23 done?

24 A I was.

25 Q Did Dr. Grover discuss then that he was a candidate

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1 for a fusion surgery?

2 A He did.

3 Q At that point, Bill had a decision to make about the
4 surgery. Did you help him make that decision?

5 A I supported whatever decision Bill made. He made it
6 on his own.

7 Q Okay. And what decision did he make?

8 A To go ahead and have the surgery with Dr. McNulty.

9 Q Okay. Now, as of the time of the surgery, it was
10 about four years since the accident. As of that time, had he
11 gotten better?

12 A No.

13 Q The surgery was March of 2009, did it seem to help
14 him for a while?

15 A Initially right after, yes. It -- the pain started
16 coming back once he started working.

17 Q Do you know how long after the surgery he started
18 working?

19 A I don't know for sure.

20 Q What did you observe that let you know he was in
21 pain again?

22 A He was starting to be stiff again. He was
23 complaining. You could just tell by how he was moving that he
24 wasn't feeling well.

25 Q Now, the surgery had some relief. Is that right?

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1 A Uh-huh. Yes.

2 Q And then the pain came back. How did it affect him
3 based on your observations when the pain came back?

4 A Well, he was still working. So if he did something
5 that was overly strenuous on a day, it would take him a couple
6 of days to recover from it. So you could tell that there was
7 something not right.

8 Q Okay. We are now almost exactly two years after the
9 surgery. Is he still in pain today?

10 A He is.

11 Q How do you know?

12 A Because of the way he acts. It's hard for him to
13 move. He complains. You can tell because his eyes turn red.

14 Q Is he the type of person that complains a lot?

15 A He never used to be. He does now. But I think he
16 tries lately to stop because he knows that it's kind of
17 wearing.

18 Q How has he changed since the accident?

19 A Well, he used to be very happy, go lucky and
20 energetic, smiling. And now, you know, more often than not,
21 he's not feeling well and he's cranky and irritated and tends
22 to snap sometimes.

23 Q At you?

24 A Uh-huh. Yes.

25 Q How does it make you feel when you see those changes

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1 in your husband?

2 A As I said before, when someone has chronic pain,
3 they are -- they're separate from you. They are concentrated
4 on how they feel. So they're not paying attention to a lot of
5 things that's going on around them. So if we communicate, it's
6 -- sometimes we miscommunicate and we're just not having a
7 good day.

8 Q Now, setting aside any issues in his personality or
9 his pain, just his physical capabilities. What differences
10 have you observed in his physical capabilities since the
11 crash?

12 A His physical capabilities are the same.

13 Q He can still do all the things that he used to be
14 able to do?

15 A Yes.

16 Q What happens if he does all the same physical things
17 that he used to do?

18 A He'll have two or three days of pain if he has to do
19 something that's strenuous.

20 Q Does he still try to do the things around the house
21 that you talked about earlier?

22 A Yes, he does.

23 Q All right. I want you to tell us how the accident
24 has affected -- well, let me ask this first. Has the accident
25 -- and we talked about some of this today. Has it actually

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1 affected your marriage?

2 A It has.

3 Q I want you to tell the jury how it's affected your
4 marriage. And let's start with your social life, the things
5 that you would go out and do or otherwise do.

6 A Well, we used to go out and play video poker. We
7 don't do that anymore. Maybe on occasion, but not like we
8 used to. We used to ride motorcycles and in fact we sold them
9 both in 2007 because Bill couldn't ride them anymore.

10 Q You each had one?

11 A Yes, we did.

12 Q Okay. Was something that the two of you enjoyed?

13 A Yes, we did.

14 Q What about -- what about issues of intimacy between
15 the two of you?

16 A Because of the strain on the relationship, because
17 of the changes in his personality, I would say that it's
18 decreased about 50 percent.

19 Q From before the accident?

20 A From before the accident, just because -- just
21 because of the personality changes. And we don't feel as
22 close as we used to.

23 Q And what about the -- along that line, then what
24 about the friendship between the two of you that's part of the
25 marriage?

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1 A It's strained because the focus is mostly on Bill
2 and not the two of us.

3 Q All right. Thank you very much.

4 MR. WALL: I'll pass the witness, Your Honor.

5 THE COURT: Very well. Mr. Rogers.

6 MR. ROGERS: Yes. Thank you.

7 CROSS-EXAMINATION

8 BY MR. ROGERS:

9 Q Hello.

10 A Hi.

11 Q Okay. I want to start with the accident itself.
12 You said that you got a phone call from your husband while he
13 was still at the scene.

14 A Yes.

15 Q Right? What did he tell you?

16 A He said that he was rear-ended, that he hit his
17 head, and that he would like me to take him to Urgent Care.

18 Q Okay. And the jury has heard a word that, frankly,
19 I couldn't place when I first heard about this, and that was
20 cage. You mentioned in the direct examination that your
21 husband said that his head struck a cage. If you would, tell
22 the jury what this cage is.

23 A It's a piece of metal that separates the front from
24 the back, and in front of it is a piece of Plexiglas.

25 Q Okay. So it's not like a freestanding four-walled

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1 cage. It's more like a wall right behind the driver's seat.

2 A Yes.

3 Q Okay. And then on the outside of that wall is a
4 plastic shield or Plexiglas shield.

5 A Yes.

6 Q All right. Did he -- when he called you, did he
7 tell you that he wanted you to come and pick him up?

8 A No, he did not.

9 MR. WALL: I'm sorry. From the scene?

10 MR. ROGERS: Yes.

11 MR. WALL: Okay.

12 BY MR. ROGERS:

13 Q Did he tell you whether he felt he needed emergency
14 care?

15 A No, he didn't tell me he needed emergency care.

16 Q You know what? Back to that cage question. This is
17 the kind of van that doesn't have rear seats, right?

18 A Right.

19 Q The reason for that cage there is because there are
20 tools and things in the back.

21 A Yes.

22 Q Do you know why your husband declined the ambulance
23 that came to the scene?

24 A I don't know why.

25 Q All right. Well, you went home after work and met

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1 up with him and took him to the quick care, when you met with
2 him, did you see any evidence of cuts on him?

3 A I didn't look for evidence of cuts.

4 Q Did he say I'm bleeding from this part or I've had
5 to put a Band-Aid here or anything like that?

6 A No, he did not.

7 Q Did he tell you whether he lost consciousness in
8 this accident?

9 A No, he did not.

10 Q Did he have any bruises on him?

11 A I didn't check.

12 Q And his main complaint on the date of the incident
13 was his head, right?

14 A Yes.

15 Q When he went to that first visit where you took him
16 to the quick care, did they recommend that he follow up with
17 his primary care provider?

18 A I don't recall.

19 Q Now the records that the jury is seeing show that he
20 didn't treat for the next three weeks. Was he working during
21 that three-week period?

22 A He was.

23 Q When -- excuse me. When your husband was treated
24 with Dr. McNulty -- this is flashing forward quite a ways.
25 This takes us up to 2007 -- that's when he bought the business

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1 Americlean.

2 A Yes.

3 Q At the time of the accident he was an employee
4 there. And then a couple years after the accident, he
5 purchased the company.

6 A Yes.

7 Q And if memory serves, the reason that your husband
8 left Dr. McNulty was because there was a personality issue.
9 He didn't like his bedside manner.

10 A Yes.

11 Q We've heard from Dr. Arita -- and you've been here
12 every day -- about the injections that were performed at
13 Southwest Medical. And those injections really didn't relieve
14 your husband's symptoms, did they?

15 A Not as far as I was aware.

16 Q Did any of the providers, meaning particularly Drs.
17 Grover or Rosler, discuss with you or your husband concerns
18 about false positives with --

19 A Not with me.

20 Q -- discography?

21 A Not with me.

22 Q Did anybody tell you or your husband listen, this is
23 a test that can produce invalid results?

24 A No, they did not.

25 Q After that discography, Dr. Grover recommended

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1 surgery, right?

2 A Yes.

3 Q Did he discuss that discography with you and your
4 husband in a way that made it seem like that discogram
5 isolated the pain generator?

6 A Yes.

7 Q Did he ever discuss with you or your husband how
8 removing two discs that weren't relieved by these anesthetic
9 injections might eliminate your husband's pain?

10 A I'm sorry. I don't understand.

11 Q Yeah, that was clumsy. Let me try it again. Your
12 husband had injections at the two discs that were removed,
13 right?

14 A I believe so.

15 Q And as you've testified, those injections didn't
16 relieve his pain. Did Dr. Grover ever discuss with you or
17 your husband how removing discs that weren't relieved by these
18 anesthetic injections might eliminate your husband's pain?

19 A I don't recall that.

20 Q Did Dr. Grover ever discuss with you or your husband
21 any alternatives to surgery?

22 A I don't remember.

23 Q Anything less invasive, like you can continue with
24 pain management or physical therapy, or things like that?

25 A I don't remember.

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1 Q Did Dr. Grover or Dr. McNulty suggest that your
2 husband see a neurosurgeon?

3 A Not that I recall.

4 Q You said that your husband doesn't have anything in
5 limitations and the activities he can do. It's simply that
6 those activities now cause pain whereas they didn't before, is
7 that right?

8 A Yes.

9 Q Was that the case too before surgery, he was able to
10 continue doing everything that he could before the accident?

11 A Yes.

12 Q Now the last time you and I met, it was in October
13 of 2008 for your deposition.

14 A Yes.

15 Q So, what, two-and-a-half years ago. And that was
16 shortly before your husband's surgery. At that time, your
17 husband wasn't taking any pain medication except for headache
18 medication, right?

19 A As far as I know.

20 Q You mentioned that your husband can't ride a
21 motorcycle now. Do you recall that, in 2009, after the
22 surgery, that he got a commercial driver's license and was
23 considering driving an 18-wheeler?

24 A Yes.

25 MR. ROGERS: One moment. I may well be done here.

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1 [Pause]

2 MR. ROGERS: Thank you. That's it.

3 THE COURT: Okay.

4 MR. ROGERS: Thank you.

5 THE COURT: Mr. Wall, any redirect?

6 MR. WALL: I do, briefly, Your Honor, if I could.

7 REDIRECT EXAMINATION

8 BY MR. WALL:

9 Q Mrs. Simao, do you understand that Bill has always
10 been in the flooring business?

11 A He's been in the flooring business for a very long
12 time.

13 Q Okay. If he's been in the flooring business for a
14 long time, why might he be looking at something else like
15 getting a commercial driver's license?

16 A Because it would be easier to do. Flooring is very
17 strenuous. It would be easier on him.

18 Q Mr. Rogers asked you about whether you remember Dr.
19 Grover talking about alternatives like -- to surgery like pain
20 management or physical therapy. Had they -- had physical
21 therapy worked for Bill over the four years since the accident
22 and before the surgery?

23 A No, it had not.

24 Q Had any of the pain management procedures taken away
25 all of his pain?

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1 A No, they didn't.

2 Q And he asked you if, when you went to the urgent
3 care with Bill the night of the accident, whether his main
4 complaint was headaches. Do you remember that?

5 A Yes.

6 Q And where were -- where did his head hurt? Where on
7 his head did it hurt on the day of the accident?

8 A In the back right here.

9 Q And was that the same as his migraines?

10 A No, it wasn't.

11 Q Okay. How was it different?

12 A Migraines for Bill were typically in the front and
13 on the left side. And that was -- it was from the back, the
14 head injury and the pain.

15 Q All right. Thank you very much.

16 MR. WALL: I don't have any other questions.

17 THE COURT: Any follow-up?

18 MR. ROGERS: No, thank you.

19 THE COURT: Thank you, ma'am. You may step down.

20 Mr. Wall.

21 MR. WALL: Your Honor, the Plaintiff would call Bill
22 Simao.

23 THE COURT: Very well.

24 Mr. Simao.

25 [Pause]

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1 THE COURT: Please remain standing. Raise your right
2 hand.

3 WILLIAM SIMAO, PLAINTIFF'S WITNESS, SWORN

4 THE CLERK: Please be seated, stating your full name,
5 spelling your last name for the record.

6 THE WITNESS: It is William Simao, S-i-m-a-o.

7 DIRECT EXAMINATION

8 BY MR. WALL:

9 Q Prefer William or Bill?

10 A Bill.

11 Q All right. Have you ever testified before a jury
12 before?

13 A No.

14 Q You've heard people talk about you over the past few
15 weeks. Are you nervous today?

16 A Very, yes.

17 Q What is your date of birth? We'll start with the
18 easy one.

19 A May 8th, 1963.

20 Q And where were you born?

21 A San Francisco, California.

22 Q You are married to Cheryl?

23 A Yes.

24 Q And when did you get married?

25 A 1984.

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1 Q How long have you been here in Las Vegas?
2 A Since 2002.
3 Q And where did you come from?
4 A Modesto, California.
5 Q Tell us what you do for a living?
6 A Right now, I have a cleaning business. We do carpet
7 cleaning and tile grout.
8 Q I'm going to ask you to keep your voice up if you
9 could.
10 A Okay.
11 Q What are your job duties? Is that Americlean, your
12 business?
13 A Yes.
14 Q What are your job duties now with Americlean?
15 A My job duties are most of the estimates and the hard
16 surface work.
17 Q What does that mean?
18 A Tile, grout, polishing, trabertane [phonetic] and
19 marble.
20 Q Do you own the business?
21 A Yes.
22 Q Who else works there besides you?
23 A My son William, Jr.
24 Q Is it a large company?
25 A It's not. It's family.

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1 Q Over the past five years or so, what's the most
2 number of employees you've had?

3 A I think six.

4 Q Okay. And now it's you and your son?

5 A Yes.

6 Q Okay. How long have you been in the flooring
7 business?

8 A Since I was a kid. I started very young.

9 Q Tell us how you got started.

10 A My neighbor had a flooring company, and I started
11 working for him at probably about 12 or 13 years old, after
12 school. He used to pick me up, and I would go help him lay
13 padding, like the small square tiles, to the floor.

14 Q All right. Keep your voice up for me if you could.

15 A Okay.

16 Q And then how did you -- were you working in the
17 flooring business before you came to Las Vegas?

18 A Yes.

19 Q Tell us what you were doing in California and then
20 what brought you to Las Vegas.

21 A I had my own flooring business in California. And I
22 was doing mostly repo homes, like Fannie Mae and Freddie Mac.
23 I had a contract with -- to do --

24 Q Repo you said?

25 A Yeah, to do -- you know, when they go in and pain

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1 them and everything, I would go in and do the flooring in
2 them. And then I moved here because my stepmother got cancer.

3 Q All right. And does she live in Las Vegas?

4 A She did.

5 Q And that was in 2002 that you got here?

6 A Yes.

7 Q Now you know, obviously, that you're here to talk
8 about the motor vehicle accident that occurred on April 15th,
9 2005 and everything that has occurred since that?

10 A Yes.

11 Q All right. Prior to the motor vehicle accident,
12 describe how your health was.

13 A I think I was in good health. Headaches now and
14 then, migraines. That's about it.

15 Q How often would you get the migraines?

16 A Once or twice a month.

17 Q Did you ever suffer from neck pain prior to this
18 accident?

19 A No.

20 Q Were you ever treated by any doctor for any neck
21 pain prior to the accident?

22 A No, I wasn't.

23 Q Did you ever suffer from left shoulder or trapezial
24 pain prior to the accident?

25 A No.

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1 Q Were you ever treated by any doctor for left
2 shoulder or trapezial pain prior to this accident?

3 A No, I was not.

4 Q All right. You said that the migraines would come
5 along how often?

6 A Probably once or twice a month on average.

7 Q And how long would they typically last?

8 A Usually four to five hours.

9 Q Describe the migraine headaches, please.

10 A A migraine is like -- it just comes on. It's like
11 right under the eyebrow and kind of under the eye, just pain.
12 They're really hard to explain. It's a lot of pain.

13 Q Now you just pointed towards your left eye.

14 A Yes.

15 Q Was it primarily on the left side or also on the
16 right?

17 A I've had a few on the right, almost always on the
18 left.

19 Q Had you seen any doctors or physician's assistants
20 for the --

21 A I have.

22 Q -- migraines?

23 A I have. I saw, I believe, Brett Hill.

24 Q And was that at Southwest Medical?

25 A Yes.

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1 Q And we're still talking prior to the accident. Had
2 you been given any medications for the migraines prior to the
3 accident, by Mr. Hill or anyone else at Southwest Medical?

4 A Yes, Fiorinal and Butalbital, same thing.

5 Q Fiorinal?

6 A Uh-huh.

7 Q Or?

8 A Butalbital. And it's --

9 Q Butalbital.

10 A -- called either.

11 Q Okay. Did those work?

12 A Kind of. I think they kind of more made me drowsy,
13 so I could go to sleep. And sometimes when I slept it made it
14 easier for the headache to go away. So yeah, they -- all in
15 all, they kind of worked, yes.

16 Q All right. I want to take you to April 15th of
17 2005, in the afternoon. What type of vehicle were you
18 driving?

19 A A Ford Econoline, like a cargo van, E-350.

20 Q And is that something you use for work?

21 A Yes.

22 Q Describe the van for us, including how the seats and
23 the equipment were situated.

24 A It's like a regular cargo van. It just had the
25 windows in the front and, obviously, like on the back doors,

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1 panel on the side.

2 THE COURT: Excuse me just a moment. I think we're
3 having a problem with some of the jurors being able to hear
4 you, sir. So if you could speak up, or else position yourself
5 closer to the microphone.

6 THE WITNESS: Is that okay?

7 THE COURT: Sorry for the interruption, Mr. Wall.

8 BY MR. WALL:

9 Q All right. Keep your voice up --

10 A All right. And then had two bucket seats with like
11 a console in the center of the seats that was higher than the
12 seats. And behind the seat there was like a steel cage or
13 frame or -- that divided the front from the back. And the
14 Plexiglas, it was solid except for one spot about the size of
15 probably this screen here that had holes drilled in it about
16 the size of a quarter, a lot of holes, and there was a piece
17 of Plexiglas over that. And it had the holes so you could
18 actually see out the rearview mirror. So there was -- that's
19 it.

20 Q So this thing we're calling a cage behind the seats,
21 was there give to it?

22 A No.

23 Q It was just kind leaning there or was it bolted?

24 A No, it was bolted in, top, bottom, and side.

25 Q Where were you, and I mean like what road, when the

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1 accident took place?

2 A I was on 15 up by Cheyenne.

3 Q Were you heading north or south?

4 A South.

5 Q Do you remember where you got on the interstate?

6 A I think it was Craig, right before that.

7 Q Were you alone in the van?

8 A I was.

9 Q How do you recall that your body was positioned at
10 the time of the accident?

11 A At the time of the accident I was stopped. I think
12 I was leaning over kind of like this on the console that was
13 neck to me.

14 Q You were leaning your chin on your right hand?

15 A Yes.

16 Q And you said that console. That was at -- in the
17 middle between the -- so were they bucket seats or --

18 A Yeah, bucket seats.

19 Q Were you struck from behind?

20 A Yes.

21 Q Were you stopped when you were hit?

22 A I was.

23 Q Do you remember what kind of vehicle hit you?

24 A I think it was a Chevy Suburban pickup.

25 Q Was that the Defendant's Suburban that struck your

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1 van?

2 A Yes.

3 Q At the time of the accident, did you lose
4 consciousness?

5 A I did not.

6 Q Did you strike anything?

7 A I did. My head hit the cage.

8 Q I'm sorry?

9 A My head hit the cage behind the seat.

10 Q Okay. Did you call 9-1-1?

11 A I'm not sure if I did or not, but they did come.

12 Q Somebody called?

13 A Yes, somebody did.

14 Q Did any law enforcement arrive?

15 A Yes.

16 Q Well, who else arrived?

17 A Ambulance came also.

18 Q How did you feel immediately after the accident?

19 Did you feel any pain?

20 A I did. I --

21 Q Where?

22 A At the back of my head.

23 Q Okay. Anywhere else?

24 A It was mostly the back of my head and neck.

25 Q Describe for us -- show us exactly where it hurt?

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1 A Like right here at the base of my skull kind of,
2 right around here.

3 Q Keep your voice up, please.

4 A At the base of my skull, like the bottom of my skull
5 and my head.

6 Q Could you move around?

7 A I could, yes.

8 Q Did you talk to any of the emergency personnel who
9 arrived at the accident scene?

10 A Yes, I did.

11 Q Who'd you talk to?

12 A The people that -- the medical people from the
13 ambulance came up and talked to me, and they looked at the
14 back of my head. Then I talked to the Highway Patrol.

15 Q The highway patrolmen?

16 A Yes.

17 Q All right. Were you transported by the ambulance to
18 the hospital?

19 A No, I was not.

20 Q Did they ask you?

21 A Yes, they did.

22 Q And what was your response?

23 A I just wanted to get my vehicle home and have my
24 wife take me.

25 Q Okay. Did you talk to Cheryl while you were at the

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1 scene?

2 A Yes, I did.

3 Q Did you call her?

4 A Yes.

5 Q What'd you tell her?

6 A I asked her if when she got home she could take me
7 to an Urgent Care.

8 Q Did you tell her about the accident?

9 A Yes, I did. I told her that I'd been in an
10 accident. I told her that I'd been in an accident, and that
11 I'd hit my head, and if she could take me to Urgent Care.

12 Q All right. Where was she?

13 A Pardon me?

14 Q Where was she when you called her?

15 A She was at work.

16 Q And what time did she get home? Did you drive home?
17 I guess I'll ask you that?

18 A I did, yes.

19 Q And what time does she normally get home on a
20 workday?

21 A Somewhere right around 5:30, maybe a couple minutes
22 after 5:30.

23 Q Do you recall approximately what time it was that
24 this accident happened?

25 A I think it was shortly after 3:00 in the afternoon.

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1 Q All right. So did you drive home from the scene?
2 A I did.
3 Q And about what time was it that Cheryl came home?
4 A It was probably a little after 5:30.
5 Q How'd you feel at that point?
6 A My head hurt. My neck hurt. My elbow hurt.
7 Q Okay. You moved your left elbow.
8 A Yes.
9 Q Is that the one that hurt?
10 A Yeah.
11 Q What happened once Cheryl got home?
12 A We got in the car and she took me to Urgent Care.
13 Q Okay. What happened once you got to Urgent Care?
14 A We were there for a little bit. They talked to me,
15 did an exam, and then I guess they took some x-rays.
16 Q All right. What did you tell them?
17 A I told them that I'd been in an accident and that
18 I'd hit my head on a steel cage in the van.
19 Q And what do you remember that they did for you at
20 Urgent Care?
21 A They just kind of talked to me, examined me, took a
22 couple x-rays I think of my head and neck and arm.
23 Q Did they explain to you the result of those x-rays?
24 A Yeah, they said there were no, like, bone fractures
25 or breaks or anything like that.

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1 Q Describe for us the type of pain that you had at the
2 Urgent Care.

3 A Like a lot of pressure. Lot of pain and a lot of
4 pressure on the back of my head. That was what I felt the
5 most at the time.

6 Q What do you mean pressure?

7 A It's hard to, like, just really -- I don't know how
8 to explain it. Just a lot of pressure. I mean it was
9 painful, but you could feel like pressure. It's --

10 Q Was it similar to the migraine headache pain that
11 you had occasionally prior to the accident?

12 A No, no, not even close.

13 Q Describe how it was different.

14 A For one, it was in the back of the my head not like
15 under my eye.

16 Q Keep your voice up.

17 A It was in the back of my head not in the front. And
18 migraines generally stay at the eye. This was in the back of
19 the head and like -- kind of like circular in the back of my
20 head to the bottom of my -- top of my neck, actually.

21 Q Did you explain that to the people at the Urgent
22 Care.

23 A I did.

24 Q Do you know if you actually saw a doctor at Urgent
25 Care?

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1 A I think it was a PA. I don't think I saw a doctor.

2 Q How long were you there?

3 A It was a couple hours.

4 Q Did they give you any prescriptions or medications
5 before you left?

6 A They did. They gave me a prescription for Ibuprofen
7 and for Flexural.

8 Q What did you understand Flexural to be?

9 A For like muscle relief.

10 Q Okay. Do you have any medical training?

11 A No.

12 Q What did they do for your arm?

13 A They gave me a sling to put it in, and they told me
14 that the pain would go away on that. They gave me the
15 ibuprofen and Flexural.

16 Q Keep your voice up, please. Did they tell you what
17 injuries you had suffered?

18 A They said a neck sprain. And I bumped my head, and
19 there was a bruise on that. Neck sprain and -- or my left arm
20 sprain.

21 Q Sprain?

22 A Yeah.

23 Q Did they tell you to follow up with your regular
24 medical provider?

25 A They did.

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1 Q What did they tell you, if anything, about the pain
2 that you would feel?

3 A They told me that it would go away after time, that
4 it was just a sprain, that, eventually, it would go away.

5 Q When did you follow up? Was it within the next week
6 or 10 days?

7 A It was close. It might have been a little bit
8 longer than that. It was close though.

9 Q Did you take time off work during this period of
10 time?

11 A I did.

12 Q Why not?

13 A Because I kind of still had to go to work and do my
14 job and support my family I guess.

15 Q Was it painful to do your job?

16 A Yes.

17 Q Did you try to make any allowances for that?

18 A Yeah, I suppose I did. I had my son take up a
19 little bit for me and do what I could do.

20 Q The records show that it was the beginning of May
21 2005 that you came back to Southwest Medical. Why did you
22 come back?

23 A Because I was still having the pain. It didn't go
24 away.

25 Q And the medical records talk about occipital pain,

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1 but I want you show us where your head hurt.

2 A The head hurt in the back, just like at the bottom
3 of my head at the top of my neck.

4 Q During the visits in May, did you -- to Southwest
5 Medical, did you tell them that your neck hurt as well?

6 A Yes.

7 Q What, if anything, did they do for that?

8 A I don't think they were worried about that. I think
9 they thought that I might have bleeding or something in my
10 brain, because they were more focused on that.

11 Q Did they do a CT scan of your brain?

12 A They did.

13 Q Did they do an MRI of your brain?

14 A They did.

15 Q Now in May of 2005, the couple visits that you've
16 seen evidence of and the jury has seen evidence of during
17 trial. Did you see a doctor on any of those visits?

18 A I don't believe so. I think they're PAs.

19 Q By the end of May of 2005, did they tell you what
20 the results were of all those tests, the MRI, CT scan, x-rays,
21 everything?

22 A Of the brain, they were negative.

23 Q Okay.

24 A Yes.

25 Q What else did they tell you?

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1 A That I probably had a neck sprain or strain and,
2 basically, follow up and go home, that it would go away, and
3 follow up in six months.

4 Q Now at the end of May, were you still having pain?

5 A Yes.

6 Q Was it the same type of pain?

7 A Yes.

8 Q Had it -- was there a time after the accident, April
9 15th, 2005, that visit to Southwest Medical May 26th, 2005,
10 did the pain go away and a new pain start during that period
11 of time?

12 A No, it was the same pain. And I think my shoulder
13 started to hurt then too. It was kind of going down my neck
14 into my shoulder.

15 Q Now then at the end of that day, when you saw
16 Southwest Medical, at the end of May 2005, what did they tell
17 you to do?

18 A Told me just to leave and follow up in six months if
19 the pain persisted, and keep taking the medications that they
20 gave me, the Flexural and the ibuprofen.

21 Q When they told you that it would go away, did you
22 believe them?

23 A Yes.

24 Q Why?

25 A Because I went there for them to help me, and I just

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1 didn't believe that they --

2 Q I'm sorry?

3 A I went there for them to help me. I believed that
4 they were and that they knew what they were talking about.

5 Q Did the pain just go away?

6 A It did not.

7 Q Did you take their advice and wait for it to go
8 away?

9 A For a little bit, but then I got worried when it
10 didn't go away.

11 Q How long did you give it before you came back?

12 A Probably about three or four months.

13 Q You understand that that period of time from the end
14 of May till October of 2005 had been referred to as a gap in
15 treatment. Have you heard that?

16 A I have heard that, yes.

17 Q Describe for us what your condition was like during
18 that four-month period.

19 A It was the same. I still had the same pain, still
20 had the head pain, the neck pain, and to my shoulder. And my
21 -- actually, my arm was getting a little bit better, but the
22 head and neck pain were not better at all.

23 Q Was the pain the same, better, or worse?

24 A I would say it was probably getting worse.

25 Q Did you consider going back sooner than October?

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1 A I did.

2 Q Did you go back before October?

3 A I did not.

4 Q Why not?

5 A I just thought that I would give it time and see if
6 it would heal.

7 Q And was the pain always there during this four-month
8 period?

9 A Yes.

10 Q Were there good days and bad days or was it just
11 constant?

12 A Yeah, there were good days and bad days. Sometimes
13 the -- sometimes it was just there and you could notice, and
14 then sometimes it was more painful.

15 Q Okay. So a good day was what?

16 A A good day was when you just kind of knew it was
17 there and you could go along pretty much with a normal day.

18 Q And a bad day?

19 A A bad day was when it hurt bad and you wanted to go
20 home and sit down or lay down or just quit doing everything,
21 stop.

22 Q Did you have head and neck pain from the date of the
23 accident through October of 2005?

24 A Yes. Yes, I did.

25 Q Did your neck pain or head pain go away as they told

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1 you it might after the May 26th, 2005 meeting with Southwest
2 Medical?

3 A No, it did not.

4 Q During that period between the end of May and
5 October of 2005, did you suffer any new traumatic injury?

6 A I did not.

7 Q Was your neck pain -- well, let me ask it this way.
8 When you went back in October of 2005, after that, over the
9 years you went through, as the jury has heard, a number of
10 different treatment regiments, right?

11 A Yes.

12 Q Were you sent to physical therapy?

13 A I was.

14 Q Did you go?

15 A I did. I went several times for -- two or three
16 times a week for months at a time.

17 Q What did they do at physical therapy?

18 A They had a tinge unit, which I think they explained
19 is like shocking, kind of, the nerves. They did massage and
20 like heat therapy, and a couple different neck exercises and
21 upper body exercises.

22 Q Did they help?

23 A The massage was kind of nice while I was in there.

24 Q I'm sorry, what?

25 A The massage was kind of nice and the heat therapy,

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1 but they didn't -- no -- nothing long-term, no. I mean for
2 while I was there, yes. I felt better for a couple minutes.

