Case No. _____

IN THE SUPREME COURT OF NEVADA

Electronically Filed
Mar 23 2020 09:52 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

HARVEST MANAGEMENT SUB LLC,
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE LINDA MARIE BELL, DISTRICT COURT CHIEF JUDGE,
Respondent,

- and -

AARON M. MORGAN and DAVID E. LUJAN,
Real Parties in Interest.

District Court Case No. A-15-718679-C, Department VII

APPENDIX TO PETITION FOR EXTRAORDINARY WRIT RELIEF VOLUME 4 OF 14

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March 20, 2020

Docket 80837 Document 2020-11088

APPENDIX TO PETITION FOR EXTRAORDINARY WRIT RELIEF
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TAB 9

TAB 9

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2/8/2018 1:48 PM
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff,	)	
vs.	)	CASE NO. A718679
HARVEST MANAGEMENT, SUB, LLC, Defendants.	)	DEPT. VII

BEFORE THE HONORABLE LINDA MARIE BELL, DISTRICT COURT JUDGE
WEDNESDAY, NOVEMBER 8, 2017

TRANSCRIPT OF JURY TRIAL

APPEARANCES:

For the Plaintiff: BENJAMIN CLOWARD, ESQ.
BRYAN BOYACK, ESQ.

For the Defendants: DOUGLAS GARDNER, ESQ.
DOUGLAS RANDS, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Case Number: A-15-718679-C

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Las Vegas, Nevada, Wednesday, November 8, 2018

THE MARSHAL: Judge, ma'am they're all here. Do you want them in?

THE COURT: Yep.

THE MARSHAL: Please rise for the jury.

[Jury in at 10:18 a.m.]

THE MARSHAL: Please be seated.

THE COURT: Good morning, everyone. We're back on the record in case number A718679, Morgan versus Lujan. I'll reflect the presence of all of our jurors, counsel, and parties.

Mr. Cloward, please call your next witness.

MR. CLOWARD: Your Honor, Plaintiff calls Dr. Alian Coppel.

THE MARSHAL: If you would, remain standing, raise your right hand, and face the court clerk for me, please.

ALIAN COPPEL

[having been called as witness and being duly sworn testified as follows:]

THE CLERK: Thank you.

THE WITNESS: You're welcome.

THE COURT: Good morning, sir. Go ahead and have a seat.

THE WITNESS: Thank you.

THE COURT: And if you could, state your name and please spell it for the record.

THE WITNESS: Sure. First name is Alain, A-L-I-A-N. The last name is Coppel, C-O-P-P-E-L.

THE COURT: Thank you.

Mr. Cloward, whenever you are ready.

MR. CLOWARD: Thank you, Your Honor. I just need to grab a couple of the articles I have.

DIRECT EXAMINATION

BY MR. CLOWARD:

Q How are you today, Dr. Coppel?

A Good. Thank you.

Q Good. Dr. Coppel, like we've done with the other witnesses, I guess the first thing I'd like to have you do is just explain for the jurors a little bit about your practice, just tell these nice folks a little bit about yourself.

A Sure. So I'm a pain management physician here in Las Vegas. I did kind of medical school I did at University of Arizona. Once I graduated from the University of Arizona, I went to do my residency in anesthesia with critical care at the University of Chicago. From there that was four years total. Did my pain management fellowship at Johns Hopkins in Baltimore, and then from there I came to Las Vegas, started practicing pain management.

So currently I practice at Nevada Comprehensive Pain Center. We're basically the largest pain management clinics in the State of Nevada. And what we deal with typically is patients that are in acute and chronic pain. The majority of it, about 80 percent of it will be spinal pain and the rest of it will be kind of more of a joint pain on larger joints like the knees and shoulders at things like that.

I'm board certified in anesthesiology with critical care, addiction medicine, as well as pain management.

Q Okay. So Doctor, I guess on a day-to-day basis, can you give us an explanation or a description of what are some of the things that I guess how does your day -- what does your day entail?

A Sure. So for pain management physicians, we physically -- we kind of act like the quarterbacks of when people have acute and chronic pain. For pain management, there's only -- only four things that can ever be done for anybody. That includes therapies, oral medications, injections which is liquid medications that we need a needle to place at a specific location, and in surgeries. And then what we do is when a patient comes in in pain, we evaluate the patient in terms of the history of their pain, the type of pain that they're having, the location of their pain, and where they are on the treatment algorithm.

So if somebody was recently injured, we will recommend more of the conservative therapies, the medications, and time. If the issues do continue, then you kind of work your way up that ladder and what you have available to the patient are injections and surgeries. So it's up to the physician to decide with each individual patient what their symptoms are, how it's affecting them personally, and then where on that treatment algorithm they are.

Q Okay. And fair to say you treat patients from our community on a day-to-day basis?

A Yes, I do.

Q Okay. So what I'd like to do, Doctor, I guess is kind of explain -- and there's a little demonstrative. I don't know if that would be helpful. It may or may not be, but what I'd like to do is kind of just talk about the

different sources of pain that folks may -- that they may have in the spine. Say, for instance, if they're in a traumatic event like a slip-and-fall or motor vehicle accident, what are some of the things that I guess you as a physician are looking for?

A Right. So basically, when somebody comes in with pain in the spine, it typically can be one of three things. It could be muscles and ligaments, it could be the joints of the spine or it could be the disk of the actual spine. And it's up to the physician to try to determine sort of where those issues are coming from. And the determination is based on the way the patient is describing their symptoms, kind of where they are in the treatment algorithm, and their response to previous other therapies or injections and things like that.

So, typically, if it's a simple muscle sprain or a strain, most people, about 80, 90 percent of the people will respond to therapies, medication, and time. When the symptoms do continue, then we have to say as physicians, okay, well, if it was just a simple sprain or a strain, it should have gone away on its own but it hasn't so what else can possibly be going on back there. And the only other two possibilities are either issues with the joints of the spine or issues with the disks themselves.

And the way that we're able to delineate which one it may be, it's going to be the way the patient is describing their symptoms, what we're seeing on MRI findings, and then we can use injection therapies which are both diagnostic and therapeutic. The injection therapies are geared -- there's only basically two types we can do. There's those that are geared towards just the joints themselves or those that are those that are geared

towards the disk nerve junctions. And each one is completely separate.

So if we think it's a joint issue, what we do is we inject the joint and we'll say, well, how did you respond to that. If somebody responds positively to it, then you can say, yes, this is most likely the cause of your issues. If your response is medium, like say 50 percent, 60 percent, then you can say it's this plus probably something else. And that something else may be the actual disk nerve junction itself.

The reason for that is because the ultimate treatment for each one's a little bit different. If it's a joint issue, it's what's called the rhizotomy or heat therapy to the joint that gives you the longer-term benefit. If it's a disk issue, then the actual long-term benefit is more of like a surgery. It could be a microdiscectomy or a fusion, different types of things. But those are basically the only two things that we have to investigate whether it's a joint or a disk issue.

Q Okay. And when you say a joint, what is I guess the scientific or technical name for that?

A What's called the -- it's a facet joint and basically what they are, they're on each side of your spine and they go all the way from the neck all the way down to your tailbone. And that's what allows your spine to basically move in all sorts of direction, forward, backward, side-to-side, bending at different angles.

Sometimes those joints can be injured in what's called acceleration- deceleration injuries. So when you get hit and your spine does this motion, it can injure the actual joints. And the joints that we have here are very similar to like a knee joint. They're almost the exact same thing

where you have two -- two bones on top, one on bottom that join together and they have a joint capsule. So imagine if I grab your knee and just did this very quickly, it can actually injure the actual joint itself and cause pain at the joint level.

Now, the joints when you do have joint pain, it's going to end up being in the central part of your spine, but depending on what joint's affected, it could radiate to different areas. So if in the neck, it can either be the upper neck joints. It could be pain that's at the top of the neck that comes up like this. Middle neck would be pain that comes -- the middle neck that comes like this, and then enter the intrascapular area like this. In the mid portion, which is the thoracic spine, it's usually pain that goes like this. Occasionally it can wrap a little bit to the flank area. And in the low back, it's typically low back pain, comes across like this. Occasionally it can go into the thigh areas but not really below the knee.

If you're having any issues that are travelling below, for instance, of the neck into the hand or in the low back that travel into the feet, calf or foot area, that's usually more of a disk issue.

Q Okay. And, Doctor, what I'd like to do is I guess show first off, can you explain to the jurors what a -- what it means to have an article that's peer reviewed?

A Right. So in medicine basically, there's different types of articles that are publishers. There's -- in the old days, it gets -- they don't get published anymore, but it's basically you as a physician saying I have this one case study and I'm going to publish it. We typically don't publish this anymore because they're not really peer review. Then there's no

scientific data behind it because it's just basically one patient that had a specific condition that you treated and they responded one way or the other.

Peer review means that there's a confluence of patients that we see. We basically put the together. We do a treatment on them, and then that treatment, they respond to it one way or the other. And then independent people are reviewing that to make sure there are just no false positive or false responses to it.

Q Okay. And is the American Society of Anesthesiologists' publication Anesthesiology, is that a reliable and authoritative source?

A Yes. That's -- that's basically the main association for anesthesiologists and also for pain management as well.

Q Okay. And then also, is the journal, The Spine, is that an authoritative source?

A Yeah. That's the main -- that's the main journal for neurosurgeons for spine surgeries.

Q Okay. So what I'd like to do is show you a couple of articles and show you kind of the diagrams that -- and the first article is "The Prevalence of Chronic Cervical Zygapophyseal Joint Pain After Whiplash". My understanding is zygapophyseal is a fancy way to say facet joint?

A Yeah, exactly.

Q Okay. Did I pronounce that correctly?

A Yeah. Close enough.

Q Okay. So I'm going to just show this. And good deal. This is working today.

A Okay. Oh, there it is.

Q Cooking with gas. Doctor, is this an accurate -- you were kind of explaining to the jurors, you know upper cervical is going to affect certain levels, mid cervical is going to affect certain -- or certain areas. Lower cervical is going to affect certain areas.

A Yes. That's correct.

Q Okay. Now these are -- this is for the cervical spine. Is there some overlap with the thoracic spine if you have, say, a thoracic facet or a thoracic disk generator or --

A There is.

Q -- [indiscernible]?

A There is. There is. There's overlap, specifically more -- can you -- yeah. Oh, sorry. Okay. So in between that area, if they have joints in the mid back, it could actually split across like this and sometimes it could spread up as well.

Q Okay. Now this is -- this article is about the disks. I also showed in opening statement, I guess, a dermatomal pattern out of Netters Science. What is Netters by the way?

A It's the main -- the main anatomy book that everybody uses in medical school, across the world actually.

Q Okay. So I showed a dermatomal pattern out of Netters that showed the different, I guess, nerve root distribution. Is there also overlap? This is for the facets?

A Yes.

Q Is there overlap with the disks?

A There is.

Q Okay.

A There's -- there's partial overlap, yes.

Q Okay. And can you just, I guess, use the monitor to kind of show just generally speaking cervical spine what areas you might have?

A Right. So the disks -- so if you look at this right here, so at every level, there's a disk and then there's a keyhole where the nerves come out of. If a disk becomes inflamed and starts to move backwards, what happens is it moves backwards. What's back there is the spinal cord and the nerves coming off the spinal cord. And it starts to rub up against a nerve. When a nerve gets rubbed up against, it gets irritated and then you can end up having pain as well as burning, numbness, tingling in the distribution wherever that nerve is going.

The higher nerves in the neck can give you headaches and kind of pain that stays in this area. As you slowly start to come down, it starts to radiate into the lateral aspects of the arm, then inner aspects of the arm. As you get into the thoracic area, it could wrap around into the check into the abdomen area. And then the low back, it could actually travel first into the anterior portion of your legs to the feet and then the lateral portions to the feet, and then finally at the back of your butt cheeks and back of your leg all the way into your feet.

So there is overlap. The thing for the physician that needs to be done is to say, you know, there is some overlap. Which one is most likely not causing the pain or is it a combination of both? And the injections, which are therapeutic and diagnostic, help us differentiate that.

Q Okay. Perfect. Now while we are on the diagrams, I'm just

going to show you one other diagram to see if that is accurate. And this is -- this article is out of Anesthesiology. It's called "The Pathogenesis Diagnosis and Treatment of Lumbar, Zygapophyseal Facet Joint Pain". And this talks about the common referral patterns from the lumbar facet joints.

A Right. And it's basically the same distribution we were talking about is that just like in the neck. The way they actually came up with these diagrams is they would have volunteers actually on the table. They would put a needle next to a joint and then they would stimulate that joint and they would ask the patients to draw where they're actually having their pain. So this is how they actually got the ones in the neck and the mid back and the low back.

So this is the typical distribution. If the higher -- the higher joints in the low back will mostly be paralumbar area like this. The lower you come down, that's when I was saying it could start travelling into the thigh areas, and it typically stays above the knee.

Q Okay. Great. Thank you, Doctor. Now are there challenges in determining a patient's I guess the generator of pain?

A There is because it's not always a hundred percent classical one thing or the other. It could end up being two things that are overlapping. So when we do, let's say, a procedure and you say, I have 50 percent benefit, that means 50 percent of the pain is probably coming from the area where we injected, but we have to figure out why you didn't get a hundred percent benefit. Is there a different pain generator that may be causing some of those issues?

Q Okay. Now in the opening, I kind of talked about how the

injections are similar to, say, for instance, a toothache. You know, when you go to the dentist, they blow the air on the tooth. If it causes pain, then they go in there with the injection and they give you, I think it's Marcaine. And if it numbs the problem, then the dentist knows, okay, that's where we need to fix the cavity or, you know, do a root canal. However, if the doctor didn't fix the issue right then and there and sent the patient home, would the pain come back?

A Yes.

Q And is that kind of the same principle with the facet injections that if you go in there, you do a block and then the patient comes out and you ask how they do -- how they're doing but then they come back and follow up with you?

A Right. So when we do the injections, there -- there's two parts to it. There's the diagnostic part and therapeutic part. The diagnostic part, meaning that I think your issue's coming from the joint so what I'm going to do is I'm going to numb up those joints. If the pain is coming from the joints, you should get relief because I just numbed up the area that's painful, right? If you come back or immediately say, yes, I had some benefit but the pain came back, I can say to you, you told me you had a 50 percent benefit. That means 50 percent of the pain is coming from the area I injected, right?

We do add a little bit of serotonin to our injections in the hopes that the benefit that you get actually is longer-term and long-lasting, but it doesn't necessarily mean that it's going to happen. So the diagnostic, once again, is I think it's the joint. I'm going to inject the joint. Did you get benefit, yes or no? Even if it's just short-term, it's going to say that's your pain

generator or part of your pain generator.

Q Okay.

A And then the long-term treatment if it's a joint, then it would be the rhizotomy type of injections. If it's a disk issue and you don't get the benefit you want satisfactorily with the epidural injections, it would be surgery.

Q Okay. So we've kind of talked about I guess the ways that the physician through the clinical examination and subject of reporting of the patient of their pain complaints gives an idea for I guess the physicians on what to focus on. Do you also look at radiographic studies to determine, you know, where you want to focus at?

A Right. So it's a combination of everything. It's actually the way the patient's describing their symptoms is important. What we're seeing on the MRI is important. And then also our physical examination is important. And then the way they responded to previous therapies is also important.

So a physician will take a little bit of everything and try to combine it together and meld it together to say my differential diagnosis is most likely it's going to be one, if not, then 2, if not, then 3. And we always address the one we think is the most likely cause of your issues, whether that being cardiology, internal medicine, whatever it is. First, it's pain management. And then we attack it with either therapies, medications, or injections.

Q Okay. So in this specific instance, now shifting focus from I guess the kind of general information to the specific case of Mr. Morgan. What was your initial impression of what might be Mr. Morgan's problems?

A So initially when he came in, he was complaining of neck pain

with headaches, mid back pain and the wrist pain. In terms of the spinal issues, I thought it was just a whiplash injury. He was involved in a motor vehicle accident. These symptoms are very typical to be seen after people that are involved in an accident.

Now initially you don't know whether it's just a simple sprain or a strain or is there something more there. But to us it's sort of irrelevant because at the beginning we treat everybody essentially the same. We say go to therapy. We have options of medications which are anti-inflammatories, muscle relaxers, and pain medications. And hopefully with the combination of therapy, medication, and time, those issues should go away.

When the symptoms do continue after six to eight weeks of those conservative measures, you have to say, okay, what else is going on. And that's when you look at the MRIs and the continued symptoms to say, okay, it must not be just a simple strain or a sprain because those issues should have gone away. And if they don't go away, is it a disk issue or is it a joint issue. Those are the only other two things. And then depending on our physical examination and the way you're describing your symptoms, that leads us to say it's more this, more that, or maybe a combination of both.

Then we perform the injections, and depending on your response to the injections, that clarified things a little bit more to say, okay, now it's really more of a joint issue. It's not really a disk or vice versa.

Q Okay. Now prior to your first injection, had Mr. Morgan undergone some conservative therapy in the form of chiropractic care?

A He had, and he also did medication management.

Q Okay. Did you feel that that he had given those treatments I guess a reasonable opportunity to improve his condition prior to performing the first injection?

A I did.

Q Okay. Now what did the MRIs in this case reveal to you, if anything?

A Sure. So the original -- let me bring them up real quick. So the original two MRIs were a cervical MRI and a thoracic MRI that were done on 6/13/14, which is about I think it was close of two months after the accident itself. The neck MRI showed two small disk protrusions at two levels, C3/C4, and C4/C5. And the low back -- and the thoracic MRI showed one disk protrusion at T3/T4.

Q Okay. So based on your I guess the radiographic imaging, your clinical examination, and the subjective complaints, what did you feel like needed to happen with Mr. Morgan?

A I think the issue was at that point mostly a -- even though we some small [indiscernible] in the neck, I thought the issue was more of a joint issue because, once again, he wasn't having any travelling pain that was going all the way into his arms. He wasn't having burning, numbness, and tingling in the arms, and subjective weakness in the arms. So the way he was injured, which is the acceleration-deceleration injury and what we were seeing in the MRI and the way he was describing his symptoms kind of made me believe more of it was a joint issue than really a disk issue.

Q Okay. And what level of the spine did you feel like was I guess problematic for Mr. Morgan?

A I thought it was -- I think it was a combination of levels to be honest with you. The main issue -- the most injections that we can do is three -- three levels at one time. And I thought most of the issues were kind of in the lower neck, upper thoracic area. So that's kind of the combination of like the lower cervical and upper thoracic facet joints.

Q And so did you actually perform an injection based on your examination?

A We did. So we performed an injection that was the facet blocks that we talked about. And those were done on 8/8/14, which is almost four months after his -- his accident. They were done at C67, C71, and T1/T2 which is the lower cervical and upper thoracic area.

When somebody comes in for their injections -- well, I'll just take you through it. So they come in, they check in. And we -- they're seen by preoperative nurse. They're asked all the questions they needed to be asked, and then put a BB IV in. We bring them into the procedure room. They're actually placed face down on a fluoroscopic table which is a special table which allows x-rays to go through. We use a live x-ray machine, which is called the C-arm to actually look at the joints and then we use a needle which is about this long, 3-1/2 inches, and under live x-rate, we put the needle next to the joints. And there will be pictures in there.

Once we verify that the needles in the correct position, what we do is we inject a local anesthetic and a little bit steroid. The local anesthetic kicks in fairly quickly. So what happens is we inject the medications, the needles come out, the patients gets taken to recovery. And then we say, when you came in you were describing your pain level is whatever it is. In

his case, it was a 7 out of 10 that day. And then now as the procedure is over before you go home, what's your pain level, and he described his pain level as 3 out of 10. So he had a response of about 50 to 60 percent with that procedure, which is diagnostic portion of it.

Patient goes home, and we typically say come back in two weeks and let us know how it did, right. The reason we do that is because, once again, we add a little bit of steroid in the hopes of that benefit lasting long-term. He came back and he basically said initially I had good response, 7 to a 3, but it really didn't provide any long-term benefit. So what that tells us is that about 50 to 60 percent of his pain is coming from the joints that we injected.

Q Okay. It gives you a piece of the puzzle that you're able to put on the table, I guess if you will. If you're putting together a puzzle, it gives you a piece of the puzzle. It doesn't give you the full picture but gives you at least a piece of the puzzle in helping to figure things out.

A Yes.

Q Is that fair?

A Yes.

Q Okay. So based on the response of not having a complete relief, what did you determine needed to be next --

A So he didn't have complete --

Q -- that needed to be done --

A Right. So --

Q -- needed to be done next?

A So he didn't have complete relief, so you have to say, okay,

well, why not. Is there a different pain generator? That different pain generator can be the joints that are higher up in the spine that we didn't inject or it could be the disk issues. Once again, in the neck, I didn't think the disk issues were much of a problem because they were only moving backwards slightly, and he wasn't having any issues that were really traveling down his arms. So what we decided to do is do the injections at levels slightly above that.

Q Okay. So you basically moved from kind of the lower neck, upper thoracic to the lower and upper neck --

A Yes.

Q -- is that fair?

A Correct.

Q Okay. And what were the specific levels that you injected there?

A We did C3/C4, C4/C5, and C5/C6.

Q Okay. And what kind of a response did he have as a result of that?

A So he had a 40 percent response to that -- to that procedure.

Q Okay.

A So basically if you kind of look at it globally, so let's say these are all the levels that you can do, right. We did these down here, and he said 50 to 60 percent benefit temporarily. Okay. We said, well, let's look at the levels above. Then you got an additional 40 percent benefit up there. So kind of if you combine the two, that's if we were able to do all at one time. Most likely than not, the benefit would be much greater. It would be like 80

percent, 80, 90 percent.

Q Okay.

A But, unfortunately, we're not able to do all levels at one time.

Q Gotcha. So you do the levels above, and I guess that gives you another piece of the puzzle you put on the table. It gives you little better picture of what's going on but doesn't complete the puzzle. What is it that you decide needed to be done next to figure out what was going on?

A So at that point, that was kind of the -- in my mind, I said, all right, the issues are coming from the facet joints. I don't think it's mostly the disk. You can repeat it. You can repeat the procedure again to make sure it's not a false positive because sometimes if you don't have more than 80 percent benefit, it could be a false positive, let's say, like a placebo effect. That's the simple way to put it. The way you rule that out is by doing the block again. If they once again receive the same type of benefit, then you know that it wasn't a placebo effect. It was actually effect from the injections.

Q Okay. So what did you determine should be done next as far as the neck or the scapular symptoms?

A Right. So in terms -- in terms of the neck issues, he later on subsequently had another injection in the neck area, much longer and he once against received 40 percent benefit from that. So in my mind, we have basically three blocks that we've done in the next that have all responded similarly to it, so that means it's not a false response. That's where the pain is coming from.

We did do the same type of blocks in the mid back lower --

lower down, and he once again with those he ended up receiving only about 20 percent benefit for four to five days.

Q Okay.

A So that was lower, but that was lower in the thoracic area and that was T3/T4, T4/T5, and T5/T6.

Q Okay. So I guess if you're looking --

MR. CLOWARD: I would need another hand here. Mr. Boyack, you want to come up and -- just put your hand right below me.

BY MR. CLOWARD:

Q So I guess you kind of looked at these, you kind of looked at these and then you shake it there, you go -- you kind of looked at those, right?

A Correct. Yes, sir.

Q All right. So that gives you another piece of the puzzle you put on to the table. You're able to I guess kind of look at the response?

A Correct. And I think once again in the neck area, it's a joint issue that's -- that's going on. Most likely, once again, that the joints can get injured when they had that sudden acceleration-deceleration injuries.

Q Okay. So after having all of the pieces of puzzle that you've had, were there any other injections in the neck that you performed?

A No, I did not.

Q Okay. So based on the information that you have before you as you sit here today and I would ask that all of your opinions be to a reasonable degree of medical probability on a more likely than not basis, what do you think is the ultimate source of the pain in the upper neck or, I

mean, excuse me, the scapular area, neck area? What do you think is causing the problems?

A It was from the joints of the neck.

Q Okay.

A I don't think -- I don't think it's a disk issue. Once again, he doesn't have pain that travels down an arm. If you look classically at the diagrams, you put in what he was describing, they just match up. And he responded well to multiple injections of the joints on the necks.

Q Okay.

A Short-term but it did respond to him.

Q Okay. And if you were to narrow it down to what specific joints do you think are causing him the problems, what would you think that that would be?

A Probably like the C4/C5, C5/C6 area. It's difficult to say because we did a couple of levels, but those are probably the main ones. If you look at your radiating patterns, that would give him kind of the pain that he's actually having.

Q Okay. And yesterday, Dr. Muir testified that based on his review of everything, he felt like that those were the I guess the culprits, if you will --

A Right.

Q -- and that based on the response that Mr. Morgan had, he would be a candidate for the rhizotomy or radiofrequency ablation.

A Correct.

Q Would you agree with that or not?

A Yeah. That's -- that's the final -- so for the joints what you do is you do the initial block or a subsequent block. If you get a positive response, the long-term treatment is the rhizotomy. And basically what the rhizotomy does is you have a very small nerve that's going from your joint to the spinal cord. So if your joint's inflamed or painful, the pain signals go through that very small nerve, hit the spinal cord, and then go up to your brain to be felt this pain.

What we do is we put the same needle goes in the same location. And instead of just giving the local anesthetic or the steroid, we put a probe through that needle and that needle heats up to 90 degrees Celsius. By doing that, it causes that very small nerve to break down over a two-week period. So as that nerve breaks down, you lose the connection between the painful joint and your spinal cord. So even though this still may have the same pathology there, you don't feel it as pain anymore because that nerve is no longer existing.

However, all nerves do grow back. So just like if I cut your finger and reattach it, you'll start getting sensation back later. And the reason for that is because as the nerves start to grow back, if they grow back in the same direction and reconnect, the pain signals start all over again. So that's why the procedure which is called the rhizotomy may have to repeat it on average like once every nine months to a year.

Q Okay.

A For the disk itself, that's -- that procedure doesn't exist. For the disk itself, it would be surgery in the form either of a microdiscectomy, plasma decompressions, fusions. There's a variety of surgeries.

Q Okay. You don't think that Mr. Morgan is a candidate for like a fusion-type -- that's not his issue. His issue doesn't have anything to do with the disk. It has to do with the facets; is that --

A That's correct.

Q Okay. Now you mentioned that there is a nerve that connects. I guess what is the name of that nerve?

A It's medial branch nerve.

Q Okay. And so the rhizotomy would be to, I guess, destroy or -- I don't know the technical name, but you're focusing in on that part of the nerve?

A Yes.

Q Okay. Now you mentioned 90 degrees Celsius. What is that in Fahrenheit? I grew up in the United States here, so.

A I mean what do you do, you multiply it be 1.8 and then you add 32 to it. So it's hot. I mean it's 200 degrees, a little bit hotter than that.

Q Okay. All right. Now let's focus in on the I guess the lower spine, the lumbar spine and we'll talk about that and I guess what your opinions in that regard are.

A Okay. So in the low back, so he was describing pain that was in the low back that was going down the leg to the calf area. That can be reproduced either by lower facet joints or by a disk issue, all right. On the MRI, he had actually two MRIs done, and both MRIs showed joint issues as well as disk issues. For us, it's up to us to try to determine really where that issue is coming from. Because it wasn't classically going all the way into the foot, I thought it was a joint issue. So what we did, we did a joint block of

the facets only on the right side. He didn't respond well to it at well. He only had like 10 percent, 15 percent benefit.

So with that, you can say it's not the joints because if it was the joints, he would have got like 50 percent, 40 percent, 60 percent, 80 percent benefit from it. Because we ruled that out, we can say, okay, what other things can contribute to that kind of pain. A disk issue can. We did an epidural injection at one particular level, which is L4/L5, and he responded well to that, about 50 percent benefit from it.

Q Okay. Now before I go on to that injection, what I wanted to do I guess was ask you, you say he had a -- on the MRI, he had a joint issue and a disk issue. What were you referring to there?

A So if you look at the -- one second -- if you look at the original MRI report on 7/31/14, he had disk bulges at three locations, and he had facet hypertrophy, which is the joint issues at several locations, at the last two actually. The subsequent MRI on 11/15/16 showed the same thing, the facet issues as well as the disk issues.

So once again, it's unlikely that every disk bulge was symptomatic because you can actually have disk bulges that don't hurt. So it's up to us to say, okay, well, how is he describing his pain, what's the physical examination to determine what's the most likely cause of the symptoms. Once again, we injected the joints. He didn't receive good benefit from that, so we can kind of rule that out as a pain generator. We ruled out muscles, ligaments, and sprains because this the pain has been going on for multiple, multiple months. by that point that should have resolved if that was the case.

The only thing we're left with is the disk. We did a disk injection which is the epidural at one level L4/L5 and he responded with a 50 percent benefit, temporary but 50 percent benefit with that. So that means that's the cause of his issues.

Q Okay. And --

MR. GARDNER: Counsel can we get the Bates number on the documents he's looking at?

THE WITNESS: Oh, I'm sorry.

MR. GARDNER: That's okay. Just --

THE WITNESS: Yeah.

MR. GARDNER: -- if you could.

THE CLERK: Just so we have it for the record.

THE WITNESS: I don't -- the problem I'm looking at my own.

UNIDENTIFIED SPEAKER: It probably doesn't have a date.

UNIDENTIFIED SPEAKER: They're right behind you.

THE WITNESS: Oh, these big ones?

UNIDENTIFIED SPEAKER: Yeah.

MR. GARDNER: Thank you.

THE WITNESS: Let's see if I can find them in here.

MR. CLOWARD: Yeah. They're under Dr. Coppel.

THE WITNESS: Okay. It just has exhibits. Do you know which --

UNIDENTIFIED SPEAKER: Exhibit 9, I believe.

THE WITNESS: Exhibit 9.

[Counsel confer]

THE WITNESS: Sorry, this is kind of confusing the way you guys have it.

BY MR. CLOWARD:

Q Doctor, if you'll look at Exhibit 9, the Bate label is NCP-000101.

MR. CLOWARD: Your Honor, may I approach and hand this up?

THE COURT: Go ahead.

MR. CLOWARD: Okay.

BY MR. CLOWARD:

Q So let's see, 90 --

A So if you actually -- if you look at -- it's NCP-000160 which is my last -- just my last note because it summaries everything in there.

Q 160?

A 160, yes.

Q Okay. Perfect.

A So it summarizes everything in there, but at the bottom of the page is the results of the radiological studies. So that kind of summarizes what they are.

Q Okay.

A And then I'm sure in here you guys actually have the readings for him. I think it was Las Vegas Radiology.

MR. CLOWARD: Was that good enough?

MR. GARDNER: Oh, that's perfectly fine. I just wanted to make sure that it's [indiscernible]. So it is Bates stamp 160 in Plaintiff's Exhibit 9?

MR. CLOWARD: NCP-000160.

MR. GARDNER: Got it. Thank you.

MR. CLOWARD: Okay.

MR. GARDNER: Thank you.

BY MR. CLOWARD:

Q Okay. So, Doctor, as you sit here having I guess the opportunity to look at that, look at the summary of the course of the treatment that you've had and was there something also significant that happened as far as Mr. Morgan? Was he able after that injection to go off of the pain medication at that time?

