THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2012-CP-43-2030

Appellate Case No.: 2016-000774

Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

RECORD ON APPEAL
VOLUME III

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based on hospital's presentation to Medicare for payment of facility fees resulting from the facility component referrals made by the physicians, and for which it received payment, and thereby deprived hospital of its right to a jury trial on the fact issue. U.S.C.A. Const.Amend. 7; Stark Law, § 1877, 42 U.S.C.A. § 1395nn; 31 U.S.C.A. § 3729(b)(1).

9 Cases that cite this headnote

[4] **Federal Courts**
⇦ Jury

Denial of right to jury is harmless only if the district court would have granted judgment as a matter of law (JMOL) to the prevailing party, i.e., if the evidence is such, without weighing the credibility of the witnesses, that there is only one conclusion that reasonable jurors could have reached; error is not harmless where both sides introduce sufficient conflicting evidence on the relevant questions such that the district court could not have granted a motion for judgment as a matter of law.

1 Cases that cite this headnote

[5] **Federal Courts**
⇦ Questions Considered

Reviewing court may address issues that are likely to recur on remand.

2 Cases that cite this headnote

[6] **Health**
⇦ Providers

Health
⇦ Providers

Facility component that resulted from physicians' personally performed services and the resulting facility fee billed by hospital based upon that component constituted a "referral" within meaning of Stark Law; thus, hospital's claims for Medicare facility fees based on patient referrals were prohibited under the Stark Law if there was a financial relationship within the meaning of the law between the physicians and hospital. Stark Law, § 1877(h)(5), 42 U.S.C.A. § 1395nn(h)(5); 42 C.F.R. § 411.351.

9 Cases that cite this headnote

[7] **Health**
⇦ Providers

Health
⇦ Providers

If a hospital provides fixed compensation to a physician that is not based solely on the value of the services the physician is expected to perform, but also takes into account additional revenue the hospital anticipates will result from the physician's referrals, such compensation by necessity takes into account the volume or value of such referrals; such arrangements do not violate the Stark Law, provided that the physician's compensation not take into account the volume or value of anticipated referrals. Stark Law, § 1877(h)(5), 42 U.S.C.A. § 1395nn(h)(5); 42 C.F.R. § 411.351.

6 Cases that cite this headnote

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*395 **ARGUED:** William Walter Wilkins, Nexsen Pruet, LLC, Greenville, South *396 Carolina; Arthur Camden Lewis, Lewis, Babcock & Griffin, LLP, Columbia, South Carolina, for Appellant. Tracy Lyle Hilmer, United States Department of Justice, Washington, D.C., for Appellee. **ON BRIEF:** Kirsten E. Small, Nexsen Pruet, LLC, Greenville, South Carolina; Mary G. Lewis, W. Jonathan Harling, Lewis & Babcock, LLP, Columbia, South Carolina; Daniel M. Mulholland, III, Horty, Springer & Mattern, PC, Pittsburgh, Pennsylvania, for Appellant. Tony West, Assistant Attorney General, Michael D. Granston, Michael S. Raab, Niall M. O'Donnell, United States Department of Justice, Washington, D.C.; G. Norman Acker, III, Assistant United States Attorney, Office of the United States Attorney, Raleigh, North Carolina, for the United States. Sandra L.W. Miller, Womble Carlyle Sandridge & Rice, PLLC, Greenville, South Carolina; Kevin Mitchell Barth, Ballenger, Barth & Hoefer, LLP, Florence, South Carolina, for Michael K. Drakeford, M.D. Melinda R. Hatton, Maureen D. Mudron, American Hospital Association, Washington, D.C.; Jonathan L. Diesenhaus, Jessica L.

Ellsworth, Hogan Lovells US LLP, Washington, D.C., for Amicus Supporting Appellant.

Before: DUNCAN, WYNN, and DIAZ, Circuit Judges.

Vacated and remanded by published opinion. Judge DUNCAN wrote the opinion, in which Judge DIAZ joined. Judge WYNN wrote a separate opinion concurring in the result.

OPINION

DUNCAN, Circuit Judge:

This appeal arises from the district court's order granting final judgment to the United States upon equitable[1] claims of payment by mistake of fact and unjust enrichment against appellant Tuomey Healthcare System, Inc. ("Tuomey") arising out of alleged violations of the Social Security Act, and awarding damages in the amount of $44,888,651.00, plus pre-and post-judgment interest.

In the underlying action, the United States alleged that Tuomey entered into compensation arrangements with certain physicians that violated section 1877 of the Social Security Act, commonly known as the Stark Law, 42 U.S.C. § 1395nn. Because the Stark Law does not create its own right of action, the United States sought relief under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–33.[2] The United States further asserted equitable claims premised on the alleged Stark Law violation, including payment under mistake of fact and unjust enrichment. A jury returned a verdict finding that Tuomey did not violate the FCA, but responded affirmatively to a special interrogatory regarding whether it had violated the Stark Law. The district court set aside the jury verdict and ordered a new trial on the FCA claim. It further ordered that, based on the jury verdict, the United States was entitled to judgment on its equitable claims.

Because we conclude that the district court's judgment in the United States' favor violated Tuomey's Seventh Amendment right to a jury trial, we vacate the *397 judgment and remand for further proceedings. Because we are remanding this case, we also address other issues raised on appeal that are likely to recur upon retrial.

I.

A.

We begin by setting out the statutory framework that forms the basis for the United States' allegations in the underlying proceeding. We first set forth the provisions of the FCA, as relevant to this appeal. We then discuss the pertinent provisions of the Stark Law.

1.

The FCA is a statutory scheme designed to discourage fraud against the federal government. 31 U.S.C. § 3729(a)(i) provides, in relevant part, that "any person who ... knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval ... is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 ... plus 3 times the amount of damages which the Government sustains because of the act of that person." Section 3729(b)(1) defines the term "knowingly" to "mean that a person, with respect to information ... has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information," with the additional provision that "no proof of specific intent to defraud" is required. Section 3729(b)(2) further defines, in relevant part, the term "claim" as "any request or demand, whether under a contract or otherwise, for money or property ... that ... is presented to an officer, employee, or agent of the United States."

2.

The Stark Law was enacted to address overutilization of services by physicians who stood to profit from referring patients to facilities or entities in which they had a financial interest. The Stark Law, and regulations promulgated pursuant thereto ("Stark Regulations")[3] prohibit a physician who has a "financial relationship" with an entity—such as a hospital—from making a "referral" to that hospital for the furnishing of certain "designated health services"[4] for which payment otherwise may be made by the United States under the Medicare program. 42 U.S.C. § 1395nn(a)(1); 42 C.F.R. § 411.353(a).[5] A hospital may not submit for payment a

Medicare claim for services rendered pursuant *398 to a prohibited referral. 42 U.S.C. § 1395nn(a)(1)(B); 42 C.F.R. § 411.353(b). The United States may not make payments pursuant to such a claim, and hospitals must reimburse any payments that are mistakenly made by the United States. 42 U.S.C. § 1395nn(g)(1); 42 C.F.R. § 411.353(c), (d). However, when a physician initiates a service and personally performs it, that action does not constitute a referral under the Stark Law. 42 U.S.C. § 1395nn(h)(5); 42 C.F.R. § 411.351.

The Stark Law and Stark Regulations define a "financial relationship" to include "a compensation arrangement" in which "remuneration" is paid by a hospital to a referring physician "directly or indirectly, overtly or covertly, in cash or in kind." 42 U.S.C. §§ 1395nn(a)(2), (h)(1); 42 C.F.R. § 411.354. An indirect financial relationship exists if, inter alia, there is an indirect compensation arrangement between the referring physician and an entity that furnishes services. An indirect compensation arrangement exists if, inter alia, the referring physician receives aggregate compensation that "*varies with, or takes into account, the volume or value of referrals or other business generated* by the referring physician for the entity furnishing" services. 42 C.F.R. § 411.354(c)(2)(ii) (emphasis added).[6]

The Stark Regulations provide that certain enumerated compensation arrangements do not constitute a "financial relationship." 42 C.F.R. § 411.357. Significantly for our purposes, a subset of indirect compensation arrangements do not constitute a financial relationship if the compensation received by the referring physician is (1) equal to the "fair market value for services and items actually provided";[7] (2) "not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician" for the hospital; and (3) "commercially reasonable."[8] 42 C.F.R. § 411.357(p). Subsection 411.357(p) is known as the "indirect compensation arrangements exception." *See, e.g.*, 72 Fed.Reg. at 51,014.

B.

We now turn to the contracts that gave rise to this litigation. Tuomey is a private, *399 nonprofit corporation incorporated in the State of South Carolina. It owns and operates Tuomey Hospital, located in Sumter County, South Carolina. Tuomey Hospital provides inpatient and outpatient health care services. Most of the physicians who provide medical services at Tuomey Hospital are not employed by Tuomey but rather practice medicine through specialty physician groups organized as professional corporations.

In early 2003, the members of Sumter County's gastroenterology specialty group informed Tuomey that they were considering whether to perform outpatient surgical procedures in-office, rather than at Tuomey Hospital. Other specialty physician groups that performed outpatient procedures at Tuomey Hospital were also considering whether to relocate such procedures. The loss of these outpatient surgical procedures posed a serious financial concern for Tuomey. To dissuade the specialist physicians from performing their outpatient procedures elsewhere, Tuomey sought to enter into agreements with specialist physicians to perform outpatient procedures solely at Tuomey Hospital. Specifically, during 2004 and 2005, Tuomey negotiated with all of the specialist physicians on its medical staff. One of those physicians was appellee Dr. Michael Drakeford, an orthopedic surgeon, with whom negotiations unsuccessfully ended in 2005.

Between January 1, 2005, and November 15, 2006, Tuomey entered into compensation contracts with 19 specialist physicians. All of the contracts included essentially the same terms. Each contract specified that the physician was required to provide outpatient procedures at Tuomey Hospital or at facilities owned or operated by it. Under each contract, Tuomey was solely responsible for billing and collections from patient and third-party payors for outpatient procedures, and the physician expressly reassigned to Tuomey all benefits payable to the physician by third party payors, including Medicare and Medicaid. Tuomey agreed to pay each physician an annual base salary that fluctuated based on Tuomey's net cash collections for the outpatient procedures. Tuomey further agreed to pay each physician a "productivity bonus" equal to 80 percent of the net collections. Moreover, each physician was eligible for an incentive bonus that could total up to 7 percent of the productivity bonus. Each contract had a ten-year term and provided that the physicians would not compete with Tuomey during the term of the contract and for two years thereafter.

Pursuant to the contracts, the physicians performed outpatient procedures at Tuomey facilities. The outpatient procedures generated two billings: a professional fee for the physician for his or her services, also known as the "professional component"; and a facility fee for Tuomey for providing

the space, the nurses, the equipment, etc., also known as the "facility component" or "technical component."[9] Subsequent to the performance of the procedures, Tuomey submitted claims requesting reimbursement for both the professional fee and the facility fee to third-party payors, including Medicare and Medicaid. As relevant here, Tuomey presented, or caused to be presented, to Medicare and Medicaid claims for payment of the facility fees generated as a result of outpatient procedures performed pursuant to the contracts.[10]

*400 C.

1.

In October 2005, Drakeford filed an action in the District Court for the District of South Carolina under the qui tam provisions of the FCA, 31 U.S.C. § 3730(b). In September 2007, the United States intervened in Drakeford's qui tam action as to the issue of whether Tuomey submitted false claims as a result of the contracts with the physicians.[11] The government subsequently filed its own complaint.[12] Pertinent to this appeal, the government asserted three causes of action: Count I (False Claims Act, 31 U.S.C. § 3729(a)(1) Presenting Claims to Medicare and Medicaid for Designated Health Services Rendered as a Result of Violations of the Stark Statute); Count IV (payment under mistake of fact); and Count V (unjust enrichment).[13]

Specifically, Count I alleged that Tuomey knowingly presented, or caused to be presented, false and fraudulent claims for payment or approval to the United States, including those claims for reimbursement for services rendered to patients who were referred by physicians with whom Tuomey had entered into financial relationships—i.e., the contracts—in violation of the Stark Law. Count I further sought the amount of the United States' damages, trebled as required by law, and such civil penalties as are required by law.

Count IV alleged that the United States had compensated Tuomey as a result of mistaken understandings of fact. Specifically, it alleged that Tuomey was not entitled to receive payment from the United States for services rendered by any physician who was in a financial relationship prohibited by the Stark Law, and that the United States paid Tuomey for such prohibited claims under the mistaken belief that Tuomey was entitled to receive payment for these claims. Accordingly, the United States claimed that Tuomey was liable to it for the amount of the payments made in error to Tuomey by the United States.

Count V alleged that by obtaining government funds to which it was not entitled, Tuomey was unjustly enriched. The United States claimed that Tuomey was liable to it for such amounts, or the proceeds therefrom, to be determined at trial.

2.

The government's claims under the FCA were tried to a jury in March 2010. At the conclusion of the evidence, the district court instructed the jury that the United States had brought the case

> asserting that the defendant has committed fraud under the Medicare program.... The United States alleges that beginning on or about January 1, 2005, and continuing until the present, Tuomey presented false claims to the United States by submitting claims in violation of the Stark Law when Tuomey *401 knew that the defendant was not entitled to receive payment for the claims.

J.A. 976–77.

The district court further instructed the jury regarding the elements of a Stark Law violation, as well as the elements of an FCA violation. With regard to the Stark Law, the district court instructed the jury to conduct a two-step inquiry to determine whether Tuomey violated the statute. At step one of the inquiry, the jury was to determine whether the contracts are indirect compensation arrangements as defined by the Stark Law and Stark Regulations. For the jury to find in favor of the government, it was required to prove that the physicians received aggregate compensation from Tuomey, and that such compensation varied with or otherwise took into account the volume or value of the physicians' referrals to Tuomey. If the jury answered step one in the affirmative, at step two of the inquiry, it was to determine whether Tuomey had proven by a preponderance of the evidence that the contracts fell within the indirect compensation arrangement exception. The district court further instructed the jury to determine the number and value of the claims for services that the

physicians referred pursuant to the contracts, and for which Tuomey received payment from Medicare.

With regard to the FCA claim, the district court instructed the jury:

> [T]he United States must establish by a preponderance of the evidence the following: One, that Tuomey presented or caused to be presented to Medicare; two, false or fraudulent claims for payment; and three, that Tuomey knew that the claims for payment were false or fraudulent. If you find that the United States has established these elements by a preponderance of the evidence then, of course, you may find a verdict for the United States.

J.A. 989. With respect to the second element of an FCA violation, i.e., whether the claims were false or fraudulent, the district court instructed the jury:

> What is false? In this case, the United States alleges that certain of the defendant's claims were false because Tuomey was in violation of the Stark Law. For purposes of this case, a claim is false if it was submitted to Medicare in violation of the Stark Law.

J.A. 990. With respect to the third element of an FCA violation, i.e., whether Tuomey knew the claims for payment were false or fraudulent, the district court instructed the jury:

> [F]or purposes of the [FCA], a person knows that a claim is false if a person, one, has actual knowledge of the information, or two, acts in deliberate ignorance of the truth or falsity of the information, or, three, acts in reckless disregard of the truth or falsity of the information. It is not necessary that the United States prove that the defendant intended to submit false claims.... In order to find that Tuomey took action knowingly, you ... would need to find that at least one individual employee or agent of Tuomey knew that Tuomey was submitting claims to Medicare and knew that the claims were false.

J.A. 990–91. The district court further instructed the jury with respect to damages under the FCA:

> If you find that the defendant has violated the [FCA], you must then determine the damages sustained by the United States because of the violations. The measure of the United States' damages under the [FCA] is the amount of money that the United States paid out by reason of the false claims. Defendant's compliance with the Stark Law was a *402 condition of the government's payment decision. If the defendant violated the Stark Law, defendant was not allowed to submit claims for payment to Medicare for services that were referred by the physician whose compensation arrangement violated the Stark Law. And if defendant violated the Stark Law, Medicare was not allowed to pay for any services furnished that were referred by the physicians whose compensation arrangements violated the Stark Law. Therefore, your calculation of damages should be based on what the Medicare program paid to the defendant in violation of the Stark Law.... If you find the hospital, Tuomey, liable under the [FCA], then you must determine the number of false claims that the defendant submitted to the United States.

J.A. 992–93.

The district court provided the jury with a verdict form, with respect to which it instructed the jury:

> [S]ubsection A, regards the Stark Law. It says, we the jury, find that Tuomey, and there are two choices here, violated the Stark Law or did not violate the Stark Law.... [S]ubsection B regard[s] the [FCA]. One, we the

> jury find that Tuomey, again, I've given you two choices, violated the [FCA] or did not violate the [FCA].... Two, if Tuomey violated the [FCA], the total damages under the [FCA], if any, and then you will record on a line that I provided for your use the amount of money you award as damages.... Three, if Tuomey violated the [FCA], how many false claims were submitted by Tuomey, if any?

J.A. 996–97.

On March 29, 2010, the jury reached a verdict. In subsection A of the verdict form, the jury indicated that it found that Tuomey violated the Stark Law. In subsection B of the verdict form, the jury indicated that it found that Tuomey did not violate the FCA. Because the jury found no FCA violation, it indicated no response to either the second or third interrogatories in subsection B, i.e., the amount of damages, if any, and the number of false claims, if any.

3.

Subsequent to the jury's verdict, the parties made several post-verdict motions. Tuomey moved for judgment in its favor on the government's equitable claims, including payment under mistake of fact and unjust enrichment. The United States, in response, moved for judgment in its favor on those claims. The United States further moved for judgment as a matter of law under Federal Rule of Civil Procedure 50 on the FCA claim, or alternatively for a new trial under Federal Rule of Civil Procedure 59 on that claim, based on its assertion that the district court erroneously excluded certain evidence regarding Tuomey's knowledge.

On June 3, 2010, the district court conducted a hearing with respect to those post-verdict motions. The district court stated that it would deny the government's Rule 50 motion, but grant the government's Rule 59 motion. Although the government sought a new trial only on the issue of knowledge under the FCA, the district court declined to grant a new trial solely "on the limited question of knowledge," but instead granted a new trial "on the whole issue of the [FCA]." J.A. 1119–20. The district court nevertheless indicated that it would grant a judgment in the United States' favor on the equitable claims based on the jury's finding that Tuomey had violated the Stark Law.

On July 13, 2010, the district court issued two orders. In the first, the district court granted the government's motion for *403 a new trial and ordered that it be held "on the whole issue of the United States' cause of action for violation of the [FCA], consistent with the separate order being issued by this Court concerning the [equitable] claims." J.A. 135. In the second order, the district court addressed the United States' motion for judgment in its favor on its equitable claims. It made the following findings of fact: (1) "Pursuant to the jury verdict, Tuomey violated the Stark Law"; (2) Tuomey submitted claims in violation of the Stark Law, and the United States paid those claims in the amount of $44,888,651.00. J.A. 136. It further made the following conclusions of law: (1) "Under the Stark Law, claims submitted in violation of that Statute and payments made by the government in response to such claims must be repaid to the government"; and (2) "The Supreme Court of the United States has recognized that where the government pays out moneys under a circumstance that is unlawful or is improper that the government has a right to be reimbursed." J.A. 137. Based on these conclusions of law, the district court held in favor of the United States with regard to Counts IV and V. It noted that the FCA allegations remained before the court for retrial.

That same day, the district court entered a judgment indicating that the United States should recover from Tuomey on Counts IV and V of its complaint in the amount of $44,888,651.00, plus pre- and post-judgment interest. The judgment further indicated that "[t]his action was tried by a jury, with the [district judge] presiding, and the jury has rendered a verdict by answering special interrogatories."[14] *Id.* 139. On July 16, 2010, Tuomey noticed appeal from the district court's order granting final judgment to the United States upon Counts IV and V and damages.

II.

On appeal, Tuomey makes several arguments. Most significantly, Tuomey contends that the district court violated its Seventh Amendment rights by basing its judgment with respect to the equitable[15] claims on the jury's interrogatory answer regarding the Stark Law, even though the district court had already set aside the jury's verdict in its entirety.[16] For the reasons set forth below, we agree.

*404 We now turn to consideration of Tuomey's Seventh Amendment argument, an issue we review de novo. *See Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 827 (4th Cir.1994). If a denial of the right occurred, we must decide whether the denial constituted harmless error. *Id.* We address each question in turn.

A.

The Seventh Amendment states that: "In Suits at common law ... the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII; *see also* Fed.R.Civ.P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution ... is preserved to the parties inviolate."). We have held that the Seventh Amendment right extends "to all suits, whether at equitable or arising under federal legislation, where *legal* rights are involved." *Pandazides*, 13 F.3d at 828.

[1] [2] The Seventh Amendment demands that facts common to legal and equitable claims be adjudicated by a jury. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959)[17]; *Lytle v. Household Mfg.*, 494 U.S. 545, 550, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990) ("When legal and equitable claims are joined in the same action, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.") (quotation marks omitted). When equitable claims rest on facts necessary to determination of legal claims, "the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). In short, *Beacon Theatres* and *Dairy Queen* teach that "a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues." *Lytle*, 494 U.S. at 551, 110 S.Ct. 1331; *see also Ritter v. Mount St. Mary's Coll.*, 814 F.2d 986, 990 (4th Cir.1987) (holding that *Beacon Theatres* and *Dairy Queen* "stand for the proposition that, where legal and equitable claims are contained in the same set of facts, the right to jury trial, which the legal claims permit, should predominate, precluding the prior determination of the factual issues by a court sitting in equity").

We now apply the foregoing principles to this case. As already noted, whether *405 there was a financial relationship between Tuomey and the physicians that violated the Stark Law is a factual predicate to liability on the equitable claims. The FCA claim, too, is premised on the existence of such an illegal relationship. As such, the factual issue of whether a financial relationship prohibited by the Stark Law existed is common to the equitable claims and the FCA claim. It follows that the district court was required to submit that issue to the jury before it could resolve the United States' equitable claims.

[3] Here, the district court failed to do precisely that. Although it tried the FCA claim to a jury, and the jury returned a verdict on that claim that indicated that Tuomey had violated the Stark Law but had not violated the FCA, the district court set that verdict aside when it granted the government's motion for a new trial under Rule 59, specifically ordering that the new trial would encompass the whole FCA claim, including whether Tuomey had violated the Stark Law.[18] As a result, the jury's interrogatory answer regarding the Stark Law is now a legal nullity. In other words, following the order granting the Rule 59 motion, a jury had yet to determine the common issue necessary to resolution of both the FCA claim and the equitable claims, i.e., whether Tuomey violated the Stark Law. In granting judgment to the United States on the equitable claims, the district court impermissibly resolved that common issue before a jury had adjudicated it. It thereby deprived Tuomey of its right to a jury trial.

B.

[4] Having concluded that the district court denied Tuomey's Seventh Amendment right to a jury trial, we must decide whether the denial constituted harmless error. Error is harmless only if the district court would have granted judgment as a matter of law to the prevailing party, i.e., if "the evidence is such, without weighing the credibility of the witnesses, that there is only one conclusion that reasonable jurors could have reached." *Pandazides*, 13 F.3d at 827 (quoting *Keller v. Prince George's Cnty.*, 827 F.2d 952, 955 (4th Cir.1987)). Error is not harmless where both sides introduce sufficient conflicting evidence on the relevant questions such that the district court could not have granted a motion for judgment as a matter of law. *Id.* at 833.

Here, both sides introduced conflicting evidence regarding whether Tuomey's contracts with the physicians violated the

Stark Law. We find that the record before us is insufficient to assess whether the district court could have granted judgment as a matter of law. Notably, as we discuss below in Part III, the jury must determine on remand whether the contracts took into account the volume or value of referrals. If it so finds, the jury must further determine whether Tuomey could bear its burden of proof with respect to the indirect compensation arrangement exception. Finally, if the jury finds that the contracts created a financial relationship—as defined by the Stark Law—between Tuomey and the physicians, it must determine the number and value of claims Tuomey presented to Medicare for payment of facility fees resulting from the facility component referrals made by the physicians, and for which it received payment.

III.

[5] Because we are remanding this case, we will briefly address other issues ***406** raised on appeal that are likely to recur. With respect to our colleague's objection to this course as expressed in his separate opinion, *see infra* at 27–31, we note that our precedent is clear that we may address issues that are likely to recur on remand. *See Levy v. Lexington County, S. C.*, 589 F.3d 708, 716 (4th Cir.2009) ("Because we are remanding this case, we will address other issues raised on appeal that are likely to recur."); *see also Elm Grove Coal Co. v. Dir. O.W.C.P.*, 480 F.3d 278, 299 n. 20 (4th Cir.2007) (addressing issue because it was likely to arise on remand); *Gordon v. Schweiker*, 725 F.2d 231, 236 (4th Cir.1994) ("Since the case must be reconsidered ... we do provide some guidance as to a matter very likely to arise at the hearing which will occur."). [19] Specifically, we address two threshold issues relating to liability under the Stark Law that are purely legal in nature and that the district court will be called upon to address upon retrial. It bears emphasis that the parties presented these issues to us as pure questions of law. First, we address whether the facility component of the services performed by the physicians pursuant to the contracts, for which Tuomey billed a facility fee to Medicare, constituted a "referral" within the meaning of the Stark Law and Stark Regulations. Second, we examine whether, assuming that Tuomey considered the volume or value of *anticipated* facility component referrals in computing the physicians' compensation, the contracts implicate the "volume or value" standard under the Stark Law.

A.

As already noted, the Stark Law and Stark Regulations define a "referral," in relevant part, as the request by a physician for a service for which payment may be made under Medicare, but not including any services performed or provided by the referring physician. 42 U.S.C. § 1395nn(h)(5); 42 C.F.R. § 411.351. Neither the statute nor the regulation addresses whether a facility component that results from a personally performed service constitutes a referral. In promulgating the final rule on referrals, however, HCFA commented that the personal services exception does not extend to a facility fee a hospital bills for a facility component resulting from a personally performed service:

> We have concluded that when a physician initiates a designated health service and personally performs it him or herself, that action would not constitute a referral of the service to an entity ... However, in the context of inpatient and outpatient hospital services, there would still be a referral of any hospital service, technical component, or facility fee billed by the hospital in connection with the personally performed service. Thus, for example, in the case of an inpatient surgery, there would be a referral of the technical component of the surgical service, ***407** even though the referring physician personally performs the service.

66 Fed.Reg. at 941. [20]

[6] Applying the Stark Law and Stark Regulations, as interpreted by the agency, [21] we conclude that there was a referral here, consisting of the facility component of the physicians' personally performed services, and the resulting facility fee billed by Tuomey based upon that component. Thus, the claims for facility fees based on patient referrals were prohibited under the Stark Law if there was a financial relationship within the meaning of the law between the physicians and Tuomey. As such, Tuomey's argument that the physicians were not making referrals—as that term is defined in the Stark Law—pursuant to the contracts fails.

B.

[7] Having concluded that the physicians were making referrals to Tuomey, we now turn to the question of whether the contracts implicate the Stark Law's "volume or value" standard. As already noted, the regulatory definition of "indirect compensation arrangement" requires that the aggregate compensation received by the physician "*var[y] with, or take[ ] into account, the volume or value* of referrals or other business generated by the referring physician." 42 C.F.R. § 411.354(c)(2)(ii) (emphasis added). Notably, the government contends that Tuomey's conduct fits within this definition because it included a portion of the value of the anticipated facility component referrals in the physicians' fixed compensation.[22] Tuomey argues that the inquiry is ***408** whether the physicians' compensation takes into account the volume or value of referrals, not whether the parties considered referrals when deciding whether to enter the contracts in the first place. Thus, the parties disagree about whether anticipated referrals constitute a proper basis for a finding that a physician's compensation takes into account the volume or value of referrals.

In determining whether contracts that are found to have taken into account anticipated referrals implicate the "volume or value" standard, we look to the Stark Law, Stark Regulations, and the official agency commentary.[23] Our analysis of these sources, set forth below, yields the conclusion that compensation arrangements that take into account anticipated referrals do implicate the volume or value standard.

We begin by observing that the official agency commentary explains that "[a]rrangements under which a referring physician receives compensation tied to the volume or value of his or her referrals ... are the very arrangements at which [the Stark Law] is targeted." 66 Fed.Reg. at 868. We further note that the Stark Regulations and the agency commentary specifically address circumstances in which compensation that takes into account anticipated referrals implicates the "volume or value" standard. The Stark Regulations, for instance, define "fair market value," in pertinent part, as compensation that "has not been determined in any manner that takes into account the volume or value of *anticipated* or actual referrals." 42 C.F.R. § 411.351 (emphasis added). The official agency commentary to the Phase I rules notes that the Stark Law "establishes a straightforward test that compensation arrangements should be at fair market value for the work or service performed," and should not be "inflated to compensate for the physician's ability to generate other revenues." 66 Fed.Reg. at 877. It further notes that "[i]n order to establish a 'bright line' rule, we are applying this interpretation of the volume or value standard uniformly to all provisions under [the Stark Law and Stark Regulations] where the language appears (for example, ... indirect compensation arrangements)." *Id.* The commentary further specifies that compensation arrangements that take into account the volume or value of *anticipated* referrals implicate the volume or value standard:

> Consistent with this interpretation, we have determined that we will not consider the volume or value standard implicated by otherwise acceptable compensation arrangements for physician services solely because the arrangement requires the physician to refer to a particular provider as a condition for payment. So long as the payment is fixed in advance for the term of the agreement, is consistent with fair market value for the services performed (that is, the payment does not take into account the volume or value of the *anticipated* or required referrals), and otherwise complies with the requirements of the applicable exception, the fact that an employer or a managed care contract requires the referrals to certain providers will not vitiate the exception.

Id. (emphasis added).

We conclude from the regulatory definition of fair market value and the applicable agency commentary that compensation based on the volume or value of anticipated ***409** referrals implicates the volume or value standard.[24] At bottom, the Stark Law and Stark Regulations seek to ensure that hospitals and other health care providers compensate physicians only for the work or services they actually perform, not for their ability to generate other revenues for the provider through referrals. It stands to reason that if a hospital provides fixed compensation to a physician that is not based solely on the value of the services the physician is expected to perform, but also takes into account additional revenue the hospital anticipates will result from the physician's referrals, that such compensation by

necessity takes into account the volume or value of such referrals. The agency commentary specifically contemplates arrangements such as the contracts that are before us, where a physician is required to refer patients to a particular provider as a condition of compensation. Such arrangements, the commentary indicates, do not violate the Stark Law, *provided that* certain conditions are met, one of which is that the physician's compensation must not take into account the volume or value of *anticipated* referrals. [25]

Accordingly, the question, which should properly be put to a jury, is whether the contracts, on their face, took into account the value or volume of anticipated referrals. As the Stark Regulations and the agency commentary indicate, compensation arrangements that take into account anticipated referrals do not meet the fair market value standard. Thus, it is for the jury to determine whether the contracts violated the fair market value standard by taking into account anticipated referrals in computing the physicians' compensation. [26]

IV.

For the foregoing reasons, we vacate the district court's July 13, 2010 judgment, and remand for further proceedings.

VACATED AND REMANDED

WYNN, Circuit Judge, concurring in the result:
Because I agree that the proper disposition of this case is to vacate the district court's judgment against Defendant Tuomey Healthcare System, Inc. and remand for further proceedings, I concur in the result reached by the majority opinion. I write separately because I come to that conclusion on different grounds, and because ***410** I am also unable to join in Part III of the majority opinion, which I find to be advisory in nature.

At the outset, I emphasize my substantial agreement with the reasoning so ably articulated by my colleagues in the majority, particularly their observation that "the jury's interrogatory answer regarding the Stark Law is now a legal nullity." *Ante* at 405. Given that the district court set aside the jury's verdict in its entirety, it must follow that the jury's answer to an interrogatory, which was a necessary condition to the jury's verdict, must itself also be a nullity. Notwithstanding that ruling, however, in its order entering judgment against Defendant, the district court found as fact that "[p]ursuant to the jury verdict, Tuomey violated the Stark Law." J.A. 136. [1]

Indeed, the sole basis for the district court's judgment against Defendant on the equitable claims was the jury's finding of a Stark Law violation. [2] As such, irrespective of the Seventh Amendment, the judgment, which was predicated entirely on what is now a "legal nullity," simply cannot stand. Given this unremarkable proposition—that a judgment must be vacated if premised on a jury finding that has been set aside and is no longer valid—I see no reason to resort to constitutional analysis to support our holding. *See, e.g., Norfolk So. Ry. Co. v. City of Alexandria,* 608 F.3d 150, 156–57 (4th Cir.2010) ("[T]he principle of constitutional avoidance ... requires the federal courts to strive to avoid rendering constitutional rulings unless absolutely necessary."); *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (internal quotation marks and citation omitted)).

In addition, I cannot join Part III of the majority opinion, which, in my view, amounts to an advisory opinion on the issues of "whether the facility component of the services performed by the physicians pursuant to the contracts ... constituted a 'referral' within the meaning of the Stark Law and Stark Regulations," as well as "whether ... the contracts implicate the 'volume or value' standard under the Stark Law." *Ante* at 406; *see United States v. Blair,* 661 F.3d 755, 773 (4th Cir.2011) ("[R]endering advisory opinions on cases not before us is not the office of this court.").

Under the district court's order for a new trial on the entire Government's False Claims Act (FCA) claim against Defendant and the majority's holding here, no legal issues remain for us to resolve prior to further proceedings. We have fully disposed of the matters before this Court, and the conclusions set forth in Part III are thus unnecessary either to the disposition or to the retrial of this case. Accordingly, there is no need to delve into these questions now and potentially usurp the ***411** proper role and province of the jury and district court.

To be sure, the three cases cited in the majority opinion for the proposition that an appellate court may properly "address other issues raised on appeal that are likely to recur," *ante* at 405–06, are distinguishable in two critical ways from the

situation presented here: (1) each identified and rectified actual, specific errors of law committed by the district court or lower authority; and (2) each involved bench trials, not juries. *See Levy v. Lexington Cnty., S.C.*, 589 F.3d 708, 716 (4th Cir.2009); *Elm Grove Coal Co. v. Dir. O.W.C.P.*, 480 F.3d 278, 299 n. 20 (4th Cir.2007); *Gordon v. Schweiker*, 725 F.2d 231, 236 (4th Cir.1994).

By contrast, here, Part III does not identify any specific errors committed by the district court during the first trial; instead, it decides issues before they have been squarely presented to this Court, particularly given that the analysis takes place in the context of what the majority has recognized as a "legal nullity." Not only does the majority fail to point to any actual error in the analysis of the original trial judge in this case (who is now deceased), but we also have no indication that the new trial judge requires this Court's cold record guidance on these issues. *Cf. Levy*, 589 F.3d at 716 (finding that trial judge had applied the wrong analysis and, since the matter was remanded to that same judge for retrial, determining that the issues were likely to recur); *Elm Grove*, 480 F.3d at 299 (finding that two Administrative Law Judges ("ALJs") and the Benefits Review Board ("BRB") had made or upheld an erroneous discovery ruling and, since the relevant decision was vacated and the matter was remanded to the BRB and ALJs for proceedings to begin anew, determining that the same discovery issue was likely to arise again on remand); *Gordon*, 725 F.2d at 236–37 (remanding for reconsideration by the Secretary of Health and Human Services, not retrial in the district court, because the Secretary's arguments on appeal gave this Court a basis to believe that the issues would likely recur upon the Secretary's reconsideration).

Moreover, the majority opinion's own analysis strongly suggests that the issue of whether referrals took place is actually a mixed question of law and fact, which is properly left to the province of the jury. Further, the conclusion that "compensation based on the volume or value of anticipated referrals implicates the volume or value standard," *ante* at 409–10, does not provide additional guidance to the district court on remand. Rather, it interprets the relevant statute and regulations in a vacuum, without the defining parameters of an actual case or controversy—the hallmarks of an advisory opinion.

The majority opinion asserts that Part III "is not advisory in nature" because the issues decided are " 'based on a concrete set of facts in the context of a live controversy between the parties.' " *Ante* at 406 n. 19 (quoting *Rux v. Republic of Sudan*, 461 F.3d 461, 476 (4th Cir.2006) (internal quotation marks and citation omitted)). Of course, such a statement is generally true of all of the issues in any case before an appellate court—yet prudence and judicial restraint require that we address *only* those questions necessary to the disposition of an appeal, lest we overstep our role. *See Rux*, 461 F.3d at 476 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961), to support the proposition that an opinion is advisory if it passes "judgment upon issues" not "necessary for decision"). Here, Part III of the majority opinion purports to resolve issues not yet passed upon by a jury or a ***412** trial judge and thus not yet focused for this Court's consideration. [3]

Because I would vacate the district court's judgment against Defendant based on the "legal nullity" identified by the majority, rather than on Seventh Amendment grounds, and I see no need to pass upon legal issues no longer before this Court as a result of that same legal nullity, I respectfully concur in the result only.

All Citations

675 F.3d 394, Med & Med GD (CCH) P 304,000

Footnotes

1 There is some dispute, discussed below, over whether the claims for payment under mistake of fact and unjust enrichment were legal or equitable in nature. For the reasons we set forth below, we deem the government's claims equitable.

2 The United States claimed that Tuomey falsely certified compliance with the Stark Law in connection with claims submitted to the Medicare program, which is actionable under the FCA. *See United States ex rel. Kosenske v. Carlisle HMA, Inc.*, 554 F.3d 88, 94 (3d Cir.2009).

3 The agencies charged with promulgating regulations pursuant to the Stark Law have published three sets of regulations relevant to this appeal: the Phase I rules, 66 Fed.Reg. 856 (2001); the Phase II rules, 69 Fed.Reg. 16,054 (2004); and the Phase III rules, 72 Fed.Reg. 51,012 (2007). Each phase of rulemaking was also accompanied by extensive official agency commentary. *See* 66 Fed.Reg. at 856–952 (2001) (Phase I); 69 Fed.Reg. at 16054–126 (2004) (Phase II); 72 Fed.Reg. at 51012–79 (2007) (Phase III).

4 The prohibition applies to eleven "designated health care services," including inpatient and outpatient hospital services. 42 U.S.C. § 1395nn(h)(6).

5 The Medicare and Medicaid programs were enacted to pay for the costs of certain healthcare services. The United States Department of Health and Human Services ("HHS") is responsible for the administration and supervision of those programs. The Centers for Medicaid and Medicare Services ("CMS") (previously known as the Health Care Financing Administration ("HCFA")) is an agency of HHS and is directly responsible for the administration of the Medicare program. Under the Medicare program, CMS makes payments retrospectively (after the services are furnished) to healthcare entities, such as hospitals, for inpatient and outpatient services.

6 Such an arrangement further requires an "unbroken chain" between the referring physician and the entity furnishing the services, and the entity must have knowledge or act in reckless disregard of the fact that the physician receives compensation that varies with or takes into account the volume or value of referrals. 42 C.F.R. § 411.354(c)(2). Neither of those elements is contested by the parties on appeal.

7 The Stark Regulations define "fair market value" as:

> [T]he value in arm's-length transactions, consistent with the general market value. "General market value" means the price that an asset would bring as the result of bona fide bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, *or the compensation that would be included in a service agreement as the result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party,* on the date of acquisition of the asset or at the time of the service agreement. Usually, the fair market price is ... the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement, ... [and] *has not been determined in any manner that takes into account the volume or value of anticipated or actual referrals.*

42 C.F.R. § 411.351 (emphasis added).

8 A "commercially reasonable" arrangement is one that "would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician ... of similar scope and specialty, even if there were no potential [service] referrals" pursuant to the arrangement. 69 Fed.Reg. at 16,093.

9 For clarity, we will refer to it as the "facility component."

10 The number and value of such claims is in dispute.

11 31 U.S.C. § 3730(b)(2) provides that the government may elect to intervene and proceed with a § 3730(b) action.

12 All references to the government's complaint are to the Second Amended Complaint of the United States, filed on November 12, 2008.

13 The Second Amended Complaint contained six counts. As we understand it, Counts II (Use of False Statements) and III (False Record to Avoid an Obligation to Refund), which both alleged FCA violations, were subsequently dismissed. Count VI, which alleged an equitable claim of disgorgement, constructive trust, and accounting, does not appear to have been dismissed, but it is not before us on appeal.

14 The judgment form provided a menu of options. One option stated: "This action was tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict by answering special interrogatories." J.A. 139. A second option stated: "This action was tried by the Honorable _____ presiding, without a jury presiding, and the above decision was reached." *Id.* A third option stated: "This action was decided by the Honorable." As noted above, the clerk of the district court selected the first of these options. *Id.*

15 Even though, at trial, the government treated Counts IV and V as equitable claims, it argues on appeal that they are legal in nature because they solely seek money damages. For purposes of our analysis, we assume that the government's claims of unjust enrichment and payment by mistake are equitable in nature, despite its seeking money damages. *See United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330 n. 15 (4th Cir.1989) (noting that remedy of restitution in claims for unjust enrichment and payment under mistake of fact is equitable in nature); *see also Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1424 (4th Cir.1991) ("[A] money damages award may be a form of equitable relief if it is restitutionary"). Notably, were we to entertain the government's argument that those claims are legal in nature, that would not change our conclusion that Tuomey's Seventh Amendment right to jury trial was violated. If those claims were legal in nature, Tuomey was entitled to a jury trial on them, which it did not receive.

16 Tuomey makes several additional arguments: that the judgment against it is improper because the Stark Law does not apply to the contracts; that because the FCA provides an adequate legal remedy for any harm suffered by the government as a result of a Stark Law violation, the government should have been precluded from seeking the relief it obtained on the equitable claims; and that the district court erred in awarding monetary relief because the government failed to prove, as it was required to do, the number of referrals and the amounts of any improper payments made to Tuomey. Because

we hold that the district court erred in relying upon the jury's interrogatory answer regarding the Stark Law and vacate the district court's judgment on that basis, we need not, and do not, address most of Tuomey's other arguments on appeal. Because Tuomey's contention that the contracts do not come within the purview of the Stark Law is an issue that is likely to arise on remand, however, we address some of Tuomey's arguments in that regard in Part III below. We emphasize that, except as set forth below in Part III, the violation of Tuomey's Seventh Amendment right forms the sole basis for our decision.

17 We note that *Beacon Theatres* left open the possibility that the right to a jury trial of legal issues could be lost through prior determination of equitable claims "under the most imperative circumstances which ... we cannot now anticipate." 359 U.S. at 510–11, 79 S.Ct. 948. There is no suggestion that such circumstances are present here.

18 *See, e.g.*, 66 C.J.S. New Trial § 331 (2011) ("Where a motion for new trial has been sustained, the issues stand as though they had never been tried. The cause is to be tried de novo. The whole case, including the issues of fact at the former trial, is open for hearing and determination.") (footnotes omitted).

19 Contrary to our colleague's description of this part of our opinion, it is not advisory in nature. "We would issue an advisory opinion were we to pass 'judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.' " *Rux v. Republic of Sudan*, 461 F.3d 461, 476 (4th Cir.2006) (quoting *United States v. Fruehauf*, 365 U.S. 146, 157, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961)). No such danger exists here. We have decided the pure questions of law "based on a concrete set of facts in the context of a live controversy between the parties." *Id.*

20 At least one district court has relied upon this commentary to reject an argument that a physician did not violate the Stark Law because his treatment of his own patients at a hospital was not an unlawful referral under the law. *See United States v. Campbell*, No. 08–1951, 2011 WL 43013, at *7 (D.N.J. Jan. 4, 2011).

21 Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we "are instructed to defer to the reasonable interpretations of expert agencies charged by Congress to fill any gap left, implicitly or explicitly, in the statutes they administer." *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 504 (4th Cir.2011) (quotation marks omitted). "Under the first step of *Chevron*, a reviewing court is to 'employ [ ] traditional tools of statutory construction' to determine whether Congress addressed 'the precise question at issue.' " *Id.* (quoting *Chevron*, 467 at 842, 843 n. 9, 104 S.Ct. 2778). "If, however, the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (citations and quotation marks omitted). At this second step of the *Chevron* inquiry, we defer "to the agency's interpretation so long as the construction is a reasonable policy choice for the agency to make. We afford controlling weight to an agency's reasonable interpretation even where we would have, if writing on a clean slate, adopted a different interpretation." *Id.* at 506 (citations and quotation marks omitted). As already noted, the Stark Law does not specifically address the issue of whether a facility component constitutes a referral. As such, Congress has not directly spoken to the precise question at issue. Under the second step of the *Chevron* inquiry, we note that neither party has challenged the reasonableness of the agency's interpretation, and we find that it is eminently reasonable. It bears note that we extend such deference to the agency's interpretation of its formal regulations because the agency possesses special expertise in interpreting the Stark Law, the interpretation emerged out of notice-and-comment rulemaking, and involved a statute of sufficient complexity that it was fair to assume that Congress understood that the agency would be required to engage in policy making when it administered the statute. *See Barnhart v. Walton*, 535 U.S. 212, 221–22, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

22 Although Tuomey has not expressly disputed this factual assertion before us, we proceed on the assumption that whether the physicians' compensation under the contracts took into account the volume or value of anticipated referrals is an open question of fact. As we discuss below, it is a question for the jury to resolve on remand.

23 Because neither the statute nor the regulations speak to the precise issue of whether anticipated referrals constitute a proper basis for finding that a physician's compensation takes into account the volume or value of referrals, we defer to the agency's interpretation, provided that it is reasonable. *See ante* at 406 n. 20.

24 At least one district court has relied upon the same sources to "conclude that 'anticipated referrals' are a proper consideration under the Stark Act." *U.S. ex rel. Singh v. Bradford Reg'l Med. Ctr.*, 752 F.Supp.2d 602, 622 (W.D.Pa.2010).

25 Tuomey argues, based upon a district court decision, that the subjective intent of the parties should not determine whether the volume or value standard is implicated. *United States ex rel. Villafane v. Solinger*, 543 F.Supp.2d 678, 693 (W.D.Ky.2008) ("Where no violation appears on the face of the arrangement, either in the form of above-fair market value compensation or of a provision allowing for increases or decreases in payment based on the number of referrals made,

the text and history of the Stark Law's desire to create a 'bright-line' rule would seem to argue against establishing a violation on the basis of intent alone."). We agree with the *Villafane* court that intent alone does not create a violation. However, that does not aid Tuomey if the jury determines that the contracts took into account the volume or value of anticipated referrals.

26 For clarification, we emphasize that our holding in Part III is limited to the issues we specifically address. On remand, a jury must determine, in light of our holding, whether the aggregate compensation received by the physicians under the contracts varied with, or took into account, the volume or value of the facility component referrals. If it so finds, a jury must further determine whether the aggregate compensation received by the physicians is nevertheless lawful under 42 C.F.R. § 411.357(p).

1 Citations to the joint appendix are abbreviated as "J.A."

2 I note, too, that I wholeheartedly agree with the majority that the district court's error here was not harmless, not least because, in addition to the significant disputed factual issues identified by the majority, the verdict sheet also provided no detail about the number or nature of the alleged violation(s). Despite the lack of any indication that the jury found each and every referral in question to be a violation of the Stark Law, the district court nevertheless awarded repayment for all services performed under the contracts at issue. Without more particularized findings by the jury concerning the specific violations, the district court's estimation of damages cannot be described as "harmless."

3 I believe the majority's own direction that the lower court "put to [the] *jury* [the question of] whether the contracts, *on their face,* took into account the value or volume of anticipated referrals," *ante* at 409 (emphases added), perfectly illustrates this point. The meaning of "the contracts, on their face" is most assuredly a question of law appropriately resolved by a court, not a question of fact to be submitted to a jury. *See, e.g., Frahm v. United States,* 492 F.3d 258, 262 (4th Cir.2007) ("The interpretation of a contract is a question of law[.]"); *Burgin v. OPM,* 120 F.3d 494, 497–98 (4th Cir.1997) ("[T]he essential question is one of the interpretation of the contract's language, a question of law clearly within the competence of courts."); *Scarborough v. Ridgeway,* 726 F.2d 132, 135 (4th Cir.1984) (same).