3 Q After this physical therapy, did the PA, Brett Hill,
4 refer you for an MRI on your neck, on your cervical spine?

5 A He did.

6 Q Did he tell you why?

7 A Because he wanted to find out why I was still having
8 pain.

9 Q What happened after the MRI results came back?

10 A I believe he referred me to an orthopedic surgeon.

11 Q All right. And who was that?

12 A Dr. McNulty.

13 Q What do you remember about that -- did you then meet
14 with Dr. McNulty?

15 A I did.

16 Q What do you remember about that first meeting with
17 Dr. McNulty?

18 A He had -- I guess he had looked at all the pictures
19 and the MRI, and he was explaining the different injections
20 and different therapy, and possible surgery.

21 Q Okay. Is that the first time that someone had
22 mentioned surgery to you?

23 A Yes, it was.

24 Q What was your reaction?

25 A I was scared. I was surprised.

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1 Q Did you realize this was an orthopedic surgeon?

2 A I did. I don't know what I thought, but I just --
3 when he told me I don't think I was ready for it.

4 Q Mr. Rogers asked Cheryl about what your opinion was
5 of Dr. McNulty's bedside manner when you first met him. What
6 was your opinion?

7 A It was a little bit rough, but he was -- I -- he was
8 honest, definitely honest, and the to the point, and seemed
9 very knowledgeable. A little rough.

10 Q After that meeting with Mr. Dr. McNulty, what was
11 the plan for trying to isolate the problem and treating?

12 A It was to go for injections and try different
13 injections I guess at the different levels that he was worried
14 about and see what relief I got.

15 Q All right. You've heard over the last week or two,
16 or more, that -- about the injection procedures you had with
17 Southwest Medical that Dr. Siegel performed, Dr. Arita
18 performed, Dr. McNulty performed. We're talking 2006 and
19 2007. What kind of relief, if any, did you get from those
20 injections?

21 A I got temporary relief from some of them. It could
22 last anywhere for -- from an hour to I mean a couple weeks,
23 and some were -- would kind of last a month or two before they
24 like wore all the way off.

25 Q Now do you remember each and every procedure?

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1 A No.

2 Q Do you remember what the name of each procedure was
3 and what the differences are between them?

4 A I don't in the order they were done, but I do
5 understand some of the differences.

6 Q All right. Do you believe -- and I'm talking about
7 all these injections and appointments with Southwest Medical.
8 Do you believe that you did everything that your doctors and
9 physician assistants, PAs -- that the PAs asked you to do?

10 A Yes. Yes.

11 Q If they set you up for an injection, did you go?

12 A Yeah, I did. I wanted to find out what was wrong.
13 Yes.

14 Q Were you still working?

15 A I was.

16 Q You heard Dr. McNulty testify that after the
17 injections performed by Dr. Siegel and Dr. Arita in 2006 and
18 2007, that he met with you and recommended surgery for you,
19 remember that?

20 A Yes.

21 Q How did -- we're into probably the last few months
22 of 2007. How did that make you feel?

23 A I don't know. I was just kind of scared, worried.
24 I thought maybe there was another way. I don't know.

25 Q What were you scared of?

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1 A Big decision, life changing, surgery. I wasn't sure
2 of the outcome. I mean I know that it possibly wouldn't take
3 all the pain away. I knew that I might lose some of the
4 motion in my neck. And big decision, very big.

5 Q Did you seek a second opinion?

6 A I did.

7 Q Why?

8 A The same reason. I was just -- I wanted to make
9 sure there were no other options.

10 Q Did Dr. McNulty discourage you at all from getting a
11 second opinion?

12 A No, no.

13 Q And then that second opinion was from Dr. Grover, is
14 that right?

15 A Yes.

16 Q He testified that he saw you early in 2008, sent you
17 to Dr. Rosler for the pain management. Do you remember the
18 discography in August of 2008?

19 A Yeah, I kind of do. Yes.

20 Q Do you remember the details of it?

21 A Not really. I think that's the one where I think
22 they kind of put me to sleep and then asked me if it hurt, was
23 it painful.

24 Q And after that discogram, did you return back to Dr.
25 Grover?

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1 A I did.

2 Q And did you meet with him?

3 A I did.

4 Q Was Cheryl with you?

5 A Yes.

6 Q And what happened at that meeting?

7 A He came to the conclusion that there were problems
8 with the C3/C4, C4/C5, and he talked about different
9 injections and things that they could do and try, and surgery.
10 And if I didn't want to go through surgery, I could try the
11 different injections for a while and see.

12 Q And in your mind, did Dr. Grover tell you,
13 essentially, the same thing that Dr. McNulty did?

14 A Yeah. Yes.

15 Q How did it make you feel to get that confirmation
16 from Dr. Grover?

17 A Kind of good and kind of bad, because I felt that
18 they had finally found what the problem was, but then it was
19 kind of scary that I actually might need surgery.

20 Q After that meeting, did you eventually return back
21 to Dr. McNulty?

22 A I did.

23 Q And what did Dr. McNulty do?

24 A He reviewed all of Dr. Grover's and Dr. Rosler's
25 information. And then I talked to him, and he wanted to send

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1 me in for more injections, to be sure that that was what it
2 was.

3 Q So at this point, it's my understanding we're into
4 the beginning of 2009. Does that sound right?

5 A Yes.

6 Q So it's almost four years after the accident. Tell
7 us what your condition was like at that time.

8 A I was still in a lot of pain, and I just wanted to
9 find out what was wrong. I was pretty frustrated.

10 Q Where was the pain?

11 A Back of my head, my neck, and my left shoulder.

12 Q Had it subsided at all since the motor vehicle
13 accident?

14 A No, it did not.

15 Q Except for the temporary relief you talked about?

16 A Yeah.

17 Q Now Dr. McNulty testified that the surgery was late
18 March 2009. Prior to the surgery, how'd you feel about his
19 bedside manner?

20 A It's pretty rough and just kind of blunt and to the
21 point.

22 Q But did you trust him at that point?

23 A I did. I did.

24 Q What do you understand him to have done during the
25 surgery?

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1 A He pulled out the C3/C4 disc in between the bones
2 and the C5/C6, and put something in, built a cage around, and
3 then put a piece of metal and screwed it in to hold it
4 together.

5 Q Had you learned a lot about the spine in the last
6 two weeks?

7 A I have, absolutely.

8 Q If Dr. McNulty said it was C3/4 and C4/5 --

9 A Sorry.

10 Q -- would you trust him on that?

11 A Yeah, C4/5. I think I said 5/6. I'm sorry.

12 Q And how long were you in the hospital?

13 A Two or three days.

14 Q Was that at UMC?

15 A Yes.

16 Q Tell us what it was like for you right after the
17 surgery.

18 A Painful and scary. I couldn't swallow. It was hard
19 to breathe. It was swollen.

20 Q Why -- did they tell you why you would have trouble
21 swallowing?

22 A Yeah. They said because they pretty much had to
23 move everything to the side when they were doing the surgery.
24 So it kind of had to all go back together.

25 Q Take us through the first two or three months after

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1 the surgery.

2 A After the swelling went down from the surgery and I
3 had the neck brace on, I felt good for a while.

4 Q Okay. How long?

5 A Well, I had the neck brace on for -- I think I had
6 it on for 12 weeks, 11 or 12.

7 Q And so, during that time, how was your pain compared
8 to before the surgery?

9 A Oh, it was way down, probably 50 percent or more.

10 Q Did you tell that to Dr. McNulty when you saw him
11 for the follow up visits?

12 A I did, yes.

13 Q What'd you tell him about the results of the
14 surgery?

15 A I told him that I thought they were good.

16 Q Now those first 11 or 12 weeks when you -- after the
17 surgery when you wore the neck collar, did you work during
18 that time?

19 A No. No.

20 Q Okay. Who ran the business?

21 A William, my son.

22 Q So after the first few months, were you allowed to
23 discontinue the neck brace?

24 A Yes.

25 Q Were you released to go back to work?

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1 A Not right away, but yeah, a couple weeks after that.

2 Q What happens after that time?

3 A I think I went back to physical therapy and --

4 Q How was that?

5 A It was just the same thing, like neck exercises and

6 stuff like that to try, and I guess loosened it up and show me

7 new movements since the surgery, so.

8 Q Why would you need new movements after the surgery?

9 A Because they said that I would be limited. I would

10 notice that I would be limited a little bit.

11 Q Did you notice it?

12 A I did.

13 Q What limits?

14 A I mean just in how far I can turn my head.

15 Q Did you have pain during the physical therapy?

16 A A little bit. I mean if my neck was pulled on or

17 twisted.

18 Q I'm sorry?

19 A If my neck was pulled on or twisted, yeah, I did.

20 Q So we're three or four months after the surgery now.

21 Is that about right?

22 A Uh-huh.

23 Q Is that a yes?

24 A Yes. I'm sorry.

25 Q Did you go back to work during that time?

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1 A I did.

2 Q Did you feel pain?

3 A I did.

4 Q Where and what kind?

5 A It started coming back in the same areas, my neck,
6 my shoulder, the top of my neck, down my neck, and into my
7 shoulder.

8 Q Was it the same or were there any differences
9 compared to before the surgery?

10 A Kind of -- probably mostly the same. A little bit
11 different though.

12 Q What was the difference?

13 A I could kind of feel it going down into my shoulder.
14 I don't know. It's hard to explain.

15 Q What did Dr. McNulty recommend?

16 A He wanted to do a couple tests and find out. I
17 think I went back to pain management after that.

18 Q Did they -- we've heard about more injections that
19 took place in 2010. Did those help? They have any effect at
20 all?

21 A No. I mean temporary, like I said, sometimes for an
22 hour or a day or two.

23 Q And during this period of time, were you taking pain
24 medications?

25 A I was.

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1 Q Did they work?

2 A Yeah, they numbed the pain to make it tolerable, but
3 I couldn't -- what they had given me I couldn't go to work or
4 I couldn't drive or anything.

5 Q Why?

6 A It made me drowsy, made me forgetful.

7 Q Were there times then that you didn't take the
8 medication?

9 A Yes.

10 Q What would make you decide not to take pain
11 medications on any particular day?

12 A If I just wanted to kind of feel normal and not
13 where I just kind of had to sit around or --

14 Q Did they have any other effects on you? Were there
15 any other side effects?

16 A I think I was a little bit irritable and depressed.
17 I was getting depressed. And that's why I stopped taking them
18 for good.

19 Q By the fall of 2010, after some of those injections
20 that Dr. McNulty described, did you see a new spine surgeon,
21 Dr. Lee?

22 A I did.

23 Q How did you get to Dr. Lee?

24 A Because I went in for the -- to pain management for
25 the injections, and I believe it was Terry Robersshaw

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1 [phonetic], and he sent me to Dr. Lee.

2 Q Who is Terry Robersshaw?

3 A I think he's a PA that works at pain management.

4 Q With Southwest Medical?

5 A Yes.

6 Q Have you seen Dr. Lee recently?

7 A About a month ago, yes.

8 Q And what did he do?

9 A He took another MRI and sent me back to pain

10 management for more injections.

11 Q For what?

12 A For more injections, pain management.

13 Q All right. I want to talk about the defense medical

14 exam that took place, according to Dr. Fish and Dr. Wang, in

15 February of 2009. Do you recall that?

16 A I do.

17 Q This was about -- February of 2009 would be a little

18 more than a month before the surgery. Does that sound right?

19 A I think so, yes.

20 Q All right. Did you see Dr. Fish on that day?

21 A Yes.

22 Q Did you see Dr. Wang on that day?

23 A Yes, I did.

24 Q Where did this take place? Was it in California or

25 somewhere else?

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1 A No, it was here in town.

2 Q Describe for us what happened?

3 A I was in a waiting room, and the two of them came
4 in. And they had me put a -- like a robe on, disrobe and put
5 a robe on.

6 Q Like a medical gown?

7 A Yeah, like a medical gown.

8 Q Right.

9 A So -- and Dr. Fish talked first, and he asked me
10 probably four or five questions, and then he left. And then
11 Dr. Wang did like a physical, and he asked me probably 20 or
12 30 questions.

13 Q Is that it?

14 A Yeah, that was pretty much it.

15 Q Was Dr. Wang in there -- in the same room when Dr.
16 Fish asked you that four or five questions?

17 A Yes.

18 Q Was Dr. Fish there when Dr. Wang asked you the --
19 how many questions?

20 A Probably 20 or 30.

21 Q When he asked you the 20 or 30 questions and
22 examined you?

23 A No.

24 Q Did Dr. Fish come back?

25 A No.

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1 Q How long do you think you actually saw Dr. Fish --
2 strike that. How long do you think Dr. Fish actually saw you?

3 A I'd say probably three or four minutes.

4 Q How long was Dr. Wang's exam?

5 A I'd say probably 10 or 15 minutes. It was a while.

6 Q All right. It's nearly six years now since the
7 accident. Have you had pain from this accident almost
8 constantly since it happened?

9 A I have.

10 Q And where?

11 A Back of my head, at the base of my neck, and down my
12 left shoulder.

13 Q Does it wax and wane? Do you understand what that
14 means? Does it come and go?

15 A Yeah.

16 Q Or are there good days, bad days?

17 A Yes, it does.

18 Q All right. You told us before the surgery what good
19 days and bad days are like. How about after the surgery, now?

20 A It's kind of the same.

21 Q What are the good days?

22 A A good day, you just -- you know it's there and you
23 tolerate it, and you just go through your daily things. And a
24 bad day would be you just don't. You just go home and sit
25 down and kind of wait for it to go away and have a good day

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1 again.

2 Q Are there more good days or bad days?

3 A I'd say probably more bad days.

4 Q Did you ever have neck or left shoulder pain before
5 this accident?

6 A I did not.

7 Q Has this accident and all of the treatment that
8 followed had an effect on your life?

9 A I would say it probably has, yes.

10 Q Let's talk about any physical limitations. Are
11 there things that you can no longer do, just physically, since
12 the accident?

13 A Not really. I can still pretty much do everything.

14 Q Do you still have the same strength?

15 A Yeah, absolutely.

16 Q What happens -- well, let me ask this. Does it --
17 how does it affect your -- how does it affect you at work?

18 A I just hurt when I do it. I mean I can still do it.
19 It's --

20 Q When you do it, what happens?

21 A I have pain, and then I usually pay for it for a day
22 or two.

23 Q How has this injury changed -- well, strike that.
24 Has this injury changed your life in any other ways?

25 A I'm sure it has.

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1 Q How?

2 A I mean there's -- I just don't function the same I
3 guess, because of the pain. I mean there's things that I
4 won't do now that I did before. I don't know.

5 Q Cheryl mentioned that the two of you used to have
6 motorcycles.

7 A Yes.

8 Q Is that something that the two of you did often?

9 A We did.

10 Q Before the accident?

11 A Yes.

12 Q How about since the accident?

13 A No.

14 Q Why not?

15 A Painful, kind of dangerous. I mean.

16 Q What do you mean kind of dangerous?

17 A I was kind of afraid that I couldn't turn my head
18 enough to see. A motorcycle is different than a car, a lot
19 different.

20 Q Well, has your -- has the range of motion of your
21 neck changed since the surgery?

22 A Absolutely.

23 Q How?

24 A I don't think I can turn it as far.

25 Q Can you demonstrate for us what you can do by trying

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1 to turn?

2 A I guess, yes. I can turn that way. That way I
3 can't turn so good.

4 Q I couldn't hear.

5 A I think I can't turn as far this way as this way.

6 Q What else don't you do anymore that you used to do?

7 A I used to job. I don't job anymore.

8 Q Why not?

9 A Dr. McNulty had me stop.

10 Q Dr. McNulty had you stop?

11 A Yes.

12 Q What about your social life? Has the injury changed
13 your social life?

14 A I would imagine, a little bit.

15 Q Are there times that you don't go out where you used
16 to go out as Cheryl described?

17 A Yeah. We used to go out a lot.

18 Q Why don't you?

19 A I get uncomfortable fairly easy now, get
20 uncomfortable, can't sit anywhere for a long amount of time.
21 It's -- I sometimes just don't feel like it.

22 Q Has the accident and everything that followed it, in
23 your opinion, changed you as a person?

24 A Probably.

25 Q How?

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1 A I imagine I complain a lot. I try not to. I
2 imagine I don't get involved in things as much as I used to.
3 I don't know.

4 Q What about your relationship with your wife?

5 A That's probably changed a little bit.

6 Q Did you know everything that she was going to say
7 about how it changed the relationship?

8 A No.

9 Q How was it to listen to that?

10 A Pretty tough.

11 Q I'm sorry?

12 A Pretty tough.

13 Q Do you currently have any appointments with doctors
14 scheduled after the trial?

15 A I do.

16 Q With whom?

17 A With pain management.

18 Q Okay. Do you understand what that's going to be
19 for?

20 A I believe it's for injections again at this point.
21 And --

22 Q And you heard Dr. McNulty testify last Friday about
23 options for the future, including a -- what you called a
24 spinal cord stimulator. How do you feel about that?

25 A Pretty scary. I'd like to see if it would be

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1 something that could help me, learn a little more about it.

2 Q Are you willing to follow possible medical
3 recommendations to help you get better?

4 A Anything that would help, yes, absolutely.

5 MR. WALL: I pass the witness, Judge.

6 THE COURT: Very well.

7 Mr. Rogers.

8 MR. ROGERS: Do we get a break or go forward?

9 THE COURT: Yeah, let's take a 10-minute break, ladies
10 and gentlemen. Remind you of your obligation not to discuss
11 this case, not to do any research, not to form or express any
12 opinion.

13 [Recess]

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

15 Counsel stipulate to the presence of the jury?

16 MR. EGLET: Yes, Your Honor.

17 MR. ROGERS: Yes, Your Honor.

18 THE COURT: Very well. Mr. Rogers, whenever you're
19 ready.

20 MR. ROGERS: Thank you.

21 CROSS-EXAMINATION

22 BY MR. ROGERS:

23 Q Good afternoon, Mr. Simao. Let's start at the
24 starting place and go back in time. You mentioned that you've
25 been doing flooring ever since high school, is that right?

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1 A Since before that. Yes.

2 Q Okay. When you moved here to Las Vegas you went to
3 work for Carpets and More.

4 A As a salesman.

5 Q And then shortly after that you started working at
6 Americlean?

7 A Yes.

8 Q You were on the job at the time this happened, sir?

9 A I went to visit -- yeah. Actually, I went to visit
10 one of the people that were doing a job for the company, yes.

11 Q All right. And at that time you were -- you were
12 employed there as a manager?

13 A Uh-huh. And also at Carpets and More as a salesman.

14 Q Okay. An then it was sometime roughly two years
15 after the accident that you bought the car?

16 A Yeah.

17 Q Now, with regard to the accident, you said that you
18 got onto the freeway an exit or two before the area where it
19 happened.

20 A Yes.

21 MR. EGLET: Your Honor, could we approach for just one
22 moment, please?

23 THE COURT: Sure.

24 [Bench Conference Begins]

25 MR. EGLET: Mr. Rogers went into this one other time and

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1 we objected, and he just did it again. And we pointed out
2 that the only reason he's doing this is to leave this jury and
3 make an impression that this -- that this was a workers'
4 compensation claim because --

5 MR. ROGERS: Oh --

6 MR. EGLET: Let me finish, please. That's exactly what
7 you're doing.

8 MR. ROGERS: No, it isn't.

9 MR. EGLET: That this is a workers' compensation claim,
10 leaving this jury with the impression that maybe he received
11 workers' compensation benefits from this accident because he
12 was an employee at the time of the accident and was on the
13 job. The only -- the only way to solve this is a curative
14 instruction to this jury right now notifying them that this
15 was -- that there was no workers' compensation claim made by
16 this and Mr. Simao did not receive any workers' compensation
17 benefits as a result of this accident. Otherwise, they are
18 left with the impression --

19 MR. WALL: There was that testimony -- was it Rosler or
20 somebody about --

21 MR. EGLET: Yeah.

22 MR. WALL: -- surveys of workers' comp --

23 MR. EGLET: Right.

24 MR. WALL:: -- patients.

25 MR. EGLET: Yeah. He asked the same thing here --

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1 MR. ROGERS: I didn't hear that. What?

2 MR. WALL: There was the testimony -- I forget -- I
3 believe it was Mr. Clausen [[sic].

4 MR. EGLET: Rosler.

5 MR. WALL: Rosler -- or somebody about surveys of
6 workers' comp claimants.

7 MR. EGLET: Right. He has now left the impression twice
8 with this jury that our client may have received workers'
9 compensation benefits from this accident. That is highly
10 prejudicial to the Plaintiff, because if this was a workers'
11 compensation case the jury would be instructed on that
12 specifically, that they are not to -- that they avow not to
13 make any deduction for that amount that he received workers'
14 compensation benefits. This is calculated. It's been done on
15 purpose. There's no reason for it. It's not relevant to any
16 issue in this case.

17 THE COURT: I wondered about the [indiscernible].

18 MR. ROGERS: There's a perfect --

19 MR. WALL: After --

20 MR. ROGERS: -- relevant reason.

21 MR. WALL: After it came up before, we told them that
22 workers' comp is not relevant to this case, so we've already
23 told them. So there's no prejudice to say to them
24 [indiscernible] based on the question that was asked
25 [indiscernible] this case [indiscernible].

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1 MR. ROGERS: There is an instruction on this already.
2 The relevance of it is not at all sinister. It is as a
3 Plaintiff's counsel as interpreted it. The main point of this
4 is -- as I went through with his wife -- is that he was an
5 employee of the company and then he became the owner after the
6 accident at a time when he claims that he was having
7 difficulty working. The defense on this is -- well, I think
8 it is evident [indiscernible] to the point where he bought it.
9 There's no intention to mislead this jury. That's not at all
10 -- it's that he's not doing as bade after the accident as he's
11 making out. That's the -- that's the theory of the case on
12 this issue. [Indiscernible] that.

13 MR. EGLET: Then there's no -- then there's no prejudice
14 in giving the curative instruction --

15 THE COURT: No.

16 MR. EGLET: -- we've asked for. And excuse me, Your
17 Honor, just for the record, if -- I don't think that just
18 about everything when he brings up the irrelevant information
19 that it's -- that there's a sinister purpose for it because
20 he's done throughout this trial. He's tried to violate every
21 single court order he can.

22 MR. WALL: Well, [indiscernible] the suggestion
23 [indiscernible] trying to establish workers' comp --

24 MR. EGLET: Yeah.

25 MR. WALL: That's not a [indiscernible] condition of the

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1 parties.

2 THE COURT: It's not relevant.

3 MR. EGLET: [indiscernible] both parties --

4 MR. EGLET: Right. Exactly. It's not relevant either.

5 MR. ROGERS: No, whether he has money is not relevant.

6 The point isn't that he's he flushed with cash. It's that
7 he's progressing in his work at a time when he claims that he
8 [indiscernible] --

9 THE COURT: Well, then that --

10 MR. EGLET: We haven't made --

11 THE COURT: -- sounds like something --

12 MR. EGLET: We haven't --

13 THE COURT: -- you could save for closing argument.

14 MR. EGLET: We haven't -- here's why that's --

15 MR. ROGERS: [Indiscernible].

16 THE COURT: [Indiscernible].

17 MR. EGLET: Here's why that's not relevant though,
18 because we have not made either a future or a past wage loss
19 claim, but we have not claimed that his earning capacity has
20 been diminished, so that argument is not relevant to this case
21 in any shape, way or form. And we have shown to this Court
22 everything he's trying to say is not relevant. It clearly is
23 just for one purpose. It's to throw this work comp in there
24 and to leave this jury with this impression.

25 MR. ROGERS: That's absolutely not at all -- not even

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1 close to the intention. But if he has hobbies or activities
2 that he's able to continue, and it appears that he will
3 testify that he was, [indiscernible] with limitations due to
4 pain, that's fair game. If he's able to continue working and
5 progressing in a work and a job that requires manual labor,
6 it's the same principle. There's nothing improper about that.

7 THE COURT: No. You know, the thing is the Court is --
8 the Court is [indiscernible] differently because
9 [indiscernible] is maybe he's physically unable to continue
10 working in the kind of work that he's doing. Maybe as
11 management or as an owner he would be better suited because
12 there would be less physical demands on his body. So that's
13 the flipside of that. I [indiscernible] you've made a record
14 and I'll instruct the jury.

15 MR. EGLET: We would -- we'd ask that the curative
16 instruction be that this case has nothing to do with workers'
17 compensation and Mr. Simao has not received any workers'
18 compensation benefits as a result of this accident.

19 THE COURT: Well, he said that he claimed management.

20 MR. WALL: Claimed it.

21 MR. ROGERS: And that --

22 THE COURT: Right.

23 MR. ROGERS: And that's the way to put it then because I
24 mean that's going too far now when you're talking about money
25 that's received or not received.

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1 MR. EGLET: No.

2 THE COURT: I think it's entirely appropriate to --

3 MR. EGLET: It's absolutely appropriate.

4 THE COURT: -- [indiscernible] those issue and the fact
5 that [indiscernible].

6 MR. ROGERS: Okay.

7 [Bench Conference Ends]

8 THE COURT: Sustain the objection. Ladies and gentlemen,
9 I think I may have mentioned previously that this case is not
10 about workers' compensation. There was no claim made by the
11 Plaintiff, nor were there any workers' compensation benefits
12 received by the Plaintiff.

13 Please proceed, Mr. Rogers.

14 MR. ROGERS: Thank you.

15 BY MR. ROGERS:

16 Q Now, getting back to the accident. You got onto the
17 freeway a couple exits before where the accident happened,
18 right?

19 A Yes.

20 Q Okay. And traffic in the lane you were in was stop
21 and go?

22 A When I stopped?

23 Q I don't mean just you. I mean traffic all around
24 you.

25 A I don't understand what you mean.

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1 Q Well, the vehicles were stopping and going rather
2 than in a constant --

3 A No.

4 Q -- flow.

5 A When I got on the freeway, I got on the freeway and
6 then I pulled up to the back of traffic that was stopped and
7 then came to a stop.

8 Q Okay. Give me just one moment.

9 MR. ROGERS: Publish this. I believe this is the first
10 [indiscernible].

11 MR. WALL: May we approach, Your Honor?

12 THE COURT: Yes.

13 [Bench Conference Begins]

14 MR. WALL: Please help me understand what potential
15 relevance there is to whether it was stop-and-go traffic or
16 whether he was stopped other than to infer or argue the cars
17 were going too slowly to have a significant impact to cause
18 the injury.

19 MR. EGLET: This is exactly why [indiscernible] was just
20 [indiscernible]. He's about to get into --

21 MR. WALL: [Indiscernible] very succinct --

22 THE COURT: Uh-huh.

23 MR. WALL: -- and very pointed with the questions I asked
24 him about the accident so as not to open the door. He's going
25 to -- he's going to impeach the witness deposition about

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1 whether it was stop-and-go traffic or that traffic was
2 stopped. I don't know what other purpose there would be --
3 what purpose there would be other than to suggest the cars
4 were moving too slowly so as to not have a [indiscernible]
5 significant enough to cause [indiscernible] relevance
6 [indiscernible] could not admit the fact the consequence more
7 or less probable whether or not [indiscernible] as being more
8 or less probable with this line of questioning.

9 THE COURT: Mr. Rogers?

10 MR. ROGERS: First of all, we had this very argument this
11 morning on the record. And the defense's point is that the
12 facts surrounding this accident are relevant to understand --

13 MR. WALL: To what?

14 MR. ROGERS: -- the prohibition that we cannot call this
15 a minor impact.

16 THE COURT: That's not [indiscernible].

17 MR. ROGERS: But you now have an irrebuttable presumption
18 that we cannot call this a minor impact.

19 THE COURT: That's not the prohibition.

20 MR. ROGERS: But you now have --

21 MR. WALL: It's not.

22 MR. ROGERS: -- an irrebuttable presumption because you
23 argue that any fact that I discuss that even gets close to the
24 accident itself somehow violates and order which holds only
25 one --

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1 MR. WALL: Can you whisper, please?

2 MR. ROGERS: [Indiscernible] irrebuttable doesn't allow
3 for the other side to present evidence to rebut.

4 MR. WALL: Here's the --

5 MR. ROGERS: It doesn't.

6 MR. WALL: Here's the point now.

7 MR. ROGERS: So what -- what fact -- what purpose is
8 there with stop-and-go traffic other than cars were going too
9 slow, she wasn't going really fast, she didn't hit him very
10 hard? What other purpose ?

11 MR. WALL: Is -- has this court ordered -- just because
12 the problem that we're having here has been running throughout
13 the trial. Has this Court ordered that the defense can
14 present no evidence about the facts surrounding this accident?

15 THE COURT: What I'd like you to do, at least answer Mr.
16 Wall's question which he's posed twice and you've responded
17 but you've not answered it. And I think that's what's germane
18 to this particular objection. So that's why I'd like you to
19 respond to.

20 MR. ROGERS: Is what -- ask the question again.

21 MR. WALL: Other than inference or the suggestion the
22 cars were going slowly and therefore she didn't hit him that
23 hard, what potential relevance is there to whether it was
24 stop-and-go traffic?

25 MR. ROGERS: The relevance is to establish that the

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1 Plaintiff's characterization of this accident is not accurate.

2 MR. WALL: How?

3 MR. ROGERS: That the medical providers' characterization
4 of the substantial hyperflexion-extension --

5 MR. WALL: How is that not trying to rebut the
6 irrebuttable presumption that this accident was significant
7 [indiscernible] enough to cause the type of injury complained
8 of?

9 MR. ROGERS: How -- it does go to rebut that, just as it
10 goes --

11 MR. WALL: No.

12 MR. ROGERS: -- to rebut --

13 MR. WALL: It can't.

14 MR. ROGERS: No, it -- just as it goes --

15 MR. WALL: It's irrebuttable presumption.

16 MR. ROGERS: No, because --

17 MR. WALL: You can't rebut it.

18 MR. ROGERS: -- if you saw the instruction that
19 Plaintiff's counsel wrote, it says that the accident -- it is
20 irrebuttably presumed that the accident can cause the injury
21 alleged, but it is up to the jury to determine whether it did.

22 MR. WALL: Based on medical causation testimony, not on
23 this.

24 MR. ROGERS: The defense --

25 MR. WALL: Not based on this. Not based on the

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1 [indiscernible]. This is what -- you don't have an expert --

2 MR. ROGERS: But when you put an expert on the stand and
3 he says that his causation opinion is based on a history that
4 there was a substantial hyperflexion-extension mechanism, then
5 we need to explore whether there was.