A Yes. So he was. Then if you look at Bates stamp NCP-159 --

Q Okay.

A -- that's when he came back to see us two weeks after the procedure. So the procedure was done on 3/10/17. We saw him on 3/28/17, which is about 18 days later. He said he received about 50 percent benefit from the procedure for one week and then during the time he had better functionality and better sleep patterns. It started to dissipate. Pain relief was only 20 percent at that point which sometimes happens, but he was able to discontinue the Norco, which is the narcotic.

So, you know, when we look at this in terms of relief, we always say, pain level, what percentage did it go down but also how did it affect your functionality and were you able to take less medications as well. So if you say my pain level got better but it's still a 6 and it was a 6 before but now I don't need my narcotic medications and I'm sleeping better and I'm more functional, obviously, that's a good response.

Q Okay. So he had not only a reduction in the pain but he's able to go off the pain medication, he's able to sleep better, doesn't give him a hundred percent relief, but he has improved functionality in these other factors that I guess give you an idea of the efficacy or usefulness of that injection?

A Yes.

Q Okay. Now, Doctor, as you sit here today, is it -- I guess what is your opinion, again to a reasonable degree of medical probability on a more than likely than not basis, what level is it that is the level in the lumbar spine that is causing the issues for Mr. Morgan?

A I think it's the L4/L5, the level we injected.

Q Okay. And Dr. Muir talked about the course of treatment for that as the surgeon, so we've already gone over that. We'll also talk to Dr. Cash about that. But what is -- I guess what is your understanding of the cause of these symptoms?

A Well, so when we as physicians talk about causation, it's sort of very basic as when somebody comes in and says, I was involved in a specific accident, whether it be a car accident, a slip-and-fall work injury, I was picking up a box, picking up my grandkids. And they say, well, when did my pain begin and that's what it is. So either you had pain before the specific instigating event, whatever that may be, and you have pain afterwards. If you say before this, I was perfectly fine, never had these issues and this one thing happened to me, whether, once again, accident, pick up my grandkid or what have you, and the pain began after that, then we can say that thing is what led to you to have your symptoms.

And then what we do is we treat symptoms. We don't necessarily treat what we're seeing, one again, on an MRI. So even like I said in the low back, he had several disk bulges on the low back on the MRI, I don't think those were symptomatic, all of them, because we did one injection and he got great benefit at just the L4/L5. So I think the L4/L5 is the main issue.

Q Okay. Are you aware of any other potential cause of these symptoms other than the car crash on 4/1 of 2014?

A No.

Q Okay. Now, I wanted to ask you about the treatment that you rendered. Was the treatment that you rendered for this patient for both the complaints of pain in the neck, thoracic area, as well as the lumbar spine, was that reasonable and necessary?

A Yes.

Q Was the billing that you billed for those services usual and customary for the Las Vegas community?

A Yes.

Q Okay. Doctor, have all of your opinions been stated to a reasonable degree of medical probability on a more likely than not basis?

A Yes.

Q Okay. Thank you.

THE COURT: Mr. Gardner?

MR. GARDNER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GARDNER:

Q Hello, Doctor.

A Hi.

Q And one of those pesky questions I do need to ask you is how much are you being -- how much are you charging today for your testimony?

A Five thousand dollars.

Q Okay. Did you do anything special to prepare for your testimony today?

A Just reviewed my medical records.

Q Did you see anything in your review of your medical records that stood out that you hadn't remembered or something unusual or odd?

A No.

Q Dr. Muir testified yesterday that if any of us would undergo an MRI of our neck or our thoracic area and lumbar that it's likely that all of us would have certain defects, small bulges or cuts. Is that correct?

A Yeah. I mean typically what I tell my patients is starting when you're about 30 year old, it's when the degeneration process starts all over your body. So that includes the spine. You know, your hair starts to go, fall out, go gray, wrinkles, things like that. And the spine's not any different. And the way that typically presents in the spine will be issues with the disk themselves. At 22 years old, it's kind of unlikely unless, you know, you did a lot of sports or some type of genetic issues or significantly overweight, things like that can play into it. But it's a possibility.

But, yes, there's studies that have been done that have taken people that are asymptomatic, meaning no pain, they stick them in an MRI machine, they come back and you see degenerative changes.

Q Okay. And thank you for that. You just made me depressed for the future by the way.

A All of us.

Q I'll get over it I guess. Now is there a difference between perhaps the pain of a, I'll say, a youngster versus someone that's more middle-aged? Is there -- do the pain generators treat old and young alike?

A Yeah. I mean basically pathology is pathology. So if you have a pain at a specific nerve root, it's going to cause the same type of pain no matter whether you're old or young. Now the response to your treatment might be a little bit different, obviously. So, you know, when we're young and we were 18, things happen and you go like, oh, I'm fine the next day. As you get older, you'll feel it for more days and more days and sometimes it just becomes chronic.

Q Yeah. Well, in this circumstance, Mr. Morgan was a young man, early twenties. Is that the kind of physiology that he would have that would do better and more quicker heal than maybe like a 40-year-old?

A Yeah. So typically the younger you are, obviously, the better you recuperate for any type of disease, whether it be pain, diabetes, anything like that. In terms of, also, the recuperation time, things that go into it is your physical state beforehand, whether you smoke or not, whether you were overweight or not but then genetics can sometimes play into it and the type of work that you do.

Q Okay. Well, did you -- do you know anything about the history of Mr. Morgan, whether he was a weightlifter or a runner or an athlete or anything like that?

A No, I remember he worked like at a -- I think at an athletic club or something like that when he was seeing me, but not -- not before that.

Q Okay. Do you know about any of his previous workout routines or anything -- I'm not saying that he had them, but --

A No, I --

Q -- were you aware of any?

A I don't, no.

Q Where is your physical office? Where are you located?

A We have five locations in the city, but the main office is on Charleston and Rancho.

Q Okay. Now do you not only own your business but also the physical location that you're in?

A Yes. We -- we have the building as ours, yes.

Q Okay. How many partners are there that are involved in that --

A None, just me. I'm the sole owner of the practice.

Q Okay. You're the sole owner of the practice --

A Yes.

Q -- and also the five locations; is that correct?

A Yes. I'm sorry. I own the practice. I started the practice about eight years ago. We just had our anniversary. In the practice right now there is myself as a physician, four other doctors, and we have I think ten mid-levels that help basically treat patients.

Q Okay. But those other doctors and the lower level employees, they don't have any ownership in any of the buildings? Those are yours?

A Yes, sir.

Q Okay. How long have you -- have you owned all five of them for about eight years?

A No, not at all. No. So the very first one we bought actually from foreclosure from a pediatrician which was tragically actually from his wife because he was jogging and he was killed while he was jogging hit by a car. And then that was probably seven years ago. So what we normally do is we'll run in a location. If it feels like this is the location that needs our services, then we typically will buy a building. And the reason we do that is just economically to try to keep the rent stable for the long-term.

Q Okay. Now do you and Dr. Muir have any kind of a business relationship?

A No.

Q He's not involved with any of the buildings that you own?

A No.

Q Okay. Do you get referrals from him?

A Yes.

Q Okay. Was Mr. Morgan a referral from him to you?

A No.

Q How did he find you? How did Mr. Morgan get to you?

A He -- let me look at my first -- so he was referred through us through Urgent Care Extra which is Urgent Care's are I think there's like 17 in the city.

Q Okay. So if someone goes in with a certain set of symptoms, they will automatically refer them to you or are there several that they had referred to --

A I don't --

Q -- several doctors?

A You would have to ask Urgent Care Extra. But basically I'm assuming there's something like 60 different pain physicians in the city, so they would basically refer the patient to whatever's closest.

Q Have you ever received a referral from Dr. Muir?

A Yes.

Q Okay. About how many?

A Less than 1 percent of what we see.

Q Okay. Can you give us a number?

A I haven't seen any this month or the month before, so.

Q Okay. If he were to give you one referral a month or one or two, that would be pretty normal for you?

A Yeah. I mean we get referrals from probably three to four hundred different physicians in the city. So we're one of the biggest pain practice in the state, so we take pretty much all the insurances. We treat all patients, so that's why we get so many referrals.

Q Okay. Are you someone that would actually refer something to Dr. Muir?

A Yes.

Q Can you give me a circumstance when you would actually refer something over to the surgeon?

A Sure. So the basics is, once again, as I told you, there's only four things that can be done for pain. There's therapies, there's medications, there's injections, and surgeries. We typically don't like to skip

any of the treatment algorithms. For instance, we won't necessarily send you to a surgeon if you haven't tried therapies because there's no point because you're going to send the surgeon, you're going to waste your time going there, waste your money, and then he's going to say, did you try the therapies? No. Well, try the therapies because that may help, right?

So we typically want the patient to try therapies and medications for a couple of months and see if their symptoms get better. If they don't better, we typically obtain the MRIs at that point to say, okay, what's going on. Why are you not getting any better? If you're still continuing to have symptoms, then we have the option of offering you the treatment choice of doing injections. Not all patients take it. Some people are very scared of needles. They say, hell, no, I don't want this done. No way that anybody's putting a needle in my spine. Other people will say, no, the pain sucks. It's bothering me. It affects my work, my sleep. That's an extreme option. I'll take it.

If you don't respond to the injections, then that's where the surgeons come in because at the last treatment option for any of it is surgery. But we typically, once again, don't like to skip any of those, at least in our practice, skip any of those -- those steps.

Q Okay. Now did I hear you correctly by saying that Mr. Morgan was not a surgical candidate for any level from thoracic down to the lumbar?

A No. I think in the neck, the main issue was the joints.

Q Okay.

A Right? So there is no surgery for that. There's the rhizotomy. Those are the injections with the heat therapy.

Q Okay.

A In the low back, we did the joint blocks. He didn't respond well to that, so we said, okay, it may be a disk issue. We did the disk injection and he responded well temporarily to that. The ultimate thing for a disk is surgery. And there's different types of surgeries. There's microdiscectomies which is the least -- the most conservative and least invasive is the microdiscectomy all the way up to fusions.

Q Do you have any explanation about why perhaps Mr. Morgan has not undergone lumbar surgery?

A No. I mean I wouldn't necessarily recommend it. The issue with surgeries is as follows: as soon as you do surgery on a disk, whether it be a microdiscectomy or an actual fusion with hardware is that you change the anatomy of the spine. And what happens is you'll have what's called an adjacent segment breakdown. By changing that anatomy and fusion it, it becomes -- you get greater pressures above and below the level of your fusion. It causes those levels to break down faster and you may require surgery in those levels anywhere from five to ten years down the road.

Q Okay.

A So what most people will say is surgery should be your last treatment option. The reason for that is it's irreversible. So a pill that I prescribe to you can be stopped. When we do an injection, needles goes in, needle comes out. There's nothing changed permanently, right? But a surgery, once I take a portion of your body out or put hardware in there, that's irreversible. So you have to make sure that most people -- and most surgeons would say this, this is the last treatment option. If you can live with

your pain right now, live with the pain. If you say -- you get to the point where you say this is unbearable now, then surgery should be done.

Q Okay. Now, you see -- you see him monthly; is that correct?

A I haven't seen him for actually some time now. So the last time I saw him was after the lumbar epidural injection. That was on 3/28/17. He was able to discontinue the Norco medications, so at that point there's no reason for him to come back and see him unless he wants more treatment from me because just to come in and say hello, I still have my issues but I don't need meds, I don't want an injection right now, I don't want to waste his time or money.

Q Is that the only thing you prescribed to him was the Norco?

A No. I think we did a muscle relaxer, an anti-inflammatory, and a pain medication.

Q Okay. What kind of pain medication?

A I think it was Norco was the pain medication was the narcotic.

Q Oh, okay.

A And then the muscle relaxer, I think, was --

Q Soma?

A -- Soma, and then he had Naproxen as the anti-inflammatory.

Q What does it suggest to you that he ultimately got to the point where he didn't feel like he needed pain medication anymore?

A Yeah. I mean at this point, yeah, because --

Q That's a good thing, right?

A Well, yeah, of course. You don't want to be on narcotics, especially with all the addiction stuff that's going on and he's young. You

want to avoid that if at all possible.

Q Okay. But the last time you saw him was what, at the end of March of this year?

A Yes, sir.

Q Is there any kind of a record or any kind of a document that suggests that he has gone back on to medication?

A Not that I know of. So I don't know because that's the last time I saw him, so we don't -- unless he comes back to the office, we have no way of knowing what his current condition is.

Q Fair enough. That makes sense, so.

A Yeah.

Q Will you describe what a rhizotomy is one more time just real --

A Sure.

Q -- slow for --

A Yeah, no problem. So, once again, you have -- I'll just take this as -- I don't want to take it off, but let's say this is your painful joint and you have a small nerve that goes from the painful joint to your spinal cord, right? In this case, let's say the computer. When we do the original block the needle comes in here. We numb up this joint right here in this nerve temporarily. We stun this -- so basically there's no pain signals that temporarily go across this. And we'll say, did you get any benefit, yes or no? If the answer is yes, whatever percent you got means it's coming from this joint.

If the issues come back and responded well to the original blocks, we could do what's called the rhizotomy. The rhizotomy is needle

goes in the same spot, but instead of just giving you a local anesthetic, we apply heat to this at 90 degrees Celsius. What that does is causes this to break down, so it's just like if I cut this wire. This still exists, but there's no longer a connection anymore to your spinal cord to go up to the brain. So the pain signals stop, right?

The pain signal gets generated, goes this way, connection's lost. You don't feel anything. The reason it doesn't last forever is, once again, the nerves grow back. If they grow back in the same direction and reconnect, those signals start all over again.

Q All right. Let me ask, is there a procedure, a rhizotomy that perhaps could reduce pain in the lower legs?

A No, because you don't want to do a rhizotomy on any other nerve because if you do a rhizotomy on a major nerve that's coming out of the spinal cord like these guys, it'll lead you to have paralysis because that's a motor nerve as well.

MR. GARDNER: Just one moment, Your Honor?

[Pause]

MR. GARDNER: I'll pass the witness. Thank you.

THE COURT: All right. Mr. Cloward?

MR. CLOWARD: Just a couple of follow-ups, Your Honor.

REDIRECT EXAMINATION

BY MR. CLOWARD:

Q Doctor, just very briefly, I just have a couple of follow-ups. Now I guess the first thing I wanted to ask you is are you aware of the recent treatment that or consultations that Dr. Muir has had with Mr. Morgan?

A No. Once again, the last time I saw him was on 3/28/17. So I'm not sure what's gone on after that.

Q Okay. If Dr. Muir has seen the patient within the last couple of months for complaints of neck and back pain and it's been over three years since the crash, do you have any reason to believe that Mr. Morgan's problems are going to spontaneously go away?

A No. Typically, you know, what we tell people is the longer you go with your symptoms, the more likely they're going to be chronic long-term. So if you told me right now, look my accident was yesterday and I have symptoms. What's the likelihood of me having this long-term? I'm going to say, like 10 percent, right? If you say, look, I've had these issues three years. What's the likelihood of me having these symptoms next month? Almost a hundred percent. I don't think it's going to go away --

Q Okay.

A -- unless something else is done for it.

Q Okay. And, again, another spine article, this is called "Radio Frequency Medial Branch Neurotomy in Litigant Versus Non-Litigant Patients With Cervical Whiplash". And I just would ask you to agree or disagree whether you agree with this statement that it says, "Studies show that 15 percent of whiplash patients suffer severe pain for one to three years. Between 26 percent and 44 percent of patients will develop long-term problems." -- do you believe that -- oh wait, excuse me -- "And 5 percent of patients develop chronic unremitting pain." Do you agree with that statement?

A Yeah. It's sort of what I told you initially. About 80 percent of

the people get better with the conservative. Of the 20 percent that's left, another say 10 -- another half of those would get better with injections and the rest of them are left with chronic issues that may require surgery.

Q Okay. And on a more likely than not basis based on the ongoing complaints that I've represented Dr. Muir testified that jurors heard that testimony, on a more likely than not basis, is it reasonable to suggest that it's more probable that Mr. Morgan is going to have ongoing pain complaints into the future?

A Yes. It's most likely than not.

Q Okay. And, again, more likely than not, is it reasonable to suggest that Mr. Morgan will have ongoing needs for medical treatment?

A Yes.

Q And, again, on a more likely than not basis, is it reasonable to suggest that he will continue to experience pain and suffering into the future?

A Yes.

Q Now you were asked some questions about your relationships with Dr. Muir and the ownership. It sounds like you've done well.

A Yeah, with a lot of work. A lot of long hours.

Q And you say there are 60 pain physicians in the Valley?

A Yeah, at least 60. Yes.

Q That do similar I guess work as you?

A Yes.

Q Have you heard of the name of Steven Sanders?

A Yes.

Q Is Steven Sanders a pain management doctor?

A I think -- yeah, I believe so. But I mean there's 60, so I don't know everybody, but I know most -- most of the people.

Q If he testified that he's actually not a pain management doctor, he's an orthopedic joint, bone and joint --

A Right.

Q -- I guess, well, we'll leave that to him.

A Okay.

Q Have you heard of Bone and Joint Specialists?

A Yes, I have.

Q I'm going to just show you just this article, this here. Have you heard of Michael Elkanich?

A Yes. He's an orthopedic spine surgeon.

Q He's an orthopedic spine surgeon, and he does spine surgeries?

A Yes, and then Dr. Manning, Dr. Mendez are joints.

Q Okay.

A Usually I think Manning is more like hippish, a hip guy. Mendez is usually shoulders and knees. Rosen, same thing. And then Sanders, same thing. And I don't know who Jocelyn [indiscernible] physician's assistant that helps him out.

Q Okay. But you are aware of Michael Elkanich?

A Yes. I've known him for almost ten years. I think he did med school at the University of Arizona and he was there before I was there.

Q Has he ever referred you patients?

A Yes.

Q Okay. And he's a spine surgeon?

A Yes.

Q Okay. How many spine surgeons are there here in the Valley?

A Oh, boy. My best estimate would probably be about 15 to 20.

Q Fifteen to twenty, okay. Just a kind of a random question, if you had an electrical problem at your house, would you call a plumber?

A No, an electrician.

Q Okay. Have all of your opinions been to a reasonable degree of medical probability, Doctor, on a more likely than not basis?

A Yes.

Q Okay. Thank you.

A You're welcome.

RECROSS-EXAMINATION

BY MR. GARDNER:

Q Doctor, what do you know about the accident that Mr. Morgan was involved in?

A Simply what he told me at his initial visit, which was he was driving his Ford Mustang and then collided with a retirement bus.

Q Do you know anything further, like --

A No. I haven't seen police reports. I'm not an accident reconstruction specialist. I didn't go to the scene of the accident or any of that. I simply what the patient told us.

Q Okay. Now if the patient began to be injured, let's just say hypothetically he was injured in the accident, okay?

A Yes.

Q When would he start showing or feeling those pains that we've been talking about throughout this trial?

A It's variable. In my experience, I've seen them from immediately right after the accident to it could be most likely not -- most people within a week, a couple of days. A lot of times what happens is the adrenaline itself is so ongoing. Then when that starts to go down a little bit, the symptoms start to appear. The other times that -- sometimes what will happen is that people will be feeling normal until they return back to work and do the physical activities. And they start noticing that they're actually having symptoms that doesn't allow them to use the normal activities. But the longer you go from an accident without any symptoms, the less likelihood it is that those symptoms are related to the accident.

So if you, for instance, if he said I had knee pain and it began six months after an accident and he says, I believe this is from the accident, I'm going to say no. It's most likely not related to the accident.

Q Okay. Well, you've rendered some opinions about the condition of his cervical, thoracic, and lower back. Are those injuries things that would have been generating pain sooner or later after an accident?

A Usually the joint issues are sooner and the disk issues can develop later.

Q Why is that?

A Because the disk itself takes time -- if you start to break down the process of the disk with an injury, it may not appear -- the symptoms may not appear for weeks afterwards or sometimes even like a month or two

months afterwards. Because as that degeneration process progresses, that's when the disk starts moving backwards and backwards more and then it finally reaches to a point where it really causes irritation of the spine or the nerves and that's when you get the symptoms. A whiplash injury is an immediate injury to the joints because you have that sudden acceleration-deceleration injury, so the joint capsules and the nerves and muscles and ligaments get inflamed right away.

Q Did we have that whiplash motion in this case?

A Yes. So any time you have a sudden acceleration-deceleration injury, it doesn't necessarily mean a rear-end. It could be a side collision, impact collision. It's just basically the sudden quick motion like this.

Q Okay. If he -- say, for example, this incident was on an angle. Would you expect the neck to have gone straight forward and straight back or would you have expected it to go in the direction of the angle that caused the accident?

A It depends on the way the patient's seated. It depends which way they're looking, and it depends on the angle. And then the forces that are transferred, it also depends on the weights and velocities of the vehicle. So I did chemical engineering in college, so I know a lot about engineering and principles and all that.

But, once again, not all collisions result in injuries. I've seen people have rollover accidents and they get out and they're perfectly fine. And then there's been cases where there have been minor accidents and it was in the news like six months ago or almost a year where a lady ended up dying that she had a aortic dissection she didn't know developed after the

accident, and it was a minor accident. So every patient is different, and that's why we always try the conservative stuff first in the hopes that most of the issues resolve on their own.

Q How would you have expected Mr. Morgan to react immediately after this accident from a physiological standpoint? Would he be walking around, laying down? What would you have expected based upon these alleged injuries?

A Well, everybody's different. It just depends on how it affects him right then and there. Some people are dazed and confused when they get out. Some people are taken immediately to the hospital. Other people are taken by family members. Other people wait several days to seek out any medical attention. I mean everybody's honestly a little bit different, and I wouldn't put a lot of basis on the way you react immediately afterwards to really whether or not you're having symptoms that are going to be long-term.

Q Okay. Take that one step further though. We're dealing with a young man --

A Yes.

Q -- presumably in good shape. Would that have any impact on the -- on your opinions regarding what he would have been expected to be like after the accident being young --

A No.

Q -- young like that?

A No, not really. That has nothing to do with it. There's a lot of issues that go into that are more important, once again, some of the ones that I mentioned, than really your age.

Q Other than looking at your chart, did you do anything else to prepare for your testimony today?

A No.

Q Have you had an opportunity to speak with counsel?

A Yeah, last night a little bit because I didn't know where I had to show up and we didn't have a depo so I was a little confused. That's why I was going to court.

Q Okay. And that's all you spoke about?

A Yes.

MR. GARDNER: I'll pass. Thank you.

THE WITNESS: Thank you.

THE COURT: Do we have any questions from the jury?

MR. CLOWARD: Your Honor, can I approach?

THE COURT: Sure.

[Bench conference begins at 11:25 a.m.]

MR. CLOWARD: I was going to say he went -- I don't like to object a lot, but he went outside the scope. I wanted to ask a couple of follow-ups if the Court would let me.

THE COURT: What did you want to ask?

MR. CLOWARD: Some of the questions about the disk and then also just to I guess there was something else I had in my note, but mainly just that.

MR. GARDNER: For what it's worth, I don't have a problem with it.

MR. CLOWARD: Oh, and the age.

THE COURT: You can just ask him -- just ask him in follow-up. when we do follow-up?

MR. CLOWARD: Sure.

THE COURT: Okay. I'll give you a little latitude in the follow up.

MR. CLOWARD: Okay.

MR. GARDNER: I'm fine with all these.

MR. CLOWARD: Okay.

THE COURT: You're fine with all of them?

MR. CLOWARD: What's that?

THE COURT: You're fine with all of them?

MR. CLOWARD: I am.

THE COURT: Okay.

MR. CLOWARD: I guess I would be fine with them so long as they're not going to open the door to -- because this one might open the door to the secondary gain for Sanders, and I don't want to say that I'm okay with this and --

THE COURT: Well, you didn't ask the question.

MR. CLOWARD: And then the same thing with the work. I don't want to say that that opens the door.

UNIDENTIFIED SPEAKER: I don't think the jury can open the door for you.

THE COURT: Yeah. I don't think so.

UNIDENTIFIED SPEAKER: Okay. We're just making sure.

[Bench conference ends at 11:28 a.m.]

THE COURT: Okay. So I'm going to ask you questions. I'm going to ask you to look at the jury when you answer them so that they can hear you.

THE WITNESS: Okay.

THE COURT: How many days after the crash did Mr. Morgan seek out help from a doctor for pain for his back pain?

THE WITNESS: Can you -- for the spine or the low back? I guess that's the --

UNIDENTIFIED SPEAKER: That would --

THE COURT: We can't really ask the question.

THE WITNESS: Oh, okay. I'm sorry. Sure. So basically on the day of the accident, he was taken to Sunrise Hospital, so he sought out medical attention the day of the accident. He went to Urgent Care before he came to see me, and he saw me -- the accident was on 4/1/14, and I saw him on 4/21/14. So in that timeframe, which is twenty days, he was seen at Urgent Care and also the same day at the emergency department. So he sought out care right away.

THE COURT: In your professional opinion, is Mr. Morgan able to work and hold a job based on his current condition?

THE WITNESS: It depends on the job. So basically, like everything else, it depends on the physical activity and what he's able to perform. In my opinion, most people are able to hold a job. It just has to be the right job. So if he says, look -- we treat a lot of firefighters, a lot of police officers. So their job requirements are much, much different than somebody who basically would be somebody -- I don't know -- typing -- types all day

that's in a chair, right? So he should be able to hold some type of job, but I don't know if returning back to his previous job, which was working at a gym that requires a lot of physical activity is doable. He's just going to have to find something that's -- that's more amicable to his symptoms.

THE COURT: How do you determine or can you determine if Mr. Morgan's faking his injuries and pain?

THE WITNESS: So we do -- at the initial office when we do an examination, we do it with Dell signs and what that basically does is it's physical examination maneuvers that we can do that you don't even know what we're doing in order to see whether you're faking it or not, so like non-anatomic tenderness if -- or over-embellishing.

Or when you say -- and it's happened before -- like I can barely move my neck and then when you go pick up your phone and it rings in the office and you go like this, we're like really, right? Or I can't pick up more than two -- two pounds but you come with your purse that has ten or fifteen pounds, you're like that doesn't make sense to me, right. The same thing if I go to touch you and dong an exam and I barely touch you and you go, oh, my god. I'm like I just barely literally brushed your -- your shirt and this doesn't make up. I didn't pick any of that up with him, but and so, yeah.

THE COURT: When you saw Mr. Morgan, where specifically did he report lower extremity pain? Was the pain in both legs or one leg?

THE WITNESS: It was one leg. It was the right leg, lateral aspect of it going into the calf area. And that's why we did the injection only on one side, which is the right, and it one level L4/L5 which would be the distribution that you would see where he was describing his symptoms.

THE COURT: All right. Mr. Cloward, follow-up?

MR. CLOWARD: Just a couple of follow-up.

FURTHER REDIRECT EXAMINATION

BY MR. CLOWARD:

Q Dr. Coppel, you were asked some questions about I guess when symptom would present, what's reasonable for symptoms to present and you kind of mentioned, look, if somebody has a symptom that presents like six months later, that's not normally going to be likely caused by the traumatic event. You said specifically with facets due to the acceleration, sudden acceleration, sudden deceleration, those are something that manifest early on right off the bat.

A Yes.

Q Is that fair?

A Yes.

Q Okay. But I want to make sure that I heard you correctly. You said when it's a discogenic pain generator, sometimes that can take a month or even two to develop due to the I guess the anatomy of the disk.

A Right. It's a longer natural progressing course than it would be for the joints. Sometimes you do see it immediately, but it wouldn't be surprising to say if it develop four weeks, six weeks into it or eight weeks into it.

Q Okay. So in this case, Dr. Muir testified yesterday and we went over the specific I guess presentation of injuries. The neck was right off the bat, the first visit with the ER. One week later at the emergence -- or at the Urgent Care, it was neck and now wrists. And then I believe about a couple

of weeks after that, I think on the 23rd is when you saw him and then the 24th is when the chiropractor saw him. And it's around that area so that would be roughly 23 days after the accident Mr. Morgan is now complaining of pain into his lower back.

Given that his pain generator in the low back is discogenic, is that an abnormal presentation for that pain?

A No.

Q Is there anything inconsistent about that?

A No.

Q Okay. Does I guess a multi-trauma -- is it unusual for a multi-trauma situation, like say, for instance, in his case he had wrist pain which he had surgery for. Does I guess sometimes one injury take precedent over another?

MR. GARDNER: Object. Leading, but --

THE COURT: Overruled.

MR. CLOWARD: I can -- I'll --

THE COURT: No, it's [indiscernible] --

MR. GARDNER: Thank you.

THE WITNESS: Yeah. I mean, so when somebody comes in with multiple areas, we say what's the worst area. That's what we're going to treat first. So we don't -- we don't like to just jump around and do a whole lot of different things. It's you're coming in, you have neck pain, mid back pain, low back pain. I'm going to say what's the level and what does it vary in each location. What's the worst and what area would you like me to treat first because we can't really do -- at least with the injections, we can't do

everything at one time. When we do give you medications though, it helps everything because when you take the pill, it goes in your stomach, dissolves, it gets absorbed in your bloodstream, so it's going to help any type of pain that you're having from the wrist, neck, head all the way down to your feet.

BY MR. CLOWARD:

Q Okay. And just a final I guess question based on one of the thoughtful questions from the jurors. Was there anything at all about Aaron's presentation that caused you to say, you know what, something's not right here. You know, this isn't -- he's not really hurt. You know, something else is going on.

A No, I mean I didn't -- I didn't pick any of that up to be honest with you. I think he tried to work consistently throughout. There was points where he actually increased his work hours and made his symptoms worse. He wasn't requiring early refills on narcotics, didn't want to go up on narcotics. In fact, at the very end, he just decided discontinue the narcotics even though he was still having issues. So there wasn't anything really that I was picking up to say this is a little bit concerning. I think this guy is playing me for more narcotics, which is what sometimes happens in pain management or other things like that.

Q So he wasn't coming in saying, hey, doctor, I want you to prescribe OxyContin, you know, in the strongest dose, nothing like that?

A Right. It's not like he's coming in and saying give me an elevation of my narcotic medications, more frequency, more strength. Oh, and by the way, I don't want to do any of the conservative stuff. I just want

to stick to the pain pills.

Q Okay.

A So I think he was trying to do what we -- what he was requested by his physicians to do.

Q Fair enough. Thank you, Doctor.

THE COURT: Mr. Garner?

MR. GARDNER: Nothing further. Thank you.

THE COURT: All right. Thank you.

THE WITNESS: Thank you, Judge Bell. I appreciate it.

THE COURT: Okay, folks. We're going to go -- I'm sorry. Could I see counsel for just one second?

[Bench conference begins at 11:35 a.m.]

THE COURT: So you got the next witness coming out?

MR. CLOWARD: Yeah. If the Court would -- we're very respectful of the Court's time, so we're prepared to call the Defendant if you'd like us to.

THE COURT: No. Let's just go ahead and [indiscernible]. We'll give them a little bit longer for lunch. It's a little easier just getting in and out in time, so.

MR. CLOWARD: Okay.

THE COURT: So we have a little bit longer than an hour, so just we'll break into -- then you have the doctor next and your clients ready whenever Dr. Cash is done then?