The undesirable and unintended consequences on the judicial process of such erroneous appellate mandates—which in this case will undoubtedly have a significant impact on the organization of the proceedings on remand—are, of course, exactly what the rules against advisory opinions seek to avoid.

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THE STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Win Myat,
Plaintiff

vs.

Tuomey Regional Medical Center,
Defendants

Motions Hearing
2012-GS-43-02030

August 24, 2015
Sumter, S.C.

Before the Honorable R. Ferrell Cothran, Judge.

Mr. William R. Padget,
Attorney for Plaintiff

Mr. David Holler,
Attorney for Defendants

Margaret T. Sullivan,
Court Reporter

THE COURT: Mr. Holler.

MR. HOLLER: Judge, we have filed a motion to amend, including an affidavit setting forth the facts at some length. And we spoke Friday when this arose, or at least came to my attention by telephone. But I'll run through it fairly quickly. We're moving to amend the answer filed on behalf of the defendant to include the charitable immunity statute as a cap on damages of recovery.

Judge, as it set forth in the affidavit that's also been filed, when I filed the answer, I did not put that defense in. I was aware at the time it was an affirmative defense. I have no explanation, and take responsibility for having not put that in the answer. Having said that, Sam Phillips was the attorney who initially handled the case. Mr. Phillips and I had a number of conversations early on, if not our initial conversation, where we talked about the cap of $300,000 in damages.

Judge, the case would rest. It was put under a scheduling order and set for a trial date. Mr. Phillips then left that firm. Mr. Padget then took over as Plaintiff's counsel. And at that time, we had already filed a motion for summary judgment.

At Mr. Padget's request we did not -- we removed the summary judgment from the roster, had it continued. It was continued several times. We put the case under a scheduling order. Accommodated Mr. Padget and his client for about 2 years. Of course, part of that was, our two residence judges recused themselves from Tuomey cases. So we had to wait for a judge who did not have a conflict to be scheduled to have a term here. That was you, of course. And you graciously set this as a date certain.

Judge, Rule 15 is the standard for Lee. Since justice should be literally or amendment should be freely allowed as long as no party is prejudiced. Judge, throughout the course of this litigation, it has been an operating understanding that the charitable immunity the cap had been placed. We mediated the case in February. The cap was discussed extensively with Richard Hinson, our mediator. And the opening demand was a cap limit of $300,000. The plaintiff's initial not covered in the affidavit, Judge, of course, and I would create a reference to the affidavit that I filed on his behalf, was the initial discovery responses from the plaintiff was that they were going to use Dr. Oliver

Wood an economist from USC. And they were also going to use a vocational rehabilitation expert.

Dr. Wood has never provided a report. And I'm assuming has never been engaged. And if damages need to be built up beyond the cap, Dr. Woods' services were never be used. Also the occupational rehabilitation specialist. The answers to interrogatories said that a CV would be required. We never received a Curriculum Vitae. We've never received a report. And I would also assume that that expert was not retained because of the understanding the cap was in place.

And, Judge, when we were on phone on Friday, Mr. Padget graciously agreed that he was not aware that it wasn't pled as a defense until some time after our mediation in February of 2015. Our position would be that the has plaintiff suffered no prejudice, that in this case, not allowing the amendment will just simply create an artificial exemption that was not intended by the statute. Judge, I would also say that I think one of the arguments that we hear is that the loss of consortium claim would have been brought if the cap had not been, or if the cap was known about.

Again, I go back to I believe everything

before the court is that the cap is understood by all parties and all attorneys. And a loss of consortium claim is a completely separate and independent claim. It would have nothing to do with this claim, that his wife has a separate statutory claim. Has been statutory since 1969. And that that would play no role whatsoever in any sort of evaluation of liability and damages under the terms of the cap.

I would also point out and we filed in the court, that when we answered discovery responses, as you requested, we sent to you and filed them today, we identified our policy numbers and insurance. And indicated that the damages were limited by the charitable immunities act. So for that reason we would move to amend the answer. And I have also filed a proposed answer, which I can hand up to you as well, Judge.

THE COURT: Mr. Padget.

MR. PADGET: May it please the court. Your Honor, it's been a number of years since this case was brought. It was brought in July of 2012. The incident that gave rise to the suit occurred in July of 2011. So now we are greater than four years out of the date of when this incident occurred. And

that timing of things is we would argue creates a substantial legal prejudice, legal prejudice to our client under Rule 15, that would prohibit an amendment. There's a number of reasons.

Your Honor, if I may approach.

THE COURT: Yes, sir.

MR. PADGET: I have already given Mr. Holler a copy of our memorandum in opposition. There is no statute of limitations to assert the defenses, somewhat ironically. But I believe the concepts of the statute of limitations as it relates to certain plaintiff's claims certainly bears a great deal of mention when evaluating the legal prejudice suffered by Dr. Win Myat in this case. The allegation is Dr. Myat slipped and fell and was seriously injured at the hospital in July of 2011. And all along throughout this case is, there hasn't been any major dispute that he earned a lot of money at that time. And that in a single year and the calendar year beforehand, he earned in excess of $600,000.

And after this beginning of May of 2012, he hasn't been able to participate. He can barely walk any great distance. And according to him, and according to his treating physician Dr. Persia who

used to work for Tuomey, he cannot perform the duties of an infectious disease physician. So our position is he has a multimillion damages claim. So I throw that out to the court for a consideration of the legal prejudice.

As far as prejudice goes as I mentioned, there's no statute of limitations for defenses. But if you -- if I were to come into court at this point and time and assert a new claim, for example, loss of consortium on behalf of Dr. Myat's wife, nearly 4 years after this has occurred, clearly the statute of limitations would bar that claim. That claim has been lost. That claim has not been filed.

In addition, Dr. Myat, the defense, the original defense as mentioned Mr. Holler mentioned in his affidavit, was that he was a statutory employee. He was never an actual employee of Tuomey. Although he did serve as the head of infectious disease. He was never an actual employee. He was always a 1099 contractor. But Tuomey put up a statutory employee defense. And it was considered about whether or not Dr. Myat could consider bringing a worker's compensation claim, where they may be no cap, which was not pled, but which there may be some limitation of his injuries.

But based upon reliance on the pleadings, Dr. Myat never filed a worker's compensation claim. There's a two year statute on a worker's comp. claim. And that also was lost nearly two years ago.

Also, there is a particular exception to the charitable immunity statute in protections. In that individual employees of charitable entities can be named as the defendants and brought in if gross negligence can be proven, can be alleged to be proven. And in that circumstance, there is no cap upon the damages. At least the position the plaintiff's take in this case, as I understand the defendants take different positions in the case we had previously. But there is no arguably no cap for a charitable employee's liability.

In reliance upon the pleadings that that defense has not been asserted. Dr. Myat never pursued in discovery the individual actions of any employees ever involved in this case, and has lost that potential right also showing legal prejudice.

Lastly, the fourth reason, Your Honor, is that the under the charitable immunity statute in order to qualify as an institution entitled to the protections of the charitable immunity statute, you have to be a 501(c)3 charitable organization. And

there are circumstances under the internal revenue code whereby, those organizations can lose their charitable status based on a number of actions. From my research over the weekend, there were 4 to 5 actions that charitable institutions can lose their immunity.

One of those is by paying key employees or directors too much money. Is one way. And as we all know from Tuomey's recent troubles with the federal government in two verdicts, in two jury verdicts have been upheld against them, the Stark law violations in that case, were indicative that key employees were being paid too much money. And those are all defenses to, or I guess I should say, exceptions to the defense that could have been asserted and ways to get around the charitable funds cap, that have now, Dr. Myat has lost either because the statute of limitations has expired, or those issues weren't framed by the pleadings.

We can -- we do not dispute, Your Honor, that at some point and time during discussions that Mr. Holler may have raised the charitable cap to Mr. Phillips, and that he even raised that to me at some point, in mentioning it to me. But we would claim, that lawyers have a right to rely upon

pleadings, that client's have a right to rely upon the pleadings that have been asserted. And in this case, while it was mentioned of a defense that was not pled, it had not been pled. And on those four ways Dr. Myat has suffered prejudice over the last few years that would result by permitting the amendment in this case now.

The last thing I would mention is if the court were to consider from the mediation, that under the governing mediation rules, that demands amounts, discussions, and everything else are absolutely privileged under the mediation rules are not something proper that the court consider in weighing the legal prejudice of the parties.

Your Honor, in sum, Dr. Myat has a multi-million damages claim, and for years proceeded based upon the reliance upon the pleadings; that there was no charitable cap that had been pled as a defense. The James case which had been cited by Mr. Holler and also by myself. And I have a copy of it if Your Honor needs one. The James case held that this defense is a Rule 8(c) affirmative defense that must be pled. Your Honor, if I may approach.

THE COURT: Yes, sir.

MR. PADGET: Mr. Holler seems to

distinguish the holding in the James case. And that's a case where a similar case, someone injured at the hospital, or at a charitable institution. Went to trial, and the verdict was rendered in excess of the cap. And after the cap, defense counsel to enforce the cap, the $300,000 cap. And the court concluded that we're not going to allow prejudice because now because of that specific exception I've already discussed, that they could have pursued the individual liability of an employee which may have not been caped. But because there was no notice of defense, that was lost.

In this case there four reasons, and four claims we believe we have lost here. And Mr. Holler attempts to distinguish the case by saying that he moved to amend before the trial began, and not after the trial was concluded in that case. But we think if Your Honor reads the case, when focusing on the legal prejudice under Rule 15, it didn't matter whether it was before the trial or after the trial by a few hours or by a few days. But it's the course of discovery throughout the trial, where it had not been pled. That was the legal prejudice that the court concluded they that suffered in that case. And here the prejudice is just the same. We

think lawyers have a right to rely on the pleadings. The client's have a right to rely upon those. And we would ask the court to deny the motion to amend.

THE COURT: Anything else?

MR. HOLLER: Yes, sir. James v. Lister, Judge, I believe stands for the proposition that Rule 15 allows an amendment once trial has started only to conform to the evidence.

In other words, it's no longer leave of the court to amend to the pleadings. It's to conform to the evidence. That's the actual holding of James v. Lister. The cautionary word in there is that yes, the charitable immunity act is an affirmative defense. I would also point out that since that decision, the Supreme Court has taken up the Tort Claims Act in a similar fashion when previously it said it's an affirmative defense it can be waived if not pled. And they changed that and said, no, that's the law of South Carolina, that it is no longer an affirmative defense, it need not by pled. It stands on its own, I can certainly provide that case to you. But the thinking in terms of these limiting statutes for the Supreme Court has changed. They've not readdressed James v. Lister, in their discussion it was an

affirmative defense.

I acknowledge and I have said in my affidavit in here today, it's my understanding is an affirmative defense. It was my intention to plead it, I did not. Finally I would say there has been absolutely no showing of detrimental alliance. There's nothing to indicate that Dr. Myat or his attorneys would have done anything more than they did. They certainly weren't relying. No one brought it to my attention. There was no reason for me to look at the pleading again. Even in a conversation if they had said, or made a demand above the limit, it would have triggered me to realize that it was not pled, or it would have had me examine the answer. None of those things happened.

So we would say there is no detrimental alliance. And Rule 15 says amendment should be allowed freely when justice requires it.

THE COURT: And I am going to read this James case and let you know in a few minutes about my ruling. My understanding and I was looking at the pleadings that in fact in the answer to interrogatories, it seems at least what I have before me is that from the first question was the

limits in price. And in fact he responded that the statutory limits were in place. And so you had notice in the first interrogatory that in fact, they were claiming the statutory.

MR. PADGET: I don't disagree with that, Your Honor. I would just ask the court to take a look at the date of those interrogatories. They were in September of 2014, those responses that we received. So I would point out the statutes of limitation on certain of these other claims had already run by the time we received those responses. So we just ask the court to consider that.

MR. HOLLER: Judge, I can get this information if you want. I answered those interrogatories when they were asked. Mr. Phillips went a very long time without asking. And It wasn't us ignoring the discovery rules.

THE COURT: Thank you. Let me read the James case and I'll let you all know something. Now do you want to -- are there any other motions you want to argue at this point?

MR. HOLLER: Yes, sir, a motion for summary judgment. And, Judge, I have a memorandum in response. It is a lot less to read than it looks like. I have already filed a copy of that.

THE COURT: Okay.

MR. HOLLER: Judge, may I step out for a moment?

THE COURT: Sure. Do you want to respond to his motion, Mr. Padget?

MR. PADGET: I'm sorry, Your Honor.

THE COURT: Summary judgment motion.

MR. PADGET: Yes. I assume Mr. Holler wants to make some argument.

THE COURT: Do you -- I have read the material here.

MR. HOLLER: Judge, I will argue it. I was going to wait until after you ruled on the summary---

THE COURT: Oh---

MR. HOLLER: ---judgment.

THE COURT: ---I wasn't reading the James case. I was reading the other stuff for the summary judgment. You allege the employer you believe was grossly negligent. Is there any evidence at all based on what I've read in the summary judgment issue, the doctor slipped and fell in the hallway. But is there any evidence at all of who put that water in the hall -- if there was water on the floor, when it got there and how long it was there?

MR. PADGET: And I will be happy to comment all those questions, Your Honor. First of all, we don't know with any certainty. And we certainly concede how long the water was there. Whether we can say it say it was an hour or two hours a day, we don't know. But if the question is, is there any way gross negligence could have been proven in the case based upon the evidence that we're relying on, I understand. I'll speak to that.

There is, in the area where the fall occurred, there is a nurse's station. I've got some pictures and stuff to try the case, which we can show all this stuff better. Essentially located in unit 3 South, is a nursing station with a number of desks. Right across from one of those desks is a room with an ice machine in it. And periodically throughout the day, in order to keep the patient's hydrated, unless there was some food restriction, the nurse's and nurse's attached to Tuomey will get ice pitchers and water from that room right across from the nurse's station that has the ice machine in the sink. Fill those pitchers on a cart, and we've got a picture of the carts just like that's typically done on. And move that ice and water throughout the unit to the patients, obviously.

The testimony of Nurse William Whitehouse is; is that, witness of the med. surge floor, so a lot of times they put the patients to bed for the night, and then in the morning, they would run 12 to 12 shifts. In the morning before the shift changes at 7 o'clock, the night shift gets geared up for the shift change, and starts preparing for the day. And in so doing, around 4:30 in the morning and according to Nurse Whitehouse, is the time when they routinely start getting the ice and water on the carts in that exact area were Dr. Myat fell.

Dr. Myat fell from the testimony to be about 5:30 in the morning, within about an hour later. A correctioner's officer who was watching an inmate, who was getting medical care that night, Ms. Kathy Sabb, who was under subpoena, you just signed the note for.

THE COURT: Right.

MR. PADGET: She will testify. She was deposed and said there was 6 to 7 inch puddle of water right there at that location next to the nurse's desk. As far as gross negligence goes, Your Honor, we think under circumstances, there's a reasonable inference that a nurse, or a nurse tech. created that danger by spilling water and ice in

that location that morning. And our position is, if you spill it, and you don't clean it, which their policies and procedures say, it is incumbent upon him to do, if they notice the spoil, that they are incumbent, it's incumbent upon them to wipe up the spill right away. It's not called housekeeping. It's not put up a big yellow sign like where Bi-Lo or anything else, it's to wipe up the spill right away.

And of course the spill remained for some period of time. We don't know what that was. But we weren't -- in looking at the pleadings and framing the issues in the case, when I looked in the pleadings after our mediation and realized that it had not been pled, it was our decision not to start taking depositions of individual people and asking now, three and half years later, where the defense had not been pled to, were you the one preparing the ice and water that morning on the unit. Were you the one doing it. And we decided not to do that, Your Honor.

So I don't know if it rises to the level of gross negligence or not. We think there's a reasonable inference that if a jury could conclude that they spilled the water and ice as part of their

routine that morning and left it there for that hour, all the while nurses and other staff members coming and going right next to that central hub there at that station and permitted it to remain for that hour, whether that rises to gross negligence where it's incumbent upon a certain person, someone to take a duty in following that policy and procedure, we think there is a reasonable inference the jury could conclude that. So we do think there is prejudice there.

THE COURT: Well the problem I see, you were put on notice back in the answers to interrogatories in September of 2014, that they were going to allege the statutory cap of $300,000. And in this case, part of what you need to prove is the fact that it was water or some substance was on the floor, and it had been there for a certain period of time. And that, you know, the defendant knew or should have known it was there, and had a chance to clean it up. So in proving your case, it's the same proof. I mean you either got to prove that Tuomey knew the water was there, and Tuomey didn't clean it up. You know, and that can somehow I guess argue that that's gross negligence and the jury can still find that and maybe get around the cap. But the

standard of proof is the same. You've got to prove both of those. You understand.

MR. PADGET: Yes, Your Honor. I'll comment on what we think the legal standard is. I would point out in the Winterstein v. Food Lion case, I'm happy to give you the cite. To the extent we are talking about the merits, that's 344, S.C. 32, 2001, I apologize. I thought the motion for summary judgment had been withdrawn. I'd didn't know it was still pending, I'd have a brief to hand Your Honor.

THE COURT: I understand.

MR. PADGET: But here's the case. And it says there is two situations. And it's in a four circumstance. So if you can prove one or two, you can prove negligence case.

THE COURT: One has to be who put the water there.

MR. PADGET: One is, who created the dangerous condition.

THE COURT: Right. Or if they didn't create it, they knew -- they had sufficient time to know it was there, and clean it up.

MR. PADGET: That's correct, Your Honor. Precisely. And so our position in this case is; is

that, the reasonable inference is that the nurse's whoever prepared the water that morning, spilled that water in that location where it's done every morning in the exact same place, beside the cart, where Dr. Myat fell, there's a reasonable inference the jury could conclude, that a nurse created the danger, which gets us past part one. That can get us the liability there. And we think with all the other circumstantial evidence, it's the smoking gun when you come around the corner here, Your Honor. We don't have some witness to say, I saw the nurse spill the water, and then not clean it up and leave. But we know what they routinely do. They do it every morning according to their testimony. And then an hour later a doctor feel in that exact location where a puddle of water, 6 to 7 inches in diameter. I think we've got enough to get to the jury on those issues as it relates to negligence, and as it relates to gross negligence.

And I would point out the timing here, Your Honor, because it's critical. This occurred in July of 2011. In September of 2014, we're put on notice of writing of the defense, to add a new, potentially where the way to get around it, is adding a new party. So for example, if it was

Ms. Marilyn Wilson, who is dealing with her father's death this week, if it was her that was involved, we have to amend to add her as a defendant. Now we are adding a new defendant more than 3 years after it occurred. The statute is already barred by the time we knew it. And so we are not in the business of T'ing up cases that are going to be easily thrown out on the statute of limitations. So the prejudice had already occurred by September of 2014, when we got the interrogatory.

THE COURT: Yes, sir.

MR. HOLLER: I can find out when they were asked, Judge. There was no motion to compel. There was no allegation that we laid an answer to interrogatory. Sam Phillips never sent an interrogatory. If they don't ask, we don't typically send them discovery responses if they don't ask us. So the timing is on the plaintiff, not on us.

MR. PADGET? We're not asking for discovery responses, because it wasn't pled.

MR. HOLLER: No, they didn't ask who the witnesses were. They didn't ask anything.

THE COURT: And I understand that. And the difference I have in this case and the James

case is of course, they didn't plead it at all. If they didn't raise it at all, it wasn't in the evidence. It was in interrogatories. So the plaintiff had no notice of it until after the verdict. In your case, you had notice of it ahead of time. And, you know, to get around that you need to prove gross negligence, well the problem is, you could allege gross negligence in whoever put the water there. And if a -- and I assume from reading the little bit that I've read that you are not going have a witness to come in to court and testify they put the water there.

MR. PADGET: That is correct, Your Honor.

THE COURT: So if that was true then you bring that person in as a party and allege gross negligence to get around the statute, but you don't have that in this case, right?

MR. PADGET: We don't, because that discovery wasn't done. And that is the prejudice we would claim is that because the statute was already barred by the time there was any notice in September of 2014, when it came up. We -- if there would have few lack at that point. Let's say September 2014, we say all right, we proved that it was Ms. Wilson that did in fact spill the water. We move to amend

to add a new party, she gets a lawyer and comes in and says, Your Honor, it's been three and a half years since this occurred. It's a futile -- it's a futile amendment. I'm a new party with no notice of this claim. And we're out of court.

THE COURT: I understand. But you, but part of your initial claim was to prove who put it there. Because you're back to the either or. You either prove that the Tuomey employee put it there or, that somebody else put it there, and it had been there a long enough time that Tuomey knew or should have known to clean it up. So it's the same standard of proof. You either got to prove that Ms. Wilson put it there, and then you can sue her. But that's the same standard.

I just don't think based on this case you're prejudice, and I'm going to allow him to amend his answer based on his responses to interrogatories as well as everything else.

MR. PADGET: Your Honor, I understand. And Your Honor's rule, I don't want to continue to argue certainly by any means. I would just point out to the court that that is but one of the four categories of prejudice that we have claimed, as it relates to the gross negligence issue. There's

three others that we think also are incurable at this point that are set forth in our memo.

THE COURT: And I can go back and deal with them individually if you want to.

MR. PADGET: Your Honor, just because I received this potentially as a major appellate issue where I need to make a clear record for my client, let's say we got a verdict and we do get a big verdict, I can certainly see us taking this amendment up. So as to the other three, the first was, the loss of consortium claim under the right. That's what we often use as a technique in order to get two layers of the cap in an injury case, where you know and it's pled that you're dealing with a charitable defendant, and you often amend and add, get the wife signed up as a client. And then add her claim. Because we could go to trial and get a 2 million dollar verdict for Dr. Myat, and a $500,000 verdict for her in a consortium claim, and then we argue there's independently two layers of the cap.

And so that prejudices of course, Dr. Myat, in trying to get around the cap that way for that claim for his family.

THE COURT: Why would she -- she could

have still made that claim once she was put on notice they were putting a cap in place, weren't you?

MR. PADGET: If that was September of 2014, again, we're talking greater than 3 years after the incident. Your Honor, I would submit we would be facing the motion to dismiss a case barred by the statute of limitations by bringing a new claim after the time period. Much like we would move to amend right now, to add her claim. I strongly suspect the hospital would say all is well after 4 years, even though you didn't plead it, I strongly suspect they would say that it's been more than 3 years and your claim is time barred, Ms. Myat.

The second issue we've got is the worker's comp. claim which the statute is two years. And again, the hospital pled as a defense statutory employee. Even though he wasn't an actual employee if the worker's comp. code defines them as an employee, then we're required to give him comp. coverage. His agreement says, there was a comp. coverage between them. When they put up that defense, and at the time they didn't put up a cap defense. So when you're looking at, shall we pursue

comp. or shall pursue a tort claim, you look at comp. and you know that it's limited by statute, it's the benefit that you can potentially get. And then you look at the pleadings in the tort case, and there is no limitations at that point and time. And there were no limitations during the two years that claim could have filed. That didn't come about until September of 2014. So he's lost a comp. claim that he potentially could have asserted, because they didn't assert this defense until last week.

Then the third issue is, and this is another big one, Your Honor, is whether or not Tuomey actually qualifies. You can register as 501 (c) 3 charitable organization with the IRS, but you can also lose that status by certain acts.

THE COURT: Yeah, but wouldn't that be a determination of the court after the verdict. I mean, you get a 2 and half million dollar verdict and then assert that they don't get the cap, because they've lost it. And now the judicial decision after the verdict.

MR. PADGET: It would be based on discovery that would have occurred over the last four years in working up whether or not they were entitled to assert that defense. And instead, I'm

here saying, it was a defense, I would have done some discovery on it or I done something else, but I didn't know about it until Friday afternoon.

THE COURT: Yeah, but you were in fact knew about in September of 2014, because that's the first response to interrogatory, and Lee could have explored that.

MR. PADGET: I would say we were put on notice of that September 2014, from the interrogatory response. But again, we just claim we've got a right to rely upon the pleadings. And for whatever reason, we concluded that they didn't -- they decided not to plead it.

THE COURT: Okay.

MR. PADGET: So those are the other basis, Your Honor. Thank you.

THE COURT: Your response in loss of consortium and worker's comp.

MR. HOLLER: I will, Your Honor. First, Dr. Myat's wife is not even listed as a fact witness in this case. So if she has an independent claim for loss of consortium, she's got to decide whether she wants to pursue that. I don't know how the pleading in this case would have anything to do with that whatsoever. She either asserts her claim or

she doesn't.

THE COURT: I mean you've got a point there. She could assert it whether he got the cap or not.

MR. HOLLER: She could be in a different courtroom.

THE COURT: Right.

MR. HOLLER: She's in a a completely different place. Different facts.

THE COURT: Okay.

Mr. HOLLER: Judge, on the comp. claim issue, the answer did include the statutory defense of no action against your employer. If in fact Mr. Padget or Mr. Phillips before him believed that he had a comp. claim, the very simple way to do that is to timely file a claim, but not request a hearing in the worker's comp. arena.

And that is not uncommon at all, that we may be in here trying to figure out whether someone is acting as a statutory employee in the scope of their employment. Did they deviate from the scope of their employment and become a third party. Those are common questions. And there's nothing that Tuomey or Tuomey's counsel did that prohibited Mr. Phillips or Mr. Padget from protecting his

client's rights in terms of preserving a worker's compensation claim. In fact, you could make the argument, we put him on notice, that he should have filed a comp. claim if in fact he believed the facts supported a worker's compensation claim. It's not what the pleadings say, it's what the facts show.

And finally, the federal government determines who is a charitable organization. Under 50(c) -- it may not be 3 in this case for the hospital, but I think it might be 50(c)3. And, Judge, there has been no discovery in this case as to Tuomey's status with the IRS. This is an issue that literally came up this morning. So it's certainly not something that Dr. Myat through counsel has pursued to show that there would be some exception to the 50(c)3 status that they enjoy right now.

THE COURT: You know, what would have prevented him from filing the worker's comp. along with just simply putting him on notice that you are pursuing the civil as well?

MR. PADGET: Your Honor, I am not a comp. lawyer, so let me make that clear. I try to stay away from the comp. commission if at all possible. I've got some friends who do that work. But and

again, I wasn't involved in the case at that time. But I think key in here, they put up at the time if you look at Mr. Holler's affidavit he filed in support, the one defense, the one other than the usual denials that he did include in his answer was a statutory employee defense. And that kicks you out of circuit court. It's a 12(b) motion. And it's a jurisdictional motion according to the case law.

If it's a comp. claim, you have no jurisdictional right to be in this court. And there are cases that say that. And I've dealt with that issue a couple of times where defendants have put up statutory employee defenses and said, well your sole right to relief are solely under the code. And if that were true for Dr. Myat, at that point and time, then we're out of court here. I'm not aware of this dual track procedure.

If I put up -- if we go in there and file a comp. claim, I am quite certain I would face a motion, a 12(b) 6 motion to dismiss. Where it says the code says you're exclusive rights are in comp. They have filed a comp. claim, you're out of court and it's jurisdictional. And that is, we're now put in a position as lawyers where we cannot protect our

client's rights. And I would point out to the court too, that at no point and time that I'm aware of during that two years, where they -- were we on notice, we're talking about within one year after the filing of the case, two years after the injury, was anybody in my firm on notice of the cap defense.

In our early days of discussions if at all, Mr. Phillips incurred, I know in writing I saw it in September of 2014, of the interrogatory response. And at no time during that time period was there -- right now we had a tort claim where they hadn't pled a Rule 8(c) affirmative defense according to the court of appeals, that allows you to go in to court and get an unlimited verdict versus a comp. claim where the facts potentially are bad for you. And you're out of court on your tort case.

I just don't think there was a meaningful choice for a plaintiff, and particularly in light of, without the benefit of knowing what the hospital was going to do two and a half years later asserting the charitable statutory defense. I don't think we had a meaningful choice then, and I think because of that, there's real prejudice for the inability or in the loss of the opportunity to

pursue the comp. claim if the hospital was claiming the charitable defense.

THE COURT: But just the fact that the hospital in their answer claimed the comp. claim, it's fact driven, isn't it? I mean, its's a situation if you take the position that your client was not an employee, you know, that's something that you all, it was not an employee. And you have to make that evaluation when the client walks in the door. What kind of claim the client has. Whether the client has a comp. claim or a tort claim. And which avenue you think is the best to pursue that in.

And at the time you brought the suit, at least you were aware that there was a potential cap. I mean, that's the law. Whether they pled it or not, and they normally do plead that cap, and the $300,000 was there. And you made a decision that it was tort claim and not a comp. claim, because he wasn't an employee.

Now I guess if the facts come out, I assume at this point you're not claiming he was an employee.

MR. PADGET: No, of course not, Your Honor.

THE COURT: So you would have a comp. claim at the get go. And they just, the fact that he just pled that in his responsive pleadings, but the facts don't support that. I don't see how you're prejudice on the workman's comp. claim. And the loss of consortium claim and that's his wife's claim. And what would prevented her from making that. Just the make that he may, you know, not have a cap, that doesn't prevent her from filing suit, does it?

MR. PADGET: No, Your Honor, it doesn't prevent her from filing suit. We're just saying it's a strategy that the plaintiff and plaintiff's counsel and plaintiff's family lost that is regularly employed where the charitable cap is in fact pled.

THE COURT: And I understand that. And I just think that she could have brought that in fact. You know there may be strategy that I don't think you're prejudiced simply because you had notice back in September that this cap was in place. And we haven't, you know, it's far different than having drawn a jury and tried the case, and then come up of after and claim the cap was in place. It's the James case. So I respectfully deny your motion on

all four.

MR. PADGET: You're granting the motion to amend, Your Honor? Their motion to amend?

THE COURT: I am.

MR. PADGET: Very well.

THE COURT: Now are you all going to argue the summary judgment?

MR. HOLLER: Judge, I will do. It's been brief, and of course you have a copy of it. I can so in a fairly quick fashion.

THE COURT: That would be fine. And of course, I assume you, go ahead. I'll be glad to see, since we're not going to try this case since you weren't prepared, do you want to send me a brief later in the week.

MR. PADGET: Judge, I'll be happy to send a brief. But I think---

THE COURT: And you may not need it.

MR. PADGET: I think if we threw it all up there, I strongly believe there's going to be a reasonable inference that it's going to get to this jury. But I'll leave that up today.

MR. HOLLER: Can you show a picture of the nursing station?

MR. PADGET: Sure.

MR. PADGET: Sure.

MR. HOLLER: Judge, Mr. Padget is being kind enough to pull out a picture of the nursing station just so you can have a since of what we're talking about. The facts are very straightforward. The nursing station is exactly what you think it is. It's where a nurse sits and writes out her work, where a doctor comes and also does his work when evaluating a patient and charting the encounter. Dr. Myat slipped. And again, I am just going into the facts in the light most favorable to Dr. Myat; slipped on a puddle of water 6 and a half to 7 inches in size, with a mark through it. It appeared as though it had been Dr. Myat's foot. That was Kathy Sabb, the correctional officer. Her deposition is attached to our memorandum as well.

Dr. Myat initially said he did not fall -- he did not see anything on the floor before or after he fell. Later in his deposition, he would say he felt liquid under his foot. And he would later say he believed, although he didn't see it, that it was water. The reality is, for the purpose of summary judgment, there was water on the floor. Dr. Myat slipped and fell and he fractured his left patella. And he's had a less than optimal outcome. And

that's where we are.

In terms of the liability the Winterstein case in fact the standard. I only cited two cases. I included in the brief though, Judge, about a dozen to 15 trial court orders, and unpublished appellate court orders all within the last 8 to 10 years, where a summary judgment has been granted under very similar circumstances.

Essentially Dr. Myat must prove that Tuomey employees put the water there. Or alternatively that it was there long enough that we knew about it and failed to clean it up, or that we were on constructive notice that it was there.

First, let me start by saying Winterstein and most of the other cases that we talk about, are invitee cases. They're cases where you invite someone into your practice when you're in business, because you make money on them. They're shoppers. They're people who go to the grocery store. Our first position is, Dr. Myat is not an invitee, but he's a licensee. And we have a lower standard of care towards him. The equivalent in a grocery store would be the person who comes in to restock the milk counter. The person who comes in to bring bread. He's a delivery person. He's working. He's there

providing services just as Tuomey is. Tuomey is providing nurse's services at the physician's direction. He does qualify as an invitee. The standard, the duty that we owe to him, is to not necessarily maintain safe hallways, that we owe that duty to invitee's. But rather, we need not -- we cannot take action to harm him. And we also have to let him know of any hidden defects if we know about them. That's the standard for a licensee, which is a lower standard than an invitee.

Under the case law, the most of which in South Carolina and across the country are invitee standards. In this case, it was only speculation and conjecture as to how the water got there, and how long it would be there. And in that case, summary judgment is appropriate. The -- again, I've cited some good, and a lot of cases are cited in these orders. I know they are probative. They are persuasive, but they're not precedent. But I think if Your Honor would look at those cases and see how the reasoning has gone in very similar circumstances, this is clearly a case for summary judgment.

A party cannot create a genuine issue of material fact through mere speculation of the

building of one inference upon another. And that's exactly what Mr. Padget argued to you earlier on the motion to amend. Because there's an ice station somewhere near in the vicinity, it must have been ice that fell and melted. There's no evidence of that. That's pure speculation. And Tuomey employees walk through this area all the time; and therefore, they should have discovered it. That's a mere speculation. And summary judgment is granted in those cases. There was one case where the plaintiff argued that there was a video camera looking in the area where the spill was; therefore, the employer, the business owner, was on constructive notice that the spill was there. Summary judgment was granted in that case.

So again, I think if you look at recent cases in South Carolina case by South Carolina judges, there's a clear pattern that in this case, there's no notice that a Tuomey -- there's no evidence that a Tuomey employee created the condition, put the water on the floor. And there's no evidence that it was there for a sufficient period of time to allow a jury to speculate that we should have found it and cleaned it up.

THE COURT: Yes, sir. Mr. Padget.

MR. PADGET: Your Honor, I appreciate leave if need be, to submit a brief on these issues. I hope they're not, but I appreciate that.

MR. HOLLER: Judge, that's a few photos of the nursing station. Just, I am sure you know exactly what it looks like.

THE COURT: Okay.

MR. PADGET: May it please the court, here first of all, the legal standard. As far as a business invitee, there is two classes of people. There's a typical public invitee, if you invite a member of the public up, and a business visitor. According to the charge book and charges that we were going to seek, and even a business visitor is still an invitee where there's a mutual benefit to the parties.

Clearly Tuomey needs doctors. I think that's pretty obvious. Tuomey needs doctors to care for its patients. Some of those doctors are employees, and some of them are independent contractors like Dr. Myat was. There's a mutual benefit for the doctor to be there. Just like say the coke delivery man at a grocery store who is delivering the coke. He benefits the store owner by delivering the goods, and also benefits himself and

his employer by delivering the goods. There's a mutual benefit, a business owner, a visitor. And the legal standard for that is a defendant owes a business owner, an invitee, a duty of care to discover the risks and take safety precautions to warn up or eliminate foreseeable unreasonable risks. An invitee is entitled to expect that the owner or occupier will take reasonable care to know the actual condition prevailing at the time the invitee is on the premises, and either make those conditions safe, or warn the invitee of dangerous conditions. That's the legal standard as far as the invitee goes.

As the Winterstein case we mentioned, there's two situations where a defendant can be held liable in a premises liability case. One is if you create the danger. There is no requirement that anybody know anything at the defendant if they created the danger. If you create the danger, you could be held legally liable under the Winterstein case.

The second prong is, that it persisted and existed so long, that you knew or should have known about it, your classic constructive notice case. And there are some facts here I think that are key

of course, and cited in Mr. Holler's brief and advocating for his client. But here's what the witnesses are going to say to build this case. Kathy Sabb, she's the correction's officer who observed the fall. She's been deposed. Portions of her deposition I'm sure have been handed up. I'm having to hand up the whole deposition. But here's what she says. She said, I saw Dr. Myat fall from down the corridor. He fell and he fell hard. I came to render aid. I got a nurse to help render aid to Dr. Myat. When I approached, I observed a puddle of water 6 to 7 inches in diameter, right where those nice ladies who are standing in that picture, adjacent to the nurse's desk. Right where they, according to the testimony of Nurse William Whitehouse, an hour beforehand most mornings, prepared ice and water on the cart to distribute to the patients at that same exact location. That's the custom and practice of that unit according to Nurse Whitehouse and the folks at Tuomey.

Ms. Sabb goes on to say, unprovoked in her deposition, that the puddle of water was like a bunch of ice that had melted. That's what she says in her deposition. Nurse Whitehouse also says some interesting things about the custom and practice and

timing of this thing. Not only was it an hour after they usually pull the carts and ice in that exact location at that water, but also that visitor's hours are restricted. And I think this is a key distinction in this case from a lot of those orders that they have handed up.

Admittedly, I haven't been through all of them. But this is a fundamentally kind of situation then say Bi-Lo or Food Lion. Because at Bi-Lo and Food Lion, at 4:30 in the afternoon, there are Food Lion employees around. There's also lots of members of the public. And the public tends to make a mess. It might be them that spilled the water on the floor. It might be them that put the banana peel on the floor. In this case, visitor's hours concluded at 9 p.m. the night before. And according to Nurse William Whitehouse, he has no recollection of any visitor's being there that night.

The likelihood that he agreed upon, his testimony was, in light of that fact that the public is not around at 5:30 in the morning at the hospital on page 27 of his deposition, after we've been through all these facts. I asked him, is it more likely that someone was a staff member working at Tuomey there, or sometime after 9 p.m. the night

before until 5:30 a.m., or is more likely that the visitor was prior to 9 p.m. And in this question I am asking him in the questions, how is it the water got on the floor was it more likely a visitor or a staff member involved in that. And he says, over Mr. Holler's objections, he says, it is more likely that it would have been a staff member.

In this case and that's an inference under the rules of evidence that comes in as long as it's based upon his personal knowledge of the operation of the unit floor, which of course he has. And so here there is evidence that in all likelihood, the jury could conclude based upon the policies, procedures, customs and testimony of the witnesses in this case, that at 4:30 in morning as they do every morning, they fill that cart with ice and water. Some of that ice and water got on the floor, in the 6 to 7 inch puddle in that exact location where Dr. Myat fell. And where one other witness walked up later and who observed it, and said, it was like ice had melted there and created the puddle.

There's an inference there that gets this case to the jury. The fact that it was exclusively controlled by Tuomey employees in that 8 and half

hour period from when the spill occurred and from when visitors have since left the unit according to their own policies, takes all the Bi-Lo, Food Lion, Dollar Tree, all those cases, where's it public and there's water on the floor, and distinguishes those. And because they have exclusive control, their own witnesses agreed that danger, which they also will say too, Your Honor. Mary Yates, the safety officer, and Nurse William Whitehouse both agree, that water on the floor is a dangerous condition. There is no dispute about that.

So if it was created by a Tuomey employee, it was a dangerous condition, and that's a reasonable inference because of the location and timing and exclusivity, it gets to this jury to determine whether or not a Tuomey employee created that spill.

THE COURT: Your response.

MR. HOLLER: Judge, the Winterstein decision specifically looked at the question: Does the owner have a duty to inspect the walkways, to find something if it happens to be there. The Supreme Court specifically rejected that duty. They said no, you only have to act reasonably. That's an extremely important position here. Tuomey doesn't

have to go looking for things that are on their floor. The last argument that we had exclus -- I'm sorry.

THE COURT: Well that's only if somebody ever put it there, right. If Tuomey puts it there, then it wouldn't even get to that question, is that correct?

MR. HOLLER: That's correct. But there's no evidence that Tuomey put it there. We will touch base with that again. The res ipsa loquitur argument that we had exclusive control, there's an exception in South Carolina res ipsa, if you are put under general anesthesia, they open your abdomen. And when you wake up, they take an x-ray and find a sponge in your belly, you don't have to prove somebody left that in your belly or who put it there. That's the only exception for res ipsa in South Carolina.

Tuomey did not have exclusive control of the hallways in the hospital a night. There are correctional officers who are sitting with inmates. There are independent contracting physicians. There are sitters that stay with people in the rooms. There are family members that stay over night. There is a number of people who are in there, and as

in surgical procedure, Tuomey does not have exclusive control in its hallway. They do not insure the fact that no one will fall. That's what the Winterstein case focused on. It is mere speculation and conjecture.

The question more probable than not when it's asked of Mr. Whitehouse, is asking him to speculate, asking him to guess. Neither Mr. Whitehouse could be asked that question in front of a jury, nor could a jury be allowed to speculate as to what might have happened. Be sympathetic to us. These decisions that I've cited, I think I believe are persuasive, because they are just those same situations where someone in summary judgment asked the court to give us a chance, let us put this to the jury, because we can put dots up and the jury can connect them. And those courts across the board have said, no, you cannot. That's -- summary judgment should be granted if you don't have evidence. And mere speculation built upon conjecture, and built upon possibilities is not sufficient. And would be summary judgment.

MR. PADGET: Judge, it's based on circumstantial evidence, which Your Honor I'm sure charges the jury about all the time. It's not

speculation. It's circumstantial. In a criminal trial, did you see him shoot. No, we didn't. Did you see him shoot him. No, we didn't. We were standing there. They had an argument, and there was smoke coming out of the gun after we heard the bang. It's the same thing, Your Honor. It's circumstantial evidence and it's sufficient to go to the jury under the scintilla standard.

THE COURT: Is there any evidence in the lady's report, department of correction, as to regard how long she had been in that hall, and whether she observed anybody coming in. There's no---

MR. PADGET: There's -- she didn't testify about that. And, Your Honor, we will admit other than the fact that at 4:30 in the morning every morning, according to their routine practice, that's when they fill the ice carts, which is an evidence fact that Nurse William Whitehouse will testify to, because I'm assume is going to be here at trial. There's no way to know how long it was there. But again, that's part two. We think part one we can satisfy. Which is that, who else created that water there. Even their own witness agreed that the likelihood, there is nice article by Judge Hill

about lay witnesses giving opinions about likelihood, and how this one fits right exactly in that.

If it's based upon your personal experiences and observations which this is, his experience of the policies, procedures and customs at Tuomey, who likely created that danger of water on the floor. And he says, it was likely a staff member. It's 5:30 in the morning. Nobody else was around. And that's enough to go to a jury under the Winterstein standard. It was likely created by a staff member. That's a preponderance of the evidence. And it gets us past summary judgment.

MR. HOLLER: It's speculation, Judge. You're playing the numbers. That's what you're doing. We know for a fact we have a witness who is a correctional officer. We have a doctor who is under employee. There are plenty of people up there, who aren't. And to say that's a question of fact, is res ipsa loquitur.

THE COURT: Let me read this brief, and read these cases. And if you want to submit me anything else, I'll let you all know.

MR. PADGET: Very well, Your Honor.

THE COURT: Get these photographs.

MR. PADGET: I assume we should be ready for next week.

THE COURT: Yeah.

MR. PADGET: Unless we hear otherwise.

THE COURT: Right.

------End of Requested Transcript of Record------

C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third Judicial Circuit of the State of South Carolina, do hereby Certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in Common Pleas nonjury Court, on August 24, 2015, in Sumter County, Sumter, South Carolina.

I do further certify that I am neither kin, counsel, nor interest to any party hereto.

6-16-16
DATE

Margaret T Sullivan
COURT REPORTER
My Commission expires: 9/7/21

State of South Carolina	)	Court of Common Pleas
	)	Third Judicial Circuit
County of Sumter	)	Case No. 2012-CP-43-02030
	)	
Win Myat,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Transcript of Record
	)	(Volume I - Day 1 of 3)
	)	
Tuomey Healthcare Systems,	)	
	)	
Defendant.	)	
	)	

Aug. 31 - Sept. 2, 2015
Sumter, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Judge; and a jury

A P P E A R A N C E S:

William R. Padget, Esquire
Francis Hinson, Esquire
Attorneys for the Plaintiff

David Cornwell Holler, Esquire
Attorney for the Defendant

Krystal J. Smith
Court Reporter

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AUGUST 31, 2015

(WHEREAS this matter was scheduled for a trial, the plaintiff appeared along with his counsel of record. The defendant appeared through counsel of record. The trial began at 10:39 a.m.)

THE COURT: Now, we're about to begin the trial of Win Wyatt v. Tuomey Hospital. So I need to know if there's any member of the jury panel who is connected by blood or marriage or close personal friends or social relations with the plaintiff in this case, Dr. Wyatt. If so, please stand. He's seated here at this table.

MR. PADGET: Judge, it's Dr. Myat.

THE COURT: I'm sorry. I look like I could pronounce your name right. It's Myat. I'm sorry, Dr. Myat.

Any member of the jury panel connected by blood or marriage, close personal friends or have been treated by him? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel been -- is a patient of his wife, Casey Liang? Is that right? She's a family practice physician here in Sumter. Or his sister-in-law, Dr. Grace Liang, who is a hospitalist in Clarendon County. Anybody connected by blood or marriage, close personal friends or a patient? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel employed by Tuomey? If so, please stand.

JUROR NUMBER 29: I'm retired Tuomey.

THE COURT: Yes, ma'am? Can you tell me your name and number?

JUROR NUMBER 29: I don't know my number, but it's Patricia Dennis.

THE CLERK: It's 29.

THE COURT: Okay. And you're retired? You have -- from Tuomey, ma'am?

JUROR NUMBER 29: Yes, sir.

THE COURT: How long has it been since you've worked there?

JUROR NUMBER 29: About six or seven years.

THE COURT: Okay. And the fact that they're a defendant in this lawsuit and the fact that you worked there -- would that affect your ability to be fair and impartial?

JUROR NUMBER 29: I don't think so.

THE COURT: Okay. Thank you.

THE CLERK: 29 for the bar.

THE COURT: Yes, sir?

JUROR NUMBER 149: I'm not an employee of Tuomey, but I've worked at Tuomey.

THE COURT: Okay. And tell me your name and number?

JUROR NUMBER 149: Tim Wilson, Number 149.

THE COURT: Okay. And, Mr. Wilson, the fact that Tuomey is a defendant in this lawsuit -- would that affect your ability to be fair and impartial?

JUROR NUMBER 149: I'm a physician at Tuomey; so I don't think y'all would be impartial to anyone associated with Tuomey.

THE COURT: Okay. And, of course, you're the only one that can know that and listen to the facts in this case whether you could, you know, give both the plaintiff and the defendant in this case a fair and impartial verdict based on the evidence you hear.

JUROR NUMBER 149: I'd be as honest as I can be.

THE COURT: Okay. Thank you, sir. Anyone else? The -- I'm going to read out a list of potential witnesses in this case and I need to know if you're connected by blood or marriage, close personal friends, social relations with any of these potential witnesses.

Kathy Sapp, who is a correction officer. William Whitehouse is a nurse at Tuomey. Carrie Burgess, a nurse at Tuomey. Marilyn Wilson, a nurse at Tuomey. Mary Yates, Director of Safety at Tuomey. Dr. Frank Cucé. Did I pronounce his name right?

MR. PADGET: Correct.

THE COURT: Okay. Any member of the jury -- or Dr. Tyler Warrick, Philip Lowe, Dr. Paralon Patel, Dr. Wilmont

McCullough, Oliver G. Wood Jr., and Dr. Charles Vanderhoff.

Any member of the jury panel connected by blood or marriage, close personal friends, or been treated by any of those witnesses or physicians? If so, please stand.

JUROR NUMBER 149: The first one, Dr. Frank Cucé, that was my fellow --

THE COURT: And if they were potential witnesses in this case, could you be fair and impartial?

JUROR NUMBER 149: Yes.

THE COURT: Okay. Thank you. Thank you, Dr. Wilson. Yes, sir?

JUROR NUMBER 30: I am a personal friend of Dr. Todd Warrick.

THE COURT: Okay. And what's your name and number?

JUROR NUMBER 30: Thomas English Jr., Number 30.

THE COURT: All right. And, Mr. English, if he was a witness in this case, would that affect your ability to be fair and impartial?

JUROR NUMBER 30: No, sir.

THE COURT: Okay. Thank you. Yes, ma'am?

JUROR NUMBER 29: Patricia Dennis. I'm friends with Mary Yates and Mark McCullough and his wife.