6 MR. WALL: You have no evidence there --

7 THE COURT: Sustain the objection.

8 MR. WALL: -- wasn't --

9 THE COURT: Let's move on.

10 [Bench Conference Ends]

11 BY MR. ROGERS:

12 Q Shortly before the accident you didn't hear brakes,
13 is that right?

14 A I did not.

15 Q You were seated facing forward?

16 A Yes.

17 Q You don't believe you were turned to change the
18 radio station or to --

19 A No. I think I was leaning over like to the side, to
20 the right side.

21 Q And this cage or this Plexiglas covering behind your
22 seat --

23 A Uh-huh.

24 Q -- is -- I think you described it as a fraction of
25 an inch behind the seat?

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1 A It's -- well, yeah. I mean the seat pushes up
2 against it, so you have the seat that you're sitting on and
3 then it's probably about an inch or so behind the seat.

4 Q Okay.

5 A Behind the back of the seat.

6 Q Right. There's been testimony about your head
7 striking that cage or that sheet. Did any other part of your
8 body strike anything in the car?

9 A I don't remember. I know my head hit.

10 Q You don't remember sustaining any cuts?

11 A I think I had a bruise on my head and a bruise on my
12 arm.

13 Q Naturally, you couldn't see a bruise on the back of
14 your head. But you felt sensitivity there, right?

15 A Right. That's -- they told me at urgent care that I
16 had a bruise.

17 Q Plaintiff's counsel brought up the policemen coming
18 to the scene. The vehicles, however -- you guys had driven
19 off to the side of the road before anybody got there, right?

20 A I don't remember.

21 Q Well, in traffic on the freeway, you know, just
22 reflecting back on it, do you think you probably pulled off
23 the road?

24 A I think I've learned that I was, but I don't
25 remember doing it.

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1 Q And you got out of your van to go back and talk to
2 Mrs. Rish?

3 A I did.

4 Q Did you need help getting out of your van?

5 A I did not.

6 Q And when you went back there to talk to Mrs. Rish,
7 what did you discuss?

8 A I asked her if she was all right.

9 Q What did she say?

10 A She said she was.

11 Q Did you have any other discussion with her?

12 A I don't believe so.

13 Q Now, we've heard several times through this trial
14 that an ambulance came to the scene.

15 A Yes.

16 Q And that you declined treatment.

17 A I did.

18 Q And the paramedics didn't transport anyone from Mrs.
19 Rish's car?

20 MR. WALL: Objection. Your Honor --

21 THE COURT: Sustained.

22 MR. WALL: -- may we approach?

23 THE COURT: Sustained. No need to approach. Sustain the
24 objection.

25 MR. WALL: Well --

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1 MR. EGLET: Well, I need --
2 MR. WALL: I Think we do, Judge.
3 [Bench Conference Begins]
4 MR. EGLET: Your Honor, I mean --
5 MR. WALL: Look, how many times do we go through this?
6 What in the world is the relevance?
7 MR. EGLET: I --
8 MR. WALL: How many times have you done this? How many
9 freaking times have you done this with every single witness.
10 You ask if she was injured. What in the world could it
11 possibly be relevant to?
12 MR. EGLET: Exactly. What? Do you want to get loud?
13 MR. WALL: Absolutely.
14 MR. EGLET: Let's do it. Let's excuse this jury and do
15 exactly that.
16 MR. WALL: You've got -- you've got even no idea what
17 you're in for. I'm going to ask that he be sanctioned in
18 front of the jury, that he be fined in front of the jury, and
19 that the jury be told that he has violated the court order
20 again.
21 MR. ROGERS: That is absolutely not true. This --
22 MR. WALL: Then let's excuse them --
23 MR. ROGERS: -- is --
24 MR. WALL: -- and make a record.
25 MR. ROGERS: Let's do it.

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1 THE COURT: Do you really need to do that?

2 MR. WALL: That's my --

3 THE COURT: I'm a little --

4 MR. WALL: My request is that he be sanctioned in front
5 of this jury.

6 THE COURT: You really made to do that? We were making
7 such progress with your examination of these other --

8 MR. EGLET: I'm sorry?

9 THE COURT: -- this witness.

10 MR. WALLS: How many times?

11 THE COURT: We've been making such --

12 MR. WALL: How many times?

13 THE COURT: -- progress in terms of this trial moving
14 along since we began with Mr. Wall's examination of your first
15 witness. Now [indiscernible]. Can we just keep this thing
16 moving?

17 MR. EGLET: Your Honor, here's the problem. Well, first
18 of all, this is the last witness for the day. So we're going
19 to have -- we're going to finish. It's not going to be a
20 problem because we expected there to be -- Dr. Wang to be
21 here, but he's not, so we don't have any other witnesses
22 available.

23 But I want to -- I want to have a conference because I
24 think we may be moving to strike the answer at this point.
25 These continuous violations.

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1 THE COURT: We have -- can we bring that radiologist in
2 this afternoon?

3 MR. EGLET: I mean he's not available till Monday.

4 MR. WALL: You can ask. I don't know.

5 MR. EGLET: I'm told it's Monday, but if he could come,
6 that's possible. I don't know.

7 [Bench Conference Ends]

8 THE COURT: Ladies and gentlemen of the jury, I'm going
9 to ask that you give us about 10 minutes or so. We need to
10 discuss some issues outside your presence in a matter of law.
11 Please don't talk about this case, form or express any opinion
12 about this case or do any research.

13 [Jury Out]

14 MR. WALL: Can he step down?

15 THE COURT: Sure. Why not.

16 Okay. Outside the presence of the jury. Mr. Wall.

17 MR. WALL: Judge, I just don't know what else to say.
18 I'll be honest with you. I made a record last Friday of
19 continuing, continuing violations and that we would seek
20 progressive sanctions. I made a record on Monday when it
21 happened again. Over and over and over again, the defense has
22 violated the same order. I made a record on Monday -- I think
23 it was Monday -- about the systematic violations of the order
24 on minor impact. The opening. The cross-examination of R.
25 Rosler:

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1 "Do you know anything about what happened to
2 Jenny Rish and her passengers in the motor vehicle
3 accident?"

4 The only possible purpose is to raise an inference
5 or an argument that she was not injured, that no one in her
6 car was injured, therefore it was a minor accident.

7 There was an objection which was sustained.

8 The examination of Dr. Fish. Well, even beyond
9 that. The cross-examination of Dr. McNulty:

10 "Whether he knows whether or not Jenny Rish was
11 injured in the accident?

12 "Objection.

13 "Sustained.

14 "Because the only possible purpose is to raise
15 an inference that since she wasn't hurt the accident
16 couldn't have been that bad and my client couldn't
17 have been hurt."

18 Again we walked through this. The Court told him
19 that it was improper.

20 The same day, Dr. Grover:

21 "Question: About whether he knows whether or
22 not Jenny Rish was injured in the accident.

23 "Objection.

24 "Sustained."

25 Same discussion at the bench every single time of

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1 the same violation. At that point I believe we discussed at
2 the bench with Dr. McNulty or Dr. Grover that it was the
3 defense's intention to goad us to ask a mistrial for repeated
4 violations of the Court's order. It cannot get any clearer
5 after the third time and after I made the record on Monday
6 that asking the witness whether they know whether or not
7 anyone in the Defendant's car was injured in the accident is
8 prohibited. It has no other purpose but to raise the same
9 defense that has been precluded by this Court. If you don't
10 like the Court's order, you make a record, and they've done a
11 great job of that. You don't just keep violating it.

12 They did on Monday with Dr. Fish's testimony, and as
13 a result we asked for a progressive sanction as I indicated
14 that we would on Friday. And the progressive sanction was an
15 irrebuttable presumption that the motor vehicle accident was
16 sufficient to cause the type of injury claimed to have been
17 suffered. That fit the violation.

18 In the discussion at the bench when Mr. Rogers
19 sought to impeach Mr. Simao with his deposition testimony
20 about whether it was stop-and-go traffic, again at the bench
21 we walked through this issue. It's prohibited. The only
22 purpose is to say or raise an inference that the accident was
23 too minor. The Court gave an irrebuttable presumption. The
24 difference between a rebuttable presumption and an
25 irrebuttable presumption is that you can't rebut it. If it

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1 was a rebuttable presumption it would open the door to allow
2 the defense to present evidence to rebut the presumption.
3 Because that was kept out by the Court's order, it's an
4 irrebuttable presumption. That doesn't mean you get to
5 present evidence to rebut the presumption. We discussed that
6 at length at the bench.

7 Barely two minutes later, the question to Mr. Simao
8 was whether the ambulance or any of the medical personnel
9 tended to any injuries for the Defendant or anyone in her car.
10 I don't understand what possible relevance there could be
11 except to violate the Court's order for what I believe is the
12 eighth time.

13 When we asked for progressive sanctions at the end
14 of that hearing, when the Court granted the irrebuttable
15 presumption, I said something to the effect of "That doesn't
16 mean it stops here. That if it continues to occur we will ask
17 for an even greater sanction." And when I argued for the
18 progressive sanction of the irrebuttable presumption, I also
19 discussed the fact that striking the answer could be
20 appropriate under these circumstances, and I walked through
21 all of the factors from the Young v. Robiro [phonetic]
22 decision. And frankly, if -- when it comes to striking the
23 answer, the Goodyear case and Foster v. Dingwall are also on
24 point. And I said if it continued to happen, that would be
25 our request.

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1 So for the life of me, I don't understand how there
2 could be any thought that asking Mr. Simao or anyone else
3 about whether Mrs. Rish or anyone in her car was injured could
4 be permissible or that could have any other purpose but to
5 raise a defense which has been precluded because they failed
6 to get expert testimony to support it. I just don't
7 understand it.

8 THE COURT: Mr. Rogers.

9 MR. ROGERS: I'm happy to explain. We had Mr. Polsenberg
10 come here because we didn't understand the limitations. He
11 came in and expressed that he doesn't understand the
12 limitations. I understand after the Court's discussion with
13 Mr. Polsenberg that we can't say this was too minor to cause
14 injury. I get that. I get that I can't tell the jury that
15 this accident was merely a tap. But beyond that, I don't know
16 where I can and can't go. Mr. Wall presents it as though
17 everything is crystal clear. It is not. I've repeatedly
18 asked for clarification on this.

19 If I can't talk about the accident, my only next
20 question is what can Mrs. Rish say on the stand? Can she say
21 anything? Can she say, "I was on the freeway"? Can she say
22 that "I was in stop-and-go traffic"? What -- I don't know
23 where it ends. And is her testimony now moot?

24 If I can't ask him these questions, am I not allowed
25 to ask her these questions? And I did not see that these

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1 questions violate a court order on a motion that the Court
2 granted stating that we can't argue that minor impacts can't
3 cause injury. And from that order, all of a sudden nobody can
4 say a word about the accident. I don't understand how that
5 order has been expanded as it has, and that's why I don't
6 understand where the limits are. If you want me to ask him no
7 more questions about the accident, I won't. Not another word.
8 But is that -- is that really what the Court wants?

9 THE COURT: Mr. --

10 MR. WALL: May I --

11 THE COURT: -- Wall.

12 MR. WALL: -- respond?

13 I don't know where you get from you can't ask if she
14 was injured in the accident to "I can't say a word about the
15 accident." There's a difference. I have not heard from Mr.
16 Rogers how he understood that asking anyone anymore whether
17 they knew if the Defendant was hurt in the accident is in
18 compliance with the Court's order. What the order precludes
19 is raising an inference that the accident was too minor to
20 cause this injury because you need an expert. That's the
21 purpose of asking the question. There's no other purpose. I
22 haven't heard any other purpose. I haven't heard anything
23 that would be relevant of any witness to testify whether or
24 not Mrs. Rish or anyone in her car were injured other than to
25 say, "They didn't get hurt. Must have been minor." I haven't

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1 heard anything. It's not relevant under the statute.

2 Frankly, I'll be honest with you, I'll apologize to
3 you and I'll apologize to him because I lost my temper at the
4 bench when we came up, but it's only because it's just
5 systemic much less systematic at this point. It is -- it is
6 on purpose, I believe. And while my request at the bench was
7 to have Mr. Rogers sanctioned and to have him admonished in
8 front of the jury that he has violated yet another court
9 order, instead -- that's not a progressive sanction. The
10 progressive sanction that we're requesting is that the answer
11 be stricken and that we dismiss this jury and prove up the
12 damages before this Court.

13 THE COURT: Response, Mr. Rogers?

14 MR. ROGERS: That is extreme. That is far too extreme.
15 If the Court doesn't want any more evidence at all relating to
16 this accident, if Jenny Rish and the Plaintiff aren't allowed
17 to speak about anything relating to it, then the defense won't
18 go there. But that's not at all our understanding of the
19 Court's order. I don't understand how anybody sees clarity in
20 this -- in this ruling. The Plaintiff says it's all so
21 simple. And then I say, "Well, I'm calling Jenny Rish," and
22 they say, "Well, what is she going to say?" and I say, "She's
23 going to describe the accident." And I honestly just don't
24 know what I can and can't say, Your Honor. I don't.

25 THE COURT: Mr. Eglet.

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1 MR. EGLET: If I can just respond, Your Honor.

2 The problem Counsel has with this argument is it
3 does not in any way, shape or form address the very issue of
4 the very simple question of asking witnesses if Jenny Rish was
5 hurt or if she was taken away in an ambulance or she was
6 injured in this accident, because that very specific question
7 has been sustained with every single witness because it was a
8 clear violation of the Court orders. Even if you were to
9 assume, and it's a huge assumption, that Mr. Rogers is somehow
10 being honest and truthful with this Court when he says he
11 can't make heads or tails of this order, he doesn't understand
12 it, he's the only room -- one in this room who doesn't
13 understand it.

14 Everybody else seems to have a very clear
15 understanding of this order other than him. And that's the
16 same thing he's been saying in response every time we have
17 these bench conferences on these objections. But even if you
18 -- even if you were to give him this huge benefit of the
19 doubt, which I don't think with what's occurred at this trial
20 he has in any way earned whatsoever, but even if you were to
21 give him this huge benefit of the doubt, it does not address
22 the fact that he has continued in the face of this Court's
23 sustaining these objections to the same exact question with
24 every single one of these witnesses, explaining to him that
25 it's not relevant, it's not a proper question, and yet, in

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1 spite of that, he continues to ask the same question, in spite
2 of the fact that Mr. Wall made a very clear record of this
3 several times now, in spite of the fact that we've -- we told
4 the Court we're asking for progressive sanctions, in spite of
5 the fact that the Court have to give a curative instruction, a
6 very specific curative instruction as well as an instruction
7 of an irrebuttable presumption as an escalating sanction for
8 his violation of this, in face of all that, that's why the
9 irrebuttable presumption was given, because of his continuing
10 asking of this exact same question.

11 And in the face of that, in the face of already
12 receiving that sanction, he just wildly goes at it, ignoring
13 this Court's order, showing this Court absolutely no respect
14 whatsoever for the orders that you've made in this case, and
15 clearly, consciously, intentionally violating that order by
16 asking our client the exact same question. He hasn't
17 addressed that at all, because he can't. He can't address
18 that because he knows it's the same question and so he wants
19 to say to the Court, "Well, I just don't understand the order.
20 I just don't understand what I can ask and I can't ask."
21 Everybody here is clear on that except him. It's not
22 believable. It's not credible.

23 There is no cure at this point. It's happened so
24 many times. It's happened so many times with this jury over
25 and over and over again that the -- you know, the message has

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1 been sent loud and clear to them by Mr. Rogers' violation --
2 intentional violations of this Court order, clear -- clear,
3 ambiguous violations of the Liocci [phonetic] decision, doing
4 exactly what our Supreme Court says you cannot do. You may
5 disagree with the Court's order. You may disagree with the
6 Court's ruling. But you are required to show the Court the
7 respect to comply with the Court's rulings and then take you
8 issue up to Carson City if you think the trial court is wrong
9 and have them address it. What you cannot do is simply say,
10 "I don't care what you say, Judge, I'm going to do this
11 anyway." And that is what he has done systematically
12 throughout this trial.

13 I have never seen -- I have -- I've been involved in
14 cases attorney -- where the answer has been struck. I have
15 been involved in cases where defense attorneys have been held
16 in contempt multiple times. I have been involved in cases
17 where they have been sanctioned. I've been involved in cases
18 where attorneys pro hac vice from out of state has been
19 revoked by the trial court because of their conduct in trial.

20 I have never, ever seen a lawyer in this state or
21 any other state simply refuse, refuse, to comply with the
22 Court's clear rulings and orders in this case. There is not a
23 case I've ever seen that cries out more for the most severe
24 sanction. This is it. This answer at this point must be
25 struck, this jury dismissed, and we move on to finishing --

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1 because we've just about finished it -- proving up our
2 client's damages in front of this Court.

3 THE COURT: Motion is granted. I'm going to --

4 MR. ROGERS: Let me ask --

5 THE COURT: I'm going to step down.

6 MR. ROGERS: Before you do that, Judge, let me just say
7 one thing. Because the case law is clear in the State of
8 Nevada, although somewhat recently, that the Court must walk
9 through the Young factors on the record and explain why the
10 Court is taking the action it does. So just to fully protect
11 the record -- I had a copy of it and I don't have it anymore,
12 my copy of Young. It's at 105 NV 88. And the -- all the
13 factors are there. I can either read them to you because I
14 have them in my notes or whatever the Court's pleasure is.

15 THE COURT: I'm going to step down for about five
16 minutes.

17 [Recess]

18 THE COURT: Please be seated. You know, I wish I
19 had a transcript -- outside the jury's presence. I wish I had
20 a transcript so I could cite to all of the specific instances
21 where defense counsel, I think, has willfully not complied
22 with the Court's prior rulings.

23 As I began to think about the instances I had -- I
24 went in my own mind back to voir dire where I think on more
25 than one occasion I think defense counsel deliberately

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1 questioned the prospective jurors on subject matters which had
2 been precluded by pretrial orders. I never had the transcript
3 so I can't give you the specific instances, but we had several
4 side bars on the matter.

5 Then in opening statement defense counsel referenced
6 the motorcycle accident and showed a slide to the jury that
7 referenced that motorcycle accident which had been excluded by
8 the Court because it had been unrelated to this incident and
9 there were no injuries sustained. In fact that was the
10 subject matter of one of the pretrial orders.

11 So I think some of those instances I think go to the
12 degree of willfulness of the offending party, not to mention
13 Dr. Fish. I'll get to Dr. Fish later.

14 The extent to which the nonoffending party would be
15 prejudiced by lesser sanctions, as I think about everything
16 that's transpired in this trial, there seems to be no way to
17 cure counsel's willful, deliberate, abusive behavior because
18 he refuses to comply with this court's rulings.

19 With respect to the severity of sanctions relative
20 to the severity of the abuse, the Court imposed progressive
21 sanctions after numerous and lengthy side bars outside the
22 presence of the jury where court and counsel reviewed prior
23 pretrial rulings and rulings that had been made in trial.

24 Whether evidence has been irreparably lost -- in the
25 Young case that was one of the components. In this case I

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1 think it's more a question of counsel arguing nonevidence.

2 In other words there's no reason for defense counsel
3 to repeatedly ask each witness the same question regarding
4 whether Mrs. Rish was injured or transported to the hospital
5 if not to be able to argue to the jury that this was a
6 low-impact collision which couldn't possibly have caused the
7 injuries sustained by the plaintiff. What other relevance
8 could there be to that question?

9 This was the subject of a pretrial order where the
10 Court ruled that defense counsel couldn't argue low-impact
11 collision couldn't have caused the injuries because defense
12 counsel had no expert witness to corroborate that theory.

13 Regarding the feasibility and fairness of an
14 alternative less severe sanction, you know, the only thing I
15 can say is less severe sanctions were imposed to no avail.

16 Dr. Fish willfully violated several pretrial court
17 orders even after the Court and counsel addressed these
18 specific orders with him prior to his testimony outside the
19 presence of the jury. We spent, I think, 30 or 40 minutes
20 with Dr. Fish reviewing all of these specific pretrial orders,
21 and then he violated several of them.

22 That caused the Court to then later impose the
23 lesser sanction, the irrebuttable presumption sanction.

24 Regarding the component of a policy favoring
25 adjudication on the merits, that's precisely why less severe

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1 sanctions were imposed.

2 Regarding the need to deter both parties and future
3 litigants from similar abuses, the Court cannot permit counsel
4 and witnesses to simply disregard court orders that they don't
5 like. That's what appellate courts are for.

6 The motion to strike, the answer is granted,
7 Mr. Wall. I would appreciate an opportunity to bring our jury
8 panel in so we can excuse them, then counsel can make any kind
9 of record they want.

10 MR. WALL: After the jury's been excused?

11 THE COURT: Yes.

12 MR. WALL: All right. Thank you.

13 THE COURT: I really don't want to keep them waiting any
14 longer.

15 [Jury In]

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

17 First, ladies and gentlemen of the jury, I want to
18 apologize for the long delay. We are sensitive to your time,
19 believe it or not, and I policy on behalf of the Court and
20 counsel.

21 Secondly, the issue is that this trial has simply
22 taken a turn where a verdict will not be required from you,
23 and as frustrating as that may be to know that you're not
24 going to get the case to render a verdict, trust me that our
25 work here is not yet done. I will be working with counsel

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1 with respect to concluding this case.

2 But the good news for you is you're now free to go.
3 Before I excuse you and dismiss you I want to thank you.

4 I want to say that although I've given you an
5 admonishment over the last couple of weeks now that you're not
6 to talk about this case, you're now free to talk to whomever
7 you wish about this case.

8 You're not obligated to speak to anyone about this
9 case. If anyone insists on talking to you about this case
10 after you've indicated that you don't want to do so you should
11 advise the Court.

12 So I thank you again for your time and patient with
13 all of us. You may be excused.

14 [Jury Out]

15 THE COURT: We are outside the presence of the jury.

16 MR. WALL: Judge, at this point with the answer having
17 been stricken, what is left basically pursuant to Rule 55 is
18 for a prove-up hearing before the Court, other than perhaps
19 some redirect, I suppose, of Dr. Arita, which we would not
20 pursue at this point.

21 We would ask for a 1:00 setting tomorrow to present
22 essentially a final argument pursuant to Rule 55(d) as part of
23 our prove-up in terms of not only the damages that have been
24 sustained overall, but also a prima fascia case to support
25 those damages has been established.

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1 Under Rule 55 as well as the case law, the defense,
2 even though the answer has been stricken, has the ability to
3 appear at that prove-up and essentially -- I'm looking for the
4 exact language from Foster. They have the ability to address
5 the Court only with respect to whether there is any -- I can't
6 find the exact language. I'm sorry, Judge.

7 The defense has the opportunity to appear only to
8 address basically fundamental errors in the damage request,
9 that is essentially mathematical errors or some issue of law
10 that would preclude, for instance, a cause of action that
11 doesn't exist.

12 Other than that it would be our intention to conduct
13 that hearing tomorrow. I don't know in the defense wants to
14 make any record today. If they wanted to make some record we
15 would want the opportunity to also make a record following the
16 comments, I guess inviting Mr. Rogers and Mr. Polsenberg --
17 the Court has made its decision. Rather than have a back and
18 forth and back and forth and back and forth, if they want to
19 make a record then we would wish to be heard after that.

20 THE COURT: Very well. Mr. Polsenberg?

21 MR. POLSENBERG: Thank you, Your Honor. Rule 55 doesn't
22 control in the way that Judge [sic] Wall was saying. In fact
23 if he's citing Foster versus Dingwall, one of the issues in
24 Foster versus Dingwall was where on the spectrum is the
25 appropriate hearing.

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1 And in a case before Foster, in Hamlet, the Court
2 made clear that there are certain -- that the Court -- that a
3 district court -- the Supreme Court made clear that a district
4 court has a number of options available from a simple prove-up
5 to a full jury trial on damages which is what happened in
6 Goodyear versus Behena.

7 And that's what we would request is a full jury
8 trial on damages including the ability of ours to present
9 witnesses.

10 And Foster versus Dingwall was a case where -- in
11 front of Judge Gonzales [phonetic] -- where the defendants
12 didn't ask for a jury and didn't ask to present their own
13 evidence, and it was simply just a presentation of the
14 plaintiff's evidence and cross-examination because that's
15 all -- I remember arguing that case and making hand gestures
16 about all the options available and about how the defendants
17 in that case -- I argued that one for the plaintiffs -- the
18 defendants in that case had only asked for this instead of
19 asking for all the rest.

20 So why in Foster versus Dingwall they didn't address
21 where on the spectrum of -- where on the spectrum of -- and I
22 hesitate to say prove-ups because prove-up seems to be the
23 bottom of it.

24 If Your Honor would like we could brief how you can
25 exercise your discretion along that so we don't have, as Judge

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1 Wall says, both of us impromptu coming up with stuff and then
2 you being forced to come up with something impromptu. So we
3 could provide briefing on that if you would like.

4 MR. WALL: He's correct -- I don't know if you were done.

5 MR. POLSENBERG: I am, thank you.

6 MR. WALL: Mr. Polsenberg's correct, and Hamlet is the
7 1998 case that says as follows. And this just lays it out:

8 NRCP 55(b)(2) regarding default procedures provides
9 that if it is necessary to determine the amount of damages the
10 Court may conduct such hearings or order such references as it
11 deems necessary and proper. And 55(b) does not mandate that
12 the defaulted party be given the opportunity to participate in
13 a prove-up hearing.

14 This court has not had -- the supreme court -- has
15 not had occasion to consider the degree to which a defaulted
16 party should participate in a default prove-up hearing. The
17 language of 55 (b) that the "court may conduct such hearings
18 or order such references as it deems necessary and proper"
19 suggests to us an intent to give trial court's broad
20 discretion in determining how prove-up hearings should be
21 constructed.

22 Thus we conclude that the extent to which a
23 defaulting party will participate in prove-up is a decision
24 properly delegated to the trial courts. The trial courts
25 should make this determination on a case-by-case basis and not

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1 according to static rules implemented by this court.

2 In deciding the extent to which a defaulted party
3 will be permitted to participate in prove-up, if at all, trial
4 courts should remember that the purpose of conducting a
5 hearing after default, according to NRCP 55(b) is to determine
6 the amount of damages and establish the truth of any
7 averments.

8 To that end trial courts should determine the extent
9 to which full participation by the defaulted party will
10 facilitate the truth seeking process.

11 This court will not reverse the district court's
12 decision as to participation absent a clear abuse of the
13 discretion granted by NRCP 55(b).

14 Now this court has heard three weeks of witnesses,
15 cross-examination, argument, opening statements and all of the
16 evidence -- almost all of the evidence in the case save for
17 perhaps two witnesses.

18 I think the Court is in a position at this point to
19 assess whether or not there is a prima facie showing of the
20 allegations in the complaint to support a verdict and what
21 those damages might be.

22 So I would ask the Court, especially given the
23 reason that there is a default judgment, to exercise its
24 discretion to not allow the defense to argue damages or argue
25 at all at the prove-up and that their participation be

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1 limited -- entirely limited.

2 THE COURT: Mr. Wall, and limited in what respect do you
3 think is appropriate in this particular case?

4 MR. WALL: I think they can be present. I think that if
5 there are any what I will call fundamental issues of law --
6 that is that if we asked for compensation for a claim which
7 the law does not recognize for instance, that they could be
8 heard as to that issue.

9 But other than that, given all of the information
10 that will the Court has to draw from -- the Court isn't simply
11 going to draw from our prove-up hearing. The Court's going to
12 draw upon three weeks of testimony and evidence that's been
13 submitted.

14 So given all of that I think the Court's in a
15 position to exercise its discretion to hear an abbreviated
16 closing argument on behalf of the plaintiffs and then render a
17 decision as to damages. Liability was stipulated in the
18 opening.

19 THE COURT: Mr. Polsenberg.

20 MR. POLSENBERG: And I'm doing this from memory, but
21 Hamlet was a case, I believe, where the answer was stricken,
22 and Foster versus Dingwall is a case where the answer was
23 stricken before trial, and Behena versus Goodyear was --
24 Goodyear versus Behena was also a case where the answer was
25 stricken before trial.

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1 What I'm suggesting is because you are taking this
2 up now instead of making an impromptu decision, let us brief
3 what the spectrum is for you and let you decide where on the
4 spectrum that it falls.

5 Unlike the plaintiffs in Foster versus Dingwall --
6 no, I was the plaintiff in Foster versus Dingwall. Unlike the
7 defendants in Foster versus Dingwall I am asking for the
8 extreme. I am asking for the ability to fully participate. I
9 am asking for the ability to cross-examine their witnesses and
10 to present our own witnesses, and I am asking for a jury as
11 well. All the things that weren't asked for in Foster versus
12 Dingwall. So I'm at the other end -- no, the other end of the
13 spectrum.

14 MR. WALL: The only thing I would say is that our
15 witnesses are complete. We finished our direct of Dr. Arita,
16 we finished our direct of our client. Our witnesses -- and
17 two of their medical experts, taken out of order, have already
18 testified. So there is no more presentation that should take
19 place.

20 MR. POLSENBERG: But they haven't been completed, I
21 believe.

22 MR. WALL: Correct.

23 MR. ROGERS: And there are two additional witnesses.

24 MR. ADAMS: Because he couldn't make it today was why
25 they weren't completed -- yet another violation.

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1 MR. POLSENBERG: Well, we can discuss why Dr. Fish and
2 Dr. Wong were not completed, but I don't think that's the
3 purpose of today's hearing.

4 MR. WALL: No. And we've -- the answer, having been
5 stricken, we've completed our presentations. There may be a
6 right even -- not a right. There may be within that realm of
7 your discretion to allow cross-examination of our witnesses at
8 a normal default style prove-up, but that's already been done
9 in this case. All the -- almost all of cross-examination has
10 been completed except for some of Dr. Arita and some of my
11 client.

12 If the Court is in a position to say over the last
13 two weeks I have sufficient evidence to justify that the
14 causes of action brought on behalf of William and Cheryl Simao
15 are appropriate under the law and the evidence and all I want
16 to hear is what the appropriate measure of requested damages
17 is and why, that doesn't require any additional participation
18 by the defense, and you would be within your discretion to
19 deny any participation.