MR. CLOWARD: Yep. Thank you.

THE COURT: Okay.

[Bench conference ends at 11:36 a.m.]

THE COURT: All right. Folks, we're going to go ahead and break for lunch until 1:00. During this break, you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial or watch or listen to any report of or commentary on the trial or any person connected to the trial by any medium of information, including without limitation newspapers, television, internet, and radio or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

I'll remind you again not to do any independent research. And we'll see you back at 1:00.

THE MARSHAL: Please rise for the jury.

[Jury out at 11:37 a.m.]

THE COURT: All right. Anything we need to take care of outside the presence of the jury?

MR. CLOWARD: No, Your Honor.

THE COURT: I do have copies of the instructions if you want those.

[Recess at 11:38 a.m., recommencing at 1:00 p.m.]

THE MARSHAL: All rise for the jury.

[Jury in at 1:13 p.m.]

THE MARSHAL: Please be seated.

THE COURT: Back on the record in case number A718679, Morgan vs. Lujan. And let the record reflect the presence of all of our jurors, parties, and counsel.

Ladies and Gentlemen, I am so sorry for the delay. It was entirely my fault. I had a mandatory judges' meeting, like all of the judges had a meeting during lunch. So while you were eating lunch, I was at a meeting, which was kind of boring. And it ran long. In fact, they're still up there and I left, but I needed to stay just for a little bit to deal with some things. So I apologize for that.

All right. Mr. Cloward, please call your next witness.

MR. CLOWARD: Your Honor, the Plaintiff calls Dr. Andrew Cash.

THE MARSHAL: Remain standing and raise your right hand and face the Clerk to be sworn in, please.

ANDREW CASH

[having been called as witness and being duly sworn testified as follows:]

THE CLERK: Thank you.

THE COURT: Good afternoon, sir. Go ahead and have a seat. If you could please state your name and then spell it for the record?

THE WITNESS: Absolutely. Good afternoon. My name is Dr. Andrew Cash, C-A-S-H.

THE COURT: Go ahead.

MR. CLOWARD: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. CLOWARD:

Q How are you doing today, Dr. Cash?

A Great, counsel. How are you doing?

Q Good. Now, like we've started with all of the witness in the

case, I guess if you could just take a moment and explain to the jurors some of your qualifications, if you're a doctor. Just let us know a little bit about yourself, if you would.

A Sure. So I went to college at the University of North Carolina at Chapel Hill and I stayed there for medical school and decided I wanted to be an orthopaedic surgeon when I grew up. So I went to Atlanta, Georgia for a 60-month program, which is five years, and I studied orthopaedics exclusively. And that's the whole musculoskeletal nervous system for the human body, so any kind of car wrecks, any kind of blown out knees, any kind of knee replacements, anything that can get broken, essentially, long bones, arms, legs, hips, pelvis, shoulders, neck, and back, spine. I studied that for five years.

But then I decided I wanted to do a little bit more intensive study in spine surgery and I was lucky enough to meet up with Bob Watkins out of Los Angeles who takes care of all the major athletic teams in the country as well as just everyday common injuries. And so I was very fortunate to get a lot of training with him. And that was in Los Angeles.

And then I came out here, having my residency and my fellowship, which is 14 years combined. I also had done a year of research back in med school, so it was about 15 years. I passed my written boards, passed my oral board examinations, and I started practicing here around 2006. I maintain a current, active licensure here. I recertified for my boards last year. It's good until 2029.

I'm an orthopaedic surgeon. I'm a fellowship-trained spine surgeon. So what I do routinely is I look at patients that come in either

through car wrecks, falls, worker's comp, aging, any kind of minor or major accidents, and I evaluate their necks and backs, any other orthopaedic conditions, and decide if they can benefit from a treatment modality other than surgery to try to get them better. And then if and when they do need surgery, I try to perform it in the most minimally-invasive way possible using state-of-the-art techniques which they actually teach internationally and I go and take courses on internationally. That's what I do.

Q You do actually treat patients?

A Absolutely. All the time. Every week.

Q Like, for instance, give me a -- I guess a day-to-day -- earlier today were you treating patients?

A Yes, sir. Earlier today I went by the surgery center to prepare for a surgery, make sure they had everything. And then I went and saw about a dozen patients in my office and I worked on a couple of reports. And then I came over here. So I see patients routinely three or four times a week, almost every week.

Q Okay. So I guess the one question I did have to -- or I did want to ask you is you treat patients. Do you also do what's called forensic expert work?

A Absolutely. When I say I was working on some reports, oftentimes in cases like these I'll be asked if I would look at some records either on behalf of the plaintiff's counsel or the defense counsel and ask if these records make sense, were there any injuries at all, if so what were they, what were they caused by, was there anything preexisting, was there anything subsequent, and if the billing corresponds with what was

performed. So I look at the causation and the damages and the medicals in cases both for defense and plaintiffs.

Q Okay. Now, obviously, if you're a treating physician you would come and testify. Are you aware of the difference between what's called a treating physician expert versus a consulting forensic expert?

A Yes, absolutely.

Q Okay. So just to be clear, you sometimes will come to court and you'll be, I guess, the treating patient's physician expert?

A That's correct.

Q And then other times maybe you're hired by the plaintiff, maybe you're hired by a defendant to come and testify in a forensic capacity as a -- as an expert witness?

A Yeah. In a case where I did not actually meet the patient or perhaps met them just for an independent medical evaluation, but I was not a treater in that instance.

Q Okay. So in that -- I guess in that setting when you're hired as a treating -- or, excuse me. See, I get like this every single day. I get -- you know, around 2:00. I apologize. It's just how it is. I'm sorry. But so if you're hired -- now I get flustered. Now I'm embarrassed so I'm forgetting what I'm supposed to say -- or my next question. Okay. So when you're --

MR. GARDNER: Do you need a Snickers?

MR. CLOWARD: What's that?

MR. GARDNER: You need a Snickers?

MR. CLOWARD: That might help, actually. I don't eat during trial because I get stomach problems, but --

BY MR. CLOWARD:

Q When you're hired -- when you're brought to court either by the plaintiff or the defense, do you have a breakdown of what that percentage is?

A Yeah. So when I'm not treating a patient, I'm being retained just to review records and give opinions as a forensics expert only, I'd say probably 70 to 80% of the time it's for defense and the other 20 to 30% of the time it would be for the plaintiffs.

Q Okay. So when you come and testify as a retained expert, more times than not it's actually as -- for the defense?

A Yeah, that's correct.

Q Okay. Now, another question that I had, Dr. Cash, was did you talk about your fellowship training?

A Yeah, I mentioned it briefly, that I spent a year with Bob Watkins out of Los Angeles and studied exclusively spine and how to treat it in the most minimally-invasive and best ways possible.

Q Okay. And we're going to be hearing tomorrow from Dr. Steven Sanders. Is he a spine-fellowship trained spine surgeon?

A No. I think Dr. Sanders -- and I worked with him when I was at UMC Hospital -- I forgot to mention that. I took care of patients at UMC Hospital, a level one trauma center here. The worst of the worst orthopaedic injuries come in. I was probably one of the only two people in the state or at least west of the Mississippi that would take care of orthopaedics, pelvis, and spine. At UMC Hospital, we had to break those into compartmentalized specialties, but I did all three of those when I was

there for three years.

So I worked with Dr. Sanders at the time. He didn't do spine there. He didn't do pelvis. He did orthopaedics. And I don't believe he did a fellowship in spine. I don't believe he's -- he might not have ever done a spine surgery as an attending. I don't think he's qualified with his privileges in the hospitals and I've never heard of him doing spine surgery. So I believe he's exclusively orthopaedics.

Q Okay. And when we talked to Dr. Muir, he explained a little bit about getting privileges and what's involved with that. Now, because you've had a fellowship training in the spine, does that mean that you can go in and perform any surgery you want at the facilities that you had privileges at?

A Now, are you talking about just spine surgeries or just --

Q No. I mean like if you wanted to go do surgery -- if you wanted to do a total hip replacement, could you go and do that?

A I couldn't right now because what they do is the hospitals have to look out for the patients that are being brought there, and part of that is making sure their doctors are competent to do the surgeries for which they're trying to perform. So what you'll do when you'll first come to town is you'll submit all the cases that you've done like in the last six months or year, whatever the independent hospital requirements are. And you'll have to tutor under somebody. They'll have to proctor you. Another doctor in town will have to proctor you for several cases and make sure they think you're competent. And then you fill out the paperwork and you get vetted by a board and everything like that. And you have to renew that every couple of years, too, at the hospital. So I haven't submitted for a knee replacement

or hip replacement in five, ten years at least. So I'd be -- I would never take a patient for one of those surgeries because I probably wouldn't be doing it as well as I could have ten years ago when I was doing those routinely. So they would not let me do that tomorrow and I wouldn't even ask that.

So if you're asking if Dr. -- if this Dr. Smith can do a spine surgery, I doubt it. I don't think he's ever done one in the ten or --

Q Dr. Sanders?

A Or, sorry, Dr. Sanders in the last 10 or 15 year --

Q Okay.

A -- that he's been here. So the hospitals really make sure that you're up to date and are doing these surgeries often enough that you can be doing them safely in the hospital.

Q Okay. One other question I had was approximately how many spine surgeons -- and that could be either orthopaedic spine surgeons or neuro spine surgeons -- are there in town?

A I'd say between 25 and 30 of orthopaedic-trained spine surgeons and neurosurgeons.

Q And then do you know approximately how many pain management doctors there are in town that do, you know, injections, things of that nature?

A I think the pain management doctors that are invasive and do interventional injections would be somewhere around 80 to 100.

Q Okay. Now, have you heard of bone and joint specialists?

A Yes.

Q Have you heard of Dr. Michael Elkanich?

A Absolutely.

Q Is he a spine surgeon?

A Yes. He's also a fellowship-trained spine surgeon.

Q Okay. Do you know if he does expert work, for instance, forensic expert --

A Oh, absolutely. Well, he -- I know he used to. I think he still does a little bit.

Q Okay. So now what I'd like to do, I guess, is to talk a little bit about the treatment of the spine. And there's a -- there's the model to your left if you -- if that'd be helpful to use. If not, you don't have to use that, if you feel like it would be. But I'd like to just talk about the spine and some of the things that can cause folks problems and how they cause problems and why they cause problems.

A Sure. Okay. Can everyone see that from there or should I move?

Q If you feel like it --

MR. CLOWARD: Your Honor, if -- may the doctor --

THE COURT: You can stand up.

THE WITNESS: Stand? Okay. Sure.

THE COURT: Like whatever you're more comfortable with is fine.

THE WITNESS: So essentially, we're talking -- this is a lumbar spine. That means lower back. Anytime you have an L with a number on it, it's lumbar one, two, three, four, five. It's very analogous to the cervical spine with a C and then the numbering system. It looks very similar. The

bones are smaller. There's subtle differences, but for demonstration purposes it's pretty much the same. And the mid-back, the same thing.

You have a unit at each level and you have a vertebral body. It's very weird-shaped, if you will. It's got a body here. It's got projections out to the side. It has projections up and down. They articulate or form joints with the next section down. So this bone has a disc in between it and the other vertebral body. There's a motion segment. It's kind of like a joint. It moves. It restricts some motion, but it can be injured and become painful.

Then on the back side, it's kind of like a -- think of a big wheel. You got the big wheel in the front and the two little wheels in the back. These knuckles back here are called facets. Those also allow motion but restrain too much motion, can be injured, can be painful.

So any time at any level of the neck, mid-back or low back, you can have a disc and/or facet problem or both at any level. So part of learning what the patient's condition is, is identifying which of these structures are injured. And you can see you have five discs here on this model, so I have ten facets in the back. You also have a pair of nerves out of each side. You got to see if they're being pressed. So there's a lot of different structures.

Oftentimes, maybe one or two structures are injured or even more. So it takes a lot of -- it takes a lot of investigation through history, physical examinations, sometimes multiple physical examinations by the same provider or providers, MRIs, x-rays, maybe a CT scan, maybe a nerve conduction study, maybe an injection to a facet to see if it -- the pain went away, an injection towards a disc or a nerve block to see if pain went away.

You have to put all this information together because there's so many structures, you just can't really afford to guess. So you have to sometimes start with an estimation until you finetune what structures are responsible for the pain.

So oftentimes, after you get an MRI, you'll find several candidates that look like they might be painful. But MRI doesn't say painful, it just says what the findings are potentially. So then you'll start with an investigation with the injections and you'll systematically identify what's the most likely pain generator and you'll give an estimate -- you'll give it a shot, no pun intended. And if it comes back positive, meaning the pain is reduced, then you know some pain must be coming from there where you put the medicine. So that's a way to kind of deduce and narrow the suspects down to figure out where the pain is coming from.

Q Okay. Now, I just really briefly want to touch on -- a facet, is that also -- is there another more longer name for that --

A Well, yeah. So --

Q -- facet joint?

A -- facets are called zygapophysial joints. That's not commonly used. I'm not sure if that shows up in the records. But --

Q Okay.

A -- facets is the most common.

Q I just wanted to make sure. And then while we're here talking about just the -- kind of the basic anatomy, where is it, say, for instance, that a patient would have pain if they had, say, a cervical facet-related issue? Where are you going to look for the pain to be reported by the patient?

A So most commonly, it's -- well, there's a lot of facets, so it's going to be kind of local to where the facets are. If you have a high facet problem, high up in the neck, you're going to think the pain is going to be high up by the base of the skull. If the -- if it's in the middle, maybe the middle of the neck. If the facets at the bottom are injured, it might be in the bottom of the neck, kind of between the -- between the shoulder blades or else the trapezius. Sometimes facets can fool you a little bit. They radiate down to the shoulders and maybe even down the arm, infrequently to the elbow, but sometimes as far as that. So it's kind of a regional type thing.

You also -- you try to provocate extension. Facets are in the back of the spinal column, so if you extend it or turn to the side, you're liable to pinch those facet knuckles even more and cause pain. So it's more than just the region, which is also important, but it's what produces more pain.

Q Okay. I'm going to just -- I'm going to show you a diagram out of a peer-reviewed article that came out of the spine journal. The name of the article is "The Prevalence of Chronic Cervical Zygapophysial Joint Pain After Whiplash." Can I just show you the diagram and see if this would be an accurate representation of facet distribution in the cervical spine?

A Right. So I forget. Can I draw on this with my finger?

MR. CLOWARD: Oh, yes.

THE WITNESS: Okay. So up high in the neck is -- mine's off by about an inch down to the right. No? Well, okay.

MR. CLOWARD: Your Honor, may I have the -- Dr. Cash just come down and point to the screen?

THE COURT: Sure. That's fine. That's fine.

THE WITNESS: Okay.

THE COURT: If that's easier.

[Counsel confer]

THE WITNESS: So the numbering system starts with the lower numbers at the top. So the cervical one, two, three, four, five, six, seven comes down here. So as you're going down, you're increasing in number. So if you have 2-3 up here, I think I told you it's kind of regional in that area. Upper cervical facets cause upper cervical pain generally. And as you get lower, it kind of moves down these pathways. So if you have C6-7, you're coming down here. So there's a little bit of overlap for each of them, but generally if you're having a 2-3 up here, it's not going to cause pain down here. If you have a 6-7, it's not going to cause pain up here. So it's kind of just a very basic schematic to kind of get the idea that the higher up you have, it's more regional in that area. As you come down, it just -- it would be representing as the lower spine.

BY MR. CLOWARD:

Q Dr. Cash, while you're there, I'm going to just have you touch briefly on discogenic pain, pain source, and where if somebody had a discogenic pain generator, where they might expect to have pain in the cervical spine.

A Yeah. So also, if you have -- so each of the facets have a disc associated with it. It's one unit and there's seven of them in the neck. So just as the higher up C2-3 is up at the top of the neck, so are the discs at C2-3. It'd be higher up. If you have a C6-7, it would be at the very bottom. Now, the discs all throughout the back -- the nerve roots, they are paired on

each side. So you see how close the disc is to each one of the nerve roots? So if you have a 6-7 nerve root, it actually starts going down the arm and off to the -- now, it doesn't always, so you can't just say it's set in stone. But when it does go down the arm, you know it's out this way. And as you move up the numbering system, 6 will be here, 5 will be here, 4 will be here. So it's the same kind of illustration that higher up in the neck it will start fanning out. And as you get lower, it'll start spreading out further. But it does top down generally.

Q And before -- and just one other question, Dr. Cash, while we got you here. Do patients also have pain in the thoracic spine at times? Can that cause pain into those areas?

A So exactly the same concept. The thoracic spine, each level is going to have the disc and two facets and two pairs of nerves on each side. So as you go from T1 very high up to T12, lower, it's going to regionally be in that area, whether it's a disc or a facet. And if it's a disc irritating the nerves, it'll start coming around 4 [indiscernible] 5, 6, 7, 8, 9, 10, the belly button, 11, 12. So it just follows the same kind of pattern [indiscernible].

Q Okay. Fair to say there's a little bit of overlap in those patterns?

A Oh, yeah. Absolutely there's overlap. People are always wired a little bit differently. This is just a basic illustration, trying to learn the concept. And we have to apply -- it's kind of a puzzle. It's a little bit of an art and a science. You have to apply [indiscernible]. You know, it's very tricky trying to figure out what -- which disc or which facet sometimes. It ultimately requires physical -- serial -- multiple physical examinations, MRIs, and even multiple injections just to identify find which pain generator at the time.

Q Okay. I just -- I'm asking you, if it's okay, because I'm going to show you one other diagram.

A Sure.

Q That way, you know, you -- if you feel like you need to reference it, then we'll have you there. We won't have you going back and forth. So, Dr. Cash, this is an article out of the American Society of Anesthesiologists -- Anesthesiology and it's called "Pathogenesis, Diagnosis, and Treatment of Lumbar Zygapophysial or Facet Joint Pain." So this is an article about that -- the lumbar. And what we have here is -- that is some distribution on there, some -- it basically says these are the most common referral patterns extended from darkest low back to lightest regions and so forth for the lumbar. Is that a -- and is that an accurate description of the referral patterns that one could expect if there was a facet involvement in the lumbar spine?

A Yeah. So most commonly a facet involvement is going to cause pain in the lower back or lumbar spine. And then it can, like I said earlier, radiate down the elbow from the neck. It can radiate down -- down the leg for the -- for the back. Now, the most common is -- in the back does not have to be down the buttocks or legs, but often it is. You have to be aware of it. So this is just a -- kind of a basic illustration that not only would you have back pain, but it can come down in these lower extremities if it were a facet.

Q Okay. And I believe the article indicates that the most common referral patterns extend from the darkest -- so you know, we're talking the most common or the areas there, whereas the least or the not so common

or however you want to say that would be the lightest regions. That'll be down there and --

A So most commonly, if you have back pain [indiscernible] lumbar facet -- low back facet problem. And then the second most common would be down in the buttocks. And as you're getting further away, it's just less common. So as you're getting down here, it happens, but down here it's very rare. Extremely common, very rare, somewhere in between. It happens with facets all the time.

Q Okay. Now, the fact that, I guess, it's rare, doesn't mean that it doesn't happen. That just kind of shows the confusing part of medicine. And you can --

A Thank you.

Q Is that fair?

A Yeah, absolutely. Just think of those illustrations as trying to say that you should expect at least back pain most likely when you have a lumbar facet injury and don't be surprised if you have radiating pain down into the legs because it happens.

Q Okay. So what I would like to do now that we've kind of talked a little bit about, I guess, a general overview of the medicine, I'd like to talk a little bit about your specific treatment in this case. And I have a copy of your report for the benefit of counsel. Did you bring a copy of your report?

A I did.

MR. CLOWARD: Okay.

[Counsel confer]

BY MR. CLOWARD:

Q So can --

THE COURT: Sir, I'm going to ask you if you could just do me a favor.

THE WITNESS: Yes, sir. Uh-huh.

THE COURT: I know you have your report, but if you could work from the exhibit book --

THE WITNESS: I'd be glad to.

THE COURT: -- we have? That way we have the right pages for the record.

THE WITNESS: Absolutely. Is this the correct one?

THE COURT: Thank you so much. Yep.

THE WITNESS: Okay.

THE COURT: That should be it. 19.

THE WITNESS: All right. Thank you.

THE COURT: Does that look right?

THE WITNESS: Yep. I have it.

THE COURT: Great.

THE WITNESS: Thank you.

BY MR. CLOWARD:

Q Okay. So, Dr. Cash, can you I guess explain to me your involvement in this case? Did Mr. Morgan come to you for a second opinion?

A Yeah. So essentially, Mr. Morgan came over to my office. He had been treating for a while with other providers, even another spine surgeon who's very competent. And a lot of times patients, especially when

faced with potential lumbar surgery or any surgery, they want to come over and maybe get a second opinion, get another set of eyeballs to just see if everybody is on the same page. So this patient came over and kind of explained what had happened back in 2014, kind of gave me a rundown generally of what had transpired as far as treatment, as far as progression of the injuries and symptoms.

And so after the history was performed, I put my hands on the patient and do an examination and then I look at any extraneous data, MRIs, perform x-rays, look at the records from other doctors, look at the results from injections, and try to come up with an idea of what I would do next and kind of a quick differential of where I think the main problem is for the main problem he's presenting for and kind of what I would just do next. Not every treatment step down the road, but just what would I do next.

Q Okay. And in seeing Mr. Morgan, did you in fact do a physical examination?

A Oh, absolutely. Every time.

Q And can you tell the jurors what, if any, examination findings there were at the time of that examination?

A So essentially we start off by looking at the patient's back and we know he's having -- this patient's having pain. We're trying to identify where the source is. So like I told you earlier, when you extend the patient, meaning make them bend backwards, and they press those irritated facets, it'll cause worse pain. So that's the first line was painful extension. So I'm thinking maybe there's a facet component, not for sure, but at least there's some symptoms correlating with a facet problem.

Then I'll have the patient bend forward, just bend all the way forward until they can't stand it anymore. And then that's indicative of potential a disc problem because they're putting pressure on the disc now instead of the facets. It could be a contribution from the facets and the disc. It happens often because as each level -- that's each motion segment -- has a disc and facets, they can have to -- they can happen -- they can be injured in unison.

So next I just kind of felt the back. The patient indicated there was pain and tenderness and spasms. You could feel the muscle spasming. That doesn't mean the patient has a muscular injury because a muscular injury would have resolved in 6 to 12 weeks after the accident, but this is really persistent. The muscle spasms and tenderness is a result of the nerves being irritated by structure, either the facets or the disc in his back, and just causing the muscles to kind of lock up to prevent painful motion.

So nothing's really specific as far as a disc only or a facet only or both. There's just some vague ideas of both might be involved. So I look at the muscle strength. Now, here I'm trying to really hone in on the levels. So I test all the muscle strengths, whether they can straighten their knee out very strong or its weak, and the same with their ankle and their toes. Each one of those characteristically tells me which nerve root level might be involved. He had full strength, so it wasn't very helpful. It doesn't mean there's no injury to the disc. It just -- it wasn't irritating the nerve enough to make muscle loss or weakness.

I did the same thing for the reflexes at the knee and the ankle.

It didn't give me any more information specifically which nerve root would be irritated. Then I felt like there was sensation diminished in the right lateral thigh. That's characteristically L4-5. It doesn't have to be. There's some overlap. But 4-5 would be right down the side of the leg, so that at least gives me something to pinpoint what level this might be in the lumbar spine. And it's most commonly a disc that runs down the leg and causes decreased sensation, but sometimes a facet. So both are still possibly at play, although I think it's a disc at 4-5 at this point.

I have to rule out hip pathology, meaning structures inside the actual hip itself sometimes cause some pain in the hip or in the side of the leg or in the back. So I tested the hips and ruled them out. So now we're still looking at the back only.

And I looked at the sacroiliac joint, which are these side joints over here. And they sometimes mimic disc injuries and nerve injuries in the back, so I had to rule those out for sure. I ruled them out.

So now I'm looking at either a disc and/or facet, most likely at L4-5 but possible a different level. So with a physical examination, I'm able to narrow it down that much. I looked at the actual MRIs that were performed. There were several disc bulges and facet findings, so that's not particularly helpful. And then I decided what would be best to do next is update the lumbar MRI because the other one was a couple years old. I want to see if there's any large disc protrusion or tear, something that would identify more which level it was.

But in the meantime, I recommended an epidural injection, which is a nerve block. It's not like you'd get when you're pregnant. They

put you to sleep for it. They come in over on the side. You wake up and it's done. It comes in at L4-5 and that puts the area to sleep. And if they get a tremendous amount of pain relief just momentarily even, that means the pain must have been coming from there because I put it to sleep. So I wanted to use the epidural injection at 4-5, not only to treat the patient's pain to make him feel better -- that's the goal -- but also to help diagnose because we're still a little bit of vague where -- how many structures are involved, how many discs, how many facets. If this came back with some conclusive evidence that it was mainly at L4-5 disc, that would lead me in one direction of what the next step was. And if it came back with information that it was not helpful at all, on a diagnostic basis it would give me more information. So it's another test and a treatment at the same time for what's most likely the primary pain generator in the low back.

Q Okay. And it's my understanding -- Dr. Coppel testified earlier. He indicated that the T -- or, excuse me, the L4-5 was also an injection that was requested by Dr. Muir. That was performed and gave the patient a 50% relief. What does that tell you about, I guess, your hypothesis or your initial impression about the case?

A So it's not really surprising that another well-trained spine surgeon would identify the same injection to reduce the patient's pain. So if the injection were performed at L4-5 as we both requested and the pain was reduced immediately, diagnostically, 50%, that seems pretty significant. The disc at L4-5 is most likely the primary pain generator in the low back. Fifty percent is not 100, so I don't think it's the only pain generator. There still could be some facets at that level or a different level. But it's 50% so it's

around half of the pain is probably coming from the L4-5 level. That's just a generalization.

Q Okay. And now I don't see in your report that you specifically, I guess, addressed the cervical. It sounds like Mr. Morgan was there more for the second opinion on the lumbar. Did you in fact formulate any -- I see that you had records from -- you had reviewed records from Dr. Coppel, Dr. Muir, Las Vegas Radiology. That's in your report. Did you have any thoughts about the cervical spine?

A Yeah. So part of the paperwork that he fills out in the office is -- this is before I actually get to meet the patient -- is they fill the paperwork out in the front and it has a section for neck and back. And if you have no neck pain, you just put no and -- or leave it blank. But in this case, he had significant neck pain also. The pain diagram, the body diagram that was filled out by the patient had marked the neck as well as the back. I knew there was significant pain in the neck as well as significant pain in the back. Looking at Dr. Coppel and Muir's records, there was complaints of neck and back pain all the way through. And he actually came in with imaging studies. But when I talked to the patient specifically, they wanted to come in for a second opinion, they really wanted one on their back. It makes sense because Dr. Muir was recommending a discogram, which is a pre-procedure to a surgery, a plasma disc decompression. Oftentimes that leads to a fusion later. So it wasn't surprising he was coming in for his lumbar spine specifically at that time and not just the whole shebang.

So, yes, I knew he had problems with his neck at the time. Looking at Dr. Coppel's records, which nicely lists the injections that were

performed and the response, it looks like the attention was drawn initially to the cervical facets and the responses reduced the pain and so I thought the patient had a cervical facet problem, although he really wanted to talk about is back.

Q Okay. Now, can you tell us a little bit more about the tests you just talked about, the discography, the plasma disc decompression. What is that?

A So discography is most commonly used as a way to figure out is it more than one disc that you're suspecting. So Dr. Muir was looking at the L4-5. They performed the injection. The injection ruled in that level. The question is, if he's going to do a plasma disc decompression, which I'll explain in a minute, is should he just do the L4-5 or is there a secondary disc. This is the primary disc. It might be the only disc. But you have to go in there and do a plasma disc decompression on one disc, not knowing that there was a second disc.

So what's commonly performed is a discogram. The needle is placed inside the actual disc. Not by the nerve root, not in the facet. It's actually punctured into the disc itself. So the disc is like a jelly donut and there's a steel-belted radial tire around the outside. That's what gives it strength. So if you put pressure on your disc like when you're sitting there in the chairs or bending forward or jumping, it doesn't explode because the outside of the annulus, the circle. Okay?

So by putting a little needle through there and injecting some fluid, you'll pressurize that jelly donut pretty quickly. If the pressure is maintained, there starts getting to be a lot of pressure, well, there's

something keeping it there and that's an intact, competent circle. If there's a tear in that circle, you start putting pressure in, the pressure out goes out the path of least resistance. It's going to go out the hole. So you can tell by the pressure study and by injecting the fluid and then watching the fluid seep out, because we put a little radiopaque dye in there and you can see it seep out, and the patient has pain, you'll know that that level is positive.

So we're pretty sure 4-5 is going to be positive. You want to do the discogram at the other levels to make sure that these were competent and didn't need the plasma disc decompression and only one level did or if you needed to include a second level. So that was his plan.

If it's positive, then what Dr. Muir's plan for the plasma disc decompression was is to inject a little wand in there, vaporize, heat up the disc, and try to like scar it down and take out the pressure that's in the disc. So he was trying to heal it through a plasma disc decompression procedure. That's why they were combining those and making the next recommendation. He knew 4-5 was a problem. He was trying to figure out if he should include the next level with the plasma disc decompression so it's surgical.

Oftentimes, those things don't last for a very long time and you wind up getting a lumbar fusion. So I think it's a nice way for some patients to avoid getting a lumbar fusion or at least postpone it for a while and try to put something on there to give them a year, two, or three of significant enough benefit that they can postpone the fusion because that's a big -- very big, invasive, risky surgery.

Q And obviously if somebody is younger, if they're 24, 25 -- your

exam date was 10/12/16, so at the time Mr. Morgan was only 24 years old. Would that be something that you would offer a younger patient rather than somebody who's maybe a little middle-aged?

A Yeah. So I hope you're not talking about me there, but -- but, yeah. I mean, really, we don't want to operate on anybody we don't have to. This is elective surgery. We want to hold off surgery until the last resort. And that's especially true the younger you get. Early 20s, 24 is very young. Because it's not just the surgery they're going to get to make them feel better, it's what -- what's going to happen to their body after surgery.

So you have all these motion segments. You were born and made to have motion in these segments. For whatever reason, if you have to do a fusion and you lock just one in position, now you have four box springs instead of five, so the other ones are going to take up more stress and they're going to start wearing down faster, abnormally faster. So in 10 years, 15 years, this one's worn out and now you're putting a second -- taking a second box spring out. Now you got three left to take all your weight and all this stuff. You probably gain weight because you're in pain and you're -- you know? You're wearing these devils down.

So if you're 24, yeah, you get another one of these surgeries at 15 years. Now you're 39. And then in another 15 years you're 54 and you got half your spine fused. That's not what you want to do.

So you want to hold off on surgery as long as you can, especially something that's going to biomechanically alter your lumbar biomechanics as much as a fusion. That's especially through -- true when you're 24. So if it's -- it's more reasonable -- I mean, it's definitely

reasonable if Dr. Muir wanted to offer him a plasma disc decompression just to get some mileage out of it because it's a slippery slope of future surgeries once you start fusing the low back.

Q Okay. And, Doctor, generally speaking, for a one or -- I guess a two-level fusion, what's the cost of a procedure like that?