THE COURT: Okay. And if they were potential witnesses in this case, would that affect your ability to be fair and impartial?

JUROR NUMBER 29: No, it wouldn't.

THE COURT: It wouldn't? You could be fair?

JUROR NUMBER 29: I would be fair.

THE COURT: Okay. Thank you, ma'am.

THE CLERK: One more on the right, Judge.

THE COURT: Oh, I'm sorry. Yes, ma'am?

JUROR NUMBER 122: I'm Karen Taylor, Number 122. Dr. Warrick is my husband's physician. He's disabled.

THE COURT: Okay. And if he was -- if the doctor was a potential witness in this case, would that affect your ability to be fair and impartial?

JUROR NUMBER 122: Um --

THE COURT: You know, it's not a right and wrong answer to this. You're the only one that knows that. I'm just trying to find a fair --

JUROR NUMBER 122: Right.

THE COURT: -- impartial --

JUROR NUMBER 122: Yeah.

THE COURT: -- open-minded juror.

JUROR NUMBER 122: He's a good doctor and I like him. So yes, I guess it would.

THE COURT: Okay. Thank you. I'm going to excuse you from this case then.

THE CLERK: Just have a seat.

THE COURT: Anyone else? All right. The attorneys

involved in this case representing the plaintiff is William R. "Bill" Padgett, Frances M. "Brink" Hinson, and David C. Holler, Leola Wilson Holler Smith.

Any member of the jury panel connected by blood or marriage, close personal friends, social relations or been represented by any of these attorneys? If so, please stand.

JUROR NUMBER 137: I was represented by Mr. Holler's firm in a case.

THE COURT: How long -- is it still pending?

JUROR NUMBER 137: No.

THE COURT: Okay. And how long ago was that?

JUROR NUMBER 137: Last year maybe or the year before last.

THE COURT: Okay. Would that affect your ability to be fair --

JUROR NUMBER 137: I know Mr. Holler. Our daughters know each other or used to know each other.

THE COURT: Okay. Would that affect your ability to be fair and impartial?

JUROR NUMBER 137: I don't think so.

THE COURT: Tell me your number again, sir?

JUROR NUMBER 137: I forgot it again.

THE CLERK: 137, Your Honor.

JUROR NUMBER 137: I'm sorry.

THE COURT: That's okay. 137?

JUROR NUMBER 137: 137, I believe.

THE COURT: Okay. All right. Thank you.

JUROR NUMBER 137: I figured I'd let you know.

THE COURT: Thank you. I appreciate that. Anybody else? Any member of the jury panel ever been involved in a lawsuit involving personal injury or death? If that applies to any of you, please stand.

THE CLERK: There's one, Judge.

THE COURT: Yes, ma'am?

JUROR NUMBER 42: Not personally involved, but I work for a law firm and we have done personal injury cases.

THE COURT: Okay. Tell me your number?

JUROR NUMBER 42: My number is 42.

THE COURT: It's 42?

JUROR NUMBER 42: Right.

THE COURT: Okay. In what law firm do you work?

JUROR NUMBER 42: For Paul Haley.

THE COURT: Okay. Of course, would that affect your ability to be fair and impartial in this case?

JUROR NUMBER 42: It would not.

THE COURT: Thank you, ma'am. Yes, sir?

JUROR NUMBER 88: I'm Juror Number 88, Travis Nelson. I had a -- I suffered bodily injuries from a Sumter County deputy.

THE COURT: Okay. Was that -- did you ever file a

lawsuit?

JUROR NUMBER 88: Yes, sir.

THE COURT: Okay. Is that still pending?

JUROR NUMBER 88: No, sir.

THE COURT: Okay. Would that affect your ability to be fair and impartial?

JUROR NUMBER 88: No, sir.

THE COURT: Okay. Thank you, sir.

THE CLERK: There's one on the right.

THE COURT: Yeah. Number 88; right?

THE CLERK: That's correct.

JUROR NUMBER 88: Yes, sir.

THE COURT: Yes, ma'am?

JUROR NUMBER 92: My name is Suzanne Odom. I'm Number 92. I once had an employee file a Workmans Comp claim against my husband's business.

THE COURT: Okay. Thank you, ma'am. Is there any member of the jury panel who has anything in your background, either through experiences or things you've heard or read or seen, that would render you unable to make monetary damages as compensation for injuries in any lawsuit? If that applies to you, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel have any preconceived notions that would affect your ability to render

a verdict in this case? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel, other than those who have stood, ever been employed in a hospital, a physician or a medical facility? If so, please stand.

Yes, sir?

JUROR NUMBER 23: I wasn't really employed by the hospital, but by a private company as a security guard. That was way back when in the early 70s.

THE COURT: In what hospital did you work?

JUROR NUMBER: That was -- at that time it was Gifford Memorial Hospital in North Carolina. That's when I first graduated from school.

THE COURT: Can you tell me your name and number?

JURUR NUMBER: My name is Darrell Cogdill, 23 is my number.

THE COURT: Okay. Thank you, sir. Of course, Ms. Dennis is the same situation. You retired from Toumey. Anything else?

JUROR NUMBER 29: Yes, sir. I was there for 27 years.

THE COURT: Okay. In what capacity?

JUROR NUMBER 29: I worked in the laboratory, office manager.

THE COURT: Okay. Thank you, ma'am. Any member of the jury panel or member of your immediate family ever been

involved in a slip and fall accident which -- which you felt someone else was at fault? If that applies to you, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel ever made a claim for personal injuries or property damages caused by someone else's negligence? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel ever been sued because your negligence allegedly caused someone else's injury or property damage? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel suffer from any chronic leg or knee injuries or conditions that affect your normal day-to-day activity? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any further questions -- well, let me ask you this. Any member of the jury panel know any reason whatsoever they can't give both the plaintiff and this defendant a fair and impartial trial? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel formed or expressed an opinion about any of the issues or matters involved in this case? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any member of the jury panel know anything about this case at all? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Any further questions from the plaintiff?

MR. PADGET: None from the plaintiff, Your Honor.

THE COURT: From the defense?

MR. HOLLER: Judge, can we approach?

THE COURT: Yes, sir.

(WHEREUPON, a bench conference was held in the presence of the jury panel but out of the hearing of the jury panel off the record.)

THE COURT: Ladies and gentlemen, I don't -- I thought I did -- one of the potential witnesses in this case is Marilyn Wilson. Any member of the jury panel connected by blood or marriage or close personal friends or know Ms. Wilson? If so, please stand.

(WHEREUPON, no one stood.)

THE COURT: Okay.

(WHEREUPON, there was a pause in the proceedings.)

THE COURT: All right. Those five who stood up that wanted to be transferred -- can y'all stand up again? I'm trying to -- now the one that was keeping the child --

THE JUROR: Yes, sir.

THE COURT: Is that going to be changed next week or the next week?

THE JUROR: It's for the -- until I find a job, it's for the whole school year. She hadn't found anybody else. I was, like, the last option for her because I was currently unemployed at the time.

THE COURT: I know. And I'm not -- and I can't guarantee you will get a year by on that. She may have to find somebody because that technically -- all right.

And understanding this may relatively be a short week, but I can transfer y'all to, you know, another term. It's going to probably be within the next two months though. You understand? But I seem to have enough to carry over business; so I'll transfer -- have the clerk transfer y'all to another term. Okay. Thank you.

THE JUROR: Thank you, Your Honor.

THE COURT: All right. Anything before we select the jury?

MR. HOLLER: No, sir.

THE COURT: All right. Mr. Clerk, if you will, scramble their names in hyperspace and let the computer spit them out.

Ladies and gentlemen, we're fixing to put all of your names in this computer and rescramble them and assign you a new number and draw a jury. So it'll take us a few minutes to do that. We used to let a blind person do it, but now we've got a blind computer. Some -- sometimes the blind computer doesn't work.

THE CLERK: Did you want to give them a 15-minute break? Because they haven't broken.

THE COURT: Well, I'll give you -- while we're doing this -- because once I get the list, I need to give the attorneys a chance to look at it. So we'll take a 15-minute break and if you -- does that give y'all enough time?

MR. HOLLER: Yes, sir.

THE COURT: If you'll be back in here at quarter after eleven, we'll select a jury. So we'll be at ease until quarter after eleven.

(WHEREUPON, there was a break in the proceedings from 10:56 a.m. until 11:26 a.m.)

THE COURT: Okay. Ready?

MR. HOLLER: Yes, sir.

MR. PADGET: Yes, sir.

THE COURT: All right. Mr. Clerk?

THE CLERK: Thank you, Your Honor. May it please the Court, Your Honor.

THE COURT: Yes, sir.

THE CLERK: Mr. Padget, for the plaintiff, strikes first.

MR. PADGET: The plaintiff strikes Juror Number 4.

THE CLERK: The plaintiff strikes Juror Number 4. Mr. Holler for the defendant?

MR. HOLLER: The defendant strikes Number 13.

THE CLERK: The defendant strikes Juror Number 13.

MR. PADGET: The plaintiff strikes Number 5.

THE CLERK: The plaintiff strikes Juror Number 5.

MR. HOLLER: Number 20.

THE CLERK: The defendant strikes Juror Number 20.

MR. PADGET: The plaintiff strikes Number 9.

THE CLERK: The plaintiff strikes Juror Number 9.

MR. HOLLER: Number 19.

THE CLERK: The defendant strikes Juror Number 19.

MR. PADGET: The plaintiff strikes Number 17.

THE CLERK: The plaintiff strikes Juror Number 17.

MR. HOLLER: Number 10.

THE CLERK: The defendant strikes Juror Number 10.

THE BAILIFF: Order in the court, please.

MR. PADGET: Do alternates now?

THE CLERK: Yes, sir.

MR. PADGET: The plaintiff strikes Number 22.

THE CLERK: The plaintiff strikes Juror Number 22 from the alternate list.

MR. HOLLER: Number 21.

THE CLERK: The defendant strikes Juror Number 21 from the alternate list. Mr. Padget, you have stricken Juror Number 4, Juror Number 5, Juror Number 9, Juror Number 17, and Juror Number 22 from the alternate list.

MR. PADGET: That is correct.

THE CLERK: Mr. Holler, you have stricken Juror Number

13, Juror Number 20, Juror Number 19, Juror Number 10, and Juror Number 21 from the alternate list.

MR. HOLLER: That's correct, Mr. Bradley.

THE COURT: Okay. Are there any matters of law pertaining to selection of the jury on behalf of the plaintiff?

MR. PADGET: None from the plaintiff, Your Honor.

THE COURT: And --

MR. HOLLER: Not from the defendant.

THE COURT: Okay. If you'll give us the jury.

THE CLERK: Ladies and gentlemen, when I call your name, please come forward and have a seat in the jury box and bring with you any personal belongings that you may have.

Juror Number 23, Darrell Cogdell.

(WHEREUPON, a black male came forward.)

THE CLERK: Right over here, sir. Juror Number 14, Ethel Heyward Brand.

(WHEREUPON, a black female came forward.)

THE CLERK: Juror Number 17, Joey Buckner.

(WHEREUPON, a white male came forward.)

JUROR NUMBER 17: I thought that they just said they struck me.

THE COURT: No.

THE BAILIFF: Sir?

JUROR NUMBER 17: Oh, I don't know.

THE CLERK: That's the two different numbers I think he's referring to, Judge.

THE COURT: Okay. You've been assigned different -- everybody has been assigned different numbers.

JUROR NUMBER 17: Oh, different numbers. Okay. Sorry. I didn't mean to interrupt.

THE CLERK: Juror Number 143, Derica Wilson.

(WHEREUPON, a black female came forward.)

THE CLERK: Juror Number 76, Treginald McLeod.

(WHEREUPON, a black male came forward.)

THE CLERK: Juror Number 88, Travis Nelson.

(WHEREUPON, a black male came forward.)

THE CLERK: Juror Number 48, Karen Hudson.

(WHEREUPON, a female of unknown race came forward.)

THE CLERK: Juror Number 67, Fred Marshall.

(WHEREUPON, a white male came forward.)

THE CLERK: Juror Number 96, Jonnie Parks.

(WHEREUPON, a black female came forward.)

THE CLERK: Juror Number 86, Lauren Motes.

(WHEREUPON, a white female came forward.)

THE CLERK: Juror Number 124, Tammy Thompson.

(WHEREUPON, a black female came forward.)

THE CLERK: Juror Number 32, David Fanning.

(WHEREUPON, a white male came forward.)

THE CLERK: Alternate, juror, Juror Number 114, Paul

Shirer.

(WHEREUPON, a white male came forward.)

THE COURT: Okay. Ladies and gentlemen who were not selected to serve on this jury, I'm going to excuse you. You are free to go. If you need a work excuse --

THE CLERK: Go to the clerk's office, Your Honor.

THE COURT: Go to the clerk's office. They will provide you one. You have a nice week. Thank you.

A JUROR: Do we have to call that number?

THE COURT: No. You're free to go.

A JUROR: All right.

THE CLERK: You're excused for the week.

THE COURT: This is the only case we're going to try this week.

(WHEREUPON, the jury panel was excused at 11:33 a.m.)

THE COURT: Are we ready to get started?

MR. PADGET: Judge, we need probably ten minutes to confer about some exhibits and make sure the technology works and we'll be ready to go.

THE COURT: Okay. Are you going to use -- do you need these exhibits in opening statements?

MR. PADGET: No, Your Honor.

THE COURT: I mean can we do opening statements and then break for lunch and then come back and have all that in place this afternoon?

MR. PADGET: Your Honor, that would be fine. That would be fine. I just need to make sure that --

THE COURT: Okay. You may swear the jury.

THE CLERK: Ladies and gentlemen, of the jury, please stand and raise your right hand to be sworn.

(WHEREUPON, the jury complied.)

THE CLERK: For the State of South Carolina, County of Sumter, in the Court of Common Pleas, Docket Number 2012-CP-43-2030, Win Myat v. Tuomey Healthcare, defendant. You shall well and truly try and true deliverance make between the State of South Carolina and the defendant, Tuomey Healthcare, whom you will have -- whom you shall have in charge and a true verdict give according to the evidence, so help you God. Please respond by saying I will.

THE JURY: I will.

THE CLERK: Thank you. You may be seated.

THE COURT: Ladies and gentlemen, we're about to begin the trial of this case and I don't know whether any of you have ever attended a court session and seen a real trial. Most people's experience has been on TV, and on TV it's usually an hour long, it's full of high drama and intense action and riveting circumstances.

While all of that may be true in a real trial, you know, we're not here to entertain you. We're here to seek justice for these parties and sometimes seeking justice is a lot

slower than that. It's deliberate and it's repetitive and so it won't be like you see on TV.

Now, your job in this case is to listen to the evidence that will come before you and determine what the true facts are. So I need you to pay close attention throughout this trial. If you make a mistake, it's very hard to correct your mistake.

My job is to rule upon the admissibility of that evidence. Under our rules, what evidence you should and should not hear, and to charge you on the law that you will apply in this case.

And basically the evidence is going to come before you in three forms. First of all, through sworn testimony. Witnesses are going to come up before you under oath and testify as to -- as to what facts do they know.

And the other way you may receive evidence is through exhibits that are introduced by the attorneys. And the third way is any stipulations made by the attorneys.

That is the evidence that you're going to hear in this case, and your job is to determine what the true facts are in this case and give justice to the plaintiff and the defendant in this case. I want a fair, open-minded jury who is going to listen to the evidence and determine what the true facts are in this case.

Now, I'm going to try to stop testimony about every hour

or hour and a half, and sometimes I try to let a particular witness finish with their testimony, but sometimes we can't because the testimony is too long. And if at any time during this trial you need a break before we stop, I need you to raise your hand because I need all of you to pay attention and, if you're uncomfortable, you're not paying attention. So if you need a break, raise your hand, we'll stop and take a break and come back and continue the testimony.

And I will tell you throughout this trial that you can't talk about this case. You can't talk about it when you go home today or tonight, you know. And if your family is anything like mine, if you sit down at the dinner table and start telling them what you did all day, they're going to have an opinion as to what you ought to do. But they haven't been here and so it's important that you decide this case based on what you hear in this courtroom.

And I'm going to even tell you you can't talk about it when you go to the jury room. And you're going to say, well, you know, why can't we go back on break and we've heard from a witness, we can't talk about what that witness said?

And the reason I don't want you to do that is because if you do that, at the end of the case you're going to want to defend that opinion you had at the beginning of the case to your fellow jurors and I don't want you to start forming opinions about the issues and matters in this case until

you've heard all the evidence and, you know, as well as the law that I'm going to instruct you, and then and only then should you start talking about this case and form an opinion.

You know, our jury system is, of course, by democracy and it works when everybody does what they're supposed to do. It really does.

In a few minutes, the lawyers are going to get up and make an opening statement to you and they're basically going to tell you what this case is about and what they think the evidence is going to show you in this case.

And then we're going to present the evidence. And at the end of the trial, the lawyers are going to get up and argue to you as to what they think the evidence showed in this case.

Their opening statements and their closing arguments is not evidence. The evidence that you're going to see is from the witnesses and the exhibits and the stipulations, and that's what you'll decide this case on.

So I need an open, impartial, fair jury that's going to listen to the evidence and determine what's true in this case. And if you'll do that, it works as it's supposed to.

The lawyers are going to talk to you in a few minutes and then we're probably going to break for lunch simply after they give their opening statements to you, and we'll come back and start the actual testimony in this case. Mr. Padget?

MR. PADGET: Judge, I just need one minute to make sure

the computer is working.

THE COURT: Certainly.

MR. PADGET: And we'll be ready to go.

(WHEREUPON, there was a pause in the proceedings.)

THE COURT: Are you going to -- I've got to approve you up here. Are you ready for me to pull it up?

(WHEREUPON, there was a pause in the proceedings.)

MR. PADGET: Judge, I'm just going to make sure that these are working.

THE COURT: And they should be. I just hit the button so all y'all are activated.

MR. HOLLER: Yes, sir.

THE COURT: Okay.

MR. PADGET: May it please the Court.

THE COURT: Yes, sir.

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

MR. PADGET: Good morning, ladies and gentlemen of the jury. My name is Bill Padget. Along with my colleague Brink Hinson from Columbia, we represent Dr. Win Myat. Dr. Myat is a former physician. He's a doctor who was working at Tuomey Hospital as part of his infectious disease practice. He was an infectious disease doctor treating patients in the hospital, treating patients at the other clinic, and also serving a role at Tuomey Hospital. This is my opportunity to tell you what this case is about.

What this case is about -- it's about a hospital that failed to protect one of its own. It's about a hospital that created a danger that caused Dr. Myat to suffer very serious career-ending injuries on the early morning hours of July the 6th, 2011.

Back on July the 6th, Dr. Myat was at work early, 5:30 in the morning like he always was the testimony will show. He was rounding on his patients who were in the hospital who needed his care. He went to work early. He got there and he was making his rounds on the hospital floor, specifically Unit 3 South.

And 3 South you're going to hear a lot about during this trial and this is a diagram of Unit 3 South. And like many hospital floors, what is centrally located and the unit is basically constructed around a central nursing station where the nurses stay. They have a number of computers, a number of desks, and that's where the doctors and nurses come and go from to monitor their patients.

The floor, as shown in this diagram -- and I apologize for this diagram. There's not much -- it's not particularly descriptive, but generally speaking the nurses station is right in the middle and all around the outside are the hospital rooms where the patients are taken care of.

And adjacent to the nurses station are a couple of other service rooms. There's a small kitchen with an ice machine

and sink that's used. There's break rooms and there's other things, but right there around that central hub are where the nurses come and go, where the doctors come and go, staff comes and goes, and that's where they work from to go out and treat patients on the various floors.

In this particular diagram, right in the middle, it's hard to show. Perhaps these pictures will show it a little better. This is a photograph that you'll see during the course of the trial and this is looking down one of the corridors on Unit 3 South. And we've blurred out the faces of these nice ladies who were working this particular day when this was taken, but just to their left looking to the left you can see there the central -- there's a cart here and behind that cart looking down this hallway is where the nurses station is.

And this is a photograph of the actual nurses station and you see the computers where the nurses work from. This is that central hub of the unit floor where the doctors and nurses come and go to treat the patients.

You'll see there is a sign -- stop, staff only. This is a small kitchen room and it's got an ice machine and it's got a sink, and that's important in this case because what this case is about is Dr. Myat in the early morning hours of June [sic.] the 6th, 2011, was coming back from treating a patient. He had dropped some stuff off at the nurses station, probably

orders that he gave to nurses to fulfill on the patients.

When he went to leave the nurses station, he slipped and he fell and he fell hard. By all accounts, the fall was heard throughout the unit by some of the other nurses and they came to his aid.

And what you'll hear a witness testify, a Kathy Sapp -- she was a corporal who was a corrections officer with the Department of Corrections. There was an inmate on the floor that night receiving treatment and she was there watching the inmate, keeping -- keeping the unit safe from the inmate and the inmate safe on the unit.

And she observed Dr. Myat's fall. She saw him fall and she immediately came to his aid, got nurses to come to his aid, but importantly and critically what she will testify to -- and you'll hear from her here in a little while -- is that there was a six- to seven-inch puddle of water just adjacent to this nurses station right on the floor in an area not far from where you see this nice lady in the white standing and not far from where you see this cart on the floor, if you'll see that.

The testimony will be in this case that -- there will be a lot of important testimony about the practices and procedures and policies on the unit, what's done, what's customarily done, and one of the things you'll hear that is done is that early in the morning about four o'clock in the

morning as the unit starts to wake up for the day -- you've got nurses there all night long, of course. It's a 24-hour unit. But the patients who have been asleep and the nurses and nurse techs begin preparing for the day and the shift change that comes at seven a.m.

And that process starts, according to the testimony you'll hear from some of the nurses, about four o'clock in the morning. And one of the tasks that they do right there at that nurses station is they use a cart like the one you see in this photograph and they go in that room with the "stop, staff only" sign and they prepare pitchers of water for patients. Patients need to stay hydrated unless they've got orders to do otherwise. But patients need water and they need something to drink and they prepare those pitchers with ice and water on those carts that are right there at the nurses station and that process begins about four o'clock in the morning.

Along comes Dr. Myat about 5:30, about an hour or so after this process occurs and slips on a puddle of water six to seven inches in diameter right at that particular location. When he fell, Dr. Myat fell hard and an ER team was called from Tuomey. They came over from the emergency department and they brought a gurney. He was unable to even lift himself up and you'll hear from Nurse William Whitehouse, who is here. He's seated over here.

Nurse Whitehouse is a nurse who worked with Dr. Myat at

Tuomey. He still works at Tuomey. And Nurse Whitehouse came to his aid and he observed or was told by another nurse that there was water on the floor in this particular location. And then he asked Dr. Myat can I help get you up. He had to be lifted off the floor.

And when he did, he'll describe to you Dr. Myat's -- his injury. His left leg was contorted completely out of position. His kneecap had been fractured and rotated out of position. This was a very serious fall. He went to the emergency department and he saw a colleague -- Dr. Myat did, who he had worked with before, Dr. Frank Cucé. Dr. Cucé worked at Tuomey at the time. He's an orthopedic surgeon practicing in the hospital and he was called to see what -- what measure of treatment Dr. Myat would need at that particular moment.

Dr. Cucé recommended immediate surgery, same-day surgery, on his leg to try to repair his injured knee, and he went back for surgery and what we'll learn is that -- this is an anatomy -- a MediVisual is what we call it, but it's just a diagram of the anatomy of the normal healthy knee. And here it shows on the left side where it says anterior superficial view of the left leg, a front view of the leg. You'll see the kneecap, but you'll hear it referred to during the course of this trial as the patella. It's the hard surface there. It's connected to a number of tendons that connect the muscles of the upper

leg to the muscles of the lower leg.

And you will hear and you will see that Dr. Myat suffered a knee injury much like this one on the right, that he suffered a displaced fracture fragment of his patella and that a -- that means a piece of patella was sheared off from the rest of the patella and additionally there were also associated tears of the connective tissue around the patella, as depicted in this MediVisual. Tears of the lateral connective tissues and otherwise.

He went through a surgery, a revision surgery to repair the patella. It was done by Dr. Cucé. Dr. Cucé no longer works at Tuomey. He moved on up to Virginia, but we took his testimony via a video deposition and you will see that video deposition in the coming hours or days where he describes the care and treatment and the surgery he did for Dr. Myat.

But in particular, this depicts the left patella open reduction and internal fixation, which is the surgery that Dr. Myat underwent that same afternoon of his fall, and it shows the sutures that are placed. It shows the drilling that is typically done during this procedure. And then finally how the repair is affected there in figure D where the patella tendon is secured to the remaining patella. Again, that fracture fragment had to be removed from Dr. Myat's knee. The evidence will show that this was a very, very serious knee injury.

After the surgery, Dr. Myat, under the care and guidance of Dr. Cucé, underwent a one-year rehabilitation program and he treated with him for approximately a year. And he went to a number of follow-up visits. At Dr. Cucé's recommendation, Dr. Myat participated in extensive physical therapy with Tuomey Home Therapy Services, and Dr. Myat complied in every way with Dr. Cucé's recommendations for how to get better.

But even though we want to get better, it doesn't always mean we do. And Dr. Myat, the evidence will show, didn't get better in this case. His recovery did not go well. After -- even a year after his surgery and after his best efforts at recovery, Dr. Cucé will testify that Dr. Myat still suffers from a 29 percent permanent impairment rating of his lower extremities, that he walks with a limp, and that he has a limited range of motion. He cannot bend his knee properly. If you cannot properly bend your knee, the evidence will show you can't walk properly. Dr. Myat, you'll see in this case, walks dragging his left leg. He walks with a limp.

He can't bend his knee properly and this caused him a lot of pain. This is not the type of injury that is fixed perfectly with the surgery. It caused him daily pain and continuing pain.

Dr. Myat. Dr. Myat was born in Burma in Southeast Asia. He grew up there to the age of 18 and literally the evidence will show he won a lottery there to get a visa to come to the

United States -- the opportunity to come here and he made the most of that opportunity. He came here at the age of 18 with a sponsor from Burma and he began working, and the evidence will show Dr. Myat is a hard worker. He started working his way up, working at restaurants, cleaning bathrooms, working two or three jobs at a time. He found his way up to New York where he continued to work in multiple jobs until he found an opportunity to go to community college, and he did.

He went to a community college and he graduated. He went on to medical school. He completed medical school. He completed a residency training program in internal medicine in New York and then went on after that. After years and years of schooling, those eight years just to get there, he then went into a fellowship, more advanced medical training in an infectious disease specialty to treat patients with bacterial and viral infections.

An opportunity brought him down to Carolinas Hospital in Florence in 2007. Dr. Myat moved down and began working there. In 2008, he decided he wanted to open his own practice and so he came to Sumter. He came to Tuomey. Tuomey didn't have an infectious disease doctor at the time and he came to Tuomey and he started his own personal practice. He also worked two other positions.

Again, Dr. Myat, the evidence will show, is a hard worker. He had three jobs. He had his own private practice

where he saw patients daily, which is what he was doing when he fell, but he also served and worked at the -- at the Sumter Family Health Center treating patients in the clinic, helping them with the various diseases that they may suffer from. And he also worked as the head of infectious disease at Tuomey, a position whereby he works with other staff members at Tuomey to develop policies and protocols about how to make the hospital safer for patients so they don't get hospital-acquired infections and otherwise.

But Dr. Myat -- after a couple of months off from work in July of 2011, he tried to go back to work in September of 2011 and he did that and he was on a cart and literally had his wife come with him and push him around in a wheelchair for a while in an effort to try to do -- come back and work and get back to work and do what he was doing. It didn't go well either. He struggled getting around.

The evidence will show that an infectious disease doctor treats patients all over the hospital. It's not just in the ER. It's not just in Unit 3 South. It's not just in the obstetrical clinic. It's everywhere. And so as an infectious disease doctor, he's got to hustle across the hospital back and forth treating his patients.

The same thing at the clinic when he's there. He's moving about treating patients, giving them a physical exam, working them over from head to toe. He's got to look at his

patients. He's got to touch his patients when he's doing his job to give them a proper diagnosis to give them proper care.

He struggled getting around and after several months of this in early 2012 he realized that the daily pain that his left leg was causing him not only was a burden that he had to bear, but more than that it presented a danger to the very patients he was trying to help and trying to cure. His pain was distracting and he wasn't able to properly focus to make his judgment calls as an infectious disease physician. He decided he couldn't do this anymore.

You're going to hear testimony in this case from a number of witnesses. You're going to hear from Officer Kathy Sapp, who we talked about earlier, who will talk about her observations of the fall, the condition of the liquid that she observed, the size of the liquid she observed, the location of the liquid she observed right beside that nursing station where nurses and doctors are coming and going and right where, according to their own routines, roughly an hour previously they filled the carts with water and pitchers with water and ice.

You will hear from Mary Yates. She was a Tuomey safety officer, and Ms. Yates conducted an investigation the day following into the circumstances surrounding Dr. Myat's fall, and you'll hear from Ms. Yates. You'll also hear from her in particular, but there are a number of policies and procedures

that the hospital has to keep people safe. Some of those involved having drinks at the workstation. Some of those involved keeping spills cleaned up off the floor.

And also a basic fundamental safety rule that we already know. If you see a spill or if you cause a spill -- ever since a child we're taught if you cause a spill or see a spill, clean it up. Clean it up right then. Clean it up because it not only affects your safety, but the safety of others. You'll hear that from Ms. Yates.

You'll hear from Nurse Whitehouse, who we introduced earlier, a colleague of Dr. Myat's, working together at the hospital. You'll hear from Nurse Whitehouse about his responding to the fall in the early morning hours, but you'll also hear from him about the customs and practices and policies of the hospital, particularly in the preparation of the water and the pitchers of water and using that ice machine and that cart in that exact area in that exact time -- time frame that Dr. Myat fell.

You'll hear from Dr. Myat himself. He's going to tell you about his fall. He's going to tell you about his experiences, his life experiences, how he got to where he is today. You'll hear from him about what he remembers about the fall that day and you'll hear from him about the devastating impact that it's had despite his best efforts to get better.

You'll hear from Dr. Frank Cucé. He's the orthopedic

surgeon and again he'll testify about the surgery that he did, the extent of Dr. Myat's injuries, that he complied in every way with his plan of treatment, and that he's now with that 29 percent impairment rating unable to walk, unable to practice, and unable to do the job of an infectious disease physician. You'll hear that on a video from Dr. Frank Cucé, who at the time of all this where he was involved worked at Tuomey Hospital.

Now, in this case, there'll be some evidence presented. This is the evidence we'd ask you to focus on in evaluating Tuomey's legal responsibility. There's a patch of water six to seven inches in diameter right next to the nurses station. It was in a location where Tuomey employees and staff prepare water and ice to take to patients routinely in the hour before the spill was found by Dr. Myat.

In the early morning hour, again, that's where -- that's where we prepare the water. And importantly too we're going to find that the visitors hours on this floor are restricted. Visitors hours aren't -- they aren't coming and going all day long and the visitors' hours end at nine p.m. the night previously and don't start again until 6 a.m.

So at the time this fall would have occurred, the only people that were frequenting, the evidence will show, this particular unit were employees, maybe another doctor like Dr. Myat. And the Tuomey witnesses in this case will agree that

water on the floor constitutes a dangerous condition. There won't be any dispute about that.

Now, at the end of the case, the judge will charge you about what the law is and the judge will tell you what the law is in a premises liability case, a case like this, but our legal position in this case is really quite simple. If you create a danger or your employees create a danger, you are legally responsible for the injuries that follow.

This has had a devastating impact upon Dr. Myat. Physically, you'll see that his -- his injuries are lifelong. He can no longer walk the way he walked before. That his knee gives him daily pain. He has that 29 percent impairment rating that Dr. Cucé will testify and talk to you about.

It's had a devastating emotional impact on Dr. Myat, as it would upon anyone. He worked really hard to get where he was and all that was lost in a moment due to a patch of water on the floor, and that's had a devastating emotional impact.

And finally, you're going to hear about the devastating financial impact this has had on Dr. Myat. He worked three jobs. He was a physician and he was making -- as we all know, physicians make a good living. Well, a physician working three jobs and working 16 and 18 and 20 hours a day makes a lot of money, and he can't do that anymore and that this fall has had a devastating financial impact on his family.

This case, ladies and gentlemen, is our opportunity, Dr.

Myat's one and only opportunity, to tell you his story and his case and seek justice for what he believes he was wronged that day. Our goal is to present the evidence to you quickly, efficiently, so that you can make a fair and just decision at the close of the evidence.

But we believe in the end of the day the evidence will show -- in this case, the preponderance of the evidence will show that in all likelihood Tuomey Hospital created a danger for one of its own, and we're going to ask you to hold them legally responsible for that. Thank you.

THE COURT: Yes, sir.

MR. HOLLER: May it please the Court.

THE COURT: Yes, sir.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

MR. HOLLER: Good afternoon. My name is David Holler again, and David Durant is a young lawyer in my office. He's fresh out of law school and he clerked for the judge last year and he's just joined our firm last week -- week before last. He'll be watching today, but not participating.

Today it's my privilege to represent the men and women that are employed and are the people of Tuomey -- Tuomey Hospital. The case is a little backwards, but we're all talking about what happened on July the 6th, 2011.

At the end of the case, Judge Cothran will tell you what the law is in South Carolina and Judge Cothran will tell you

that you must accept that law even if you think it's not right. I think you will believe it's right and do believe it's true, but your instructions will be to follow the law.

Here's the law that applies for someone who owns or operates a business or a facility. If you're the owner of the building, if you're the lessor, if you lease the building, you do not guarantee that people will not fall down. You cannot. It can't be done. People fall down. They fall down at home. They fall down in the yard. They fall down on sidewalks. They fall down all the time and sometimes they are hurt very badly and we don't dispute that Dr. Myat hurt his knee and had surgery afterwards. That's not the issue.

What is in dispute is whether the men and women, the very competent people who work for Tuomey, created this danger, and I submit to you at the end of the case you'll see the evidence shows they did not.

The next question would be was it on the -- was the water on the floor long enough where they knew or should have known and had an opportunity to clean it up. Mr. Padget told you that from nine p.m. to six a.m., no one is up there except Tuomey employees and a doctor or two. I submit to you that evidence will show you that for every single patient that's on the floor, they are encouraged to have a family member stay with them as a patient advocate, someone who can help their mother, their brother, their sister, their child. If you had

a sitter before you came in the hospital, you are expected to have your sitter at the hospital.

In this case, Kathy Sapp was a correctional officer. There were two correctional officers who were assigned to watch an inmate who was in for medical care. So there are tons of people -- tons of people who are always moving through the hospital that are not Tuomey's employees.

You will hear that at this nursing station, this is Ground Zero, and Mr. Padgett told you that they wake up at four o'clock. If you've ever been on a hospital floor -- and the evidence will show you that from seven p.m. to seven a.m. is not the lazy shift. No one is sitting around reading a book. Everyone has work to do.

There are four nurses and two nurse techs that work up there full-time. Every time they transfer their attention from one patient to another, they go back to the nursing station. They walk around it. They get supplies. They go to provide services for a patient. They come back. They document the services they provided for the patient. They walk through this exact same area.

The evidence will show you that although Dr. Myat doesn't remember what he was doing before his fall, he most likely walked through this very same area himself to put the charts -- in one end of the nursing station, there are charts for all the patients on the floor. And when a physician pulls a

patient chart, he puts -- if he puts an open order in it, he or she, the physician, puts the chart at the other end of the nursing station right where he fell to alert the nurses there's new orders to be filled.

You will hear that this is Ground Zero. You will hear from the first two Tuomey employees that made it to Dr. Myat after he fell. And I submit to you on the evidence you will find that Tuomey neither created nor had an opportunity to find this water and clean it up, if it was here.

You will also -- Marilyn Wilson is one of the Tuomey employees who has now since retired. You will hear from her. She was one of the first people to arrive to Dr. Myat after he fell. Dr. Myat told her that he slipped in water. She looked down and she will tell you that she saw one to two dime-sized spots of water on the floor. She grabbed a towel and she wiped it up. And she will tell you as someone who trains nurse techs on how to fill water coolers where she saw Dr. Myat and where she saw these drops of water was very far and not likely had anything to do with the ice machine or anything else.

Just like in a home, just like in a grocery store, just like in a -- in a shopping mall, you have to take reasonable steps to keep your floors safe, but you do not guarantee that no one will fall. It can't be done. It just can't be done. People fall down. That's unfortunate.

Let me talk a little bit about the procedures of the -- of the first couple days of the week. Hopefully, we'll try to bring you the evidence as quickly as possible. I would ask on behalf of Tuomey that you -- as Judge Cothran mentioned earlier, keep an open mind. That might sound like a relatively straightforward simple thing to do, but it could be a little bit more challenging than you might think.

Dr. Myat has the burden of proof. He gets to go first. He gets to call witnesses who he wants you to hear from first, but there are other people who will testify.

And I'll give you an example. Years ago my wife convinced me to go on a weekend trip with 35 13-year-olds. If you can ever avoid doing that, I would encourage you to do so. The other parents before -- I guess because of my profession and partly because of my size said you will be the arbiter of any disputes, like Judge Cothran, that would come up between the young men and women.

So sure enough. We got to the first bathroom break and there was a dispute between a young man and a young woman. So I pulled them apart from everybody else and I tried to be like Judge Cothran and I said, okay, ladies first. Young lady, tell me what happened. So she went through her story. I didn't interrupt her. He didn't interrupt her. She told me what happened.

Then the young man started telling me what happened and I

said, now wait a minute, that's not exactly what she told me happened. He was a little frustrated. I said, okay, go ahead and try to tell me the story again. So he starts to tell me his side. Again, I stopped him. I didn't realize it at the time, but I was not keeping an open mind.

That's why it's so important that Judge Cothran instructs you not to discuss the evidence between breaks or overnight or in the mornings. Listen to what all of the defense witnesses have to say, all the plaintiff's witnesses say, and then together you'll discuss, deliberate, and come up with a verdict that speaks the truth.

Also, I don't think we've done it yet, but from time to time we may have to -- I think we did this morning. We walked up and we talked to Judge Cothran at the bench. During the trial, we may have issues of evidence that we're asking Judge Cothran to use a rulebook to make a decision on. Sometimes you may walk out -- we may send you out of the room and we'll talk to the judge, and other times we may walk up and whisper.

On behalf of everybody involved in this process, I apologize for that. We're just simply trying to get Judge Cothran to rule on certain evidentiary issues.

At the conclusion of the trial, if anybody wants to know what we're talking about, I'm sure anybody involved in the process would gladly tell you. Most of it's boring, routine stuff. It's lawyer stuff. But no one will keep competent,

relevant information from you that would help you make a good decision.

Again, we will try to present the evidence to you as briefly as possible, but I think at the end you will find no Tuomey employee either created a dangerous condition, water on the floor, and there was no opportunity for a Tuomey employee to find what was on the floor to clean it up.

One note on damages. Dr. Myat says he does not work. His attorney has told you he cannot work. No doctor -- no doctor -- and Dr. Myat doesn't -- can't diagnose himself. No doctor will tell you he cannot do his job as a physician of infectious disease.

Thank you for your attention.

THE COURT: Okay. Ladies and gentlemen, we're going to stop now for lunch. Now, during lunch you can't discuss this case or allow anyone to discuss it around you. You can't read anything about this case. You can't get on the Internet and Google anybody. I don't want you to do any independent research. Everything you know about this case you need to learn in this courtroom because that keeps the process fair.

And if you -- are we going to come back at 1:30 or quarter to two? Can y'all -- is an hour and 15 minutes long enough for y'all to get lunch?

MR. HOLLER: Judge, we do have some evidentiary matters that we can address.

THE COURT: All right. Well, we'll come back at 1:30 and have them come back at quarter to. So if y'all will be back in the jury room at quarter to -- 1:45. And I'll get you out and we'll begin the testimony in this case. You have a nice lunch. I'll see you at quarter to.

THE BAILIFF: Follow me.

(WHEREUPON, the jury exited the courtroom at 12:11 p.m.)

THE COURT: Okay. Is there anything we need to do before we break for lunch? All right. I'll see y'all at 1:30.

(WHEREUPON, there was a break in the proceedings from 12:11 p.m. until 1:35 p.m.)

THE COURT: All right. So we have some evidentiary issues to deal with?

MR. HOLLER: Judge, we do have a few. Judge, just I'd like to address a matter now. I think we'll address it again at the directed verdict stage and we also talked about it at the summary judgment stage.

During the opening argument -- and again, I didn't object because I don't know that it's that big of an issue for the jury right now. Mr. Padget talked about probability that it was a Tuomey employee that put water on the floor. The essence of the summary judgment and now would be directed verdict motion when we arrive at that stage is probability is not circumstantial evidence of anything. That it's not a sheer number game. In this case, there is no evidence that a

Tuomey employee put water on the floor and there's no evidence that it was there long enough to have been discovered.

So during questioning of witnesses and as we continue through the trial to the directed verdict stage, I will intermittently object if there's questions along the lines of probability because that's really not the law. It's not the standard. It's not the right burden. So I just did want to make that clear.

We have -- during Dr. Cucé's deposition -- again, I understand it probably won't be played today, but all of the medical records were offered in of Dr. Myat. I stipulated to the authenticity. We've exchanged the medical records. We're very comfortable they are, in fact, his medical records, but I objected to the admissibility for obvious reasons.

The best evidence is the doctor's testimony. He testified he relied upon others who did provide services and provided reports and, again, there's so much information in there that the jury may not understand. I just don't think it would be appropriate for them to have the medical records themselves.

For example, they may see a Tinel's sign and if the doctor documents Tinel's sign is negative, some juror might decide that's a terrible thing to have a negative Tinel's sign. Well, the reality is a negative test is a good thing as opposed to a bad thing.

Without the witness to testify and to tell what those things mean if the jurors have a question, I just think it's customarily that those medical records themselves would not come into evidence. The exception of that, of course, is in a medical malpractice trial when you are talking about the actual care that was rendered and, of course, the people who have made those records are there to testify.

THE COURT: Okay. Do you want to respond to that, Mr. Padget?

MR. PADGET: Judge, very briefly. When it comes to probabilities, as long as the probability is reasonable -- we're talking about in a civil case the preponderance of the evidence standard as we really briefed in detail in our summary judgment motion.

There may be some questions which I'm sure we can deal with specifically of certain witnesses where we may ask them, for example, Nurse Whitehouse, you know, who has familiarity with the customs, practices, and policies of the hospital and the timing of things early in the morning. We may ask him, as we did in his deposition, you know, was -- if a mess was caused there by the nurses station, was it likely done by a staff member or by some third-party, and he testified in his deposition it was likely by a staff member because he's familiar with the fact that there aren't many people else coming and going in that area or messing with water in that

area.

And so as it relates to those specific questions, I'm sure we can take that up, you know, at the appropriate time during the questioning depending upon the foundation that's been laid, but that goes directly to the preponderance of the evidence standard. We don't have to prove to a hundred percent certainty or 75 percent certainty what occurred. Fifty-one percent, if a jury so sees it, gets a verdict.

And if a layperson is asked a question as it relates to those things, based upon their personal experiences, the rule makes clear and, as we detailed in our brief, as long as any -- as long as any question like that is prefaced upon their personal knowledge of comings and goings, like, for example, here in that particular unit, it's proper. You don't have to have an expert to testify to those things. An expert wouldn't be proper to testify to those things because they wouldn't know, but who would know is someone like Nurse Whitehouse.

But we can address that specifically I would think as those questions come up. I don't think there's many of those questions.

The -- the second thing Mr. Holler brought up was the medical records. The main records that we're looking to admit are the office notes of Dr. Cucé, which are very descriptive over the course of the year that he treated Dr. Myat after the surgery that he did.

And in his notes, he goes directly to the point and says he's reached maximum medical improvement. He's going to be permanently impaired. He's going to have, you know, a total impairment rating of this and that. Those are notes. They're going to hear it from him from the witness stand, but also he wrote it down and that's also competent evidence for the jury to take back and consider.

You know, whether or not they look at any other things that are in the records, I don't know, but they were admitted without -- well, I take that back. They were admitted at his deposition as authentic and then just generally as to admissibility I guess we preserved for today. But I've never had an injury trial in two states in a couple dozen trials where the medical records were not admitted. So that would be a first one for me.

THE COURT: Okay. Do you want to respond to anything he's telling me?

MR. HOLLER: Judge, a witness guessing is a witness guessing regardless of who that witness is employed for. And if you're asked to guess is it more probable that a Tuomey employee would've done X or Y, that's not based upon a personal experience. That's a premise for a probability argument, which is not allowed. That's not evidence. It's a guess.

Again, speculation built on conjecture, not evidence.

Circumstantial evidence is -- I saw someone in scrub suits with a nametag spill something and walk away. That's circumstantial evidence. We couldn't locate who that person was.

THE COURT: No, that's direct evidence.

MR. HOLLER: Okay. Or I saw someone in that area with a cup of coffee or with a glass of water. But still, it's -- it's not circumstantial. It's simply guessing under any other term.

THE COURT: And I -- and I guess I'll have to respond to that when it comes up. I mean, you know, if a witness testifies that the routine habits are that at four o'clock every morning ice trays are filled in that location, that's their own personal knowledge.

MR. HOLLER: I don't have a problem with that testimony.

THE COURT: And it's -- and, you know, it is possible that that filling station or at any time in the past has anybody ever spilled water or ice on the floor, you know, and is it possible they could've done it again? I mean I don't know that the question being asked is improper.

Now, the next question is what -- you know, is whether the burden of proof gets passed on the judgment -- I mean on directed verdict. Now, they've got to, you know, prove by a preponderance of the evidence that -- that -- that Tuomey put it there because I assume based on where this case is going

now nobody had -- there is no evidence that it was there, that it was observed by Tuomey or by anybody else and therefore not cleaned up. The whole question is whether Tuomey or its employee actually caused the spill.

MR. HOLLER: Well, A, either caused it or, B, it was there long enough where they should have observed it.

THE COURT: Right. But there's no -- I assume based on what y'all have told me there's nobody that says I saw it there an hour before.

MR. PADGET: That's correct, Your Honor. Our case is almost entirely premised on all in one --

THE COURT: Right.

MR. PADGET: -- which is the creation of the danger.

THE COURT: Yeah. You know, so we -- the last slip and fall case I dealt with was in the grocery store in front of the egg counter and there was evidence that the eggs had been broken for an hour and it was on a video camera and that was a pivotal issue in that trial and not who put them there. As a matter of fact, you know, it was on camera who put them there. One of the employees -- I mean one of the customers broke them. You know, it had been there an hour; so that was a whole different issue. Okay.

MR. HOLLER: Judge, also a witness, Mary Yates, is -- works in the risk management department. A day after this event occurred, she went back and spoke with Mr. Whitehouse,

spoke with Kathy Sapp, the correctional officer, and did a report or an investigation. It's being offered into evidence and we object.

This is after-the-fact. Ms. Yates is also -- I've accepted a subpoena for her. She has since retired and last Tuesday finished her chemotherapy, and they say for the next three or four weeks she's going to be immunosuppressed. I told Mr. Padget she's available. She lives near here. Her husband is also a cancer battler and I've told her, because she didn't want to be in a public place very long, we could produce her here quickly.

Our position would be that her involvement is completely after-the-fact. That her testimony is not relevant. It could possibly become relevant if someone told her something different than what they testify to and then it would potentially be a prior inconsistent statement. But to have her come and testify in the case in chief is bolstering at worst and we don't think it's relevant or admissible.

She has no knowledge of what happened on July the 6th, 2011. She was not even notified of what occurred until July the 7th, 2011. She did an investigation and she had some conclusions, which is what risk management does. Let's keep the floors sweeped. Let's do the things we can do to make sure that nobody falls.

And again, putting her up there to testify at best is --

it doesn't offer any direct evidence on what happened on July the 6th.

THE COURT: What about that, Mr. Padget?

MR. PADGET: One second, Judge. If I could confer with co-counsel for a second?

THE COURT: Sure.

(WHEREUPON, there was a pause in the proceedings.)