20 THE COURT: I think that's -- Mr. Polsenberg?

21 MR. POLSENBERG: Thank you very much, Your Honor. Just
22 so we make sure what your positions are, or so that I make
23 sure I'm clear on what my position is, if the Court is taking
24 this because of trial counsel's trial conduct, then I think it
25 is too extreme a penalty to place on the client. If you want

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1 to declare a mistrial, impose liability as a sanction and have
2 a jury trial on damages, but I do -- I am not acquiescing, as
3 the defendants in the reported cases did, in having a
4 submission without a jury.

5 MR. WALL: Liability's already been stipulated to, and
6 it's been our position over the last two and a half weeks that
7 there was a -- at least a specter of an intention to create a
8 mistrial. And so to strike the answer -- well, to declare a
9 mistrial, rather than strike the answer as the Court has
10 already done, is absolutely prejudicial, and at this point the
11 jury's been discharged.

12 THE COURT: Well, we're way beyond the motion for the
13 mistrial. It comes late at this point, and it came earlier
14 before and the Court denied it.

15 I think there's no question that plaintiff's met its
16 burden with respect to the prima fascia showing and we should
17 go forward with the hearing tomorrow at 1:00. That's the
18 order.

19 MR. POLSENBERG: Your Honor, just to figure out where on
20 the spectrum we are, and Judge Wall's done a good job of
21 articulating what his position is. Is the Court ruling his
22 way on how limited our participation will be tomorrow?

23 THE COURT: Well, let me hear what you think is
24 appropriate.

25 MR. POLSENBERG: Well, I am imagining -- I've suggested

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1 that we present our witnesses, and he's asked that we not be
2 able to present our witnesses. He's saying he's already
3 presented all of his witnesses and that we've been able to
4 cross-examine. He's suggesting you go on that. I think we
5 should go toward with what the trial would have been even in
6 the absence of the jury.

7 THE COURT: Your witnesses have really, for the most
8 part, already testified.

9 MR. ROGERS: There are two additional --

10 THE COURT: The case is just about -- had just about
11 concluded. That's the irony of the whole thing.

12 MR. WALL: There was an economics expert, Dr. Skoug
13 [phonetic]. There was a radiology expert, Dr. Winkler
14 [phonetic]. Neither of them were going to address the issue
15 of causation.

16 And if Dr. Skoug was going to be allowed to testify
17 we were prepared to file a motion before this court because
18 certain of his opinions cannot stand and cannot be addressed
19 before this court.

20 He -- my understanding is he would not be able to
21 take any position with regard to the past and future medical
22 expenses or the present value of those.

23 His testimony, I believe, was going to be limited to
24 issues of loss of enjoyment of life and the loss of consortium
25 claim. I could be wrong but that's my understanding.

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1 So I don't -- the Court can make its own independent
2 decisions given its experience on issues of hedonic damages,
3 as Nevada obviously recognizes, and loss of consortium.

4 MR. ROGERS: Thank you. Dr. Winkler was going to
5 establish that the discogram was invalid, that there was no
6 injury caused to the levels that the plaintiff's surgeons
7 ultimately fused. He reported as much for the original and
8 supplemental reports that the defense has produced.

9 Dr. Skoug is a rebuttal expert, a rebuttal to
10 Mr. Smith or Dr. Smith who just testified yesterday.

11 We were going to bring Dr. Wong back because he had
12 material opinions that he had not yet testified to because his
13 examination wasn't complete. Dr. Wong is the surgeon from
14 UCLA.

15 And then Dr. Arita's examination was not complete.

16 THE COURT: What was Mr. Skoug going to testify to?

17 MR. ROGERS: To rebut Mr. Smith's opinions. And his
18 opinions, Dr. Skoug's, are outlined in his report as well and
19 in the deposition.

20 THE COURT: And to what extent? Just that he disagrees
21 with the notion of hedonic damages or to what extent
22 specifically?

23 MR. ROGERS: While he does disagree with the notion, he
24 was deposed and testified that applying that economic theory,
25 it was clear that Mr. Smith misapplied it, that he did not

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1 have foundation for the opinions that he reached. That was
2 and will be Dr. Skoug's testimony.

3 THE COURT: Mr. Wall.

4 MR. WALL: Let me address that briefly. First of all,
5 his -- Dr. Skoug -- is it doctor? I don't know if it's Dr.
6 Skoug or Mr. Skoug. Gary Skoug was going to testify
7 essentially, criticize the methodology of those damages.

8 He was, although, as Mr. Rogers is exactly correct,
9 he disagrees with the entire notion of hedonic damages --
10 obviously he wouldn't have been able to testify to that. He
11 would not have presented any alternative number --

12 THE COURT: He would not have presented?

13 MR. WALL: He would not have presented any alternative
14 number for those damages. He would have simply criticized the
15 methodology.

16 As for Dr. Wong, whatever additional things
17 Mr. Rogers says he was going to bring up, the Court must
18 understand that it's only -- direct had been completed. What
19 was left was the completion of cross-examination and then
20 limited redirect which is, of course, limited to the scope of
21 cross. So there aren't brand new opinions that would be
22 brought by Dr. Wong should he have testified in any respect.

23 So again, it is our position that the Court has
24 received evidence not only from the plaintiff but evidence --
25 substantive evidence on behalf of the defendant in order to

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1 certainly be in a position to enter a default judgment and the
2 amount is what we would be requesting to present to the Court
3 tomorrow.

4 THE COURT: Mr. Wall, would Mr. Skoug have offered any
5 alternative methodology?

6 MR. WALL: Not to my knowledge. He may have -- I mean,
7 his report was limited to basically criticizing Dr. Smith's
8 methodology for calculating loss of enjoyment of life.

9 I'll give him this. He did, on areas that we have
10 withdrawn, he had some substantive opinions, loss of business
11 income, loss of household services, but on the remaining
12 areas, and there's only three.

13 One is the medical expenses, past and future. My
14 understanding is he was not going to criticize the methodology
15 to calculate present value. Two is loss of enjoyment of
16 life. And three is the loss of consortium claim.

17 And he had no alternatives. He criticized the
18 methodology but present a different methodology by which to
19 calculate -- or a calculation of what those damages would have
20 been. I don't even care if you get his report. How about
21 that?

22 THE COURT: Well, I don't mind seeing it, but I don't
23 think it would be appropriate necessarily to allow defense to
24 call witnesses of their own if plaintiffs are not calling any
25 witnesses of their own.

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1 MR. WALL: Correct.

2 THE COURT: So it should be a pretty straight forward
3 hearing I should think.

4 MR. POLSENBERG: Very good, Your Honor. There's one
5 other request that I would want to make in light of your
6 ruling right now -- I'm pretty sure what your ruling's going
7 to be on that as well.

8 But since the jury's gone and we don't have the same
9 timetable that we would have, because of the new evidence that
10 came in on surgery and more specifically a spinal cord
11 stimulator, since that came in for the first time at trial
12 both through their medical evidence and their economics
13 evidence, we would request the ability to present experts on
14 that as well.

15 THE COURT: What about that? We've been around and
16 around and around --

17 MR. WALL: I know. I have great --

18 THE COURT: We've heard this --

19 MR. WALL: -- respect to Mr. Polsenberg.

20 THE COURT: -- so many times.

21 MR. WALL: I don't blame him --

22 THE COURT: I know he wasn't here.

23 MR. WALL: -- for not having been here.

24 MR. POLSENBERG: You didn't yell at me for not being
25 here. Thank you.

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1 MR. WALL: It's early in the day, though. But we've been
2 'round and 'round on the notice, deposition of Dr. Seibel
3 about a stimulator, the subsequent test that he said was a
4 predicate to needing it. Ms. Hartman's [phonetic] life care
5 plan, Dr. Fish's response to the -- in his last report about
6 the possibility of a spinal cord stimulator. So that issue of
7 notice has been, I think, on four occasions, addressed by the
8 Court.

9 THE COURT: And so that we have a time frame for purposes
10 of this particular transcript, can we go back through that
11 time frame yet once again because I know Mr. Polsenberg wasn't
12 here when we reviewed this issue several times.

13 MR. WALL: It was November of -- October or November --
14 well, you want to do this?

15 MR. ADAMS: Yeah. Let me get my notes for a minute.

16 MR. WALL: The other thing I would ask before that
17 happens, Judge, is because some of the case law -- and I know
18 Mr. Polsenberg's aware of it -- requires that when there is a
19 case-concluding sanction, and I'm sure I saw it either in
20 Young or in Foster, the supreme court, although the record
21 here I think is appropriate, also prefers a written order.
22 And so I would ask to be able to prepare that order for the
23 Court.

24 THE COURT: Very well. Please do so.

25 MR. WALL: Mr. Adams is going to addresses the issue of

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1 notice.

2 MR. ADAMS: Yes, Your Honor. I don't have all my notes
3 from the last couple of times I've argued this, but the
4 defense was first put on notice of the spinal cord stimulator
5 first in Dr. Seibel's deposition which they took on August
6 20th, 2010. Again, there was discussions of Dr. Seibel that
7 this was a modality that he would consider.

8 He said at that time he didn't have a future
9 treatment plan available to him because he needed to the
10 another diagnostic evaluation. That diagnostic evaluation was
11 done in November 11th, 2010 in which the plaintiff received 75
12 to 80 percent relief. Since he did have a positive outcome
13 now he was a candidate for those modalities being a spinal
14 cord stimulator, also an intrathecal morphine pump was
15 discussed in Dr. Seibel's deposition.

16 Ms. Hartman, as you are aware, in her life care plan
17 listed a spinal cord stimulator. Pretrial the defendants
18 filed a motion with regard to Ms. Hartman to exclude her and
19 this court ruled it, as long as there is foundation for her to
20 testify, foundation coming in through the doctors then she
21 would be permitted to testify.

22 As you heard counsel say, they give this
23 information, the medical records, to Dr. Fish, he says in his
24 last report in February, 2011 -- February 9th, 2011, he's
25 reviewed the medical records. He's also reviewed Dr. Seibel's

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1 deposition. He also reviewed Dr. -- I mean, excuse me, Nurse
2 Hartman's life care plan.

3 I mean, they've had that notice all the way
4 throughout. As if that wasn't enough, the plaintiff has on-
5 going treatment, as this court -- we've talked about and
6 discussed here through evidence and in argument. As late as
7 last month the plaintiff met with Dr. Lee [phonetic] who we
8 know is his doctor --

9 MR. POLSENBERG: Your Honor, I'm aware of all these from
10 the trial briefing. He doesn't need to -- if he's made the
11 record in front of you before --

12 THE COURT: Well, I think this transcript should also
13 reflect that there really isn't issue with respect to notice
14 as to the defense on this issue. That's all.

15 MR. POLSENBERG: Well, we stand by our position that we
16 expressed before.

17 THE COURT: I understand. I understand.

18 MR. POLSENBERG: Thank you, Your Honor.

19 MR. ADAMS: Should I continue?

20 THE COURT: Yes, please do.

21 MR. ADAMS: And then -- okay. Thanks. And where Dr. Lee
22 recommended pain management. At trial we didn't bring Dr. Lee
23 because he is the partner of Dr. McNulty, quite frankly, they
24 work together. Dr. McNulty testified with regard to the need
25 of the spinal cord stimulator.

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1 Now, that information was given to -- via transcript
2 to our economic expert Stan Smith pursuant to NRS 50.2(8)(5).
3 He's permitted to form opinions based on evidence how it comes
4 in through trial. He was provided that evidence through both
5 transcript and a copy of the exhibits that were marked and
6 entered into evidence. That was with regard to the spinal
7 cord stimulator.

8 As the Court is aware, heard Dr. Smith testify, he
9 was also provided with the figures for the adjacent segmental
10 breakdown surgery which Dr. Wong testified more likely than
11 not within -- after 20 years our client would need that, and
12 he was provided with the -- we didn't have the transcript
13 available, he was provided with the figures that Dr. Wong
14 believed was reasonable and customary. We gave him that
15 figure.

16 And if you recall on cross-examination of Dr. Smith,
17 when he was testifying about this, Mr. Michalek said, "So if
18 that figure that they gave you, Dr. Smith was different then
19 your calculation would be different."

20 The only reason I think he asked that question -- I
21 could be wrong -- is because we didn't orally have a
22 transcript to give Dr. Smith. But if you recall, in redirect,
23 Mr. Wall then got up old exhibit -- I believe it's Exhibit 67
24 and showed him that that figure that's on Exhibit 67 in fact
25 matched his figure.

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1 So as we come full circle with regard to the
2 evidence as it has come in and the economic basis of it.

3 MR. POLSENBERG: Mr. Adams is familiar with my position
4 on this issue because he's heard me argue it before, and we've
5 had it up on several appeals that have never gone through
6 argument.

7 It is, I think, inappropriate for plaintiffs to
8 convert a mere possibility or a patient who is a candidate
9 into surprise testimony at trial that this person is going to
10 have surgery.

11 They have to show things by a reasonable degree of
12 medical probability, the burden of proof is on them. But it's
13 even more important in a due process sense, that they have to,
14 before trial, in discovery, and if it comes up after
15 discovery -- under Yamaha versus Arneau [phonetic], they can
16 move to reopen discovery. But due process requires that we
17 know what it is that they're going to say before trial.

18 And a candidate for surgery is not the same as
19 surgery. Surgery must be reasonably necessary. Any medical
20 treatment must be reasonably necessary and reasonably
21 certain. And that's right out of our jury instruction.

22 And they didn't have that before trial. And the
23 trials change when we come into trial and I've been a real
24 advocate of stopping that entire process of having the
25 surprise at trial, which is why we are argued to Your Honor

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1 that there should be a mistrial on this issue.

2 If they want to present this we have to reopen
3 discovery, give us the opportunity, not only to do discovery
4 on this but to present our own expert evidence on this.

5 And I say to you now that this is the situation we
6 have. Now that you've discharged the jury, you have the
7 opportunity to allow us to reopen discovery and present
8 medical and economic experts on this.

9 Dr. McNulty said he couldn't prescribe an implant in
10 this case. No doctor recommended the implant before trial.
11 And Dr. Seibel saying he is a candidate is a well-worn
12 artifice to be able to get this to happen.

13 And because of all those circumstances I ask you now
14 to allow us to be able to present experts on that issue.
15 Thank you, Your Honor.

16 THE COURT: Mr. Adams.

17 MR. ADAMS: Just a couple of quick points. With regard
18 to Dr. Seibel, he said where we would believe -- he said
19 something to the effect in his deposition -- where he said I
20 could see where others would believe that's appropriate now,
21 at the time of Dr. Seibel's deposition. But Dr. Seibel, being
22 a little bit more conservative wanted to do another
23 procedure.

24 So I keep going back to this issue of surprise.
25 It's for the surprise as evidenced by Court's Exhibit 22 which

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1 is Dr. Fish's February 9th, 2011 report. Their own expert
2 knew about it. They actually -- he authored an opinion about
3 it and a report about it. They had him formulate testimony.
4 They asked questions about it, you know, while he was on the
5 stand.

6 I am familiar with Mr. Polsenberg's arguments. In
7 those past cases there wasn't an expert like Dr. Fish who had
8 already rendered an opinion here. I don't know how they can
9 claim surprise since they've already got an opinion, unless
10 they just didn't talk to him. I conceivably can't figure out
11 why they believe it's a surprise when it was -- they were on
12 notice through a deposition; they were on notice in a report;
13 and they're on notice through their own expert. I can't
14 fathom that.

15 THE COURT: I see no --

16 MR. ADAMS: I keep going back to the fundamental block of
17 it being a surprise. I just don't see how it is a surprise.

18 THE COURT: I see no element of surprise either.

19 MR. WALL: The other thing I would add -- very briefly,
20 and then I hope we are done with this issue -- is that it
21 doesn't seem to me that the -- that part of the sanction for
22 continuously and systematically violating court orders at
23 trial is to reopen discovery and allow them to pursue the case
24 again. That's not where we are in this case.

25 I understand we're just making a record, but it was

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1 more than just making a record; it was an invitation to the
2 Court to somehow vacate its order striking the answer and
3 reopening discovery in the case, and that would be absolutely
4 inappropriate at this point, I believe.

5 THE COURT: I agree. I think that's a mute request.

6 MR. WALL: 1:00 tomorrow?

7 THE COURT: 1:00.

8 MR. POLSENBERG: Your Honor, so we're just doing argument
9 tomorrow?

10 THE COURT: Yes.

11 MR. WALL: Just the plaintiff.

12 THE COURT: Well, there'll be a presentation, I would
13 imagine.

14 MR. WALL: Just the plaintiff, correct?

15 THE COURT: Right.

16 MR. POLSENBERG: Defense won't be permitted to argue?

17 THE COURT: You mean, based on what they present without
18 calling any witnesses?

19 MR. ADAMS: It's my understanding that no witnesses are
20 going to be permitted.

21 THE COURT: Right.

22 MR. ADAMS: That the attorneys are to appear tomorrow,
23 and the plaintiff will make their closing, the defense will do
24 a closing and then --

25 MR. WALL: I was going to do a very abbreviated prove-up,

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1 essentially a statement of with a your damages are --

2 THE COURT: Um-hmm.

3 MR. WALL: -- and how we've established them. I expect
4 it to be about 15 to 20 minutes. And at this point the Court
5 had already ruled that the defense participation in the
6 default prove-up, given all the evidence that's been presented
7 so far, wouldn't be allowed, and that would be our position.
8 It's certainly within your discretion underside Hamlet.

9 MR. ROGERS: I'll give you a simple capsule summary of
10 the points that the defense would want to make in this hearing
11 tomorrow.

12 They would include Dr. McNulty's testimony that he
13 can't at this time recommend a spinal cord stimulator because
14 there hasn't been a sufficient work-up.

15 It would be Dr. Wong's testimony, which when read
16 fairly it does not establish the need for a future adjacent
17 level fusion -- doesn't at all actually.

18 It's to point out what the defense perceives as
19 errors or flaws in the plaintiff's damages position.

20 THE COURT: Well, I'm not going to prevent you from
21 making a brief statement. But your statement should be at
22 least as brief as Mr. Wall's is.

23 MR. WALL: If you want to put -- hold on one --
24 [Counsel Confer]

25 MR. WALL: I guess if they're going to be heard, one

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1 thing -- we want to make sure that the exhibits which have
2 been offered so far, including Exhibit 1, which sets forth the
3 medical costs which I believe it's been stated on the record a
4 few times, I'm not entirely sure, but I think it has -- the
5 defense has not contested Exhibit 1 which lists the past
6 medical expenses or that they are reasonable, customary
7 charges and necessary. They don't challenge causation. But
8 my -- you know, if you want to -- I'll leave that to you. You
9 have the discretion. We're going to present -- we're not
10 going to present a two-hour PowerPoint as we would before the
11 jury.

12 THE COURT: Good.

13 MR. WALL: I can have 15 or 20 minutes, and you know
14 what, if you want to give Mr. Rogers five or ten minutes to
15 respond and then we would have a five minute rebuttal we can
16 have it done in less than an hour.

17 THE COURT: I think that's appropriate, and I think you
18 bring a good point with respect to the exhibits. Let's make
19 sure that everybody's in agreement with respect to which
20 exhibits have been admitted.

21 What does the clerk show? Do you have them down?

22 [Court and Clerk Confer]

23 MR. ADAMS: I think everything's in.

24 THE COURT: Oh, you do? You don't have any questions
25 about what's in and what isn't?

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1 MR. ADAMS: It wasn't formally, I guess, put on the
2 record. We talked about it numerous times.

3 THE COURT: One through 58 were stipulated to, is that
4 correct?

5 MR. ADAMS: Right. And then the remaining ones I think
6 were done in open court.

7 MR. WALL: Yeah.

8 MR. ROGERS: However there were no stipulations to
9 causation and necessity, only the reasonableness of the
10 charges.

11 THE COURT: Sure.

12 MR. ADAMS: Right.

13 THE COURT: One through 58 were admitted and what other
14 items, do you recall? Do you have a list of the others.

15 MR. WALL: All the way through 68 without 66. Is that
16 right?

17 MR. ADAMS: No.

18 MR. WALL: No? All right.

19 MR. ADAMS: 59 was admitted, Your Honor, 64, 65, 67, and
20 68. I match the Court?

21 THE COURT: Yes. All right. Thank you. See you
22 tomorrow.

23 MR. POLSENBERG: Your Honor, just one more thing. And
24 I'm sorry, and you're being very patient with me, and I
25 appreciate it. We hit one topic. Obviously I object to only

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1 having a short and truncated closing argument. I just wanted
2 to put that on the record.

3 THE COURT: I understand.

4 MR. POLSENBERG: Thank you, Your Honor.

5 THE COURT: Sure.

6 [Proceedings Concluded at 4:23 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
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8 Kelley Grijalva

9 KELLEY A. GRIJALVA, Transcriber

10 Antoinette M. Franks

11 ANTOINETTE M. FRANKS, Transcriber

12 Cynthia Adams

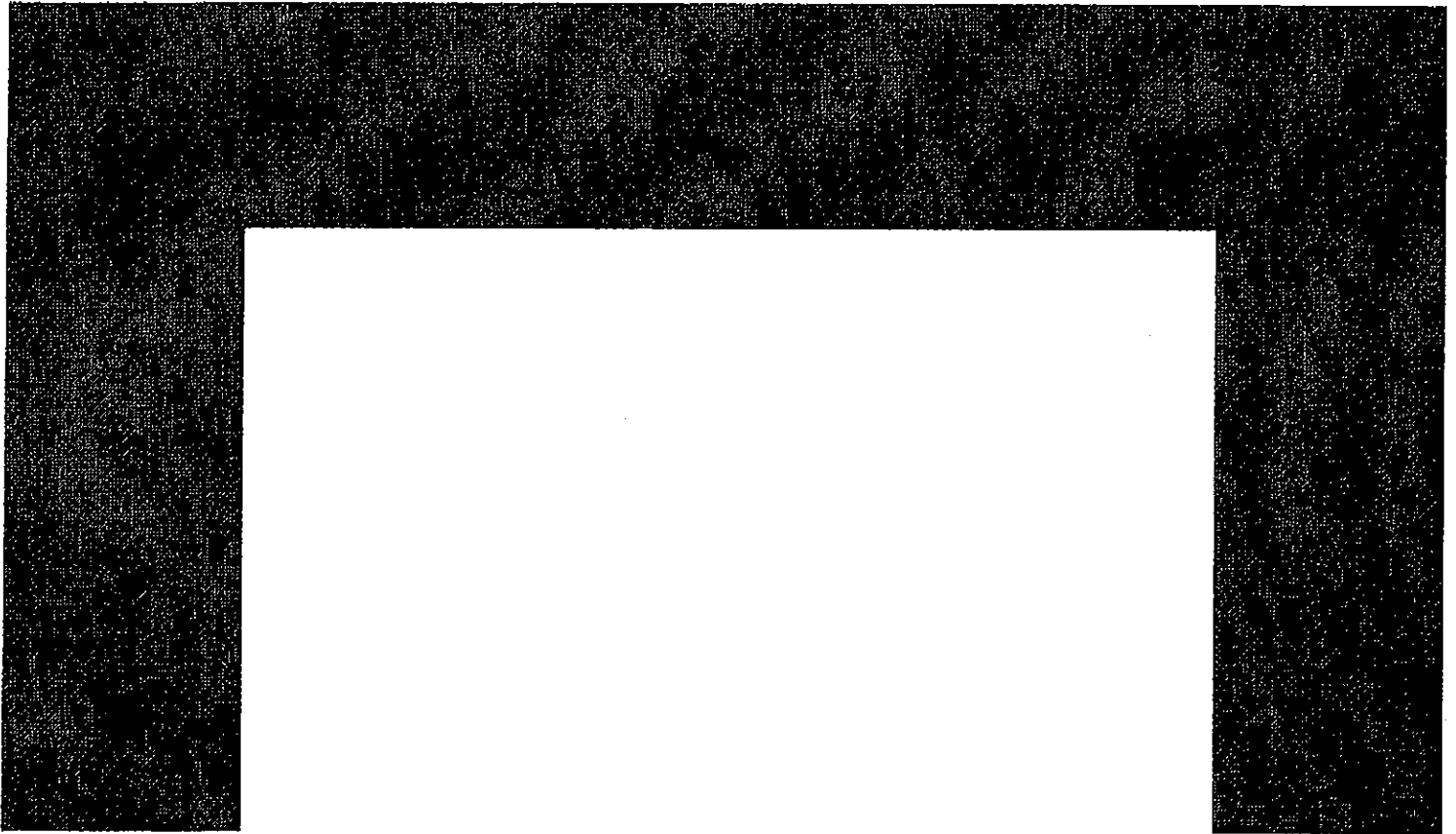
13 CYNTHIA ADAMS, Transcriber

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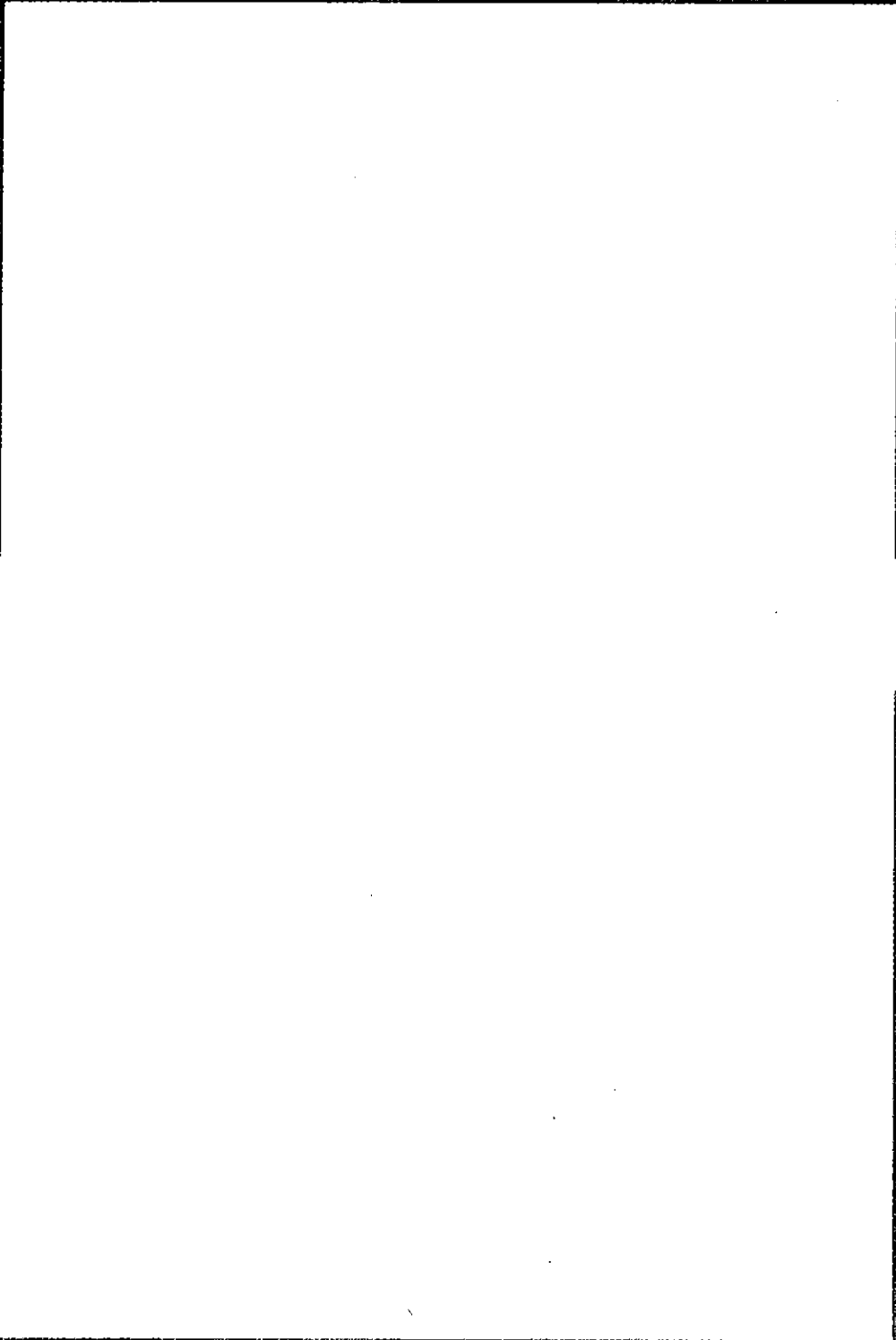
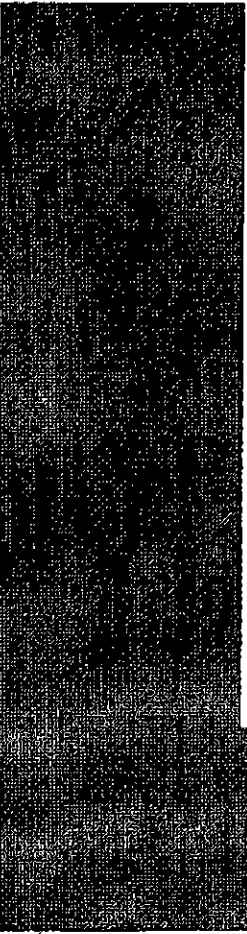
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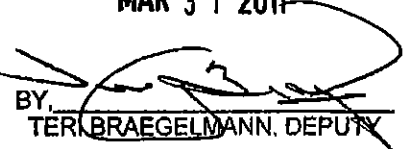
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CLERK OF THE COURT

MAR 31 2011

BY, 
TERI BRAEGELMANN, DEPUTY

SODW
BRYAN W. LEWIS, ESQ.
Nevada Bar Number 3651
LEWIS & ASSOCIATES, LLC
500 South Rancho Drive, Suite 7
Las Vegas, Nevada 89106
Tel: (702) 870-5571
Fax: (702) 870-8978
Attorneys for Defendants James and Linda Rish

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

WILLIAM JAY SIMAO, individually and
CHERYL ANN SIMAO, individually, and as
husband and wife,

CASE NO.: A539455
DEPT. NO.: X

Plaintiffs

vs.

JENNY RISH, JAMES RISH, LINDA RISH and
DOES I through V and ROE CORPORATIONS
I through V, inclusive,

Defendants.