A So the hospital -- well, the hospital is the biggest cost and that's up in the couple hundred thousands of dollars on average. So including everybody else, you might reach 300,000, maybe more, maybe a little bit less. It depends on what's -- what they find when they're in there. But it's in the range of six figures.

Q And you were talking about this adjacent segment. Are you aware of any literature, spine literature or otherwise, that would, I guess, forecast looking at a data set of how often or how -- you know, if somebody in the future would have this adjacent segment break down that you're talking about?

A Yeah. So it's very common in the literature. It's called adjacent segment degeneration or breakdown. And so what they've studied is that on average, the fusion will wear down the next level to the point that they'll not just have a breakdown or symptoms or treatment, they'll need surgery for the next level at a rate of 3% per year.

So what that means is, very basically, 100 of us get a lumbar -- lumbar fusion today. In one year from now, already three of us will have a revision surgery at the next level. And that's just -- and, I mean, they must have been going through pain for at least six or nine of those months already before we commit to another fusion. At -- so you already got those

three. So the rest of the 97 of us are out there at one year. Well, three more of us will have a lumbar fusion at the next level then, so it'll be 94 left after two years without a lumbar fusion. Six people after two years will have an adjacent level fusion. And then three more of us will go over to the fused side to make nine more fusions within three years. Ninety-one of us are left over here.

So what I also cite in my reports when testifying is that by the time you get to 17 years, you will have had 51 of us over on the fused side. So more of us will have a fusion than not have a fusion at 17 years. So within 17 years, at 17 years, it's more likely the next level is going to be fused. So he's 24. We're talking about 41, next level, 58, the next level, on average. It could be sooner, maybe a little longer.

Q Okay. Now, Dr. Muir, he prepared a life care plan in this case. He did not think that Mr. Morgan was a candidate for the fusion. He said, you know what, I think that plasma disc decompression would be the -- a more conservative, appropriate approach. Do you agree or disagree with that?

A I don't know what he [indiscernible] for it, but I will tell you what's likely that he means, is that he wasn't a candidate at the time because he felt the plasma disc decompression was a safer, easier, and a procedure that he would get more use of for only two or three years. I don't think Dr. Muir would say it's going to last him ten years, but --

MR. RANDS: Objection. This calls for speculation. Dr. Muir has already testified.

THE COURT: Sustained. Mr. Cloward, if you could just --

BY MR. CLOWARD:

Q Just your --

THE COURT: -- ask [indiscernible].

BY MR. CLOWARD:

Q Just your -- I guess, your opinion as to whether you agree with that or don't agree with that, and I guess what your views are of those two procedures.

A Okay. So if you're a candidate for a plasma disc decompression, you are also a candidate for a lumbar fusion. By the time you've had the workup for a plasma disc decompression in which the last step is the discogram, it's identical to a lumbar fusion. The only time that you would pick one or the other is patient would say they want to try something less invasive and they don't want the screws and rods in this area and they want to buy some time. So if you're a candidate for one, you're a candidate for the other, unless you're 80 years old and you can't have rods and screws because it's going to stress you out too much, you might die. Then that's -- obviously you would get the plasma disc decompression only. But generally, the workup and the diagnoses and the medicals preceding each one of those would be the same.

So I would say for him at 24, I would agree that, yes, let's go for a plasma disc decompression if you feel like you want to put this fusion off for a while. But if you didn't want to, you know, beat around the bush and get right to it, you're definitely a candidate for the lumbar fusion at the same -- or alternately.

Q Okay. Now, I want to level with the jurors here. You and I met

last night, right?

A Absolutely.

Q Okay. And I asked you about a -- about Dr. Muir testified that he believes that Aaron would be a candidate for radiofrequency ablation once a year for the rest of his life. And I asked you about that. And do you share that opinion?

A No. So I've been asked this many times over the last ten years. I don't think the majority of patients that have a facet injury are treated for their entire life on an annual basis with facets radiofrequency ablations. What I commonly see and testify to is that if they have a set of those and they do need another one, that they're likely to proceed with that second, maybe third, maybe fourth, maybe fifth, but that would encapsulate the vast majority of the patients with either a second, third, fourth, or fifth set of injections of radiofrequency ablations. I don't see it going on forever on a more likely than not basis. You might find some people that have facet treatments every year for the rest of their life. They're in that one percenter or, you know, that very small. It's not a more likely than not situation. The more likely than not is the second, third, fourth, or fifth subsequent procedures.

Q Okay. So as far as the future treatment regarding the lower back, you agree with Dr. Muir that he's a candidate for the plasma disc decompression. You also agree that he's a candidate for a lumbar fusion. However, you disagree with Dr. Muir as far as the radiofrequency ablation. You don't believe that that's appropriate to go that far into the future. You say it's more likely than not reasonable up to five of those radiofrequency

ablations in the neck, but not anything past that. Is that fair?

A At this point, yes. If the patient were to have lived another ten years and we're sitting here ten years from now and they've had one every year, that changes the story. But at this point, with this set of medical data, I think it's fair to say expect a repeat second, third, fourth, and fifth, somewhere in that range, but not a lifetime.

Q Okay. And any -- I guess, in addition to the rhizotomies, is there other treatment that would be expected along with that?

A So when the facet joint is treated with a rhizotomy, that's the definitive, that's the all-in, that's the most you can do for the facets as far as a local -- a spot -- a site-specific procedure. When the pain reoccurs in 6 months, a year, 18 months, 2 years, whenever it does, then the same doctor that's going to do the injection really is kind of obligated to make sure it's still a facet problem. Because what if he had a disc injury in the meantime and you start treating the facets with radiofrequency ablation and it did nothing, it should have been -- the disc should have been worked up?

So often, most commonly, the doctor will reinject the facets to confirm it's still a disc facet problem, which it most likely is, but they're going to -- it's a higher standard than just testifying. It's medicine. So they're going to reconfirm with the facet injections -- or alternately called medial branch blocks -- before doing the radiofrequency ablation.

Q Okay. So as I understand it, you would think it would be reasonable on a more likely than not basis that the future care for the neck would be five injections and also five -- the rhizotomies? Is that fair?

A That's right.

Q Not --

A That's correct.

Q But not over that?

A No, not the lifetime that Dr. Muir is saying -- Dr. Muir opined to. No.

Q Okay. Now, another issue that some of the other doctors have talked about and I wanted to talk to you about -- it's not in your report, I did not have a chance to ask you about this last night -- but what is a Waddell sign?

A Okay. So Waddell was a doctor who published an article talking about what are the nonorganic factors with this patient. That means is there something more than just physical problems. Is it in their head? Are they faking? Is there something nonorganic, meaning physical in their body?

Q So if you suspect a patient is, let's just say, malingering or faking, you can apply some of these Waddell signs and try to get a better understanding if that supports your suspicion. So when a physician performs Waddell signs, they're trying to either distract the patient and do the same procedure they did when the patient thought they should have pain and they did it when they're distracted -- or they didn't do it when they're distracted, then it tells you that they were probably anticipating or maybe faking the pain when they did the exact same procedure distracted produced no pain. Or they have some other signs. I could go through them all, but essentially it identifies things that might be not physical injuries with the patients, but might be something from an outside source, whether

they're faking or secondary gain, something like that.

Q What I wanted to do is to ask you whether there's any controversy about Waddells and if you perform those tests yourself.

A So with most things in spine there's some controversy. But I don't always perform those. I know some doctors that do as a matter of routine. But I look at the patient and talk to them in-depth about, you know, their history and if I identify anything that's suspicious or inconsistent, I'll investigate further with the history, but also I might do it with the exam. But if their exam is matching up and they seem like they're forthright, I have no reason to not believe what they're saying and it seems consistent and the exam is consistent, I don't always do Waddells. But I do reserve those in cases where I am suspicious.

Q Okay. Is there a potential for the examiner to have bias in performing the Waddell testing? Meaning, you know, if you're a defense doctor, you know, you're going to say, hey, you know what, they -- the patient exhibited this based on that bias that the defense doctor have, or even on the other hand if a plaintiff doctor says, hey, you know what, they didn't have any Waddells? I mean, level with me on that. Is there examiner basis [sic] both for the plaintiff and for the defense in preparing those -- or performing those tests?

A So certainly bias can work either way for any physician. I'm not saying any was done in this case. I didn't see evidence that a bias was performed through what I reviewed in the clinical treatment records. But it's possible that a doctor who performs examinations for a defense firm might be biased towards finding positive Waddell signs. It's possible that a doctor

who's doing it on the treatment side or for a plaintiff's firm might not find Waddell signs. But, yeah, I don't find that very often. That would mean that either consciously or subconsciously the performing physician is biasing one way or the other. I mean, it's possible, but I just don't think it's very likely.

Q Okay. Do you think that that would change if the examining physician only did, say, for instance, defense exams?

A No, I can't say that. I mean, there's a potential that on the subconscious level this could affect a provider or a expert. It would be kind of a stretch -- it would be a lot to prove if somebody were actively either, let's say, exaggerating or falsifying or making up findings when they weren't there or doing just the opposite, hiding them, excluding them, or omitting them when they weren't [sic] there. That's a hard -- I've never seen any evidence of that. And I don't think if you did a thousand defense reports you would veer and have that bias necessarily, or the same with the plaintiff's side. So, I mean, like you said, if you're asking me if it's possible, certainly -- or the operator bias is possible, but I think it's just highly unlikely.

Q Okay. Now, Doctor, I guess a -- just kind of a recap of your opinions today. I would ask that your opinions be to a reasonable degree of medical probability. Have all of your opinions been to a reasonable degree of medical probability on a more likely than not basis?

A Absolutely.

Q Okay. And fair to say you're of the opinion that the pain generator that is causing the symptom -- the symptoms in the neck would be facet related, whereas the pain generator in the lumbar spine would be a discogenic pain generator?

A That's correct.

Q You could state that to a reasonable degree of medical probability on a more likely than not basis?

A Definitely.

Q Now, other than the automobile accident of April 1, 2014, are you aware of any other cause that would have caused those symptoms?

A No.

Q Okay. Doctor, was the treatment that you rendered in this case reasonable and necessary for the injuries that Mr. Morgan sustained?

A Definitely.

Q And were your bills usual and customary for the Las Vegas community?

A Absolutely.

Q And you gave the charges for the fusion surgery of 350- -- 250-, I think, to 350,000 or 300,000?

A Somewhere in that range, yeah.

Q Is that usual and customary for the Las Vegas community?

A Yes, it is.

Q And is the fusion surgery, is that a reasonable and necessary option for a patient to pursue to relieve lumbar or cervical pain caused by a discogenic source?

A Yes, that's correct.

MR. CLOWARD: Doctor, I have no further questions. Thank you.

THE WITNESS: Thank you.

THE COURT: Mr. Rands?

CROSS-EXAMINATION

BY MR. RANDS:

Q Dr. Cash, how are you doing?

A Good. How are you doing?

Q It's Doug Rands. I represent the Defendant in this matter -- or one of the attorneys for the Defendant. I got a report -- or it appears to be a report from your office, your Desert Institute of Spine Care?

A That's correct.

Q Okay. And the report I have is date of service 10/12/16. Is that when you saw --

A That's correct, sir.

Q Okay. And the report I have is -- I think the Bates number I have goes through CASH000005. Is there any more of that report that I don't have?

A Technically, it's just an electronic signature on the back of 6, but, yeah, the substance are on pages 2 through 5.

Q 2 through 5? Okay. And then page 1 of the -- of what I have is the -- it looks like your billing record?

A Yes, sir.

Q And you billed $850 plus $400, correct?

A That is correct.

Q How much are you billing for your time today?

A So I think it's -- I renew this every year. I think it's $6,000 for a half day.

Q Okay. And so even if we get out of here early, you got paid $6,000 for this afternoon?

A I'm reimbursed for my time today. I will not be able to squeeze in patients even if I got in early, so it's -- I'm -- the time is reserved. I'm here all afternoon for you.

Q Well, we -- we'll try not to keep you here all afternoon.

A You always say that. I'm on to you.

Q Okay. We'll set a time. I guaranty you I'll have less time with you than Mr. Cloward did.

A Did you get that?

Q You mentioned some other documents that you had, a report or something that was filled out by the patient. Did you provide that to counsel?

A We should have, yeah. That's part of the chart.

Q Is it in that exhibit?

A I don't know. I've only been directed to 19.

Q No, just the 19, the one that you --

A In 19? No, I don't -- well, there's a little more back here. Nope, it's not in 19.

Q Okay. Let's just go through a little bit -- oh, before we get started, you were asked some questions from counsel about your qualifications and that you spent time getting a spine fellowship and with the gentleman in Los Angeles.

A Bob Watkins, yeah.

Q Bob Watkins. And but you also said that you spent six

years -- if I'm remembering right, six years in Atlanta?

A So I said 60 months in --

Q Five years in Atlanta?

A Five years, yeah.

Q Okay. I got the six mixed up. Five years in Atlanta. And we've already established that math isn't my strong suit. That's why I'm here. But five years in Atlanta. And that was just a -- that was -- not just. I apologize for any -- I don't mean any fault. But that was your orthopaedic residency, correct, or fellowship?

A That was orthopaedic residency. And the first year is a general surgery categorical where I did three months of orthopaedics and seven months of general surgery, and some of that was plastics and some other specialties, and did, I think, a month of medicine and maybe either a month -- maybe a month of research. So it was not exclusively in the first year, but the latter four years two through five are exclusively orthopaedics.

Q And you've answered some questions and said that, you know, you -- after that, you went and got the spine fellowship and decided to concentrate almost exclusively on spine, I think you said?

A Yeah. So the spine fellowship was exclusively looking at spine. We had -- you know, as part of -- exclusively spine means you have to look at shoulders and hips and rule out other pathologies.

Q Sure.

A And so we're seeing musculoskeletal conditions, but we're focused --

Q Because the body is connected, right?

A Yeah. We're focused on spine.

Q But questions were that you -- when a patient comes in today, you're -- your practice is the spine today?

A No, it's still orthopaedic. I still look at orthopaedic injuries, but I rarely would do, like I said, a knee replacement.

Q And that's where I was going. A patient comes in to you, just for an example, and says, okay, I've broken my neck, I've got a bad neck, something --

A Uh-huh.

Q -- and also the patient is -- maybe has some instability in their knee. And you can evaluate the knee and say I think you need surgery on the knee and I'm going to refer you to my partner or somebody else for the surgery on the knee?

A Sure could, yes.

Q Or I think your hips -- you know, you have the ability as a surgeon, as a board-trained orthopaedic surgeon to do evaluations on a patient's hip --

A Certainly.

Q -- and say that's not my specialty, I'm not going to do the surgery, but I think you need a hip replacement?

A Yes. Sure.

Q And do the various evaluations. You can read the reports. You can read the x-rays, the CT scans. You have the ability to do that even though you don't do that kind of surgery, correct?

A That's correct.

Q Okay. Let's go through your report just real quick, a couple of things. On page 2, I'm just going to refer to the last number so we're on the same page, literally. History of present illness, is that something that the patient -- the Plaintiff gave to you?

A Yes. So the patient's in there for an illness and we're trying to get a history of it. And so it's performed on uniformly every patient that comes in and they kind of give their historical account.

Q Okay. And so where he says -- where it says in here patient reports he felt shaken up, adrenaline, and upset, is that what he told you or is that your --

A That would have come --

Q -- what you interpreted what he told you?

A That would have been straight from the horse's mouth.

Q Okay. He felt immediate pain in his neck, right shoulder, and upper back. His low back and headaches began later that day. Is that what he told you?

A That's correct.

Q Okay. And then this next pain is 810 -- 8 out of 10, 10 out of 10 at the worst. Back pain, 8.5 out of 10, 10 out of 10 at the worst. Denies radicular symptoms in the upper and lower extremities. That means he doesn't have numbness and tingling going down into his foot or his hand?

A So essentially what you ask him -- yeah. You ask if you have numbness and tingling going down your arms, do you have any like patterns of like pain, numbness and tingling, or some kind of weakness. And that's what they're usually asked.

Q And then prior injuries, you said he reported a motor -- an MVA, motor vehicle accident, right?

A That's correct.

Q Ten years ago with no residuals? And he had another MVA four months ago and reports that his symptoms were not aggravated?

A That's correct.

Q If someone in the condition of the patient -- or the Plaintiff comes in to you, does it make any sense that his symptoms aren't aggravated when he rear-ends another vehicle?

A No. I mean, there's no details really right there except that the -- it -- it happened and it wasn't aggravated.

Q Okay.

A So the most important part is was it aggravated. I don't have any details about mechanisms or anything like that. But he said, yeah, it didn't do anything to me. It's -- I don't have any contradictory information.

Q Yeah. So somebody in his position, in his -- at -- for -- what your understanding was, he was still suffering from pain and -- from this collision that we're talking about here today, right --

A Yes, that's correct.

Q -- when he came to see you?

A Yes, that's correct.

Q Okay. And then four months before that he was in another accident, didn't cause any additional pain, discomfort?

A Well, fortunately not. I mean, he already had facets that needed radiofrequency ablations and disc injury to his back. It didn't make

him any more surgical that he had an accident.

Q Okay.

A So he didn't have more -- worse pain.

Q All right. Let's go down to the review of the systems. I think -- and one of the doctors yesterday said that these are just something you have in your computer and if you don't check the box, it just goes in. Is this something that you actually did on this patient?

A So uniformly -- or most commonly, these are in probably all the doctors', no matter what kind of specialty or not specialist. They kind of just look at these systems. So you don't want to -- the first one really looks if somebody's having like symptoms -- red flags of cancer and stuff like that. So you kind of just get this review going on. And so I wouldn't usually go through this necessarily. This is on a checkbox format for the patient on the paperwork.

Q Uh-huh.

A And they just fill it out and they start checking things. And that's how we --

Q So but someone said in the -- for example, you said, psychiatric, the patient denies depression, anxiety, tension, memory loss, difficulty sleeping. Somebody told you that he didn't have any difficulty sleeping, correct?

A Yes. He would not likely have checked the box --

Q Okay.

A for difficulty sleeping.

Q But as -- you couldn't really substantiate that unless you had a

sleep study on him, right?

A Well, you know, so most commonly they have to come in and they say, yeah, I -- I wake up every night or it's tough falling asleep, the pain keeps me from sleeping or it wakes me up. That's usually what it means.

Q Okay. And he said there was no difficulty in this when he came to see you?

A It looks like he probably didn't check the box on that --

Q All right.

A -- occasion.

Q And musculoskeletal, the patient denies pain down the legs, pain down the arms. Reports neck pain, hip pain, and low back pain. That was something that you -- that he checked the box on that, too, correct?

A Yeah. It'd be either checked the box or wrote that out. I don't know if it's a checkbox or a line format for that, something like that --

Q And then the physical examination is what you actually did, correct?

A That's correct.

Q And you did a -- did you do a neurological exam of the cranial nerves?

A Yes.

Q Okay. And neuropsychiatric exam. Musculoskeletal, that's where you -- a musculoskeletal exam -- it says the lumbar spine. Did you do an exam of his cervical spine when you --

A No, I don't recall doing a cervical spine exam.

Q Okay. Or a thoracic spine?

A No. Just lumbar.

Q Just the lumbar? Okay. And you've already been through painful extension. I'm not going to waste any of our time to go through it again because you've already been through that, but the -- you talked about the imaging studies, the MRI. And then your recommendations, that's on page 3 -- or 5. You said you recommended an updated MRI lumbar, correct?

A That's correct.

Q Do you know if he ever had that?

A I don't recall if he's had that.

Q Okay. And an epidural at L4-5. Do you know if he had that?

A We discussed that he had 50% improvement earlier.

Q Okay. And then follow up as needed. That just means he can come back and see you if he needs to?

A Yeah. So essentially, he just wanted to get my opinion and wanted to go back and do whatever he was going to do after that. So that's why I put updated MRI lumbar and the epidurals, in case Dr. Coppel or somebody else saw the record, they-- or Dr. Muir, they'd know what my next step would be. So that's why there was no follow-up. Usually that would be a two-week follow-up for the MRI and a one-month follow-up for the epidural. But since he decided he was going to just hold on to those recommendations and think about it, then I just put follow up as needed.

Q Okay. And you didn't put anywhere in here about surgery. You just told him to go back to the doctors he was treating with, correct?

A I told him this -- these are the options I would recommend next

and if he wants to come see me again, I'd be more than happy to.

Q Okay. I just didn't see anywhere in your report anyway that you had recommended any specific procedure or surgery.

A The procedure I recommended was epidural at L4-5.

Q Okay.

A But I didn't recommend a definitive surgery at that time because we're in that -- because it wasn't appropriate at that stage of the workup.

Q Perfect. And you did give him a disability recommendation, no bending, stooping, squatting, climbing, lifting more than 10 pounds or 20 pounds occasionally, right?

A Yeah. I felt that those restrictions would serve him best to be protective of his injured low back.

MR. RANDS: Just one minute. Can I have the Court's indulgence?

THE COURT: Sure.

[Counsel confer]

MR. RANDS: Thank you. That's all I have.

THE WITNESS: Oh, thank you.

THE COURT: Mr. Cloward?

MR. CLOWARD: Your Honor, just a couple brief follow-ups.

REDIRECT EXAMINATION

BY MR. CLOWARD:

Q Dr. Cash, you were asked some questions about hips and if you could do certain surgeries and stuff like that. Would you agree with me that theoretically you can have an electrician replace somebody's toilet?

A Theoretically, sure.

Q Okay. If you had a complicated plumbing issue, would you call an electrician to come evaluate that?

A Very unlikely.

Q You'd probably call an expert in the field?

A Yeah, most likely.

Q Okay.

A I'd probably call my dad first.

Q Is he a plumber?

A He does everything, man. He can do everything.

Q Okay. Now, regarding this second accident, I think your record was October of 2016, correct?

A That's correct.

Q You said four months before that there was another accident, so that would have been, doing the math, I believe 6 of 2016, which would be June 2016?

A Yeah, roughly around June. You know, it's not like -- he didn't say it was exactly four months. It was somewhere around four months, so probably around June.

Q Okay. And now prior to June of 2016, is it your understanding that the recommendations for Mr. Morgan were PDD for the low back and for -- rhizotomies for the neck?

A Yes. That's what I was mentioning earlier. I mean, he already had those recommendations. Even if he had a subsequent accident and he says there no worsening, it matches up with the recommendations. He

didn't become more surgical. He's just still surgical.

Q Okay. So it didn't --

A So preexisting or from the --

Q It didn't --

A -- subject accident.

Q It didn't change the recommendations?

A That's correct.

Q Have you ever heard of a red herring?

A Yes.

Q Okay. Now, in your examination of Mr. Morgan, was there anything that raised any red flags whatsoever for you about him, about his treatment, about his complaints?

A What do you mean? A red herring or a red flag? What are you saying?

Q Sorry. I'm getting -- the red herring, that was just one question.

A Okay.

Q Now the next question is was there anything that caused any red flags --

MR. RANDS: You're mixing your metaphors, Ben.

MR. CLOWARD: I know I'm mixing my metaphors. It's getting late in the day. Hopefully I can bring it together.

BY MR. CLOWARD:

Q Was there anything that caused any red flags for you regarding Mr. Morgan's presentation when he came to see you back in October of 2016?

A No. Had there been any red flags, I would have documented those. I would have done a further history into why there was inconsistencies. I would have looked at probably the Waddell signs. I would have commented on it in the report. I would have specifically looked even further in the reports I have with Coppel and Muir, which I did look thoroughly through. I didn't see any red flags there either.

Q Okay. And finally, you were asked about whether or not you believed that the car crash of April 1, 2014, were the cause of the symptoms that Mr. Morgan was seeing you for. Would a -- is it usual, I guess, that you would find a 22, 23 year old, at the time he saw you 24 year old, having these symptoms without a traumatic event?

A No, not usually. I mean, my office is full of patients and we rarely see a 24 year old. I mean, it does happen, but it's very unlikely and when it does it's usually traumatic.

Q Okay. So if Mr. Morgan had not been in a car crash on April 1, 2014, do you believe that he would have still gone ahead and had to have the treatment that he had in this case?

A Absolutely not.

Q Do you think --

A No way.

Q Do you think that without the car crash of April 2014, do you think that Mr. Morgan would have to go on and have to have a -- either a plasma disc decompression or rhizotomy treatment in the cervical spine?

A No.

Q Okay. So you agree -- or I guess your opinion would be that the

car crash was the ultimate cause of all of these issues?

A That's correct.

[Counsel confer]

BY MR. CLOWARD:

Q If you did an IME in this case, would you have done anything differently or --

A No. I still would have performed a history. I still would have performed a physical examination. I still would have performed x-rays and looked at the MRIs that had been performed and looked at all the records from his treating providers. And it would be very similar and I would give my recommendations and I would talk about what caused the symptoms and what's needed next as far as treatment.

Q Okay. And the final question was, you actually did view the discography studies, the MRIs; is that correct?

A That's correct.

Q And the MRIs, I guess, or the findings on the MRIs clinically correlate to the subjective complaints of pain as well as your objective examination?

A Yes.

Q Okay. Thank you, Dr. Cash. And have all of your opinions been to a reasonable degree of medical probability on a more likely than not basis?

A Yes.

MR. CLOWARD: Thank you.

THE COURT: Mr. Rands?

MR. RANDS: I want to get my own flag in, so I'm just waving the checkered flag. I think we're done with this witness.

THE COURT: All right. Any questions from the jury?

UNIDENTIFIED JUROR: Yes.

THE COURT: Counsel, approach, please.

THE WITNESS: Here's your lovely --

THE COURT: Oh, that's Mr. Cloward's. You can just leave it right there.

THE WITNESS: Okay.

[Bench conference begins at 2:23 p.m.]

THE COURT: Okay.

UNIDENTIFIED SPEAKER: [Indiscernible].

MR. CLOWARD: [Indiscernible] fine with all of the questions.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: [Indiscernible].

MR. CLOWARD: Thanks, Judge.

THE COURT: All right.

[Bench conference ends at 2:24 p.m.]

THE COURT: All right, sir. I'm going to ask you some questions. I'm going to ask you to look at the jury, though, when you answer so that they can hear you.

THE WITNESS: Yes, Your Honor.

THE COURT: Did Mr. Morgan discuss with you any functional limitations he has? If so, what are those functional limitations or impairments?

THE WITNESS: Okay. That's a good question. So I knew at the time he was being evaluated by me that he was not at work and I knew he was having significant pain. He rated it 8 out of 10. Because I wasn't assuming his care and he wanted my opinion on what the next step, I don't think I investigated too fully on what specific -- you know, actually, let me look at one other thing in my records.

So what I have on page 6 of my intake form is something we call a back disability index. And it has ten parameters and it identifies what functional limitations they have based on their pain. And so we ask them about their pain intensity. It said it was severe and did not wobble too much, it was always severe. Asked about personal care and they said that they did -- they needed help every day in most aspects of their personal care. I asked him about lifting. They could only lift very lightweight objects. I asked him about walking. They said they could not walk without increasing their pain. I asked him about sitting. They said they avoided sitting because it caused immediate pain. I asked him about standing and he said he avoided standing because it caused immediate pain. His social life was hard because of his pain. Driving, restricted, form -- the pain restricted the form of travel to driving. His sleep was disturbed, five to seven hours. And his recreation was gradually worsening because of pain. So, yes, we have a lot of functional indices right here, page 6.

THE COURT: All right. Did Mr. Morgan report any lower extremity numbness or tingling to you?

THE WITNESS: So when he was asked about if he had radiating pain down the arms, hands, and feet, he said no. But when I

looked at his pain diagram and corroborated that with the physical examination, he had numbness and tingling down the right thigh. And then -- that's on my report Bates 4. And the pain diagram or body diagram shows back markings as well as markings out towards the side. So it looked like there was radiating pain and numbness and tingling.

THE COURT: How would you treat chronic pain associated with facet issues after the fifth ablation and is that treatment associated with adjacent cervical issues?

THE WITNESS: Okay. So there's two questions there. So we're looking at a patient now who is up for radiofrequency ablation and we're trying to figure out and estimate to the best of our ability how many he'll need in his lifetime. At this point, we're very limited. We don't have five radiofrequency ablations. We just have what we have now. So I think he's going to fall within two to five. That's just what I see as a standard deviation from the bell curve.

If, like I said, there's -- ten years from now and in fact he has had five radiofrequency ablations and the historical representation by the records show he has had five, then we will continue them on at that point. I'd have to re-estimate how many he'll need, how often he's having them, how often will he have them. So that question is in the future, provided he has five. I don't know if he will have the whole five. I don't know if he will have more. But we're talking about a bell curve of most people at this point needing two to five. But if he does get up to five, then he will probably need more and I have to re-estimate at that point based on what the records show.

And is that adjacent level? Adjacent level degeneration occurs with a lumbar or cervical fusion, either one, and it's the forces from the fusion being pushed up. The injury in the neck is the facets. There's not going to be an adjacent level breakdown because there's no fusion necessary for the cervical spine, just the radiofrequency ablations.

THE COURT: All right. How many times is the plasma disc decompression procedure recommended prior to committing to a lumbar fusion?

THE WITNESS: Rarely. So I do a lot of lumbar fusions. I'm sure Dr. Muir does, too. He does more plasma disc decompressions than I do. But it's very rare. This is often -- if we think that the patient is very young and we would like to kick the can down the road a little bit or our patient is very old and has very debilitating medical conditions like heart or lung and we think they wouldn't be safe for a fusion, we might go with a plasma disc decompression. But the fusion usually is gone -- is usually performed more often than a preceding plasma disc decompression by a number of magnitudes. It's just very rare we do the plasma disc decompression first. Now, this is a case where the patient is so young it might benefit to try that.

THE COURT: All right. Any follow-up, Mr. Cloward?

MR. CLOWARD: No, Your Honor. Thank you.

MR. RANDS: No, Your Honor.

THE COURT: All right.

MR. RANDS: Thank you for your time, Doctor.

THE COURT: Sir, you are free to go.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Cloward, please call your next witness.

MR. CLOWARD: Thank you, Your Honor. We would call the Defendant --

THE COURT: Okay.

MR. CLOWARD: -- Mr. Lujan.

THE COURT: Sir, come on up, please.

[Counsel confer]

THE MARSHAL: If you would remain standing, face the Clerk, raise your right hand to be sworn in, please.

DAVID LUJAN

[having been called as witness and being duly sworn testified as follows:]

THE CLERK: Thank you.

THE COURT: Good afternoon, sir. Go ahead and have a seat.

THE WITNESS: Thank you.

THE COURT: And if you could please state your name and then spell it for the record.

THE WITNESS: Okay. David Lujan, D-A-V-I-D L-U-J-A-N.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. BOYACK:

Q All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?

A Yes.

Q And what was your employment?

A I was the bus driver.

Q Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?

A Harvest Management was our corporate office.

Q Okay.

A Montara Meadows is just the local --

Q Okay. All right. And this accident happened April 1, 2014, correct?

A Yes, sir.

Q All right. And --

THE COURT: I'm sorry, Mr. Boyack. Could counsel approach for a second?

[Bench conference begins at 2:31 p.m.]

THE COURT: It's nothing you did. I just have an IT guy here to look at something that's wrong with my computer.

MR. BOYACK: Oh, okay. Okay.