MR. PADGET: Judge, we're not -- I'm going to make this easy. We're not going to offer the report that she -- that she put together into evidence. We are going to call her to -- to testify about what particular employees of Tuomey who she spoke with the following day who were involved in the incident, what they told her, which is not hearsay under the definition of hearsay because it involves statements made by the defendant's employees.

So we're just going to call her for that and for the purpose of -- she also testifies about a couple of the policies and procedures of the hospital. But as far as offering her report into evidence, we don't intend to do so.

THE COURT: Okay.

MR. HOLLER: And, Judge, our position would be that her testimony, again, is -- would be at best prior consistent statements. If there is an inconsistency about what one of the people who actually witnessed the after events, since no one saw the event itself other than Ms. Sapp -- you know,

again, you could have an unlimited number of people who would come and testify about what someone told them later. It's never admissible unless it's an inconsistent statement.

She did an investigation. Whether or not Tuomey did an investigation, they certainly have a right in discovery to talk to Ms. Yates to find out who all the potential people would be who might have information. Clearly, her identity and her report is discoverable, but that doesn't make it relevant or admissible in this trial.

THE COURT: Okay. And I don't know if it's going to -- whether it's relevant or admissible. I mean if you objected because it violates the hearsay rule -- and I understand normally, you know, a witness gets on the stand and I don't know -- and, you know, you can use that to impeach if they deny it. If they say the same thing --

MR. HOLLER: Again, the fact that any witness that testifies -- be it Mr. Whitehouse for example. If he says the same thing to a hundred different people, you don't call the hundred people that he talked to. You call him.

THE COURT: I understand that.

MR. HOLLER: And if he testifies inconsistently, then you can call someone to impeach him with a prior inconsistent statement.

This is just an attempt to try to cast this in a light of, oh, you did an investigation. There must've been some

wrongdoing. I mean whether there was an investigation or not is irrelevant as to why Mr. -- you know, Dr. Myat fell.

THE COURT: Okay. And I understand that. I don't -- you know --

MR. PADGET: Judge, early on they denied there was water on the floor in this case and we took her deposition and she -- she testified that she conducted an investigation. She talked to employees who were there who verified there was water on the floor, which is what she wrote in her report.

THE COURT: Okay.

MR. PADGET: So that's the fact that's clearly at issue in the case. Was there water on the floor?

THE COURT: I understand that, but if those witnesses are going to get on the stand now and say there was water on the floor, then, you know, if they get on the stand and say, no, there was no water on the floor, then you've got a report in which they told her there was water on the floor, that's a prior inconsistent statement and that's admissible. But if they get on the stand now and agree and say, yeah, there was water on the floor, then true.

MR. PADGET: I think it goes more to the order of witnesses that we're calling. We hadn't intended to call -- Ms. Wilson was not early on in the case. We were not able to locate her. David was not able to locate her either. She had since left the hospital.

And so we had not -- she's not been deposed and so having not knowing exactly what she's going to say, we didn't intend to call her in our -- in our case in chief, but she told somebody at the hospital that there was water on the floor that day. That's evidence I have to get into my case in chief. I can get it in through other people, but I also need to get it in through her. And then just the policies and procedures of the hospital are the only other items we intend to examine her about.

I certainly don't intend to suggest that because she conducted an investigation that something was done wrong. I'm sure that she will testify that she conducts investigations all the time and that sometimes things are found done wrong and sometimes they're not, but we're not asking for her conclusions, just about what she discovered.

And if people said there was water on the floor, that's an element of our case that I've got to prove and I want -- the hearsay rule doesn't apply here because it's -- it's a defendant employee who was telling her and I need to get that in in my case in chief. So that's -- that's where we're coming from, Judge.

THE COURT: Okay. And you want to respond to that?

MR. HOLLER: Ms. Yates's testimony is not relevant. It becomes relevant if someone testifies inconsistent with what she was told. She did not even appear and become involved

until the day after this fall and there's hundreds of other people who could also fall in that category. You know, policies and procedures, we can look at them closely. I don't think there's a dispute that we're not to put water on the floor and that we're to clean it up when we find it. Well, I don't know how those are necessarily relevant, but certainly there is no policy or procedure that we violated.

THE COURT: Okay.

MR. HOLLER: So again --

THE COURT: When do you plan on calling her as a witness? Not first; right?

MR. PADGET: Probably tomorrow morning. She's not first.

THE COURT: And I don't know at this point whether it's relevant or not and I don't know -- you know, it depends on who -- if all the other witnesses are present and can testify and they all -- unless they give a prior inconsistent, it may not be. I guess we'll have to figure that out when we get there.

MR. HOLLER: But the hearsay rule doesn't mean that you get to not call the people who actually were there. The jury needs to hear the people --

THE COURT: He can still call --

MR. HOLLER: He's going to call --

THE COURT: I understand that, but I can't tell him how to try his case. I mean he can -- right? I mean he can not

necessarily call them, you know.

MR. PADGET: Judge, there's no rule that says that I have to go straight to the person who observed it directly. I don't think there's a rule or a case out there that says that. If it's not hearsay, it's certainly relevant whether or not there was water on the floor in this case. I don't know how anybody could argue that's not relevant. And if other employees told her that there was water on the floor that day, that -- that's not hearsay and it's relevant testimony.

THE COURT: The big problem is normally that rule you're talking about comes into play where it is hearsay. An exception to the hearsay rule is when they have testified and you can impeach them with it, but normally the statement on its face is not hearsay because it's not a party, you know, admitting it.

But if -- if it comes under one of the other exceptions, I don't know that he has to call her in that order, does he? I mean normally that doesn't come in until the person says something differently on the stand because it wouldn't come in at all but for that.

But in this situation, you know, if it's an employee of a party, it's not hearsay, is it? If it's relevant --

MR. HOLLER: It's not relevant.

THE COURT: Well, if there's water on the floor, how is that not relevant?

MR. HOLLER: Well, it's not evidence there's water on the floor. It's a fact that Tuomey did an investigation the following day to locate the people who had evidence for this jury. She is not a substitute for the evidence for this jury, regardless of an exception to the hearsay rule.

She's not the evidence. It's perfectly appropriate to take a discovery deposition of her. It's perfectly appropriate to take a discovery deposition of anybody else who was identified. Now, the fact that they chose not to depose Ms. Wilson has no bearing on who she calls or how they call witnesses. That's a choice they made. She has no direct evidence whatsoever of what happened. She did an investigation, as she should have and as we would want her to do, as anybody would want any employer to do.

MR. PADGET: Judge, by way of an example, those are criminal cases, a murder trial, and the defendant was accused of murdering somebody and told someone the next day I murdered him. And I called them -- as the prosecution called them to testify, not the defendant but the person who said I murdered them. I don't have to call the defendant. Why would I? I can't. I don't necessarily have to.

It's the same thing here. If Tuomey employees said there was water on the floor, that is an element of my civil case and I've got to prove it. You know, if it's not objectionable under the hearsay rules, which it's not under 801(d)(2) --

THE COURT: Right.

MR. PADGET: -- admission by party opponent, it's by definition not hearsay. Then if we want to plug that up as an element of our case, then that's our right and we get to call the witnesses in the order that we want to call them. I'm not saying it's not better evidence to talk to the other people directly, which we probably will later.

THE COURT: Right.

MR. PADGET: But if Tuomey people were saying the day following that there was water on the floor, it's exactly akin to I murdered or I killed somebody yesterday.

THE COURT: Right. I mean that happens every day.

MR. HOLLER: Judge, the dispute here is not that water was on the floor. The dispute is how it came to be there and how long it was there. That's never been an issue.

THE COURT: Okay.

MR. HOLLER: Marilyn Wilson's testimony is that when she got to Dr. Myat, he stated that he slipped in the water, and then she looked and saw two spots of water about the size of a dime. She took a towel and wiped it up.

Where -- you know, where is an issue. Where was the water when she saw it? What Ms. Sapp saw.

So again, Judge, it's -- this is not an admission. This is not the smoking gun. This is using a risk manager to try to infer something.

THE COURT: There was water on the floor.

MR. HOLLER: Well, Judge, we don't dispute that two people who saw the water on the floor will testify and someone who saw those people a day later need not testify. That's not relevant. She's not the best evidence.

THE COURT: That may be true, but I mean that happens in every case about whether the lawyer decides to call one witness versus another witness and get the fact in because some -- there may be other reasons, because of the personality of a witness or something. I mean -- but if it's admissible evidence, it's admissible evidence and I can't tell him what witnesses he has to call to get it in. And if it's not hearsay, then the only other issue is whether it's relevant or not. All right?

MR. HOLLER: Right.

THE COURT: And the fact that there was water on the floor is relevant in this case.

MR. HOLLER: And it's a -- it's a prior consistent statement and then not admissible as a prior consistent statement. You simply are bolstering of what Ms. Sapp and Ms. Wilson would say. So -- and Mr. Whitehouse.

So again, that's not appropriate evidence because she's simply talking to them after the fact. Yes, if they get on the stand and they testify differently than what they told Ms. Yates, absolutely.

THE COURT: But the analogy he made about a murder case -- he doesn't have to call the defendant if he told the police he murdered them; right? And he doesn't have to call the employees if the employee tells her.

MR. HOLLER: Well, in a murder case, he can't call the defendant.

THE COURT: I understand that, but how does --

MR. HOLLER: But there's -- there's -- in a civil trial, you can call the defendant.

THE COURT: I understand.

MR. HOLLER: You can't -- you can't introduce a prior consistent statement to bolster what someone is testifying in court and that's at best what he's trying to do.

THE COURT: They haven't testified yet. I mean if they -- you know, assuming -- I understand your argument, but he may not call any of those witnesses. So they're not bolstering their testimony. She's saying it. You know, if the witness can get on the stand and say, yes, there was water on the floor, and then you put her up and she tells you, yeah, they told me there was water on the floor, that's bolstering their testimony; right?

So I've had Ms. Sapp say there was water on the floor and then Ms. Wilson gets up and says the next day Ms. Sapp told me there was water on the floor. That -- you know, that is bolstering. But what if they never called Ms. Sapp? They

just put Ms. Wilson up and nobody else?

MR. HOLLER: Our position would be that the eyewitnesses, the people who saw what happened, are relevant and admissible testimony to tell the jury what happened.

THE COURT: I understand that.

MR. HOLLER: And that you don't say, well, I'm choosing not to call them and I would rather call a risk-management investigator.

THE COURT: I understand that and I understand your argument. I just don't know any rule that keeps you -- keeps you from him trying the case the other way. I mean I understand your argument. You don't want him to and it doesn't make -- but under what rule can he not just call her and not call anybody else?

MR. HOLLER: I --

THE COURT: He's got the burden of proof.

MR. HOLLER: I would say because her testimony is not relevant.

THE COURT: Well, it is relevant if that's the only testimony he's got that there was water on the floor. I mean --

MR. HOLLER: If only -- if it --

THE COURT: It's not relevant if the other witnesses have already testified.

MR. HOLLER: If Ms. Sapp moved to California and Ms.

Wilson also moved to California, I agree. Ms. Yates would then be relevant because the other witnesses are beyond the subpoena power of the Court. We can't bring them. She now is the best evidence.

THE COURT: I understand.

MR. HOLLER: But as we sit here, both are available.

THE COURT: I understand your argument and the best evidence rule normally applies to documents that deal with that. I just -- I understand your rationale. I just don't know what in the rules makes me tell him how he's got to try his case on that.

MR. PADGET: Judge, the definition of relevance under 401 -- relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The fact that Tuomey people said the day following there was water on the floor certainly meets that standard.

THE COURT: I understand. I mean I think it's relevant to this. It's just an issue of the best way to get there. Well, we'll just have to deal with it and, if you object in the middle of it, I'll see how it falls then. I just don't know either way. If it's not hearsay -- you know, if it was hearsay, then it wouldn't come in except for impeachment purposes for prior inconsistent statements.

MR. HOLLER: Well, they're certainly -- I don't know what Mr. Padget would ask her, but obviously subsequent remedial measures would play a role as well.

THE COURT: And that --

MR. HOLLER: What did you do to make sure this didn't happen again in the future?

THE COURT: And they -- and if he --

MR. PADGET: We don't intend to ask those questions.

THE COURT: If he goes there, then you object and I'll rule on that at that time. Okay? Are we ready? All right. Are we ready for the jury then?

MR. PADGET: Judge, I think we've got some exhibits that are coming in by agreement. We can go ahead and get them in.

THE COURT: Okay. And y'all need -- okay. And you say these exhibits are into evidence that you're going to show the jury? Then if you'll let the court reporter mark them.

MR. PADGET: Yes, sir.

THE COURT: That way we won't have to stop to do that.

MR. HOLLER: Judge, we have nine photographs from the defense.

THE COURT: Okay.

MR. HOLLER: That --

THE COURT: And they're in without objection?

MR. PADGET: They are in as well, Your Honor.

THE COURT: Okay.

MR. PADGET: That's Defense 1?

MR. HOLLER: 1 through 9.

MR. PADGET: 1 through 9? Okay. This is Plaintiff's 1, the diagram of Unit 3 South.

MR. HOLLER: Let's do this. Let's let her get them marked because if you're talking while you're doing that, then she's going to hate us both.

(WHEREUPON, there was a pause in the proceedings to mark exhibits.)

MR. PADGET: That's it. So as I understand it, by stipulation you've got Plaintiff's Exhibit 1, Plaintiff's 2, Plaintiff's 3, and Plaintiff's 4, and Defense 1 through 9 being admitted without objection. Is that correct, David?

MR. HOLLER: Correct.

THE COURT: All right. Okay.

(WHEREUPON, the following exhibits were admitted into evidence: Plaintiff's 1, floor diagram; Plaintiff's 2, color photograph, Plaintiff's 3, color photograph, Plaintiff's 4, policies, and Defendant's 1 through 9, all color photographs.)

THE COURT: All right. Are we ready for the jury?

MR. PADGET: Judge, we're ready to proceed.

THE COURT: Okay. You can go get me the jury.

THE BAILIFF: Yes, sir.

(WHEREUPON, the jury entered the courtroom at 2:05 p.m.)

THE BAILIFF: Your Honor, all the jurors are present in the courtroom.

THE COURT: All right, sir. Thank you. Okay. Ladies and gentlemen, I apologize for being late and I know you all think we have -- I have a -- you know, there's just matters sometimes that take a little bit longer than I anticipated that I have to deal with, but hopefully, it will make things run smoother.

Mr. Padget, you may call your first witness.

MR. PADGET: Thank you, Your Honor.

MR. HINSON: Thank you, Your Honor.

THE COURT: All right.

MR. HINSON: The plaintiff calls Kathy Sapp.

THE COURT: Okay. If you would, come around, please, ma'am, and place your left hand on this Bible and raise your right.

THE CLERK: Place your left hand on the Bible and raise your right hand. State your name, please.

THE WITNESS: Kathy Sapp.

THE CLERK: Do you solemnly swear or affirm your testimony to the Court shall be the truth, the whole truth, nothing but the truth, so help you God?

THE WITNESS: I do swear.

THE CLERK: Thank you. Have a seat up here, please. Please state your full name and spell your last name for the

record.

THE WITNESS: Kathy Jean Sapp, S-a-p-p.

MR. HINSON: Thank you, Ms. Sapp.

KATHY SAPP, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HINSON:

Q: Ms. Sapp, have you ever testified in court before?

A: No, sir.

Q: If you would, speak loudly --

A: Oh, I'm sorry.

Q: -- and slowly so the jury can hear you. Miss Sapp, where do you live?

A: I live in Dalzell, South Carolina.

Q: And how long have you lived there?

A: Almost twelve years.

Q: And how long have you lived in the area?

A: Most of my life.

Q: And would you please tell the jury are you currently employed?

A: Yes, I am.

Q: And what do you do for a living?

A: I'm a correctional officer.

Q: And how long have you been a correctional officer?

A: This January will be 18 years.

Q: And so in your 18 years as a correctional officer, tell me -- tell the jury a little bit about your -- your duties in that -- in that job?

A: I am to supervise the inmates, you know, make sure that they do what they're supposed to do, you know, protect them to make sure they're taken care of and safe. If they're sick and they're hospitalized, we will go and sit with them at the hospital. So we have to stay with them.

Q: And if you would, tell us a little bit more about what that means when you would go to the hospital and you're sitting with an inmate?

A: Well, anywhere they would go, if they have to have x-rays, we would be in there. If they went to surgery, one of us would be in their surgical room with them. I mean we have them in our sight at all times.

Q: And did that occasionally take you to Tuomey Hospital?

A: Quite frequently. Yes, sir.

Q: Have you ever worked for Tuomey Hospital?

A: Yes.

Q: And how long -- when was that?

A: It's been a couple years ago since I actually pulled hospital detail, but --

Q: Were you an employee of Tuomey?

A: No.

Q: Okay. That's --

A: No, sir. I was there as an -- as an officer sitting with an inmate.

Q: Okay. And do you recall an incident in the early morning hours of July 6th, 2011, at Tuomey hospital?

A: Yes.

Q: Okay. And tell me why you were there?

A: We had an inmate that had been hospitalized and we had to stay with him.

Q: And did you witness Dr. Myat fall?

A: Yes, I did.

Q: And tell me --

A: Yes.

Q: Tell the jury, if you would, where you were and what you saw?

A: It was I would say sometime between 5:30 and six o'clock in the morning. We'd had a nurse come into the room to attend to the inmate. The way we are positioned in our rooms, the one wearing the weapon has to sit near the door and the other officer is on the other side of the room. I was -- I was the armed officer; so I was stationed by the door. When the nurse walked into the room, she left the door open and from where I was seated at I could see straight down the hall.

And, of course, being the wee hours of the morning, you know, distractions; so I'm looking down the hall. I observed Dr. Myat walking down the hall coming from the far end back

towards this way when I actually saw him slip and fall and then he went down hard. So I, you know, said Dr. Myat fell and I ran outside to check on him.

Well, when I got there, I asked him if he was all right. He looked at me and he said he slipped on some water. I looked on the floor. Now, I couldn't say if it was water. I know it was a clear liquid. Now, what I thought when I first noticed it was that it might have been where some water and some ice had fell on the floor and melted. Whether that's what it was, I do not know, but there was liquid on the floor.

Q: All right. And, Ms. Sapp, did you observe Dr. Myat's knee?

A: Yes, I did.

Q: Can you tell the jury how it looked to you?

A: You know how an individual when they bend their leg how the knee is shaped like this? Well, when he pulled his pants leg up, his knee was like this with a big old hole like that. I mean he had no knee.

Q: And, Ms. Sapp, what time of day was it you said?

A: I'm thinking between 5:30 -- six o'clock in the morning, in the early, early a.m. I know I got off -- we change shifts at 6:30 and I know it happened before then.

Q: And did you observe any visitors on the hall during that time?

A: I did not.

MR. HINSON: Permission to approach the witness, Your Honor?

THE COURT: Yes, sir.

BY MR. HINSON:

Q: And, Ms. Sapp, I'm going to show you a few photographs. This one has been marked as Plaintiff's Exhibit 2. Can you identify that picture for the jury?

A: Yes, sir. This is the hallway of the hospital.

Q: All right.

MR. HINSON: And I think you've got an extra one of those, don't you? Do you have an extra?

MR. HOLLER: No.

MR. HINSON: Your Honor, permission for her to mark the place?

THE COURT: Any objection?

MR. HOLLER: No.

THE COURT: Okay.

BY MR. HINSON:

Q: Ms. Sapp, if you would, would you take this red pen and make a mark approximately where you witnessed Dr. Myat fall?

A: Somewhere within this area here. It was near the nurses station.

Q: All right. And if you would, put your initials by the circle. And, Ms. Sapp, I'm going to show you what's been marked as Defendant's 9. Is that a closer picture of the area

you've marked?

A: Yes. Very much so.

MR. HOLLER: Can I see those, please?

MR. HINSON: Sure. Your Honor, may I publish these to the jury?

THE COURT: Sure. Of course, you know, they have capabilities of putting it on the screen if you want.

MR. HINSON: Do we have an Elmo?

THE COURT: Yeah. It's in that drawer right there.

MR. HINSON: On this side? Your Honor, I think we're fine.

THE COURT: Okay.

MR. HINSON: This won't take but just a second.

THE COURT: Sure. Go ahead.

MR. HINSON: If I could have just a moment.

BY MR. HINSON:

Q: And, Ms. Sapp, did you witness anyone clean up this clear liquid?

A: Yes, I did.

Q: And tell me what you witnessed, please --

A: When I was there --

Q: -- about that?

A: When I was there with Dr. Myat, two nurses come around, you know, when they realized he had fallen and, you know, they were told about the fluids or the water. One of the nurses

went and got a towel and she dropped it on the floor and she used her foot to wipe the water up with, with the towel.

Q: What kind of towel are you speaking of?

A: It was a white hospital towel.

Q: And, if you could, could you estimate the size of the water you saw on the floor? Could you --

A: It's been a while, but I mean it wasn't a huge spot. It was, you know, probably about like so.

(WHEREUPON, the witness gestured.)

Q: And that was after he had fallen --

A: Yes.

Q: -- that you saw it? Ms. Sapp, is there any doubt in your mind that you saw a clear liquid on the floor after Dr. Myat fell?

A: There's no doubt in my mind there was clear fluids on the floor.

MR. HINSON: If you would, answer any questions Mr. Holler has.

CROSS-EXAMINATION

BY MR. HOLLER:

Q: Ms. Sapp, how are you?

A: I'm fine. Thank you.

Q: I'm David Holler. We introduced --

A: Yes, sir.

Q: We met before. Do you remember -- you said you worked in

the Department of Corrections for 18 years. Do you remember that patient that you had with you?

A: It's been so long. I've sat with so many. I'm sorry.

Q: I know. I know. And you do the same thing with a lot of different people who are in the Department of Corrections?

A: Yes, sir.

Q: So it's hard sometimes to separate one event from another. I mean just that's what you do it every day at work?

A: (No verbal response.)

Q: Is that a yes?

A: Well, I mean the doctor falling -- I mean that's very -- you know.

Q: And no question, but I'm just talking about in terms of what individual you may have been with in the room.

A: Yeah. I don't remember the inmate's name.

Q: One of the -- working for the Department of Corrections, there's a term that I would assume you and most of your co-employees don't like and that's called guard. You don't guard anybody, do you?

A: No, sir.

Q: You provide services?

A: We supervise.

Q: You supervise? And like any population of people, the inmate population -- one inmate is not the same as the next?

A: No, sir.

Q: You have general -- different facilities are different risk levels?
A: Yes.
Q: In a general -- in a population in a prison, you have what I might term relatively good people who just did something bad?
A: Yes.
Q: And they're generally compliant?
A: Yes.
Q: And they don't have to be kept in body chains all the time? They -- they live inside a penitentiary, but they live a relatively normal existence in terms of moving around freely with some restrictions; correct?
A: Yes.
Q: Okay. And also in that population, you have some people who break the rules inside the prison. Those are called the prison within a prison or SMU?
A: Yes.
Q: Special management unit?
A: Yes.
Q: And someone who is in the special management unit may be someone who requires a much higher level of service, meaning they are not allowed outside their locked cell unless they're in body chains?
A: Yes, that's correct.

Q: So, for example, if they had to go to a doctor visit. If someone has broken the rules and they have to go to a doctor, they would have to be cuffed before you open the cell?
A: Yes.
Q: They have to be put in body chains as opposed to a general population inmate who wouldn't require such high level of care?
A: Well, the institution I work at, sir, every time we take one outside the facility, he has to be in leg irons and a belly chain.
Q: Right. So you don't have escapes; correct?
A: Well, we try not to have any. Yes, sir.
Q: Okay. Thank you. And also in your population, you have people who have mental illness?
A: Yes.
Q: And through no fault of their own, they could be dangerous? It may be their choice to be dangerous, but it could be of no fault of their own they're dangerous?
A: Yes.
Q: Okay. So it's important to know who you're sitting with to have some idea of what those expectations might be?
A: Yes.
Q: Okay. And when you sit with an inmate who is in a hospital, would it be fair to say you communicate the expected level of need with interacting with the patient?

A: Yes, sir.
Q: As an example, if you have a patient who hates needles who is going to get very upset when someone tries to put a needle in their arm, be it a normal fear of needles or some aspect of mental health, that's important information for the hospital staff to know; correct?
A: Yes.
Q: And you would communicate that with the staff?
A: Well, I wouldn't because I wouldn't know it unless the inmate told me.
Q: Fair enough. And would it be fair to say that traditionally when you sit -- if you're assigned as you were in 2011 to sit with an inmate that you may come back on your next shift and sit with the same inmate again?
A: Yes.
Q: And there's always two people there?
A: (No verbal response.)
Q: Is that a yes?
A: Yes. And we do have to leave the room briefly, like to run to the restroom or something.
Q: Two people are assigned; one person is always in the room?
A: Yes. There is always one person in the room.
Q: Okay. So when a -- in addition to making sure an escape doesn't occur, you're also there to protect anybody who might

be providing services to the inmate?

A: Yes, sir.

Q: Okay. So if an inmate -- if someone came in with a sharp object to draw blood and the inmate tried to take it -- and I don't -- you said you didn't remember this patient, but that would be something that you're there to help intervene and protect the caregiver?

A: Yes. Well, when the -- when they're all -- when the inmates are in the hospital, they are still in restraints.

Q: All right. So --

A: And restraints are not removed while they're in the hospital.

Q: So they may be handcuffed to the bed? They may have leg shackling to the bed or something?

A: We have them in leg irons at least. They still have to have the belly chain. Sometimes we do free one arm so they could eat.

Q: Okay. Again, all of this protocol is for security?

A: Yes, sir. It's policy also.

Q: Would it be fair to say that when someone comes into the room to provide services to your charge -- is that -- is that an appropriate term if I call your inmate your charge?

A: Yes, sir.

Q: Okay. And I understand you don't guard somebody because generally when you're at your facility you're providing

services to them; correct?

A: Yes, sir.

Q: You're helping them get to meals. You're helping them get to showers.

A: Yes.

Q: You're helping them if they need to go to training, if they have jobs such as in a kitchen or something?

A: Yes, sir.

Q: So very little of your time at the Department of Corrections do you actually just sit down and read a magazine?

A: No, sir.

Q: You're doing something all day?

A: Yes, sir.

Q: And you're documenting what you're doing?

A: Yes, sir.

Q: It's a job?

A: Yes, sir.

Q: Okay. It's a little different though at the hospital here because you don't have all your other inmates and other people to provide services to. You just have your one inmate?

A: Yes, sir.

Q: Okay. So would it be fair to say when a nurse comes in to provide services to your charge, your attention should be on your charge?

A: Yes, sir.

Q: Okay. And you were the -- you said you were the one with the gun on this occasion?
A: Yes, sir.
Q: Only one of you has a gun?
A: I'm the -- I was the armed officer. Yes, sir.
Q: And traditionally when you're inside the Department of Corrections facility, you don't carry a gun?
A: No, sir.
Q: That's -- it changes when you go outside the facility?
A: Yes, sir.
Q: Okay. One of the two of you get that? I know this is July of 2011 and I apologize. Do you remember what room you were in?
A: I do not. I know it was close to the nurses station.
Q: If I told you it was room 346 -- well, let me say this. The Tuomey staff -- any hospital staff, they want to know where the inmates are?
A: Yes.
Q: Okay. It's important for security reasons?
A: We always alert security with the rooms that we have and who we have sitting in the rooms with the inmates. So Tuomey is always aware of the rooms. Security is.
Q: And you probably wouldn't know room 346 from room 345 or any other room?
A: We have been positioned in a lot of rooms at Tuomey, sir.

Q: Fair enough. This is a photograph that's taken from room 346, which we will hear from later testimony is where your charge was and where you were. Okay?

A: Yes, sir.

Q: So if you look through to this picture -- and we've marked it as either Defendant's 1 through 9. Excuse me. When you saw Dr. Myat fall, you said that he had been further down the hallway from where you were? In other words, he had been at the far end of the hallway?

A: He was walking from the other end.

Q: Let's look at this for example. I believe this is Plaintiff's Exhibit Number 1. But let me do a little orienting here. This is -- do you see this -- this picture?

A: Yes, sir.

Q: This is wonderful I think for an architect; it's horrible for us. So let's see if we can try to figure out where some -- some things are. This would be where the -- do you see the red dot?

A: Yes, sir.

Q: This would be where the visitors elevators are?

A: Okay.

Q: And this is what's known as 3 South. And where I'm moving the line, the dot right now, would be the hallway?

A: Yes, sir.

Q: Okay. This would be a corner room in the hallway? Do

you see that?

A: Yes, sir.

Q: And all of these are patient rooms. So someone couldn't walk like the dot is walking. Do you follow? I'm trying to get you oriented to this a little bit.

A: Okay.

Q: So again, we will identify where 346 is, but 346 -- let me -- let me do something else first. It's difficult to see in here, but this is the nursing station and someone can actually walk around through here.

A: Okay.

Q: We've got a picture we'll put into evidence shortly, but of the nursing station. But contrary to looking at the shaded area, that's an area where people can walk and that's actually where all the nurses do their work -- their paperwork. And doctors too. Okay? This is 346.

A: Okay.

Q: Do you follow me?

A: Yes, sir.

Q: And we'll establish this through more testimony, but your testimony is that you saw Dr. Myat walking from down in this area?

A: Well, he was walking from that direction.

Q: Okay.

A: I don't know where he came from exactly, but he was

coming from that end of the hall from where I was sitting at the opposite end.

Q: Okay. So if we look back at the picture looking out of room 346, Dr. Myat would have been further away from you down that hallway walking towards the room that you were in or at least the area where you were in?

A: Yes. He was going from that direction.

Q: Okay. You're nodding your head and I apologize.

A: I'm sorry. Yes, he was coming from that direction.

Q: And she can only repeat what you say. So she doesn't see your head nod.

A: Okay.

Q: So that's why I tried to get a yes. Okay? So Dr. Myat would be -- if you look at this picture and see the red dot, he would be coming down the hallway like this toward you except it was back here where he slipped?

A: The angle I was in, sir, I could see a little further down the hall just past the nurses station. The angle on the picture is not exactly what my vision was. My line of sight went a little bit beyond the station.

Q: Okay. You're saying this is not the angle that you had?

A: No. It was a little bit further down past the station because I saw him coming up. He fell when he got real close to the station.

Q: How did -- how did Dr. Myat fall? What hit first?

A: I don't know.

Q: Did his feet go out like that or did he go down forward? Did his face go down or did his back go down?

A: I want to say he went forward. It's been so long, but, yeah, he fell. Coming up from that angle, he come down and I seen him go down and I went to check on him.

Q: What hit the floor first?

A: I don't know.

Q: When you --

A: It was so fast.

Q: When you got to Dr. Myat --

A: He was sitting up.

Q: Okay.

A: He had his back leaned against the nurses station right there. He was sitting there holding onto his leg and kind of, like --

(WHEREUPON, the witness made heavy breathing sounds.)

Q: We're looking at the -- this is --

A: Yes, sir.

Q: This is the nursing station?

A: Yes, sir.

Q: And this is the one we were talking about being able to walk around this thing?

A: Yes, sir.

Q: It's the shaded area on the diagram, but you're saying he

was sitting right here on this corner?
A: He was a little bit more further in that I can remember.
Q: Okay.
A: It's been many years, but yeah.
Q: And he had his legs out into the center of the hallway with his back up against the nursing station?
A: He was leaning back towards the station, yes. But he didn't have his leg out. One was out, but he had the other one up and he was, like, rocking kind of like -- you know, like he was in pain.
Q: Which one was up? The one that was injured or the one that wasn't injured? You said one leg was out and one leg was up?
A: I had it in the back of my head. I'm sorry.
Q: It was July of 2011.
A: I know he was favoring the right leg, if memory serves me right, because I remember when he pulled his pants leg up, I could see the knee was jacked up on that leg.
Q: Did he pull up the right leg pants leg or the left?
A: I want to say the right. It's been so long. You're asking me to remember from 2011.
Q: I'm sorry. That's -- that's the first chance we've had to ask you in front of a jury.
A: Oh, my goodness. I remember him pulling up a pants leg and seeing his knee. I want to say the right, but --

Q: Okay. Then you said a couple of nurses came up?
A: Yes, sir. I remember there was two female nurses.
Q: White or black?
A: I want to say white.
Q: Both? Do you know they were nurses or could they have been nurse techs?
A: Well, I just know they were in scrubs.
Q: Okay. They were wearing traditional hospital attire?
A: Yes, sir.
Q: Okay. And you saw one grab a towel and clean up the floor?
A: They -- they come around. They all saw that he had fallen and they were talking with him. I remember they were trying to get him to stand up and he couldn't get up.
Q: Okay.
A: And I remember one had come back and she had -- she walked off and she had come back and she had a white towel and she dropped it on the floor and then she had used her foot, you know, just rubbed it a little bit on the floor to get it up.
Q: There's a sometimes common misconception that people who work in the correctional office guard people -- that the correctional department guard people. That's not true. You're busy all day long; right?
A: Yes, sir.

Q: You work a twelve-hour shift and you have something to do all the time?

A: Yes, sir.

Q: Sometimes you have more to do that can be done during your shift?

A: Yes, sir.

Q: Based on your observations in 2011 being at Tuomey, the people who work there -- they're busy, aren't they?

A: All the time.

Q: Nobody is -- nobody is sitting around reading magazines?

A: No, sir.

Q: It might be night shift, but there's something to do all day?

A: Oh, they stay busy.

Q: Okay.

A: Yeah.

Q: Going from one room to another providing services, not unlike what you do at the Department of Corrections?

A: Yes, sir.

Q: Okay. And once you do those services, you have to document them at the Department of Corrections, and I imagine the nurses and the nurse techs do the same thing?

A: Yes, sir.

Q: Okay.

MR. HOLLER: Court's indulgence, please.

THE COURT: Okay.

MR. HOLLER: Thank you, Ms. Sapp.

THE COURT: Yes, sir?

REDIRECT EXAMINATION

BY MR. HINSON:

Q: Ms. Sapp, did you spill a clear liquid on the floor on 3 South?

A: No, sir.

Q: Did you observe -- your co-officer -- co-correctional officer spill water near the nurses station or anyplace?

A: No, sir.

Q: Did you observe any visitors spill water?

A: No, sir.

Q: And you testified that you work in the room or look after the inmate in the room?

A: Yes, sir.

Q: And when you were there -- the picture --

MR. HINSON: Let me see where it is here. That's the one picture I can't find. There it is. Thank you.

BY MR. HINSON:

Q: The picture that Mr. Holler showed you -- if you could, explain to the jury how you said your view differed?

A: Well, the way this --

Q: If you would like to --

A: The way this other was taken, it's kind of like they're a

little bit further into the room at an angle looking down. The way I was positioned -- I mean I was pretty much right up against the wall. So whenever I looked down the hall, I had a different -- little bit further line of sight going down the hallway.

Q: So --

A: But it was a little bit -- but it was past -- I could just see past the nurses station.

Q: So that picture differs than the -- than the view you had?

A: A little. Yes, sir.

Q: So if you were in that room, your view was different than what's in that photograph?

A: A little different. Yes, sir.

Q: Would your view of the nurses station have been better or worse than what's in that photograph?

A: You've got a clear sight of the nurses station, but, like I said, my line of sight was just a little bit down the hall a little bit past the station. But I mean it's a good view of the nurses station, but I seen a little bit more hallway than what's depicted in this photo.

Q: Okay. Thank you, Ms. Sapp.

A: Yes, sir.

Q: And earlier, you gestured with your hands as to the size of the water. Could you estimate the diameter of the -- of

the -- of the liquid that you saw?

A: It wasn't a huge puddle. It wasn't a really large puddle.

(WHEREUPON, a juror raised their hand.)

THE COURT: Hold on just a minute.

THE WITNESS: Oh.

THE COURT: Hold on just a minute. Go ahead. Go ahead. Hold on. Don't talk anymore. Okay?

(WHEREUPON, a juror exited the courtroom.)

THE WITNESS: It was about this size.

(WHEREUPON, the witness gestured.)

THE COURT: Hold on just a minute. You can't talk. They've got to listen to you. Okay? Anybody else need a break? Everybody else okay?

THE WITNESS: Sorry.

THE COURT: Oh, I know. That's no problem. I just had a juror that needed to be excused real quick. So I need you to wait until she gets back.

THE WITNESS: Yes, sir.

(WHEREUPON, there was a pause in the proceedings until the juror re-entered the courtroom.)

THE COURT: Okay. Now, you can proceed with questioning, counsel. Thank you, ma'am.

THE WITNESS: Yes, sir.

BY MR. HINSON:

Q: Ms. Sapp, you were gesturing with your hands. Is six to seven inches a fair approximation of the diameter of the liquid?

A: I don't know. Maybe just a little bit smaller. I mean it wasn't a huge amount. Maybe -- about like this maybe.

(WHEREUPON, the witness gestured.)

Q: And --

A: I mean it wasn't a -- I mean, like, it got scattered a little bit. I mean it wasn't -- it wasn't a completely round spot, like it -- you know.

Q: It wasn't a perfect circle?

A: No, sir.

Q: Okay.

A: It looked like it had been spread a little bit when I saw it.

Q: Okay. And, Ms. Sapp, as Mr. Holler established, it's been several years since this incident. Shortly after it happened, did you have the occasion to talk to anyone from the hospital about it?

A: Yes, sir. I do remember a lady had come by to speak with me. I don't recall her name.

Q: Okay. And at that time, your memory was -- it was recently in your mind at that point?

A: Yes.

Q: And getting back to your -- well, when you saw the --

when you saw the liquid on the floor, were you -- were you in the room? Were you standing beside the liquid? Where were you?

A: When I had actually observed the liquid was when I went to check on Dr. Myat and he had said he'd slipped on some water.

Q: Okay. So how close to the liquid were you at that point?

A: Fairly close. I was pretty close there.

Q: Okay. And when you are guarding an inmate or in a room with an inmate, do nurses come and go in the room?

A: Yes.

Q: And do they occasionally bring ice?

A: Yes.

Q: Do they on occasion bring water?

A: Yes, sir.

MR. HOLLER: Judge, I believe this is outside the scope of cross-examination.

THE COURT: Yeah. Sustained.

MR. HINSON: Nothing further.

THE COURT: Okay. You can step down. You can step down.

THE WITNESS: Thank you.

THE COURT: Okay. You may call your next witness.

MR. PADGET: Thank you, Your Honor. The plaintiff would call Nurse William Whitehouse.

THE CLERK: Place your left hand on the Bible and raise

your right hand. State your name, please.

THE WITNESS: William Whitehouse.

THE CLERK: Do you solemnly swear or affirm your testimony to the Court shall be the truth, the whole truth, nothing but the truth, so help you God?

THE WITNESS: I solemnly swear.

THE CLERK: Thank you. Have a seat up here, please. Please state your full name and spell your last name for the record.

THE WITNESS: William Ferrell Whitehouse, W-h-i-t-e-h-o-u-s-e.

WILLIAM WHITEHOUSE, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGET:

Q: Mr. Whitehouse, good afternoon. I --

A: Good afternoon.

Q: I understand you're a nurse at Tuomey hospital; is that correct?

A: Yes, I am.

Q: And how long have you been employed there?

A: January 5th, 2009.

Q: I also understand you had prior military service in the Air Force and also in the Navy; is that correct?

A: Yes. Fourteen years in the Air Force and six years in

the Navy.

Q: What would you prefer I address you as? Nurse Whitehouse? Mr. Whitehouse? Captain Whitehouse? William?

A: William.

Q: William. Very good. If you would, William, please tell us a little -- a little bit more detail about your professional background as a nurse and how you came to be employed with Tuomey Hospital?

A: I had gone to college, had dropped out, went into the Navy, did six years, went back to college, and decided to look into healthcare because as a child I was always told I should be a doctor. But I wasn't really ready for that step and so I figured I would experiment. So I thought nursing would be a good way to do it. I got my degree in nursing, wound up going into the Air Force, spent 14 years in the Air Force providing care, seeing the world, enjoying it. I got done, retired at Shaw Air Force Base and applied for work in several locations and wound up getting a job at Tuomey.

Q: My understanding is you were present the morning of Dr. Myat's fall, that is the early morning hours of July the 6th, 2011; is that correct?

A: Yes.

Q: You had worked -- before this morning, you had worked with Dr. Myat previously?

A: Yes.

Q: Could you describe your working relationship with Dr. Myat?

A: He was a friend. I enjoyed working with him. I respected him. We often had conversations and bantered back and forth in the morning a little bit when he would come to the floor and we would discuss patients with him when he would come to the floor.

Q: It's fair to say the two of you got along well?

A: Yes. I had invited him to dinner at least once, but we never did actually manage to make that occur.

Q: And Dr. Myat -- how did he get along with the other nurses on that unit?

A: He got along very well with the other nurses. My understanding is we all liked him and enjoyed working with him.

Q: From your observations, was he a hard worker?

A: To me, yes. I mean he would come in early morning, see his patients, ask about his patients, pay attention, listen, do what he wanted to do, and would move on to go to his next because he had a lot of patient care to do.

Q: And as an infectious disease specialist, Dr. Myat -- he would treat patients in almost every unit of the hospital; is it accurate?

A: Yes, pretty much.

Q: This particular unit, Unit 3 South, tell us what kind of

unit it is?

A: Unit 3 South is a med/surg unit, typically it's more medicine than surgical. We also typically would have the dialysis patients on our floor. And then depending on the medical severity of the patients, sometimes we would actually have surgeries and things come back to our floor. And so going into like inpatient surgical floor, but mostly medicine patients, fairly complex.

Q: Okay. Dr. Myat often came in early first thing in the morning, 4:30 -- five o'clock in the morning to treat his patients on 3 South; is that -- is that correct?

A: He would come in early morning and he would come to our floor typically somewhere around -- probably around the five o'clock time, sometimes earlier, sometimes a little later depending on how his night went.

Q: Sure. On this particular day, July the 6th, 2011, in those early morning hours, do you have a recollection if any other physicians were present on the floor?

A: At the time he was there, no, I don't remember another physician there.

Q: Do you have a recollection whether or not any other physicians had been present on the floor in the minutes or hours preceding Dr. Myat's fall?

A: That I remember, no.

Q: Let's talk about Unit 3 South just a little bit, if we

could, William.

MR. PADGET: And, Judge, is it possible for you to put --

THE COURT: Yes.

MR. PADGET: -- my HDMI cable here up?

THE COURT: Well, I got it approved. Now, whether the technology --

MR. PADGET: We'll make it work.

THE COURT: There you go.

MR. PADGET: There you go.

BY MR. PADGET:

Q: William, I've got up on the screen now a photo of the corridor there on 3 South. Is that accurate?

A: Yes.

Q: Can you see it? Do you have a screen up there --

A: Yes.

Q: -- that you can see?

A: I have a screen up here.

Q: Okay. Perfect.

MR. PADGET: And that, just for the record, is Plaintiff's Exhibit 2 that we're referencing.

BY MR, PADGET:

Q: Here, let me show it to you. And that's looking from down the hallway past the nurses station past room 346 as we've been over and so forth. Is that accurate?

A: Yes. You're actually just standing right by the door

between 25 and 46 there.

Q: Okay. But just generally looking from that direction --

A: Yes.

Q: -- down the hallway? And we've got the nurses station there on the left?

A: Yes.

Q: And that would be just to the left of the nice lady in her white scrubs?

A: Yes.

Q: Okay. Now, William, if you would, tell us what all nurses -- what do nurses do at the nurses station?

A: We review charts. We do chart checks. We chart on our patients. We figure out what we need to do for our patients. We can do vital -- mostly it's the paperwork that we're doing there. I mean we go take care of the patient and we go back and we do the paperwork or the documentation normally at the nurses station.

Q: My wife is a nurse. She does a lot of paperwork. Do nurses on Unit 3 South do a lot of paperwork there at the nurses station?

A: Yes.

Q: Preparing charts and documenting the --

A: Right.

Q: -- ongoings of the treatment and care of each patient?

A: Yes. If it's not documented, it's not done. That's one

of the standards that we try to keep to.

Q: And, William, you're during great, but if you could talk loud just to make sure everybody could hear, that would be great.

A: Can I move this down?

Q: Yeah. Sure. Of course.

THE COURT: You can move it down.

MR. PADGET: Thank you.

THE WITNESS: Okay.

BY MR. PADGET:

Q: Mr. Holler described the nurses station I think as a Ground Zero. That's where the nurses are coming and going back and forth to the -- to see their various patients; is that fair?

A: Yes. That is a fair statement.

Q: Okay. At 5:30 in the morning, Unit 3 South, this medical/surgical floor, often has a lot of dialysis patients. Are there often a lot of visitors frequenting the nurses station at 5:30 in the morning?

A: There's not a lot of people visiting. When you say visitors, do you mean that are just coming in to see a patient and leave or do you mean the people -- but if there's people staying the night with a patient, sometimes they come out, but normally not very many, no.

Q: Okay. All right. So it would -- on a usual night, usual

morning, 5:30 in the morning, Unit 3 South right at the nurses station where the nurses are coming and going, the doctors here or there are coming and going and working, there's not a lot of visitors in that location typically; is that fair?

A: Typically, no, there is not a lot of visitors in that location.

Q: Do you recall this particular morning, July the 6th, 2011, 5:30 and the minutes and hours previously if there were any visitors frequenting the nurses station?

A: I cannot recall specifically for that day, no.

Q: I know that's asking a lot of you, but you have no recollection of any specific visitors that morning?

A: No, I do not have any recollection.

Q: In these photographs, the one that we're showing, which I think is Plaintiff's 3 now -- I'll hand it to you. In looking at Plaintiff's 3, William, there is a -- a door right here in front of the nurses station that says stop, staff only. Do you see that?

A: Yes, I do.

Q: Okay. And what's in that doorway?

A: That's what we call the patient kitchen. There's a refrigerator, a sink, an ice machine, snacks and things for the patients there.

Q: Okay. And only staff, according to the sign at least, are to come and go from that particular room?

A: Yes.

Q: The -- I see here there's a tray in this picture right next to the nurses station. Do you see that?

A: Yes.

Q: And in the picture prior, Plaintiff's 2, there's also a depiction here. It looks like a utility type cart with 3 South written on it. Do you see that?

A: Yes.

Q: And do these particular -- the cart and the tray -- do they -- are they frequently in this location?

A: Now, yes. The trays -- we didn't actually have spare ones until actually they had started getting more. So at the time I don't think we used the tray up front there at that time.

Q: Okay. And these pictures were taken more recently --

A: Yes.

Q: -- than this incident occurred. But the cart -- the gray cart in this picture -- it says 3 South on it. That's something that the nurses and nurse techs on 3 South would use to -- for various items, but also use it to move water and ice from that staff room out to the patient rooms?

A: Yes. The nurse tech -- the technicians would normally do that.

Q: And then the nurses -- and let's -- let's draw the distinction. The nurses -- you have more advanced training

than a nurse technician?

A: Yes.

Q: You provide more of the clinical patient care?

A: Yes.

Q: Than the nurse techs do?

A: Yes.

Q: And the nurse techs would be there to assist the nurses in performing the duties of the unit?

A: The nurse techs -- I mean they would be doing, like, vital signs. They would assist with bathing. They would be turning patients, doing basic care. Typically, we would be doing -- passing medications, doing assessments, evaluating how the patients are doing.

Q: One of the duties that the nurse techs would regularly perform would be though to retrieve ice and water from that particular staff room and move it out to the patients?

A: Yes.

Q: And they often do that utilizing a cart like that grey one pictured in this picture, wouldn't they?

A: Yes.

Q: And certainly while it's a 24/7 nursing unit there on 3 South, understanding that nursing is going on constantly, isn't it true though about -- around about four o'clock in the morning there is -- the nurses and the nurse techs start preparing for the shift change which is upcoming at seven

o'clock?

A: Yes. We're gearing up for the morning.

Q: And one of the tasks the nurse techs do typically there is when they're gearing up for the day is retrieve ice and water with the cart at that location?

A: They would take the cart to where the patient kitchen is and they would put ice water on that and then deliver it to the rooms, yes.

Q: And this cart -- do they actually wheel it into the room in order to get the ice and water or do they leave the cart out by the actual nurses station?