STIPULATION AND ORDER FOR DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between counsel for their
respective parties, that Plaintiffs' claims against Defendants JAMES RISH and LINDA RISH
only be dismissed with prejudice, each party is to bear their own costs and attorneys' fees.

Plaintiffs' claims against Defendant JENNY RISH shall continue unaffected by this
stipulation.

...

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Stipulation and Order for Dismissal With P
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LEWIS AND ASSOCIATES, LLC

Attorneys at Law
500 SOUTH RANCHO DRIVE, SUITE 7
LAS VEGAS, NEVADA 89106
(702) 870-5571 FAX (702) 870-8978

002902

SIMAO v. RISH, ET AL.**CASE NO: A539455**

DATED this 31 day of March, 2011. DATED this 31 day of March, 2011.

LEWIS & ASSOCIATES, LLC

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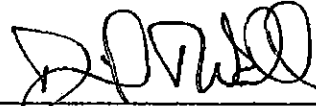
BRYAN W. LEWIS, ESQ.

Nevada Bar No. 3651

500 S. Rancho Drive, Suite 7

Las Vegas, Nevada 89106

Attorneys for Defendants James and Linda Rish



DAVID T. WALL, ESQ.

Nevada Bar No. 2805

400 South Fourth Street, 6th Floor

Las Vegas, Nevada 89101

Attorneys for Plaintiffs

DATED this ____ day of _____, 2011.

ORDER FOR DISMISSAL

IT IS SO ORDERED that Plaintiffs' claims against Defendants JAMES AND LINDA

RISH only be dismissed with prejudice, each party is to bear their own costs and attorneys' fees. Plaintiffs' claims against Defendant JENNY RISH shall continue unaffected by this stipulation.

DATED this 31st day of Mar, 2011.



DISTRICT COURT JUDGE

LEWIS AND ASSOCIATES, LLC

Attorneys at Law

500 SOUTH RANCHO DRIVE, SUITE 7

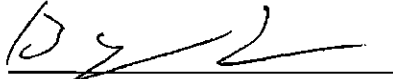
LAS VEGAS, NEVADA 89106

(702) 870-5571 FAX (702) 870-8978

SIMAO v. RISH, ET AL.
CASE NO: A539455

Respectfully submitted by:

LEWIS & ASSOCIATES, LLC



BRYAN W. LEWIS, ESQ.

Nevada Bar No. 3651

500 S. Rancho Drive, Suite 7

Las Vegas, Nevada 89106

Attorneys for Defendants James and Linda Rish

LEWIS AND ASSOCIATES, LLC

Attorneys at Law

500 SOUTH RANCHO DRIVE, SUITE 7

LAS VEGAS, NEVADA 89106

(702) 870-5571 FAX (702) 870-8978

In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

JENNY RISH,

Appellant,

vs.

WILLIAM JAY SIMAO, individually, and
CHERYL ANN SIMAO, individually and as
husband and wife,

Respondents.

Electronically Filed
Aug 14 2012 04:11 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JESSIE WALSH, District Judge
District Court Case No. A539455

**APPELLANT'S APPENDIX
VOLUME 12
PAGES 2682-2904**

DANIEL F. POLSENBERG
State Bar of Nevada No. 2376
JOEL D. HENRIOD
State Bar of Nevada No. 8492
LEWIS AND ROCA LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
(702) 474-2616
DPolsenberg@LRLaw.com

STEPHEN H. ROGERS
State Bar of Nevada No. 5755
ROGERS MASTRANGELO CARVALHO
& MITCHELL
300 South Fourth Street, Suite 170
Las Vegas, Nevada 89101
(702) 383-3400
SRogers@RMCMLaw.com

Attorneys for Appellant

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1 Q All right, 64,527. So when you factor out what the
2 cost is going to be in 20 years, and how much money it will
3 take now to set aside to cover that, what was the number that
4 you came to as a present value?

5 A You need today 72,883. And if that were invested in
6 U.S. treasury bills, then you should have enough to pay for
7 that surgery, assuming that the surgery costs grow at about
8 2.2 percent above inflation. You should have enough in 20
9 years to pay for that.

10 Q All right. So \$72,883?

11 A Yes.

12 Q Have you had occasion to add these three numbers
13 together?

14 A I -- well, I have not, no.

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

16 THE COURT: Yes.

17 BY MR. WALL:

18 Q You know these; right?

19 A Sure. I have a little one in my briefcase, but yes,
20 I could certainly --

21 Q One-hundred and ninety-four thousand three-hundred
22 and eighty.

23 A One nine four three eight zero.

24 Q Two-million six-hundred and eight thousand eight-
25 hundred and eighty-nine, and seventy-two thousand eight eighty

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1 three.

2 A All right. So that total is 2,876,152.

3 Q One fifty-two?

4 A One fifty-two.

5 Q All right. What are "hedonic damages," Doctor?

6 A That's an economic term of art for what we talked
7 about earlier, which are the loss of enjoyment-of-life
8 damages. Hedonic equations are used to sort out and to
9 determine certain of the values that are used in determining
10 the value of a statistical life.

11 Q Is that loss of enjoyment of life?

12 A Yes.

13 Q And is that the type of calculation that you
14 explained to us previously?

15 A Yes.

16 Q You told us a widely accepted economic value is 5
17 point -- I wrote down 5.4. Did you say 5.5?

18 A Because every year obviously with inflation these
19 numbers slightly change over the course of time, in my
20 appendix I discuss this and indicated 5.4 million, yes.

21 Q And that's your conclusion on the overall value of
22 life for a statistically average American based on all the
23 information that you provided to us; is that right?

24 A Yes.

25 Q Did you consider any potential critiques to this

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1 methodology?

2 A Well, we have close to 40 years of peer review of
3 economic literature. This is one of the most well established
4 fields in economics. I don't think there's any sensible
5 economist in the country who wouldn't say, one, that the value
6 of life is well established, and number two, that the value is
7 well established in the 5- to \$6-million range. I don't think
8 that's disputable by really any serious economist in the
9 nation.

10 Q So how do you translate this total value for a
11 worker in America into estimates of the net enjoyment of life
12 for some particular unknown person?

13 A Okay. First of all, as I said earlier, I use the
14 figure of 4.1 million. So that if someone looks at these
15 figures they can be reasonably assured that we're not
16 overestimating. But if we are making any errors, it's more
17 likely on the conservative side by using a figure about 25
18 percent lower.

19 Secondly, that's for a statistically average person
20 with 45 years left to live. So let me just talk generally for
21 a moment.

22 If someone is -- for example, I'm 64 years old. I
23 don't have 45 more years left to live. The value of my future
24 enjoyment of life would be proportionally reduced, because my
25 life expectancy is about 23 or -4 years, assuming I'm in

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1 average health.

2 If someone is only say 15 years old or 18 years old,
3 they've got 55-60 years of future remaining life expectancy.
4 So they would have more than the \$4.1-million value to look
5 forward to.

6 So one of the things we do is we modify that figure
7 by life -- by the proportionality of life expectancy.

8 And then the second aspect is that in the interview
9 that we conducted with Mr. Simao, and we talked to him about
10 how this has impacted his enjoyment of life, both from the
11 point of view of daily practical living, and social and
12 leisure activities, the impact on his occupation, the
13 emotional impact, et cetera, when it came down to it, you
14 know, we asked him in terms of overall loss of enjoyment of
15 life, by how much does he believe his, you know, quality of
16 life has changed. And he said, you know, it's a difficult
17 thing to put a percentage to.

18 The ultimate figure that we used, because he said
19 it's not easy for me, you know, but it's obviously
20 significant, is we then determined that we would put up two
21 examples.

22 One example at a 15-percent loss of enjoyment of
23 life, and one example at a 30-percent loss of enjoyment of
24 life.

25 Q Well, if he's lost 15 percent of the enjoyment of

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1 his life as a result of the injuries suffered in this case,
2 then you take that -- you start with your number of either 5.4
3 million or 4.1 million, and you -- since that's for a
4 statistically average American who has 45 more years left, you
5 reduce that down because he's only got 31.6 --

6 A Thirty point --

7 Q Statistically --

8 A Yeah, 31, something like that.

9 Q -- he has 31.6 more years of life expectancy.

10 A Right.

11 Q So you made that reduction first.

12 A Right.

13 Q And then you say, "Okay, then there's the total."

14 And then you --

15 A We take 15 percent of that remainder.

16 Q Fifteen percent of that remainder.

17 A Right.

18 One of the things to understand is is that someone
19 with 40 years left to live doesn't have twice as much
20 enjoyment as someone with 20 years left to live, because it's
21 all discounted.

22 The very same thing is understanding that if I'm
23 going to give you a dollar a year for 40 years, that's not
24 worth twice as much as if I give you a dollar a year for 20
25 years. Because the dollars in the earlier years are worth

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1 more than the dollar in the later years.

2 So if we say enjoyment of life average amount per
3 year, but we're looking at how much now is a future year
4 worth, a year of life 40 years from now is not valued as much
5 as a year of life 20 years from now, which is not valued as
6 much as a year of life next year. So this is discounted
7 years.

8 So we should understand that while Mr. Simao has 30
9 years left to live, the average person has 45 years left to
10 live, those 30 years are -- the first 30 years, each year is
11 more valuable than the last 15 years after 30 in which the
12 average person lives. So it's discounted years. That's an
13 important thing to remember.

14 So we do the discounted proportionality for the
15 years, and I apply the 15-percent factor as an example,
16 because I'm not here to tell the jury he's lost 15 percent of
17 his enjoyment of life, or 20 percent, or 10 percent. I'm here
18 to give a tool.

19 And so if we use this economic method to put a value
20 on a statistical average life to take into account his life
21 expectancy, and if we say he's lost 15 percent, then I have a
22 figure for that.

23 Q All right. And this is all based on the type of
24 analysis that's routinely done in this arena of economics; is
25 that right?

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1 A Exactly.

2 Q All right. So if we use the 15-percent number, do
3 you have -- have you calculated out both what it would be
4 under the average value of life of 5.4 million, and also with
5 your conservative number of 4.1 million?

6 A Just the 4.1 -- just the 4 --

7 Q Just the 4.1?

8 A Only the 4.1 million.

9 Q All right. What did you come up with as 15 percent
10 based on your --

11 A A 15-percent impairment rating would be 603,000, and
12 then I mean the computer can compute it to the nearest dollar.
13 But I'm not suggesting we know it that precisely. But 603,454
14 if you want to get that precise, but I think to the nearest
15 thousand is probably --

16 Q And what about if we use 30 percent?

17 A So if we use 30 percent it's really -- it's double
18 that number. It's 1,206,884. We could think of it also for
19 each ten percent. Each ten percent is roughly 402,000.

20 Q So how much of this loss of enjoyment of life for
21 Bill Simao is pain and suffering?

22 A It's not; it's not. This is -- you need to think of
23 this as independent of pain and suffering.

24 Let me give you just an -- this is -- if we look at
25 what we will invest to reduce the risk of death, and it's the

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1 value of the ordinary quality of life that we will look
2 forward to.

3 You can have loss of enjoyment of life with or
4 without pain and suffering. I'll give just two theoretical
5 examples.

6 You could have two people terribly injured. One is
7 in a permanent vegetative coma, a coma so deep and an injury
8 so severe that doctors agree that there's no dispute that
9 there's no feeling, no hearing, nothing that we don't know
10 that we don't know, just someone who is literally in a
11 persistent vegetative state.

12 At that level we would assume that the person is not
13 experiencing any pain and suffering, because there's no
14 cognition. There's no thinking going on, no internal
15 experience that we can't even be aware of. But a hundred-
16 percent loss of enjoyment of life for that person.

17 Imagine someone else who is in what we call a
18 "locked-in syndrome," able to maybe move one eyelid, and there
19 are such instances, and that's all. And the person has full
20 awareness, full cognition. And so they have also presumably
21 lost all their enjoyment of life, but they also may be
22 experiencing significant pain, suffering, and mental anguish.

23 Pain -- physical pain might be from burns sustained,
24 in my example, or broken bones, or all sorts of things that
25 are mending and healing. And then there's the mental pain and

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1 anguish from knowing that you're now locked in. And you can
2 hear. So you know as the doctors tell you that you're never
3 going to move again.

4 And so there's that enormous emotional pain and
5 suffering that may occur from being in a locked-in syndrome,
6 as well as the full loss of enjoyment of life. They are
7 independent.

8 Q So your loss of enjoyment-of-life calculation for
9 Mr. Simao doesn't take into account pain and suffering at all?

10 A Correct.

11 Q Now, is your conclusion -- you touched on this a
12 minute ago. But is this conclusion, is this a final answer
13 for the jury, or is this a guideline?

14 A Well, I'm an economist. So if you ask me a question
15 I'm going to give you an answer from an economic point of
16 view. But I'm also more than an economist. I know that all
17 of us come to things with more than just our own professional
18 point of view.

19 We can bring our experience as our -- you know --
20 there's our own personal philosophy, our own emotional
21 experience. People may bring their own spiritual perceptions
22 and principles to this.

23 So I think, for example, if a jeweler is looking at
24 a gem stone and looking to analyze the value of the gem stone,
25 that the jeweler will shine the light through many different

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1 facets.

2 So when you shine light through the economic facet,
3 this is the answer you get. I don't suggest that that's the
4 only facet through which this very difficult issue of loss of
5 enjoyment can be looked at, because I think there's more to it
6 than just the economic facet. But if you apply the principles
7 of economics, that's the answer you get.

8 Q All right. Then the last area would be the loss of
9 society and relationship. And who in this case are we talking
10 about?

11 A Well, Cheryl Simao, who we also interviewed,
12 indicated that this has affected her significantly.

13 Q The injury to her husband?

14 A Yes, and that her quality of life has changed.

15 Q And how do you go about calculating her loss of
16 society and relationship?

17 A Well, again the same as the way we did Mr. Simao.
18 She hasn't experienced the physical injury, but the impact on
19 her enjoyment of life anyway no different than --

20 Hypothetically you could take someone and put them
21 wrongfully in prison. They're not injured, but they've lost
22 enjoyment of life because you've constrained their
23 opportunities. You've changed their expectations of what --
24 how they will live their normal life.

25 So when we're married or in a relationship with

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1 someone, and the person that we have expectations of enjoying
2 our life with, when that's shifted significantly, then we
3 ourselves experience -- may experience our own loss of quality
4 of life.

5 For Mr. Simao, because he said, "I can't really put
6 a percentage on it," we just gave as a tool as an example like
7 a 30-percent figure.

8 Mrs. Simao suggested to us herself, she said 15- to
9 20-percent change would be a reasonable estimate from her
10 point of view. So again to be conservative, we used a 15-
11 percent figure for her.

12 Q And are there published works that you rely on that
13 discuss calculating the value of the loss of a relationship by
14 a family member in this manner?

15 A Yes. There's peer-review literature that indicates
16 that the very same literature we can look at for the enjoyment
17 of life when we can use it as a physical injury can also apply
18 and we've applied it many times for people who have been
19 raped, for people who have experienced, you know, defamation
20 of character and their careers have been destroyed, and their
21 entire, you know, relationship with the world has shifted.

22 You could obviously use it for people, and we have
23 for people who have been wrongfully imprisoned for a period of
24 time. No physical injury whatsoever. But the way they
25 expected to lead their lives has changed significantly.

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1 Q Did you calculate in this case the loss of society
2 or relationship sustained by William Simao's wife, Cheryl,
3 under the method of analysis that you've outlined today?

4 A Yes. And again based on her remaining life
5 expectancy, which is -- sorry for the delicacy of talking
6 about a woman's age. But for her remaining life expectancy,
7 approximately 37 years. And based on that, then 15 percent
8 for her would be \$681,286.

9 And again if someone were to say, "Well, we think --
10 what's the ten-percent number," that would be one-third less.
11 Or "What's the 20-percent number?" That would be one-third
12 more.

13 Q And what assumptions, if any, did you rely on in
14 making this calculation?

15 A Well, again I told you earlier the primary
16 assumption is that each of Mr. And Mrs. Simao have the
17 ordinary average ability to enjoy life as the rest of us.
18 Nothing major different about their lives. They seemed to be
19 engaged in careers, and social and leisure activities,
20 motorcycle riding.

21 I mean all the -- everybody leads a slightly
22 different life, but they were leading lives in the way in
23 which one would normally, you know, expect individuals and
24 couples to lead their lives. So the major assumption is that
25 they're average.

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1 Q Dr. Smith, have you reviewed the report of Gary
2 Scoog [phonetic] who was hired by the defense in this case?

3 A Yes.

4 Q Are you familiar with Mr. Scoog?

5 A Yes.

6 Q To your knowledge, has he ever done an analysis of
7 value of life?

8 A He never has. He's never published any peer-review
9 literature on the value of life.

10 Q Has he ever contributed to I suppose a peer-review
11 discussion of this issue within the economic community?

12 A No. Neither has he done any peer-review research.
13 He doesn't also do any economic calculations.

14 Q And with respect to the three categories that you've
15 done today, can you address any criticism he has -- let's
16 specifically deal with loss of society and relationship, as
17 well as loss of enjoyment of life.

18 A Well, he simply does not believe in this approach
19 for the purposes of applying it to a particular individual.
20 He wrote maybe 25 pages, which is what sometimes people do if
21 they aren't clearly thinking, saying basically this approach
22 should not be used to apply to a specific individual.

23 But nobody who has published in the peer-review
24 literature value-of-life statistics as I have, and dozens and
25 dozens of other economists have, none of those economists have

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1 ever said this should not be applied to an individual.

2 The few people who say you should not apply it to an
3 individual, like Gary Scoog, don't have the credentials of
4 being an expert in the field. The primary credential is have
5 you published peer-review literature that your peers have
6 approved of and said, "Yes, this is of sufficient quality
7 thinking and research that it should be published in a quality
8 economic journal."

9 That usually means your thinking then has been
10 reviewed by your peers and approved. So it is they -- it is a
11 standard, a gold standard of evidence that what you have to
12 say is accepted in the economics' profession.

13 A few people who don't have that gold standard have
14 said, as Gary Scoog has said, "You shouldn't do this."

15 So that's all I have to say.

16 Q The method you've used again is what's widely used
17 within the economic community?

18 A Yes.

19 Q And accepted within the field?

20 A Yes.

21 Q Have all the --

22 A I would say that most economists who do forensic
23 work aren't necessarily trained in this, just like most
24 economists aren't trained to analyze the trade, as I said,
25 between India and Pakistan. That would be outside my field.

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1 So I wouldn't do that.

2 It's actually a fairly specialized area, but there
3 are dozens of economists who do this, although I think the
4 majority who do testify, the majority of forensic economists
5 are probably not familiar enough with the area to testify.

6 Q Have all the opinions that you've expressed today
7 been based upon data and information regularly relied upon in
8 your profession of economics?

9 A Yes.

10 Q Have you testified in any way out of the ordinary
11 given your professional standing?

12 A No.

13 Q And have all the opinions you've given today have
14 been to a reasonable degree of economic probability?

15 A Yes.

16 MR. WALL: Your Honor, I would ask that this three-page
17 chart be marked as plaintiff's next in order.

18 THE COURT: Very well.

19 MR. WALL: And we'd move for its admission.

20 THE COURT: Any objection?

21 MR. MICHALEK: Just one second.

22 MR. WALL: Oops, it's four pages.

23 MR. MICHALEK: No objection.

24 THE COURT: It will be admitted.

25 [Plaintiff's Exhibit 68 Received]

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1 MR. WALL: What's the number? Can we just do it as 1?
2 It's 68? Thank you very much.

3 I'll pass the witness, Your Honor.

4 THE COURT: Mr. Michalek?

5 MR. MICHALEK: Shall I begin, Your Honor, or does the
6 jury need a break?

7 THE COURT: Does anyone need a break? Yes. Let's take a
8 five-minute break, ladies and gentlemen.

9 [Court Admonishes Jury]

10 [Recess]

11 [Outside the Presence of the Jury]

12 THE COURT: [Audio Begins] -- the jury. There's another
13 question which reads: "Someone enjoys flying, then something
14 happens and they cannot fly any more so they learn to sail.
15 They enjoy it. Would your loss of enjoyment of life hold up?"
16 That's the question.

17 MR. MICHALEK: Would you do it once more?

18 THE COURT: Want to hear it again?

19 MR. MICHALEK: Please.

20 THE COURT: "Someone enjoys flying. Then something
21 happens and they cannot fly any more so they learn to sail.
22 They enjoy it. Would your loss of enjoyment of life hold
23 up?"

24 THE WITNESS: What juror number is that?

25 THE COURT: Well, it looks like a two but I thought

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1 Marshal Diamond said that juror number 7 is the one that
2 handed it to him, but I think it's a number two.

3 MR. MICHALEK: Okay.

4 THE COURT: It does not look like number 7's hand writing
5 because the hand writing's very different so I think it's
6 juror number 2.

7 MR. MICHALEK: Okay.

8 THE COURT: Would be Kisler [phonetic]. So I'm going to
9 ask that be marked as court's exhibit --

10 MR. MICHALEK: Are you going to read that question, Your
11 Honor?

12 THE COURT: Well, I would inclined to do so unless you
13 have some objection.

14 MR. MICHALEK: I don't have an objection. I was
15 wondering whether you were going to read it now for the jury
16 first or --

17 THE COURT: Might as well do it first before you begin
18 your examination. That way we don't have to interrupt you.

19 THE WITNESS: Your Honor, is that -- you will read the
20 question but also ask me to address it?

21 THE COURT: Yes. If you would be so kind.

22 THE WITNESS: Yes, certainly.

23 THE COURT: Okay.

24 [Jury In]

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

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1 Will counsel stipulate to the presence of the jury?

2 MR. WALL: Yes, Your Honor.

3 MR. MICHALEK: Yes, Your Honor.

4 THE COURT: Well, before you begin, Mr. Michalek, there's
5 a question submitted by one of the jurors I'd like to read
6 into the record and ask the witness to answer if he can. It
7 reads: "Someone enjoys flying. Then something happens and
8 they cannot fly any more so they learn to sail. They enjoy
9 it. Would your loss of enjoyment of life hold up?"

10 THE WITNESS: Okay. It's a great question. So when the
11 question said they enjoy it, if they enjoy it just as much,
12 just the same -- so they used to fly; for some reason someone
13 took away their airplane, then they learned to sail and
14 discover, gee, I like sailing just as much as flying -- you
15 wouldn't have any loss of enjoyment of life.

16 But if they really liked flying and sailing is not
17 quite as enjoyable, it would be like you go to a multiplex and
18 you really want to see a film and it's sold out so you can
19 only get a ticket for a different film. You might enjoy that
20 film as much -- you didn't know about it -- but you might
21 not. When there's an injury that affects your life in a
22 multitude of ways there are probably some ways in which you
23 will substitute and find things to be okay.

24 But would it -- would all the things you couldn't do
25 before, because if there's constant pain then all sorts of

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1 things you're no longer trying to do as much, it's possible
2 that nothing changes in your enjoyment of life because you've
3 found alternatives in ever single moment of ever single day
4 with respect to how you do your job and how you do everything
5 else in life.

6 It's hard to imagine that with a significant injury
7 you could shift and get still the same hundred percent. It's
8 certainly possible. I can't tell you whether that's true in
9 this case or not no more than I can tell you if you don't see
10 the move of your choice at the multiplex that every time that
11 happens you will always enjoy the other movie just as much. I
12 don't know. You may; you may not.

13 THE COURT: Thank you. Any follow-up questions by
14 counsel?

15 MR. WALL: No, Your Honor.

16 MR. MICHALEK: No, Your Honor. Not on that point.

17 THE COURT: Okay. Whenever you're ready, Mr. Michalek.

18 MR. MICHALEK: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. MICHALEK:

21 Q Mr. Smith, one of the first things you mentioned in
22 your direct examination was a textbook that you wrote. Is
23 that correct?

24 A It was -- I was -- yes. I was asked about writings
25 and publications.

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1 Q Okay. There's a textbook you wrote sometime around
2 1990. Is that correct?

3 A First published in 1990 with some updates for
4 another half dozen years, I think.

5 Q There was something you said you relied upon in
6 forming your opinions in this case. Is that true?

7 A No. I wouldn't rely on my own work. I would rely
8 on the work of others.

9 Q Well, when you say your textbook is authoritative
10 [sic] in the field --

11 A It's a pretty basic textbook; it's been used in
12 college courses at Penn State, University of Pennsylvania,
13 University of Wisconsin, Bellarmine College. It's pretty much
14 basic.

15 Q There's no need to be modest. I mean, you would say
16 that other people in your field would rely upon your
17 textbook. Isn't that true?

18 A I would say they read it and found it useful, yes.
19 I'm not going to pat myself on the back too much on that.

20 Q But in the industry people would rely upon it,
21 correct?

22 A Look, it's not as if I'm the only person -- that
23 that textbook is the only textbook. So they will read it, and
24 they will find ideas in there that are similar elsewhere.

25 Q I appreciate your modesty, Mr. Smith. I'm just

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1 asking a simple yes or no question, sir. There's no need to
2 be modest --

3 A Well, they might --

4 Q Is it a yes? Your text look would be relied upon in
5 the field. Is that true?

6 MR. WALL: Objection. Asked and answered.

7 THE COURT: I think it was. Sustained.

8 BY MR. MICHALEK:

9 Q What other books -- you said you contributed to a
10 half dozen other books. Did you ever contribute to a book
11 called The New Hedonics Primer For Economists And Attorneys?

12 A I think I have as many chapters in that as any other
13 author. There are no authors that have more chapters in
14 that -- that's one by Ward and Ireland?

15 Q Correct.

16 A So I think I have three chapters in that book.

17 Q Okay. And once again that would be considered
18 authoritative in the field correct?

19 A Well, here's the problem with your question. You're
20 taking a huge thing and you're saying that's authoritative --

21 MR. MICHALEK: Your Honor, I'm asking simple leading yes
22 or no questions. I would ask that the court assert --

23 THE COURT: Well, if he can answer yes or no, otherwise
24 you may need to rephrase the question.

25 THE WITNESS: Well, just like my textbook, that book's

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1 got many chapters and it's written by many different people.
2 So there are things in there that I might not agree with. I
3 haven't actually read the whole book. Of course I read my
4 chapters, and I skimmed and read some of the other chapters
5 that interested me,

6 But -- and even when you say, "Is this article
7 authoritative?" there may be some paragraphs that you might
8 say I don't agree with. I might agree with this part of the
9 article, not that part of the article.

10 So it's hard to say is the whole authoritative any
11 more than -- it's different to say well, was that a perfect
12 movie? No. There might have been some scenes that you liked,
13 other scenes you thought should be filmed differently.

14 So I would say there are chapters in that textbook
15 that some people might regard as very authoritative and other
16 chapters that people might regard as very questionable. I
17 actually don't recall all the other chapters in that book.

18 BY MR. MICHALEK:

19 Q You've testified in over 200 -- I think you said
20 over 200 times at trials. Is that -- --

21 A On the loss of enjoyment of life issue. Most of the
22 work that I do involved other things, actually.

23 Q So you are familiar with what a learned treatise
24 is. Is that correct?

25 A Do I understand what the word means?

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1 Q Yes.

2 A Yes, of course.

3 Q Okay. So would you consider your book and
4 Mr. Ireland's book to be a learned treatise.

5 A Well, it's Ward and Ireland --

6 Q Okay.

7 A -- and you can't -- look, it's pretty basic stuff.
8 So you can't really raise it to a high level. It's not a high
9 quality, peer-reviewed publication with high quality new
10 research. I have done new research published, but I regard my
11 textbook as pretty basic. So I don't know that it's a learned
12 treatise any more than a high school English book is a learned
13 treatise. It's a pretty basic book. I don't claim that it's
14 the leading thing in the field. There's a lot of sophisticate
15 economics that are not covered in a basic forensic economics
16 textbook.

17 Q MR. Smith, I'm going to try and get through this
18 pretty quickly because we've been here for a few weeks now and
19 I'm asking questions. Okay? These are either yes or no or
20 the answer will be I can't answer the question. Other than
21 that I would ask you to hold yourself to those answers; either
22 yes, no, or I don't know. If I ask you a question that
23 doesn't call for a yes, no, or I can't answer that question,
24 feel free to expound. But really we want to get through this
25 testimony as fast as possible. Okay? Can you hold yourself

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1 to that, please.

2 A I'll do my best unless the answer's misleading as
3 yes or no, yeah.

4 Q I'm going to state my answers all leading questions
5 except for the ones that I don't want to and for those I feel
6 free for expound. But really this is just a simple yes or no
7 or I can't answer that question with a yes or no. Do you
8 understand that?

9 A I'll do my best.

10 Q Now your first report was written April 16th, 2009.
11 Is that correct?

12 A Yes.

13 Q Okay. And what was the date of your last full
14 report in this case?

15 A Well, we just had the testimony last week of the
16 medical doctor, so it was dated -- yesterday we were given the
17 numbers to run the calculations. But loss of enjoyment of
18 life figures were run quite some time ago.

19 Q Okay. So March 29th, 2011?

20 MR. WALL: Two thousand what?

21 THE WITNESS: 2011. It's this year.

22 MR. MICHALEK: Yes.

23 THE WITNESS: This is 2011.

24 THE COURT: Still is.

25 MR. MICHALEK: I thought I said 2011, Your Honor.

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1 BY MR. MICHALEK:

2 Q Yes, on March 29, 2011, that was the date of the
3 last record. Correct??

4 A With the medical costs from last week, yes.

5 Q Okay. And then you had a supplement report that you
6 gave on March 30th, this morning?

7 A With the -- that last \$65,000 item that might happen
8 -- that would be an item that would occur 18 years from now.

9 Q Okay. When was it that you were first asked to
10 calculate the present value of Mr. Simao's future life care
11 based upon the cost provided by Dr. McNulty?

12 A I think that was last week.

13 Q Okay. Can you give me a day?

14 A What day -- I honestly don't know. I think someone
15 either e-mailed it or faxed it to us. The testimony of Dr.
16 McNulty was March -- last week, March 23rd. I actually don't
17 know when in the last several days we received it, but it was
18 done yesterday.

19 Q Okay. So sometime, after Doctor McNulty testified
20 here last week you were asked to supplement your report. Is
21 that correct?