THE COURT: So I'm just going to take a break, if that's all right with you.

MR. BOYACK: Okay. Yeah. We can take a break.

THE COURT: I just need to take a break because the IT guy is here to do something with my computer.

MR. GARDNER: No problem, Judge. No problem.

THE COURT: All right.

[Bench conference ends at 2:31 p.m.]

THE COURT: Ladies and gentlemen, we're just going to take a short break right now. During the break, you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including without limitation newspapers, television, internet, and radio, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you. I remind you not to do any independent research. We'll come back in ten minutes.

THE MARSHAL: Please rise for the jury.

[Jury out at 2:32 p.m.]

[Recess taken at 2:32 p.m.]

[Proceeding resumed at 2:48 p.m.]

THE MARSHAL: Please rise for the jury.

[Jury in at 2:49 p.m.]

THE COURT: We're back on the record in --

THE MARSHAL: Please be seated.

THE COURT: -- Case Number A718679, Morgan versus Lujan. The record will reflect the presence of all of our jurors, counsel, and the parties.

And, sir, I will just remind you, you are still under oath.

THE WITNESS: Thank you.

THE COURT: Mr. Boyack, whenever you're ready.

MR. BOYACK: All right. Thank you.

BY MR. BOYACK:

Q Okay. So this accident happened April 1, 2014, right?

A Yes, sir.

Q And it happened -- you pulled out of the -- what's that park, Paradise Park?

A Yes.

Q Pulled out of the parking lot and drove right in front of Mr. Morgan; is that right?

A Well, I looked both ways and then I didn't see any traffic coming, and then so I proceeded across three lanes. And then we collided on the right lane where he was going north, I believe.

Q Okay. All right. And at the scene of the accident, did you speak to anyone?

A Just the officer and then briefly him and his mother. I mean, his mother and I were -- talked about him being -- I was concerned about him.

Q Okay. And isn't it true that you said to his mother you were sorry for this accident?

A Yes.

Q And that you were actually pretty worked up and crying after the accident?

A I don't know that I was crying. I was more concerned than I was crying --

Q Okay.

A -- because I never been in an accident like that.

Q Okay. And isn't it true that you continued to apologize to

Mr. Morgan's mother for this crash?

A I apologized. I don't know if I did it continuously, but I did apologize.

Q Okay. And in fact, you were so concerned about Aaron after the accident, isn't it true that you told her [sic] mother that you would continue to pray for Aaron?

A Yes.

Q Okay. So this was a big accident?

A Well, it was for me because I've never been in one in a bus, so it was for me.

Q Okay. But you were so concerned about Aaron and what he may have injured that you felt the need to pray for him?

A Well, based on my religion -- I can't speak for anybody else -- but my -- I'm a very religious person, so, you know, prayer is, at least in our church, something you would do for somebody who you think might be ill or sick.

Q Okay. And you said you spoke to the officer, correct?

A Yes.

Q And you didn't tell the officer at the scene it was Aaron's fault, correct?

A No. I never placed blame.

Q Okay. And -- okay. And so tell me how this works. You cause this accident and how does it work corporate wise? You got to fill out paperwork?

A Yes. I go --

MR. RANDS: First of all, let me object to the form of the question. I think he's referenced cause and I'm not sure that's been established.

MR. BOYACK: Your Honor, this is cross-examination.

THE COURT: Yeah. Overruled.

BY MR. BOYACK:

Q You can answer. What's the --

A The protocol was I was -- then went back to the facility. I was sent for immediate drug and alcohol test and I filled out our accident report.

Q Okay. All right. I've got those copies here. This is Defense Exhibit A that I'm going to show you, the incident accident report. Is that your handwriting?

A Yes.

Q Okay. And I'm just going to scroll down. If you can, read for us what you wrote there.

A It says that I stopped at the driveway, I looked both ways and then I pulled out -- I pulled out, not -- and I did not see him and then that's when the collision happened or --

Q Right. Just read it word for word, if you can. I can zoom in if you want me to.

A All right. I stopped at the driveway and looked both ways and pulled --

MR. GARDNER: When you zoom out like this, you really can't see it, counsel, on these monitors, these screens.

MR. BOYACK: Oh, okay. On the smaller ones?

MR. GARDNER: Yeah. There you go.

MR. BOYACK: There you go. Sorry.

THE WITNESS: Okay. Again, I stopped at the driveway, looked both ways, pulled out, and he hit the bus by the passenger door.

BY MR. BOYACK:

Q Okay. By you writing he hit the bus, are you putting fault on Aaron?

A I was saying where the vehicle struck our vehicle. I wasn't placing blame.

Q Okay. And now I'll have you look at, I think, which is Exhibit B, the driver's statement report. If you can read that?

A I was pulling out of the driveway, stopped and looked both -- or stopped and looked and pulled out and the Mustang hit the bus.

Q Okay. And then this is the bottom of it. This is all your handwriting?

A Yes.

Q Okay.

A It was dry. It was windy and clear.

Q Okay. And you mark -- was a police report filed, you marked yes?

A Yes.

Q Were you issued a citation, you marked no?

MR. GARDNER: Objection. Relevance.

THE WITNESS: Yes.

MR. GARDNER: Relevance.

THE COURT: Counsel, approach.

[Bench conference begins at 2:55 p.m.]

MR. BOYACK: It's cross-examination. He's --

MR. GARDNER: It's [indiscernible].

THE COURT: [Indiscernible].

MR. GARDNER: He can't reference a ticket or a citation. That's irrelevant.

MR. BOYACK: We can.

MR. GARDNER: There's no foundation for it.

MR. BOYACK: We can for impeachment purposes because he was issued a citation. He had it. On a corporate form, he's marking that he did not receive a citation.

MR. GARDNER: Well, what does that mean?

THE COURT: What does that mean?

MR. BOYACK: It's just impeachment, that he's telling --

MR. GARDNER: Citation from the company or a citation from the cops [indiscernible]?

MR. CLOWARRD: We'll, ask him -- let him ask that question.

MR. BOYACK: Yeah.

MR. CLOWARD: Let him ask the question. This is cross-examination. You can rehabilitate.

THE COURT: I understand that, Mr. Cloward. But, you know, the -- citations are not admissible [indiscernible].

MR. GARDNER: Yeah.

MR. BOYACK: We understand that.

MR. CLOWARD: For specific purposes, but there are exceptions. There are exceptions to the rules of evidence.

THE COURT: Okay.

MR. CLOWARD: Things are allowed for other purposes.

THE COURT: But what is the exception [indiscernible]?

MR. BOYACK: The exception would be it's not offered for the truth of the matter asserted. He was issued a citation. It's impeachment.

THE COURT: Okay. Hold on a second.

MR. GARDNER: That's getting it in the back door.

MR. BOYACK: It's impeachment that he's changing the stories.

[Bench conference ends at 2:56 p.m.]

THE COURT: Okay, folks. I'm going to ask you to step out for a minute. During this break, you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including without limitation newspapers, television, internet, and radio, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you. I remind you not to do any independent research. Hopefully it'll be just a couple minutes.

THE MARSHAL: Please rise for the jury.

[Jury out at 2:56 p.m.]

[Outside the presence of the jury]

THE COURT: Go ahead and have a seat.

All right. Mr. Gardner, why don't we just start from the top so

that we make sure we have a good record.

MR. GARDNER: There's reference to an automobile citation that was allegedly issued to my client. Number one, it's not relevant. And number two, no one really knows what happened to that ticket, whether it was pled guilty or pled down or whatever happened to it. Not to mention the fact that I think it's prejudicial, especially when it's not admissible. I am not aware of any exceptions to that.

THE COURT: All right.

MR. BOYACK: We're relying on -- this is used solely for impeachment purposes. In a corporate document he's stating to a supervisor I was not issued a citation, yet, he was.

MR. GARDNER: [Indiscernible].

MR. BOYACK: We're not looking to pursue that anything further other than it's -- than to his corporation or to his bosses, he said I wasn't issued a citation and that's it. So it --

[Counsel confer]

THE COURT: All right.

MR. CLOWARD: And, Your Honor, if we can have the Court's indulgence? I've got the case up right now.

THE COURT: Sure. What's the case?

MR. CLOWARD: It is, I believe -- I thought that was the case. I thought it was *Johnstone v. State*, but that looks like a criminal -- it's 548 P.2d 1362. I'm not sure if that's actually the case, though. But I think the analogy would be just like insurance is not admissible for certain purposes, it is admissible for other purposes, for control, ownership, things of that

nature. And in this instance, if, you know, after the crash, the second day when we've had a -- we have an opportunity -- the Defendants have had an opportunity to think about it, the story starts to change, and now fault starts to be placed on Mr. Morgan, that is impeachment. That is impeachment information.

MR. RANDS: But, Your Honor, if I may, since counsel has jumped in on it, they can't use this as impeachment unless they try and say, okay, you say you weren't cited here, well, were you cited. How does it become impeachment if they can't get the citation in as evidence?

Mr. CLOWARD: Because the fact that he reported that he --

MR. RANDS: So what they're saying now is that they want to have this -- okay, we showed that he said he was not cited, now we get to go talk about the citation. And that's not relevant. That's not impeachment.

MR. CLOWARD: I think --

MR. RANDS: It's irrelevant to the case. It's not used -- it can't be used to establish liability. And that's what they're trying to do through the back door.

MR. CLOWARD: No. I think if we were to try and admit the police report as a result of that, that would be inappropriate. But the sole question of were -- you know, did you fill out this report accurately, yes or no, isn't it true that you actually were cited for this so this isn't accurate, and then that's the end of the inquiry. You don't get to -- this wouldn't open the door for us to say, well, okay, let's take a look at the police report, let's get into the police officer's opinion, let's do that. That's not what we're trying to do and I don't think that that would be appropriate.

MR. RANDS: The --

MR. CLOWAD: But I think to impeach his statement of what he put on this report, because it is not accurate --

MR. GARDNER: The case is *Frias v. Valle*, 101 Nev. 219 (1985). And it's illustrating the Nevada court's, it says, hesitation to admit traffic accident report and traffic citations and places limits on an investigating officer's testimony regarding liability. Basically, because they weren't there, they -- I mean, they didn't witness this, it's all -- the information that they're getting is not firsthand. It's -- frankly, it's probably biased and it's probably -- I mean, it's just totally irrelevant.

MR. CLOWARD: But again, all we're introducing, even the mention of it, is he filled out a form telling his supervisors, no, I was not issued a citation, when in actually he was. So he's not being truthful with his supervisors. That's the only thing we're bringing it up for. I mean, it --

THE COURT: All right. So the authority I have right now is *Frias*, which says evidence of traffic citation is inadmissible.

MR. CLOWARD: And I think that's -- that was because the reason that it was admitted was for the officer's conclusions as to cause of the accident.

THE COURT: Right. I understand and I understand what you're saying. But do you have any authority to support that since the default for traffic citations is that they are inadmissible?

MR. CLOWARD: Well, I think that the Court needs to look at what we're trying to do. We're not trying to admit the police report, so we would not run afoul of *Frias v. Valle* because we're not attempting to admit

the police report into evidence. The analogy would be if Mr. Morgan told the police officer I am absolutely not hurt, I am completely fine, and then goes, you know, to the hospital and says, hey, I have all these problems, and they wanted to admit it for -- you know, to -- for impeachment purposes. That's the same thing. Here, the Defendant goes back to the office and says, yeah, you know what, I wasn't at fault, I didn't -- I wasn't issued a citation. That's not true.

MR. RANDS: I don't think --

MR. CLOWARD: It --

MR. RANDS: Sorry. I don't think the analogy works though because if the police officer were here to testify, there would be hearsay issues but he could still testify this is what he told me. There he wouldn't be trying to admit the fact of a citation.

THE COURT: Well, no. But, I mean, the --

MR. RANDS: And I think that's where we're going. Oh, yeah, you could --

THE COURT: But the issue is that -- I mean, what they're saying is that he lied on the form to the company.

MR. CLOWARD: Yeah. That's exactly it.

THE COURT: That's what they're trying to admit it for.

MR. RANDS: How do they establish that without getting the citation in or the fact of the citation in?

THE COURT: Right. But can't they introduce that for the limited purpose of impeachment, not to show that he --

MR. RANDS: That's --

THE COURT: -- actually was responsible for the accident.

MR. RANDS: That's just a back door to try and get it in, Your Honor.

THE COURT: Well...

[Pause]

MR. CLOWARD: I guess if we were to admit the police report to prove -- or to prove liability, that would not be appropriate. We are not attempting to do that. We are simply attempting to establish that Mr. Lujan was not truthful on this report. That's it.

Because the fact that, you know, he received a citation, that doesn't mean anything. That doesn't mean anything. He could be issued a citation for a failure to wear a seatbelt. He could be issued a citation for, you know, anything. You know? The fact that he was issued a citation does not prove conclusively liability in the case.

And we're not attempting to show him the citation and say, well, Mr. Lujan, here's a copy of the citation, isn't it true you -- you know, the police officer said you were at fault for pulling out in front of Mr. Morgan, failure to, you know -- I think it's -- the citation was something along the lines of failure to yield out of a private driveway. We're not attempting to do that.

All we're trying to do is to say on this corporate form, the next day you marked I received no citation, when in fact you did receive a citation. But we're not trying to take the next step, which is, hey, ladies and gentlemen, here's a copy of the citation and we're going to attempt to use the citation to show that he was at fault for this crash. We're not going there.

And I think for that -- for the limited -- very limited

purpose -- because even in traffic citation cases, the court has said that statements made to the police officer are admissible. You can actually admit a -- a citation. You just can't admit the officer's opinion. We're not even close to getting to the officer's opinion.

THE COURT: Well, I mean, no. All right. So, I mean, statements of a party opponent to an officer are admissions and so they would be admissible in that --

Mr. CLOWARD: Yeah.

THE COURT: -- way, right? So --

MR. RANDS: Sure.

THE COURT: -- I mean, I understand what you're -- what your intention is. My question is, is there any authority? Because the case law that -- I mean, that we have seems to suggest that citations are inadmissible. It is not clear to me, though, whether it is inadmissible for all purposes or no.

MR. CLOWARD: I'm just trying to find some authority, Your Honor.

[Pause]

MR. CLOWARD: Your Honor, I can't -- I don't -- I'm not able to find any authority one way or another. I guess, you know, our ultimate position would be we're not attempting to have the police report admitted. We're not having the opinions admitted from the police report. We're not attempting to represent to the jurors what the police -- what the police ultimately found, any conclusions that the police officer made, anything along those lines. All we're attempting to do is to show that Mr. Lujan was

not accurate in his reporting of this event in corporate documents.

MR. RANDS: And we just stand by our position that we've already discussed.

[Pause]

THE COURT: Okay. Mr. Cloward, I'm not -- I don't know if you found anything. I'm not really finding anything.

MR. CLOWARD: I'm not either, Your Honor. I'm trying to do KeyCite research and I'm not finding anything, so --

MR. RANDS: I didn't find anything under Shepard, so --

MR. GARDNER: I guess we'll have to go to Google to break the tie.

MR. RANDS: I tried Google, too. It didn't work either.

[Pause]

MR. CLOWARD: Your Honor, without conceding the position for appellate purposes, I think I would recognize the Court's position that *Valle v. Frias* [sic] is the -- I guess the standard that we start from and that Plaintiffs have been unable to present authority for the Court to consider whether or not an exception would be appropriate.

THE COURT: All right, Mr. Cloward. Really what I've been able to find from other jurisdictions, if anything, suggests that they're just simply not admissible. But, you know, I obviously -- I don't know. This is a very difficult thing to compare. I mean, it makes it hard because there's really no Nevada law on it and we have --

MR. CLOWARD: Sure.

THE COURT: -- a particular ruling in Nevada and how that

stacks up to, you know, a statute in another -- or legal opinions in other jurisdictions. I mean, I just don't know the answer to that. It just appears that all we have suggests that they are not admissible. So I am going to sustain the objection.

MR. CLOWARD: Okay.

MR. GARDNER: Thank you, Your Honor.

THE COURT: All right.

Mr. RANDS: And [indiscernible] objection, I'd like it pulled off the screen --

MR. BOYACK: Yeah.

MR. RANDS: -- Your Honor, --

THE COURT: Yeah. Yeah.

MR. RANDS: -- before the jury comes back.

THE COURT: Yeah. I'll instruct the jury to disregard the answer -- or the last question and answer.

MR. GARDNER: Thank you.

[Counsel confer]

MR. CLOWARD: Can we make an offer of proof? Outside the presence or afterwards?

THE COURT: Yeah. Can we just wait? Do you mind? I mean, I don't --

MR. CLOWARD: Not --

THE COURT: I think I --

MR. CLOWARD: Not a problem.

THE COURT: All right. Mr. Cloward, I think I understand your

position fully. If you feel like you need to flesh out the record some, we'll do that --

MR. CLOWARD: No. I just thought I was --

THE COURT: -- later outside the presence of the jury. All right?

MR. CLOWARD: -- supposed to do that.

MR. MARSHAL: Please rise for the jury.

[Jury in at 3:27 p.m.]

THE COURT: Yeah. No. I want you to be able to make a record. I just -- I don't want you to feel like it would have a different outcome.

MR. CLOWARD: Let's do it at the end of the day, though --

THE COURT: Yeah, yeah.

MR. CLOWARD: -- when we send the jury home.

THE COURT: That's fine. No, I just don't --

MR. CLOWARD: Fair enough.

THE COURT: You understand what I'm saying?

MR. CLOWARD: Yep.

THE COURT: All right.

MR. CLOWARD: I know what you're saying.

THE COURT: Okay. Folks, sorry about that. We're back on the record in Case Number A718679, Morgan versus Lujan. Let the record reflect the presence of all of our jurors, parties, and counsel.

I'm going to ask the jury to disregard the last question and answer.

And Mr. Boyack, if you will continue, please?

MR. BOYACK: You bet. Thank you, Your Honor.

DIRECT EXAMINATION CONTINUED

BY MR. BOYACK:

Q Mr. Lujan, earlier you testified -- I don't want to put words in your mouth, so I'm going to ask you it this way. Did you testify earlier that you've never placed blame on Aaron for this accident?

THE COURT: Sir, I'm going to ask if you could just scoot up --

THE WITNESS: Oh.

THE COURT: -- because the microphone is that little black box thing there. Thank you.

THE WITNESS: Okay.

MR. GARDNER: I think that's been asked and answered, Your Honor, so I would object.

THE COURT: Overruled.

THE WITNESS: No, I don't think I placed blame on Aaron.

BY MR. BOYACK:

Q Okay.

A Or I wasn't.

Q Okay.

A I mean, I wasn't.

Q Okay. So when you filled out reports and other documents with your corporation, your intent was never to place blame on Aaron?

A Right. It was just -- I was stating what had happened with the accident.

Q Okay.

A That's what the report says, state what happened.

Q Okay. All right. I'm going to show you a document that is a court document. I'm going to show you portions of it. Mr. Cloward spoke about this in his opening about the answer to our complaint. The complaint's a lawsuit. The answer is filed by the attorneys in the matter. And there's a section called affirmative defenses. Can you see that on your screen?

A Uh-huh.

MR. GARDNER: Let me object, Your Honor. He knows that the Defendant had nothing to do with the answers.

MR. CLOWARD: Please, speaking objections, Your Honor. Please no more speaking objections.

THE COURT: Yeah.

MR. CLOWARD: That's not fair.

THE COURT: All right. Counsel, approach, please.

MR. GARDNER: Okay. Excuse me.

THE COURT: Yeah, Counsel approach.

[Bench conference begins at 3:29 p.m.]

THE COURT: All right. [Indiscernible], Mr. Gardner, if you have something beyond the objection hearsay, please approach the bench. But he's [indiscernible].

MR. GARDNER: I apologize.

THE COURT: So -- all right. So the objection's overruled. [Indiscernible].

[Bench conference ends at 3:30 p.m.]

DIRECT EXAMINATION CONTINUED

BY MR. BOYACK:

Q Okay. If you will look at -- I highlighted this portion, but a Second Affirmative Defense. It says negligence the Plaintiff caused or contributed to any injuries or damages that Plaintiff may have sustained, and the negligence of Plaintiff in comparison with the alleged negligence of Defendant, if any requires that the damages of Plaintiff be denied or be diminished in proportion to the amount of negligence attributable to the Plaintiff. Let's just focus on that highlighted section.

Do you have any proof that negligence of Aaron caused or contributed to any injuries?

A No.

Q Thank you. Also, Third Affirmative Defense. First section. The Plaintiff had knowledge of and was fully aware of the condition existing at the time of the incident and assumed any risks.

MR. GARDNER: Object. Foundation.

MR. CLOWARD: Are you aware of any proof that you have?

THE COURT: Hold on. Overruled.

MR. CLOWARD: I'm sorry, Your Honor.

BY MR. BOYACK:

Q Are you aware of any proof that Aaron was aware of the condition of your vehicle entering McCloud Drive?

A No.

Q Now, we'll focus on Number 6. The occurrence during which

Plaintiff received said injuries, if any, as alleged in the Complaint was the result of an unavoidable accident and occurred without the fault of either of the Plaintiff or Defendant.

MR. GARDNER: Same objection.

THE COURT: Overruled.

BY MR. BOYACK:

Q Do you have any proof that this crash was the result of an unavoidable accident or occurred without the fault of either side?

A No. I don't have any proof.

Q Seventh Affirmative Defense. That the injuries sustained by the Plaintiff, if any, were caused by acts of unknown third persons who were not agents, servants, or employees of these answering Defendants who were acting on behalf of these answering Defendants in any manner or form, and as such, these Defendants are not liable in any manner to the Plaintiff.

MR. GARDNER: Same objection. Foundation.

THE COURT: Sustained.

BY MR. BOYACK:

Q Are you aware of any --

THE COURT: I'm sorry. Overruled.

MR. GARDNER: Dang it. I thought we had one.

THE COURT: [Indiscernible]. I mess it up at least once a trial. [indiscernible]. Yeah. Overruled. That's what I meant.

MR. GARDNER: Thank, Your Honor.

THE COURT: You know what I meant.

BY MR. BOYACK:

Q Are you aware of any unknown third party or person that is involved in this accident and is at fault?

A No. No.

Q All right. And I did want to just go through real fast. I believe this is Exhibit D. Accident Information Card, Other Vehicle.

Is this your handwriting?

A Yes.

Q If you can, read for us the description of events.

A I was pulling out of the driveway to cross on McCloud Drive. Car was on McCloud Drive -- on McCloud Drive. Did not see him. He ran into the bus.

Q So you wrote you did not see Aaron or his vehicle?

A Right.

Q Is that true today?

A Yes.

Q And yet, you pulled out onto McCloud Drive in front of his vehicle and the crash happened?

A After looking both ways.

MR. GARDNER: Object to argumentative. Speculation.

THE COURT: Overruled.

BY MR. BOYACK:

Q Can you state that answer again? Sorry.

A After looking both ways.

MR. BOYACK: Okay. I don't think I have any further questions.

[Counsel confer off the record]

MR. CLOWARD: There may be another question pending, Your Honor.

THE COURT: Oh, I'm sorry.

MR. BOYACK: Yeah. I apologize, Your Honor. I spoke a little soon.

BY MR. BOYACK:

Q You would agree with me that Aaron driving on McCloud at this intersection had the right-of-way at the time of the accident. Correct?

A Yes.

Q Okay.

A Yes.

Q And you would agree with me Aaron did nothing to cause this accident?

MR. GARDNER: Object. Foundation. Speculation.

THE COURT: Overruled.

THE WITNESS: No. I mean, yes. I agree. Sorry.

MR. BOYACK: No other questions for real.

MR. GARDNER: Thank goodness.

I'll just -- I'll defer my cross-examination until my case-in-chief.

THE COURT: All right.

Sir, you can go ahead and have a seat. If you folks have -- are -- actually, you know what? If you have questions right now, just any other question -- here a second?

Counsel approach.

[Bench conference begins at 3:35 p.m.]

THE COURT: I don't know what I was thinking because it's with every single trial --

MR. CLOWARD: Overruled. Equals. It's okay.

THE COURT: -- at least once. Actually I didn't do it in -- almost every single one.

MR. GARDNER: You've been perfect in every other way.

THE COURT: Just in case I get confused.

MR. GARDNER: Okay? You're fine.

MR. CLOWARD: I got to take a picture of that. That's awesome.

THE COURT: It also took me about ten years to keep Plaintiff and Defendant straight, but --

MR. CLOWARD: The question is okay.

THE COURT: -- I just [indiscernible]. I'll lose sleep over it. Okay.

MR. CLOWARD: That is a good question. Thanks.

[Bench conference ends at 3:35 p.m.]

THE COURT: All right. Sir, I'm going to ask you a question. I'm going to ask you to look at the jury when you answer so they can hear you.

THE WITNESS: Okay.

THE COURT: Where were you going at the time of the accident?

THE WITNESS: I was coming back from lunch. I had just ended my lunch break.

THE COURT: Any follow up? Okay. Sorry. Any follow up?

MR. BOYACK: No, Your Honor.

THE COURT: Mr. Gardner?

MR. GARDNER: No, Your Honor.

THE COURT: Mr. Rands?

MR. RANDS: No. We're going to reserve our --

THE COURT: Go ahead and take your seat, sir.

THE WITNESS: Okay.

THE COURT: Mr. Cloward? Please call your next witness.

MR. BOYACK: Thank you, sir.

MR. CLOWARD: Your Honor, we would call Rebecca Morgan.

THE COURT: All right.

THE MARSHAL: And if you would please remain standing, face the clerk, raise your right hand to be sworn.

REBECCA MORGAN

[having been called as a witness and being first duly sworn, testified as follows:]

THE COURT: Good afternoon, ma'am. Have a seat.

THE WITNESS: Yes, ma'am.

THE COURT: And scoot up [indiscernible]. And if you could please state your name and then spell it for the record.

THE WITNESS: Sure. Rebecca Morgan. R-E-B-E-C-C-A M-O-R-G-A-N.

THE COURT: Do me a favor. That little black square box, if you can [indiscernible] just because your voice is a little soft.

THE WITNESS: Yes, ma'am.

THE COURT: Mr. Cloward?

MR. CLOWARD: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. CLOWARD:

Q How are you today, Ms. Morgan?

A I'm fine. Thank you.

Q Are you nervous?

A Yes. Sorry.

Q It's okay. I'd like you to ask -- I guess I would like to ask you to talk to the jurors a little bit about your son. Do you know -- Aaron's your biological son, right?

A Yes. He is. Yes.

Q Give us a little bit of an idea of Aaron, his personality. Tell us a little bit about your son.

A He -- it's changed a bit, but he's definitely a caring, wonderful, gentle -- I'm a proud mama. What can I say? He --

Q You're not biased, are you?

A Sorry. I know. I love him so much. I'm sorry. He's a really good kid. This has been hard. So this has changed him a little bit, but.

Q Did Aaron, I guess, you know, growing up did he play a lot of sports? Did he -- he's kind of a bigger guy. Did he play football? Did he play hockey?

A No.

Q Anything like that?

A No. We -- I guess he could have, but he didn't. My husband's very tall. I know he said that they always go for the tall guy's legs, so we didn't put him in sports. So he never really played sports. I mean, he was an active kid, so to speak, but no. No sports. I don't -- I -- sorry.

Q Just curious. So he didn't play sports growing up. What are some of the things that he liked to do?

A He liked skateboarding, reading. He liked to work out. Hang out with his friends. Just pretty much the normal things.

Q Okay. Prior to the crash -- he had a crash in April of 2014, right?

A Uh-huh.

Q Is that a yes?

A Yes. Yes. Sorry. Excuse me.

Q Prior to the crash had you ever had to take him to the doctor, say, for any sort of a neck or back problem?

A No. No. I'm very lucky with Aaron especially. He's not broken any bones. Like, he was an easy boy compared to some of my other kids. But, yeah, no broken bones. No nothing. No. He was easy. So no issues until the accident, mind you.

Q And can you give us a little bit of an idea of what it's like -- been since the accident?

A It's not been easy. It's -- I mean, it's not been easy for me. So I can imagine how it's been for him. The last couple years have been really, really hard especially when the pain was at it's worse. Because he is such a -- he's always been that courteous, helpful guy. Like, he's always, you

know, from the time he was knee-high he'd open up doors for people and everything. So he's a helper. And so, when he was unable to like help me at home with things, it was very frustrating to him, and I know it affected him a lot. He'd recluse to his bedroom a lot. You know on the bad days or bad nights, I'd walk out into the living room and he'd be on the floor just in pain, and that really sucks as a mom, you know, because there's not much I can do. I mean, I can get out the heating pad, get out the ice, try to massage it, but it was not helpful. It's -- what -- I'm -- it's not -- it's just been horrible. It's been horrible to watch him. His friendships -- I'm sorry. I'm a little scattered, but I'm trying to get across to you guys what I'm feeling inside.

He used to be very social with, you know, with his buddies and everything. And after the accident that really declined quite a bit to the point where he really didn't want to, you know, be around his friends. Because -- and I would imagine that's from hurting so much and just not wanting to do anything because of the pain. So it's just -- It's not been fun. It's been a horrible experience. He has -- and I don't think he, you know, with kind of looking back and thinking here -

MR. GARDNER: Object, Your Honor. Foundation.

THE COURT: Hang on just a second.

THE WITNESS: Sorry.

THE COURT: Mr. Cloward, how about if you ask another question?

MR. CLOWARD: Yeah. That's fine.

THE WITNESS: I apologize.

THE COURT: No. That's fine.

BY MR. CLOWARD:

Q Has it always been that bad or is it -- have there been times where it's gotten better? Is it -- has he always had --

A Yeah.

Q -- I guess, those types of -- I guess has it always been like that or not?

A After -- since the accident on you -- are we talking about?

Q Yeah.

A No. We actually got blessed, I think in -- I think it was March, I think he had a nerve block in his back that really helped. And it seems like after that, Aaron started doing a few more things. So it's -- he's started to feel a little bit better. I've noticed him doing a little bit more around the house. I've noticed his demeanor has changed a little bit and he seems to be a happier fellow. He has -- he's working again, which is amazingly wonderful. When the accident happened, it was hard. He wasn't able to continue to work because of the pain. So it's exciting that now he's working full time. So we've gotten in a better place. We're not in a perfect place, but we have hope now that that -- he will continue to figure out what he needs to do to get better.

Q Okay. Is he still continuing to go see the doctors or is he done doing that?

A No. He's still seeing doctors.

Q Okay. When you say that Aaron kind of reclused or, you know, spent some time in his room, what do you mean by that?

A He just pretty much kind of turned off to the world. He used to

be social and happy and, you know, more, you know, in and out of the house, and communitive. And he pretty much shut off. And, you know, and I know it was he was depressed. And I understand because of the situation. That's not something that he wanted to happen and I don't think he could control what was happening, so I think he just shut off.

Q Okay. Now you mentioned that he was an easy kid. Fair to say that this is the most traumatic thing that's happened to him in particular?

A Definitely. Definitely. The most life-changing thing, too, unfortunately. Not, you know, --

Q And have your other kids, have they had things that have happened to them that, you know, they experienced?

A Not like this, no.

Q Okay. Now you say that, I guess, that Aaron, you know, at certain points that he was kind of recluse and depressed. And has he gotten better since then, though?