A: Typically, when they'd use the cart -- there's two ways that I've seen them do it. Which way they would have done it that morning, I don't remember. There's a way where we use, like, a patient's belonging bag. We fill it up with ice, close it, and then we put it on the cart. In that case, they might not necessarily have it directly, but when they actually had the pitchers that they used to do, it would be normally directly in front of the door so that you would be blocking the doorway.

Q: I see. So the gray cart filled with pitchers of water and ice would be somewhere in this area in between the actual nurses station and the door with the -- where the patient kitchen is?

A: Yes.

Q: And in this location then that's where the nurses would fill the ice and water and from there they would move it out to the patients --

A: Yes.

Q: -- on this? And by routine, that typically begins about four o'clock most mornings?

A: 3:30 -- four o'clock, yes.

Q: And here Dr. Myat -- Dr. Myat fell about 5:15 -- 5:30 in the morning; is that correct?

A: That is my understanding, yes.

Q: Visitors hours -- and when I say visitors, I mean those of the public coming and going to the unit. Visitors hours on Unit 3 South are the same as for the rest of the hospital, which is six a.m. to nine p.m.; is that correct?

A: That is correct.

Q: And that was true back in July of 2011 when this incident occurred?

A: Yes. That was true back then also.

Q: You were working that morning?

A: Yes.

Q: The morning in question, did you actually observe the fall?

A: No.

Q: You were in a patient room nearby?

A: Yes.

Q: Did you hear the fall?
A: I did not hear a fall. I heard somebody's voice or a call or something, but I did not hear, like, a thump or a bang or anything like that that I remember.
Q: Ms. Sapp -- Ms. Kathy Sapp -- she's a corrections officer. You saw her testify here a moment ago. Do you recall if her or someone else on the unit summoned you to help Dr. Myat?
A: She was in the room with me at the time --
Q: Okay.
A: -- when the fall occurred. So I know that after -- after we heard the noise, she investigated it.
Q: And was that room 346?
A: Yes.
Q: Were you told by Ms. Sapp that she had seen Dr. Myat fall?
A: I was told by Ms. Sapp that someone fell, but it was not a patient.
Q: Okay. And what did you do at that point?
A: I was drawing blood at that time. I finished drawing blood. After I was done drawing blood and had it labeled, I went out to see the situation.
Q: Were you drawing blood from the inmate?
A: Yes.
Q: Do you have any recollections of this particular inmate

at any point in time on this day causing any trouble?

A: He did not. I had no problem drawing blood from him that morning. I had been warned that he was -- that he liked to scream or act out a little bit at times and so I had saved him for last.

Q: I see. But you didn't have any trouble?

A: No. I did not have any trouble drawing his blood. He had nice veins.

Q: As you left room 346 and approached Dr. Myat, tell us what you saw?

A: I saw Dr. Myat on the floor, back against the nurses station, and he was holding his left leg. It was bent up towards his body.

Q: When you say at the nurses station, roughly in this area now where this tray is situated in this photograph, which is Plaintiff's 2?

A: Where the tray area is, yes. You can see the end of the nurses station.

MR. PADGET: And I think Defense 9 may show it better. If I may I approach, Your Honor?

THE COURT: Yes, sir.

BY MR. PADGET:

Q: I'm going to hand you Defense Exhibit 9 there, William. Does -- does that better depict the area where Dr. Myat was sitting after his fall?

A: Yes.

Q: And you said he was seated on the floor and he was holding his left leg?

A: Yes.

MR. PADGET: Your Honor, if I could, could I pass this around?

THE COURT: Sure.

BY MR. PADGET:

Q: When you --

MR. PADGET: I'm going to let them finish up.

(WHEREUPON, there was a pause in the proceedings.)

MR. PADGET: Thank you.

BY MR. PADGET:

Q: William, as you approached Dr. Myat, how did he appear?

A: He appeared to be grimacing in pain, holding his leg. He was alert. He was orientated. I mean he was conscious.

Q: Did you ever have an opportunity to actually observe his injury to his left knee?

A: I remember looking at it and knowing that it looked wrong.

Q: It looked wrong?

A: It was not the best thing. I mean I can't remember if it was twisted funny or, like, the kneecap was turned and there was, like, an open area there or indentation, but it did not appear as a normal knee.

Q: The left kneecap was contorted and out of position?

A: Yes.

Q: And he was in pain?

A: Yes.

Q: What did you do next?

A: I was asking questions to find out if he had hit his head or anything else. I mean it was the typical. Also, there was other people there, other nurses. I think Ms. Carrie was there and Marilyn Williams had been there. They said that they had called downstairs to the ER and they were sending up a stretcher or a gurney to get him, and that arrived just shortly afterwards.

And I remember the fact that they didn't bring a lift board with them. So the problem was that there was no way for him to stand up on his own to get onto the gurney and I had asked him if I could lift him. He was going to let me. I stood behind him, put my arms underneath his arms, and lifted him straight up, and then we kind of turned and sat him on the gurney and I went to try to stabilize his leg. So I was trying to bring them over. It was too painful for him; so I just kept away from them and let him try to do the rest of it on his own.

Q: Did you ultimately assist in lifting him up onto the gurney?

A: I stood behind him and lifted him up so that he was able

to put his weight on his right leg and pivot.

Q: I see. Okay. Did you have an opportunity at any point in time to speak with Marilyn Wilson, one of the nurse techs there on the -- on the unit?

A: Yes.

Q: About the fall?

A: Yes.

Q: And what did the two of you discuss?

A: I was basically asking what happened. I hadn't seen it. I wanted to know what happened. I know that we -- I don't remember if she didn't see the fall. She came after the fact. She said that she had wiped up, like, two drops of water, like drops that, like, would come off your fingers or something like that, but just a -- just a little bit of water that you could wipe it up easily.

Q: And Ms. Wilson -- she would have been one of the nurse techs on the unit that morning who would have been tasked with preparing the pitchers and the ice?

A: Yes.

Q: And moving it about from the kitchen area on the cart and then out to the patient rooms?

A: Yes, she would have been.

Q: And typically, how many nurses and nurse techs staff Unit 3 South?

A: Unit 3 South, we have, like, a full census. There would

be four nurses, two technicians. From what I remember, there was four nurses and two technicians that morning.

Q: Four nurses and two techs? Going back to your conversation with Ms. Wilson, you spoke with her. She told you there was some water on the floor and that she used a towel to clean it up? Is that accurate?

A: When I spoke to her, she said there was, like, two little drops of water on the floor and she had wiped them up. I don't know if she said she used a towel or she used a facecloth. I just knew that she had wiped them up.

Q: Okay. So shortly after the fall though, the water was cleaned up immediately?

A: Yes.

Q: Whatever was on the floor? Okay. You never actually laid your own eyes on the spill though?

A: I never saw water on the floor, no.

Q: Do you recall if Dr. Myat told you while he was in pain and on the floor during any of that process during your assessment whether or not he said he slipped on water on the floor?

A: I can't remember if it was at that time or at a later time that that statement came out, but I know that at some point in time -- it was either then or when he had come back to work for a brief moment in time that he had -- he had said he had slipped on water.

Q: Okay. So you're not certain if it was that morning, but at some point you had a conversation with Dr. Myat and he said to you that he had slipped on some water on the floor?
A: Correct.
Q: And based on your observation that morning, your knowledge of his reputation or anything, did you have any reason to disbelieve what Dr. Myat told you?
A: No.
Q: At 5:30 in the morning, the patients on Unit 3 South -- they typically aren't moving about the unit, are they?
A: Very rarely would a patient be moving about typically; correct.
Q: And visitors are typically not on the unit floor at this hour save for the one or two who may actually spend the night with their -- with their loved one?
A: Right. And sometimes they're getting up around that time as well depending on if they have to go to work or things like that.
Q: Are they typically -- are visitors -- are any visitors typically moving about the unit between four a.m. and five a.m. at the time the nurse techs are preparing the water there from the -- by the nurses station?
A: Typically, there might be one at the most, but normally we really don't see very many people. But when we're doing vital signs and doing everything else, we're turning on

lights, waking up all the patients and numerous people in the room. It's not unusual for them to be getting up looking for coffee or something like that.

Q: Okay. But you don't have any specific recollection of anybody else being around the nurses desk that you're coming and going from constantly that morning other than Tuomey staff?

A: That I remember, no.

Q: Do you believe the water on the floor, whatever amount -- well, let me back up. Do you believe the substance on the floor, the clear liquid that was on the floor that morning in whatever amount -- do you believe it's likely it would have been there since nine p.m. the night before when visitors hours ended?

MR. HOLLER: Objection. Calls for speculation.

THE COURT: You'll have to lay a little bit better foundation.

MR. PADGET: All right. Thank you.

BY MR. PADGET:

Q: William, you're familiar with how this Unit 3 South -- you're familiar with how it runs and how the staff at Tuomey run the unit; correct?

A: Yes.

Q: And you're familiar with visitors hours; correct?

A: Yes.

Q: And you're familiar with the typical pattern of visitors that come and go at Unit 3 South early in the morning and late at night, if at all? Are you familiar with all those things?

A: Yes, I am.

Q: You're familiar with Tuomey's policy that there is -- visitors hours begin at six in the morning and end at nine p.m.; correct?

A: Yes.

Q: Now, based on all that, your familiarity with the unit, your familiarity with the policies, your familiarity with the customs and habits of the unit, do you believe that water in some amount next to the nurses station would have persisted there for eight and half hours from nine p.m. the night before until 5:30 a.m. when Dr. Myat fell on the water? Do you believe that that water likely sat there for eight and a half hours?

A: No, I do not believe that.

Q: And in light of your knowledge about the comings and goings of visitors or the lack thereof, the comings and goings of doctors or the lack thereof, and the particular location where this water was found next to the nurses station, the fact that it was right around the time of day or shortly thereafter that the nurse techs prepare the water and ice in that location, and the absence of other visitors that you recall, isn't it true it's more likely that a Tuomey staff

member created that spill on the floor?

MR. HOLLER: Objection. Calls for speculation.

MR. PADGET: I believe a proper -- the foundation has been laid, Judge.

THE COURT: Well, the -- what I'm interested in is how long he was on the floor, where he worked, what observations he personally made versus speculation. I mean you need to --

MR. PADGET: I'll rephrase the question.

THE COURT: Okay.

BY MR. PADGET:

Q: William, in light of everything you know about the unit comings and goings and so forth, is it more likely that water was spilled in that area by a Tuomey employee or by some third-party?

MR. HOLLER: Objection. Again, speculation. It's a guess.

MR. PADGET: Judge, I'm happy to take it up with you with or without the jury.

THE COURT: Ladies and gentlemen, there's a matter of law I need to address outside of your presence; so I'm going to send you to the jury room for a few minutes. I'll get you back in here in just a minute. Okay? I'll remind you don't discuss the case.

(WHEREUPON, the jury exited the courtroom at 3:07 p.m.)

THE COURT: Okay.

MR. PADGET: Judge, we detailed this exact legal issue in our memorandum in opposition to summary judgment. And the rule that governs this is Rule 701 of the Rules of Evidence, which governs lay witnesses' opinions and permission to offer inferences and opinion testimony.

And the rule expressly permits lay witnesses to give opinion testimony and offer inferences where those opinions and inferences are rationally based on the witness's perception and are helpful to an understanding of the witness's testimony for determining a factual issue in the case and do not require any specialized knowledge or training, i.e. expert-type testimony.

Well, here, clearly, no experts would be appropriate to give testimony about the habits and customs and so forth of Unit 3 South. This is well within Nurse Whitehouse's wheelhouse when it comes to personal knowledge.

The key case, Judge, that we cited was the *Small* case. It's *Pioneer Machinery -- Small v. Pioneer Machinery*, which is 329 S.C. 448, and that case was a products liability case and the driver of a log skidder was given -- was permitted to testify about why the log skidder's throttle assembly was sticking. And in his opinion, it was due to the fact that fragments of trees and so forth were gathering into the piece of equipment and that was what was causing the log skidder throttle to waiver.

In that case, Judge, the defense objected and said this shouldn't come in under the rules. We need expert testimony. We need mechanical engineers. We need all this other stuff. And the Court of Appeals specifically held that that lay inference, that lay opinion, was squarely within his wheelhouse because he's the guy who operates the machine. He's the guy who sees when the throttle sticks and when the throttle does not stick.

Here, Your Honor, similarly, the key issue is who created this spill, this water on the floor, and here Nurse Whitehouse we believe is going to testify, if he testifies like he did at his deposition, is that it was more likely created by a staff member than not a staff member, and the basis for that is, of course, what we've laid. That the custom, practices, hours, policies, and so forth of the hospital in that location and at that time there's a whole lot more Tuomey employees coming and going, preparing water and doing those things, than there is visitors or third parties.

And so when it comes to that likelihood, this is a lay opinion that is right in the wheelhouse, just like the *Small* case, just like under rule 701 that permits lay testimony to come in.

I would also go on to say that the Court of Appeals has said in *Small* that conclusions or opinions of lay witnesses should not be rejected unless they are superfluous in the

sense that they will be of no value to the jury. And that's a pretty low standard to get past, Your Honor, and here I think answering the key question is who likely created this -- this water on the floor at this location based upon this circumstantial evidence. We think that, of course, the lay opinion of a nurse who is familiar with that would be of great value to the jury and could easily overcome that hurdle, that very small -- that very low hurdle that the Court of Appeals articulated in *Small*.

This is -- our brief, Your Honor, is detailed really on -- this is our memorandum in opposition to the motion for summary judgment at pages 7, 8 -- 7 through 10. I'd be happy to hand up my copy, Judge.

THE COURT: I've got one.

MR. PADGET: You've got one? But we think Rule 701 and the Court of Appeals specifically permits this kind of opinion testimony as long as it is founded on their reasonable observations and experiences, which here there are many.

THE COURT: Well, one of the things that I was -- you know, the prior objection was the foundation. And maybe I missed it about -- clearly, he was working at that time he was in the patient's room, but how long had he been on shift? What observations he had made in the hall, how long he'd been at the nurses station that night or normally, and that's what I didn't hear him testifing about. You know, of course, it's

the normal practices of filling the ice --

MR. PADGET: Sure.

THE COURT: But this particular day and night --

MR. PADGET: And I'm happy to lay a more thorough foundation if that's what the Court believes is necessary.

THE COURT: That's -- you know, that was one of the concerns was how he would know the probability this particular day at least, you know, unless he had been on all night and had observed that, versus just coming in off from another floor and walking in that patient's room. Anything else you want to add, Mr. Holler?

MR. HOLLER: Judge, for 250 years, the world believed the east coast of the United States was a shortcut to India because you were asking the best and the brightest what their opinion was. It was a guess. They were wrong. North America was a separate continent.

The fact that this person is guessing and speculating makes it no different. It's a guess and a speculation. He has no knowledge of -- he could be asked about facts that he knows about, but his guessing and speculation and probabilities is exactly why we're going to ask for a directed verdict at the end of the evidence.

This is not about probability and conjecture built on speculation. Did you walk the floor? Did you see it? How often do you walk through those areas? Those are appropriate

questions. Those are facts that are within his knowledge.

Rule 608 -- I'm sorry -- 602 says witnesses typically don't testify of things they don't have knowledge of. He didn't have knowledge of the water. He doesn't know how it got there. And what his theory might be could well be completely wrong.

THE COURT: I understand that, but it -- you know, the question is -- I mean you certainly can argue it. That goes to the weight. Whether his theory is admissible or not -- you know, his theory could be completely wrong and the question is whether the jury gets to even hear his theory. Just like in many times expert witnesses' theories are completely wrong and the juries weigh that all the time.

MR. HOLLER: He was asked at his discovery deposition to guess what happened more probable than not. There was an objection to the question at the deposition. He answered anyway. It doesn't make it admissible. It's still speculation.

It's not circumstantial evidence. Circumstantial evidence would be no one walked through this area for nine hours. Circumstantial evidence is the ice cart. Him guessing what happened when he does not know is not circumstantial evidence.

THE COURT: And I understand that's your argument for I assume directed verdict, that there is -- that is not

circumstantial evidence and his guess is not circumstantial evidence, but whether it's admissible evidence or not -- does he -- is he entitled under 701 to give that lay opinion? And the courts found, you know, that opinion testimony regarding a mother's behavior -- that was in the *Robinson* case. It was admissible because it was based on personal observations and did not require special knowledge, skills or training.

How about ask him some other questions about it as far as the foundation is concerned about his personal knowledge and observation, how long he'd been there, how long he'd worked, those kind of things?

MR. PADGET: Very well, Your Honor. I'd be happy to lay a more thorough foundation.

THE COURT: Okay. And I want you to do it now.

MR. PADGET: Oh, very well.

THE COURT: Because I want you to --

MR. PADGET: Absolutely.

THE COURT: I want you to at least do it and let me hear it and then let me rule versus bringing the jury back in and then sending them back out.

MR. PADGET: Sure.

PROFFERED DIRECT EXAMINATION

BY MR. PADGET:

Q: William, this particular day, July the 6th, 2011, when Dr. Myat fell, how long had you been on shift?

A: If it was like a normal night, typically I get there about ten minutes after six. I get ready for shift. Shift starts at 6:45. Shift change ends at 7:15. Typically, then I have the floor until 7:15 -- 7:30 in the morning.

Q: So you were there when Dr. Myat fell at 5:30 or so in the morning. You had been there during the PM shift sometime before seven p.m. the night before, staying until sometime after seven a.m. on the 6th; is that correct?

A: Yes. I probably had been there close to eleven hours by that time.

Q: So you had been on the unit floor close to eleven hours by the time Dr. Myat -- you responded to Dr. Myat's fall?

A: Yes.

Q: And during that time and in the hours preceding responding to Dr. Myat's fall, William, do you recall any particular visitors at the nurses station that morning on Unit 3 South?

A: No, I do not recall any particular visitors at the nurses station that morning.

Q: And on a typical morning, Unit 3 South, there would have been nurses and nurse techs employed by Tuomey coming and going regularly there at the nurses station before Dr. Myat's fall?

A: Yes.

Q: So, William, based on those recollections -- well, let me

ask that specifically, William. Was that true also of this particular day, July 6th, there would have been nurse techs and nurses coming and going from the nurses station before Dr. Myat's fall?

A: Yes.

Q: And, William, based on that, isn't it more likely that the water on the floor was created by an employee of Tuomey coming and going from the nurses station performing those various duties than by some third-party that no one has seen?

A: Yes.

THE COURT: Okay. Are you going to ask him any other questions?

MR. PADGET: No, Judge. We think that lays a sufficient foundation to get the evidence in.

THE COURT: Okay. Do you want to ask him any follow-up questions about that, Mr. Holler?

MR. HOLLER: Not for the -- I mean for the ruling, but, Judge, it's *res ipsa*. That's *res ipsa*. I mean we don't follow that doctrine in South Carolina. The thing does not speak for itself and what he's saying is -- he's putting his opinion in there. He doesn't know.

THE COURT: Right.

MR. HOLLER: My question -- well, to William would be --

PROFFERED CROSS-EXAMINATION

BY MR. HOLLER:

Q: William, are you guessing?
A: Yes.
Q: Do you have any idea how the water got there?
A: No.
Q: Is there any fact that brings you to a conclusion that made it more likely than not it was a Tuomey employee?
A: Other than statistical analysis, you know.
Q: Quantum mechanics? Under quantum -- we're talking about the quantum mechanics as a theory that if you put a monkey and a piano and enough time it will eventually bang out Beethoven's Fifth?
A: Yes.
Q: So it's just a percentage?
A: Yes.
Q: That's the only support for your determination that it's your opinion that it's more likely a Tuomey employee than somebody else?
A: Yes. It would just be my -- I did not -- I didn't witness it. I never saw the water.
THE COURT: Okay. Anything else?
MR. PADGET: Judge, the Court of Appeals says it makes for a great cross-examination, but it's for the jury to decide.
THE COURT: Okay. I'll take a five-minute break and I'll come back and let you all know.

(WHEREUPON, there was a break in the proceedings from 3:21 p.m. until 3:33 p.m.)

THE COURT: Okay. Anything else?

MR. PADGET: Nothing further from the plaintiff at this time, Your Honor.

THE COURT: And based on my looking at the law and Rule 701, I think he can probably give his opinion on probability based on his knowledge of what he observed that day and what's the normal practice of the hospital. It may make his -- that admissible, you know.

Whether it's -- that's a whole different ballgame is that whether it gets, you know, past the directed verdict situation simply because it is -- it is a guess, but he had -- you asked him what the probability was, you know, and it's more -- he can give that opinion, but just like Mr. Holler said, he has no factual basis much to put it on and it's a guess.

So I think strictly under this rule he can give that opinion, that that opinion applies under 701. You know, whether that gets to the standard of summary judgment is totally different.

MR. PADGET: Understood, Your Honor.

THE COURT: Okay. All right. Anything else before I bring the jury in?

MR. PADGET: No, sir.

THE COURT: Bring me the jury.

(WHEREUPON, the jury entered the courtroom at 3:36 p.m.)

THE BAILIFF: Your Honor, all of the jurors are present in the courtroom.

THE COURT: Thank you, sir. You may proceed.

MR. PADGET: Thank you, Your Honor.

DIRECT EXAMINATION - CONTINUED

BY MR. PADGET:

Q: William, that particular night that we're talking about, July the -- the morning of July the 6th, 2011, how long had you been on the unit that day?

A: I had probably been on the shift approximately -- on the unit approximately eleven hours I'm thinking.

Q: And your typical -- you typically -- there's two shifts for this nursing unit? There's a morning shift seven a.m. to seven p.m. and the night shift from seven p.m. to seven a.m.; is that right?

A: Yes, that's correct.

Q: And you were working the seven p.m. shift that night?

A: Yes. I was working night shift.

Q: So if Dr. Myat fell around 5:30, you had been there since sometime before seven p.m. the night before?

A: Yes.

Q: Do you have any recollection of any observations of any visitors or third parties or non-employees of Tuomey in the area of that nurses station in the hours prior to Dr. Myat's

fall?

A: No, I don't have any specific recollection.

Q: You don't remember anybody else other than Tuomey employees being there?

A: No, I don't remember anybody else.

Q: William, based on that, if -- if a person caused this spill to be on the floor -- as the water existed there that day in the early morning hours, if a person caused the water to be there, was it more likely done by a Tuomey employee, somebody working there, or by some third-party that nobody has seen?

MR. HOLLER: I note my objection that we previously made, Judge.

THE COURT: Okay. It is noted. You can answer it.

BY MR. PADGET:

Q: You can answer it.

A: Yes.

Q: Yes, meaning it's more likely a --

A: Yes.

Q: -- Tuomey employee that caused the spill?

A: Yes. More likely.

Q: The water on the floor and the condition that Ms. Marilyn, the nurse tech, described to you, do you believe that would have been such an open and obvious condition that anybody walking along should have seen it?

A: Am I allowed to say what she described to me?
Q: Yeah. Sure.
A: She described two little drops, two little spots, and I don't know if that would have been easily seen or not.
Q: Sure. But you don't believe that a reasonable person like Dr. Myat walking along should have seen it in advance before they stepped into the water and slipped and fell? You don't believe that, do you? Based on what you know about the scene?
A: Based on what I know, it would not have been easily seen, no.
Q: You would agree that water on the floor and by the nurses station where people are coming and going, nurses and doctors coming and going and treating patients, in such an amount that could cause a dangerous fall would constitute a dangerous condition?
A: Yes. If there's -- if there's enough water on the floor, they could step in it and slip and fall, yes.
Q: And it proved to be dangerous for Dr. Myat in that -- those early morning hours, didn't it?
A: Yes.

MR. PADGET: William, that's all the questions I have for you at this time. Thank you.

CROSS-EXAMINATION

BY MR. HOLLER:

Q: How long have you been a nurse, William?
A: I got my degree in -- I believe in 1994.
MR. HOLLER: Excuse me. I'm going to try not to create a trip hazard here.
BY MR. HOLLER:
Q: William, you were asked a number of questions about who was up at the hospital on the third floor on July the 6th, 2011. Do you have a recollection of whether people were there or not? Other people besides Tuomey employees?
A: Specifically, no.
Q: It wouldn't be unusual for other people to be up there?
A: No, it would not be unusual.
Q: When patients come into the hospital setting where you're a nurse, is it encouraged that a family member or someone else stay with them?
A: Yes.
Q: Do you like to have people with the patients on the hospital floor?
A: Yes, we do like to have that. Typically, a patient would be feeling lonely, could become confused in an unusual environment, and if we have somebody who knows them and is familiar with them, it's encouraged for them to be there.
Q: And if someone before they came in the hospital had a sitter, someone who stayed with them at night at home, would you encourage that -- would you tell them to send the sitter

home or would you encourage them to keep the sitter with them at the hospital?

A: If the sitter -- if the family is willing and wants the sitter to stay, typically the patient would want the sitter to stay.

Q: Would it be fair to say you tend to remember things that are atypical, unusual, such as Dr. Myat falling?

A: Yes.

Q: Okay. And you tend to not remember things that are routine and ordinary?

A: No, I normally don't.

Q: Okay. It would be ordinary to have sitters, family members, and other people up on the third floor back in 2011 and in 2015?

A: Yes.

Q: So there could be many people up there who don't -- who are not employed by Tuomey?

A: Yes.

Q: Okay. And you described earlier that as you go around and you go into a patient's room and you turn on lights and the techs might go in to get vital signs, that wakes the patients up?

A: Yes.

Q: Okay. Is it fair to say that people at Tuomey on the third floor don't get a good, long, uninterrupted night's

sleep?

A: That's very true.

Q: Okay. We talked a little bit about Ms. Sapp. Is there any time during your shift where you shut down, where you sit down and read magazines or watch TV?

A: Normally, no. We typically are lucky if we get lunch.

Q: Okay. When you have a patient encounter, do you have to document your encounter?

A: Yes. We have to. If we do something specifically with a patient, we're documenting, whether it's giving meds, doing an assessment, answering a request. Like, if they're complaining of pain or something, we would document it.

Q: Okay. Where do you -- where do you physically document that? Do you write that down in the patient's room?

A: No. We document it at the nurses station.

(WHEREUPON, Plaintiff's Exhibit Number 1 was placed on the screen.)

Q: Okay. And that's -- we'll talk a little bit more about the nurses station. Let me -- let me look at this layout, if you will. I'm going to show you what was an exhibit to your discovery deposition and we talked about this a little bit with Ms. Sapp, but I want to start by kind of drawing out some areas that are not clearly apparent from this particular diagram. In other words, you can't see, for example, the nurses station. If I did this though, let's get the jury

oriented, if you will. This would -- the red dot -- that would be where the visitor elevators are?

A: Yes. That's the open area in front of the visitors elevators where they would get off and on.

Q: Okay. So a visitor elevator coming to the third medical/surg floor would come in like this red dot and then come down the hallway?

A: Yes.

Q: Depending on where they were going. Employees would come up and doctors would come up the employee elevator?

A: It's up a little further.

Q: Up some?

A: Right.

Q: Here?

A: Right.

Q: Okay. So they would come out this elevator and come down the hallway; is that correct?

A: Either hallway.

Q: Okay. Now, are any of these rooms different from other rooms?

A: 39 and 36 are negative flow rooms, which means they're for, like, airborne isolation.

Q: Okay. So there's special patients that go in these two corner rooms? You described them by number, but they would be the ones --

A: In both corners.

Q: In the -- in the corners, the far end of the hallway so to speak?

A: Yes.

Q: Based upon where the elevators were, the two corners. Now, who would you normally put in those rooms?

A: If we have any type of patient that is suspected for TB, which is airborne illness, then we would put them in those rooms.

Q: So patients who can be contagious by simply breathing would go into those rooms as opposed to the other rooms?

A: Yes.

Q: And the air filtration system there vents to the outside of the hospital as opposed to into the hallway or into the other rooms?

A: Yes.

Q: Okay. Would a physician of infectious disease often have patients in those particular rooms?

A: It would be likely he would have them. If we had a patient with TB or something like that that would go in that room, yes. More than likely, he would be contacted for that.

Q: I'm going to -- excuse me. I'm going to enlarge this a little bit and let's see if I can draw in some features here. Is this approximately where the nursing station would be, what's now shown in red?

A: Yes.

Q: Okay. And we've seen a picture where the nursing station has computer terminals and chairs that are sitting in front of the nursing station?

A: Yes.

Q: So if I were to draw little lines here just to show the chairs that are pulled up to the nursing station on both sides, is that somewhat accurate?

A: Yes.

Q: And the red dot -- these would be areas where someone could walk past the nursing station?

A: Yes.

Q: All right. On this diagram, let me show you where the -- well, let's go back to the dot. Is this where the icemaker is?

A: Yes. It's in that room.

Q: This is a closet that's called the --

A: Patient kitchen.

Q: Patient kitchen? Let me see if I can roughly draw this. Is that fair to show where it is?

A: Yes.

Q: This other -- what is this other closet or small area that's next to it?

A: That's the dictation room. That's where a lot of times the doctors will go in and dictate in that room.

Q: If you have a blood draw or if you have to print -- excuse me -- print out the paperwork to go along with a sample, a fluid sample from a patient, is that where you would get your labels from?

A: Typically, after midnight we print out all the lab slips and then we would place them in that room, yes.

Q: Okay. We talked about the fact you just don't remember whether there were other people up there other than the four nurses and the two techs. You said you don't remember if there were sitters? Family members?

A: No, I do not remember specifically.

Q: Do you remember Dr. Myat being up there before he fell?

A: Yes.

Q: Do you remember having an interaction with him?

A: Yes. I remember talking to him about one of his patients.

Q: Okay. Do you know whether he had walked through the office -- through the office -- through the hospital floor prior to when you first saw him?

A: I believe when I came up to the nurses station he was at the nurses station, but I don't remember if he came from which unit before, but he had arrived at the nurses station.

Q: Looking at this diagram, what is -- this is the nursing station?

A: Yes.

Q: This long thing that we have a picture of as well. What's kept on this end of the nursing station?
A: There's a turnstile that has all the charts for the patients that is kept there.
Q: Okay. What do the charts look like? Are they blue?
A: I believe they're more of like a purple --
Q: Maroon?
A: Purple in color.
Q: All right. So they're color-coded so that anyone walking in, a medical person, would know that's a patient chart?
A: Yeah. We use that color chart on our floor.
Q: Okay. And for every patient -- unless someone has pulled the chart and is working with it, for every patient that's on the third floor there is a chart kept here?
A: Yes.
Q: Okay. What's on the far end of this nursing station? This would be the area where Dr. Myat -- where you saw him on the floor.
A: Yes. There's the fax machine where we fax orders down and then there's the metal rack where we put charts with orders in them that need to be reviewed.
Q: Okay. When you say we, who puts charts in that rack?
A: The physicians put them in there. The charge nurse during day shift keeps them there. The unit secretary -- when she has them, she puts them there.

Q: Okay. You were asked a lot of questions about tradition and what normally happens, what happened on July 6th. Typically, a physician -- do the physicians tend to use the visitor elevators or do they tend to use the employee elevators?

A: It depends on where they're coming from. They use either one. Typically, I've seen them on both. Most -- I couldn't tell you. I mean I see -- depending on where they're coming from would depend on what elevator they were using.

Q: Okay. They're free to use any elevator they want; right?

A: Yes.

Q: Okay. An employee -- I mean -- I'm sorry. A physician using the employee elevator would generally be coming down through this -- would be coming down this hallway? My pointer is not working. Correct?

A: Typically, they would come down that hallway or the other hallway depending on where they're going.

Q: And you -- and let's talk about Dr. Myat in particular. You knew him for a while. You had known him for a while before he fell?

A: Yes.

Q: And his general practice -- would he go to a chart before first when he got there to the floor or would he go straight to the patient's from?

A: From what I remember, he would go for the chart and talk

to the nurse before he went to see the patient.

Q: Okay. And you said you did recall a conversation with them. Where was he seated?

A: From what I remember, he would've been seated about where your dot is at this time on -- I guess you would call it the north side of the nursing station.

Q: So prior to Dr. Myat's fall on July 6th, 2011, you recall seeing him seated at the nursing station and speaking with you about a patient?

A: Yes.

Q: Okay. You don't remember which patient?

A: I -- I think I remember, but I can't guarantee that I'm a hundred percent sure.

Q: Okay. Do you remember where the patient might've been kept or where the patient was -- what room the patient was in?

A: I'm thinking that he had talked to me about a patient I was taking care of in 39. I don't know why that sticks in my head, but it does.

Q: And 39 is one of the rooms with the special ventilation?

A: It's an airborne isolation room, yes.

Q: And again, those are typically sick people --

A: Yes.

Q: -- and Dr. Myat takes care of sick people -- took care of sick people?

A: Yes.

Q: Okay. So when you talked to Dr. Myat and he was seated at the nurses station, where were you?

A: I remember being -- talking across the nurses station to him. I don't know if I was in the charge nurse seat or if I was one down at that terminal. I don't remember which one.

Q: The area where Dr. Myat fell -- is that area well-traveled during the night shift?

A: Yes.

Q: Do you walk through that area frequently?

A: Yes.

Q: Would it be fair to say you walk through that area every time you transferred your attention from one patient to another either to go back and chart what you've done or look at a chart to see what you needed to do?

A: Typically, yes.

Q: Okay. You've already -- I think we've already heard that you were working with an inmate that was in 346?

A: Yes.

Q: Okay. Do you remember -- tell -- if you would, describe to the jury what you would do before you would do a blood draw for any patient, but in this case it would be for the inmate that was in 346?

A: Typically, I would first go get the lab slips to see what labs needed to be drawn and then I would go to the medication room where we keep the lab tray, get the lab tray, make sure

that I do have everything on the tray that I need, and then I would go back out and go back through to the patient's room.

Q: Okay. Do you remember -- when you started this process for the inmate, you would have been somewhere at the computer -- one of the computer terminals?

A: Yes. I would have been somewhere on the south side of the nurses station.

Q: Can you describe to the jury or help me with this dot show what you would have done? Where -- you said you print the labels for the vials?

A: The labels probably were preprinted. Typically, they are. And they are kept in the dictation room, which is the room that you drew on the bottom of it there.

Q: So you would walk into this room?

A: Right. And I would get the labels.

Q: Okay. And from here, you would go to where?

A: I would go to that room, head down --

Q: Okay. Head down?

A: And then I would head north, then stop and go left and that is the medication room. And the lab trays are kept in there, just inside the door.

Q: This is the materials you need to actually draw the blood?

A: Right.

Q: Okay. And how would you go back to the -- how would you

get to 346?

A: Typically, I would come back out, I would go south, cut through the nurses station --

Q: Which side?

A: I would cut through on the south side because it's wider.

Q: This is the south side?

A: Yes.

Q: Okay. And then where?

A: And then I would go back north to 346.

Q: Okay. Would you walk through this area where Dr. Myat was found on the floor?

A: Yes.

Q: Did you see anything on the floor that morning when you walked through there?

A: No.

Q: So point to me where -- can you see 346 on this map -- on this diagram?

A: You can just barely see it at the end of the diagram.

Q: Okay. That's where you would have been drawing blood?

A: Yes.

Q: Okay. The inmate had two correctional officers in the room with you?

A: Yes.

Q: When you are working on an inmate, do you expect the correctional officers to pay attention to your health and

safety?

A: Yes.

Q: Okay. And you said you were able to draw this blood without incident?

A: Yes.

Q: Okay. How was the lighting on the third floor in July of 2011?

A: It's well lit. The morning -- the lights would all have been on. I mean it's not like shadows or anything. It would be just like the picture that you have. That lighting would be the same lighting as in the photos.

Q: You were asked a question about probability. Okay? Over objection, but nonetheless asked questions about probability. You work with these people day in and day out at Tuomey?

A: Yes.

Q: Three other nurses and two nurse techs; correct?

A: Yes.

Q: Do you know them to be good and careful people?

A: Yes.

Q: Have you ever known them to put water on the floor and walk away from it?

A: No.

Q: Have you ever known them to see a spill and ignore it?

A: No.

Q: Do you have any idea whatsoever how this water came to be

on the floor that Dr. Myat fell near or in?

A: I have guesses.

Q: Anything more than guesses?

A: No.

Q: Were you negligent?

A: No.

Q: When you walked through this area moments before Dr. Myat slipped and fell, did you see any water on the floor?

A: No.

Q: Do you look at the floor when you walk through the hospital --

A: Yes.

Q: -- hallway?

A: Typically, when I walk, I kind of --

Q: In this diagram, you were asked to draw -- well, let me go back. Can you point for me -- do you see this X? That's where you drew the X. And I may have drawn the nursing station not in relation to where you thought it was, but the X on your deposition when the red lines weren't there. Can you tell me in relation to the nursing station as its drawn in red where was Dr. Myat when you came out?

A: When I came out, his back was towards the nurses station. He was on the floor leaning against the nurses station and, in relationship to this drawing, he would be near the corner, the northern corner of the nurses station.

Q: Where this dot is?
A: Basically, yes.
Q: Dr. Myat -- you saw him leaning against the nurses station on the corner on the opposite side from where the patient kitchen would be?
A: Yes.
Q: Okay. And you've drawn in here also in blue ink as an exhibit to your discovery deposition two blocks, one here and one there. Do you see those?
A: Yes.
Q: Okay. And you were asked to draw those blocks as positions where you saw the cart was placed while the nurse techs would fill coolers with ice or alternatively fill thick plastic double bags with ice?
A: Right. The patient's belonging bag or the pitchers, yes.
Q: Okay. These are marked Defendant's 1 through 9. They'll be in evidence, but we can look at them here. Let's talk about a couple of them.
(WHEREUPON, Defendant's Exhibit Number 1 was placed on the screen.)
Q: This is looking in the patient's kitchen?
A: Yes.
Q: Okay. What is this thing right here?
A: It's a security lock.
Q: Okay. Do you have to have top security clearance to get

the code to that door?

A: No.

Q: Okay. How many doors in the hospital have the exact same code to get through it?

A: The kitchen, the clean utility, the dirty utility would all have the same code.

Q: Okay. You worked at Tuomey for six years?

A: Yes.

Q: Have you ever known the code to be changed?

A: No.

Q: Okay. It's not high security?

A: No.

Q: Is the door sometimes left open?

A: Sometimes, yes.

Q: In 2015, it has a sign on it keep the door closed. Is it always closed?

A: Typically, we keep it closed most of the time because the ice machine is noisy.

Q: Okay.

(WHEREUPON, Defendant's Exhibit Number 3 was placed on the screen.)

Q: Okay. The process that you -- you have described where the nurse techs would fill the coolers. This would be looking at the floor inside the patient's kitchen?

A: Yes.

Q: So as I understand your testimony to be that if any ice spilled while the nurse tech put the cart next to the door, the ice would fall on the floor that you see in this photograph?
A: Yes.
Q: Okay. Which, of course, if ice fell on the floor and melted and someone closed the door, the door would keep someone from stepping in the water?
A: Yes.
(WHEREUPON, Defendant's Exhibit Number 4 was placed on the screen.)
Q: Okay. Is this photograph another photograph of the floor in the patient kitchen, but looking out of the door?
A: Yes.
(WHEREUPON, Defendant's Exhibit Number 5 was placed on the screen.)
Q: Okay. Is this the nursing station that we see right here?
A: Yes, it is.
Q: And this is a nurse sitting here at one of the workstations?
A: Yes.
Q: Okay. This would be the same picture of the nursing station. There again is a nurse. And this configuration is the same today as it was in 2011?

A: Yes.

Q: Okay. So this is the nursing station. What are these things?

A: Those are patient charts.

Q: They're purple. You described them before?

A: Yes.

Q: So why are these -- you said on the far end of this nurse's counter there was a little device that held charts for every patient on the floor?

A: Right.

Q: Why are these here?

A: Those are there because they recently had orders written that have not been scanned or transcribed or they need to be reviewed by the charge nurse, but if they're there, it tells us that we need to look at those charts.

Q: Okay.

A: That's what it means.

Q: And who puts those charts there?

A: Typically, on my shift during that night we have a work clerk. Doctors tend to give charts to the work clerk and she places them. In the early morning, typically doctors know to put them over there so that we know that we need to look for orders.

Q: And can you see the area where Dr. Myat fell in this picture or where you saw him seated on the floor?

A: Basically, if you -- it's just shadowy, but --
Q: It would be over on the other side?
A: Just off -- just over the other side, yeah.
(WHEREUPON, Defendant's Exhibit Number 9 was placed on the screen.)
Q: Okay. Let's go back. Well, let's -- let's look at this for a second. The other way that you described that the nurse techs would load ice for the patients would be to put a cart right here where I'm --
A: Yes. They'd put the cart over by where the tube system is.
(WHEREUPON, Defendant's Exhibit Number 1 was placed on the screen.)
Q: And if we look back at your -- the exhibit to your deposition, again we see that's where you drew the cart in?
A: Yes.
Q: And you were asked to put a C for cart?
A: Yes.
Q: Okay. And in this fashion that's when you said they take the bag?
A: Yes.
Q: Fill the bag, a double bag, heavy plastic?
A: The heavy-duty bag, patient belonging bag.
Q: Close the bag and then put it on the cart?
A: Yes.

(WHEREUPON, Defendant's Exhibit Number 6 was placed on the screen.)

(WHEREUPON, Defendant's Exhibit Number 7 was placed on the screen.)

Q: Is this the service cart that we're talking about?

A: Yes.

Q: That the techs use? And does that service cart have a lip on it?

A: Yes, it does.

Q: So if water falls onto the cart or ice falls onto the cart and melts, it won't pour off the cart?

A: Yes.

(WHEREUPON, Defendant's Exhibit Number 9 was placed on the screen.)

Q: Where on the floor was Dr. Myat when you saw him? And this is a picture of the nurses station. You tell me do I move left? Right? You tell me where.

A: Right in that area would be where I had seen him sitting on the floor with his back to the nurses station.

Q: And you said he had his legs coming out this way?

A: Yes.

Q: Out into the center of the hallway?

(WHEREUPON, Defendant's Exhibit Number 2 was placed on the screen.)

Q: Again, when you were asked about probability, based on

your experience of working on the floor with the people that you work with, is it probable that ice fell during a transfer from the ice machine to the cart inside the patient kitchen, which is a closet, got kicked out by the nursing station out into the hallway, kicked or hit or thrown, again hit, kicked or thrown out into the main hallway, and then hit, kicked or thrown again all the way down where you saw Dr. Myat on the floor? Is that probable?

A: Not probable.

Q: Do you believe that happened based upon your experience?

A: No.

Q: Understanding, William, that you said earlier you tend to remember things that are out of the -- out of the ordinary and it's hard to remember things that are usual, do you know whether Dr. Myat had been up there -- you said you saw him and talked to him about a patient across the nursing station. Do you know whether he had been there for ten minutes or an hour and a half on this particular day?

A: I know he had been there at least ten minutes. I don't think he would've been there much longer than that.

Q: Do you know -- if he had gone to see a patient, is it quite likely that he walked through this area prior to his fall?

A: It's likely he would've walked through the area if he had seen a patient prior to talking to me, yes.

Q: From where you saw him before you went to do the blood draw on the inmate where he was seated at the nurses station, Ms. Sapp said she saw him coming back from the other direction down that hallway, down from 39.

A: Yes.

Q: That's that far corner. Would Dr. Myat have had to walk through that very same area where he fell to get to that 39 to that patient in that area?

A: Yes.

Q: Okay. So Dr. Myat may well have walked through that area moments before he came back through and fell?

A: Yes.

Q: Okay.

MR. HOLLER: Court's indulgence. Thank you, William.

MR. PADGET: Briefly, Your Honor.

THE COURT: Okay.

MR. PADGET: If you could put mine back up, please?

REDIRECT EXAMINATION

BY MR. PADGET:

Q: William, at the nurses desk right around this area where Dr. Myat fell here where now the tray cart remains, right here, this is the area where you found Dr. Myat after he had fallen?

A: Yes.

Q: Right here on the floor?

A: Yes.
Q: What is the nearest source of clear liquid to that location that's readily available?
A: The patient kitchen.
Q: Right in there? The patient kitchen right here?
A: Yes.
Q: The one that's staff only?
A: Yes.
Q: Where you keep it locked?
A: Yes.
Q: That's not accessible to visitors?
A: Yes.
Q: That's the nearest source? Is there another source of water somewhere close by at this time? Is there a visitor water fountain nearby?
A: No. There's not a visitors fountain.
Q: Is there a visitor water fountain anywhere around this area?
A: No.
Q: Is there -- was there a roof leak that you recall that day?
A: No.
Q: Any other readily available clear liquid source that is right there at that same location right by the nurses -- excuse me -- the patient kitchen? Any other source of clear

liquid that you're aware of --

A: No.

Q: -- on July the 6th, 2011?

A: Other than patients' rooms, no.

Q: And that's the stuff in patients' rooms?

A: Yes.

Q: Did visitors frequent the nurses desk between the hours of four o'clock and six o'clock on Unit 3 South at the time around the fall?

A: That I remember, no.

Q: And you have no recollections of any third parties on this particular day?

A: No.

Q: Except for Dr. Myat and except for Officer Sapp, everybody else on that floor worked for Tuomey Hospital, didn't they?

A: Unless there was people with their family members in patients' rooms, yes.

Q: Right. The ones we don't remember. The ones you do remember are the three other nurses --

A: And Ms. Sapp.

Q: -- yourself and the two nurse techs. You all work for Tuomey Hospital; correct?

A: Yes.

Q: You are employees of Tuomey Hospital?

A: Yes.
Q: Visitors don't prepare their personal water typically in the patient kitchen, do they?
A: No.
Q: That's limited to staff?
A: Yes.
Q: Is policy on the unit that if you see a spill or cause a spill, you immediately clean it up; right?
A: Yes.
Q: You don't call housekeeping and wait for them to come there and put out a yellow sign. The policy is you clean it up; right?
A: Yes.
Q: Particularly if you caused it; right?
A: Yes. Now, once the cart is prepared in the area, whether it be here as you marked or whether it be here where the cart is currently situated in this photograph, pitchers or bags of ice are prepared and then it's moved about to the unit; correct?
A: Yes.
Q: By the nurse techs? Early in the morning; right?
A: Right.
Q: And when they move it about, that cart -- they can move it this way or they could move it that way down the hall out to the various patient rooms; correct?

A: Correct.
Q: And in so doing, that cart is going to be passing by precisely where Dr. Myat fell; is that right?
A: I --
Q: In the area?
A: But the cart would have started on the other side of the nurses station, but yes, it would have.
Q: Oh, you're saying here it was starting over here?
A: Right.
Q: Then if the nurse decided to, say, move it down the hallway this way, she would have come this way?
A: Yes.
Q: Precisely across the area where Dr. Myat fell?
A: Yes.
Q: There's no other water sources around?
A: I mean there's --
Q: Nearby, I should say.
A: Accessible that we would be using, no. I mean --
Q: That's the question.
A: Right. We have sinks that we can wash our hands in in the medication room. We have sinks that we wash our hands in in the patients' rooms.
Q: But that's the nearby water source?
A: That's the nearest water source, yes.
Q: In your experience as a nurse there, has one of the nurse

techs ever spilled some water off of the cart ever?

A: I'm sure they have.

MR. PADGET: That's all the questions I have. Thank you.

RECROSS EXAMINATION

BY MR. HOLLER:

Q: Have you ever know a nurse tech or a nurse or any other employee of Tuomey to spill something and not clean it up immediately?

A: No.

MR. HOLLER: Thank you.

THE COURT: You can step down. You can step down. Is everybody okay? Do you need a break?

MR. PADGET: Judge, can we discuss scheduling just briefly?

THE COURT: Okay.

(WHEREUPON, a bench conference was held in the presence of the jury but out of the hearing of the jury off the record.)

THE COURT: Ladies and gentlemen, it's going to take a few minutes to get this next witness in; so if y'all want to go to the jury room, it'll probably take ten minutes or so.

So if you want to go to the jury room and I'll get you back out and we'll take one more witness. I'll remind you don't discuss the case.

(WHEREUPON, the jury exited the courtroom at 4:15 p.m.)