22 A Correct.

23 Q Do you recall who it was who asked you to do that?

24 A It was probably by e-mail. I don't know. There's
25 some staff people at the Mainor Eglet firm, and the e-mail

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1 usually comes to me and at least one of my staff. So I really
2 can't say who sent the e-mail.

3 Q Do you recall what was said or what was written in
4 the e-mail?

5 A Nothing other than the general notion of here's some
6 costs, please use these and put -- and do a life care plan
7 analysis.

8 Q And what was it that you were provided?

9 A Well, the testimony and this summary page in
10 particular.

11 MR. MICHALEK: If I could approach the witness, Your
12 Honor.

13 THE COURT: Sure.

14 MR. MICHALEK: For the record it's a photo copy of the
15 Exhibit 65.

16 THE COURT: Thank you.

17 BY MR. MICHALEK:

18 Q Did you read Dr. McNulty's entire trial testimony?

19 A I did not need to, no. I'm not a medical doctor.

20 Q So you reviewed only the portion of the testimony
21 that talked about or gave the numbers. Is that correct?

22 A Yes.

23 Q Your calculations require that Dr. McNulty actually
24 recommend a future surgery. So that if he didn't actually
25 recommend that surgery your future numbers would be invalid.

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1 A I'm not here to decide who recommends what. If
2 someone says to me, here's six numbers, here's how often they
3 are needed, it doesn't matter to me whether this applies to
4 Mr. Simao and whether it's Sigmund Freud who recommends it or
5 not.

6 These figures are the figures that went into my
7 spread sheet program. And really whether they should be used,
8 not be used, which doctor recommended them, how much you
9 believe in it -- totally irrelevant to me.

10 I can give you what these costs are, leave it to
11 somebody else to determine should we award those costs, are
12 these the right costs, should we do something else -- I have
13 no idea.

14 Q Well, let's take a look at what Dr. McNulty
15 testified.

16 A You're just going to get nowhere with -- you're not
17 going to get anything from me on that.

18 MR. EGLET: Your Honor, I object.

19 MR. MICHALEK: Can we approach?

20 MR. EGLET: I move to strike that, Your Honor.

21 THE COURT: The jury will disregard the witness's last
22 statement.

23 [Bench Conference Begins]

24 MR. EGLET: Are you going to ask the economics professor
25 to discuss whether it's unreasonable to create a medical

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1 probability of a certain procedure?

2 MR. WALL: He's going to cross-examine this witness on
3 whether Dr. McNulty's testimony as to a reasonable degree of
4 medical probability that our client will require a spinal cord
5 stimulator in the future. It's the same problem.

6 THE COURT: [Indiscernible].

7 MR. WALL: Excuse me. Let me finish, please.

8 THE COURT: Sure

9 MR. WALL: This gentleman is an economist. He based
10 calculations based on numbers that were provided. It's the
11 jury's to determine whether Dr. McNulty gave that testimony or
12 not. Counsel can argue in his closing argument, but it's not
13 appropriate for cross-examination of an economist as to
14 whether a spinal cord stimulator is reasonable, necessary, is
15 actually recommended by Dr. McNulty or not. It doesn't make
16 any difference.

17 MR. MICHALEK: It goes to the foundation of his opinion,
18 Your Honor. He testified that he did not read Dr. McNulty --

19 THE COURT: [Indiscernible] ask you to keep your voice
20 down please, Mr. Michalek.

21 MR. MICHALEK: He did not read the entire testimony of
22 Dr. McNulty. I'm simply foundationally making him aware of
23 what Dr. McNulty actually said. It is certainly appropriate.

24 THE COURT: Please keep your voice down, Mr. Michalek.

25 MR. EGLET: It's no different than requesting Dr. McNulty to

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1 calculate the present value. Guess what? He's not
2 qualified. It's not his expertise.

3 THE COURT: Given this witness's answer to your last
4 question, I don't think any of this is relevant. This is not
5 his area of expertise.

6 [Indiscernible] you need to get your slide down too.

7 [Bench Conference Ends]

8 MR. WALL: Please take the slide down. I didn't realize
9 the slide was up. We ask that the jury be admonished to
10 ignore the testimony on the slide.

11 THE COURT: Well, the jury's already heard the testimony
12 before court sustained counsel's objection.

13 So disregard the slide that you saw to the extent that it
14 comes in the course of this witness's testimony.

15 All right. Please proceed Mr. Michalek.

16 MR. WALL: Your Honor, may I just point out that that
17 slide was not --

18 MR. MICHALEK: Your Honor, I thought we were -- that was
19 being objected to --

20 MR. WALL: May I point out that --

21 THE COURT: Counsel approach, please.

22 [Bench Conference Begins]

23 MR. WALL: I'd like to point out that that slide was not
24 on when we approached the bench -- that it was put up as we
25 were approaching --

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1 THE COURT: I believe it was.

2 MR. WALL: I want his tech admonished not to do that
3 again.

4 MR. MICHALEK: First, Your Honor, if there's anybody to
5 admonish, I'm the one who asked the tech to put it up. So I
6 don't think --

7 MR. WALL: While we were approaching the bench. Then I
8 want him admonished.

9 MR. MICHALEK: No, I asked -- I asked that it be placed
10 up, okay? I approached, I started to ask the question, you
11 made an objection, we came up here. But I believe it was
12 already up.

13 MR. WALL: It was not up.

14 THE COURT: Let's carry on. It's late in the day. Let's
15 carry on.

16 [Bench Conference Ends]

17 BY MR. MICHALEK:

18 Q All right. So let's get to the point here. Then
19 what you're saying is because you're not a doctor you need to
20 rely upon Dr. McNulty to determine whether there's a need for
21 this future surgery or spinal cord stimulator or whatever. Is
22 that correct?

23 MR. WALL: Same objection, Your Honor.

24 THE COURT: Same ruling. Sustained.

25 ///

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1 BY MR. MICHALEK:

2 Q Do you have your report dated December 14th, 2010,
3 in front of you?

4 A Yes.

5 Q At that point in time you had a future life care
6 plan or value of \$450,165. Is that roughly correct?

7 MR. WALL: Your Honor, could we approach please?

8 THE COURT: Sure.

9 [Bench Conference Begins]

10 MR. WALL: We withdrew -- that report was based on a life
11 care plan presented by a Ms. Hartland [phonetic], a nurse. We
12 sent them formal notice that we withdraw her as a witness and
13 we withdrew that life care plan. So those calculations have
14 nothing to do with the spinal cord stimulator that Dr. McNulty
15 testified to last week or the adjacent segmental breakdown
16 that Dr. Wong testified to yesterday. So he's trying to
17 mislead this jury about calculations that are based on a life
18 care plan that has not been present into evidence and it's
19 been withdrawn. And they've received notice that it's been
20 withdrawn.

21 I would ask that his last question be stricken and
22 he be admonished not to mislead this jury when he's been --
23 they've been formally instructed that those numbers have been
24 withdrawn.

25 MR. MICHALEK: They're allowed to withdraw Kathy

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1 Hartland, but the fact is he wrote a report detailing what the
2 economic losses are. Now that's changed in the last 24 to 48
3 hours --

4 THE COURT: Do you know how to whisper?

5 MR. WALL: Do you know how to whisper?

6 MR. MICHALEK: Sorry. That's changed in the last 24 to
7 48 hour. I think it's certainly relevant to this jury --

8 MR. WALL: It's not relevant if its calculations are
9 based on of evidence that's been presented. That evidence has
10 not been presented. It's been withdrawn. We specifically
11 followed the rules to withdraw that. What he's doing is
12 unethical and he should be reported to the bar for it.

13 THE COURT: Well, here's the thing. The report has been
14 withdrawn and [indiscernible] sustained objection.

15 MR. WALL: As to his last question [indiscernible].

16 [Bench Conference Ends]

17 THE COURT: The jury will disregard counsel's,
18 Mr. Michalek's, last question.

19 BY MR. MICHALEK:

20 Q Let's go to the supplemental report dated March
21 30th, 2011. That's your one from this morning. Do you have
22 that?

23 A Yes.

24 Q Okay. Do you recall when you were first asked to
25 give an opinion based upon the testimony of Dr. Wong?

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1 A Last night.

2 Q Okay. And did you actually review his trial
3 testimony?

4 A I think I was given the number. I don't believe I
5 had the testimony.

6 Q Okay. So plaintiff's counsel gave you some
7 information, and upon that you've based your opinion. Is that
8 correct?

9 A They said this was the figure that was testified to,
10 and when I put that in to an analysis, yes.

11 Q Okay. And if the figures were wrong or the
12 testimony's different from Dr. Wong, that would obviously
13 affect whether your number is valid. Is that true?

14 A My numbers are correct using the 64,527 number. If
15 there's another number then my numbers don't apply to that
16 number.

17 Q But if Dr. Wong didn't recommend surgery there would
18 be no need for your number, 72,883. Is that true?

19 A I'm not here to tell you what's needed. I'm only
20 here to tell you what the numbers are. Kind of like a human
21 calculator. I'm not the kind of doctor that helps people, as
22 my mother used to say. I'm a Ph.D. doctor, not a medical
23 doctor.

24 MR. MICHALEK: Your Honor, I asked a simple yes or no
25 question. Or yes, no, or I don't know. If the court could

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1 instruct the witness to either answer yes, no, or I can't
2 answer, a simple I don't know.

3 THE COURT: You know, I think he's doing the best he
4 can. Let's proceed.

5 BY MR. MICHALEK:

6 Q Let's discuss your willingness-to-pay theory. Now
7 this is the value of life that Mr. Simao feels as a result of
8 this accident?

9 A I didn't hear your full --

10 Q In short. Mr. -- this is the value Mr. Simao would
11 place on the lost enjoyment of his life. Is that true?

12 A It's really the value that an economist would say is
13 associated with a 15 or 30 percent reduction in the quality of
14 life, yes.

15 Q And you discussed this value with him? Is that
16 true?

17 A I have didn't discuss my calculations with him, no.

18 Q Have you ever spoken to Mr. Simao?

19 A He was interviewed at my direction by a member --
20 one of my five staff economists. So I've not the spoken with
21 him until I met him today.

22 Q Okay. So until today you actually had not spoken
23 with him. Is that true?

24 A I actually had not spoken to him, yes.

25 Q And you say that that member of your staff spoke

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1 with Mr. Simao. Is that true?

2 A Yes.

3 Q Okay. When did that conversation take place?

4 A There was an initial interview on April 15th of
5 2009, along with Mrs. Simao on that day, and then also the
6 next day, April 16th and then another telephone interview
7 December 13th. So there were a total of four conversations;
8 three with Mr. Simao and one with his wife.

9 Q You were provided a copy of Mr. Simao's deposition
10 to review. Is that true?

11 A Yes.

12 Q Okay. And you did review it?

13 A Yes. But I caution you I didn't memorize it.

14 Q Okay. You did see in there, in the deposition, that
15 Mr. Simao said he never spoke with you or anyone from your
16 office. Is that true?

17 A Could you direct me to the page number and line
18 number, sir?

19 Q I'd be happy to.

20 MR. MICHALEK: Your Honor, I'd like to move to publish
21 the deposition of Mr. Simao, volume II.

22 THE COURT: Any objection?

23 MR. WALL: No, Your Honor.

24 THE COURT: So ordered.

25 [Pause]

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1 MR. MICHALEK: Your Honor, if I could approach the
2 witness.

3 THE COURT: Yes.

4 BY MR. MICHALEK:

5 Q I would have you look at page 36, line 20. It says:
6 "Have you ever met Stan Smith?" There is a question by, or
7 statement by defense counsel, "Personally or on the phone?"
8 Mr. Rogers says, "In any way." And the answer was, "Not that
9 I recall." And the next question: "Have you ever discussed
10 with anyone related to this lawsuit the distribution of
11 household duties between your and your wife and your
12 children"? "Have I discussed it with anybody?" "Right."

13 And the answer is --

14 MR. WALL: Wait, wait. You didn't read the whole answer.

15 MR. MICHALEK: I'm switching to the next page.

16 MR. WALL: Well, wait a minute. If you're going to read
17 you got to read the whole question and answer, Judge.

18 THE COURT: Counsel approach, please. Counsel approach
19 please.

20 [Bench Conference Begins]

21 MR. MICHALEK: [Indiscernible].

22 MR. WALL: That isn't the objection. He didn't read the
23 answer.

24 MR. MICHALEK: [Indiscernible].

25 MR. WALL: He was asked a question and then skipped a

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1 whole bunch of answers and stuff.

2 THE COURT: Wait a minute. Wait a minute. If you're
3 attempting to use this to impeach him, this doesn't -- nothing
4 that I saw on the screen --

5 MR. WALL: Doesn't even impeach him.

6 THE COURT: -- impeaches his answer.

7 MR. MICHALEK: It says right here [indiscernible],
8 "Question, Personally or on the phone in any way." "Not that
9 I recall."

10 MR. WALL: He said he didn't. He said -- that's what he
11 said on the stand too.

12 THE COURT: This statement that he gave here on the stand
13 in person in front of the jury is not contradicted
14 by [indiscernible].

15 MR. MICHALEK: Your Honor, it goes on to say:

16 "I didn't discuss that with anybody other than
17 Mr. Rogers." [Indiscernible].

18 MR. WALL: Household -- his division of household
19 services. That's what he's skipping over. He's misleading
20 this jury.

21 MR. MICHALEK: Stan Smith actually wrote an expert report
22 concerning household services. And the plaintiff's loss of
23 household services. So whether he spoke to the plaintiff
24 regarding this item is certainly relevant.

25 MR. WALL: It doesn't impeach his testimony.

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1 THE COURT: Have you got anything in there that impeaches
2 what he said? Because I haven't seen that.

3 MR. WALL: You have no idea what you're doing, do you?

4 MR. MICHALEK: The fact is this does say the plaintiff
5 has never spoke with either Mr. Smith or anybody from his
6 office.

7 MR. WALL: It says it about household services.

8 THE COURT: Where does it say that?

9 MR. MICHALEK: Concerning household services -- so the
10 fact that no member of his office spoke with him regarding it
11 is certainly important.

12 MR. WALL: Your question was --

13 THE COURT: Where does it say --

14 MR. WALL: -- about willing --

15 THE COURT: [Indiscernible] you're telling me.

16 MR. WALL: Your question was about what he needs to pay
17 in hedonic damages, not household services. And then you
18 tried to impeach him with this. It doesn't impeach him.

19 MR. MICHALEK: Second, Your Honor [indiscernible].

20 THE COURT: You haven't ask him any question about that.

21 MR. MICHALEK: I haven't gotten to that point yet, Your
22 Honor. But the point is he was hired to assess household
23 services, loss of relationship, and the hedonic damages. This
24 deposition transcript shows he didn't talk about household
25 services and he didn't talk about discussion of the effect on

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1 his relationship.

2 THE COURT: Let me see it. Because [indiscernible].

3 MR. WALL: See, here's the thing, judge. As I just said
4 a moment ago when we were up last time, we also withdrew --
5 there's nothing on direct about loss of household services.

6 THE COURT: Uh-huh.

7 MR. WALL: We didn't present a loss-of-household services
8 claim in this case. We haven't presented to the jury. So he
9 doesn't get to cross-examine him on household services because
10 we didn't ask for that.

11 THE COURT: That's true.

12 MR. MICHALEK: [Indiscernible] loss of consortium --

13 MR. WALL: What page does that start on, Judge?

14 THE COURT: Page 36. At the bottom.

15 MR. WALL: This is all household services.

16 THE COURT: Give me a chance to read it. This kind of
17 jumps around so much.

18 MR. WALL: It's household services, Judge.

19 MR. MICHALEK: [Indiscernible].

20 THE COURT: The household issue isn't an issue for the
21 jury --

22 MR. WALL: No. Because we didn't present it. It's --
23 this is all household services.

24 THE COURT: This part you just showed the jury didn't
25 impeach him. I don't know how else you intended to use this

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1 because you haven't asked him any questions about loss of
2 consortium.

3 MR. EGLET: And ask him whether anyone from his office
4 spoke with the plaintiff regarding the loss of relationship.

5 MR. WALL: Then ask him that.

6 THE COURT: You haven't asked him any question --

7 MR. MICHALEK: Your Honor, I intend to ask him now.

8 MR. WALL: Okay. So where is that in the depo then that
9 impeaches him? Where is he impeached by that in the
10 deposition.

11 MR. MICHALEK: Right here.

12 MR. WALL: What page is that.

13 MR. MICHALEK: It's [indiscernible].

14 THE COURT: I can't hear you.

15 MR. WALL: What page is that?

16 MR. MICHALEK: That's 37, line [indiscernible].

17 MR. WALL: It's line what? Okay.

18 THE COURT: And what's the answer?

19 MR. MICHALEK: "Not that I can recall."

20 MR. WALL: No. No, no, no, no. He said that --
21 clarification by his attorney at the time says: "Since the
22 last deposition." Mr. Rogers says, "Yes."
23 Mr. [Indiscernible], "I guess we can assume that for all
24 questions." "Right." Then he says, "Not that I can recall."
25 He likes to leave out all this stuff that clarifies

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1 it.

2 MR. MICHALEK: Plaintiff's deposition was in 2008, prior
3 to Stan Smith ever being hired by plaintiff's counsel, prior
4 to him getting any surgery. So after that point in time
5 Mr. Rogers asked him had anybody talked to you about it.
6 There's no way that Mr. Smith talked to the plaintiff or
7 anybody in his office talked to the plaintiff before there was
8 even the hiring date which would be April of --

9 MR. WALL: It doesn't mean you get to leave it out. You
10 don't get to leave stuff out in the deposition when you read
11 it to the jury.

12 MR. MICHALEK: The fact is he was asked whether there was
13 a discussion between anybody other than Mr. Rogers --

14 MR. WALL: Okay, well --

15 MR. MICHALEK: -- about loss of relationship.

16 MR. WALL: Let me point something out. Here's the
17 problem with this, okay? The interview about the loss of the
18 marriage relationship was with Mrs. Simao. She's the one who
19 has the loss of consortium claim, not Mr. Simao. So the
20 interview would have been with her. Now if he's got somewhere
21 in her deposition where she says nobody asked her about those
22 questions then that's fine. But this has nothing to do with
23 Mr. Simao. Mr. Simao doesn't have a loss of consortium
24 claim. That belongs to his wife.

25 THE COURT: Right.

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1 MR. WALL: This is so incredibly improper, counsel.

2 THE COURT: Sustain the objection. Let's continue.

3 [Bench Conference Ends]

4 BY MR. MICHALEK:

5 Q I believe you indicated on direct that this "Value
6 of Life" theory is where you pay a certain amount of money,
7 say \$46 for a carbon monoxide protector and that lowers the
8 risk of death by 1/1000th; is that true?

9 A It's one of the two major types of studies, yes.

10 Q Okay. So if 100,000 people each paid \$46 for the
11 detector, then one life would be saved, and if you do the
12 little math of 46 times 100,000 you get 4.6 million dollars?

13 A Yes.

14 Q Now, is this theory apply to everyone, this "Value
15 of Life" theory, or is it just the people who pay the \$46 to
16 eliminate the risk of death?

17 A Well, the studies look at dozens of things that are
18 affordable to the average person. So you may not have bought
19 a smoke -- a carbon monoxide detector, but if it's the kind of
20 thing you would do -- even though you haven't gotten around to
21 it, because there's a lot of things I don't get around to, if
22 it's the kind of thing I would do, then you could apply that
23 to me, even if I haven't done it.

24 Q Are those who would not be willing to pay the \$46 to
25 eliminate that risk, are they valuing their life at less than

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1 4.6 million?

2 A Well, you'd have to look at the individual reasons,
3 but then do they do other things: Do they have, you know,
4 routine medical exams, because those can save lives; do they
5 take other kinds of medical supplements; or exercise; or --
6 there's lots of things we can do to reduce our rate of death.
7 So just because I do some things, you know, I look two-ways
8 when I cross the street, we all do common things. I don't
9 have to do everything, but I'm not perfect and I imagine
10 you're not perfect, I don't do everything in the world I can
11 do to keep my life perfectly safe or I'd dig a hole in the
12 ground and never come out. So we undertake reasonable things,
13 most of us, not all of us.

14 And then there's a second class of studies, also,
15 that look at what workers are paid to endure risk of death.
16 We had this tragedy in the Gulf, where we had loss of life.
17 Workers are paid premiums to work in risky jobs. It's a
18 second class of studies.

19 Does this -- do these studies apply to every single
20 one of the 300 and whatever -- 100 -- 300 million Americans
21 there are, I'm not going to say it does. Does it apply to the
22 average person, absolutely. And no economist would ever come
23 into court and say it wouldn't apply to the average person.

24 Q So the riskier behavior a person engages in, the
25 less likely it is that they value their life at 4.6 million

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1 dollars, given this arrange; is that true?

2 A No, not at all. I mean, people go to the beach,
3 that's a risky behavior, but they enjoy the beach. And so you
4 can't just say, because you do something risky, it means you
5 don't value your life.

6 Q Well, not everyone has a carbon monoxide detector,
7 correct?

8 A That's correct.

9 Q Okay. So there's a diversity in the population
10 about people who are going to use this device versus those who
11 will not, correct?

12 A If -- no, I think what I said earlier was, if it's
13 the kind of thing that most people would buy, not that
14 everybody has to, but most would think, yeah, it's probably a
15 good thing to have, then it would apply to most people. We
16 didn't pick something so strange that hardly anybody would do
17 it.

18 You could, also, look -- I mean, movie stars,
19 politicians, some people have bodyguards. Most of us don't
20 figure the paying for -- couldn't afford it. Most of us won't
21 pay that amount of money for a bodyguard, we just don't value
22 our life that much.

23 Q My question is just something simple, though. There
24 is diversity in the population about individuals and whether
25 they would buy a carbon monoxide detector; isn't that true?

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1 A Not everybody would, yes.

2 Q Do you know whether Mr. Simao has a carbon monoxide
3 detector?

4 A I told you, I assumed he was an average person. I
5 don't know whether he has a carbon monoxide detector.

6 Q Prior to the April 16th, 2009 report, you had not
7 spoken with Mr. Simao, correct?

8 A The first time, I believe, was April 15th, so, yes,
9 the prior day.

10 Q You had spoken, you personally?

11 A Well, I told you, I have not spoken to him --

12 Q So --

13 A -- until we met.

14 Q Okay. So as of the date of writing your report, of
15 April 16th, 2009, you don't know whether Mr. Simao had sought
16 any counseling; is that true?

17 A I don't recall if it was mentioned in the interview
18 notes and I don't recall if he said that in the deposition.

19 Q So you don't know that?

20 A As I sit here, I don't know. I mean --

21 Q You don't know whether there was any troubles in his
22 marriage; is that true?

23 A Hard to imagine a marriage that doesn't have
24 troubles, but if someone told me I had no troubles in my
25 marriage, I suppose I would believe it, but that would be a

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1 rare person.

2 Q Well, let's take a look at your April 16th, 2009
3 report. Can you tell me in the report where it contains a
4 listing that there was counseling sought by the plaintiff
5 where there was troubles in his marriage?

6 A I thought we just discussed these.

7 Q No, I'm saying -- I'm asking you to look at your
8 report --

9 A Yes.

10 Q -- and tell me if your report lists whether the
11 plaintiff had sought counseling or whether there has been any
12 troubles in his marriage.

13 A I thought I told you that I'm not aware, one way or
14 the other, whether he had troubles in his marriage and I'm
15 unaware one way or the other. So why --

16 Q Okay.

17 A -- would you, then, ask me if it's in the report. I
18 mean, I know what's in my report.

19 Q Okay. I'm asking you whether it's in there. All
20 right. Is it listed in the report whether Mr. Simao feels he
21 is enjoying life less than before the injury?

22 A Well, it's in the work notes, which are -- which are
23 the notes from the four interviews. So we have extensive
24 notes from the four interviews and there's detail in there
25 about the impact on his ability to enjoy life.

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1 MR. MICHALEK: Your Honor, I asked a simple yes or no
2 question as to whether it was in the report. If the Court
3 would, please, direct the witness to answer whether it was in
4 the report or whether it's not. We don't need continual
5 speaking by the witness outside of the realms of the
6 questioning.

7 THE COURT: I think he's doing the best he can, Mr.
8 Michalek.

9 THE WITNESS: Just to clarify, the interview is
10 referenced in the report, but the report does not contain the
11 interview. The interview -- the report says there was an
12 interview and then you go to the interview for the details of
13 the interview.

14 BY MR. MICHALEK:

15 Q All right. You, yourself, do not have any trainings
16 sufficient to give an actual pagan of the percentage of Mr.
17 Simao's lost enjoyment of life; is that true?

18 A It's outside my field. That's correct.

19 Q You would rely upon a psychologist in order to
20 determine whether -- what the percentage would be; is that
21 true?

22 A It's not I would rely -- Mr. Simao, you know, may
23 have an answer to that. I'm simply going to say, it's not my
24 job to come up with a percentage. There has been an impact,
25 he says, he's given us detail of the impact. I know that

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1 psychologist, or psychiatrists, or people in the psychosocial
2 evaluation field have assessed those kinds of percentages.
3 Most of the time, in a case, we don't have a formal assessment
4 like that.

5 Q Okay. Well, since 1990, when you wrote your book,
6 you said that it should be a forensic psychologist who would
7 look at it, talk to the plaintiff, and determine that fifteen
8 to thirty percent number that you have thrown out there; is
9 that true?

10 A I don't think I said that in the book. I did write
11 an article that suggested, because it was written with a PhD
12 psychologist, that psychologist has metrics that can do those
13 assessments, but as to whether it should be done or shouldn't
14 be done, it's really up to somebody else to make that
15 decision.

16 Q Well, let's take a look at your book. It'll be page
17 67 in the supplement.

18 MR. EGLET: Can we approach, Your Honor, please.

19 THE COURT: Sure.

20 [Bench Conference Begins]

21 MR. EGLET: I think he [indiscernible] in front of the
22 jury. He can't publish this book.

23 MR. MICHALEK: Let me -- can --

24 THE COURT: What?

25 MR. EGLET: He can't publish this book.

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1 MR. MICHALEK: Your Honor, it his book. He's the last
2 client. He used it in his report in his report that he
3 states. It is a learning treatise.

4 MR. EGLET: Actually, he said it wasn't a learning
5 treatise.

6 MR. MICHALEK: Your Honor, he was being modest. He
7 said --

8 THE COURT: I'll ask you to keep your voice down, please.

9 MR. MICHALEK: He said it was a learning treatise.

10 THE COURT: He didn't say that, Mr. Michalek. He did not
11 say that.

12 MR. MICHALEK: He said it's relied upon, generally --

13 MR. EGLET: No, he didn't.

14 MR. MICHALEK: -- at the beginning. Yes, he did.

15 MR. EGLET: No, he did not.

16 MR. MICHALEK: He was being modest, but he said a lot
17 people have used it --

18 MR. EGLET: No, you said that.

19 MR. MICHALEK: Yeah, he subpoenaed this document that is
20 part of his file, and it was listed in his report.

21 THE COURT: I think -- do you know the specific question
22 for him regarding that book?

23 MR. MICHALEK: The book? Yeah, a couple, but the book
24 specifically states that the fifteen to thirty percent is
25 something that a psychologist should be treating. And I'm

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1 simply going to use that, for right not, that page to go for
2 that.

3 MR. EGLET: First of all, as the Court knows, he did not
4 say it was learning treatise.

5 THE COURT: No, he didn't.

6 MR. EGLET: He also said he did not rely on it for his
7 opinions today. He did not indicate it as part of his file.
8 So all three of those representations are false by Mr.
9 Michalek, all of them false. So there's no foundation.

10 Second of all, they never identified this book as
11 something that they would use for an impeachment purposes,
12 which you have to do, just like we identified all the
13 depositions in our -- of their experts that we have used for
14 impeachment. We identified them, we produced them, they have
15 done nothing with respect to this book. So they don't haven't
16 done that.

17 And second of all, and they still won't get to
18 publish the book, even though it's a learning treatise issue
19 to cross-examine the witness with it, but you don't get to
20 publish it to the jury. So it's improper use, but it's not a
21 learning treatise, there's no testimony he relied upon it and
22 there's no testimony that he used it in his opinions or part
23 of his file. So there's no basis to even impeach him for it.

24 MR. MICHALEK: Your Honor, it is a part of his file. In
25 fact, his website states that a copy of the book is given to

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1 every counsel who appoints him. It is a part of his file and
2 cited in his report, he relies upon it. It is something that
3 he used. I released the document to the jury. I can
4 certainly examine -- use it to examine him. If counsel says,
5 well, I don't want to see this light up there. That's fine,
6 I'll ask him the question and then I'll brief with the book.

7 THE COURT: I'll sustain the objection. Let's move on.

8 MR. EGLET: Thank you.

9 [Bench Conference Ends]

10 BY MR. MICHALEK:

11 Q Did you review any psychologists' determination of
12 the percentage of the lost enjoyment of Mr. Simao's life?

13 A I wasn't aware that there was any analysis along
14 those lines performed.

15 Q We were discussing earlier about -- one of the
16 jurors questions, about a juror who's -- I'm sorry -- a person
17 who has had an injury, can no longer fly, and then they go and
18 they can -- they take up sailing, and whether they enjoy
19 sailing more than they enjoyed flying; do you recall that
20 testimony?

21 A Yes.

22 Q Okay. I want to switch to sort of a similar example
23 of a person who has a pinky injury. And let's say they play
24 the piano. And so, because of their pinky injury, they can no
25 longer play the piano. And then someone else with the same

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1 injury, but they don't play the piano. So they haven't
2 enjoyed that, they really don't care whether or not they can
3 play it. Has one person, then, sustained the loss of
4 enjoyment of life, i.e. he can longer play the piano, and the
5 other individual who can care less whether or not they can
6 play the piano, has not sustained; isn't that true?

7 A Sure. Sure. You've hit on a very important point.
8 Because if the person with the pinky injury happens to be the
9 world's most famous concert violinist, that person's life
10 would be, perhaps, catastrophically impacted. And if I had an
11 injury to my pinky it would be a minor inconvenience, but I
12 don't play the piano.

13 Q Right. So --

14 A One injury could have a vastly different impact or
15 the same injury could impact people differently.

16 Q Right. Let's talk about this value, this 4.1- and
17 4.2 million dollars. You said that applies to everyone,
18 that's the average person, and that's the stock number that
19 you use when you determine your calculations; is that true?