A Yeah. And, yes, and it's really nice. It's -- I don't have my old Aaron back, but I have a piece of him back. You know, he's out in the living room more, and he actually, hey, mom, come sit with me. Hey, mom, come, you know, hang out with me. And that wasn't happening. It just, you know, it was really sad. It's before, you know, before he started feeling better. So I feel like, you know, we're getting better. We're getting to a place where we were before.

Q Okay. Does Aaron historically, does he have a high tolerance for pain or does he have a low tolerance for pain?

A I think he has a -- I've -- I think he has a pretty high tolerance for

pain. I mean, I mean, he's not a -- you know, he -- you know what I -- I'm sorry. I'm like, that's a hard -- I'm like, you know what I mean? It's like he doesn't -- he's not a complainer. He's not a complainer. He's never been that one that, you know what I mean, oh, I stubbed my foot or anything. So he's definitely -- I mean, if he says something usually, I'm like, okay, it's true.

Q Okay. All right. Well, Rebecca, we certainly appreciate the time you've given us to talk a little more about your son.

MR. CLOWARD: I don't have any other questions, Your Honor.

CROSS-EXAMINATION

BY MR. GARDNER:

Q Hello, Ms. Morgan.

A Hi.

Q I'm Douglas Gardner. You and me met out in the other room, didn't we?

A Yeah.

Q I barged in on you. I didn't know -- I didn't even know who you were. So good to see you again. First of all, I believe that the way you feel about your son, if more people felt about their kids that way, we'd be living in a better world. So I congratulate you for that. That is spectacular. And so, and I love the relationship that you've testified about. Fantastic. Now you did say that he used to be a helper.

What did you mean by that?

A Just he's always willing to help with whatever you need. If the dishes need to be loaded, he'll load the dishes. If I'm bringing in groceries, he's willing to help me with the groceries. He's, you know, just if someone

dropped something that, you know, say you dropped something, he'll pick it up for you. He's just that person.

Q I can't even get my kids to do that. What do you need to do to -- whip them or something?

A No.

Q Yeah.

A Listen, so anyway, I just wanted to reiterate that. I think it's fantastic. Now where -- what is the address that Aaron was living at the time of this accident?

Q 4453 McCloud Drive, our house.

A Okay.

Q Your --

A We've been there three years.

Q Okay. And does it have a basement? Does it have a second story? What does it have?

A No. It's just a regular house, just a, you know, a medium income house. Just a house.

Q Well, one story?

A Like no -- one story house, yeah.

Q Well, does it -- it's a one-story house. And how many bedrooms? How many baths?

A It's got three bedrooms, two bath.

Q Okay. Now the reason I asked that is I understand that at the time of this accident Aaron was living at home?

A Yes.

Q And with him was his girlfriend who was also living at the home. Correct?

A Uh-huh. In and out, yeah.

Q Okay. In and out. I was just wondering if it was difficult to have enough room to use the bathrooms and things like that. No problems there?

A No. I mean, not for me. My husband, we have our own bathroom. So I don't know if the other kids had their problems, but we were fine.

Q Okay. Okay. But you didn't hear any fighting or --

A No.

Q -- bickering about that or anything? That's pretty neat, too. Let's see. Now how long did -- well, Aaron said that he'd been living at the house with his girlfriend for approximately four years by the time this accident occurred. Does that sound right to you?

A Probably.

Q Okay. When he was living at the house during then, maybe just the last four years, what did he do around the house? What were his -- did he have set jobs or something like that?

A No. We just -- I just ask my kids if I need something done or they see something done, they do it. I mean, no. I don't have a board on the wall saying, no. I'm sorry.

Q Remember, you're under oath. You asked your kids to do something and they do it?

A Yeah.

Q Wow. It's pretty good.

A You don't know their father, so.

Q Okay. I got it. I got it. What did you do to prepare for this hearing today?

A Nothing really. Just got dressed. Sorry. I didn't know I was -- I mean, other than they asked me to come here.

Q Well, thank goodness for that at least.

A Sorry. I mean, I -- they just asked me to come. So nothing.

Q Okay. And that's no problem. Let's see. Would you explain to the jury why Aaron ended up going to three separate high schools during his teen years?

A Yeah. The one that he was going to was -- he had asked me if he could go to Coronado because the education's better, and so I was all for it. It was better. And then, the last one?

Q Why did he transfer from Coronado?

A Why did he transfer to Coronado?

Q Or did he transfer from Coronado?

A Yeah. He went from Coronado to Del Sol, I believe.

Q Okay. Why?

A Because then it got too much. The driving got too much because I didn't see my son. Because he'd hang out at my grandma's house, my mom's house.

Q Okay. So instead of Coronado, and I know where both of those are. Instead of Coronado you were closer to home --

A Right.

Q -- to go to Del Sol. Right?

A Yes.

Q Okay. Okay. From Del Sol, where did he go?

A He went to -- he did the classes, the Nevada -- I think it's Nevada -- the classes that you take. I don't remember the name -- to get your Nevada high school -- I'm sorry.

Q It wasn't CEPTA, was it?

A Pardon?

Q Was it CEPTA that he went to?

A No.

UNIDENTIFIED SPEAKER: CERT?

THE WITNESS: I don't know what that is. It's -- sorry. It -- he wasn't in trouble or anything if that's the case. It's just he wanted to get his high school diploma.

BY MR. GARDNER:

Q Yeah. I was -- I didn't think that he'd been getting in trouble or anything. But Coronado and then Del Sol and -- but there weren't any grade problems or anything else that caused him to go from Del Sol to the online stuff?

A His attendance a little bit.

Q What do you mean?

A Just -- he didn't' go all the time.

Q He sounds more like me every day. It really does. Did you know he wants to be a lawyer?

A Yes.

Q Okay. And you're --

A He'll be a very good one, because he's --

Q And you --

A -- he's very good. Yes.

Q And you still love him.

A Very smart. Yes. Of course.

Q Okay. I got it. That's good. Now, he has told me that he worked -- that he was still living at the house. Is he still there?

A Yes.

Q Is he still got the girlfriend there with him?

A No. She comes and goes but not as much, no.

Q Did they break up or something?

A No. No, no, no, not at all. She just got a nice job and it's closer to her parent's house, and it just makes it easier, I believe.

Q Okay. Now he said that he -- when he's there now, he kind of watches over the place --

A Yes.

Q -- while you're working? Your husband's at work? What does that entail?

A It's just having an extra body there just to make sure that, you know, everything's good. We, unfortunately, as most areas, our area has changed a bit, and, you know, you can turn a corner and see a couple homeless people. And I get -- I'm on the neighborhood watch, and quite a few houses have been broken into. So it's nice, because I also have my other son who's 22 years old living at the house. And we try to always make sure that someone is in the house. Someone is always there.

Q Okay. Now your 22-year-old son, does he have a girlfriend living there also?

A No.

Q Now he told me that, well, I asked him. I said, well, what do you do at the house during the day. And he kind of -- he didn't really have a great answer, but I asked him. I said, do you mow the lawn? And he said, no.

A No.

Q I said, okay. Just -- what -- who does the lawn? Oh, my dad does it. Okay, fine. So then I asked, well, what is it that you do then during the day typically, even before this accident? And apparently, he liked to be kind of a, I say, a homebody. That's what I am, too. It -- would you describe him as a homebody?

A Yeah -- no. It depends on what period of his life. See, the sad thing is, is right when the stupid freaking accident happened, Aaron was doing so freaking good. You know what I mean? He was on a good path. He was on a great path. So homebody, maybe a little bit before that. Then the accident. Then definitely homebody, you know. He's an -- and now he's breaking out of his shell. It seems like now that he's feeling a little bit better, he's starting to get more social. So it just -- that's a hard question to answer.

Q Okay. But slowly but surely he's becoming more of himself? Is that what you're saying kind of?

A A little bit. Since the last block it seems like he's doing more.

Q Okay. Now do you have anything at the house that you would like him to do during the days that he doesn't do?

A No.

Q Does his girlfriend stay there during the day?

A No.

Q What time of the day or night is she there?

A If she -- well, not so much anymore, but usually just after work and then throughout the night and then she'll leave in the morning.

Q Okay. so after work she comes over. She spends the night and then she goes to work.

A Uh-huh.

Q Right? Right? Okay. And then, during this time, Aaron, he would see her off so to speak and then stay at the house? Is that what he is doing?

A Right now or?

Q That's a good question.

A Yes. I mean --

Q Yeah.

A Not now. No. Now he works. He's working full time. But, yes, he did when things, yes, when he was at his worst, yeah. And that's pretty much it.

Q Okay. And let's go back even maybe the day before this incident occurred. Before anything came about, is that a typical progression for Aaron to have gone through during the day? Remember the accident hasn't occurred.

A To just stay at home and not do anything?

Q Yeah. Did he stay at home? Did he work at home? What did

he do at home?

A Oh, my God. I don't even. Sorry. It's hard enough for me to remember yesterday. I don't remember if he was working right before the accident. I don't -- but no. I mean, he -- I mean, yeah, he'd hang out with his friends. He was -- he loves his tennis -- like he loved. He really hasn't done it, but right when the accident happened, like right before, he really got into the tennis shoes. Was it the Jordans and the -- I'm going to insult him if I say Nike. So I think it's the Jordan shoes.

Q Oh, that's right.

A And how the kids, they buy them and trade them and all that stuff. So that was a big -- one of his big passions were the tennis shoes.

Q Okay.

A Kind of, you know.

Q But you got it right, because Jordan is Nike.

A Okay. All right. There you go.

Q So you dodged the bullet there. Listen. When you said that he was, I think you used the words right track before this accident, what did you mean by that?

A Just meaning -- just he -- you know, he was positive. He was happy. He was working out. He was hanging out with his friends. You know, it just -- it just was a good time. I -- a good time in his life. Not a good time. But just he was a happy kid, you know.

Q Okay. Now how old was he when this accident happened?

A Fourteen, 17, so we're 25, so like 22, 23, I believe.

Q Okay. So he was 22, 23, and he was living at the house with

his girlfriend at night and then you'd send her off to work in --

A Yeah. Or if she didn't have to work, she'd, you know, yeah.

Q Okay . Okay.

A Hang out.

Q And you said he liked hanging out with his friends during that time. Is that what you said?

A Before.

Q Before the accident even.

A Right.

Q What were his friends' names?

A Oh my God. Now I'm going to blank. Aren't you doing that to me? May I look -- if I had my phone, I'm -- sorry. Sorry.

Q Let me make it easier.

A I can tell you where he lives and I can tell you what he does. But I'm blanking on his name. I know his mom's name. Susie. I'm sorry. I'm so sorry. I'm --

Q You know the moment we walk out --

A I don't do good under pressure, obviously. I'm like, sorry.

Q The moment we walk out of here it's going to come to you.

A Yeah. And you guys are going to laugh the moment I walk out of here. What a scatterbrain, but.

Q What does he do with his friends that you like?

A They hung out. They played video games, I believe. They'd -- one had a band and Aaron was -- the one who I'm thinking of and his mom's Susie, and he's go hang out with them. I know that his father installs

elevators and he was talking about maybe working with him and doing that as well at that time. It, you know, just the normal. He'd, you know, the normal stuff guys do, I guess. Working out.

Q Now look, we're not going to go into the secrets of what guys do, okay? We don't want to go there, but when you say hung out, does that mean they went over to 7-Eleven?

A Like he'd go over to his buddy's house all the time.

Q Okay.

A So I wasn't there, but I assumed that they were doing video games or the music. Music was a big thing with a lot of his friends.

Q Okay. So 22, 23 -- he's hanging out with his friends playing video games and doing band things, right? Am I saying it right?

A Yeah. Like music. Yeah. His friend is in a band, yes.

Q Okay. Now did Aaron play an instrument?

A No.

Q What was his part in the band?

A Just a good guy in support of -- Aaron's just a good guy. Just support.

Q And you're not saying that he was a groupie, right?

A No. He was going to promote it. He was a promoter.

Q Okay.

A No.

Q That's a better explanation. Promoter.

A Yeah.

Q What did he do to promote the band. Do you know?

A I was being facetious there. I mean, he's no groupie.

Q Oh. I --

A I was just being, I'm sorry. I was being facetious.

Q You know what, that -- I didn't mean that in a negative way, but okay. So you don't really know exactly what they did other than the video games and maybe doing the band stuff?

A Right.

Q Okay. And do you realize or remember that he was unemployed at the time of this accident?

A I don't remember. I'm sorry. But you're telling me?

Q Yeah. That's --

A Okay. That could be. I -- it's -- that could be.

Q Okay.

A I'm sorry.

Q Now from what I understand, a few months after this incident that he drove your car and he rear-ended another vehicle. Do you remember that?

A When was this? Like --

Q A couple months after the accident. Isn't that true? In fact, let me do it this way.

A Yeah, please.

Q I'm not -- really I'm not trying to --

A Sorry. I'm sorry.

Q No. That's okay. That's okay. But what I'm trying to figure out is and if I'm saying the wrong dates then that's on me. And I will check it.

But it's my understanding that several months maybe after the incident that he had another crash where he rear-ended some -- a lady. Do you remember that?

MR. CLOWARD: Hold on.

Your Honor, can we approach really quick?

THE COURT: Sure.

MR. CLOWARD: You just said several months after.

THE WITNESS: Yeah.

MR. GARDNER: Oh, wasn't it four months or two months?

MR. CLOWARD: No. It was in 2016.

MR. GARDNER: Oh.

MR. CLOWARD: And you're a couple years off.

MR. GARDNER: Okay.

BY MR. GARDNER:

Q And I didn't really mean anything by that, but let's go to 2016 then. I'm just going from things that I thought that I remembered from his deposition. Okay. So 2016, do you recall or remember that accident that he was in?

A Yes.

Q Okay. If we get it right here --

A I'm sorry. I didn't remember when a few months after. So I was like, God, I'm really -- I'm losing it.

Q That's okay. You know --

A Sorry.

Q -- you got to have the right year, I guess.

A Thank you.

Q Okay. So he gets in an accident. Now, was he at fault in that accident?

A Yes.

Q And do you know whether he was arrested after that accident?

A Yes. He was.

Q For?

MR. CLOWARD: Your Honor? Your Honor?

THE WITNESS: For --

THE COURT: Counsel, approach.

MR. GARDNER: I mean, good grief.

[Bench conference begins at 4:05 p.m.]

MR. CLOWARD: I'd ask for a mistrial immediately. I mean, this is geez almighty.

MR. GARDNER: Hold on. We're talking about an automobile accident that he's suing my client for and now I'm talking --

THE COURT: [Indiscernible].

MR. CLOWARD: Yeah. It's completely ridiculous.

MR. GARDNER: No. It's --

MR. CLOWARD: I'm asking you to dismiss the jurors so that I can make a complete and full record.

THE COURT: Okay.

MR. CLOWARD: Is there -- it's -- this, I mean, there's no way that this -- I mean, it's a mistrial.

MR. GARDNER: No way. Come on.

MR. CLOWARD: Yeah. Yeah.

MR. GARDNER: Why? We're defending an auto accident. He had another auto accident when he was under the influence.

MR. CLOWARD: Of pain medications. And *Holderer v*. -- I mean, this is so far off the --

THE COURT: All right. [indiscernible].

[Bench conference concludes at 4:06 p.m.]

All right, folks. We're just going to take a little break. During this break, you're not to talk or converse among yourselves or with anyone else on any subject connected with this trial; or to read watch or listen to any report of, or commentary on, the trial or any person connected with this trial by any medium of information including, without limitation, newspapers, television, the Internet and radio. And you're also admonished not to form or express any opinion on any subject connected with this trial until the case is finally submitted to you. And you are not to do any independent research. Thank you.

THE MARSHAL: Please rise for the jury.

[Jury out at 4:07 p.m.]

THE COURT: You can have a seat.

THE WITNESS: Yes, ma'am.

THE COURT: You can step down, whatever you'd like to do. Just make yourself comfortable, because I think this is going to be a minute.

MR. CLOWARD: Your Honor, never in my career -- this is, I believe, my 25th jury trial, have I insisted on a mistrial. I am insisting on a mistrial.

In this case, what has just happened is incurable. Period. End of story. It is incurable. There is nothing the Court can instruct the jurors, there is nothing the Court can ask the jurors to disregard that will unring the bell that has just taken place. To leave the jurors with the impression -- well, I mean, the factual -- the facts of the matter are that my client did rear-end an individual and he told the police officer. He said, hey, just want to let you know -- I just want to let you know I have had -- I have pain medication in my system. I take pain medication on a daily basis for pain. And the police officer took him on a per se. He didn't get pulled over because he was driving erratically. He didn't get pulled over because he was doing anything that would suggest a level of impairment rather --

MR. GARDNER: He ran into a vehicle. He rear-ended it.

MR. CLOWARD: Hey, let me finish.

MR. GARDNER: So --

MR. CLOWARD: Can I finish?

THE COURT: Mr. Gardner, [indiscernible] make his record. All right.?

MR. GARDNER: No.

MR. CLOWARD: Can I finish?

THE COURT: All right.

MR. CLOWARD: And to suggest, to leave these jurors now with the impression that who knows what took place, but the impression is the facts are the evidence that's been developed from the witness stand is that he was arrested as a result of this. Was arrested as a result of this. They don’t get to know that, you know what, we're actually disputing this.

We are fighting this. It's not adjudicated. It's not anything. We're going to take this as far as it's going to go.

The criminal component -- Mr. Ryan Helmick of our office is representing Mr. Morgan on that because we don't believe that the level of impairment or the toxicology, the amount of pain medication that was in his system gives rise to impairment to even suggest that there was anything wrong. And I think that that's a flaw in our system. That's a side note.

But the levels of per se impairment to get a DUI for a drug offense are arbitrary. The numbers don't mean anything. If you have smoked marijuana 30 days before you get a blood sample and it comes up on a positive toxicology, you get DUI, driving under the influence. And there is nothing to --

THE COURT: Mr. Cloward, can I ask you a question?

MR. CLOWARD: Yeah.

THE COURT: What was the ultimate outcome of that arrest?

MR. CLOWARD: It's pending. It's set for trial in, I believe, February of 2018.

THE COURT: In District Court?

MR. CLOWARD: I believe so. But *Holderer v. Aetna*, *Holderer v. Aetna* was a case, a Nevada Supreme Court case where the individual was actually, I think it's applicable in this case. *Holderer v. Aetna* was the Plaintiff was doctor shopping, going around doctor shopping, getting different medications from different providers and, obviously, that would be a significant component of whether or not they were in pain or suffering, whether they were having the issues that they were complaining of. And in

that case, the Court held that it was complete error, reversible error for the Defense to try and present that evidence. There is no --

THE COURT: All right. I mean, well we have a statute that covers this issue.

MR. CLOWARD: We have a -- but I guess what I'm -- the point that I'm trying to make is that the prejudicial effect, the Court held in *Holderer v. Aetna* that the prejudicial effect of admitting evidence of the medication overuse in that case was so prejudicial that it had zero relevance. And in this case, the fact that the Defense would bring this up for some sort of a cheap shot, for some sort of a who knows what, but it has zero application. It -- there is zero relevant purpose to bring this up other than try and muddy the waters and the prejudicial effect is so significant, that I really, truly, honestly -- I've never asked for a -- insisted on a mistrial. Never have -- I've said, you know what, Judge. You know, we probably need a mistrial. But I don't know. This bell cannot be unrung. The toothpaste is completely out of the bottle. There is nothing that can put the toothpaste back in the toothpaste bottle.

THE COURT: All right.

Mr. Gardner?

MR. GARDNER: First of all, I'd like to know what the big deal is. What has gone wrong? What is -- what rule have I violated?

THE COURT: Okay. So --

MR. GARDNER: We are defending this man --

THE COURT: Mr. Gardner, hold on just a second. So you can't impeach someone with evidence of a crime they have not been

convicted of. So 50.095, requires a conviction. And, otherwise, it's not proper impeachment evidence.

MR. GARDNER: Your Honor, I didn't call this witness. They called this witness. This witness came into bolster the credibility and the testimony of the Plaintiff. Now remember, we are defending our client, who was in an accident with the Plaintiff. And it was an automobile accident. And notwithstanding that the fact that the pleadings were used earlier to denigrate, perhaps, even my client when everyone knows that the pleadings don't -- aren't done by the clients. I mean, that was unbelievable. But the point is, is that --

THE COURT: Mr. Gardner, I need you to focus on this. Well, first, and just for the record. You know the pleadings are the pleading of the parties. That's the position of the parties. So if there's an issue, I mean, I don't -- I don't think that that's unreasonable.

But let's focus on this, because under 50.085 and 50.095, you know, an arrest without a conviction is not proper impeachment. So I --

MR. GARDNER: If we were dealing with a trip and fall, Your Honor, or some other thing, but there's a question about the way this automobile accident occurred. There is a question about whether --

THE COURT: Oh yeah, but he wasn't arrested in this case. It's a car accident two years later. So I -- I mean, I don't know how we could take that as anything except for impeaching the character of Mr. Morgan.

MR. GARDNER: Hold on, Your Honor. This witness was brought in to bolster the credibility of the Plaintiff. I did not call her. She was called by her -- her attorneys, okay?

MR. GARDNER: And I was not trying to --

THE COURT: I understand that.

MR. GARDNER: -- impeach his testimony. But what I am doing here is I'm defending my client who was in a questionable automobile --

THE COURT: Okay. So, Mr. --

MR. GARDNER: -- accident with him, and I think I have every right to --

THE COURT: -- Gardner --

MR. GARDNER: -- deal with the concept of whether he is a good or safe driver. And that's what I was doing.

THE COURT: Okay. But, Mr. Gardner, you need to give me some evidentiary basis for that, because, as I understand the Rules of Evidence, you cannot bring in specific instances of conduct of a witness to attack their credibility. And I don't know what an arrest would do other than attack the credibility of Mr. Morgan.

MR. GARDNER: I just -- I'm -- frankly, I'm dumbfounded. This witness was brought to bolster. I have every right to talk to her about the realities and the truths. Okay? It's --

THE COURT: But, Mr. Gardner, you're not answering my question. So, I mean, we have limitations on character and conduct evidence that can be admitted. And particularly in the area of crimes. And so what I'm asking is how, you know, what the legal basis that allows you to bring out that evidence is, because it's a specific instant of conduct, right, that he was arrested?

How about -- you know what? I'm just going to take a break for a couple minutes. And I'll be back.

THE MARSHAL: Ma'am, you can come down from the witness stand.

[Recess at 4:16 p.m., recommencing at 4:40 p.m.]

THE COURT: Okay. Mr. Cloward, did you want to make --

THE CLERK: Hold on.

THE COURT: I'm so sorry.

THE CLERK: It -- always at the end of the day.

THE COURT: It gets tired like all the rest of us.

[Pause in proceedings]

THE CLERK: Okay. Thank you.

THE COURT: All right.

Mr. Cloward, is there any additional record you would like to make?

MR. CLOWARD: Yes, Your Honor. I would. The case that I cited earlier, I had a chance to pull it up. It's *Holderer v. Aetna*, *H-o-l-d-e-r-e-r v. Etna Casualty & Surety Company*. The citation is 114 Nevada 845. It's a 1998 Nevada Supreme Court case. And there were ultimately two issues that dealt with kind of a 403(b) analysis, probative versus prejudicial analysis. The first was the Plaintiffs obtaining or the Plaintiff obtaining prescription medications. There was some potential evidence to suggest that the Plaintiff was illegally or inappropriately obtaining medication. The Court discussed that under the subheading of Holderer's alleged improper acquisition of prescription medications. Then it -- and the parties,

importantly, they briefed one issue. They briefed it on a hearsay analysis. The Supreme Court actually skipped over the hearsay analysis. Said, we don't even go there. We decline to address the party's specific hearsay arguments pertaining to the admissibility or inadmissibility of the pharmacist's testimony. But instead, conclude that evidence indicating Holderer may have improperly acquired prescription medications was error.

Ultimately, the Court said because of its marginal relevance and inflammatory nature, we conclude that the probative value of evidence pertaining to Holderer's alleged improver acquisition of prescription medication was substantially outweighed by the danger of unfair prejudice. Accordingly, on remand, we instruct the District Court to exclude all evidence suggesting that Holderer may have obtained her medication unlawfully.

Then the next issue that the Court addressed regarding that medication was whether or not there should have been evidence presented to establish a causal relationship between Holderer's prescription medication usage and the accident. In that case, the expert for, I believe, Aetna, would have testified or did testify that the use of the -- this is what it says. Although Aetna's expert witness testified that Holderer's dosage of Xanax, which was the largest dosage of the antidepressant he had ever seen could have affected her reaction time at the time of the accident, he did not explain the extent of the alleged impairment or how such impairment contributed to the accident.

Other than speculating that Holderer's reactive abilities could have been affected, Aetna never demonstrated the Holderer's prescription

medication use was a contributing cause of the accident. And here in this case, the Defense essentially has one and only one reason that I think that it could give on an evidentiary basis to present the evidence of a subsequent crash, which his -- which would go to Mr. Morgan's comparative negligence. However, out of the mouth of its own witness, Mr. Lujan admitted that there was no evidence that he was aware of that would suggest that Mr. Morgan did anything wrong in the instant crash.

So instead, what the Defense does is they try to cite to an accident that took place two years after to suggest that well, you know what, he was in an accident and he rear-ended somebody so he's not a very safe driver. And so, we're going to use that. That's the evidentiary basis for the, I guess, the use of that piece of evidence. And the probative value of that teeny shred, number one, they don't have an expert that would even say, hey, look. He was in an accident two years later. And so, somehow he's an unsafe driver. And so, somehow in this instant case he should be assessed a comparative negligence amount. And I'm sorry for sitting, Your Honor. I just -- it's been a long day.

THE COURT: That's all right. That's fine.

MR. CLOWARD: May I continue to sit?

THE COURT: You're fine.

MR. CLOWARD: Thank you. But there is zero evidentiary basis -- zero. In order for evidence to even be relevant to get through a 401 analysis, or the, you know, the comparative Nevada statute, it has to be relevant for a certain particular purpose. Once it's determined that it's relevant for a particular purpose, then you move on to -- then you move on

to an analysis, the 403(b) which is a federal component of our statutory authority about whether or not it -- there -- you know, the probative value is not substantially outweighed by the prejudicial effect.

Here, the Defense does not even meet the initial burden or relevance. It -- a crash that took place two years later has zero bearing -- zero bearing on any factual issue in this case. To suggest that, hey, you know what? You got into an accident two years later, so that's somehow relevant to determine Mr. Morgan's comparative fault in this case, you don't even meet the initial threshold analysis of relevance. And then when you look at the 403(b), the -- and I cite to the Federal Rules because I know that Your Honor is extremely well-versed in the federal system. And -- but it's the same statute. I believe it's R -- NRS.48.025. It's the same analysis. You look at the probative value of evidence.

And in this case, number one, you don't even have the relevance. And when you look at *Holderer v. Aetna*, *Holderer v. Aetna* looks at this exact analysis and it basically says, hey, look. This issue, even if it did come in, the substantial prejudice to the party is so outweighed that there is no way you would ever admit this. I, sincerely in my heart of hearts, I would never ask for a mistrial especially after calling all of my witnesses, being done with my case in chief, being on the last witness other than my client if I did not sincerely believe that there is absolutely no way that we can cure this. And I sincerely, in my bottom of my heart do not believe that there is anything that we can tell these jurors that is going to cure the prejudice of them knowing that Aaron was arrested in a subsequent event. It's just -- there is no -- there is not even a good faith basis. I can't -- I -- the -- it was --

the question was even asked is beyond me. And I don't know what else to say, Your Honor.

THE COURT: Mr. --

MR. GARDNER: Your Honor, I won't belabor the point. If I stepped over the line, I stepped over the line. I was -- I was almost relied upon NRS-50.0853, discussing specific instances of a witness for truthfulness. But if I stepped over the line then that's on me, and I'm sorry for that. But the case that's being cited, the *Holderer v. Aetna* case, they actually allowed the evidence in and just allowed a limiting instruction.

MR. RANDS: No. They didn't do limiting instruction. They just disallowed the information in. They didn't do a --

MR. GARDNER: Okay. Okay.

MR. RANDS: -- limiting instruction.

MR. GARDNER: They disallowed it to come in. And again, I haven't briefed the issue. But yeah, I'm not going to sit here and be defiant to the Court or to my colleagues. I just want to see if we can get this going. I --

THE COURT: Right. But so, 50.085(3) says specific instances of conduct of a witness for the purpose of attacking or supporting credibility other than conviction of a crime may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for truthfulness or untruthfulness subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS

50.090.

And then, we have 50.095 that is the specific statute that deals with when evidence of a crime is admissible, which does require a conviction within the last -- it has to be ten years since the completion -- no more than ten years since the completion of the sentence for that particular crime. But it does require a conviction. And, in fact, in criminal cases the prosecutors are not allowed to ask about the convictions unless they possess a certified copy of the conviction.

So I'm struggling a little bit to find out how that question was a proper question under the rule. And my concern is that, you know, it's an extraordinarily -- I mean the reason we have the rule, right, is it's extraordinarily prejudicial to someone to say that they have been arrested, particularly given, you know, that whole presumption of innocence thing.

So I'm concerned, Mr. Gardner.

MR. GARDNER: Again, Your Honor, I'm not going to sit here and be defiant. If --

THE COURT: No. I just want to give you the opportunity to make whatever record. I mean, I'm, you know, certainly not taking that as being defiant. I -- this was a -- you know we're three days into a four-day trial. I do not take, you know, which is why I took a long break. I consulted with a fellow colleague, which is something I always do when I have a motion for mistrial that I'm taking seriously, because I never want to make a decision like this in haste. And I want to give you every opportunity to make the record or make any arguments that you have to me why I should not mistry this case at this point. So please --

MR. RANDS: If I might, Your Honor?

THE COURT: Mr. Rands, go ahead.

MR. RANDS: The question was inappropriate. I think we've established that. But I believe that it's not so inappropriate with the way it came down here and the answer that it couldn't be a limiting instruction. The case cited by Counsel, the judge let it in and, in fact, in that case, the judge compounded it by -- in the voir dire saying particularly one of the jurors said I don't care for personal injuries attorneys. And the judge says I don't particularly care for them either. I mean, that was another issue in that particular case. They allowed the evidence in. They didn't put a limiting instruction on it. It was just allowed in as evidence. And the Court said, no, that's not appropriate, shouldn't have been allowed in, go back and try again.

In this particular case, I believe that a limiting instruction could be made to the jury to -- and, you know, if they want to explain the issue, it's certainly within their purview to do so. But I think that this case can be saved by a limiting instruction to the jury that that was an inappropriate question, that Counsel shouldn't have asked it, and disregard it and let's go forward.

THE COURT: All right. Thank you.

THE COURT: Mr. Cloward, anything you want to say?

MR. CLOWARD: I mean it's incurable. There's no way that I could get up there and explain away that he was arrested. I mean, imagine that. Ladies and Gentlemen, you know, my client, he was arrested, but, you know, he admitted that he had pain medication. And he rear-ended

somebody and he was DUI and hauled off in the police car. There is no way, no way to unring the bell. There is no way to unring the bell, and I have never -- I truthfully have never insisted on a mistrial. I've halfheartedly, you know, Your Honor, I may be way out of -- to kind of create a record, but there's no way to recover from this. There is no way to recover from this.