THE COURT: Okay. We'll be in recess for ten minutes or until y'all come get me. And if I haven't seen you by five, I'm going home.

(WHEREUPON, there was a break in the proceedings from 4:16 p.m. until 4:32 p.m.)

THE COURT: Okay. Bring me the jury.

(WHEREUPON, the jury entered the courtroom at 4:32 p.m.)

THE BAILIFF: Your Honor, we have all the jurors present.

THE COURT: Ladies and gentlemen, we've got -- we're going to have a short delay in getting this witness. And so instead of keeping you here -- and I'm trying to get you home by five. We're just going to quit for today and come back at 9:30 in the morning. The witness will be here at that time and it shouldn't take long to get started.

I remind you don't discuss this case or allow anyone to discuss it with you and don't go do any research. I'll see you at 9:30.

Now, if you have an emergency tonight, you need to call the clerk's office or 9-1-1 or somebody and tell them that you've got an emergency because I can't start until all thirteen of you show up. And if I don't hear from anybody and somebody is missing in the morning, I'm going to send the deputy looking for you to bring you in. So if you've got an emergency, call me. Okay?

I will see you all in the morning. Thank you.

(WHEREUPON, the jury exited the courtroom at 4:34 p.m.)

THE COURT: Okay. Is there anything -- y'all discussed this initially -- we need to clear up on the deposition? Is that something that needs to go on the record or what do we need to do? Do y'all need to talk a minute?

(WHEREUPON, there was a pause in the proceedings.)

MR. HOLLER: Judge, in the deposition of Dr. Frank Cucé, on cross-examination -- actually, let me set the stage briefly. It's not an atypical presentation at all.

Dr. Myat -- Dr. Cucé operated on Dr. Myat's knee. He then referred him to Philip Lowe in Florence for a functional capacity evaluation. Philip Lowe is a physical therapist. He also referred him to Todd Warrick.

He testified -- Dr. -- I'm sorry. Philip Lowe, using the *AMA Guides to Permanent Impairment*, gave Dr. Myat a 29 percent impairment to his left lower extremity using a quite complicated formula. Philip Lowe, whom Dr. Cucé relied upon, used the *AMA Guides -- Fifth Guide to Permanent Impairment*.

I had the Third, the Fourth, and the Sixth with me when I was taking his deposition, but the preamble and a lot of the general principle information in each of those versions are pretty similar. Okay? Sometimes the formulas get tweaked a little bit, but the general principle of what a physician does -- for example, the book says -- and I can show it to you, Judge. It's in the cross-examination.

But it says the purview of the physician is impairment, not disability. In other words, it's not the physician's job to determine disability. Contrary to that, it's the physician's job -- and in this case working with Philip Lowe -- to determine a patient's physical limitations, i.e. functional capacity evaluation.

So a part of my cross-examination of Dr. Cucé was just that, you know, what factors go into, you know, the AMA guidelines. So we talked about the difference between, for example, impairment -- the term impairment and the term disability, and that's part of the cross-examination that they are objecting to.

The other part of the -- and this is not on the record. We spoke briefly before we started the trial. So you have some idea of what's coming, but Dr. Cucé was also cross-examined as to issues of secondary gain. Again, that's something that the AMA guidelines speak to. He testified it's something that orthopedic physicians in particular like to know about. It can -- it can factor into their assessment as to whether a patient consciously or subconsciously wants to return to work, issues such as Workers Compensation claims that are pending and personal injury lawsuits, private disability insurance.

Dr. Cucé, although he had filled out one piece of -- it's actually in evidence I believe, Judge. It's a two-page piece

of paper that is, in fact, a statement for a disability insurance policy. I'm not sure he knew that or understood that, but he filled it out and he testified about it. But he was unaware that there was private disability insurance involved in Dr. Myat's care or that was a factor overall.

So part of my cross-examination of him was the fact that he said we'd like to know about issues of secondary gain that are out there, such as a pending Workers Compensation claim or personal injury lawsuit or private disability policy, and that information is helpful in assessing our patient and rendering opinions.

We believe under 703 -- that private disability policy is $8,000 a month, $96,000 a year. It's paid with after-tax premium so it's not taxed, whether that comes in or not, but the point of the matter is that raises an issue of secondary gain as to the testimony of Dr. Cucé and how earnest the patient's efforts were to return to work.

In light of the fact that Dr. Cucé will testify he never put any limitations on Dr. Myat, he never took him out of work, he never told him he couldn't work, and he didn't find him disabled, the collateral source rule -- of course, a legitimate evidentiary rule -- goes to damages. Here, we are using the private disability policy on the issue of Dr. Cucé's opinion of what he can and can't do.

And we believe an appropriate charge would be that the

private -- that if Tuomey is responsible for Dr. Myat's injuries, they cannot consider any source from other -- any income from other sources in assessing damages. That's completely separate and unrelated and we're not entitled to an offset.

And I think we could easily make it clear so the jury wouldn't take that information and misuse it on damages. And quite frankly, Judge, under the facts of this case, the damages will still exceed the statutory cap. I mean he's going to board close to $2 million in lost wages as opposed to $400,000 in collateral source income.

So it will make a difference if the jury misused the information, but I do think that's appropriate cross-examination under 703 because it's a type of information that's reasonably relied upon by an expert of this type and in this case an orthopedic surgeon.

And we have handed up a case, Judge. It was a CSC case and obviously -- I'm sorry -- a violent sexual predator case.

THE COURT: I know. You've given that case up.

MR. HOLLER: And ordinarily, all these past acts would not be admissible, but for the expert's opinion on whether or not the person is likely to repeat the sexual offense. It came in to assess only the expert's opinion, not to say because you've done this in the past, you will do it in the future.

THE COURT: Right.

MR. HOLLER: Now, if that's not inflammatory type of evidence, I don't know what would be, the fact that you've committed these offenses against people before, but in that case 703 allowed it in.

THE COURT: Yeah, but in that case and in most sexual predator cases, the jury knows about the offenses that they've committed before. This goes, you know, into the probability of whether he's cured or whether he'll repeat that. And one of the issues in that was the doctor -- part of that is to recognize he committed these offenses and recognize they were wrong and that was in his process of healing.

And so as far as inflammatory issues, the jury in those cases know why he was a sexually violent predator and know what he was convicted of. This goes to, you know, his opinion and that I don't think, you know, that he is cured for the most part because he won't even admit that he did anything.

And that's kind of different than this case. I mean I guess if you're telling me that the doctor's testimony is not about disability but about impairment rating and whether he -- whether the plaintiff is impaired at all, that goes to a medical opinion as to range of motion and what he can do with his leg. The fact that he doesn't go back to work -- how is that -- that doctor's concern in that if he says he's medically and physically capable, he's impaired 29 percent of

what he normally was --

MR. HOLLER: Judge, I have a copy of the video deposition. It's about an hour and a half. He is asked in direct examination -- Dr. Cucé -- if he -- and it was the way it was brought out on direct examination. Did you give him a disability placard? Was it permanent? Will he have -- you know, will it be forever? I mean the tone of the direct examination was this guy fell and is disabled.

THE COURT: And this -- and this -- did he give him a disability rating?

MR. HOLLER: No. He gives an impairment rating.

THE COURT: Right. You know, he's impaired to this degree. Now, whether he's disabled or not will depend on whether this impairment keeps -- you know, that's another question.

MR. PADGET: I asked him in direct -- you may have misheard, Your Honor. Did he give him a disability placard for his car so he could park in a handicapped parking spot --

THE COURT: Oh, okay.

MR. PADGET: -- is what I asked him. And I certainly --

MR. HOLLER: I think --

MR. PADGET: I'll let David finish before I speak.

MR. HOLLER: Well, I think given the nature of the direct examination and the opining that he's disabled and that this doctor found him disabled and this doctor -- you know, the

insinuation is he took him out of work.

That's again what we believe opened up the door and made it relevant, and Dr. Cucé says for orthopedic surgeons treating people who are involved in insurance claims and litigation of whatever type, Workers Comp, personal injury, that's very important information for them to know to assess -- do I need to refer this patient to psychological counseling? Do I need to refer this patient to occupational therapy? He's going to say when he saw him on the second to last visit there were five or six things that he recommended that Dr. Myat do, none of which were done.

And again, when you're assessing do I send him -- make this referral, do I make that referral, part of that picture is what else might be going on with this patient. In other words, he's looking at the total circumstances in front of him to decide whether I need to pursue another option for possible recovery.

Judge, we can certainly give you a copy of the deposition or we can give you -- if you want to play it or a written copy, the paper copy, to make it all clear.

THE COURT: I'd love to see the paper copy now.

MR. PADGET: Judge, I think we gave up earlier a paper copy --

THE COURT: Okay.

MR. PADGET: -- with the exceptions highlighted that --

THE COURT: Okay.

MR. PADGET: -- are subject to our objections that are detailed in our motion *in limine* we filed earlier.

THE COURT: Okay.

MR. PADGET: But --

THE COURT: So the issue is you're objecting to David's cross?

MR. PADGET: That's correct.

THE COURT: Okay. And you're objecting under the collateral source rule? Is that basically your objection?

MR. PADGET: There's a couple of bases for the motion, Judge.

THE COURT: Okay.

MR. PADGET: The first is the collateral source rule.

THE COURT: Okay.

MR. PADGET: As a general rule, I get yelled at when I talk about Workers Comp or disability policies or anything else in a courthouse and then people start threatening mistrials usually and all that sort of stuff.

So the first basis of our motion is that anything barred by the collateral source rule is barred by the collateral source rule, whether it's cross-examining an orthopedic surgeon, in this case, who knew nothing about any of that. So clearly it wasn't the basis of any of his opinions because he didn't even -- he didn't even know. And when he said, well,

sure, I'd like to know, it didn't change any of his opinions.

THE COURT: Oh, okay.

MR. PADGET: He just said, oh, okay, I found out about it. So the first part of it is any reference to Dr. Myat's disability policy that he's receiving should be stricken under the collateral source rule. Any reference to Social Security disability benefits should be stricken under the collateral source rule. Any reference to Workers Compensation -- which has a particular risk of confusion in this case because Dr. Myat was on the job, but he was not an employee of the hospital, and we have a significant concern with these folks when they go back and deliberate on the case may take any reference to Workers Compensation the wrong way.

So any -- any part of a deposition as we've outlined in our motion that makes reference to any one of those collateral sources should be stricken.

And then Mr. Holler's argument about the secondary gain. Secondary gain is something I did some research on because I've never even really heard of it until David started cross-examining the doctor on it in this case. But I did some research on it and it -- it's a -- it's a theory that the Defense Research Institute put out a while back and did some presentations on it, but the thought of it is what we can't get in directly through the -- through the -- because of the collateral source rule, we're going to try to slide in through

our experts that it is some basis of their opinion.

And all the courts that have dealt with it have looked at it and said, well, let's look at its particular relevance in the case, and we put those in a footnote in our brief. But they said if there's evidence in the case of whether or not the particular patient is feigning the injuries, then the doctor might want to know they're getting some money from Workers Compensation or from a disability policy.

But here, I specifically asked Dr. -- Dr. Cucé and he was adamant that there was absolutely no reason to believe Dr. Myat was feigning any of his injuries, any of his symptoms, and we've got a picture we're going to put in of his knee splayed wide-open and all that other stuff during the surgery.

So here, it just doesn't have any application and would only serve to confuse the jury under Rule 403. So we'd asked the Court to keep out the collateral sources, the reference to secondary gain.

And then the one other issue David brought up on his cross of the doctor is that -- and it wasn't certainly my intention in bringing up a disability placard. It was my intention to bring up not that he was disabled, but that he needed the placard to come and go from the doctor's office or everywhere else because the doctor was concerned about his walking limitations.

But there's a fundamental difference legally between

impairment, which physicians talk about in these cases, and disability, which we're -- which Social Security commissioners evaluate. And to the extent that David's cross discusses disability, it's -- it's implying the wrong legal standard that we're talking about and would further serve to confuse the jury.

So for those reasons, what we specifically set out in our motion -- and I'll make sure the Court has a copy --

THE COURT: Okay.

MR. PADGET: -- if you want to read it. The deposition is about 60 pages, and in 58 of them there are no objections by either party. So most of it is going to come in, but right at the end of David's cross those concerns were raised and we'd asked the Court to exclude those.

THE COURT: Okay.

MR. PADGET: There's one thing I need to know because I'll need to prepare the video, the sections of the video that are actually going to come in or not; so I would appreciate a little heads up with the Court about what's fair.

And then the idea -- presuming David got some of his cross-examination in, I asked some questions too I think on redirect that if his come in, I want mine to come in because they relate to those issues, but if they -- if his stay out, then certainly mine equally should be -- should be stricken.

THE COURT: Okay.

MR. PADGET: Thank you, Your Honor.

THE COURT: All right. I'll go back there and read this real quick and talk to my law clerk if y'all need to know something tonight so you can redact it.

MR. PADGET: Tomorrow is fine, Judge. It'll just take me ten or 15 minutes to make the notations of the actual times in the video where I'll need to pause it and move it forward.

THE COURT: Okay. Well, I'll let you know first thing in the morning then.

MR. PADGET: Do you have the --

THE COURT: Yeah.

MR. PADGET: You've got it? Okay. Very good.

THE COURT: Okay.

MR. PADGET: Thank you.

THE COURT: I'll see y'all in the morning then.

MR. HOLLER: Thank you, Judge.

MR. HINSON: What time are we going to start in the morning, Your Honor?

THE COURT: The jury is going to be here at 9:30. I'll probably be here at nine. Okay.

(WHEREUPON, the proceedings adjourned for the day at 4:51 p.m.)

--- CONTINUED IN VOLUME II of III ---

State of South Carolina	)	Court of Common Pleas
	)	Third Judicial Circuit
County of Sumter	)	Case No. 2012-CP-43-02030
	)	
Win Myat,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Transcript of Record
	)	(Volume II - Day 2 of 3)
	)	
Tuomey Healthcare Systems,	)	
	)	
Defendant.	)	
	)	

Aug. 31 - Sept. 2, 2015
Sumter, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Judge; and a jury

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Court Reporter

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SEPTEMBER 1, 2015

(WHEREUPON, the proceedings resumed at 9:39 a.m.)

THE COURT: Okay. Are we ready for the jury?

MR. HOLLER: Judge, yes. Judge, I wanted to follow up on the discussion that we had yesterday afternoon.

THE COURT: Okay.

MR. HOLLER: In Dr. Cucé's deposition, I used the term secondary gain and that's the issue that we believe makes the private disability policy admissible. And Mr. Padget mentioned something about the Defense Research Institute maybe came up with that term secondary gain, which kind of stunned me because I've never known -- I've always known of the -- of the concept, at least since I've been practicing law. It turns out that that term was coined by Sigmund Freud; so it's been around a little longer than the Defense Research Institute.

And, Judge, it's not synonymous with malingering. And again, I've got a medical literature document that I'll hand up, but at the risk of oversimplification, it is a battery of tests that the DSM-III -- that's designated to determine if there may be issues of secondary gain as well as malingering, but secondary gain is different from malingering primarily in the sense that it may not be the intention of the patient to not want to get well.

In other words, consciously the patient says I want to

get well. Secondary gain says there may be some reason subconsciously -- and it's a little bit more complicated than that. I'm certainly dumbing it down for myself, but there's -- there's long-standing literature that suggests that it is a component that is to be addressed whenever a patient doesn't recover as expected, which is what happened in this case.

And if you've read Dr. Cucé's deposition or portions of it, you'll see on the second to last visit he gave five or six recommendations of what Dr. Myat may have benefited from, and one of them was psychological evaluation and testing. That did not occur.

And just because that wasn't explored doesn't mean that couldn't be something the jury could consider in evaluating Dr. Cucé's testimony. Again, I'll hand this up. This is a 2006 article that simply talks about some of the origins of the principle.

THE COURT: Okay.

MR. HOLLER: But I certainly didn't want to leave the Court with the impression that I made that up or that some defense attorney somewhere made that up.

Also, Judge, just as a matter of housekeeping -- I have two of those articles if you'd like another copy, Judge -- I have requests for charges.

THE COURT: Okay.

MR. HOLLER: If the witnesses proceed as we discussed

yesterday afternoon, I may be able to call the one witness that I have before or after lunch. We could potentially finish the testimony and, Your Honor, I don't know what your position would be on arguing and charge, but I'll be ready to go forward --

THE COURT: Okay.

MR. HOLLER: -- if our schedule allows. I know we -- once we get far into Wednesday, we have issues.

THE COURT: Okay. All right. I'll be glad to -- if you've got any charges, pass them up and we'll deal with them. You know, we may get to jury today.

MR. PADGET: Judge, I'll be happy to. I brought some charges as well and I meant to pass them up yesterday. Some judges I've found want lots of whole charge from counsel and some really don't want us to submit too many charges, but we brought some and I'll be happy to give them to the Court.

THE COURT: Okay.

MR. PADGET: Addressing the secondary gain issue, if I said yesterday it was created by the Defense Research Institute, I misspoke. What I found was in several presentations over the last four or five years, it was a concept that was advocated by the Defense Research Institute. If I said that they created it, I misspoke.

But nonetheless here, if secondary gain has been around since Sigmund Freud, which is nearly 100 years -- 75 or 100

years or so, and the principle of the law has remained that secondary collateral sources do not come into evidence during the same time, I could see in every case -- in every case where someone is injured and receiving any sort of benefit, whether it be a disability policy, Social Security disability or whatever it is, that would come into evidence.

And for these many years, of course, it has not. And the reason it has not is because its probative value is really very little in the scope of the case, particularly where here the doctor says there's no issues of malingering or anything else. These are very serious injuries, and the prejudice that comes from it, of course, would be great, and that's why the collateral source rule -- in part, the reason the collateral source rule has remained to exclude that -- that type of evidence from a jury's consideration.

And of course, you know, the typical charges -- in Judge Anderson's charge book for example, there's a collateral source rule charge for the juries not to consider any -- any secondary collateral sources. And here, there's -- no position is different with regards to secondary gain.

I'm really quite curious as to why the defense is advocating so hard in this case to put forth the policy. It is, in the scheme of things, a fairly substantial amount of income from a disability policy, $8,000 a month, but I don't see how that's relevant to any fact at issue in this case.

And the truth is that's $.15 on the dollar of what Dr. Myat was making in his practice.

And the mere suggestion that he would want to feign injuries, which there will be no evidence that he is feigning any injuries, to earn $.15 less on the dollar than he was making in his practice, I just don't see how that's particularly relevant in the case and if the -- but the jury could hear that dollar figure and it may very well -- his disability income may very well be much more than many of them make, you know, working hard every day. And, of course, that could prejudice the jury in consideration of the damages and the issues in the case.

So for those same reasons set forth in our brief that we handed up yesterday, we'd ask these issues of secondary gain and collateral sources be excluded.

THE COURT: You know, in at least my understanding of this case, I think the collateral source rule applies and that his compensation -- you know, it's not like -- you know, he has some pain and some issues where he's feeling that he can't go back to court -- I mean -- I'm sorry -- go back to work and the doctors can't find the source of his pain or the source of his disability and they are trying to -- you know, they can't find any medical reason why he should not function. And then it gets into the psychological issue, secondary gain and why he would not want to go back to work.

But that's not the situation in this case. There's plenty of medical documentation of his injuries and his source of pain and, you know, the secondary gain situation may be -- you know, you could technically argue that there's some psychological reason that he won't go back to work and there may be. I mean I don't know what it is and it may be some issue in the fact that the doctor is recommending counseling and he won't go and I -- I think you could may argue that part to the jury that we don't know why he won't go back to work and it may be some underlying psychological issue.

But -- but the collateral source of him receiving disability income shouldn't come in to support that because I think the collateral source rule is there and the fact that he was earning, you know, so much more working than he does on disability. Even though he's got a substantial disability policy, you know, he could earn so much more working.

And so, you know, you may can explain to the jury that there's something going on outside of his medical condition that's keeping him from returning to work without bringing out the fact that he's getting a disability policy, and that may be -- and that may be the situation with the doctor that his secondary gain of getting $100,000 a year or whatever, you know, on the disability policy is -- I mean I think it violates the collateral source rule and that technically that shouldn't come in. But that doesn't mean you can't explain to

them that there's some other reason that he -- there's some psychological reason that he doesn't want to go back to work.

MR. HOLLER: And, Judge, I certainly respect your ruling. Just for the record to make sure that I'm clear and the record, under 703 -- 701 --

THE COURT: Right.

MR. HOLLER: Because it's information that orthopedists rely upon when evaluating patients and how they respond, there is -- without question, every doctor that's looked at Dr. Myat has said he could do his job, has not pulled him out, has not put restrictions on him. It is a legitimate question for this jury to wonder why. It is a legitimate question for this jury to wonder in evaluating Dr. Cucé's opinion why he did not follow through with the five or six things that he recommended that he would benefit from. I mean --

THE COURT: And I --

MR. HOLLER: And they -- and I'm just trying to preserve the record.

THE COURT: Okay.

MR. HOLLER: That the collateral source rule simply says that Tuomey does not get an offset on the issue of damages. That can clearly be cleaned up and corrected so there is no violation of the collateral source rule and tell the jury in awarding damages that you may not consider income from any other source. I'm telling you as a matter of law not to

consider that when assessing your damages.

But as it relates to Dr. Cucé's opinion as to whether -- you know, why he didn't progress as you would expect a patient to progress with this injury and recover, that's the issue. He did not respond normally.

The majority of people with a 29 percent impairment to the left lower extremities still work, actually all. It's not a disability unless you're a left-footed field-goal kicker in the NFL. This is not an injury that typically leads to disability. This is what the jury, if they're deliberating properly, will consider, and the fact that he's got issues of secondary gain and that's something that Dr. Cucé relies upon is vital that they know that information to be able to assess Dr. Cucé's opinion.

THE COURT: Okay. Then let me see that charge on the collateral source rule. Where's the charge that's in Judge Anderson's book?

(WHEREUPON, there was a pause in the proceedings.)

MR. PADGET: Your Honor, if I may approach?

THE COURT: Okay.

MR. PADGET: I just have the actual book, but that's the Anderson charge. It's at 1320.

(WHEREUPON, there was a pause in the proceedings.)

THE COURT: Have you got a copy -- my law clerk went to look for our copy -- of the last two pages of the deposition?

The last two pages of the doctor's deposition? My law clerk has misplaced our copy. Can you let me see that one more time?

MR. PADGET: Sure.

MR. PADGET: Judge, here's the doctor's deposition. I had turned to a couple of pages that I wanted the Court to consider.

Page 37 where I had asked the doctor -- this was in June of 2012 after he's treated him for about a year and he says -- I asked him:

Are you going to write it's your medical opinion he'll have difficulty continuing his medical practice as an infectious disease specialist due to the fact he's not as mobile as he was before and does not have endurance and strength of that extremity? Doctor, was that your opinion in June of 2012?

Yes.

Did you hold that opinion to a reasonable degree of medical certainty?

And I would note just in June of 2012 in his office notes long before this lawsuit was ever filed, Dr. Cucé wrote:

It is my medical opinion he will have difficulty in continuing his medical practice as an infectious disease specialist due to the fact he is not as mobile as once before and does not have the endurance and strength of that

extremity.

This is stuff we're going to offer into evidence obviously as part of this. Here's the deposition and we've highlighted the sections that we're concerned about. And I think it begins at page 50 --

THE COURT: And that's -- and that's what I'm missing on this one issue.

MR. PADGET: That's where it starts is the highlighted section there.

THE COURT: Okay.

(WHEREUPON, there was a pause in the proceedings.)

THE COURT: Okay. I see where you were talking about the secondary gain on page 67 and the actual money. Where does the doctor say that he can't -- that the secondary gain situation is psychological that he won't go back to work? Is that in here specific?

You know, in the Workmans Comp, the problem in referring to all these Workers Comp situations is there wasn't Workmans Comp. He's not entitled to Workmans Comp and it implies in here that he would. So how are you going to explain that to the jury? I mean --

MR. HOLLER: Judge, the issue in evaluating any patient -- and it's more complicated than just -- secondary gain can be beyond Workers Comp lawsuits and disability policies. It can be a mother who pays you no attention unless you're sick.

It can be a wife that was threatening to divorce you, but now is not because you're sick.

There -- there's -- there is a multitude of factors. It's very complicated, but it's a component of what orthopedic surgeons do when trying -- and again, the referral to the psychological testing. It goes beyond what they do, which is basically overpaid carpentry of putting bones back together, and it deals with other aspects of a patient's life.

In this case, I don't think anybody would disagree, including the jurors, that Dr. Myat did not respond to treatment as anticipated. He had a less than optimal outcome and it's not explained. It's simply not explained.

And what we were discussing with Dr. Cucé is that issues of secondary gain are to be considered, that the orthopedist has to look at that and realize there could be things going on in a patient's life other than the bone structure.

THE COURT: Okay. And where in here did Dr. Gaines say -- I mean Dr. Cucé say that he -- that his basis is on secondary gain?

MR. HOLLER: He said -- well, he says on page 69 that that's the type of information that he would want to know when evaluating a patient. He did not know about the disability policy until he was asked about it.

THE COURT: Okay. So -- so obviously, that's information that he'd like to know, but --

MR. HOLLER: Which he did not.

THE COURT: -- where in here did he use that information to do any kind of assessment on him?

MR. HOLLER: The point of the cross-examination is that he didn't have all the information, that that information was kept from him, and that affects his opinion and how the jury should view it because he says that's the type of information that I would like to know, that orthopedic surgeons reasonably rely upon.

THE COURT: But they reasonably rely upon that in doing a disability rating or an impairment rating, don't they?

MR. HOLLER: They will -- they use that information at every stage of treating a patient, particularly a patient that doesn't respond as expected. You expect someone to go to surgery, they come out and go to rehab, and they get essentially well, though there are some that may not come out perfect. When the patient doesn't progress as normal, that's when those issues must be considered, such as I'm recommending this patient eleven months' post-surgery to go to a psychological evaluation, to go to work-hardening therapy, to go to occupational therapy.

That's one of the components of what the orthopedics do and that's what 703 says. That's something that they rely upon in making their decisions. And the fact that he was not given a significant piece of information -- and that is

$96,000 a year in income based on not being able to go back to work.

THE COURT: I understand. I understand that. So now that he's been given that, does he change his opinion in any way?

MR. HOLLER: He did not. But I think that's --

THE COURT: So then what probative value is that information to him or the jury?

MR. HOLLER: Well, Judge, simply because -- because he says that's the type of information he relies upon, 703 makes it admissible, with a curative instruction that the jury cannot consider that income in awarding -- if they choose to award damages. Those are two separate issues. Damages -- and we're not speaking to damages. We're speaking to why did this patient not progress as expected and issues of secondary gain are a component of how that doctor evaluates his patient. I would submit to you had he known that information earlier, like while he was treating, it would have made a difference, not four and a half years later when he hasn't seen his patient in three years.

Again, it goes back to this is information that he likes to know at the time he's rendering care. He didn't know it then. He didn't know it until years and years later.

THE COURT: I -- I understand, but if he's -- if he didn't know it then and it didn't affect his recommendations

or treatment, it would have only affected now an impairment rating. I mean how would it in any way affect his treatment of the plaintiff if he didn't know it?

MR. HOLLER: The fact that it was concealed from him and he didn't know it is significant. The fact that had he known that at eleven months, he could have insisted or made the referrals --

MR. PADGET: He signed the forms for the disability policy, Judge. He knew it.

MR. HOLLER: If he -- if he knew what it was. When I asked him about the policy, he didn't know about it. He said I didn't know that in his deposition.

THE COURT: Okay.

MR. HOLLER: He could have insisted, for example, had he known --

THE COURT: Well, my whole thing is what's the benefit in this case of telling this jury that and then telling them they can't consider it when there's nothing that they can consider out of it? I mean if -- if the doctor didn't consider it and the doctor didn't use it and the jury can't use it, then why -- then why do we need to tell them?

MR. HOLLER: Because the doctor testified that that's the type of information that he routinely -- that orthopedists routinely rely upon.

THE COURT: I understand that, but that's -- the fact

that the doctor said we normally rely on this information, but I didn't rely -- you know, you can ask them any question did they rely on, but I didn't know about it in this case and I didn't rely on it in this case, it had nothing to do with my opinion in this case, why should it come in?

MR. HOLLER: He said more information is better. He would have wanted to know at the time he was treating him.

THE COURT: I -- I -- I understand he says that, but what benefit is that going to give to this jury at all in making their decision?

MR. HOLLER: Because they are going to have to -- they are going to have to answer the question why didn't he go back to work. It's the question that you had in your mind. It's the question that everybody's had in their mind. No doctor is going to testify he can't go back to work. No doctor has put him on work restrictions. No doctor has told him not to go back to work.

THE COURT: Okay.

MR. HOLLER: Yet he's saying he can't work and he's asking for wages for several years. So that information is very probative and it's admissible under 703.

THE COURT: Okay. Any reply?

MR. PADGET: Judge, first of all, the doctor -- I'm reading page 67 of his deposition and when David asks him the fact that -- he says the fact that you applied for and are

receiving disability benefits -- the doctor says okay, right, 8,000 or 96 -- 8,000 a month or 96,000 a year. The doctor says okay.

David asked could this be someone choosing to be disabled rather than choosing to get well as they could? And the doctor says I don't know the answer to that.

Is that something you would consider to be significant in making a determination of disability? And again, you've been asked this twice since he can't work as an infectious disease doctor and a permanent disability placard and the doctor says let me clarify that. It's called a disability placard. It's not an impairment placard. I can't change what it's called.

Answer: Right. So I didn't say that. I know you were asked that question. So that's that. As far as this is concerned, my opinion was that he would not be able to work at full capacity. I didn't say he couldn't work at all. I just said that he would not be able to work at full capacity due to his injury.

And then he says -- David asks so you didn't take him out of work; right? I didn't make that determination. The insurance company made that determination.

The doctor testifies repeatedly in his deposition that in his opinion in light of Dr. Myat's physical limitations he can't perform the duties at full capacity of an infectious disease physician.

THE COURT: Okay. So why do you want to exclude that?

MR. PADGET: No, I don't want to exclude that. I only want to exclude the reference to the disability policy itself.

THE COURT: Okay.

MR. PADGET: The $8,000 a year, the 92,000 a month [sic.] because that is not a fact that is relevant for the jury to consider. I mean, quite frankly, I think what obviously has happened here is the defense wants to get the fact he's getting other money into evidence so -- so that they'll either reduce a verdict for them, if there is a verdict, or say, well, he's getting some other money. That -- I mean if we boil it right down to the truth, that's why we want to get this into evidence. That's why the defense does. We, of course, want to keep it out.

And the -- and the seminal case -- it's in the evidence handbook on this under Rule 411 relating to insurance. This is about -- the case relates to Workers Compensation benefits, but the principle is equally applicable to disability benefits.

The amount of compensation paid by the employer or the compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages. That's the *Ryland v. Southern Equipment* case from the Court of Appeals back in 1998.

That's the rule and the rule is there for a reason, which

is that the folks developing the rules knew that juries -- if juries knew that people are getting money from other sources, they are less likely to assess damages against those defendants.

It doesn't change this doctor's opinion --

THE COURT: Right.

MR. PADGET: -- one way or the other, as the Court has pointed out. So I mean the only point that I can see in the cross-examination is trying to just get into evidence the fact that he's receiving a disability policy. There's no other relevant fact that that goes to.

THE COURT: Okay. So you're objecting to line 66 -- I mean page 66, line 25, 67, which is line 1, 2 and 3, that question, and then the $8,000 a month. If you take those out, then there's no other reference; right? And everything else is admissible?

MR. PADGET: I'd have to -- Judge, you have my copy.

THE COURT: Okay.

MR. PADGET: So I have to look and see these --

THE COURT: Outside of the -- the objections to the amount of money coming in under that, you know, is there anything else in here that's objectionable? And you need to look at the -- and we can get there. I mean it's almost like a situation of objecting to whole pages on theory. It's almost -- you know, it's question-and-answer that you object

to and if -- and if the objection is the money doesn't come in but everything else comes in, it seems to have satisfied his argument, you know, unless there's some other reason why he's not working short of telling the jury how much money he was getting.

MR. PADGET: And that's precisely why we think it's prejudicial. Judge, it's just David's argument. There's no piece of evidence that any witness in this case will testify to. They could have retained an expert to say Dr. Myat could work. He could do this. He could do that and I've evaluated him. He can do this job. He can do that job. He can make this much money.

All of that was the defense's option to be brought here. They chose not to do it. Instead, they chose to bring up the disability policy amount with the treating physician, who, keep in mind, this is a Tuomey employee.

THE COURT: All right.

MR. PADGET: This is -- Dr. Cucé is a Tuomey employee who is saying that I didn't consider that, it wasn't a part of my determination, and when David crossed him on the issue, he says I'm not saying he can't work at all. I'm saying he's going to have difficulty and he can't work at full capacity. That part comes in clearly.

THE COURT: And on its face, you know, he's sitting there testifying and you object to that question about the money.

You know, I would sustain that objection.

MR. PADGET: Sure.

THE COURT: Because he didn't -- he didn't say he considered it. If he had considered it, it would be a different ballgame, but on its face it just brings in the amount of money, which has no probative value.

And so it's just those particular questions. The rest of it seems to come in, which satisfies both sides, doesn't it? Other than -- the only thing it cuts out is the amount of money he's receiving and what does the jury need to know that for? Because the way the questions are lined up --

MR. PADGET: The other references to Workers Comp and disability and everything else, it's -- in many ways, Judge, it's the same principle. It's just trying to infuse to the jury the idea that there's compensation in other areas, which we all know is inappropriate for them to consider.

And so I just don't understand how any of this relates to his bone was broken, his knee was broken, there's permanent impairment related from the knee which is not disputed, and there's limited range of motion and so forth from that. In my opinion, he can't do what this doctor knew an infectious disease doctor did or he certainly can't do it to full capacity. That's what the doctor said.

THE COURT: Okay.

MR. PADGET: Whether or not there's Workers Compensation

benefits in the world or Social Security disability or disability insurance, all of that is a collateral source that there is a prohibition of mention of insurance in a trial. We're all taught that early on. You don't say it. It can be a mistrial if you do.

And here, there's no probative fact whatsoever that that goes to. I submit it's only to mislead the jury, which is just outright prohibited under the *Ryland* case and under Rule 403.

THE COURT: Okay. And it seems to me that there's an objection to line -- question 25 on 66 and at the top of 67 dealing with $9,600 a year and 8,000 a month -- 96,000 a year. I'm sorry. That I would sustain those objections and those figures don't come in.

The other line of questioning, unless y'all give me specific lines of what violates it, the rest it seems can come in. And I hadn't even -- you know, those are the only references I see to the disability policy and the amount, and the jury doesn't need to know it.

MR. PADGET: Judge, can I trade with you? Can I get --

THE COURT: Yeah. And there may be others that we need to deal with on a case-by-case basis. Now, is the situation where we can bring the jury in or do we need to know this now? Are we finished at least with everything but the deposition? Or do we need some time?

MR. PADGET: Well, the next witness is Ms. Yates.

THE COURT: All right.

MR. PADGET: Which I don't think any of this will be brought up, and then Dr. Myat and, of course, we -- we would object to any line of questions about any of the disability policy with Dr. Myat.

THE COURT: Okay. In -- in the case that Mr. Padget has cited, you don't think it's the law in the state about it can't come in?

MR. HOLLER: First, Judge, Rule 411 has to do with liability insurance. That's not the collateral source rule. Rule 411 says the fact that someone is insured with liability insurance is not admissible and a mistrial is the result if it comes into evidence. We -- he's -- he's conflating the two issues and they're not related.

THE COURT: Okay.

MR. HOLLER: The collateral source rule is a damage rule. It says we do not get an offset or a credit for income that an injured party has from another source. That is not why we're asking. We're asking under 703 that one of the considerations an orthopedist -- thank you -- and it's --

THE COURT: I understand that, but he doesn't say that. I mean I understand your argument, but -- but you -- show me in here where he says that.

MR. HOLLER: The rule is not necessary that that witness

relied upon it, but that under 703 experts in that field rely upon that information.

THE COURT: I understand that, but did you -- you know, his testimony -- if you never asked him that question, you can't -- is there anywhere in here -- and I haven't found it -- where you say experts in the field rely on this and he says yes?

MR. HOLLER: Yes, sir, 96. I'm sorry, 69.

THE COURT: Okay.

MR. HOLLER: In rendering your care -- line -- page 69, line 11.

You said in rendering your care to a patient you would want to know that information. The more information the better. Answer: Sure.

And that's -- we've been talking for two pages about this secondary gain issue.

MR. PADGET: And he says I guess they would. I don't do that, but I assume they would want that information.

MR. HINSON: Your Honor, if you ask a doctor would you like more information, the answer is always going to be yes.

MR. PADGET: Yes.

THE COURT: I understand that.

MR. HOLLER: Judge, in this case, the reference was made why didn't you hire an expert. Well, we didn't need an expert. Number one, our doctors who -- the physicians we

employed are not leashed the last time I checked. We can't change the way they practice medicine.

Number two, Philip Lowe, who does not work for Tuomey Hospital, said he can go back to work. He clearly said he could go back to work. He placed no restrictions on it. He's a physical therapist who did a functional capacity evaluation. We didn't hire an expert because we didn't need one. Dr. Myat's expert told us he could work.

THE COURT: I -- I understand that and that will come before this jury. The question is the specific objections that I have and it almost needs to be on a question by question basis of what you're objecting to and I need to rule on those questions versus the last three or four pages because, you know, I can't just take the last three or four pages out of a deposition unless the whole thing is -- if he was testifying, you would have to be objecting to the question and I would rule on the particular questions.

MR. PADGET: Sure. Judge, it seemed to me in the deposition beginning on page 65 down to line 24 --

THE COURT: Right.

MR. PADGET: -- where we've made the notes, there's just repeated references here to multiple collateral sources. They're referring to what a disability determiner would make, which is a disability commissioner, which has nothing to do with this case. And then he talks about -- the doctor talks

about his limited involvement with disability claims. He says I don't make that determination. I just send my notes to the people who do.

And then he goes on to say the AMA guidelines -- the group of people that make the determination of disability would want to know about issues of secondary gain, would they not? His answer is I guess they would. It's not what I do. He's referencing what disability determination examiners do, but I guess they would.

And if some patient of yours had applied for disability under a private disability policy of 96,000 a year without paying taxes on it, is that something that would be significant in making a disability determination? He goes on to say the fact that someone applies -- he says okay, right. 8,000 or 96,000 a year. Okay. And he says could that be someone who is choosing to be disabled rather than choosing to get as well as they could?

I mean the implication is is Dr. Myat making a choice not to get better to get disability policies and he says I don't know the answer to that.

Is that something you'd want to consider? And he -- then he says I can't change what it's called about the disability placard.

And then he finally gets to the point here at the end and he says, so that's that. As far as this is concerned, my

opinion was that he would not be able to work at full capacity. I didn't say he couldn't work at all. I just said he would not be able to work at full capacity due to his injury.

And then he says you didn't take him out of work; right? I didn't make that determination. The insurance company made that determination with regard to the policy.

Now, clearly, that reference to insurance we think should be stricken as well, but the whole line of questioning -- you know, if it gets into -- as far as the one section of -- about his ability to work at some capacity but not full capacity, I think that's fine there at that part of 68, but all the references to disability and insurance and then later we get onto Workers Compensation training and we talk about Workers Comp for a while on the same -- the same notion.

Notice we didn't try to take David's cross-examination out when he didn't make reference to that, which where David asks him you didn't take -- this is page 70. You didn't take him out of work? No. You didn't tell him not to work? No. You didn't limit him? He says let me qualify that. I'm pretty sure I gave him out-of-work notes initially on, especially right out of the surgery.

And so then David goes on to say -- but you're not the guy that found him disabled, and the answer is no. Again, that's not the determination in this case. That goes to our

motion *in limine*.

Whether or not he's disabled under SSA disability standards is not what we're litigating in this case. The Commissioner has already found Dr. Myat to be disabled under the federal disability regulations, but a cross-examination that focuses on disability and Workers Compensation and all these other things, quite frankly, it appears is just intended to put those inflammatory issues in front of the jury.

It has -- except for the section where the doctor says I didn't put permanent limitations on him or complete limitations, I just said he wouldn't be able to work at full capacity, I think that's fair game to come in, but everything else where we're just talking about these collateral sources should -- should stay out.

And the *Ryland* case, by the way, is under Rule 411. I'm happy to show David the citation and what it's referencing. It's referencing Comp benefits under the rule, which has nothing to do with liability insurance. But that's *Ryland v. Southland Equipment* and I'm happy to hand up a reference.

But the rule there -- the rule works both ways under 411. I don't need to put up evidence of the insurance nature of the hospital. Well, it's not really the hospital's money that's going to be paid here, and the same token, if there are collateral benefits, the defense doesn't get to put that up. That's been the rule for a long time and it shouldn't change

in this case.

THE COURT: Okay. Do you want to respond real quick?

MR. HOLLER: Judge, I would just ask for some deference. This deposition was taken in Harrisonburg, Virginia, and to just without objection take out whole lines of questions is really unfair when I don't have an opportunity to try to correct those questions with Dr. Cucé.

I believe I established in his deposition that that's the type of information that his profession relies upon. Whether or not he chose to consider it I think is irrelevant. It's proper cross-examination and admissible under 703. As an accommodation to simply remove the numbers may be one appropriate way to address it.

THE COURT: Okay.

MR. HOLLER: And there's a -- you know, there's a pretty good argument that $96,000 a year after tax is the equivalent of $200,000 a year taxable. If you're in the maximum tax bracket, you pay self-employment tax of seven percent and state tax of seven percent. You know, it's not as uncomparable and it's not $.10 on the dollar.

So I'm okay with not going there, but I do think since that's something -- it's a question that's burning in this case. It's a question this jury is going to grapple with and that is relevant, admissible evidence under 703 for them to use.

THE COURT: Well, I understand that, and insurance and benefits in every case is what a jury wants to know. You know, the fact that the legal profession has decided to stick our head in the sand in every case and not mention insurance -- especially in an automobile wreck. Everybody that drives a car understands about insurance. We just can't tell them that. And it seems to me it's crazy that we can't come up with a definition to explain that to the jury to deal with that issue in trial. You know, the Supreme Court says we can't do that and the juries understand that.

And in this particular case, how much money he's getting -- they don't need to know in making their determination. If you're a doctor and said part of my diagnosis is I've taken into account that he's getting $96,000 a year and that that may affect his ability and I have considered that and that may be affecting his ability in not getting well, then that's a different story.

He didn't consider any of that. So, you know, I don't know how the numbers are going to -- it didn't help the doctor's diagnosis. Then how is that going to help this jury? You know, now, the consideration of what is normally done on cross-examination and why he doesn't go back to work and there may be other issues, but I don't know why you need to tell them how much money he's getting.

And so I think the money stays out. Now, the other

questions may go and you almost would have to object, you know, on a question by question basis. I just don't think it's any benefit for this jury to know how much money he's gotten every month because the doctor didn't say it.

If he had said I considered that and that helped my findings and that's a normal consideration that my profession takes into consideration in treating a patient and why he's not responding and what we should do and I did that in this case and the patient wouldn't go to seek psychiatric counseling and so I didn't know what else to do for him, then that may be relevant, but it wasn't in this case.

So I'm going to leave the numbers out. The rest probably will go, other than if you've got a specific question that deals with that, I can deal with that. And we can -- you know, I guess at this point we can get started with the other witnesses and then deal with the deposition right before we need to take a break. Okay?

All right. Bring me the jury.

(WHEREUPON, the jury entered the courtroom at 10:30 a.m.)

THE BAILIFF: Your Honor, we have all the jurors present in the courtroom.

THE COURT: Thank you, sir. Ladies and gentlemen, I'm sorry. I know you all think I haven't got a clock, but we were in here working on some legal matters. It just took longer than I anticipated, but we're ready to proceed. Mr.

Padget?

MR. HINSON: Your Honor, the plaintiff calls Mary Yates.

THE COURT: Okay.

THE CLERK: Right here, ma'am. Place your left hand on the Bible and raise your right hand. State your name, please.

THE WITNESS: My name is Mary Lisbon Yates.

THE CLERK: Do you solemnly swear or affirm your testimony to the Court shall be the truth, the whole truth, nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you. Have a seat up here, please. Please state your full name and spell your last name for the record.

THE WITNESS: Yes. My name is Mary Lisbon Yates and that's Y-a-t-e-s.

MARY YATES, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HINSON:

Q: Good morning, Ms. Yates.

A: Good morning.

Q: Would you please tell the jury where you're from?

A: I'm from here, Sumter, South Carolina, for approximately 43 years.

Q: And please tell the jury where you worked?

A: I'm retired from Tuomey Healthcare System. I was an employee at Tuomey for 33 years.

Q: And for the majority of your time at Tuomey, what -- what role did you have?

A: My role was as a safety director and emergency preparedness coordinator for the hospital.

Q: And could you tell us a little bit about what -- what your duties were?

A: My duties were to make sure that I identify any type of potential safety issues that might arise that could cause injuries. I do inspections throughout the building of the hospital and the other off-site facilities.

Q: And if there was an injury at Tuomey, did that involve your -- your position?

A: Yes, it did.

Q: And what would you do?

A: Normally, there are several different mechanisms in place that would alert me to the possibility of an injury or especially a fall. Employee Health has a protocol that they use and, if there's an injury or a fall, they normally fax me the report or sometimes it may be the administrative director or sometime it may be the manager that would send me a report that is needed to investigate. So I go up and do the assessment to make sure what's going -- see what's going on.

Q: Okay. And would you speak with people?

A: Yes.

Q: Let me ask do you know Dr. Win Myat?

A: Yes, I do.

Q: Okay. And did you know him as a physician that had privileges at Tuomey?

A: Yes.

Q: And to the best of your knowledge, was he a hard-working doctor?

A: Yes. To the best of my knowledge.

Q: To the best of your knowledge, he had a good reputation?

A: Yes.

Q: Were you the -- serving as the safety coordinator in July of 2011?

A: Yes, I was.

Q: And did you have the occasion to look into a fall that happened in July -- on July the 6th, 2011?

A: Yes, I did.

Q: Okay. And tell me what you did with regard to that fall?

A: With regard to the fall, when I got into work that morning, someone -- I cannot remember. It's been a while, but I cannot remember who it was that sent me the report that Dr. Myat had had an injury on 3 South and I needed to go up and take a look at it.

So that's what I did. By the time I got there, the night shift that was on duty at the time of the injury had already

left; so I could not assess them. I could only assess the area and see what had happened and look for ways to try to correct it.

Q: And did you speak with the folks later on though?

A: Yes. I came in the next day, earlier the next morning, so that I could catch the night shift before they left. And I spoke with them.

Q: Okay. Did you speak with Ms. -- Ms. Sapp, who is an officer with the Department of Corrections?

A: Yes, I did.

Q: And -- so when was that that you spoke with Ms. Sapp?

A: On the 7th -- July 7th.

Q: Okay. So that was just one day after --

A: Yes.

Q: -- the injury?

A: Yes.

Q: And what did Ms. Sapp tell you about the conditions on the floor?

MR. HOLLER: Objection. Hearsay.

MR. HINSON: Your Honor, I believe Mr. Holler brought up the issue of whether Ms. Sapp's memory was -- was good and the length of time.

THE COURT: I understand that, but how is this not hearsay?

MR. HINSON: Well, Your Honor, I believe it's showing

that her testimony was consistent one day after the incident as it was in the courtroom yesterday. And Mr. Holler brought up the --

THE COURT: I understand your argument, but just tell me how it's not hearsay and how does -- whether it fits under one of the exceptions.

MR. HINSON: Well, Your Honor, I believe it fits under the exception -- again, the memory -- the witnesses -- I'm showing that she has a prior consistent statement and there was implication that she --

THE COURT: Prior consistent statement? How does that work? Under what rule? I mean she testified yesterday. You could have asked her. I mean she's not -- she was not an employee of the hospital; so it doesn't come under that exception, does it?

MR. HINSON: Your Honor, I beg the Court's indulgence.

THE COURT: Sure.

(WHEREUPON, there was a pause in the proceedings.)