20 A It's the value of a statistically average person,
21 yes.

22 Q Okay. But if we're going to take a person, let's
23 say Mother Theresa or, I believe, you said someone in prison,
24 do they have that same 4.2- value or do they have a different
25 value?

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1 A Well, if I am in prison, I -- well, I wouldn't be
2 enjoying my life as much I get to enjoy it when I do my work,
3 so I would be restricted and constrained. You mentioned
4 someone of great fame, Mother Theresa. We can't say that,
5 because someone is -- does good in society and his highly
6 regarded, we may value them, but are they enjoying their life
7 more. So you might -- you know, you might say, okay, we have
8 a leader of this country. If you look at all the 20, 30, how
9 many presidents have we had, 40 some presidents, they're all
10 in varying regards have been important people to this country.
11 But actually it's a very difficult job. So people we might
12 say, that was a great president, might have had a very
13 difficult time in the presidency and actually might not have
14 enjoyed their life as much as who don't get to have -- or
15 aren't subject to the pressures of the presidency. So just
16 because someone is famous, or a leader, or something doesn't
17 mean they enjoy their life more or less, but I do think you've
18 got chains around your ankles and you can't move away from the
19 cave wall, that's a pretty severe restriction on the ability
20 to enjoy life.

21 Q Well, they don't have the same value though, right?
22 I mean, let's take Donald Trump, right, hypothetical. Donald
23 Trump has a lot more than 4.2 million dollars. So if someone
24 -- and he was faced with a life threatening situation, you
25 would agree with me, that Donald Trump wouldn't say, oh, I'm

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1 not going to pay more than 4.1 million dollars to save my
2 life. He might pay five or six million. He's got that amount
3 of money, correct?

4 A Well, you're showing a deep misunderstanding of the
5 literature. When a gun is point to your head, you're going to
6 pay anything you have to save your life, if you're captured
7 and held hostage. The issue is not how much money do you have
8 in the bank. And, by the way, tomorrow anybody could lose all
9 their money from the bank and Trump has been down also. So
10 the real issue is, what do we, on average, value our life.
11 Not when the gun is pointed to our head, but would Trump buy a
12 carbon monoxide detector, probably. If you think even -- that
13 he has a higher value of enjoyment of life than the rest of
14 us, you could assign, if you wanted to, individualize figure
15 to him. The real issue is, is do Mr. and Mrs. Simoa [sic],
16 can we regard them as average people.

17 Q Simao.

18 A Simao, excuse me.

19 Q Okay. So -- but getting back to my question. We're
20 talking about Donald Trump and we've established this 4.2
21 million dollars as the value of someone's life. Mr. Trump
22 would not be held to that standard. He could pay and would
23 pay more to save his own life; isn't that true?

24 A The issue is the value of enjoyment.

25 Q It's a simple question. Would he pay more than 4.2

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1 million dollars to save his life, yes or no?

2 MR. WALL: Objection. Calls for speculation --

3 THE COURT: That's --

4 MR. WALL: -- and relevance.

5 THE COURT: -- asked and answered. Sustained.

6 BY MR. MICHALEK:

7 Q Let's talk about an elective surgery, where you've
8 got someone who's got a two percent chance of dying. And then
9 you have that same -- a similar elective surgery, where
10 there's a seventy percent chance of dying. You would agree
11 with me that the chance of death determines whether or not
12 that person is going to undergo an elective surgery, correct?

13 A That would be a factor, I would imagine.

14 Q Okay. So the larger the percentage chance goes to
15 death, that increases the amount of risk or the amount of
16 compensation or the type of surgery that person is going to be
17 willing to undergo; is that a fair statement?

18 A You just asked four questions. I'm not sure I
19 understand any of them.

20 Q Okay. If the chance of death is two percent for an
21 elective surgery, someone might think, okay, that's fine, but
22 at seventy percent, there's no way I'm going to risk my life
23 this elective surgery at seventy percent chance of death;
24 isn't that true?

25 A I can't agree with that, because if a two percent

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1 surgery has to do with getting rid of a little bit of pain in
2 my pinky, but the seventy percent chance of surgery gets me
3 from being a permanently paralyzed person back into having a
4 whole life, I might take that seventy percent surgery if I can
5 have -- if, otherwise, my life means lying flat on my back for
6 the rest of my life. So --

7 Q That's not the same --

8 A I'm not telling you I've ever faced those
9 circumstances, so I can't tell you what my real answer would
10 be, but I can't agree with your question. I can't agree with
11 what you think is the right answer to the question. No, I
12 think --

13 Q Let's do it this way.

14 A -- the percentages are just one of many factors.

15 Q Let's do this, this way. We'll do cosmetic, okay?
16 So then completely elective, doesn't affect someone's chance
17 of survival, or pain, or anything. Whatever you want:
18 Liposuction, breast enhancement, whatever it is. Same
19 surgery, two percent chance of death versus seventy percent
20 chance of death. The riskier person is going to say, hey, I'm
21 not going to get a liposuction if it's going to potentially
22 cause me seventy percent chance of me dying.

23 A I wouldn't go to that --

24 MR. WALL: Objection. Relevance.

25 THE COURT: Sustained.

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1 MR. WALL: Thank you.

2 BY MR. MICHALEK:

3 Q The "Value of Life" literature you've been talking
4 about, these government studies, that involves death and not
5 injury; is that true?

6 A It's the probability of living or dying, yes.

7 Q Okay. So are you -- can you say that someone is
8 twenty percent or thirty percent dead?

9 A You might be able to. I have no idea whether you
10 can or not.

11 Q So it can't be --

12 A It sounds somewhat ridiculous, doesn't it.

13 Q Someone can't be twenty percent dead or thirty
14 percent dead, they're either alive or they're dead, correct?

15 A Or twenty percent pregnant, correct, it's just not
16 -- we don't think that's possible.

17 Q Now, your theory says that a twenty-year-old has a
18 higher value of life than a forty-year-old; is that true?

19 A More future enjoyment to look forward to, yes. Just
20 like a twenty-year-old carpenter is going to have more wages
21 to look forward to than a fifty-year-old carpenter.

22 Q You don't think that a younger person is more
23 willing to risk their life or engage in riskier behavior?

24 A There are foolish things we do at age 15 to 20 --
25 and I don't know if you've done them, I've done them, but I

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1 don't do them anymore -- but the real issue is, is not what
2 somebody is doing when their hormones are raging, but what
3 somebody does in the ordinary dispassionate course of thinking
4 things through in a sober manner.

5 Q Well, an older person would be, like you were
6 saying, more likely to think, eh, I'm not going to engage in
7 that riskier behavior anymore, not the stuff that I did when I
8 was young; is that fair to say?

9 A You know, look, here's something you are
10 fundamentally misunderstanding: Engaging in risky behavior,
11 does not mean you don't enjoy your life. Astronauts engage in
12 risky behavior. Do you think they don't value their life
13 much? That's the fundamental misunderstanding you are
14 bringing to this. I know you are not an economist, but you
15 cannot look at what people do as risky. What you have to do
16 is, what they pay to reduce risk when there's no pleasure
17 involved, when there's no drive involved.

18 An astronaut goes out into space risks because they
19 are advancing science, number one. Number two, it's their
20 job. Number three, there are certainly some aspect of
21 patriotism involved. When an economist looks at the value of
22 life, you have to look at decisions we make when there are
23 only two things involved: The cost and the risk reduction.
24 When you go and become an astronaut or you go to the beach,
25 there's a third thing involved: The benefit you get from the

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1 activity. I don't think my house is any better or worse
2 decorated when the carbon monoxide detector is plugged into
3 the wall. It has purely one function; Risk reduction.

4 Now, when you go to the beach to get a tan or when
5 you become an astronaut, there is a third element involved, an
6 ulterior motive you are missing that when you engage in risky
7 activity, there's an ulterior motive. You drove to work
8 presumably. You engaged in risky activity. The ulterior
9 motive was, you get --

10 MR. MICHALEK: Your Honor, I move to strike. This is
11 getting ridiculous. I'm asking simple questions --

12 THE COURT: Well, I don't know.

13 MR. WALL: Your Honor --

14 MR. MICHALEK: It's non-responsive to my question.

15 MR. WALL: -- it's asked and answered. Well, that's
16 fine.

17 MR. MICHALEK: The astronauts and --

18 THE COURT: May counsel approach, please.

19 THE WITNESS: Well, I don't have to say anymore, Your
20 Honor.

21 [Bench Conference Begins]

22 MR. WALL: If you want to start the objection, make an
23 objection. Categorizing this very sensible testimony as
24 ridiculous is absolutely inappropriate. And I would ask that
25 that be stricken.

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1 THE COURT: You're getting a little far field here. I
2 haven't heard a lot of objections with respect to relevance.
3 I've heard a couple of them, but very far field here and I
4 know -- can you bring it back to the issue at hand and to his
5 testimony?

6 MR. MICHALEK: I am, Your Honor, but he's just going to
7 continue to work hard --

8 THE COURT: And that is an unacceptable question, Mr.
9 Michalek, and you've pretty much, in the Court's view, you
10 sort of asked for it and that's why you got it is, you've
11 asked for it. So I'm asking you to refocus and let's move on.

12 MR. WALL: Can you strike that?

13 THE COURT: Yeah.

14 [Bench Conference Ends]

15 THE COURT: The jury is to disregard counsel's
16 characterization of the witness's answer as being ridiculous.

17 BY MR. MICHALEK:

18 Q Did you say that the value of life is constant for
19 each year of life?

20 A We assume that each future year could hold the same
21 value as any other future year.

22 Q Are you aware of a paper by Joseph Aldy and Kip
23 Viscusi, "Age Differences and the Value of Statistical Life:
24 Revealed Preference Evidence"?

25 A Yes.

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1 Q Okay. And do you understand that in that paper they
2 say, well, no, that the value does vary with age?

3 A There is some research that is looking at that.
4 It's not well established one way or the other. We assume
5 unequal value per year, although, when you get to that year,
6 you might have a great year in the future or you might have a
7 bad year. If you look back, you may have had better or worse
8 years in the past, but this process assumes that each year
9 holds the same opportunity as any other future year.

10 Q So -- but Kip and Viscusi and Joseph Aldy, they
11 disagree with; is that correct?

12 A Well, look, there's hundreds of papers published in
13 the field. I'm not saying I agree or disagree with them.
14 They are at the forefront of some research to look at, well,
15 are there any real differences. So far, there's no absolute
16 peer-reviewed, full agreement that we can actually distinguish
17 whether age 48 is better or worse than age 64.

18 Q You cite in your report "The Relevance of
19 Willingness-To-Pay Estimates of the Value of a Statistical
20 Life in Determining Wrongful Death Awards", by Lauraine
21 Chesnut and Daniel M. Violette; do you recall that?

22 A Yes.

23 Q Okay. Their paper was never intended, by them, to
24 apply to the measure of appropriate compensation in the case
25 of person injury; is that true?

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1 A Ninety percent of economic research is never
2 intended for any reason, no more than Einstein's Theory of
3 Relativity was intended to result in a bomb in Hiroshima.

4 Q So you're aware that the two authors of the paper
5 that you cite do not believe that your theory -- that their
6 paper should be used to support your theory; isn't that true?

7 A You have an --

8 MR. WALL: Objection. Calls for speculation.

9 THE COURT: I'll ask you to rephrase the question.

10 MR. MICHALEK: Sure.

11 BY MR. MICHALEK:

12 Q You testified that you're aware of these two
13 individuals and you're aware, true or false, that these two
14 individuals say that their paper should not be used to support
15 your theories; isn't that true?

16 A First of all, I'm not aware that they've said that,
17 but even Einstein said, please, don't use my Theory of
18 Relativity to build a bomb, that bomb would explode just as
19 potently as if he had begged that his paper be used.

20 Q So you've never seen an affidavit from either,
21 Lauraine Chesnut, or Daniel Violette which say, this theory --
22 this -- our paper was never intended to be used in this manner
23 with your theory?

24 A It wouldn't matter what the intention is, but there
25 are --

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1 Q I'm simply asking you whether you've seen --

2 A --somebody that's -- sir, I'm in the middle of an
3 answer.

4 Q -- you've seen the affidavit, sir.

5 THE COURT: One at a time, one at a time.

6 THE WITNESS: I'm in the middle of an answer.

7 MR. WALL: Objection. Relevance, Your Honor.

8 THE COURT: Sustained. Let's move on, Mr. Michalek.

9 BY MR. MICHALEK:

10 Q What was the purpose of the book that you were
11 referring to earlier, the one you wrote -- co-wrote in 1990?

12 A To explain the basic principles of forensic
13 economics.

14 Q Was written for attorneys?

15 A It says it's a practice manual for plaintiff and
16 defense attorneys, although, it ultimately became used in
17 college courses in forensic economics.

18 Q In the book, do you advise attorneys as to what
19 types of questions to ask you?

20 A Every chapter gives tips and, perhaps, you've read
21 the chapters that I -- and are -- have taken advantage of some
22 of the tips we give to defense attorneys on how to cross-
23 examine economists.

24 Q Do you advise attorneys as to what type of jurors
25 they should select?

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1 A I don't recall that there's anything in there on
2 that, but I certainly have never acted as jury consultant.

3 Q Well, do you give them more -- or state that --
4 approaches that counsel might use to pick a jury, whether they
5 might be a leader, or a follower, or --

6 MR. WALL: Objection. Relevance.

7 THE COURT: Yeah, what's this got to do with anything?
8 Sustained.

9 BY MR. MICHALEK:

10 Q Does your book contain the arguments for defending
11 against an hedonic damages case?

12 A There's a chapter on hedonic damages, there's
13 questions for both the plaintiff side and the defense side. I
14 haven't read it in quite some time, I don't recall what the
15 questions were.

16 Q Let's talk about that other book that we'd -- I had
17 mentioned to you earlier, "Ireland in Ward". Do know what
18 their arguments are for not utilizing hedonic damages?

19 MR. WALL: Objection. Relevance.

20 THE COURT: Sustained.

21 BY MR. MICHALEK:

22 Q You don't have any medical training, do you?

23 A No.

24 Q Okay. Have you ever worked in the field of
25 vocational rehabilitation?

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1 A No.

2 Q Are you a psychologist?

3 A I'm an economist and nothing else.

4 Q When you use the term "benchmark" or illustrate in
5 your report, that's basically just a hypothetical guess as to
6 a number; isn't that true?

7 A No.

8 Q Let's take a look at your March 29th, 2011 report.
9 And I'll direct you to page 6, second paragraph. In your
10 report, the first sentence says, "All opinions expressed in
11 this report are clearly labeled as such." Did I read that
12 correctly?

13 A Yes.

14 Q Okay. Now, we're going to skip down a sentence and
15 it says that "estimates, assumptions, illustrations, and the
16 use of benchmarks, which are not opinions, but which can be
17 viewed as hypothetical in nature, are also clearly disclosed
18 and identified herein"; did I read that correctly?

19 A Yes.

20 Q Okay. So it's a hypothetical guess when you use the
21 term "illustrate, estimate, assumption, and benchmark",
22 correct?

23 A No, you're misreading the sentence. The sentence
24 says that "estimates, assumptions, illustrations, and
25 benchmarks can be viewed as hypothetical in nature", they may

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1 be based on fact. And the "guess", as you can clearly read,
2 is not in that paragraph. You may guess, I have not guessed.

3 Q Well, you, personally, gave the fifteen to thirty
4 percent determination of the plaintiff's loss of enjoyment of
5 life and that was, in your report, labeled a benchmark,
6 correct?

7 A Or an illustration.

8 Q Or illustration.

9 A That's correct.

10 Q Okay. So that's a hypothetical, that you're not
11 saying it is fifteen percent or it is thirty percent, you're
12 just throwing those numbers out there, and you're telling the
13 jury, well, they can use those numbers however they see fit as
14 a guide, correct?

15 A As an illustration and we, also, showed how we could
16 get to ten percent, for example. So these are examples, yes,
17 of how to use the method.

18 Q Do you recall the date of Mr. Simao's surgery was?

19 A I didn't focus on the -- his medical condition.

20 Q Okay. If I told you it was March 25th, 2009, would
21 you have any reason to disagree with me?

22 A No.

23 Q Do you know what type of surgery he had?

24 MR. WALL: Objection. Relevance.

25 THE COURT: Sustained.

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1 BY MR. MICHALEK:

2 Q If I told you it was a two-level fusion --

3 THE COURT: I sustained the objection, Mr. Michalek.

4 Let's move on.

5 BY MR. MICHALEK:

6 Q I want you to assume, for a moment, that it takes
7 eight weeks to recover from surgery, six to eight weeks.

8 MR. WALL: Objection. Relevance. I don't know --

9 THE COURT: Sustained the objection.

10 MR. WALL: -- where this hypothetical is --

11 THE COURT: I don't know.

12 BY MR. MICHALEK:

13 Q Isn't it true that the plaintiff was halfway through
14 recovering from surgery when you wrote your first report in
15 this case?

16 MR. WALL: Objection. Relevance.

17 THE COURT: Sustained. Will counsel approach, please.

18 [Bench Conference Begins]

19 MR. WALL: I don't know how much more there is to this,
20 but --

21 THE COURT: I don't why you're asking this witness
22 questions that have nothing to do with his field of expertise.
23 and nothing to do with direct examination.

24 MR. MICHALEK: Well, it does, Your Honor. His report was
25 written April 16th, 2009. He saying, and that report says,

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1 that this plaintiff has lost the enjoyment of his life in the
2 term of, you know, millions of dollars and the fact the he's -
3 - he hadn't even recovered from surgery yet. So to be able to
4 give an opinion three weeks post-surgery that this guy has
5 lost the enjoyment of life is certainly relevant to cross-
6 examining him.

7 THE COURT: Any response, Mr. Wall?

8 MR. WALL: I don't know why you asked him what his
9 medical condition was. It's all based on his interviews with,
10 not only three weeks after the surgery, but also in October or
11 December 2010, I think it was December of 2010. So based on
12 those assumptions that he makes, he talks to them with the
13 intent to get the percentage and does the math, just does the
14 math for God sakes. And so I'm going to walk through his
15 medical training with him. I don't know that I'd go on with
16 this. I just don't know, Your Honor, how to.

17 MR. MICHALEK: And how can you say to a reasonable degree
18 of certainty that somebody is lost their enjoyment of life
19 when they haven't even halfway recovered from surgery.

20 THE COURT: Well, that's not so much something for
21 placing an argument.

22 MR. MICHALEK: And that's what I'm trying to establish
23 with this witness.

24 THE COURT: Well, you can never do that, but this is not
25 within the witness's scope of expertise. Hold on a second.

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1 The direct examination was really very concise. And this
2 witness has made clear what his level of expertise numerous
3 times here in answering your questions. So let's stay within
4 his scope of expertise and let's stick with what was covered
5 in direct examination.

6 MR. WALL: How much more do you have?

7 MR. MICHALEK: Well, there's a lot of questions I'd like
8 to ask this witness.

9 THE COURT: Let's continue.

10 MR. ENGET: Your Honor, I just want to apologize to the
11 Court. I've got a meeting that I cannot miss. I'm going to
12 step out.

13 THE COURT: Okay.

14 MR. ENGET: Okay. Thank you.

15 THE COURT: You're welcome.

16 MR. MICHALEK: Your Honor, [indiscernible] I have --

17 THE COURT: Yes.

18 MR. MICHALEK: I have documents and affidavits on the
19 listing of items that, yes, were listed in Mr. Smith's report,
20 that I'm going to cross-examine this witness. And if the
21 Court is not going to allow me to do that based upon, I guess,
22 what we're earlier [indiscernible] I don't even know what the
23 joint exhibit is, but there's lots of studies and documents
24 that elicit [indiscernible] And I'll make an offer of proof
25 outside the jury.

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1 THE COURT: Are we going to give an instruction --

2 MR. MICHALEK: I don't know. I think he's saying that
3 there's -- that his expert sent some articles which use a
4 different view than he's used. Is that what you're talking
5 about?

6 MR. MICHALEK: There were articles that my expert
7 [indiscernible]. They have been introduced to plaintiff's
8 counsel. They were cited in the expert report.

9 THE COURT: That's a problem.

10 MR. MICHALEK: And there's also a number of cause of
11 [indiscernible] record on those, because some of them are hard
12 to understand. So I think that I should be able to cross-
13 examine, Your Honor, so can I make an offer of proof?

14 THE COURT: Not at this moment. I'll let you do it
15 tomorrow.

16 MR. MICHALEK: Okay.

17 THE COURT: Let's finish with this witness.

18 MR. MICHALEK: Thank you.

19 [Bench Conference Ends]

20 BY MR. MICHALEK:

21 Q Mr. Smith, have you always used the same discount
22 rates when writing your reports?

23 A Well, over the years, the discount rate will migrate
24 slowly, because treasure will rates, the average of the last
25 20 years, will change slowly. But in the vast majority of

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1 ninety plus percentage of the reports, no matter which side
2 you're working for, I would use the same rates. If we're
3 doing business cases, we'll use a somewhat different rate,
4 sometimes if we're working a defense side, we'll ask to match
5 the rate by the plaintiff economist, sometimes we're given
6 specific different assignments. In Michigan, you've got to
7 use five percent civil discount rate. There are about four
8 other states that have things like that. So maybe one, or
9 two, or three times out of a hundred there will be occasion to
10 use a different rate. But the -- in ninety plus percentage of
11 the cases I would use the discounts rates to be used in this
12 case.

13 Q Well, in 2004, for example, would have used a two
14 percent real discount rate when writing one expert report and
15 then a 9.37 percent real discount rate when writing another
16 expert report?

17 A Well, if he had a reason to have a different rate,
18 the two percent would be the rate we would use that year this
19 is now seven years ago, in ninety plus percentage of our
20 reports. But, as I said, one, two, three times out of a
21 hundred, and certainly in certain states, there are occasions
22 to use different rates, rarely, but it can happen.

23 Q Do you know what NAFE is?

24 A Yes.

25 Q Can you tell the jury what NAFE is.

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1 A Sure. It's the National Association of Forensic
2 Economics. I was the vice president of that association for a
3 three-year term.

4 Q Are you still a member?

5 A Yes.

6 Q And NAFE says that when you do your economic
7 reports, you are supposed to be pretty much fair and neutral;
8 isn't that correct?

9 A It has some words to that regard.

10 Q Okay. And do you think it's fair or neutral that
11 you used one number when writing one report and a different
12 number when writing a report for the other side --

13 A Well --

14 Q -- let's say plaintiffs and defense?

15 A -- it depends on what the reasons are. And it maybe
16 that if you use the same method in two different reports,
17 you're actually being unfair. It depends on the specific
18 circumstances. You can't just generalize.

19 MR. MICHALEK: No further questions, Your Honor.

20 THE COURT: Very well. Mr. Wall.

21 MR. WALL: Thank you, Judge. If you can indulge me for
22 about a minute-and-a-half.

23 THE COURT: Sure.

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REDIRECT EXAMINATION

1
2 BY MR. WALL:

3 Q Dr. Smith, you said that someone -- actually, and it
4 may have gotten cutoff, about who interviewed Mr. Simao and
5 his wife; did you say staff economists?

6 A Yeah, I have five economists -- research economists
7 who work for me.

8 Q And --

9 A And one of them, Amber Conner, conducted the four
10 interviews.

11 Q And that's someone who's trained in this widely
12 accepted method of economic evaluation that you've talked
13 about today?

14 A Well, look, I'm the -- she the research economist.
15 She's trained on gathering data, so she can go to the
16 websites, she can call government officials, she can call
17 union officials, she gets information from various sources,
18 including interviewing people. Sometimes she'll interview
19 employers, sometimes she'll interview whoever she needs to
20 interview.

21 Q She understand what you need the information for?

22 A Oh, absolutely, yes.

23 Q She understands the process?

24 A Of course.

25 Q Now, you were asked on cross-examination whether

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1 your figures, regarding the testimony from Dr. Wang, on this
2 future surgery, were dependant on Dr. Wang; is that --
3 something like that?

4 A There was some confused question about that, yes.

5 Q You're not the medical doctor?

6 A Correct.

7 Q You're not a spine surgeon?

8 A Not at all.

9 Q So when he testified that that amount of the surgery
10 , a reasonable and customary price for that would be \$64,527,
11 that's the figure you used, right?

12 A That's the number we used, right.

13 Q And that testimony came before this jury just
14 yesterday; is that right?

15 A We got an e-mail late yesterday afternoon or
16 evening.

17 Q So even though it came into court from a defense
18 witness yesterday, you were able to receive the number last
19 night, do the calculations, prepare the report, and fly out
20 here; is that right?

21 A Yes.

22 Q Finally, you were asked by Mr. Michalek, whether
23 this 4.1 million dollars figure is the statistical average --
24 statistically average person's value of life, in fact, 5.4
25 million is; isn't it?

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1 A Yes, it's lower than -- it's what I use, but it's
2 lower than the statistically average person.

3 Q So you discounted about twenty-five percent or
4 twenty -- or you're the econo- --

5 A It's about that, yes.

6 Q All right. Twenty-five percent or so before you
7 present it to a jury?

8 A Yes.

9 Q Why?

10 A Well, I first began doing this work in 1988. And
11 I've grown the number with inflation, but additional research
12 over the last 20 years or so has increased that value. I have
13 not moved my figure upwards as the literature has shown that
14 the figure actually is higher than what I originally used back
15 in the middle-80s.

16 Q Well, why, as a forensic economist, do you present a
17 more conservative number to a jury?

18 A It's just I think simply so that I can say, if you
19 use this number, you can be pretty confident that you're not
20 making a mistake on the high side.

21 Q All right. Thank you so much.

22 MR. WALL: No other questions.

23 THE COURT: Any follow-up, Mr. Michalek?

24 MR. MICHALEK: No, Your Honor.

25 THE COURT: Okay. With the same set of court doctors,

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1 Mr. Smith, you may be excused.

2 There is a question from one of the jurors about how
3 many more days of the trial it's anticipated to take. I don't
4 know the answer to that question. I guess, my question to you
5 would be, with that in mind, can we start at noon tomorrow and
6 Friday? Does it work for everybody's schedule? Does that
7 work with counsel's schedule?

8 MR. MICHALEK: Yes, Your Honor.

9 MR. WALL: Yes.

10 THE COURT: Very good, then noon tomorrow, please, ladies
11 and gentlemen. Thank you.

12 [Proceedings Concluded at 5:32 p.m.]

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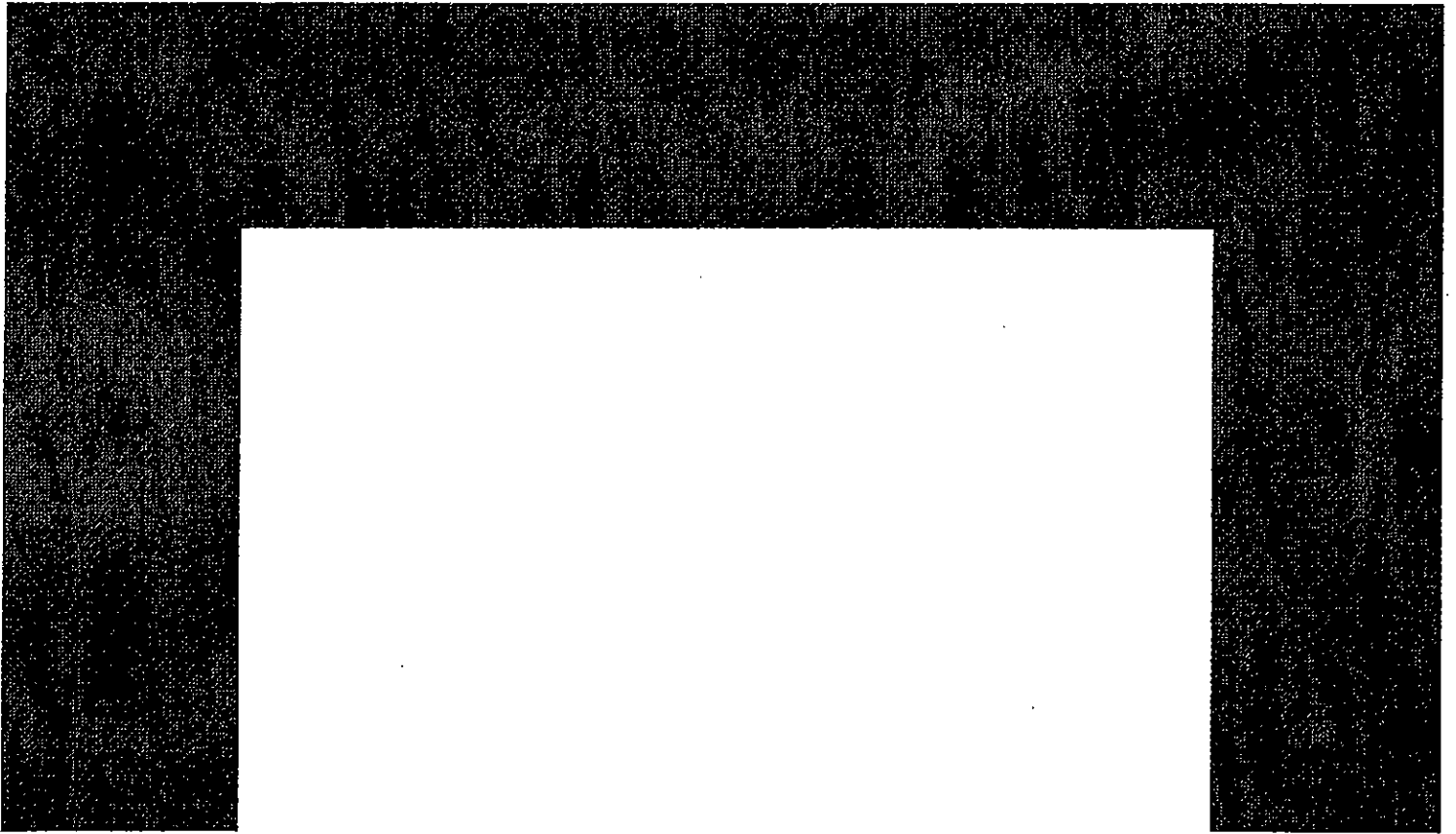
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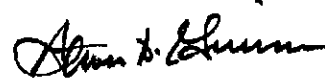
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CLARK COUNTY, NEVADA
CLERK OF THE COURTCHERYL A. SIMAO and
WILLIAM J. SIMAO,

Plaintiffs,

v.