THE COURT: All right. Anything else, Mr. Rands?

MR. RANDS: I just disagree on that issue. I mean, he presented the case that, yes, my client, due to this accident he was arrested because he had his medication -- pain medication, nothing more than that and we're fighting it to -- he hasn't been convicted. I think that would cure the issue and we could move on.

THE COURT: You know, I actually was hoping that when Mr. Gardner said it that was just a mistake that we could just tell the jurors that he hadn't been arrested, which, I think, might be something that was fixable. Unfortunately, under the circumstances, I just don't think so. So I'm going to grant Mr. Cloward's motion for mistrial. We're going to have to figure out when we can do this again. I can start Monday if you want. I actually could start tomorrow if you want, but we might not have a jury panel.

MR. CLOWARD: I would have to confer, obviously, with the witnesses. I would be open Monday, fortunately, to do it. I do -- I could do it Monday. I'd have to --you know, I'd need --

THE COURT: Mr. Rands?

MR. CLOWARD: -- I'd need some time -- Your Honor, I'd need some time to confer with the experts. I can take a moment and begin to make those phone calls now.

THE COURT: Yeah.

MR. RANDS: Monday's fine.

MR. GARDNER: Monday's fine.

THE COURT: All right. So why don't we bring in the jury. We'll let them go and then we'll see if we can start this on Monday. And I will [indiscernible].

THE MARSHAL: Please rise for the jury.

[Jury enters at 4:57 p.m.]

THE MARSHAL: Please be seated.

THE COURT: All right. Ladies and Gentlemen, so there's good news and bad news. The good news is that you're going to go home today and not come back. The bad news is we're just not going to be able to finish the trial [indiscernible]. So I want to thank you for your time.

If you are called again to serve on a jury in the next two years, please contact my Department and I will have you excused from jury duty unless this was so fun you want to come back and do it again sooner. But please feel free to contact us. But I really appreciate all your time and attention to the case. I could tell from the questions that you were all paying close attention. There were some very good questions, and I do appreciate. Everyone have a good evening.

THE MARSHAL: Go ahead and leave your notebooks and binders and I'll meet you guys outside.

Please rise for the jury.

[Jury exits at 4:59 p.m.]

MR. CLOWARD: Your Honor, may I?

THE COURT: Yes. Mr. Cloward, I was going to suggest that maybe everybody can come about 10:30 tomorrow when I finish my regular calendar and then that will give you a little bit of time to sort it out. Make sure we can start on Monday. That -- if there's any way we can do it, I would really prefer to.

MR. CLOWARD: Me, too.

THE COURT: I'm not sure. I have -- I just know we are really stacked up, I think, probably through February or March. And so, I am concerned about my ability to get you in for trial if we can't do it next week.

MR. CLOWARD: Fair enough. I --

THE COURT: But I do have next week available.

MR. CLOWARD: Okay. Thank you.

THE COURT: I let them know I can't take another full case, so.

MR. CLOWARD: Thank you.

THE COURT: All right. Everyone have a good evening.

MR. CLOWARD: 10:30 tomorrow.

MR. GARDNER: 10:30 tomorrow?

THE COURT: At 10:30 tomorrow. That should give --

Hopefully, Mr. Cloward, that will give you enough time to --

MR. GARDNER: All right.

MR. CLOWARD: -- have stuff taken care of.

MR. CLOWARD: Okay. Thank you.

MR. GARDNER: Thank you.

THE DEFENDANT: Thank you.

THE DEFENDANT: I don't have to come tomorrow then?

THE COURT: No, sir. You don't need to come tomorrow, but they'll let you know if we're going to start again on Monday, all right?

THE DEFENDANT: Okay. Yeah. Because I need to request the time off from work.

THE COURT: Okay. Well, if you need something from the Court, we can always get you something, too, sir. All right.

THE DEFENDANT: Thank you.

[Proceeding concluded at 5:04 p.m.]

ATTEST: We do hereby certify that we have truly and correctly transcribed the audio-visual recording of the proceeding in the above-entitled case to the best of our ability.

Deborah Anderson

Deborah Anderson, Transcriber, CET-998

Liesl Springer

Liesl Springer, Transcriber

Date: February 5, 2018

TAB 10

TAB 10

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON MORGAN, Plaintiff, vs. DAVID LUJAN Defendant.	CASE#: A-15-718679-C DEPT. VII

BEFORE THE HONORABLE **LINDA MARIE BELL**, DISTRICT COURT JUDGE

MONDAY, APRIL 2, 2018

RECORDER'S TRANSCRIPT OF HEARING
CIVIL JURY TRIAL

APPEARANCES:

For the Plaintiff: DOUGLAS GARDNER, ESQ.
DOUGLAS RANDS, ESQ.

For the Defendant: BRYAN BOYACK, ESQ.
BENJAMIN CLOWARD, ESQ.

RECORDED BY: RENEE VINCENT, COURT RECORDER

TheRecordXcha

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Voir Dire 19

WITNESSES FOR THE PLAINTIFF:

None

WITNESSES FOR THE DEFENDANT:

None

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Las Vegas, Nevada, Monday, April 2, 2018

THE COURT: Just a reminder to everybody that -- do you have copies of your proposed voir dire? That is something I don't have right now.

MR. CLOWARD: You know, I can email that over.

THE COURT: They filed -- if they're filed.

MR. CLOWARD: I -- Your Honor, to be honest if we refiled them, but I can have them refiled right away.

THE COURT: If you filed them ever, I can find them.

MR. CLOWARD: Okay.

THE COURT: Or maybe not. I'd just remind everybody under EDCR 7.70 that you can't ask questions that have already been asked and answered, questions touching on anticipated instructions on the law, questions touching on a verdict a juror would return based on hypothetical facts, questions that are in substance arguments of the case. I'll ask questions of the whole jury panel. We'll start then with juror number 1.

We did something in my last trial that I thought a court's really lost and if we can do that again, which is if you have a challenge for cause, please make at the time you're on that juror, but we're not going to let them go until we get to the end and then we'll excuse the jurors who've been challenged for cause and then replace them and go through those. It helps a little with the learning how to get out of --

MR. CLOWARD: And they don't know what the guy said or lady said, yeah, that makes sense.

THE COURT: Right. Because if you let one person go because they say, oh, I -- possibly be fair or they have a hang nail or

whatever.

MR. GARDNER: Maybe if you do -- to the death penalty and criminal cases and civil cases.

MR. CLOWARD: That makes sense.

THE COURT: Whatever excuse. So we'll -- please make the challenge as we are on that juror, but we will not excuse them at that particular time. We'll wait until we get all 20 -- through all 20 questioning and then we'll excuse the ones who've been challenged for cause. And then we'll replace those.

MR. CLOWARD: Okay.

THE COURT: And I'd ask everybody to stay at counsel table for -- turn during voir dire. And remind you all that you have the right to ask questions, but not have a conversation, and thank the jurors. Please don't make personal comments, Mr. Cloward.

MR. CLOWARD: Mr. Gardner was guilty of that last time too.

MR. GARDNER: I don't know what you're talking about.

THE COURT: He was guilty, but less guilty.

MR. CLOWARD: Okay.

MR. GARDNER: But it was a good for the goose, good for the gander situation.

MR. CLOWARD: I like that, yeah.

THE COURT: He was less guilty. And if you -- okay, so when we get to the end, I've never had a problem with this until my last trial and then somehow it got very confusing for everybody.

You have four peremptory challenges to exercise for the jurors

in seats 1 through 16. That is the entire back row. In the first six seats from the right to the left. So starting with the blue chair, 11, 12, 13, 14, 15, then 16. Your first four peremptory challenges are exercised against those jurors and those are the jurors who would be the deliberating jurors. Your last peremptory challenge is exercised against the alternates. And those are the jurors, the potential alternates are seated in seats 17, 18, 19, 20. So the last four seats are the four seats that are closest to counsel table.

If you do -- if you are -- if you waive a peremptory challenge, you waive one. You don't waive them all. But if you do waive a peremptory challenge, then we would strike from the bottom. So I will have extra jurors if there are waived peremptory challenges. So for example, if each side waived one peremptory challenge, we would strike juror 16 and juror 15. Does that make sense?

MR. CLOWARD: So a waiver counts to strike the bottom people?

MR. GARDNER: 16.

MR. CLOWARD: Okay.

THE COURT: Just because we have extra. So we've got to get rid of somebody.

MR. GARDNER: But your alternate still come from 17, 18, 19, and 20?

THE COURT: Right. But if you waived -- if one side waived their -- or both sides waived their peremptory challenges for the alternates, we would also -- we would get rid of number 20, number 19.

MR. RANDS: Sure.

THE COURT: And so the alternates would be in seat 17, 18 --

MR. RANDS: What I'm saying is someone waives it in one of your four, it would knock off 16 and you would still have the alternates out of the last --

THE COURT: Yes. So they don't just all move up.

MR. RANDS: 16 wouldn't move into the top space?

THE COURT: No.

MR. RANDS: Okay. I got it.

THE COURT: The alternates are completely separate from the other jurors. It's fairly clear on the form. It says seats 1 through 16 and 17 through 20. Except in my last [indiscernible] for alternates. We got it sorted out.

MR. RANDS: The only thing I've seen worse than that is in the first trial I had years ago. It was the first civil trial for somebody to come out of the public defender's office. And he [indiscernible] he tried to strike a juror for cause, but then didn't use one of his peremptory challenges on that juror. And I thought oh, okay. Well we'll leave him on. Came in the next day and asked the judge to let him use one more peremptory challenge because he meant to preempt the juror that he had tried to strike for cause and --

THE COURT: That doesn't --

MR. RANDS: I didn't get to make my objection. The judge just said, no, that ain't going to happen. Move on.

THE COURT: All right. Bench conferences are part of the record. So everybody watch their language.

MR. BOYACK: I didn't swear before.

THE COURT: I'm glad Mr. Boyack got that.

MR. BOYACK: Did I?

THE COURT: Mr. Cloward, have you ever sworn in court? No, no. Nobody here has ever sworn in court except for perhaps me.

MR. GARDNER: Probably at me, too.

THE COURT: I was a public defender for a long time. So -- All right. Please stand in the same place at the bench conferences every time. It just helps with the transcriptions. Is anybody reading from a deposition, not impeaching, but actually reading testimony? If you are, please make sure that you have a reader who is not somebody sitting in the courtroom right now.

Do we have stipulated exhibits?

MR. RANDS: We did last time.

THE COURT: I know. I just don't remember what that was.

MR. CLOWARD: I don't think we do. Actually, I think defense has their set and we have our set.

THE COURT: All right. Do I have the defense --

MR. RANDS: The last time we stipulated to them, but --

MR. CLOWARD: Yeah, I think were sets, but we --

THE COURT: Are they -- I have two plaintiff's binders. I don't have a defense binder.

[Court and clerk confer]

THE COURT: Yeah, I have plaintiff's exhibits. I don't have defense exhibits.

MR. BOYACK: Then we've got an addition to our Exhibit 12.

THE COURT: All right. Are there additional defense exhibits? Mr. Gardner?

MR. GARDNER: What's that? Oh, excuse me.

THE COURT: Are there additional defense exhibits?

MR. GARDNER: No.

THE COURT: Oh, all right. So this goes at the end?

MR. BOYACK: Correct. At the end of Number 12. Is this two copies?

MR. BOYACK: No. I think it's just the one.

THE COURT: I need two of them please.

MR. BOYACK: Oh, okay. Here you go.

THE COURT: So it goes right at the end?

MR. BOYACK: Yes, of Number 12, yes.

THE COURT: All right. So nothing --

MR. GARDNER: No. We're good.

THE COURT: Okay. So what exhibits are being stipulated to, if any?

MR. CLOWARD: I don't think any.

THE COURT: None?

MR. CLOWARD: None. I don't think so.

THE COURT: Okay. And so in terms of publishing things to the jury, you can publish anything that's been admitted, which at this point is nothing. Anything that you've agreed on and anything that the Court has said can be published to the jury.

So for your openings, just a reminder that if you have something

in your opening, if you're doing a Power Point, you have something, a slide that is something other than a summary of your argument, you need to run it by the other side. So chart, diagram, deposition, testimony, whatever. Obviously, the same goes if you're using an actual demonstrative exhibit. It needs to be run by the other side. And if you can't agree, then let me know and then I'll make a decision about it.

Okay. Anything else we need to take up outside the presence of the jury?

MR. GARDNER: I don't think so.

MR. CLOWARD: Your Honor, I hate to -- I don't want to be a pain. I know how you like things done. Can I just make a brief record?

THE COURT: Absolutely, Mr. Cloward. I was waiting for -- you're later than I thought you would be with this. So --

MR. CLOWARD: You know, I respect the Court. I don't want to create a -- you know, any hard feelings with the Court by continuing to do this every time I'm in here.

THE COURT: You will not, Mr. Cloward. I --

MR. CLOWARD: Good.

THE COURT: You have a job and I have a job to do. So I respect the job you have to do.

MR. CLOWARD: I hope at a minimum the Court believes my belief that my client's ability to receive a fair trail is impaired by not being able to ask group questions. And that's why -- you know, what kind of a lawyer would I be if I didn't get up and try and --

THE COURT: Right.

MR. CLOWARD: -- persuade the Court to deviate from the Court's preference. You know, I thought about this and I would just ask if the Court would give us 15 minutes of group questioning, and if it's -- if the Court feels like the record's not being protected, then we can go back to the way the Court wants to do it.

I know the Court has concerns about the record and preserving the record. And that is definitely an important consideration. And I could assure the Court that I would not let anybody talk without identifying their number. So that there was a very clear record of every comment that was made and who was making it. And I would be very vigilant in making sure that those folks identified themselves so that we have a clean record in the event that there are some challenges.

But, you know, I just -- I feel like the one by one is difficult to get people to elicit their true feelings because after about the third person, their just parroting what the previous two people have said. And so you don't really get a good feeling of what people really think, number one. Number two, it's extremely exhausting for me, as the lawyer, and I would imagine for the jurors to have the same exact questions asked. And obviously we don't want to waste anybody's time. If there's a juror that maybe doesn't have a problem with personal injury cases, to me you know, asking that person those same exact questions to try and find that out would be exhausting, and by just simply asking, you know, a group question, you know, who here has some strong feelings about a personal injury case or who has strong feelings about what I just said. And allowing the individuals to raise their hands and self identify, it allows more of a free flow of information.

And you know, so if the Court would even allow 15 minutes of group questioning just to try it out and if it's not working, I promise I won't squawk about going back to the way the Court wants to have it done because I know that the Court is concerned about the record.

THE COURT: There are actually two concerns, Mr. Cloward.

MR. CLOWARD: Okay.

THE COURT: So the first concern is the record. The second is my ability to do my job. So if there is a challenge for a cause, it is -- or a Batson challenge, which I know does not happen frequently in civil, but you absolutely are entitled to make those sorts of challenges.

It is very difficult for me to sort out that information if it comes scatter shot. So I appreciate what you are saying, but I am going to continue to select the jury in the method that I traditionally do.

MR. CLOWARD: Okay. Fair enough, Judge.

THE COURT: But you are welcome to make that record every time we have a trial, Mr. Cloward. Well, because the Supreme Court may, you know, disagree with me at some point and tell me I've got to do it differently. And I certainly have changed my -- I used to not do the -- I used to do it the really old-fashioned way. So where we would not prequalify 20 jurors, we would just have the 10 people up there and if somebody had -- when somebody exercised their peremptory challenge, we'd just stick another juror up there. So at the end, the lawyers didn't know exactly what was particularly the plaintiffs. You're know, well -- I mean, you didn't know exactly what was going to happen with the last couple of jurors, right?

MR. CLOWARD: Sure.

THE COURT: And the Supreme Court has come down and said that's not a meaningful exercise of peremptory challenges and now, I actually agree. Now, that I've done it this way I think it's better. It gives you a better opportunity to exercise peremptory challenges. So I don't exclude the possibility that I am incorrect and if the Supreme Court tells me I have to do it differently, I absolutely will. So --

MR. CLOWARD: Okay.

THE COURT: -- and you have -- are completely entitled to make that sort of record.

MR. CLOWARD: Thank you.

THE COURT: All righty.

[Court and clerk confer]

THE COURT: And so everybody's clear, we're going to be using the badge number, not any of the other numbers. So it'll be a number somewhere between 3 and 48.

Does anyone know any of the jurors? I forgot to ask that.

MR. CLOWARD: I don't.

[Pause]

THE MARSHAL: Please rise for the jury.

[Prospective Jurors in at 9:43 a.m.]

THE MARSHAL: Please be seated.

THE COURT: Good morning everyone. This is the time set for trial, Case Number A15718679, Aaron Morgan v. David Lujan. Are the parties ready to proceed?

MR. CLOWARD: Yes, Your Honor. If I --

MR. GARDNER: Yes, Your Honor.

MR. CLOWARD: Yes.

THE COURT: Ladies and gentlemen, you are in Department VII of the 8th Judicial District Court. My name is Linda Bell. I'm the judge of this department. I want to thank you for being here today. Did you have a judge come talk to you this morning?

GROUP RESPECTIVE: Yes.

THE COURT: Who came and talked to you this morning? Oh, Judge Cadish? Okay.

So, see if I know who comes in to question you, I can sometimes get a little bit of an idea what they might have said so I'm not repeating things. But I just want to just talk to you a little bit about the importance of what you're doing here today. When our founding fathers wrote the constitution and greeted the idea of having trials by jury, the purpose of that was to have everyday citizens be able to participate in the judicial branch. That's some that hadn't happened before. Many countries still have professional judges that hear all cases and there isn't really any opportunity for citizens to participate in the judicial branch of government unless they happen to be attorneys or judges.

So in order to allow that oversight of the judicial branch by citizens, our founding fathers created this concept of having jurors come in from all walks of life. And the jurors make the decision in the case. So this allows you to take part in our democratic process by being here today. And part of what you're doing here is being good citizens of our community. It's a civic responsibility like obeying laws, paying taxes, but it's also an

opportunity to see what the judicial system's all about.

Most of our jurors find the process very interesting. We do appreciate that you came here willing to do your job today. Even with all of that, I know some of you are sitting here thinking, I'm going to answer these questions in a way to try to get out of jury duty. And you may ask, how do I know that? Well, I had jury duty. I had jury duty a few years ago, and I didn't have this courtroom. But there was a different judge in this courtroom. I was on the third floor at the time. I actually was a juror here. I was sitting in the seat where you are, ma'am, up there on the top row in this very courtroom. But before that, I was standing outside, just like you all were a minute ago and the guy in front of me was talking to the lady in front of him about how to answer the questions to get out of jury duty. I'm sure he was very, very surprised when we came into court and he I was sitting up there and explained what I did for a living.

So some of you might even be Googling right now how to get out of jury duty. I understand. There are many of you who have -- everybody has important things to do. Many of you don't want to be here. And I understand, and I appreciate that. Let me ask you a question though, if you had a dispute and you wanted to have people come in and listen to it and make a decision, what kind of jurors would you want? You would want good people like yourselves to come in and sit as jurors.

And second, you may get out of this particular jury here answering questions, but you go back to jury services and they may put you on a different jury and then you're answering questions again. And that's the super boring part. It's -- right. Jury selection is boring. The interesting

part is the actual trial. So if you're seated on a jury and you get to hear the trial, it's much more interesting than going through the jury selection process a few times.

Also, this case, we anticipate this case will last a week. It's possible it would go into Monday of next week. But some of our cases -- this is a relatively quick case. My colleague down the hall, Judge Johnson does construction defect cases. She has cases that sometimes last for six months. So this one is relatively short in terms of our trial.

You have been summoned here today to serve as jurors in a civil lawsuit. The subject of this civil trial is a disagreement between people. The parties are here to have their disagreement resolved by a jury. And this particular case involves an automobile crash.

We do anticipate the case will last no more than six days. And our trials generally run from no earlier than 8:30 in the morning and usually it's about 10:00, to no later than 6:00 at night. And usually it's five. Sometimes, particularly if we're picking a jury and we haven't quite gotten there or if we have a witness that isn't done, we'll stay a little bit past 5:00, but generally we try to wrap up right at 5:00.

Under Nevada Law we need eight people for a civil jury trial. So we will have eight plus two alternates. So for a total of 10 people who will be going forward and listening to the trial.

Before we begin selecting a jury, I would like to introduce you to the Court staff. You've already met our Marshal, Lamonce Walker [phonetic]. Officer Walker is -- his job is to maintain order and security in the courtroom. He's also my representative to the jury. So anything -- any

problem that you have during the course of your time here, please let him know. Keep in mind he can't talk to you about anything to do with case, not even, like, why did the lawyers ask so many questions or wasn't that witness wearing a cute suit today, that sort of thing. He can't talk to you at all about the case. But if you need to know where the restroom is, where a good restaurant is for lunch, that sort of thing, he'd be happy to help you with that.

Renee Vincent at the desk down here, is the court recorder. So everything that happens in the courtroom is recorded. You can see there's cameras here and there. For those of you selected in the jury, the jurors are not videoed, it's just audio, but the witnesses, the lawyers, me, we're all on video when we're talking so that we have a record of everything that happens during the trial. And Renee's job is to make sure that that's all working the way that it's supposed to.

And Aja Brown is our court clerk today and she swears in witnesses, marks exhibits, keeps track of evidence, and prepares minutes of the proceedings for the court record.

You may also see in the courtroom from time to time, my assistant, Sylvia Perry and my law clerk, Veronica Fink. They make sure that everything runs -- keeps going whenever we're in here. So we have lots of other cases. So they keep everything on track while we're sitting in here during the trial.

Mr. Cloward, if you want to introduce yourself and your folks.

MR. CLOWARD: Yes, Your Honor, absolutely. Do you want me to introduce the whole firm or?

THE COURT: That'd be great.

MR. CLOWARD: Okay. I was just writing -- making that list.

My name is Ben Cloward. I have the privilege of representing Aaron Morgan here who is the -- who we call the plaintiff in the case, meaning he's the individual bringing the lawsuit.

Marge Russell is my assistant and then Brian Boyack is my co-counsel in the case. And I'm a partner at a firm called the Richard Harris Law Firm. Members of that firm include Richard Harris, Joshua Harris, Samantha Martin, Elaine Marzola, Ian Estrada, Travis Dunsmoor, Nia Killebrew, Brian Unguren, Kris Helmick, Ryan Helmick -- those two are brothers -- Adam Williams, Jonathan Leavitt, Jeff Scarborough. Anybody else? I think that's it.

THE COURT: All right.

MR. CLOWARD: Thank you, Your Honor.

THE COURT: Mr. Gardner?

MR. GARDNER: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica is right back here. Let's see, I think that's it for me.

THE COURT: All right.

Ms. Clerk, if you'll please call the roll of the panel of prospective jurors?

When your name is called, if you'll just say "here" or "present" please.

[Clerk calls roll]

THE COURT: All right. Anyone whose name was not called?

Great. So folks we're about to begin the jury selection process. This is a part of the case where the parties get to know a little bit about you in order to help them come up with their own conclusions about who will serve on the jury in this case.

The process is going to go like this. First, I'm going to ask some general questions of all of you and then after those questions, we're going to start with the folks who are currently sitting in the jury box and we'll ask them individual questions. The attorneys will have the opportunity to follow up with some more specific questions.

The questions that you are asked during this process are not intended to embarrass you or unnecessarily pry into your personal affairs. It is important that the parties and their attorneys know enough about you to make the important decision about who will sit as jurors in this case.

If a question is asked that you would prefer not to answer in front of all of the other prospective jurors, please let me know and you can come up and answer the question just in front of me and the attorneys.

There are no right or wrong answers to the questions that will be asked of you. The only thing that I ask is that you answer the questions as honestly and completely as you can. You will take an oath to answer all of the questions truthfully and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates that oath, it can result in having to try the case all over again. And it can result in penalties against the juror personally. That is my least favorite thing to do, is to have a hearing involving penalties for jurors. We really appreciate your time and your service to the Court and so I just don't

want to be put in that position because somebody didn't follow the rules.

It is important that you be as honest and complete with your answers as possible. If you do not understand a question, please ask for a clarification. At some point during the process of selecting a jury, the attorneys for both sides will have the right to ask that a particular person not serve as a juror and that's called a challenge. There are two types of challenges.

The first type of challenge is a challenge for a cause. And a challenge for a cause is a request to excuse a juror because the juror might have a difficult time giving a fair and impartial hearing to this particular case.

The second type of challenge is a peremptory challenge. A peremptory challenge means that a juror can be excused from duty without counsel having to give any reason for excusing them. In this case, each side gets five peremptory challenges.

Please do not be offended if you are excused by either of the challenge procedures. In fact, whenever I was here for jury duty, I was excused by a peremptory challenge. They're simply part of the process to assist the parties and their attorneys to select a fair and impartial jury.

Once all the challenges are exercised, we'll have 10 qualified jurors. At the end of the trial, two of the 10 will be identified as our alternates. And the eight remaining jurors will deliberate in the case. The selection process is done under oath, so if you'll all please stand and raise your right hand, the clerk is [indiscernible].

[The Prospective Jury was sworn]

THE COURT: All right, folks. Go ahead and have a seat.

I'll ask some questions of the group. If you wish to respond to a question, please raise your hand and then I want your badge number. I know there are about 50 numbers on that badge. So the one I'm looking for, there is a 01 and a dash, and I want the number after that. It's going to be something between 3 and 48.

Is there anyone here that has a disability or medical issue that might impact their ability to serve as a juror in this case?

Yes, sir? What's your badge number?

PROSPECTIVE JUROR NUMBER 0013: Thirteen.

THE COURT: And sir, can you tell me --

PROSPECTIVE JUROR NUMBER 0013: I have a sciatic nerve problem and a hard time focusing. Also, I have a problem right now that I'm getting ready to have fixed is I have a dental problem and I have a lot of pain in my teeth.

THE COURT: Okay. Sir, with respect to the sciatic nerve problem, if you're able to stand up, does that help?

PROSPECTIVE JUROR NUMBER 0013: Yes, it does. I mean, I had a hard time making it to -- from walking from the garage here today. I had to stop two or three times because the pain was --

THE COURT: Okay.

PROSPECTIVE JUROR NUMBER 0013: -- the pain was pretty excruciating.

THE COURT: Thank you. Anyone else with a medical issue? Yes?

PROSPECTIVE JUROR NUMBER 0035: I have a medical

procedure this Wednesday and another one next week.

THE COURT: All right. Sir, can I get your badge number please?

PROSPECTIVE JUROR NUMBER 0035: Thirty-five.

THE COURT: So the procedure this week, when is that scheduled for?

PROSPECTIVE JUROR NUMBER 0035: 9:15, Wednesday morning.

THE COURT: And how long do you anticipate that that will take?

PROSPECTIVE JUROR NUMBER 0035: Maybe an hour.

THE COURT: Okay. And then do you anticipate you would be all right after that or are you going to be medicated?

PROSPECTIVE JUROR NUMBER 0035: I do not think I'll be available after that for the rest of the day, if not [indiscernible].

THE COURT: All right. Anyone else? Yes, sir?

PROSPECTIVE JUROR NUMBER 0045: Number 45.

THE COURT: Yes, sir?

PROSPECTIVE JUROR NUMBER 0045: I have a heart [indiscernible], 30 percent heart function. I also have a note from the doctor. I'm on medication and this condition.

THE COURT: All right. Do you have that with you, sir?

PROSPECTIVE JUROR NUMBER 0045: Yes.

THE COURT: Would you just hand that to the Marshal? Sir, do you take medication for that issue?

PROSPECTIVE JUROR NUMBER 0045: Yes.

THE COURT: Does that impact your ability to pay attention to things?

PROSPECTIVE JUROR NUMBER 0045: Yes.

THE COURT: Anyone else with a medical issue? Yes, ma'am?

PROSPECTIVE JUROR NUMBER 0020: I just had my wisdom tooth pulled last week.

THE COURT: I'm sorry, ma'am. Can I get your juror number please?

PROSPECTIVE JUROR NUMBER 0020: Okay. I'm sorry, 20.

THE COURT: Okay.

PROSPECTIVE JUROR NUMBER 0020: I just had my wisdom teeth pulled last week, ma'am. And I'm still swollen. And I'm on medication for that right now.

THE COURT: Okay. Thank you. All right. Is there anyone here who's been convicted of a felony? Is there anyone here who is not a United States citizen or who is not a resident of Clark County? No response to that question. No response to the previous question either.

Is there anyone here who has trouble understanding the English language? No response to that question. We do anticipate this case will last somewhere around five or six days. I recognize that serving on a jury is almost always a personal or financial hardship. For that reason, financial hardship is not generally considered an excuse to serving as a juror. We do understand though you may be confronted with unique inconveniences or hardships that would impact your service in this particular trial at this

particular time.

Is there anyone who has an extraordinary reason that they are unable to serve as a juror in this case? Yes, ma'am?

PROSPECTIVE JUROR NUMBER 0015: I'm self-employed.

THE COURT: What's your badge number please?

PROSPECTIVE JUROR NUMBER 0015: Oh, 15.

THE COURT: Okay. What do you do, ma'am?

PROSPECTIVE JUROR NUMBER 0015: I'm a hairdresser.

THE COURT: What are your normal work hours?

PROSPECTIVE JUROR NUMBER 0015: I go in at 9 and I stay as late as 7, 8.

THE COURT: And what days do you usually work?

PROSPECTIVE JUROR NUMBER 0015: I work every day but Sunday and Thursday usually.

THE COURT: All right. Thank you, ma'am. Anyone else? Yes?

PROSPECTIVE JUROR NUMBER 0039: I'm Juror Number 39. I sought financial hardship, but it is a special circumstance. On Thursday, the casino that I work at in southern California sponsors a minor league baseball team for California Angels, Los Angeles Angels. And I am throwing the first pitch [indiscernible].

THE COURT: What time's the game?

PROSPECTIVE JUROR NUMBER 0039: 7:00 in San Bernadino.

THE COURT: Thank you, sir.

Yes, sir?

PROSPECTIVE JUROR NUMBER 0044: Forty-four. Self-employed.

THE COURT: What do you do, sir?

PROSPECTIVE JUROR NUMBER 0044: I drive for Uber.

THE COURT: All right. Thank you, sir.

Yes?

PROSPECTIVE JUROR NUMBER 022: Juror Number 22.

THE COURT: Yes, sir.

PROSPECTIVE JUROR NUMBER 022: I was trying to get out because my father was just in -- my 93-year-old dad was just put into the hospice. I don't know how much longer he has and I wanted to go see him before he passed.

THE COURT: Where is he, sir?

PROSPECTIVE JUROR NUMBER 022: He is in Honolulu, Hawaii. World War II Vet.

THE COURT: Do you have plane reservations yet?

PROSPECTIVE JUROR NUMBER 022: No, not yet.

THE COURT: Yes, sir?

PROSPECTIVE JUROR NUMBER 0024: Juror Number 24. I'm actually a consultant and I have a flight already scheduled for next Sunday to go to my client in Boston.

THE COURT: Yes, sir?