MR. HINSON: Your Honor, I believe it comes under an exception under 803(1), the present sense impression, a statement describing or explaining an event or condition while the declarant was perceiving the event or condition or immediately thereafter. So I'm asking about --

THE COURT: It was the next day. It's not immediately thereafter.

MR. HINSON: Your Honor, I'll --

THE COURT: Okay.

MR. HINSON: -- move on.

BY MR. HINSON:

Q: Ms. Yates, what was your understanding about the size of the amount of water on the floor?

MR. HOLLER: Objection. Calls for hearsay.

THE COURT: I -- I sustain it.

BY MR. HINSON:

Q: Ms. Yates, you're familiar with safety policies at Tuomey?

A: Yes.

Q: All right. And do y'all have -- does Tuomey have written policies?

A: Yes.

Q: All right.

MR. HINSON: May I approach, Your Honor?

THE COURT: Yes, sir.

BY MR. HINSON:

Q: I'm going to show you what's been marked as Plaintiff's Exhibit Number 4 and, Ms. Yates, I'm going to just draw your attention to the -- I believe the third page under general policies, number 3. Could you read that policy?

A: Number 3?

Q: Yes. Just the first line of that policy. It begins

general visiting hours.

A: Yes. General visiting hours are six a.m. through nine p.m. daily.

Q: All right.

A: These --

Q: And that -- go ahead.

A: These hours may vary depending on the condition and location of patients.

Q: And were those the visitation hours of Tuomey in July of 2011?

A: They were. However, sometimes you have -- we have patients that their caregiver or their relative or loved one may stay with them.

Q: That's the exception, not the rule though?

A: Okay.

Q: Is that correct?

A: Yes.

Q: Okay. And, Ms. Yates, are there rules at Tuomey against nurses having personal drinks at the nurses station?

A: Yes.

Q: And so if a nurse had a personal drink at the nurses station, that would be against the rules?

A: Yes.

Q: And you make rounds through the hospital?

A: Yes.

Q: Did you on occasion see that rule being broken?
A: Yes.
Q: And, Ms. Yates, is there a rule that if there's liquid on the floor and a Tuomey employee spots it, they should clean it up?
A: Yes.
Q: And as you're making rounds around the hospital in your career, did you ever see the occasion where there was a liquid on the floor?
A: There were times and if there were, they had a wet sign barrier around it. Once they identify it, then they'll address it by either putting a wet sign or getting up to assist to clean it up.
Q: And that was the rule that if someone spilled, they should clean it up?
A: Yes.
Q: Or put a barrier?
A: Yes.
Q: And so if someone didn't do that and there was liquid on the floor, they would have broken that policy and procedure?
A: If they had seen it, yes.
Q: You would agree that water on the floor could be a dangerous condition?
A: It could, yes.
Q: Okay. And in the hospital do doctors sometimes have the

occasion to -- or nurses too to walk with great haste or maybe even -- even run through the hospital?

A: I wouldn't say running, but yeah.

Q: But they pick up the pace sometimes?

A: Yes.

Q: And are you familiar with -- with the floor 3 South?

A: Yes, I am.

Q: Okay. And the nurses station there on 3 South?

A: Yes.

Q: And tell me in the nurses station at 3 South, what are the nearest places where one might get water or ice?

A: There is the -- the service room. In other words, where the ice machine is located.

Q: Okay. And are there any other sources of water or ice nearby?

A: Not -- it's been a while, but not that I'm aware of.

Q: Okay. There's no water fountain open to the public near the nurses station right there?

A: No.

MR. HINSON: Court's indulgence. Nothing further at this time, Ms. Yates.

CROSS-EXAMINATION

BY MR. HOLLER:

Q: Ms. Yates, that policy that you're looking at, you were cut short, but patients are encouraged to bring a family

member or a sitter, someone that they're familiar with?

A: Yes.

Q: Because people who are sick are often confused?

A: Yes.

Q: They don't feel well?

A: Yes.

Q: They may become disoriented?

A: Yes.

Q: They may be combative?

A: Yes.

Q: Through no intent on their part?

A: Yes.

Q: And it's helpful to have someone they know, maybe someone they love, maybe a professional sitter?

A: Yes.

Q: But when people come to your hospital, they don't leave their sitters. If they had sitters when they came in, they don't leave their sitters at home, do they?

A: Most of the time, no.

Q: Okay. And you want those people as a caregiver as a part of the Tuomey system? Until you retired, as a caregiver you want those people there to advocate for your patients?

A: Yes.

Q: The more people that are there -- in a perfect world, you'd have one person for every patient in every room,

wouldn't you?

A: Yes.

Q: And that person's sole function being a sitter or being a family member is to help the nursing staff and the doctors take care of the patient because that's why we're there, aren't we?

A: Yes.

Q: Okay.

MR. HOLLER: Thank you, Ms. Yates.

MR. HINSON: Very briefly.

REDIRECT EXAMINATION

BY MR. HINSON:

Q: Ms. Yates, you conducted an investigation after the fall?

A: Yes.

MR. HOLLER: Outside -- outside of the cross-examination.

MR. HINSON: One second, Your Honor.

Q: Did it reveal any outside individuals --

MR. HOLLER: Objection.

Q: -- any visitors --

THE COURT: Okay. Let him finish his question. Go ahead.

BY MR. HINSON:

Q: Did it identify any visitors that were likely to have caused liquid to be on the floor?

MR. HOLLER: Objection. Outside the scope of cross-

examination.

MR. HINSON: Your Honor, he implied that there were visitors on the hallway in the patient rooms at this time. This is the same subject.

THE COURT: I mean isn't that what you asked her? What normally --

MR. HOLLER: He had asked her about the policy. I asked her about the policy, not her investigation. We stipulated the policy into evidence. He asked her about the policy. I asked about the policy only. I did not use the word investigation.

MR. HINSON: He can have a second chance at this, Your Honor. I think this goes to his -- what he implied in his -- in his -- in his exam.

THE COURT: I'll allow it. Go ahead.

MR. HINSON: Thank you, Your Honor.

BY MR. HINSON:

Q: Ms. Yates, you conducted an investigation?

A: Yes, I did.

Q: And did your investigation -- speaking with -- in your investigation, you spoke with nurses on the hospital floor?

A: Yes.

Q: And did it reveal or identify any individuals that were outside of Tuomey, so non-Tuomey employees, who were on the hall at or around the time of Dr. Myat's fall?

A: Other than Officer Sapp?

Q: No other individuals?

A: No.

MR. HINSON: Thank you.

THE COURT: All right. Do you want to follow through with anything?

RECROSS-EXAMINATION

BY MR. HOLLER:

Q: Ms. Yates, there would be no documentation of people who sit with a patient, would there?

A: Right.

Q: If a sitter is in a room, that's not generally documented in a record?

A: No.

Q: And you wouldn't go through the patient's records because there's privacy laws?

A: No, I would not.

Q: Even if that information was recorded, that Aunt Jo was with Patient Smith, you wouldn't go in there to find out because that patient has rights to privacy?

A: I would not go in, no.

Q: So your investigation, which was the next day and then you said two days later you went back and talked with the staff that was there, there's no way you could have found out what private people who were with their -- with patients or

their sitters were in the rooms, could you?

A: No, I could not.

MR. HOLLER: Thank you.

THE COURT: Okay. You can step down.

MR. PADGET: Judge, we've got a number of exhibits to be admitted by stipulation.

THE COURT: Okay.

MR. PADGET: We'll go ahead and get these marked.

THE COURT: Okay.

MR. PADGET: Because we'll be using them for Dr. Myat's examination.

(WHEREUPON, there was a pause in the proceedings to mark exhibits.)

MR. PADGET: Judge, what's been marked as Plaintiff's 5 through Plaintiff's 16 --

(WHEREUPON, there was a pause in the proceedings as counsel conferred.)

MR. HOLLER: Judge, 5 through 13 without objection.

THE COURT: Okay.

MR. PADGET: David, it was through 16.

MR. HOLLER: It's 5 through 16, Judge. My apologies.

THE COURT: Okay.

(WHEREUPON, Plaintiff's Exhibits 5 through 16 were admitted into evidence.)

MR. PADGET: Your Honor, at this time, the plaintiff

calls Dr. Win Myat.

THE COURT: Okay. Come around, please, sir.

THE CLERK: Place your left hand on the Bible. Raise your right hand. State your name, please.

THE PLAINTIFF: Win Myat.

THE CLERK: Do you solemnly swear or affirm your testimony to the Court shall be the truth, the whole truth, nothing but the truth, so help you God?

THE PLAINTIFF: Yes, sir.

THE CLERK: Thank you. Have a seat up here, please. State your full name. Spell your last name for the record.

THE PLAINTIFF: Win Myat, M-y-a-t.

DR. WIN MYAT, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGET:

Q: Dr. Myat, good morning.

A: Good morning.

Q: What's your date of birth?

A: February 2nd, 1972.

Q: How old does that make you today?

A: Forty-three.

Q: Where do you reside?

A: In Sumter, South Carolina.

Q: And how long have you lived there?

A: About eight years now.

Q: And who lives with you there?

A: My wife and my sister-in-law.

Q: I was going to ask are you married?

A: Yes, sir.

Q: And to whom?

A: Cassie Liang.

Q: And how long have the two of you been married? Tough question always.

A: We've been together for 25 years. I think 15 years.

Q: So you were together long before you got married?

A: Yes, sir.

Q: And you're still married today?

A: Yes, sir.

Q: In July of 2011, you were practicing as an infectious disease physician with privileges at Tuomey Hospital?

A: Yes, sir.

Q: Let's go back and talk about your background a little bit, Dr. Myat. Where are you from?

A: I'm from Burma.

Q: How did you come to live in the United States?

A: I won a green card lottery to come here as a legal resident.

Q: And when did you come to the United States?

A: It was in 1990.

Q: How old were you that?
A: I was 18.
Q: Okay. When you first came to the United States, where in the states did you come to?
A: I first went to Tampa, Florida.
Q: Tampa, Florida?
A: My legal sponsor was there. So I stayed there for a couple days and then I went to a Buddhist temple where you can get shelter for people who need it. So I stayed there a couple weeks. Later, I found out that we have a family friend who lives in Gainesville, Florida; so I moved to Gainesville, Florida.
Q: Okay. What did you do when you moved to Gainesville, Florida?
A: Well, I stayed with my friend for a couple -- my parents' friend for a couple days, maybe a week, and then I looked for a job and I got a couple jobs. So I worked. I was working two jobs.
Q: And what kind of work did you have?
A: I worked for Burger King and I also worked for a Pick 'n Save.
Q: And what kind of duties did you have at these jobs?
A: Well, I -- I couldn't speak English at that time when I first came; so pretty much most of my work was cleaning bathrooms and cleaning mostly floors and parking lots, and the

same thing with the Pick 'n Save. I was mostly cleaning the -- Pick 'n Save is like Walmart. So you go around and you clean all the floors and bathrooms and stuff like that.

Q: Okay. And did you ultimately leave Gainesville, Florida?

A: Yes, sir. At the time, I was sharing with a college student a room and I was making $3.80 an hour at that time. So both jobs -- at the end of the month, I really couldn't save money and I wanted to go to school. So I spoke to a friend and he said, well, if you want to earn more money, you've got to go to New York City. So I went to -- I moved to New York.

Q: And when did you move to New York?

A: Well, after three months in Gainesville.

Q: Okay. And what did you do when you went to New York?

A: Well, I went to -- again, you know, I don't have any family members; so I went to a Buddhist temple where I get free shelter and food, and then I -- then I looked for jobs and I was working a couple jobs again, you know, Wendy's, a Chinese laundromat, and a -- and a Chinese restaurant as a dishwasher.

Q: And, Dr. Myat, you're from Burma. You mentioned you've gone to a number of Buddhist temples. Is that -- is that your religion that you grew up with in Burma?

A: I'm a Buddhist.

Q: Okay. You're up in New York now. You're working a

number of jobs at Wendy's, a Chinese restaurant and a few others. Tell us about how you came to come to attend community college?

A: Well, my goal was always to go to school and so eventually I managed to go to a community college. At community college, I was taking evening courses and then eventually I -- you know, at one point, I saved up some money and then I went to a full-time college and my money went -- my money went very fast. In just a few months, my money was gone. So I was, like, okay, what do I do? And I spoke to a financial aid counselor and he said, well, there's something called student loans. So I took student loans and I continued at school. I finished my community college.

Q: And where did you go to community college?

A: City University in New York at La Jolla Community College.

Q: And did you get a degree from there?

A: Yes, sir. I graduated with an associate degree.

Q: Okay. Where did you -- where did your education take you next?

A: And then I continued on State University of New York at Stony Brook where I graduated with a bachelor of science.

Q: And when did you graduate from Stony Brook?

A: It was about '96.

Q: 1996? What did you do after you got your degree from

Stony Brook?

A: After I got my degree, I was applying for medical school. In between, I was working jobs here and there. I worked for Marriott at that time.

Q: What kind of duties did you do while you were working for Marriott?

A: I was the maintenance person there. It was -- I was hoping that would be temporary because my goal was to go to a medical school.

Q: And what kind -- you were a maintenance person?

A: Yeah. Maintenance meaning you helped every department, concierge, the restaurant part of the hotel, things like that.

Q: Was it fair to say you worked yourself through your college and medical school?

A: Yes, sir. Just like any other immigrant.

Q: Ultimately, you went to medical school. Where did you attend?

A: I went to -- I went to a Caribbean medical school in the Caribbean.

Q: What was its name?

A: It's called Ross University.

Q: And did you get a medical degree from there?

A: Yes, sir, I did.

Q: Thereafter, did you decide to participate in a residency training program?

A: Yes, sir.

Q: And what residency training program did you participate in?

A: It's internal medicine.

Q: Okay. And where did you complete that internal medicine?

A: Yes, sir. Brooklyn, New York.

Q: In what hospital?

A: New York Methodist Hospital.

Q: How long is a residency program?

A: A residency program -- it depends. After you finish medical school, you pick your medical specialty that you like and then you have to go for specialized training, so to speak. If you want to go for surgery, it's about five years. Neurosurgery, about seven years. And internal medicine, three years.

Q: So you completed a three-year internal medicine residency program?

A: Yes, sir.

Q: Thereafter, did you get some additional training in the medical field?

A: Yes, I did.

Q: And what did you do?

A: I did my fellowship training in infectious diseases.

Q: And where did you complete your fellowship program?

A: That's in State University of New York Syracuse Medical

Center.

Q: Okay. And how long did your fellowship take to complete?

A: Two years.

Q: And as an infectious disease physician, just tell us generally, Dr. Myat, what kinds of patients and what kinds of diseases do you regularly treat?

A: An infectious disease doctor is a doctor who is trained in different kinds of infections from bacteria, virus, fungus, and usually we get referrals from other physicians when there's an infection that's difficult to treat or when somebody's having persistent fevers or somebody has HIV or AIDS.

Q: Those are the types of patients you regularly treat?

A: Yes, sir.

Q: Okay. Dr. Myat, I understand you immigrated from Burma. Did you ultimately obtain your United States citizenship?

A: Yes, sir. I became a naturalized citizen after five years. You know, in 1995, I became a naturalized citizen.

Q: When you completed your fellowship program in infectious disease, where did you get your first -- your first position practicing infectious diseases?

A: After I finished my fellowship, I came to South Carolina, Florence, and I worked for a group practice.

Q: What brought you to South Carolina from New York?

A: Well, I was from New York and New York was very cold.

Here it is very warm and the people are very friendly here. So I decided to come here.

Q: And what hospital or what group -- what city did you originally come to?

A: Initially, Florence, South Carolina.

Q: Practicing over at Carolinas Hospital in Florence?

A: Yeah. I worked -- I worked with a group practice and I worked for both Carolinas Hospital and -- I worked at both Carolinas Hospital and McLeod Hospital.

Q: Okay. So you were with a private practice group?

A: Yes, sir.

Q: With other physicians?

A: Yes, sir.

Q: In that group, you had privileges both at Carolinas Hospital and McLeod Hospital?

A: Yes, sir.

Q: Okay. And that was in what time frame? Around 2007?

A: 2007.

Q: And then what brought you to Sumter?

A: I stayed there for about seven or eight months in Florence and then I wanted to have my own private practice, and so I found out that they didn't have any infectious disease doctor here in Sumter for about ten years or more. So I figured I would come here and give it a try.

Q: And did you do that in 2008?

A: Yes, sir.
Q: And when you came to Sumter, you said you wanted to start your own private practice. Did you take any other positions as a physician?
A: Yes, sir. When I came here, I worked -- I worked for my own private practice and then I also worked for Tuomey Hospital as an infection control director and I also worked for Sumter County Health Center taking care of HIV and AIDS patients.
Q: And that was -- that's here in Sumter with the Sumter County Health Center?
A: Sumter County Health Center. Yes, sir.
Q: Okay. When you were in private practice, Doctor, did you have a company that handled your billing?
A: Yes, sir.
Q: Of the patient accounts and so forth?
A: Yes, sir. I contracted an outside company in Columbia for my billing issues.
Q: Dr. Myat, I'm going to hand you a couple of documents we can confirm. I'm going to hand you first --
MR. PADGET: If I could approach, Your Honor?
THE COURT: Yes, sir.
BY MR. PADGET:
Q: Plaintiff's Exhibit 7. Can you identify Exhibit 7, Doctor?

A: Yes, sir. This is my private billing account receivables report.

Q: And it looks like it's done by a company called Resource One?

A: That's correct. That's the name of the company that I contracted with.

Q: You contracted with them to -- to handle your billing for your private practice?

A: Yes, sir.

Q: What was the name of your private practice?

A: Palmetto Infectious Diseases.

Q: Okay. And Exhibit 7, what's been marked, this receivables report for your practice, does it detail the amount of income receivables there? I think it's on page 2 or 3 --

A: Yes, sir.

Q: -- that your infectious disease practice -- the gross revenues that it brought in annually during those years?

A: Yes, sir, it did.

Q: Okay. Thank you.

A: Thank you.

Q: I'm also going to hand you Exhibit 5. Is that a copy of your -- your agreement to be the -- what did you call it? The medical director agreement for infectious disease and epidemiology at Tuomey?

A: Yes, sir.
Q: And this is the contract you had with Tuomey to serve in that role?
A: Yes, sir.
Q: And how were you compensated in that role when you were working in that position?
A: I was on hourly rate.
Q: And what was the hourly rate that Tuomey was paying you?
A: They were paying me a hundred dollars an hour.
Q: And were there some restrictions on the amount of hours per month that you could serve in that role?
A: Yes, sir. It was between 18 to 30 hours a month.
Q: Did you submit your time on a monthly basis to them, the actual time that you spent in that role?
A: Yes, sir.
Q: And tell us, if you would -- thank you, Dr. Myat. Tell us, if you would, what is it that the -- the director for infection control and epidemiology -- what is it you did with Tuomey?
A: As director for the infection control, I worked closely with the hospital administrator to make sure the hospital followed the local, state, and federal governments' regulations in terms of fighting infections and preventing infections, and I also maintained the -- the -- the program in accordance with hospital policy and revised the protocol as

needed, and I also worked closely with outside agencies like the CDC. Sometimes you have to give them a call, CDC, DHEC, things like that.

Q: Okay. Dr. Myat, I'm going to hand you Exhibit 6, your agreement with the Sumter Family Health Center. When you served in that position, is that your agreement with the Sumter Family Health Center?

A: Yes, sir.

Q: And how were you compensated when you performed those services?

A: Hourly as well.

Q: What was your hourly rate?

A: $140 an hour.

Q: And is there -- approximately how much time per month did you typically spend treating patients at the -- at the clinic?

A: About maybe 15 -- 20, sometimes 25. It depends.

Q: Okay. Doctor, you've got three positions here when you came to Sumter now in 2008 that you're holding down. If you would, describe for us just on a daily basis how it would be that you performed and served in those three different roles?

A: Yes, sir. I usually start around three -- 3:30 in the morning and I go to Tuomey Hospital and I would work for my private -- I would see my private patients first until 7:30 or eight, and then I go to County Health Center where I'd see my HIV and AIDS patients over there until one o'clock or so. And

then afterwards, I'd usually come back and finish up my own private patients for a couple hours or so, and then afterwards I'd work for Tuomey Hospital as an infection control director for an hour or two.

Q: Okay. So what -- you typically go to work 3:30 -- four o'clock in the morning and you come home at what time at night?

A: I tried to get home by three -- four, but sometimes it goes a little later.

Q: Sure. Typically, would a 12 -- 13-hour workday be typical for you when you were serving in those --

A: Yes, sir.

Q: -- three various roles?

A: Yes, sir.

Q: Doctor, if you would, describe for us -- Tuomey Hospital is not too far away. It's just a block away. And you worked there. When you're treating patients at Tuomey hospital, did you treat patients on one particular unit or were you treating patients all over the hospital?

A: Oh, I had patients from all over the hospital. They could be from intensive care unit. It could be from women's health, OB/GYN area. Any medical floor.

Q: And how is it, Doctor, that you as an infectious disease doctor -- why is it that you're treating patients in all the different areas, whether it be the emergency department,

med/surg, oncology, wherever -- wherever you find yourself, how is that different than other doctors that see patients in one area?

A: Because we -- mostly, we deal with patients -- infections in patients in the hospital. The majority of my patients -- I would say 99 percent except the outpatient at the HIV clinic. So whenever there is a patient that needs my expertise, so to speak, they call me from any -- any area of the hospital, be it the emergency room, intensive care. So I just -- I have patients all over the hospital.

Q: And how would it -- how was it that you got from one area of the hospital to the other?

A: Well, you know, usually I go early in the morning, 3:30, and I park my car and you walk to the nursing station. You go see a patient. When you're finished you go -- you walk to another station and you see a patient. Basically, constant walking.

Q: How many patients -- just on a typical day, how many patients would you see in the hospital?

A: It varies, but usually I'd say about 20 -- 25.

Q: Okay.

A: In the hospital.

Q: And for each of those, describe the process that you would go through to get information about the patient, treat the patient, issue orders for the nurses to carry out?

A: Once -- once I walk to the nursing station, usually the end of -- the long table in the middle of the nursing station -- at one end there is the chart rack and next to that is a few computers. And then you just go there first, pick up the chart, put it next to the chart rack, and then sit down there, review the chart, and then review the data from the computer, and I would talk to nurses. I usually talked to nurses and I'd ask them what happened to my patient overnight. Is there anything else? Anything new that I need to know?

And then you go -- you walk to the -- you leave all of your charts in the -- in the nursing station. There's no need to take them to the patient's room. And then you walk to the nursing station -- or you walk to the patient's room and if that's a new patient, you have to stand there, talk to the patient for the next 30 minutes. The first time -- the first time you see a new patient, you have to do a thorough history. It takes about 30 minutes -- 45 minutes while you're standing, and then you -- and then you -- after you finish you talk to and then you see the patient physically as you do a physical examination.

A thorough physical examination usually takes about 15 -- 20 minutes from head to toe. And if -- if I have a patient who is paralyzed from the waist down in a wheelchair and if he has a wound in the back of his leg and he's 200 pounds, then you kneel, you stoop, you bend your body in any way you can to

go behind the knees, behind the legs and then you undress the dressing, take a look at it, feel it, see it, examine it, and then make sure the bone is not involved. You know, that's the kind of examination I have to do. And then after that, I tell the patient what the course of treatment will be and then I go back to the -- I walk back to the nursing station.

As you write in the chart what you're going to do, what orders you write, you tell the nurse. I usually tell the nurse and I'm always in constant communication with the nurses. So I tell the nurse. I said I saw this patient and this patient needs this medicine and I need -- you know, I just wrote orders. They will pick it up. Either they or myself will put the chart in the chart rack at the other end of the table, and then I see another patient, maybe on the same floor or maybe on a different floor.

Q: Dr. Myat, when you perform this physical examination of a patient from head to toe as you described, was that an important part of the clinical process for you in evaluating patients and what course of treatment?

A: Yes, sir. Even in medical school, we were always taught that a good physical examination yields about 20 percent of the data that's required to treat and diagnose a patient.

Q: Do you believe you could properly treat a patient without performing a head to toe physical exam?

A: In my personal opinion, whether you're a family physician

or an internal medicine physician or infectious disease physician, it doesn't matter. You really need to see, feel, examine the patient. Head to toe thorough examination is a must.

Q: Dr. Myat, you were working in three positions, long hours. Did you enjoy your work as a physician -- as an infectious disease physician?

A: I certainly did.

Q: What was it about your practice in particular that you enjoyed?

A: Well, the fact that you could have a patient recover from infections and fight off the infections. That's very satisfying.

Q: Doctor, let's turn to July the 6th, 2011, the day of your fall. What were you doing that morning before your fall there on Unit 3 South?

A: Well, I was seeing patients.

Q: Making your typical rounds of your hospitalized patients?

A: I was there to see my patients.

Q: And your fall was sometime around 5:30. Had you arrived at the hospital -- obviously, you arrived to the hospital prior to that?

A: Yes, sir.

Q: Do you recall about how -- about when that was?

A: Exact timing, exact locations and those, I don't

remember.

Q: At some point that morning, you came to Unit 3 South?

A: Yes, sir.

Q: That's right? And what type of unit is Unit 3 South?

A: It's a medical/surgical, but mostly medical floor.

Q: Were you familiar with that unit and its layout?

A: Yes, sir.

Q: And I understand that typically there's a number of dialysis patients that may be housed there as well?

A: Sometimes, yes, sir.

MR. PADGET: And if we could, could we please activate this source here?

THE COURT: Do y'all's monitors work?

MR. HOLLER: Yes, sir.

THE CLERK: There it goes. It's on.

THE COURT: It cut off. It went away.

MR. PADGET: I'm looking for Plaintiff's 2. Okay.

THE COURT: Are yours on?

MR. PADGET: Yes, sir.

THE COURT: Are the jury's on?

THE BAILIFF: Yes, sir.

BY MR. PADGET:

Q: Dr. Myat, I'm going to do it the old-fashioned way and hand you Plaintiff's 2 as well, the same photograph we're looking at.

A: Yes, sir.

Q: You said you were familiar with Unit 3 South and we've been over this already, but this is looking down the hallway of Unit 3 South?

A: Yes, sir.

Q: And the nurses desk would be just to the left there at those ladies. Going to Plaintiff's 3, this shows the nurses desk?

A: Yes, sir. This is where we usually work at one of these computer stations. You sit down there and write your notes.

Q: Just generally speaking, Doctor, what activities occur at this location?

A: Well, usually they have this -- the kitchen there -- the kitchen area inside and the -- I've seen the nurses and techs filling water -- water pitchers, you know, and then later on distributing them to the patient rooms. And also sometimes nurses go in there and they maybe have a drink or two. They get it from there.

Q: All right. We'll get to the water in the second, Doctor. Just generally speaking, is this the area where nurses and doctors come and go from treating patients?

A: Yes, sir. This is the nurses -- they usually -- this is the nurses' central area. They do all type of -- most of their work there. They do it there except seeing a patient, giving out the medications and things like that, dressing

change, they do it in patient rooms. Other than that, they come back and they -- they usually document their work and so on and so forth.

Q: All right, sir.

A: They also have the call bell there. So when a patient presses the call button in the room, they answer it from there.

Q: So whether you're a nurse or a doctor, it's common to come and go from this central location, the nurses station, in between treating patients?

A: Yes, sir.

Q: You also mentioned that -- an issue in this case, the water. That nurses or nurse techs -- you had observed them gathering ice and water from the patient kitchen?

A: Yes, sir.

Q: And that's the area behind the door and the lock with the "stop, staff only" sign on it?

A: Yes, sir.

Q: Now, you were often up at 3 South early in the morning rounding on your patients; is that right?

A: Yes, sir.

Q: And would you see nurses and nurse techs in that time early in the morning? Would you see them routinely preparing ice and water early in the morning first thing?

A: Usually they do, yes, sir.

Q: Now, when you were on the floor that morning, you were working in your capacity as your private practice?
A: I was seeing my own patients, private practice patients.
Q: At that time, you were not working as the medical director for infectious disease?
A: No, sir.
Q: And you weren't -- you weren't working for Sumter Family Health Center plainly --
A: No, sir.
Q: -- in Tuomey? You were working for your private practice?
A: Yes, sir.
Q: Okay. And that's Palmetto Infectious Disease?
A: That's correct.
Q: Do you recall what you were doing just before the fall occurred around 5:30?
A: I was there to see the patients. That's all I remember. I don't remember what I was doing exactly and I don't remember what I was -- which way I was going.
Q: Okay. Doctor, do you -- do you know where you physically fell, the location of your fall?
A: The exact location, I don't remember, but it was -- it was somewhere in the vicinity of the patient table, where the patient table is. That -- that particular area around -- maybe -- I don't know -- maybe three or four feet up and down,

plus or minus. The exact location, I can't remember. I just remember I fell. I fell so hard.

Q: And, Doctor, going back to Exhibit 2, which we've got on the screen here, Ms. Sapp made a notation there with a mark. Do you see that?

A: Yes, sir.

Q: And in that location, there where the mark is that she made, is that the location where you found yourself situated after the fall?

MR. HOLLER: Judge, I'm going to object to leading. We moved through the earlier part and there was a lot of leading, but at this point, we need to have information from the witness, Your Honor.

MR. PADGET: I can rephrase the question, Your Honor.

THE COURT: All right. Thank you, sir.

BY MR. PADGET:

Q: Dr. Myat, using Exhibit 2, can you describe for us where you were situated after your fall occurred?

A: Yes. Somewhere around the neighborhood of that -- the mark there, but exactly on it, I don't remember.

Q: Sure.

A: Exactly on that spot, I don't remember, but somewhere around there.

Q: But around the mark that Ms. Sapp made?

A: That's correct, sir.

Q: Okay. And in relation to the unit and the nursing station, where were you? Were you touching the nurses station after your fall in some way?

A: I don't remember which -- which way I was on the floor or how I was on the floor.

Q: Okay.

A: All I remember was my knee was bent totally out of shape and I remember thinking to myself -- I said, oh, my God, I'm going to be out of work for months given this knee look and I was in severe pain. That's all I remember.

Q: What did you see -- well, when you looked down at your knee?

A: It was just bent in such a way that I -- it's just terrible. It was just out of shape and it was twisted.

Q: Were you in pain?

A: I was in severe pain.

Q: Do you recall telling anybody what you believed the cause of your fall was?

A: I believe I slipped on water -- I mean some sort of liquid and -- and that that ultimately caused my fall. And I don't remember the moments proceeding directly exactly, as I mentioned, how or where exactly I was and what I was doing. I don't know that.

Q: Did you see any water on the floor or anything as you approached the area?

A: If I did, I wouldn't have -- I wouldn't have fallen.
Q: All right.
A: If I did, I would've avoided it, sir.
Q: So you didn't see any water?
A: No, sir.
Q: Okay. Dr. Myat, is there a particular kind of shoe that you would typically wear when you were making your rounds at the hospital in the morning?
A: I wear work shoes with the skid resistant.
Q: Had you ever have any trouble wearing those kind of shoes with slipping in those shoes before?
A: No, sir.
Q: Did you find they provided good traction?
A: Yes, sir.
Q: Okay. What kind of sole did the shoes you typically wore -- what kind of sole did they have on them?
A: I don't know. I just go to Clarks or somewhere and just buy the one with the skid resistant.
Q: Did you -- when you were practicing and making your rounds on patients, did you ever wear leather bottom shoes like the ones I'm wearing that are a little slippery on the bottom?
A: No, sir.
Q: Okay. You've described to us where the nurses prepare the water for patients. Did you ever observe any nurses

getting any water for their personal use at the nurses station?

A: Yes, sir. Sometimes if they want to drink water, they go get ice and water from there.

Q: Okay. Do you have any recollection of seeing visitors or patients ever utilizing that kitchen with the lock and the sign to get water?

A: Well, there's no access for outsiders over there. It's just for the staff only.

Q: After your fall and you're laying on the floor, you're in pain, your knee is contorted out of position, do you remember anyone coming to your aid?

A: Yes, sir.

Q: Describe that for us?

A: I was -- I was on the floor, which position I don't know. I was in severe pain and one of the first nurses came was Mr. Whitehouse and he came by and he tried to help me lift it up and I was in severe pain. I couldn't be moved. He tried to lift it up for me and I said -- I screamed. I told him -- I said I was in so much pain we probably should wait until a few more people come, and then a couple people came later on, if I remember correctly, and then they put me on a stretcher and then they took me down to the ER.

Q: Okay. You went down to the ER. What do you recall about being in the ER?

A: Well, they gave me pain medicine and then Dr. -- Dr. Cucé I believe came by.

Q: Ultimately, an orthopedic consult?

A: Yes, sir.

Q: An orthopedic doctor came? Did you know Dr. Cucé?

A: Yes, sir, I do.

Q: How did you know him?

A: Well, I work with all the hospital -- all the -- Dr. Cucé is an orthopedist and he's a bone doctor and I work with all the orthopedists at the hospital. I treat all of their patients. I get referrals from them. So I know him.

Q: Dr. Cucé conducted an evaluation and some x-rays were taken and so forth in the ER. What did you learn were the nature of your injuries?

A: Well, he told me that my kneecap was broke, my patella was broke.

Q: Did he tell you anything else?

A: He also told me that there was a tendon that was attached to the lower part of the -- the lower part of my kneecap. Given the bone was broken off, that tendon also came off, and also there's -- on both sides inside and outside of the knee where you have these fibers. It's called retinaculum, these fibrous tissues. They were -- they were also torn between the fall.

Q: Did Dr. Cucé recommend that you undergo surgery?

A: Yes, sir, he did.

Q: And when was the surgery scheduled?

A: The same day in the evening.

Q: In the evening?

A: Yes, sir.

Q: And ultimately you went back to surgery that day?

A: Yes, sir.

Q: Obviously, you were under anesthesia during the surgery. I presume you have no recollections of the surgery?

A: No, I don't.

Q: What's your first memory after the surgery was completed?

A: I was in a room and they were giving me pain medicine and that was it.

Q: Dr. Myat, I'm going to hand you Exhibit 15. It's been admitted. Is this a photograph taken during your -- your knee repair surgery?

A: Yes, sir.

Q: And Dr. Cucé gave you this?

A: Yes, sir.

MR. PADGET: Your Honor, I'd like to publish this to the jury.

THE COURT: Okay.

MR. HOLLER: Judge, excuse me. Let me -- I move to strike that last question and answer that was who gave him that photograph.

THE COURT: Okay.

MR. HOLLER: There's not a foundation for that. I would move that be stricken from the evidence. Judge, I'd be happy to walk up and --

THE COURT: Yeah.

(WHEREUPON, a bench conference was held in the presence of the jury but out of the hearing of the jury off the record.)

THE COURT: All right. Ladies and gentlemen, that last question about where the photograph came from is withdrawn and you're not to consider that, but you can look at the photograph.

BY MR. PADGET:

Q: Dr. Myat, Exhibit 15 -- is this a photograph of your left knee during your surgery?

A: Yes, sir.

Q: Okay.

(WHEREUPON, a large poster was placed on an easel in front of the jury.)

MR. PADGET: With the Court's permission, I'm going to just continue while that photograph is being passed around.

THE COURT: Sure.

BY MR. PADGET:

Q: Dr. Myat, I've placed up here a medical illustration. Does this -- does this on the left side depict the normal knee

anatomy?

A: That's correct, sir.

Q: And this on the right side -- it depicts a left knee injury with a fractured patella, a displaced fracture fragment, and the tears of the lateral -- help me out with that one?

A: Retinaculum.

Q: Retinaculum?

A: Yes, sir.

Q: Doctor, is this -- does this depict the type of injuries that you were diagnosed with?

A: Yes, sir. I had the tear of both inside and outside of the retinaculum, both sides.

Q: So both --

A: Yes, sir. That's the outside --

Q: Both the outside and the inside?

A: In and out, yes, sir.

Q: And the retinaculum -- that's the connective tissue on the outside of the knee?

A: That's the fibrous bands that basically stabilize the knee.

Q: But these were the -- the type of injuries that -- that you -- you suffered?

A: Yes, sir.

Q: And that were attempted to be repaired by way of that

surgery?

A: Yes, sir.

Q: On the 6th? Okay. And the patella -- we've heard it throughout this trial. The patella -- what -- what is that commonly known as?

A: It's the kneecap, sir.

Q: Okay. And how is the patella -- what -- I guess I should say which tendons -- these tendons that connect to the bones of the lower leg to the muscles of the upper leg -- those are depicted in this medical illustration?

A: Yes, sir.

Q: Medical illustration?

A: Yes, sir.

Q: Thank you. And the repair surgery that was done -- the revision done by Dr. Cucé, left patella open reduction and internal fixation -- is that what you underwent?

A: Yes, sir.

Q: And this medical illustration depicts generally the process by which that surgery that you underwent is completed?

A: Yes, sir.

Q: Okay. All right.

A: Can I -- can I say a little bit about that?

Q: Certainly.

A: The -- I was told that my kneecap broke off, the lower part with the tendon. The tendon -- the bone was so small to

be reattached to the remaining kneecap. So what he did was he took off that broken piece.

Q: Are you referring to the fractured fragment?

A: Yes, sir. Right there, that bone. That bone was broken off and with that there's a tendon attached to the bone. He was trying to reattach that to the remaining bone, the patella, the kneecap, and he said that the piece was too small to be reattached. So what he did was took off the tendon from the bone and then he -- then he sutured that back to the remaining bone.

Q: I see. So there was -- it sounds like after the surgery there would have been a shortening?

A: Yes, sir.

Q: Of the tendon?

A: The tendon was shortened, yes, sir.

Q: All right. And then once the repair is made, the sutures are affected as shown in this photograph?

A: Yes, sir.

Q: Exhibit 15 before the final closure is completed?

A: Yes, sir.

Q: All right. After your surgery was completed, did you have discussions with Dr. Cucé? How did he tell you how the surgery proceeded?

A: He said --

MR. HOLLER: Judge, I'm trying to be very lenient here.

I understand this is not something we challenge. That is Dr. Cucé has been deposed and he will testify.

MR. PADGET: He will testify, Your Honor, but he's also an employee of Tuomey. So by definition it's not hearsay.

MR. HOLLER: Judge, this is not kept in the ordinary course of business. These are not business records. These are --

MR. PADGET: Opinions.

MR. HOLLER: -- all questions --

MR. PADGET: We're going to hear from Dr. Cucé here momentarily.

THE COURT: Okay. Go ahead.

BY MR. PADGET:

Q: How long were you in the hospital, Dr. Myat?

A: I just -- I was discharged the next day.

Q: So the following day?

A: Yes, sir.

Q: When you were discharged from the hospital and sent home after the surgery, were you given any medications?

A: Yes, sir.

Q: What medications? Do you recall? Not the exact -- the exact medications, but the type of medication that was given to you?

A: I was given pain medicine, narcotics.

Q: Were you in pain when you went home?

A: Yes, sir.
Q: Can you describe the pain that you were undergoing?
A: It was very painful, sharp pain, very sharp.
Q: From your left knee?
A: Yes, sir.
Q: When you were discharged, your left leg -- in what condition was your left leg when you were sent home from the hospital?
A: Well, after the surgery, I'm not supposed to move. So they put me on a knee immobilizer.
Q: A brace that keeps your leg --
A: Yes, sir.
Q: -- in one place? It keeps the knee from bending?
A: Yes, sir.
Q: Did you -- did Dr. Cucé schedule a follow-up visit?
A: Yes, sir.
Q: About how long out from the surgery was the first follow-up visit scheduled?
A: I saw him about three weeks after the surgery.
Q: And that's what he had -- that's -- that's a follow-up visit that he had made?
A: Yes, sir.
Q: And you went to that appointment?
A: Yes, sir.
Q: Did -- at any point, did -- after the initial healing

process over those first couple weeks, did Dr. Cucé recommend you undergo physical therapy?

A: Yes, sir.

Q: And did you?

A: A couple weeks after -- after a couple weeks after surgery, I had home health come to my home and teach me how to get in and out of bed, the therapy, and then just a couple weeks later I started physical therapy.

Q: Tell us just how your days were in the weeks following the surgery with your leg immobilized. Tell us about what you could do and you couldn't to that you were used to doing at that time?

A: Well, after I go back to work or before I worked?

Q: No. Just in the weeks -- the weeks after the surgery before your first follow-up visit. Just tell us about how your home life was.

A: Well, you can't -- you can't -- you're supposed to have your knee straightened out for a few weeks. So basically you can't move much. You're just in pain as well with it.

Q: In the weeks following, at some point did you start to attend physical therapy?

A: Yes, sir.

Q: At Dr. Cucé's recommendation?

A: Yes, sir.

Q: And did you attend those therapy sessions?

A: Yes, sir.
Q: How long did you attend physical therapy?
A: It was probably until December or January, about seven months.
Q: About seven months? And I realize we don't have the benefit of the medical record right in front of us, but your recollection is about seven months?
A: Six or seven months, yes, sir.
Q: And how often would you go to therapy?
A: I'd go there three times a week.
Q: And you did that?
A: Yes, sir.
Q: Tell us about -- once your recovery had progressed a couple of weeks or months, tell us about any new limitations, if any, that you were experiencing then?
A: After going back to surgery?
Q: Yes.
A: Well, the type -- the -- the type of injury I had and the surgery involves the knee and the knee joint. They're usually very painful. So I was -- you know, I was having difficulty with my endurance, strength, stamina, and also it mostly has to do with -- it's a mechanical problem. Bending, either by walking or not walking and sometimes you may -- you may be at home sleeping and you try to sleep in a certain position and the -- I usually sleep in a fetal position. You try to bend

your body all the way and at night your body doesn't know and tries to bend it and then your knee does not agree with the way you bend it and then you just -- you've got woken up in a writhing pain and you're just taken out for at least a few hours. You can't really do much. So in terms of ambulating, weight-bearing, stooping, kneeling, all that's affected.

Q: You were continuing to treat with Dr. Cucé?

A: Yes, sir.

Q: How long after the surgery did you continue to treat with Dr. Cucé?

A: Well, after the first surgery, the -- I underwent physical therapy. And usually a few weeks after physical therapy, you're expected to be able to bend your knees about 90 to 120 or so degrees, and mine was only doing 45 -- 50 at that time. So Dr. Cucé wasn't -- he wasn't satisfied with the outcome at the time.

Q: And ultimately in October of 2011, did you undergo a second procedure?

A: Yes, sir, I did.

Q: To evaluate the range of motion of your knee?

A: Yes, sir.

Q: And I'm going to hand you Exhibit 16. Is that a photograph taken during that procedure?

A: Yes, sir.

Q: And, Doctor, what did you understand to be the purpose of

this second procedure that you underwent in October?

A: Because my knee wasn't bending the way it's supposed to; so what they tried to do was take me to the operating room, put me under anesthesia, and then they bend it with force basically to break the scar tissues.

Q: And did -- did they evaluate the range of motion at that time?

A: Yes, sir. Their goal was to get to -- reached to 135 or 140, but when they reached -- under anesthesia, when they reached 100 degrees, my wound -- the top -- the top part of my wound broke open. And so because there was so much scarring in there and so when they tried to bend it under force, it broke open. So they had to stop. They had to stop the surgery. Otherwise, the whole wound would've opened up. That would be a major disaster.

Q: Doctor, what is normal range of motion for an average healthy adult for their knee?

A: I'm not an orthopedist.

Q: Sure.

A: I was told that about 135 to 140 is the normal range of motion.

Q: And that's something you would have been taught in med school?

A: To some extent, yes, sir.

Q: If you can't get to the normal range of motion, 135 to

140 degrees, what types of limitations does that present for you?

A: Well, if I -- in a normal day, my comfort level is about 45 -- 50 and I -- you know, 60 -- 70 -- that would be a stretch, but you normally need about 90 degrees to get in and out of the cars, going up and down the stairs, walking down -- up and down slopes. If you can't bend over I guess 110 or so, you can't kneel, you can't stoop, you can't squat, you can't run, you can't swim, you can't bike. So with my -- with my limitations, all of this I couldn't do.

Q: I understand, Doctor. I'm going to hand you what's been marked as Plaintiff's 13 and 14. Are these some photographs taken in July of this year?

A: That's correct, sir.

Q: And do those depict the scarring on your -- on your left leg?

A: Yes, sir.

Q: And that remains to this day?

A: Yes, sir.

Q: In addition to the scarring, Doctor, is there -- I noticed that your -- your left leg -- the musculature of your left leg --

MR. HOLLER: Objection. Leading.

THE COURT: Okay. You can rephrase.

MR. PADGET: I'll rephrase it.

BY MR. PADGET:

Q: Doctor, is there anything else notable about those photographs?

A: Well, my muscles in the left upper leg is definitely smaller.

Q: What does that -- what do physicians call that when muscles shrink?

A: We call it atrophy. Atrophy, meaning muscles not as developed as the other side.

MR. PADGET: Your Honor, permission to publish these to the jury?

THE COURT: Okay.

BY MR. PADGET:

Q: Dr. Myat, you were out of work for a period of time? How long was that?

A: After the first surgery, about two months until I was given the green light to go back to work.

Q: And that was in September? September 5th, 2011?

A: Yes, sir.

Q: That you went back to work?

A: That's correct.

Q: When you went back to work, did you speak with any Tuomey staff members about the circumstances of your fall?

A: Yes, sir, I believe so.

Q: Who did you speak with?

A: I spoke to Mr. Whitehouse, Mr. William Whitehouse, and also I believe I've spoken to Ms. Marilyn Wilson as well.

Q: Okay. Did Mr. Whitehouse tell you anything about the circumstances of your fall or what they believe to be the cause?

A: Just the fact that there was water at the site of the accident.

Q: How would you describe your working relationship with Nurse Whitehouse?

A: I would call it very good. He's a friend.

Q: When you went to try to go back to work in September of 2011, tell us how you did that and about any limitations you had at that time?

A: I don't understand your question.

Q: Sure. I'll be glad to. Going back to September of 2011 when you tried to go back to work --

A: Okay.

Q: In light of the limitations that you've described in your knee, tell us about any challenges you faced when you went back to work?

A: Okay. When I -- first when I went back to work, I was in a wheelchair. My wife pushed me around the hospital, all over the hospital, and then I was on a scooter and then I was on a walker and then I was on a four-pronged cane and then on a one-pronged cane, regular cane, and then finally I was on my

own over the course of maybe seven to eight months, eight -- nine months.

Q: And how did that go? How did your -- how did that return to work -- were any challenges presented with your physical limitations?

A: Well, again, given the nature of the injury that I have, it's always a struggle. I was working with pain and I still had limitations in terms of bending and stooping and kneeling, as well as ambulation, walking around, weight-bearing. It's not about -- you know, sometimes you -- I mean the more you walk, the more pain I get, but sometimes it's just a certain move, a certain position change can just -- can just give you a lot of pain if that doesn't agree with your knees, so to speak, my left knee.

Q: Dr. Myat, when you went back to work, was your -- was your gait -- was the way you walked -- was it the same as it was before?

A: My balance was totally off because I was -- I have so much pain on the left knee. So I tried to put more weight on the right knee and subsequently the right hip and I started having pain over the right knee, right hip, and lower back as well because, you know, gradually from the wheelchair to a scooter to a -- finally to be on my own, I just progressed with pain and I tried to be on my own, but I had to compensate on the other side to avoid so much pain. I was still having a

lot of pain.

Q: Did you find new pain from your right side?

A: At that time, because I was compensating, I wasn't putting much weight on the left side, so I was putting more weight on the right side.

Q: Was that a new symptom? Had you ever had trouble with your -- your right lower extremity before?

A: Well, that was -- that would be new at that time. Yes, sir.

Q: Dr. Myat, I didn't ask you this earlier. Just generally speaking before this fall, describe to us your physical condition. Did you have any major problems?

A: No, sir, I don't. I hadn't seen a doctor for many, many years before the accident.

Q: You continued to treat with Dr. Cucé?

A: Yes, sir.

Q: You went to all the follow-up visits that he scheduled?

A: Yes, sir.

Q: How long did you -- you said earlier you participated in physical therapy for about seven months?

A: That's correct.