JAMES RISH, LINDA RISH
and JENNY RISH,

Defendants.

CASE NO. A-539455

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, MARCH 31, 2011

REPORTER'S TRANSCRIPT
TRIAL TO THE JURY
DAY 9 - 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, LLCAlso Appearing: DANIEL F. POLSENBERG, ESQ.
Lewis and Roca, LLP

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1 THURSDAY, MARCH 31, 2011 AT 11:55 A.M.

2 [Outside the Presence of the Jury]

3 THE COURT: Anything else?

4 MR. EGLET: Your Honor, it's our understanding from a
5 phone conversation, in spite of what I understood the Court's
6 instructions to Counsel yesterday, is that Dr. Wang will not
7 be appearing today.

8 THE COURT: Mr. Rogers?

9 MR. ROGERS: Yes, that's correct. As I advised Your
10 Honor yesterday, he had two cervical fusions to perform today
11 that could not be moved. He will be here tomorrow and
12 available to conclude the 30 to 40 minutes Plaintiff's counsel
13 has said they have to finish their cross examine.

14 THE COURT: I thought we talked about this yesterday.

15 MR. ROGERS: We did.

16 THE COURT: Well, I don't know what we do with a witness
17 who won't return so that Counsel can continue cross-examine,
18 who thinks that he can dictate the trial schedule.

19 MR. ROGERS: I don't regard it at all as unwilling.
20 It's unable. As I said, he had these two procedures to perform
21 that could not be moved. And Plaintiff's counsel has said
22 that they have a very brief time to conclude his examination.
23 I don't understand exactly why Mr. Eglet can't come. But he
24 certainly has competent co-counsel who conclude that
25 examination. I did some research on this issue and found

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1 several cases holding that striking a witness is a drastic
2 remedy that should be utilized under only the most compelling
3 of circumstances. This is particularly so when the exclusion
4 would be of a party's most important witnesses.

5 In this case, we advised the Court when Dr. Wang was
6 here that all he had available was that day. We advised the
7 Court as 5:00 approach that that examination could be
8 completed within 30 to 40 minutes. And the jury was excused.
9 It did not pass my attention yesterday that the Plaintiff's
10 expert who came in from out of town was permitted to remain on
11 the stand for the additional 30 minutes that was needed to
12 conclude his examination. It seems that in fairness to both
13 sides that Dr. Wang should be permitted to do the same.

14 THE COURT: Mr. Eglet.

15 MR. EGLET: Well, we're not asking that the witness be
16 struck, Your Honor. But I -- you know, the -- I just want to
17 clear some things up for the record. Mr. Roger did not tell
18 this Court nor did Dr. Wang tell this Court on Wednesday that
19 Friday was his only available day. That is a misstatement.
20 That was not what occurred. What Mr. Rogers said, "I will have
21 to get back to the Court when he's available." That's what
22 happened. Or -- what day was he here to testify? I forgot.

23 MR. ROGERS: Tuesday.

24 MR. EGLET: Tuesday. Excuse me. I misspoke. Tuesday.
25 So it was Tuesday evening that called Mrs. Eglet and then we

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1 had the hearing outside the presence yesterday before the
2 Court, Wednesday, where we explained to the Court that I was
3 unavailable on Friday.

4 Here's the problem, of course, is that while, you
5 know, I represented that it would -- I would be another 30 to
6 45 minutes, I can't guarantee that Mr. Wall is now -- has to
7 get ready for the cross-examination, if it's going to go
8 tomorrow. You know, it may not be 30 to 45 minutes. It may
9 be longer than that because you have an attorney who's now
10 trying to -- have to make himself familiar with this part of
11 the case, who -- the way we prepared this case is I handled
12 that portion of the case. So I don't think, you know, in any
13 way, shape or form unfair. This doctor's testimony was
14 extended to the length it was not because of what the
15 Plaintiffs did. I moved along in my cross-examination and
16 very swiftly. And when he finally got done fighting with me
17 over what he had said at the very beginning on the adjacent
18 segmental breakdown, after that, the testimony went extremely
19 swiftly.

20 So we're not asking that the witness be struck, but
21 this is a perfect example of why I don't particularly like
22 accommodating Defense counsel and I suspect we're probably not
23 going to do that in the future. Okay? And I hope when that
24 occurs the Court will understand why because this is a perfect
25 example of, you know, they put their witnesses in the middle

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1 of our case. And if we're supposed to jump through hoops
2 according to their witness' schedule - they chose to bring
3 these out-of-state witness experts when there's volumes of the
4 same type of experts here in Las Vegas. They chose to bring
5 them. And now we're and the Court and the jury is being
6 dictated to of the schedule by this witness. And I want to
7 remind the Court what Mr. Rogers represented to the Court
8 yesterday, is that he actually moved these procedures from
9 Friday to today.

10 MR. ROGERS: Moved one of them.

11 MR. EGLET: So -- well, if he would have moved one of
12 them Friday to today, he could have moved one of them from
13 today to Friday. So -- either way, the Court and us is
14 jumping through hoops for this witness.

15 THE COURT: You know, Mr. Eglet --

16 MR. EGLET: If he comes tomorrow -- Dr. Arita is going
17 first at noon. And we're going to finish Dr. Arita however
18 long that takes. Dr. Wang is going to have wait. And we will
19 finish him when we're done with Dr. Arita.

20 THE COURT: Well, you know, your points are well taken.
21 And I've seen on numerous occasions Plaintiff's counsel
22 accommodate Defense counsel with respect to scheduling issues.
23 And I've seen Defense counsel accommodate Plaintiff's counsel.
24 But I've never seen this result after Plaintiff counsel has
25 accommodated Defense counsel for calling witnesses out of

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1 order. I think it's very unfortunate. Are those the only two
2 witnesses that we'll hear from today?

3 MR. EGLET: Well, I don't know. They say they have Scoob
4 [phonetic] scheduled for tomorrow. I don't see any way in the
5 world he's going to get done tomorrow.

6 MR. ROGERS: We could. It's not certain. In fact, I'm
7 going to ask for a couple of minutes to ask my associate Mr.
8 Androssi to make a few phone call. Not to have you wait while
9 the phone calls are made, but just to tell him who to call to
10 advise of scheduling for tomorrow.

11 THE COURT: I would suggest we go with those two
12 witnesses. Because I'll tell you something, we are stopping
13 no later than 5:00 tomorrow.

14 MR. WALL: Here's my concern. I'm just going to lay it
15 out there. We have addressed to the Court in the past a
16 belief that there might be some intent to force a mistrial
17 here. So if we're going to short circuit tomorrow somehow
18 with the Defense witnesses and we don't get them all done on
19 Monday, all we have is Tuesday. And if it doesn't finish and
20 be argued on Tuesday before the Court has to leave, then we're
21 stuck. So I know we're starting at noon tomorrow. There's no
22 reason why they can't have witnesses present. And I think it's
23 necessary right now to know exactly which witnesses they're
24 going to call and try to schedule them right now. That would
25 be my preference.

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1 MR. ROGERS: I'm happy to call Mr. --

2 THE COURT: Well, I think so. And the only other thing I
3 wanted to ask you is, and I don't know if it's even feasible
4 with the Court's schedule and I don't know whether it's
5 feasible with the members of the jury, but just thinking out
6 loud, what if we had Tuesday morning?

7 MR. EGLET: I was about to suggest the same thing. I was
8 going to suggest that you tell the jury in order to finish
9 this case that we're going to start at either 9:00 or 10:00 on
10 Tuesday, Your Honor, so that we can make sure this case is
11 done. If we can have a full day on Tuesday. And possibly if
12 we could start at noon on Monday, as well. I don't know if
13 that's possible for the Court. But if we could do that --

14 THE COURT: That's a little tighter because I have a
15 criminal calendar Monday. And I don't know how big it is.

16 MR. EGLET: Okay.

17 THE COURT: I'd have to check and see.

18 MR. EGLET: All right. Well, if that's possible. But,
19 you know, one or the combination of those two would be great.

20 MR. ROGERS: I think I have a way to simplify this.
21 Tomorrow the exams that we have schedules, Doctors Arita and
22 Wang are not long. It's just wrapping up. They've already
23 spent a couple of hours or maybe more on the stand. So those
24 are brief. I think we're going to have time for a third
25 witness and maybe even a fourth. I mean, I don't know how

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1 Skoog takes because I'm not very versed in that area. But I
2 think we can at least get him on.

3 THE COURT: How many witnesses are there left?

4 MR. ROGERS: We're looking, depending on the testimony,
5 at calling Skoog, who's the economist, Winkler, a radiologist.
6 That will be very brief because he's not going through all the
7 medical records. He's just discussing a few films. And on
8 that front, remember yesterday we requested the fluoroscopy
9 images. The ones that Dr. Rosler brought but didn't produce
10 with his file. So Plaintiff's counsel said that they would
11 talk to Dr. Rosler and get those.

12 THE COURT: So who do we have left? We have to finish
13 Arita. We have to finish Wang. We have this guy -- what do
14 you call him? Scoob?

15 MR. ROGERS: Gary Skoog, S-K-O-O-G. He's the economist
16 who will come in and discuss Smith's testimony from yesterday.
17 And then finally, we're considering calling Dr. Sibel who is
18 one of the Plaintiff's treating providers who the Plaintiff
19 identified in the opening but didn't call. We're not certain
20 on that. Cause obviously we don't have a line of -- direct
21 line of communication with him. But as I understand it, his
22 only available day would be Monday. At least according to my
23 assistant. So anyway, that's it. Then my client and possibly
24 her daughter. But those are brief.

25 MR. WALL: What would be the relevance of her daughter?

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1 MR. ROGERS: To discuss the accident.

2 MR. WALL: To discuss the nature of the accident? I
3 don't think that's --

4 MR. EGLET: The Court's already ruled that's not
5 relevant. I mean, we had this discussion early in the case,
6 what's the relevance of her daughter.

7 MR. ROGERS: The discussion was the admissibility of
8 describing the impact as a minor impact. The Court has ruled
9 on that. But has not excluded percipient witness testimony
10 about the accident. We're aware of the Court's prohibitions.
11 I don't know --

12 MR. WALL: What Counsel is going to do --

13 MR. ROGERS: Well, hold up just a moment. I don't know
14 where Mr. Wall got the idea that the Defense intends to force
15 a mistrial. We are going to follow the Court's orders. We in
16 fact this morning read back through the transcript of the
17 hearing we had on March 18th when we asked for clarification
18 on the order and the Court said, "Well, you can't say minor
19 impact. And you can't say tap." From that, I understand we
20 cannot describe the impact. We've obviously make a record of
21 our objections to that since there's been testimony from the
22 Plaintiff's treating providers that seems to characterize the
23 accident, substantial and words like that. However, we're
24 aware of the Court's order. We're going to follow it. That
25 aside, certainly, we're permitted to have Jenny Rish come in

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1 and describe what happened.

2 MR. EGLET: He's obviously not going to follow the
3 Court's order. He didn't follow the Court's order in his
4 opening statement. He hasn't followed it with the cross-
5 examination of every single doctor. He can sit here and tell
6 you we're obviously going to follow the Court's order. But as
7 the Court has seen throughout this trial, he has not followed
8 the Court's order. He is again trying to box us and Your
9 Honor into this fantasy that he's come up with that the
10 Court's order is limited to nobody saying minor impact or that
11 it was a tap. That is not the order. We've gone over this
12 argument over and over and over again. Either they don't get
13 it or they refuse to get it. Cause that is not the order of
14 the Court. And what he's going to have this witness come in
15 and do is say, "Oh, it was stop and go traffic. We were
16 barely moving. We were hardly moving. And, you know, we had
17 stopped behind him and then he had stopped. And all she did
18 was, you know, slightly take her foot the brake and it rolled
19 forward." I mean, that's what we're talking about. Okay?

20 So you don't have to use the word tap or minor
21 impact to get -- to describe that it's a tap or minor impact.
22 And that's why the Court's order was as broad as it is.
23 That's the ruling. Not that you can't say just tap or minor
24 impact. That is a total misrepresentation. It's intellectual
25 dishonesty. Okay? He is attempting to violate these Court's

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1 orders. And when he's sits here and says, "We're not going to
2 try to get a mistrial," that is just absolutely false. Cause
3 obviously he is. That's what he's doing here. And he's
4 going to violate these Court orders. There is absolutely no
5 relevance to this witness' testimony. This witness is not a
6 doctor. She has no medical training. She's not a
7 biomechanical engineer. She hasn't been identified as a
8 witness in this case. So the only purpose -- the only purpose
9 -- of her testimony would be to infer and imply to this jury
10 that this was not a very big or significant accident. When in
11 fact what has happened because of these violation of the Court
12 orders, you have now had to give a curative instruction to
13 this jury informing them that in fact this accident was of a
14 sufficient force to cause these type of injuries. So there's
15 no relevance in light of the Court's previous ruling and
16 specifically in light of the curative instruction that the
17 Court has given.

18 THE COURT: Mr. Rogers.

19 MR. ROGERS: Yes. First, the Plaintiff --

20 MR. EGLET: You can't -- excuse me. You cannot rebut and
21 irrebuttable presumption. And it's only a medical doctor who
22 can give an opinion on causation -- medical causation in
23 Nevada. So she -- there's no relevance to this testimony.
24 And at this time, we would move to exclude that witness.

25 MR. ROGERS: The Plaintiff is moving to exclude the

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1 Defendant --

2 THE COURT: No.

3 MR. ROGERS: -- from testifying.

4 MR. EGLET: Rish.

5 THE COURT: The Defendant's daughter.

6 MR. EGLET: Jenny. Your daughter. The daughter.

7 MR. ROGERS: The Defendant?

8 MR. EGLET: The daughter. Linda.

9 MR. ROGERS: Okay. Well --

10 MR. WALL: The Defendant can't discuss it either but --
11 but we're specifically moving to exclude the daughter.

12 MR. ROGERS: Okay. The Plaintiff has repeatedly
13 characterized the accident as I've described. The
14 irrebuttable presumption certainly takes away any prejudice
15 that the Plaintiff may think that they suffer because of a
16 description of the accident. Consider this, Your Honor. This
17 is a case where the jury is being asked to determine cause. I
18 don't want to rehash everything. I know you've heard most all
19 of this. But they're being asked to determine cause from an
20 accident that they know nothing about, except for what the
21 Plaintiff's medical providers have told them and whatever the
22 Plaintiffs may tell them today. And the characterization of
23 that accident from those providers is that the Plaintiff's
24 head was slammed into a cage behind his seat. Now, clearly,
25 an idea of this accident has been sent -- or this message has

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1 been sent the jury. The Court has told the Defense that we
2 can't send a message. That the Defense is not permitted to
3 characterize this accident in any way. But at no time did
4 the Court say that no percipient testimony or party testimony
5 about this accident will be admitted. That's never happened.
6 And to the extent that Plaintiff's counsel has over expanded
7 the exclusion of the photos and the idea that a minor impact
8 can never cause an injury to this conclusion where we are
9 right now discussing this strange idea that this jury can't
10 hear a word about the accident. Whatever concern they might
11 have was resolved by the Court's irrebuttable presumption.
12 Remember, the Defense never once described the impact as
13 minor. Never once used the word tap. Never once said the
14 things the Court said we can't say. Still the curative
15 instruction was read. There -- not only does Ms. Rish have a
16 right to describe this, the Plaintiff can't possibly protest
17 it because they can be no prejudice now.

18 MR. EGLET: Well --

19 THE COURT: Well, Plaintiff's motion to strike Linda Rish
20 as a witness is granted. Certainly Mrs. Rish -- Jenny Rish
21 can testify. But I think Counsel needs to be very careful
22 that she complies with the Court's orders and that you're
23 within those parameters. So that's enough said on this
24 subject. We've kept our jury waiting long enough.

25 On the scheduling issue which is what we really

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1 started with, is Skoog an out-of-state witness or a local
2 witness?

3 MR. ROGERS: Out-of-state, Your Honor. That's why I need
4 to tell someone to call him if he's going to appear tomorrow.

5 THE COURT: What about the radiologist? Is he local?

6 MR. ROGERS: He's a local.

7 THE COURT: What other witnesses does the Plaintiff have?

8 MR. WALL: Well, we should rest tomorrow after Dr. --
9 after Dr. Wang.

10 MR. EGLET: After Dr. Wang, we'll rest tomorrow, Your
11 Honor.

12 THE COURT: All right. Can we bring our panel in then?

13 MR. ROGERS: Can I have just one moment to get these
14 phone calls made?

15 THE COURT: Sure.

16 MR. ROGERS: Thanks. I don't need to make them myself.
17 It really will just be a moment.

18 [Jury In]

19 [Within the Presence of the Jury]

20 THE BAILIFF: Please be seated. Courtroom X is now in
21 session. The Honorable Jessie Walsh, Judge, Presiding.

22 THE COURT: Thank you. Good afternoon, ladies and
23 gentlemen of the jury. Will Counsel stipulate to the presence
24 of the jury?

25 MR. WALL: Yes, Your Honor.

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1 MR. ROGERS: Yes, Your Honor.

2 THE COURT: Very well. Mr. Wall.

3 MR. WALL: Thank you, Your Honor. The Plaintiff calls
4 Jenny Rish.

5 THE COURT: Very well. Please come forward, Ms. Fish
6 [sic]. Rish. I'm sorry. Did I say Fish? I meant Rish.

7 JENNY RISH, PLAINTIFF'S WITNESS, SWORN

8 THE CLERK: Please be seated, stating your full name,
9 spelling your last name for the record.

10 THE WITNESS: Jenny Rish, R-I-S-H.

11 DIRECT EXAMINATION

12 BY MR. WALL:

13 Q Is it J-E-N-N-Y?

14 A J-E-N-N-Y.

15 Q All right. Thank you.

16 MR. WALL: If I could indulge the clerk to -- we would
17 like to publish the deposition of Mrs. Rish.

18 THE COURT: Any objection?

19 MR. ROGERS: No.

20 THE COURT: So ordered.

21 BY MR. WALL:

22 Q Good afternoon, Mrs. Rish.

23 A Good afternoon.

24 Q Do you recall having your deposition taken in this
25 case?

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1 A Yes.

2 Q You were sworn -- you took an oath just like the one
3 that the clerk gave you today?

4 A Yes.

5 Q And you told the truth at your deposition. Is that
6 right?

7 A Yes.

8 MR. WALL: One moment. Thank you very much, Ms. Clerk.
9 May I approach, Your Honor?

10 THE COURT: Yes.

11 BY MR. ROGERS:

12 Q Mrs. Rish, I'm going to hand you the copy of your
13 deposition which was -- which was transcribed. That's a copy
14 of the transcript. All right?

15 A Okay.

16 Q Could you open it up to Page 25, please.

17 A Okay.

18 Q I'm going to ask you to read to yourself Lines 9
19 through 11 on that page.

20 A Okay.

21 Q Mrs. Rish, at your deposition, you were asked the
22 following question about the motor vehicle accident of April
23 15th, 2005 and you gave the following answer. The question
24 was, "Yes, it was your fault. Correct?" Answer, "Yeah. I hit
25 him." Did I read that correctly?

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1 A Yes.

2 Q All right.

3 MR. WALL: Thank you very much, Your Honor. I don't have
4 any other questions.

5 THE COURT: Very well. Any follow up?

6 MR. ROGERS: We'll call Ms. Rish on the Defendant's case
7 in chief.

8 THE COURT: Okay. With that mind, you may step down,
9 ma'am. Thank you.

10 Mr. Wall.

11 MR. WALL: We would call Cheryl Simao.

12 THE COURT: Very well. We'll ask Ms. Simao to come
13 forward.

14 CHERYL SIMAO, PLAINTIFF'S WITNESS, SWORN

15 THE CLERK: Please be seated, stating your full name,
16 spelling your last name for the record.

17 THE WITNESS: My name is Cheryl Simao, S-I-M-A-O.

18 DIRECT EXAMINATION

19 BY MR. WALL:

20 Q C-H-E-R-Y-L?

21 A Yes.

22 Q All right. Cheryl, have you ever testified before a
23 jury before?

24 A I have not.

25 Q All right. Are you nervous?

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1 A I am.

2 Q All right. Do your best and relax. You are Bill

3 Simao's wife. Is that right?

4 A I am.

5 Q How long have you two been married?

6 A Twenty-six years.

7 Q When did you first meet him?

8 A In 1983.

9 Q And how did you meet him?

10 A I worked at Round Table Pizza and he was the draft

11 beer person.

12 Q Okay. And you met him there?

13 A Uh-huh.

14 Q Do you have any children together?

15 A We do. We have two. William and Amanda.

16 Q How old are they?

17 A William is 25 and Amanda is 22.

18 Q All right. What do you do for a living?

19 A I'm the surgery biller at Southwest Medical for

20 OB/GYN.

21 Q How long have you been with Southwest Medical?

22 A Since 2002.

23 Q Now, is your work at Southwest Medical completely

24 separate from all the medical providers that we've talked

25 about in this case?

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1 A It is.

2 Q Do you strictly work with the OB/GYN section?

3 A Yes, I do.

4 Q Do you see patients or treat patients?

5 A No, I do not.

6 Q Okay. And you do some of the billing paperwork. Is

7 that right?

8 A Yes.

9 Q I want to ask you about your husband. What was --

10 and I want to focus this on the time prior to this motor

11 vehicle accident. All right? What was Bill like as far as

12 his physical capabilities are concerned before the accident?

13 A He was very active and able to do everything that he

14 wanted to do, including chores around the house, work. That

15 type of thing.

16 Q All right. Was he healthy?

17 A Absolutely.

18 Q Had you ever known him to have neck pain before the

19 accident?

20 A Never.

21 Q How about pain in his left shoulder?

22 A Not -- no.

23 Q Did he have a history of migraine headaches?

24 A He did.

25 Q How often did those effect him? And again, we're

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1 just talking about before the accident.

2 A I would say once a month, maybe more.

3 Q And how did you know when he had a migraine?

4 A You could tell. His eyes would turn red and he
5 would start to complain that he had headache.

6 Q Personality wise, prior to the crash, how would
7 describe Bill?

8 A He was a happy person. Energetic. Always laughing.

9 Q Okay.

10 A Active.

11 Q At the time of the accident, where was he working?

12 A I believe he was working for two jobs, at Carpets
13 and More as a flooring salesman and Ameri-Clean.

14 Q What's Ameri-Clean?

15 A It's our cleaning business. We clean floors.

16 Q Okay. Is that the business he's in now?

17 A Yes.

18 Q And what did he do for Ameri-Clean?

19 A He runs the business. He also would clean tile
20 floors.

21 Q Who else is in the business now?

22 A William.

23 Q Your son?

24 A My son, yes.

25 Q Just the two of them at this point?

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1 A And myself. I help with the secretarial things.

2 Q Okay. Had you ever known Bill to be hospitalized or
3 have any surgery prior to this accident?

4 A No.

5 Q All right. You said you would describe him as being
6 healthy and active prior to the accident?

7 A Yes.

8 Q Did that change after the accident of April 15th,
9 2005?

10 A I did.

11 Q In the time period immediately after the accident,
12 how did that change?

13 A He was suffering from pain. He was taking pain
14 medicine. And he was easily agitated because he wasn't
15 feeling well.

16 Q Did it change the type of things he did around the
17 house?

18 A No. He always did the same things. He just was in
19 pain while he was doing them.

20 Q Okay. The evidence that's been presented to this
21 point, as you're aware, suggest that the accident occurred on
22 April 15th, 2005, sometime around or just after 3:00 in the
23 afternoon. Do you recall whether it was a day that you were
24 working?

25 A I was working, yes.

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1 Q And how did you find out about the accident?
2 A He called me from the scene.
3 Q Okay. Did you go to the scene?
4 A I did not.
5 Q Did you meet him at home later?
6 A I did after I got off of work.
7 Q And what time did you ordinarily get -- or let's
8 just take that day. What time did you get off work that day?
9 A 5:00.
10 Q Had you discussed with Bill in a telephone call that
11 you were going to meet him at home?
12 A Yes.
13 Q And what time do you think you got home?
14 A Between 5:30 and 5:40.
15 Q And what did you do from there?
16 A I took him to the urgent care.
17 Q Why did you take him to urgent care?
18 A Because he said he struck his head. And we thought
19 that it would be important for him to be seen.
20 Q What do you remember about the visit to the urgent
21 care that night?
22 A They did a physical exam. They did a neurological
23 exam. I believe they did x-rays. And gave him prescriptions
24 medications to take when he went home.
25 Q When you took him to urgent care on the night of the

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1 accident, how was he?

2 A He was in pain.

3 Q Okay. Was he describing the pain to you?

4 A Yes. He was -- he had pain to the back of his head,
5 his shoulder, his neck and his elbow.

6 Q You pointed to shoulder and elbow. Were those your
7 left shoulder and elbow?

8 A Yes.

9 Q Okay. Now, this urgent care location, is it near
10 your home?

11 A It was the closest one at the time.

12 Q Is it where you work?

13 A No.

14 Q Did you know anyone at the urgent care since you
15 worked for Southwest Medical?

16 A No, I did not.

17 Q Did you pull any strings or use any influence
18 because you're a Southwest Medical employee?

19 A No.

20 Q Tell us what you remember about Bill's condition for
21 the first few weeks after the accident.

22 A He was complaining of pain. He had increased
23 headaches. He was stiff, had a hard time getting around. But
24 he continued to work.

25 Q He was stiff where?

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1 A In his neck and shoulder and -- he had pain in the
2 back of his head.

3 Q And you said he continued to go to work?

4 A Yes.

5 Q Okay. During that -- let's say -- let's take the
6 first month after the accident. During that first month after
7 the accident, did he seem to be getting better, getting worse,
8 or staying the same?

9 A He didn't seem to be getting better. He seemed to
10 be staying the same.

11 Q And why do you say that?

12 A Because we continued to go back to the urgent care
13 to get them to understand that Bill was still feeling the
14 same, not getting better, no matter what they had told him to
15 do.

16 Q Did he still have the same pain that you described?

17 A Yes.

18 Q Did he still have the same stiffness?

19 A Yes.

20 Q When you talk about stiffness, even during this
21 whole month, you're talking about what?

22 A Stiffness in his neck.

23 Q Okay. What was his frame of mind during that first
24 month or so?

25 A He was in a lot pain so he was agitated and tired

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1 because he was taking medicines so it would make him tired.

2 Q Now, are you -- were you working Monday through
3 Friday during that time?

4 A Yes.

5 Q We've seen the records of the various times he went
6 to the -- to Southwest Medical during April and May of 2005.
7 Did you accompany him on those visits?

8 A No, I did.

9 Q Did you accompany him on some of them?

10 A I did.

11 Q Okay. Now, Bill seem anxious to find out what was
12 wrong?

13 A Yes, he did.

14 Q And why do you say that?

15 A Because he kept going back. He felt like they
16 weren't listening to him or paying attention to his
17 complaints. So he thought if he went back and said more that
18 they would pay more attention and find out what was going on.

19 Q Now, the medical records that we've seen show that
20 on May 26th, 2005, Bill's -- Brit Hill, the physician's
21 assistant -- do you know Mr. Hill?

22 A I don't know him personally. I believe I met him in
23 the office with Bill once.

24 Q Okay. And that -- he was told on that date or at
25 least knew as of that date that all of the tests that Bill had

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1 undergone were negative, the CT scan of his brain, the MRI of
2 his brain, the x-rays on his head and neck and left arm. Were
3 you with him at that visit?

4 A I was not.

5 Q Okay. As of that time, the end of May 2005, had
6 Bill's condition improved based on your observations?

7 A No, it had not.

8 Q Did you discuss with your husband the fact that all
9 those tests had come back negative?

10 A Yes, I did.

11 Q And what was his reaction?

12 A He wanted to be worked up more because he felt that
13 they were missing something.

14 Q Was he still being given medications at that point?

15 A Yes.

16 Q Now, the medical record that the jury has seen from
17 May 26th, 2005 suggests that he was -- that Bill was told to
18 come back in six months for a follow up or words to that
19 effect. And we have also seen the medical records showing
20 that he came back on October 6th, 2005. So I want to talk
21 about the period between those two, between the end of May
22 2005 and the beginning of October of 2005. All right?

23 A All right.

24 Q How would you describe Bill's condition during that
25 time period?

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1 A It stayed the same.

2 Q What did you -- what did you observe?

3 A Well, he was irritated. He was in pain. He was
4 taking the medication that they told him to take and he wasn't
5 getting better.

6 Q Was there any time when all of the pain went away
7 during that period?

8 A No.

9 Q Did he continue to work during that time?

10 A Yes, he did.

11 Q Do you know why?

12 A Because he had to support his family.

13 Q Were there any other accidents or injuries he
14 suffered during that period of May to October of 2005?

15 A No, there were not.

16 Q What led him to going back to Southwest Medical in
17 October?

18 A He needed to return to let them know that the
19 therapy that they were prescribing, the medications, were not
20 helping, that he was feeling no better.

21 Q So he was -- he still had the medications during
22 that time period?

23 A Yes.

24 Q All right. Then after October 2005, the jury has
25 heard testimony about the physical therapy and injections and

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1 Dr. Siebel and Dr. Arita and Dr. McNulty and Dr. Rosler and
2 Dr. Grover, all of that. I want to take that sort of several
3 year period before the ultimate surgery and take that several
4 year period. During that several year period, tell us what
5 you observed about those conditions.

6 A It never seemed to get any better no matter what he
7 did. He would go to physical therapy. He had the injections
8 with the pain management doctors. And he just was never
9 getting any better.

10 Q And did he still appear just from your observations
11 of him to have pain?

12 A Yes.

13 Q Did he still have that stiffness?

14 A Yes.

15 Q How did it affect his personality?

16 A As I said, it made him irritable because he wasn't
17 feeling well. He would be tired. Quick to snap or hard to
18 communicate with.

19 Q Were there -- I think one of the doctors mentioned --
20 - waxing and waning. Did -- were there good days and bad
21 days?

22 A Yes.

23 Q Tell us what a good day was like.

24 A A good day would be when he didn't have a headache
25 or he wasn't having any neck pain. But a bad day would be

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