PROSPECTIVE JUROR NUMBER 0013: Juror 13. It would be a hardship for me to miss that many days of work. I have a part-time job

with Clark County School District and it would be a hardship for me to miss that many days of work.

THE COURT: Okay.

PROSPECTIVE JUROR NUMBER 0013: It's pretty rough right now as it is.

THE COURT: All right. Thank you.

Did you raise your hand, sir? No. Anyone else? Does anyone know the plaintiff in this case, Aaron Morgan? And there's no response to that question. Does anyone know the plaintiff's attorney in this case, Mr. Cloward? Any of the people he introduced? Any people on his firm? No response to that question.

Do any of you know the defendant in this case, David Lujan? There's no response to that question. Do any of you know Mr. Gardner or any of the people he introduced, Mr. Rands? No response to that question.

I'm going to ask the attorneys to read a list of the witnesses who might be called in the case and then after that I'll ask if anybody knows them.

Mr. Cloward?

MR. CLOWARD: You bet. Alyssa Baker, Dr. William Muir, orthopedic spine surgeon. Dr. Alain Coppel, pain management physician. Dr. Andrew Cash, orthopedic spine surgeon. And then Dr. Bhuvana Kittusamy, a radiologist.

THE COURT: All right. Mr. Gardner, you have any additional witnesses? Mr. Gardner?

MR. GARDNER: Thank you, Your Honor. Okay. We're going

to call a gentleman by the name of John Baker. We're going to call our client, Mr. Lujan, and we may call a lady by the name of Sharon McNair [phonetic]. And Dr. Steven Sanders is also we're going to call.

THE COURT: All right. Is anyone familiar with any of those folks? Yes, ma'am?

PROSPECTIVE JUROR NUMBER 0017: I work at Summerlin. I know all their names --

THE COURT: And ma'am, can I get your badge number?

PROSPECTIVE JUROR NUMBER 0017: I'm sorry, 17.

THE COURT: Okay.

PROSPECTIVE JUROR NUMBER 0017: I work as a nurse. I probably know some of the doctors by name.

THE COURT: Do you work with any of them regularly?

PROSPECTIVE JUROR NUMBER 0017: I work in the ICU.

THE COURT: You don't have any social relationship with any of the --

PROSPECTIVE JUROR NUMBER 0017: Not [indiscernible] --

THE COURT: -- doctors that were listed? Okay. Thank you, ma'am. Anyone else? I thought I saw another hand. No? Yes?

PROSPECTIVE JUROR NUMBER 0046: Your Honor, Juror 46. I know some of the physicians by name. I'm a pharmacist. No personal relationship.

THE COURT: Okay. Thank you, sir. Do any of you know me or any of the Court staff that I mentioned? No response to that question. Do any of you know any of the other prospective jurors? And there's no

response to that question. Does anyone believe that they may have heard or read about the case before coming to court today? There is no response to that question. Does anyone have philosophical, religious, or other beliefs that would prevent them from serving as fair and impartial jurors? And there's no response to that question. Are there any of you who believe that for any other reason you would be unable to serve in this case? And there's no response to that question.

Could counsel approach, please?

[Bench conference begins at 10:09 a.m.]

THE COURT: So [indiscernible] because I can't read my own handwriting. All right. Okay, so you're all in places?

UNIDENTIFIED SPEAKER: Yes. I mean [indiscernible].

THE COURT: All right, we have --

UNIDENTIFIED SPEAKER: I don't want to come up [indiscernible] you every time, though.

THE COURT: Well, Mr. Mabry who has turn number 13 who has a number of health conditions and is working part time at the school district --

UNIDENTIFIED SPEAKER: No objection.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: No objection.

THE COURT: So, we'll let him go. We have the lady who works as a hairdresser. I'm not inclined to let her go right now unless somebody has strong feelings about that.

UNIDENTIFIED SPEAKER: No.

THE COURT: I prefer to keep her for now.

UNIDENTIFIED SPEAKER: Yes, that's fine.

THE COURT: We have the lady who's a nurse at Summerlin. Ms. Humphries who had a wisdom tooth pulled last week, let's just hang on to her. And if it seems like she's having a hard time paying attention or something, we can revisit that. The guy with the dad in Honolulu, can we -- I know.

UNIDENTIFIED SPEAKER: I would want to know maybe a little more detail.

THE COURT: Okay. Well, let's just hang on to him for right now. The guy that's going to Boston. So, Mr. Rands, when is your doctor scheduled [indiscernible]?

MR. RANDS: It will be probably on Thursday or Friday.

THE COURT: Okay. So I'm a little concerned because I think it's cutting it close if he's got to go out of town. I mean, we can put an alternate in but it just --

UNIDENTIFIED SPEAKER: I didn't have a problem with any of them.

UNIDENTIFIED SPEAKER: It's if you want to adjourn [indiscernible] to let him go, that's fine.

THE COURT: I'm going to prefer to keep him, but I'm just concerned that we're not going to get this completely wrapped up by the end of this week.

UNIDENTIFIED SPEAKER: Yes, I mean --

THE COURT: Because he's here this week.

UNIDENTIFIED SPEAKER: Yes. If he could move it to, like, Monday.

THE COURT: It's, you know, because [indiscernible] already got the tickets.

UNIDENTIFIED SPEAKER: Oh, yes.

THE COURT: He posted on Sunday.

UNIDENTIFIED SPEAKER: I just, if they're going to call three witnesses, last time I think they were only going to call one. So that would lengthen the --

THE COURT: Yes.

UNIDENTIFIED SPEAKER: What other witness are you guys [indiscernible] you're probably going to call and move on in your case.

THE COURT: Yes, right.

UNIDENTIFIED SPEAKER: It would be Sanders and then Baker. Yes. I think chances are it would probably go into Monday.

THE COURT: Okay. [Indiscernible] with the medical procedure, do you want to know more about that or do you want to excuse him?

UNIDENTIFIED SPEAKER: He's far enough down [indiscernible] before we excuse him.

UNIDENTIFIED SPEAKER: I mean, if he's got something Wednesday that -- there's no reason to keep him around.

THE COURT: Mr. Hall (phonetic) with the baseball.

UNIDENTIFIED SPEAKER: Oh yes, and that would be a big deal if I was doing that.

THE COURT: I know it's a big deal. It's just --

UNIDENTIFIED SPEAKER: [Indiscernible].

UNIDENTIFIED SPEAKER: Oh, it's only a minor league.

UNIDENTIFIED SPEAKER: I would be super bummed.

THE COURT: I know.

UNIDENTIFIED SPEAKER: Let's keep him all day now. Let's not let him go yet.

THE COURT: Well, let's see where we get. I just, it seems not right to any other juror to keep, like, because of job issues or whatever to let somebody go over something that's --

UNIDENTIFIED SPEAKER: I'm fine with whatever.

THE COURT: While I'm very sympathetic to it, let's just hold off on that.

UNIDENTIFIED SPEAKER: Yes. And if they're saying that now, they just don't want to be here more than others don't want to be here.

UNIDENTIFIED SPEAKER: Defense [indiscernible].

THE COURT: Okay. Mr. Turner, the Uber driver, I think he can do that. That's the most flexible job on the planet. The guy with the heart issue, so the thing that he had was just a list of his medical conditions, it wasn't actually a note from the physician. But he does have a number of heart conditions, and I know --

UNIDENTIFIED SPEAKER: How old is he, because he may qualify for the statutory 70 years old.

UNIDENTIFIED SPEAKER: Sixty-four.

UNIDENTIFIED SPEAKER: He's only sixty-four?

THE COURT: Yes. It looks like we've got a couple that are more than that, but it's not him. I mean, typically people with those kind of medical issues fall asleep a lot, that's my concern.

UNIDENTIFIED SPEAKER: Medications, yes.

THE COURT: Because of the medication, because of the heart. When your heart's not working right, you don't get good oxygen. So, and we can hang on to him.

UNIDENTIFIED SPEAKER: I'm easy.

THE COURT: I know. It's just --

UNIDENTIFIED SPEAKER: I prefer if we're going to let him go, just --

THE COURT: Just let him go?

UNIDENTIFIED SPEAKER: -- let him go now and they don't have to sit here.

THE COURT: Okay. Then the other guy was a pharmacist. So I'm going to excuse 13, 24, 35, and 45?

UNIDENTIFIED SPEAKER: Wait, wait, wait. Thirteen, I thought it was 23, the Boston fellow.

THE COURT: So 13 is Mr. Mabry in seat number five.

UNIDENTIFIED SPEAKER: Yes, I got him.

THE COURT: Twenty-four is Mr. Shank in seat number 16.

UNIDENTIFIED SPEAKER: Oh, I must have written it down wrong. I thought he was, I thought that was juror 23 that said that, I'm sorry.

THE COURT: Juror number 23 is in seat 15.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: And then 35, Mr. Goldstein who is over there still, and 45, Mr. Horton who is over there still.

UNIDENTIFIED SPEAKER: So those four?

THE COURT: Yes.

UNIDENTIFIED SPEAKER: Thirteen, twenty-four, thirty-five, forty-five.

THE COURT: And we'll hang onto the others at least for a little bit.

UNIDENTIFIED SPEAKER: Okay, fair enough.

UNIDENTIFIED SPEAKER: No objection. Sounds good.

[Bench conference ends at 10:16 a.m.]

THE COURT: All right, I'm going to ask the following folks if they would return to jury services. Juror number 13, Mr. Mabry, sir, good luck to you. Juror number 24, Mr. Shank, juror number 35. Yes, go ahead and just return to jury services, thank you. Mr. Goldstein, good luck with that, sir. And Juror number 45, Mr. Horton.

All right. I'm going to call a couple people up to fill those seats in the jury box and then we'll start with questions. It was 45, Horton. You can call the next couple.

THE CLERK: Batch number 29, Kiesha Polla (phonetic). Batch number 32, Sheena Keyho (phonetic). All right, Ms. Galicia, is that correct? Okay. So we haven't met you. And we have, in this group a few of you have fairly complicated names. So if we don't get it right the first time, please make sure that you correct us so we can try to get it right. It may take a couple times, but we really do want to get it right, we just haven't met

you yet.

So, ma'am, could you introduce yourself by just giving us the information that's on the card on the seat?

PROSPECTIVE JUROR NUMBER 3: Should I stand up?

THE COURT: If you want. It makes it a little bit easier to hear, but you don't have to.

PROSPECTIVE JUROR NUMBER 3: Okay. I'm Claire and I currently live here in Clark County for about 12 years. How far did I go to school? College graduate, Bachelors of Science in nursing, and currently employed at one of the local hospitals here in the valley. Married for about 20 years, and I have two kids, 16 and 18 years old, and both are in high school.

THE COURT: What does your spouse do?

PROSPECTIVE JUROR NUMBER 3: Real estate.

THE COURT: Okay. And, ma'am, go ahead and have a seat. What do you -- go ahead and sit down. What do you do at the hospital, what specific area do you work in?

PROSPECTIVE JUROR NUMBER 3: I'm a registered nurse at IMC, or intermediate care unit, or like a step-down unit.

THE COURT: Have you ever served as a juror before, ma'am?

PROSPECTIVE JUROR NUMBER 3: I haven't been selected as a juror, no. But I think I've been in one of [indiscernible] five or six times already.

THE COURT: Have you ever been a party to a lawsuit or a witness in a lawsuit before?

PROSPECTIVE JUROR NUMBER 3: No.

THE COURT: Have you or anyone close to you worked in the legal field?

PROSPECTIVE JUROR NUMBER 3: No.

THE COURT: You have medical training. Anyone else who's close to you who's had medical training or worked in the medical field?

PROSPECTIVE JUROR NUMBER 3: Most of my family members are in the medical field.

THE COURT: Anyone here in Clark County?

PROSPECTIVE JUROR NUMBER 3: No.

THE COURT: What kinds of -- can you give me just a few examples of people in your family and what they do?

PROSPECTIVE JUROR NUMBER 3: We have a doctor in the family. We have about four or five nurses in the family, and two nurse anesthesiologists.

THE COURT: Have you or anyone close to you suffered a serious injury?

PROSPECTIVE JUROR NUMBER 3: No.

THE COURT: Have you or anyone close to you been in a car crash?

PROSPECTIVE JUROR NUMBER 3: Not a relative though, but a close family friend.

THE COURT: Can you tell me a little about that?

PROSPECTIVE JUROR NUMBER 3: It's back in Michigan. It's because of the bad weather in Michigan, they got hit from behind.

THE COURT: Were they injured?

PROSPECTIVE JUROR NUMBER 3: Not severely.

THE COURT: Can you wait to form an opinion until you've heard all of the evidence?

PROSPECTIVE JUROR NUMBER 3: Yes.

THE COURT: Can you follow the instructions on the law that I give you, even if you don't personally agree with them?

PROSPECTIVE JUROR NUMBER 3: Yes.

THE COURT: Could you set aside any sympathy you may have for either side and base your verdict solely on the evidence and the instructions on the law presented during the trial?

PROSPECTIVE JUROR NUMBER 3: Yes.

THE COURT: Is there any reason you couldn't be completely fair and impartial if you were selected to serve as a juror?

PROSPECTIVE JUROR NUMBER 3: No.

THE COURT: And if you were party to this case, would you be comfortable having someone like yourself as a juror?

PROSPECTIVE JUROR NUMBER 3: Yes.

THE COURT: Mr. Cloward?

MR. CLOWARD: Thank you, Your Honor. Good morning, how are you?

PROSPECTIVE JUROR NUMBER 3: Pretty good.

MR. CLOWARD: Good. So kind of, I guess, as a brief introduction, this is an opportunity for the parties to ask questions on behalf of their clients to find out certain things about the jurors. And the way that

we do this is we ask questions kind of one at a time. And so it's important, I guess, for the rest of the jurors and those folks sitting back here that if something is said in a conversation that's important to you, that when I come, or myself or Mr. Gardner, when we come to talk to you, I would love for you to volunteer what was important when we discuss that with you.

That will help to speed the process. We'll find out what things are actually important and what things aren't so important. We can kind of hone in on the things that are meaningful rather than spending a lot of time on the things that aren't really necessarily meaningful. So it will help the whole process.

And I've done this a lot. This is, you know, I've talked to thousands of potential jurors. And I can tell you that what happens is a fear that I have is that sometimes the next juror will just kind of parrot what the last juror said, and then the third juror will kind of parrot what the second one said. And so we don't get a meaningful discussion of feelings.

And it would be like if I asked everyone if they like the Boston Red Sox. Not everybody's going to like the Red Sox, there are going to be some Yankee's fans and there will probably be some folks that actually really don't like them.

But Ms., is it Galicia?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Okay. So I start talking to jurors and I tell two quick stories. One of them is that I don't like cherry pie. Okay? I really don't like it. And if you were a baker and you had worked on a cherry pie and you had entered a contest, say it was a Clark County pie baking

contest. And you found out that I was the judge, and you heard maybe from one of the other contestants that I hated cherry pie. First, how would that make you feel as a contestant?

PROSPECTIVE JUROR NUMBER 3: Well, if it's a cherry pie thing and I'm stuck, and I have to bake a cherry pie for you even though you don't' like it because that's what you're judging for.

MR. CLOWARD: Would you want me to share that information and divulge that to you?

PROSPECTIVE JUROR NUMBER 3: What, the --

MR. CLOWARD: My preference, that I did not like cherry pie.

PROSPECTIVE JUROR NUMBER 3: I really don't mind.

MR. CLOWARD: Even if you knew that I absolutely just hated cherry pie?

PROSPECTIVE JUROR NUMBER 3: I don't mind at all.

MR. CLOWARD: Okay. A lot of times --

PROSPECTIVE JUROR NUMBER 3: I might do some baking that you might like and --

MR. CLOWARD: Well, it's one of those things that, kind of like, you know, asparagus or brussels sprouts, the older I've gotten I like those, didn't when I was a kid. Cherry pie, never liked it. And so would you at least want me to share that with you so that you could make a decision as to whether or not you wanted to select a different judge to judge your pie?

PROSPECTIVE JUROR NUMBER 3: In a way, yes. But if I'm a good baker, I think that I'm good enough to persuade you for liking the pie. You know, because some people, they might get intimidated by knowing

that you don't like it. They might, you know, they might not do their best. But if I don't know it, more likely, you know, I'll just be more confident in making a good pie for you.

MR. CLOWARD: Okay. Do you think that it might influence my decision one way or another, or it's possible that it could, the fact that I don't like cherry pie and you're the --

PROSPECTIVE JUROR NUMBER 3: It's possible.

MR. CLOWARD: Okay. And so I kind of share that story because it helps to illustrate the importance of identifying potential feelings or life experiences that each of you may have that might color your view of the case.

Another example that I give, and these will be the only two stories that I really tell, is that I have two Nancys in my life. I have an Aunt Nancy and then I have a mother-in-law Nancy. And my Aunt Nancy owned a fabric store in Provo, Utah. And she had somebody come into the store and trip and fall. And they sued her.

And she does not like the fact that I am a personal injury lawyer because of that experience. She's told me that, that I'm a disappointment.

My mother-in-law, however, she had a vastly different experience. She was walking outside of a restaurant one day out by the back door. And out by the back door, that's where they would drag the trash out. And they would drag bags of, you know, the hamburger grease, it was a burger joint, across the sidewalk.

And she was walking along and she slipped on the oil and grease, and she actually shattered her knee. And so she had to file a

lawsuit. And do you think that those two individuals, based on their life experiences, might see a personal injury case differently?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Do you think that it's fair to say that they might not be the right fit for that particular type of case? You know, that they can probably be on a contract case, a land dispute, a motor vehicle crash. But for a slip and fall, due to their personal experiences, it might be too close to them that they might not be fair to one party or the other.

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Do you agree with that?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Okay. So with those two examples in mind, you know, that's what this process is about because the unique thing about our community is we all have different views. We have different feelings, we have different experiences in life, and that's what makes us all unique.

And I would ask do you think that either of those two women are bad people because of their experience with a slip and fall case?

PROSPECTIVE JUROR NUMBER 3: No.

MR. CLOWARD: They're not, are they? They just had a different experience. Okay. So, throughout this process I would just ask that everybody be brutally honest with me. And I promise you will not hurt my feelings, you will not hurt Mr. Gardner's feelings, you will not hurt our clients' feelings.

Even if you say, you know what, I hate lawyers and I especially hate bald ones. It's not going to make me feel bad, I promise. I would

rather know these things now than on the way to the parking lot, you know, saying hey, you know what, I never told you this but I really hate personal injury cases because I got sued and it was miserable and so forth.

So I'm going to ask some questions that are pertinent to this type of a case to see how folks feel. And again, it will help the process go a lot faster. I'm going to ask questions that I guarantee people will have strong feelings about. I promise you will, and that's completely fine.

I would just ask that you make a note so that when we get to you, you can say hey, you know, when we were talking about this issue or that issue, what was it on that that was important to you, and it will help us to go faster. So, ma'am, what does brutal honesty mean to you, by the way?

PROSPECTIVE JUROR NUMBER 3: Brutal honesty to me means whether you like the response or not, you just have to accept it because that's the fact.

MR. CLOWARD: Sure. It's the truth, regardless of whether somebody's feelings will be hurt. It's just, it is. Do you agree with that?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Okay. Will you be brutally honest with me in your answers?

PROSPECTIVE JUROR NUMBER 3: Always.

MR. CLOWARD: Okay. Will you also be very -- my hope is that this will be the most talkative panel of prospective jurors that's ever been in this courthouse. Will you agree to do that?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Okay. Thank you. Thank you. So I'm going

to be brutally honest with you. We're here for money damages. And at the end of the case, we're going to be asking for an amount into the millions of dollars. I want to be brutally honest and tell you that right up front. How does that make you feel, just hearing those -- hearing me say those things, seeing my client. He's got all of his limbs, he's still here, he's not, you know, passed away. How does that make you feel to hear that?

PROSPECTIVE JUROR NUMBER 3: It's okay.

MR. CLOWARD: Not even just a little bit of a problem?

PROSPECTIVE JUROR NUMBER 3: No.

MR. CLOWARD: Do you know folks that I guess that maybe they see the system, they see the system and say to themselves you know what, the system is set up for people to come into court and try and make a quick buck, a quick buck or a quick payday. Have you heard people say that?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Who are some of the folks in your life that maybe you've heard say those things?

PROSPECTIVE JUROR NUMBER 3: Just some, you know, like, friends for example. If there's, like, a gathering or get together.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NUMBER 3: [Inaudible.]

MR. CLOWARD: What are some of the things that maybe you've heard on that?

PROSPECTIVE JUROR NUMBER 3: Sometimes people are just suing to get quick money.

MR. CLOWARD: Yes. That happens. There are a lot of frivolous cases; would you agree with that?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Tell me some of the frivolous cases maybe you've heard about in your experience.

PROSPECTIVE JUROR NUMBER 3: Nothing really. But I've been watching a lot of the investigational channels. So --

MR. CLOWARD: I'm sorry, what was that?

PROSPECTIVE JUROR NUMBER 3: Investigational channel.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NUMBER 3: And, you know, like, they show cases like this where people are just suing one individual for money.

MR. CLOWARD: Yes. And is there a particular case that maybe you've heard of? A lot of times I've talked to folks and they'll say you know what, there's this McDonald's case and a lot of discussion about that. Have you heard of that case?

PROSPECTIVE JUROR NUMBER 3: Now that you mention it, about that hot water? Is that --

MR. CLOWARD: Yes.

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: You've heard about that case? What are your feelings about it?

PROSPECTIVE JUROR NUMBER 3: I've heard of it. At that time I think it's ridiculous because burned by the hot water, I mean, that's why you're ordering -- you know, I don't know about the temperature of the

coffee on what can you sue. At that time it's kind of ridiculous, but I didn't hear the whole case.

MR. CLOWARD: Yes. I mean, and there's other ones. I've heard of one where somebody in New York, they sued the dry cleaner for, like, $10 million for losing his pair of pants or something along those lines. I mean, I think, you know, you hear those and it's kind of like geez, what's going on here.

Tell me some more about your feelings about law suits, I guess, in general. You've had some discussions with family members, friends?

PROSPECTIVE JUROR NUMBER 3: No, not really. No. Well, people are suing because there's, you know, there's, they have to prove something. You know what I'm saying?

MR. CLOWARD: Yes.

PROSPECTIVE JUROR NUMBER 3: But I really didn't experience personally about any specific cases.

MR. CLOWARD: Okay. A lot of times when we talk to jurors, jurors will say things like, they'll say you know, I don't really have a problem if somebody sues to get medical bills, to get their medical bills paid. Or I don't really have a problem if somebody sues for maybe lost wages. But where it crosses the line is where they're going to ask for pain and suffering. I don't like the idea of pain and suffering. What are your feelings about that? How do you view that topic?

PROSPECTIVE JUROR NUMBER 3: Pain and suffering. I guess, that's a hard question to ask but, or to answer. But I guess, yes, people can sue for that. But you know, you have to hear the whole

scenario.

MR. CLOWARD: Sure.

PROSPECTIVE JUROR NUMBER 3: That's the thing.

MR. CLOWARD: What if, because I guess have you had any experience with that?

PROSPECTIVE JUROR NUMBER 3: No.

MR. CLOWARD: I wrote down that you had a family member or a friend that was in a car crash?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Tell me a little bit about that.

PROSPECTIVE JUROR NUMBER 3: Well, I just heard it from my best friend, those are her parents. And just [indiscernible] accident, and those are two elderly couple. But I just feel bad because one of the one who got injured was my godmother who's also a cancer patient. So I just feel bad that just kind of what's going on health wise she got into an accident also, unfortunately.

MR. CLOWARD: It was another thing that she had to deal with.

PROSPECTIVE JUROR NUMBER 3: Yes, on top of what's going on.

MR. CLOWARD: Sure, okay.

PROSPECTIVE JUROR NUMBER 3: And they were okay.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NUMBER 3: They didn't sue anybody. But everybody's alive.

MR. CLOWARD: Got you. I forgot to mention, one thing that's

important to note is I have, you know, co-counsel and my assistant, Marge here. And from time to time they're going to write questions, maybe Mr. Morgan will write down some questions. And so they may hand me notes. And I hope that's not, you know, disruptive. But sometimes I forget things or they'll assist me in that way.

I guess on this one issue of money damages, you know, imagine that you were injured. Would you file a law suit to recover for medical bills or for pain and suffering? How would that set with you personally?

PROSPECTIVE JUROR NUMBER 3: I might because on the, you know, what kind of injury I sustained [indiscernible] and if I lose a lot of hours from work, for example. Then probably I would.

MR. CLOWARD: Okay. And you wouldn't, I guess you don't have a strong feeling one way or another about whether that's the right thing to do or the wrong thing to do? Do you have any strong feelings even just a little about the system itself? Do you feel like the system, it allows for people to come in and ask for another person to be held accountable? Do you think there's something wrong with that system, do you agree with it, do you disagree with it? Do you think that people should just, you know, whatever happens happens?

PROSPECTIVE JUROR NUMBER 3: people sue for a reason. So I don't have anything against that, people suing for damages. So for me, it is okay.

MR. CLOWARD: Thank you for your honesty. So another thing, I have an outline up here. And I like to kind of just go through the

outline to make sure that I hit everything that's important. And so if I refer to this, I'm sorry. I just want to make sure that I'm thorough on behalf of Mr. Morgan. I want to do a good job for him.

Have you ever had a, say a worker's compensation claim, or do you know the different between maybe a worker's compensation claim versus a personal injury claim like this?

PROSPECTIVE JUROR NUMBER 3: [Indiscernible].

MR. CLOWARD: Okay. In cases like these, this is kind of the one and only opportunity for Mr. Morgan to present his damages. Say for instance if his problems get a lot worse five years from now, he can't call up the judge and ask the judge to reconvene and have another trial. Or 20 years from now he can't ask for everybody to come back down here and do it all over again whereas in a worker's compensation case, you can reopen the case and they'll reevaluate it even, you know, down the road.

A lot of times, jurors, they think, and they say to me, they say well, you know, Mr. Cloward, you mean to tell me we have to decide medical care needs for somebody for 20 years in the future. I don't know, I don't feel comfortable with that. I don't want to do that. And I just wanted to see how you feel about that. You know, if you're asked to evaluate the medical needs way down the road, how does that make you feel as an individual?

PROSPECTIVE JUROR NUMBER 3: A lot of responsibility because it's somebody's life we're talking about. And it's way down the road. But then again, you know, thinking ahead of the things that he might be needing in the future.

MR. CLOWARD: Does that responsibility, would that bother

you if you were asked to do that?

PROSPECTIVE JUROR NUMBER 3: No, but it is a big responsibility, though.

MR. CLOWARD: And on the other side of the coin, you know, the defendants in this case. You know, if the evidence shows what we believe it will show, you know, they will be responsible. How does that make you feel to know that your decision may affect -- it's going to affect one party one way or another, you know, no question about it. It just, it is. And are you okay with that?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: Do you have any reservations or problems with that?

PROSPECTIVE JUROR NUMBER 3: No.

MR. CLOWARD: Okay. Have you ever had any maybe setbacks in your life, things that, you know, were hard for you to get through? You've never really been placed in that situation and maybe you thought that you would react differently. But then when you actually were placed in that situation you were kind of like oh, I didn't really, you know, this was tougher than I thought or maybe this was easier than I thought?

PROSPECTIVE JUROR NUMBER 3: Well, probably being a possible juror right now.

MR. CLOWARD: Yes.

PROSPECTIVE JUROR NUMBER 3: I mean, it is a big responsibility. But once you get selected, you just have to deal with it and really learn the process.

MR. CLOWARD: Okay.

PROSPECTIVE JUROR NUMBER 3: You just got to do it, and whatever's best for the person.

MR. CLOWARD: What's maybe the most difficult thing that you've been through in your life?

PROSPECTIVE JUROR NUMBER 3: I really don't have anything in my mind.

MR. CLOWARD: Okay. And you know, I apologize in advance for the questions. A lot of the questions I'm going to ask you are going to be very personal questions. If at any point anybody doesn't feel comfortable, just please let me know. I do want to get everything out on the table. And so I will ask a lot of questions that, you know, that are personal. And I appreciate everybody's willingness to answer those for me.

So earlier we kind of, we talked a little bit about, you know, frivolous cases, the McDonald's case, the case with the dry cleaner. I want to ask about the other side of the coin and just ask if you think that maybe sometimes defendants also have frivolous defenses, whether it's a one-way street, it's only plaintiffs, only plaintiffs are the ones that come in and try and take advantage of the system, or do you think that sometimes defendants do that as well?

PROSPECTIVE JUROR NUMBER 3: Well, it's the plaintiff, he's the one that's doing the suing. So I'm not so sure.

MR. CLOWARD: Do you ever watch the show COPS?

PROSPECTIVE JUROR NUMBER 3: Not really.

MR. CLOWARD: Okay. I watch the show, I think it's

entertaining. Sometimes you'll see the cops will come up on a situation and they'll have somebody on camera. And it's like the person, you know, they're being investigated for drugs. And you'll see the person drop it and then the cops will say hey, is this yours. And the guy will say no, it's not mine. And everybody knows, it's right there on camera. But they still kind of say, you know, no I'm going to fight this and so forth.

So I guess my question was, you know, do you think that defendants sometimes do things that maybe it's obvious but they're going to fight? I'm just trying to see if there's another side to the coin, or if it's only plaintiffs that take advantage of the system.

PROSPECTIVE JUROR NUMBER 3: Well, sometimes they might because they think that their side is also correct.

MR. CLOWARD: Okay, sure.

PROSPECTIVE JUROR NUMBER 3: Or might be right.

MR. CLOWARD: Tell me a little more about that. I would be interested if there's more.

PROSPECTIVE JUROR NUMBER 3: Because they're being sued, but at the same time they might be thinking that they didn't do anything wrong.

MR. CLOWARD: Sure. Okay. So maybe the way that they see it is that, you know, it is okay to have that defense? Okay, fair enough. Thank you for sharing that.

I'll ask a question, you know, one of the witnesses that they've identified, there's going to be I guess some disagreement, so disagreements in our doctors and some disagreements in their doctors. And I wanted to get

your feelings. It sounds like you work in a hospital and you treat folks that are injured.

Do you know anybody that's ever been involved in say a minor accident that maybe was hurt pretty badly, or do you know anybody that was say involved in a really serious accident like a rollover and they walked away?

PROSPECTIVE JUROR NUMBER 3: No.

MR. CLOWARD: Have you ever heard of that?

PROSPECTIVE JUROR NUMBER 3: I'm going to say no.

MR. CLOWARD: Have you ever heard of I guess the saying yes, the guy, you know, he walked away without a scratch? Have you heard that saying?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. CLOWARD: So I wanted to just find out from you in particular, some individuals that I've talked to in doing jury selection, they say look, unless the cars are completely mangled, I don't think anybody could be hurt seriously. And other folks, they say you know what, my neighbor, they got into a fender bender and hurt themselves pretty badly. And they're open to the possibility that people do get injured. And so I wanted to see your kind of views on that.

PROSPECTIVE JUROR NUMBER 3: Well, I mean, the person needs to be checked internally also. You know what I'm saying. It's not just the outside appearance. There might be bleeding inside, there might be concussion, so on and so forth, fracture that, you know, the outer part you probably don't see it. But once you get that person checked, that's when