Q: Did -- did the physical therapist that you were treating with -- did they discharge you from their care?

A: Yes, they did. I think here December or January of 2012, I was there and the physical -- one day the physical therapist

said --

MR. HOLLER: Objection. Hearsay.

BY MR. PADGET:

Q: Dr. Myat, please don't tell us what -- what the therapist said. Did they ultimately -- were you discharged from their care?

A: Yes, sir. They said you don't have to --

MR. PADGET: I'm sorry. We're trying to get around that.

THE COURT: They said don't come back again.

THE PLAINTIFF: I'm sorry, Your Honor.

THE COURT: That's okay.

BY MR. PADGET:

Q: Did you follow all the recommendations of your physical therapist?

A: Yes, sir. Yes, sir.

Q: As you continued to -- to attempt to work in early 2012 leading up to May of 2012, did you have concerns about your ability to continue to work?

A: Yes, sir.

Q: Did you discuss those concerns with anyone?

A: Yes, sir. As I mentioned before, I was -- I was having multiple problems with the right side as well. So not only the left knee now, now I had pain over the right knee and right hip, and the pain was getting worse and worse while I was on my own, but I still tried to do what I was supposed to

do.

I worked with pain and eventually it was -- the pain was so much that it was interfering with my concentration, my clinical judgment, and the patient safety as well. So at one point I spoke to my doctor, Dr. Cucé. I said, Dr. Cucé, you know, the pain is getting worse and it's affecting my concentration and patient care, and he said if you can't do it, you can't do it.

Q: What -- what in particular -- I understand just generally getting around was a problem. Did you find it difficult to perform a physical exam like we spoke of earlier?

A: Yes, sir. It's just that when you -- you know, you -- when you have problems bending your knee in certain ways and certain degrees -- I couldn't bend it but just, you know, 45 -- 60 -- 70 degrees. Sometimes you've got to stoop. Sometimes you've got to kneel. Sometimes you've got to twist your body in such a way that you can reach certain places you're supposed to reach, and you can't do a lot of things.

MR. PADGET: Judge, at this time I'd ask Dr. Myat if he could come down and just -- just give us a demonstration of his gait now, of his walk now with his limp just from the witness chair back to counsel table.

THE COURT: Okay.

(WHEREUPON, the plaintiff complied.)

MR. PADGET: And, Dr. Myat, I'm going to -- Judge, with

your permission, I'd just like to sit Dr. Myat down here and just have him show the jury his scar as it currently exists and his upper legs.

THE COURT: Okay.

MR. PADGET: Please have a seat, Dr. Myat.

THE PLAINTIFF: Thank you.

(WHEREUPON, the plaintiff was seated in a chair placed in front of the jury.)

BY MR. PADGET:

Q: Now, the gait that you've demonstrated dragging your leg, is that how you are every day?

A: Yes, sir.

Q: How long has your leg been that way?

A: Since the surgery.

Q: If you would, Dr. Myat, if you could just roll up your pants leg on your left knee and just show us the scarring that you currently have from the knee surgery.

(WHEREUPON, the plaintiff complied.)

BY MR. PADGET:

Q: Dr. Myat, just by comparison, can you pull up your right pants leg?

(WHEREUPON, the plaintiff complied.)

BY MR. PADGET:

Q: Do you find you have the same strength in your right leg as you do your left leg?

A: I have more muscle here. I don't have -- this is just a bone. I don't have muscle anymore. I mean much less muscle there.

Q: And is that the atrophy you referred to earlier?

A: Yes, sir. That's the atrophy. Your muscle mass is getting smaller and smaller. It's very difficult to move around and lift your leg up and things like that on top of -- on top of the problem with my bending.

Q: And, Dr. Myat, I noticed you've -- you're able to move from counsel table to chair and so forth and that you've parked across the street in the handicap parking --

A: Yes.

Q: -- section and come across. You can walk and move about?

A: Yes, sir.

Q: How long can you do that before the pain begins?

A: If I'm having a good day, I can walk maybe about ten minutes continuously.

Q: And on a bad day?

A: A bad day -- if I -- if I've just woken up from my sleep because I was trying to sleep that way, I could barely go to the bathroom six or seven feet away.

Q: Dr. Myat, if you would, I'll help you up and get you back to the stand.

A: Thank you, sir.

MR. PADGET: We'll put this back.

(WHEREUPON, the plaintiff returned to the witness stand.)

BY MR. PADGET:

Q: Dr. Myat, you said earlier there was a time when you realized that the pain you were experiencing with your leg was affecting your clinical judgment?

A: Yes, sir.

Q: Was there any particular event that occurred when you came to that realization?

A: Yes, sir. At one point, I was seeing a patient in my HIV/AIDS clinic. I was seeing an AIDS patient and I was talking to the family of the patient and we were talking about the treatment course. And I was working with so much pain that day and when I -- when I was explaining to him about the treatment and then I said -- I said something that totally that didn't make sense and the patient and the family -- they caught it. They were like uh-huh, and then I caught it too as I -- I said what did I just say? And then I realized that it was really impairing my clinical judgment, my thinking process, and also affecting the patient's safety.

Q: You were -- you were speaking gibberish to your patient?

A: Yes, sir.

Q: What time frame after the original surgery -- you went back to work in September. When did you have this realization?

A: Well, that was around May -- May of 2012. That's about

eight months out -- nine months out.

Q: The last day you worked was when?

A: May 3rd of 2012.

Q: Dr. Myat, let's back up. Your practice -- you've come to Sumter and you've worked here for a number of years before your fall -- two or three years before the fall in your private practice?

A: Yes, sir.

Q: How was your practice doing before you suffered these injuries?

A: Well, when I first came to Sumter, nobody knew me and so initially I earned the trust of other physicians in treating their patients. Then once I earned the trust of other physicians, they referred me more patients and I was treating more of their patients and my practice grew eventually.

Q: It was growing?

A: Yes, sir. It was growing. Yes, sir.

Q: Were you earning substantial income from your -- from your three positions?

A: Oh, I was making -- I was making some.

Q: Is that yes?

A: Yes, sir.

Q: You were earning?

A: Yes, sir.

Q: Okay. Dr. Myat, did you bring with you today any

financial documentation that's already been admitted as an exhibit detailing the compensation --

A: Yes.

Q: -- that you earned in 2009, '10, '11, '12, and 2013?

A: Yes, sir.

Q: These are your tax returns for those years?

A: Yes, sir. Those are my tax returns.

Q: And that's Plaintiff's 8 through 12; is that correct?

A: Yes, sir.

Q: Doctor, Exhibit 7 -- we talked about this earlier, your private practice receivables report?

A: Yes, sir.

Q: I'll have you turn to page 4 there and just detail for us the payments that your private practice received in each year?

A: When I first started in 2008, I received -- from my private practice, I received $204,680. In 2009, it went up to $502,189. In 2010, it went further up to $566,639. In 2011, this is the time I fell. The year that I fell, I made $448,026.

Q: And you were out of work two months of that year?

A: I was out for two months and then when I went back to my practice, I didn't have any patients. So I had to build it back up from scratch.

Q: So much of the income shown in 2011 was from before your fall?

A: Yes, sir.

Q: Okay. Please continue.

A: In 2012 -- I made $198,000 in 2012. In 2013, I made $7,900 -- $7,909. In 2014, I made 739 -- $798.

Q: Now, some of these receivables detailed in 2013 and '14, was that because you were continuing to work or was that for work that you had already done where you're just receiving the payment?

A: Those were accounts receivable from the previous -- before the accident. It was just residuals coming in.

Q: I see. Okay. In addition to your income you received from your private practice -- and those were the gross numbers?

A: Yes, sir.

Q: We'll talk about the net figures less your expenses here in a moment. But you also -- in addition to your private practice income, you also had income from your two other positions?

A: Yes, sir.

Q: That was the hourly income you received from --

A: Tuomey Hospital.

Q: Tuomey and from the clinic?

A: And from the Sumter County Clinic. Yes, sir.

Q: Okay. On your tax returns from '08 to 2013, your private practice -- here we go. Your private practice income -- is

that shown on the Schedule A's?

A: Yes, sir.

Q: For each of those tax returns?

A: Yes, sir.

Q: It also shows the expenses for your private practice?

A: Yes, sir.

Q: And what type of expenses did you incur?

A: The medical malpractice -- the insurance.

Q: Sure.

A: And also billing fees and office supplies and that's about it.

Q: Those types of professional fees for you to run your practice?

A: Yes, sir.

Q: Okay. And the income from Tuomey and from the clinic -- by what method would that have been detailed in your returns? Was it 1099 income? Was it --

A: Tuomey was -- Tuomey was 1099, independent contractor. And from the Sumter Family Health Center, I was their employee. I got a 1040.

Q: Okay. All right. And that income that you earned from those for the various years is shown in Exhibits 8 through 12?

A: Yes, sir.

Q: Your tax returns?

A: Yes, sir.

Q: All right. Dr. Myat, did you prepare a calculation of your lost income that you've lost over the last 38 months that you haven't worked?

A: Yes, sir, I have.

MR. PADGET: Your Honor, if I may approach?

THE COURT: Yes, sir.

MR. PADGET: I'll get this marked.

MR. HOLLER: Judge, no objection to the Rule 1001 summary.

THE COURT: Okay.

MR. PADGET: Your Honor, at this time, we'd move Plaintiff's 17 in, the calculation Dr. Myat performed. I understand it's without objection.

MR. HOLLER: Can I move this?

MR. PADGET: Sure.

MR. HOLLER: Because I can't see him at all.

MR. PADGET: Sure.

THE COURT: Okay. No objection.

(WHEREUPON, Plaintiffs exhibit number 17, Rule 1001 summary of lost income, was admitted into evidence.)

BY MR. PADGET:

Q: Dr. Myat, I'm going to hand you now Exhibit 17.

A: Yes, sir.

Q: Is this a calculation you prepared of your lost income over the last 38 months?

A: That's correct, sir.

Q: And if you would, just describe for us how you detailed this calculation.

A: The top part is -- I have the total.

MR. PADGET: Hold on a second, Dr. Myat. I'll pull it up so everybody can see it here. All right. Can everyone see? All right.

BY MR. PADGET:

Q: Dr. Myat, if you would, please continue.

A: On the right -- on the right, I have the column -- total column from 2009, the amount, until 2013, and at the bottom -- this is a total income that I was receiving from all three jobs that I had done. At the bottom, it has the net income after my expenses were taken out and -- from 2009 until 2014.

Q: Dr. Myat, going to the next page --

A: And what I did was I took the average from 2009, 2010, 2011, net average per year. And if you calculate it to per month, it turns out to be $47,024. And if I use the previous three years' average and I've been out for about 38 months since my -- since my last day that I worked, and I have this number. It's a net -- lost net income.

Q: I see. And, Doctor, you have not worked since May of 2012?

A: No, sir.

Q: All right. And you have not participated in your medical

practice or any other medical practice --

A: No.

Q: -- since May 2012?

A: No, sir.

Q: Does your calculation that you prepared -- and it's now been made I believe Exhibit 17. Does it take into account the growth that your medical practice was experiencing?

A: No, sir. It didn't take that into account.

Q: And in 2011, part of which you based this average on --

A: Yes.

Q: Did you work a full year that year?

A: No, sir. It was just the first six months and then the latter -- latter part of the year was pretty slow initially.

Q: All right. Doctor, do you -- to this day, do you continue to have pain and limitations from your leg injury?

A: Yes, sir. I still have the knee pain and limitations, which are permanent.

Q: Have you -- in light of the troubles you've had with your leg but in light of your extensive experience and training as a physician, have you attempted to find other types of employment that could accommodate your -- your limitations?

A: Yes, sir, I have. I've called a friend of mine who works at Ascension Health Center -- Health System to help me find a job at an insurance company working as a physician for the insurance company.

Q: Yeah.

A: Usually what they do is they just use the phone, call other doctors and hospitals. It wasn't successful. And I also -- I emailed VA in Columbia my resume and the application. I had an interview -- two interviews with them and then what happened was they told me that I didn't --

MR. HOLLER: Objection. Hearsay.

BY MR. PADGET:

Q: They can't you can say what they told you, Dr. Myat.

A: Okay. Sorry.

Q: Were you able to get a position with the VA in Columbia?

A: No, I didn't. I didn't meet the physical requirements that's required for a physician to perform for the VA, which is you have to be able to kneel, bend your knees, stoop, which I couldn't do. So they said --

MR. HOLLER: Objection. Hearsay.

BY MR. PADGET:

Q: Again, Dr. Myat, please don't tell us what you told them.

THE COURT: You just can't say what they told you.

THE PLAINTIFF: I'm sorry.

BY MR. PADGET:

A: So --

Q: Were you able to find a position at the VA?

A: That one also didn't work out because of my physical -- and I also contacted the chief of VA at the Sumter clinic here

without success and I also contacted a few physician recruiters telling them my limitations and, you know, trying to find a job.

Q: A physician recruiter? Some -- some of us call it a headhunter?

A: Yes, sir. Yes, sir.

Q: Looking for positions at other places?

A: Yes, sir. For organizations. They look -- they look for -- they look for physicians for organizations, like for hospitals trying to hire physicians.

Q: Did you have any luck trying to find another position that would accommodate your physical limitations?

A: No, sir. The minute you mention physical limitations, they --

MR. HOLLER: Objection. I just don't want to get into hearsay.

THE COURT: Okay.

BY MR. PADGET:

Q: Dr. Myat, have you considered other types of employment in the medical field that would not require you to walk and bend and kneel, like going back to school to become a radiologist or some other specialty?

A: Radiologist? I've never been a radiologist. Radiology -- radiologists are trained as I did, four years residency, and I haven't -- I haven't inquired about that.

Q: So even if you did do that, you would be in training for how long?
A: I think it's four years.
Q: Four years?
A: Yes, sir.
Q: And your residency program that you participated in -- did you find it physically demanding?
A: That's the toughest -- the toughest part of being a physician is going through a residency.
Q: And how was it tough? What kind of hours did you work?
A: Usually you have to work 36 to 42 hours straight sometimes. When you're working on call, you start at six a.m. and then you finish the next day sometimes six -- eight p.m.
Q: Dr. Myat, how is it now today -- now that you're not practicing as a physician, how do you spend your days?
A: Well, I usually stay home. I sit on my chair, a reclining chair. I have my knee elevated and that's basically it.
Q: Aside from the physical limitations that you've described to us, how have these injuries affected you?
A: Well, obviously, you know, I feel down sometimes given the current conditions and also, you know, relationship problems, intimacy problems. Given your limitations, you have problems sometimes. And the basic daily things are also affected as well, given I can't bend my knee.

So most everything you do every day requires some degree of knee bending, such as trying to clean the bottom of my left foot while I'm trying to take a shower. I couldn't do that. It's very difficult.

Q: Doctor, you said earlier you were a Buddhist. You grew up a practicing Buddhist in --

A: Yes, sir.

Q: -- Burma?

A: Yes, sir.

Q: Has your physical injury -- has it affected your ability to worship?

A: When you go to a Buddhist temple, you're supposed to kneel -- I mean sit in a kneeling position and you pray in front of a Buddhist statue. So the fact that I can't kneel at all and I really -- I really can't pray in front of a Buddhist statue. And also when you go to a Buddhist temple, you're supposed to -- everybody sits in a kneeling position and when I go, my knee is going to be straightened out and that's considered very offensive going to a Buddhist temple. So I try to avoid it as much as I can.

Q: Dr. Myat, you've come a long way. Let me back up and ask one other question. You -- when you left Dr. Cucé's care in June of 2012 --

A: Yes, sir.

Q: -- your physical condition then -- how would you compare

that to your physical condition now?

A: Just the fact that I continue to have pain. The more pain I have, the more I don't use. The more I don't use it, the muscle gets smaller and smaller. So the more muscle gets smaller, the more you don't use, the more pain, and that's a vicious cycle. It's just that my muscles get smaller and smaller.

Q: Do you believe you're better or worse than in June 2012?

A: I would like to think --

Q: What about --

A: I would like to think the same except those muscles.

Q: Dr. Myat, you've come a long way. You've worked hard to get where you are professionally.

MR. HOLLER: Objection. Leading.

MR. PADGET: The question just simply is --

THE COURT: Go ahead.

BY MR. PADGET:

Q: How does it make you feel to have lost your medical practice?

A: Well, you know, ever since I came to this country, I've tried my best to achieve what I've achieved and I really enjoyed helping patients out, helping them with their infections and getting rid of their infections, working with nurses and other -- my colleagues, other doctors. And I also enjoyed the status of being a practicing physician. All of

that is gone now.

MR. PADGET: Judge, those are all the questions that I have.

THE COURT: Okay. Let's talk before you start about scheduling real quick.

MR. HOLLER: I will be lengthy, but a restroom break would be nice.

THE COURT: Okay. Well, what about a lunch break? I mean when you say lengthy, I found out if you don't go to lunch at 12 or 12:30 or one, after one it's tough to go to lunch because the restaurants close and they have issues. So I normally break by one. And I don't want to cut you off, but if you can't be through by one, we've got a problem. So should we just go to lunch now and come back?

MR. HOLLER: Probably.

THE COURT: Okay. All right. Ladies and gentlemen, we'll go to lunch and ask you to be back at -- let's see. I usually give an hour and a half and they may need that if we've got any other issues. A quarter to? Well, that's giving them an hour and a half; right? If you'll be back in your jury room at quarter to -- 1:45. I'll remind you don't discuss this case.

(WHEREUPON, the jury exited the courtroom at 12:15 p.m.)

THE COURT: For scheduling, potentially we can finish cross on this witness and one more witness, the deposition?

MR. PADGET: That's correct, Your Honor.

THE COURT: Okay.

MR. HOLLER: Judge, I probably could finish in 45 minutes, but I couldn't promise that.

THE COURT: Oh, I know. And I didn't want to cut you off. I think everybody needs a restroom break and by the time we took a restroom break and came back, you know -- so we'll just start back, you know. I'll be here by 1:30 or earlier in case we need to discuss anything. I'll see y'all then.

MR. HOLLER: Thank you.

THE CLERK: Judge?

THE COURT: You can step down. You just can't discuss your testimony with your lawyer during the lunch break. Okay?

THE PLAINTIFF: Okay.

THE COURT: You can talk about the weather or anything else, but you can't talk about your testimony.

THE PLAINTIFF: Yes, Your Honor.

(WHEREUPON, there was a break in the proceedings from 12:16 p.m. until 1:52 p.m.)

THE COURT: Okay. Are we ready for the jury?

MR. HOLLER: Yes, sir.

THE COURT: Okay. Doctor, if you would, come back. And I'll remind you you are still under oath.

THE PLAINTIFF: Yes, Your Honor.

THE COURT: Okay. Bring me the jury.

(WHEREUPON, the jury entered the courtroom at 1:52 p.m.)

THE BAILIFF: We have all the jurors present, Your Honor.

THE COURT: Okay. Thank you, sir. Mr. Holler?

CROSS-EXAMINATION

BY MR. HOLLER:

Q: Dr. Myat, good afternoon again. I'm David Holler.

A: Hello, sir.

Q: We've met before, haven't we?

A: Yes, sir.

Q: When I took your deposition? Do you remember that?

A: Yes, sir.

Q: We met in a conference room. Your lawyers were with you and you were under oath and you gave testimony. Do you remember that?

A: Yes, sir.

Q: Okay. Let's talk about July 6th, 2011.

A: Yes, sir.

Q: I asked you specifically on the -- in your deposition what you remember and let's talk about the things that you said that you did and didn't remember at that time. Okay?

A: Yes, sir.

Q: And it was sometime in 2014 when I asked you about the 2011 event?

A: Yes, sir.

Q: Okay. You don't recall where you were coming from or

going to at the time that you fell?

A: No, sir.

Q: Okay. You did not strike your head when you fell?

A: No. I don't believe so. No, sir.

Q: You were not rendered unconscious?

A: Well, I was on -- I was on the floor when I realized -- you know, after the fall, I was on the floor.

Q: The point I'm trying to make is you were not knocked out, which would explain why you wouldn't remember some things. You didn't have a head injury?

A: No, sir.

Q: You didn't have any bruises --

A: No, sir.

Q: -- or abrasions or anything else on your head?

A: No, sir.

Q: No reason to believe that you lost consciousness at your fall?

A: No, sir.

Q: You don't know whether you fell forward or backwards?

A: No, sir.

Q: You don't know whether you went out to the side? You don't know what hit the ground first?

A: No, sir.

Q: Do you remember telling Dr. Mot McCullough in the emergency department that you fell and struck your coccyx and

also your knee?

A: I remember at that time I was having pain on the tailbone.

Q: Okay. Do you remember telling Mot McCullough, the doctor in the emergency room, that you fell and struck your coccyx and your knee?

A: Struck, I don't remember, but I remember telling him I had pain over the tailbone, sir.

Q: Okay. And your coccyx -- if humans had a tail --

A: Yes, sir.

Q: -- that's where it would be attached?

A: Yes, sir.

Q: Okay. And you refer to it as a tailbone?

A: Yes, sir.

Q: You can't describe to this jury -- it's documented that you told Mot McCullough that you fell and struck your coccyx and your knee, but you can't describe to this jury how it is you fell and struck your coccyx and your knee?

A: I -- I can make a guess how it could have happened.

Q: I asked you in your deposition how it could have happened and you couldn't explain it to me.

A: I don't remember, but I could guess.

Q: All right. That's okay. I'd rather you tell us facts.

A: Okay.

Q: Particularly facts that you remember.

A: Yes, sir.
Q: Okay.
A: I don't remember I guess.
Q: All right. So let's talk about -- as part of a health care team, you were a physician in that team; correct?
A: Yes, sir.
Q: Okay. And everybody is there for the patients?
A: Yes, sir.
Q: Okay. To take care of the patients?
A: That's correct.
Q: And as part of being a team member, as a physician you're an advocate for patient safety?
A: Yes, sir.
Q: And that would include any dangerous conditions in a patient's room, in a hallway or anywhere else?
A: Yes, sir.
Q: You'll agree with me that when you walk through -- as part of the patient team, the care team, the physician, you give orders to nurses, the nurses fill out the orders. As part of that team, it's part of your responsibility to maintain or make sure that there's no things that are dangerous to the patients and those that are with -- people that are with the patients?
A: If I see there's -- there's anything, yes, sir, I'll tell a nurse.

Q: And you're an independent contractor?
A: That's correct.
Q: You make money by seeing your patients in the hospital?
A: My private patients, yes, sir.
Q: Okay.
A: As well as work for the hospital. Yes, sir.
Q: Right. Part of your income -- and we can see the percentages because you've given us those numbers. Part of your income is you're paid by the hour to maintain the infectious disease controls, the rules if you will, on how to treat people with infectious diseases?
A: How to keep the hospital safe, yes, sir.
Q: Safe in terms of bacteria --
A: That's fair.
Q: -- fungus, not safe like --
A: In terms of infections, yes, sir.
Q: Okay.
A: Bugs.
Q: And the story that I heard earlier is probably very similar for a lot of doctors. Before you were a medical doctor, you had jobs where it was your responsibility to clean floors?
A: Yes, sir.
Q: And to take trash out?
A: Yes, sir.

Q: Fill water pitchers? Maybe not fill water pitchers --
A: Not fill water pitchers.
Q: But you had to move mop buckets around?
A: Yeah. I was cleaning a Burger King basically.
Q: Right. And you don't want to have water spilled without warning signs; correct?
A: No, sir.
Q: Because people could come into Burger King and slip and fall and get hurt?
A: Sure. That's true.
Q: Okay. So you know it's important that if something is on the floor, water or something else, that it should be taken care of immediately?
A: If anyone sees it, yes, sir.
Q: Okay.
A: It should be taken care of, yes.
Q: And you'll agree with me that as someone who was walking through the hospital, you have a duty and a responsibility to look where you're going?
A: I do look for any hazardous material when I walk, yes, sir.
Q: Okay. You would not be following your duty if you were walking around reading a chart, not looking at where you were walking?
A: That's true for sure. Yes, sir.

Q: And that's part of your responsibility as well not only to look out for what your patients and their family members may slip in or become injured by, but also for yourself?
A: Yes, sir. If you don't look where you're walking, sir.
Q: And I asked you and you didn't know if you had been -- on July 6th, 2011, you didn't know if you had been there for two minutes or two hours?
A: I was there on the floor, sir. I don't remember how long I'd been there or how many patients I had already seen. I don't remember.
Q: You don't know whether you'd seen zero patients yet or four patients yet?
A: On that particular floor or in the hospital?
Q: On July 6th, 2011 -- and I asked you about it at the deposition. You don't know whether you had been to see a few patients already or whether you had yet to see your first patient on 3rd South?
A: I usually start around three o'clock.
Q: Okay.
A: That's all I can tell you, sir.
Q: Fair enough. And it's about five -- 5:30?
A: Yes, sir.
Q: You also said you see your sickest patients first? Wasn't that your testimony?
A: Sickest -- if they call me, right away I go there, sir.

But by sick meaning -- you've got -- I have to clinically judge who is sickest, yes, sir.

Q: I understand. If you have patients in ICU, they're typically sicker than they would be on 3rd Medical South?

A: Sometimes. Not necessarily.

Q: Okay.

A: Sometimes they could be stable, waiting to be transferred out.

Q: Okay. Well, Dr. Myat, I tried to find out where you were before you fell and you couldn't remember. Do you remember more today about where you were before you fell?

A: No, sir.

Q: Okay. So you don't know -- once you got to 3rd Floor South at Tuomey, you don't know whether you had seen zero patients yet or whether you had seen four patients yet?

A: To be exact, no, sir. But just as I said, yes, sir.

Q: Okay. And again, you don't know what direction you were -- you don't know if you were walking, you don't know if you were standing, you don't know what you were doing when you fell?

A: Yes, sir.

Q: You just knew you'd had fallen?

A: I just knew I had fell very hard, yes, sir.

Q: Okay. And you're nodding your head yes to a -- let me clear this up. It's my question that's poorly. You don't

know if you were walking or standing, do you? And the answer would be? No, you don't know?

A: I remember I fell. I remember I slipped on water.

Q: At the time you fell, you don't remember if you were walking or you were standing?

A: I was walking or standing? I don't -- I just remember I fell. Yes, sir.

Q: Do you remember when I asked you in your deposition at the time you fell were you walking or were you standing and you said you don't know?

A: I don't remember. I just remember falling.

Q: Okay. That's what I wanted. That's what I wanted to establish.

MR. HOLLER: Mr. Bradley, can you --

THE CLERK: Yes, sir.

MR. HOLLER: I believe this is Plaintiff's 1. This is Plaintiff's 1? Okay. This was Plaintiff's 1 to Mr. Whitehouse's deposition. I'm not positive what it is in the case.

MR. PADGET: It's 1, but without the blue markings.

MR. HOLLER: Okay.

BY MR. HOLLER:

Q: My apologies. This has some markings when Mr. Whitehouse was given this in his deposition. He made some markings on here and this is what I wanted to look at. Are you generally

familiar with this diagram of 3 South?

A: Yes, sir.

Q: Okay. And I'm going to blow it up in a little bit so it's a little closer and easier to see, but would you agree with me that over here where this red dot is would generally be where the visitors elevator would be?

A: That's right, sir.

Q: Okay. So someone coming off the visitors elevator would come and walk down the hallway to where the patient rooms are; correct?

A: Are you talking about walking during the daytime or -- I don't know what you --

Q: Okay. Let me put it a different way.

A: Yes, sir.

Q: If I -- if I'm a person and I'm walking where this red dot is and I'm trying to walk down this path right here, I'd have to walk through walls, wouldn't I, because those are patient rooms?

A: That's correct. Yes, sir.

Q: I'm just trying to establish where the -- where the walkway is -- where the hallway is.

A: Okay.

Q: This is the main hallway right here; correct?

A: That's correct, sir.

Q: Now, these two rooms down here -- do you remember the

room numbers?

A: No, sir.

Q: Okay. But the two rooms on the corner are special, aren't they?

A: They're isolation rooms.

Q: Okay. And what is an isolation room?

A: When somebody is, you know, airborne, could spread it to other people. Yes, sir.

Q: They have a potential airborne illness and their breathing alone could infect other people?

A: That's correct, sir.

Q: So when people go in the rooms, they have to take certain precautions, wear masks?

A: Yes, sir.

Q: And likewise, you don't want the air from that room to be ventilated into the other rooms in the hospital or the hallway?

A: Yes, sir.

Q: Okay. Is it fair to say that often times your patients, some of the sicker people, are in those rooms?

A: That's correct. Yes, sir.

Q: Let me -- let me cover this just briefly. You're a doctor of infectious disease. Patients don't generally pick up the phone and say, Dr. Myat, will you please come see me, do they?

A: I get referred by their primary care physicians. Other physicians refer me.

Q: You get brought in on a consultation?

A: That's correct, sir.

Q: So when you say build up a practice and a reputation, your practice and reputation is with doctors? Doctors know you, they know your name, they know what you do?

A: Yes, sir.

Q: And they ask you to come in and treat their patients or consult with their patients?

A: Yes, sir.

Q: They may have an infection that's gotten out of control?

A: Yes, sir.

Q: And they say, Dr. Myat, will you look at my patient and see if I'm doing the right things to keep this infection under control?

A: Yes, sir.

Q: Okay. In fact, you've told me you've never admitted a patient to the hospital?

A: No, not on my own patient. No, sir.

Q: So you really provide services as much as anything to the attending physician. You care for the patient, but your services are provided to the attending physician?

A: I was a consultant.

Q: Exactly. You're a consultant to the physician?

A: Yes, sir.
Q: And the person with the ball, if you will, the control stick, is the primary attending physician?
A: Yes, sir. That's correct.
Q: You give them a suggestion and they may say I disagree, I'm concerned, I'm more concerned about some other --
A: Yes, sir.
Q: -- medical issue. Thank you for your advice, but I'm going to pick this choice and sometimes they agree with you?
A: Yes, sir.
Q: Okay. Now that we've got the layout a little bit, I'm going to make this a little bit bigger and I want to talk about this nursing station here. Is that -- where I've drawn the red -- is that a rough approximation of what would be the solid nursing station with computer terminals on top of it?
A: Yes, sir. That would be the table. Yes, sir.
Q: So -- and I'll go back to the dot. Employees, physicians, and other people can walk around this area where you see the red moving?
A: Yes, they could.
Q: Okay. And there are chairs that are in front of the nursing station; so when physicians or nurses are documenting -- when they're reading charts to find out what they need to do and documenting what they have done, they can sit down?
A: Yes, sir. They have chairs. Yes, sir.

Q: And there are chairs on both sides?
A: Yes, sir.
Q: There are also two closets, one we've referred to as a patient kitchen with an ice machine in it right here?
A: That's correct.
Q: And one with printing supplies and a printer and other supplies that the nurses use right there?
A: Yes, sir.
Q: I think you testified earlier at one end of the nursing station where the dot would be right now -- this is where the patient chart carousel is?
A: Yes, it is.
Q: So unless somebody's pulled the chart, every patient on the floor would have a chart in that carousel?
A: Every chart -- not necessarily, sir.
Q: Well, if somebody comes in and pulls a chart to do work with a patient, it wouldn't be in the carousel, but other than that, it should be in the carousel unless it's down here with orders to be filled?
A: Not true, sir.
Q: Okay.
A: At night -- usually at night -- night shifts, the nurses sit in certain spots. Four nurses, four different spots, and they have the computers there and they have their charts placed in front of their -- where they sit. So let's say each

nurse has seven patients that night. They would have all seven charts there. So sometimes when I look for that, it might not be on the carousel. I have to go around and look.

Q: And listen to -- let me ask you the same question again. Listen to me carefully. Unless someone has pulled the chart because they're working on it, every patient would have a chart in that carousel? You just described to me you pulled the chart because a nurse is working on it.

A: No, sir. They may or may not be working on it. They just leave it there, sir. That's what I'm saying. Because it's more convenient for them to have all the charts in front of them as opposed to go there at night every single time going and picking it up because at night nobody -- usually no physician comes except one or two or three. So you will see the charts right there --

Q: So the --

A: -- all night long, sir.

Q: So the charts are either in the carousel or somewhere nearby because the nurses have been working with the charts?

A: They may or may not be working on the charts, sir.

Q: Okay. And if you or another physician put an open order, something that needs to be done, in a chart, you put it here right at the other end of that nurses station?

A: Generally, yes, sir, but, you know --

Q: And that's at or near the area where you fell or where

people have described you were sitting after you fell?
A: That's correct. But sometimes I give it to -- sometimes I give it to the nurses, especially when -- some physicians work closely with nurses, sir. They talk to -- they have constant contact with the nurses. I do that most of the time. And after I finish my orders, I usually tell the nurse and usually I give -- I give the chart to the nurse.
Q: Good communication is better. The more communication you have about a patient, the better the patient care?
A: Different styles for different physicians.
Q: Okay. So do you use the visitors elevator very often or do you generally come up on the employee elevator?
A: I don't remember. I just --
Q: I understand you don't remember about July 6th, 2011. Do you typically use the employee elevator or could you use any elevator?
A: I used any elevators I guess.
Q: Fair enough. When you come on -- when you come on the 3rd Floor South at Tuomey, do you generally pull a patient's chart before you go to physically examine the patient?
A: My standard practice is I go to the chart, I get the chart next to the computer, sit down, check the chart, check with the nurse, check the computer, and then I go to the patient and see the patient.
Q: Okay. And you may have one, two, three, four or even

more patients on the third floor?

A: That's correct.

Q: Okay.

A: Yes, sir.

Q: So let's talk about this. Where this dot is -- let's say you came off the patient -- I'm sorry -- the employee elevator. You would come down this hallway; correct?

A: I'd go -- yes, sir.

Q: Okay. And then you would go to the far end of the nursing station from where people have described you were sitting after your fall because that's where the charts are unless you said they're laid out on the nurses table?

A: I thought the accident site was on the other end.

Q: It is. I said it was on the far side of where people have described you as having been on the floor --

A: Oh, okay.

Q: -- after your fall.

A: Yes, sir. I usually start -- you know, you've got to go pick up the chart from there first.

Q: Right. So you went -- if you came off the employee elevator, you would probably come down this hallway. Do you think you would walk all the way over here and come down the other hallway?

A: I doubt that, sir.

Q: It would be walking out of the way?

A: Yes, sir.
Q: Longer than you would have to?
A: Yes, sir.
Q: That's correct?
A: (No verbal response.)
Q: I need you to say yes?
A: Yes, sir.
Q: Okay. Okay. So let's say you came off the visitor elevator. All right? Because you said often times you used the visitor elevator?
A: Yes, sir.
Q: So you would come down this hallway again because it would be closer?
A: Yes, sir.
Q: And would you walk down this hallway and then walk over here to where the charts would be kept?
A: Or you could go straight, walk this way. Either way.
Q: Or walk down?
A: Yes, sir.
Q: Well, let's -- do you ever remember coming off the visitor elevators, walking down the hallway to get to the patient charts?
A: I could walk either way. I don't remember, sir.
Q: Okay. If you walked down -- I guess I would call that the west -- the west hallway. Do you follow me? This is

south. That's north.

A: Okay.

Q: West and east. If you walked down the west hallway and then walked over to get the chart, that would take you immediately through the area where you were seen when you were on the ground?

A: As I said, I could've done it. I could've done the other way. I don't remember. Yes, sir.

Q: But if you were walked immediately past this area and there was something on the floor and you were paying attention as you said you were supposed to, you would have seen it?

A: If I -- if you are asking me if I -- if I should have seen the water from looking at it when I'm walking, well, it depends, sir, you know.

Q: Go on.

A: You're walking around. Normally when I walk, I do look down for hazardous materials, but do I look down before each and every step I take? Do I look constantly down? No, I do not, sir.

Q: Dr. Myat, do you have a lesser duty to look for stuff on the floor than any other employee at Tuomey -- or any employee at Tuomey?

A: I don't understand what you're saying. Do I have a lesser duty?

Q: Your duty to look in front of you when you walk and

observe what's there -- is your duty to do that any lesser than anybody else's? Do you get a break?

A: Well, what I'm trying to explain to you, sir, is I do look for hazardous material. But every single step I take, do I look down at the floor continuously all the time? No, sir. I mean I don't think anybody would do that before every single step they take. Do they look at the floor all the time continuously? I don't think so, sir.

Q: If you walked in a reasonable fashion through this area prior to your fall, if there was something on the floor, you should have seen it?

A: I may or may not have seen it depending -- as I mentioned --

Q: There's two options here.

A: Yes, sir.

Q: If it was there, you may have seen it, but if it wasn't there, how could you?

MR. PADGET: Judge, I'm not sure what the question is. That was about three different questions.

THE COURT: He's --

MR. HOLLER: Judge, I was --

MR. PADGET: He's asking a singular question --

THE COURT: I thought it was clear.

MR. HOLLER: I thought I was too.

THE COURT: If you can answer his questions one at a time

-- you have a right to explain it, but if you could just answer. And if you don't understand his questions, you'll ask him and he'll repeat it some other way.

THE PLAINTIFF: Yes, Your Honor. I'll try my best.

BY MR. HOLLER:

A: As I explained before, if I -- have I looked continuously before every single step and I answered to you already that I have -- you know, I do look, but not every single step before I put my feet. And if you're asking should I have seen it because I was walking on it, I may or may not have seen it. That would be my answer.

Q: Okay. Dr. Myat, I'm not saying you're supposed to walk around with a magnifying glass or some special headset that you wear to see anything on the floor. I'm talking about an ordinary reasonable person going about their business who needs to look where they're walking. Is that what you would do if you walked through that area?

A: Just everybody would look for any hazardous material on the floor.

Q: Thank you.

A: Yes, sir.

Q: Your duty to look for things like that -- that's the same duty that everybody has?

A: That's correct, sir. Everybody should look. Yes, sir.

Q: Your duty is no lesser than anybody else's; correct?

A: Everybody should look, sir.
Q: Correct. So if you walked through there and there was something on the floor, you should see it?
A: You may not see it all the time, sir.
Q: Okay. If you walked through there and it's not there, there's nothing to see; right? Because it's not there yet? So if you walk through and don't see it, there's a pretty good indication that it might not have been there?
A: You know, sometimes I -- I don't mean to be difficult, sir. You know, for me, just because -- it's like -- it's like fishing. Just because you don't catch fish doesn't mean there's no fish there. Just because you don't slip on it doesn't mean there's no water on there or there was water.
Q: You don't think that Tuomey guarantees that nobody will fall, do you? No business owner --
A: I don't --
Q: -- guarantees that no one will ever fall down?
A: I don't know the hospital policies.
Q: Do you think any owner of a building should be absolutely responsible if somebody happens to fall down?
MR. PADGET: Judge, I object. It's a legal question he's asking the witness.
THE COURT: I'll allow the question. Go ahead.
BY MR. HOLLER:
A: I don't know. I don't know a building policy or -- where

I came from in New York, if they have snow and somebody falls, you're supposed to clean it for one foot. So if you clean it for one foot and you fell on the other foot, then you are not responsible, but if you don't clean it, then you're responsible. That's in New York.

Q: Dr. Myat, people fall down all the time, don't they?

A: Yes, sir. I know.

Q: A lot of the people that you come to treat have fallen. They fall at home. They fall on the sidewalks.

A: Yes, sir.

Q: Some are old; some are young?

A: Yes, sir.

Q: It happens. Unless you're saving a child from a burning building, there's no good way to get hurt, is there?

A: No, sir.

Q: People get hurt?

A: Yes, sir.

Q: And it doesn't have to be somebody's fault?

A: It may be or may not be, sir.

Q: It may or may not be?

A: Yes, sir.

Q: But people get hurt all the time and it is nobody's fault?

A: Sometimes it may be nobody's fault, yes, sir.

Q: So if you came off the visitor elevator as you said you

often did and you walked through this way, will you agree with me that if you were reasonably observing the floor, if there was water visible there, you would have seen it?

A: I would or I would not agree that you may or may not have seen it, sir.

Q: You got me on that. I have no idea how you answered that.

A: You said your question was I would have --

Q: If you were reasonably -- you said when you walk you act reasonably and look where you're going and if you were doing that and there was water on the floor, you would have seen it?

A: If you say if you're walking in somebody else's hallway or Walmart or Kmart and there's a spot of water on there, you should look. Do you always see it? I don't -- I don't think you always see it, sir. Anybody for that matter, sometimes you may and sometimes you may not see it. I'm just simply answering in that fashion.

Q: So whether you -- whether you walked through here through this way, whether you walked and came down the east hallway on 3 South, either way you ended up over here where the medical charts were?

A: Yes, sir.

Q: And you may have already seen one or two patients?

A: I may have. Yes, sir.

Q: You may have seen three? You may have seen four?

A: Right.
Q: But you don't remember either way?
A: I don't, sir.
Q: Okay. So the chart was here or either somewhere on the desk, the nursing desk?
A: Yes, sir.
Q: For what we'll call for our purposes your then patient. It may have been your first, it may have been your fourth.
A: Yes, sir.
Q: So you would sit down with the chart and review what had happened since you last visited the patient's chart?
A: Yes, sir.
Q: Okay. You may have gotten test results back?
A: Yes, sir.
Q: Somebody else may have consulted. Something else might be going on. The patient's condition may have changed?
A: Yes, sir.
Q: You said in addition to looking at the chart, you would generally talk to the nurse?
A: I would, sir. Yes. As a practice.
Q: And you may have -- you may have three or four different nurses that you'll need to speak to before you finish seeing all your patients; right?
A: Yes, sir.
Q: All of your patients may not be with the same nurse?

A: That's correct.

Q: So at some point in time after you receive the information from the chart and you have talked to the nurse about how the patient is doing on that shift --

A: Yes, sir.

Q: -- you would go see your patient?

A: Yes, sir.

Q: And it's been described -- you don't remember, but it's been described by Ms. Sapp that she saw you walking down this hallway, down the west hallway, moving in a northerly fashion. Do you remember that testimony?

A: Yes, sir.

Q: Okay.

A: She did say that.

Q: Can -- will you agree with me that you would have no reason to go down this hallway until after you had reviewed a patient's chart?

A: I don't understand your question, sir.

Q: Okay.

A: I'm coming back this way. That's what she saw.

Q: You said -- right. She says you were walking north down the west --

A: Yes, sir.

Q: -- corridor?

A: Uh-huh.

Q: You said your general practice was when you come in the first thing you would do is go to the chart, you talk to the nurse, you'd get that information, then you'd go do a physical exam?

A: See the patient, yes, sir.

Q: And you indicated it was around this area that you would do the chart review?

A: That's correct.

Q: So if you were going to see a patient that was on the west side of the 3rd Floor North --

A: Yes, sir.

Q: -- you necessarily would have walked through this area, maybe a second time now, to get to that patient?

A: Maybe.

Q: Okay. And if you had come off the visitor elevators and come through the first time, the same would be true for this time. You would have to walk through that very same area where you were found on the floor and again you would be looking to see if there was anything that would be a hazard?

A: Well, like I said, there are a lot of things I don't remember. So I -- you know, I don't know how many times I walked on it already or would I have already walked on it. I could have, but I don't remember a lot of things.

Q: But if you were reasonably -- if you're walking in a reasonable fashion, you're not holding something in front of

your face, you're not, you know --

A: Yes, sir.

Q: -- scooting too fast --

A: Yes, sir.

Q: All right. You should see something that's readily visible on the floor?

A: If it's visible, somebody should -- you should see it, yes, sir.

Q: Right. So the great likelihood is if you walked this way to see a patient on the west side down the west hallway --

A: Okay.

Q: -- that you would have walked through that area before you went to see the patient?

A: If I was going that way, if I was walking in the direction you are mentioning, yes, sir.

Q: Okay. And because you didn't see anything and you didn't alert the staff there was something on the floor, there's some assumption here there was nothing on the floor?

A: Well, that's your assumption, sir.

Q: Are you saying there was something on the floor that you didn't see?

A: It could be, sir.

Q: But you believe somebody else should've seen it?

A: Should or should not have, I don't know, sir. I don't know the answer to that, sir.

Q: Mr. Whitehouse testified that he spoke to you across the nursing station?
A: Yes, sir.
Q: Okay. His recollection is he spoke to you prior to your fall?
A: Yes, sir.
Q: Okay. And you heard his testimony that he walked through this very same area to go into 346 prior to the fall?
A: I don't know which direction he walked, sir.
Q: Okay. Do you have any reason to believe that his memory is wrong?
A: No. I trust Mr. Whitehouse, sir. He's a very trustworthy nurse.
Q: You had a good working relationship with him?
A: Yes, sir.
Q: And you consider him to be a colleague and a friend?
A: Yes, sir. He's a friend.
Q: So the likelihood based -- if Ms. Sapp is telling us accurately that you were walking down north on the west hallway, that you and Mr. Whitehouse both would have walked through this immediate area before you fell?
A: If Mr. Whitehouse already -- if he said he walked on it, I'll take that. Yes, sir. Had I already walked on it? I don't remember, but I probably -- yes or no, I could have. I'm not disputing that, sir. I could have. I'm just saying I

don't remember.

Q: Okay.

A: Yes, sir.

Q: The water that you slipped in -- you have no idea how long it was on the floor?

A: No, sir.

Q: You have no idea if a Tuomey employee knew about it?

A: I don't know who knew about it.

Q: You don't know of any way that a Tuomey employee could or should have known about it?

A: I do not know, sir.

Q: You don't know how long it was there?

A: No, sir.

Q: Let's change gears a little bit, Dr. Myat. Let's talk about what you do as an infectious disease doctor. Mostly what you do is think; correct?

A: I've got to examine the patient, sir.

Q: You do have to examine the patient, but most of it's done with your brain. Do you agree with that?

A: Well, part of it is brain. Yes, sir.

Q: Okay. I think you -- I think you testified on direct that 99 percent of your patients are typically in a hospital setting?

A: Yes, sir. Ninety to 99 percent. Yes, sir.

Q: And you said you had the one percent or the lesser number

of patients you see that have long-term autoimmune like AIDS and other diseases where you see them on an outpatient basis?

A: Outpatient? The only one -- I had a patient who was really sick and they can't commute to Florence, so on and so forth, at special request I was seeing them outpatient. Otherwise, I don't see -- you know, I only see AIDS patients and HIV patients.

Q: And let's -- let's touch on this a little bit. You -- your workplace is the hospital?

A: Well, I worked three jobs, sir.

Q: I understand. We're talking about one of those is the Family Health Center?

A: Yes, sir.

Q: When you see people at Tuomey -- when you're not at the Family Health Center, you're either handling the quality control on the infectious disease department or you are in your private practice seeing patients at the hospital, be it ICU --

A: Yes, sir.

Q: -- women's ward, whatever they -- OB/GYN?

A: Yes, sir.

Q: Or the medical floors?

A: Yes, sir.

Q: So you go to those floors. That's your workplace. That's your office in a sense?

A: In the hospital, yes, sir.
Q: Okay. You benefit from going there to go to work?
A: I provide care to the patients. Yes, sir.
Q: It would be really hard for you to earn a living if you didn't have a hospital to work in?
A: Most of what I do is based in the hospital. So you would -- you would be right, sir.
Q: Just like a radiologist, you might not be employed for the hospital, but the x-ray machines and the other machines are in the hospital; so that's where you spend your time?
A: The hospital is where I work and that's -- I agree with that, sir.
Q: And that's characteristic of infectious disease?
A: Yes, sir.
Q: But the point is is you go there to treat the patients and you're paid by the patients or on their behalf?
A: Yes, sir.
Q: Okay. And you gain financial compensation. Your purpose of going to the hospital is to be paid for your work that you do? I'm not saying that's the only reason you do it. Okay?
A: Yeah. They are -- not every patient -- not every patient is a paying patient, sir.
Q: And that -- that's not at all why I was asking that question. I apologize. I'm not trying to put wings on you or me or anybody else.

A: Yes, sir.
Q: The question is that's where you do your work?
A: Yes, sir.
Q: You go there because -- you know, if I break rocks for a living, I have to go to a quarry. If I'm a lawyer, I have to go to court. If I'm an infectious disease doctor, I've got to go to a hospital?
A: Yes, sir. I enjoy -- I enjoy going there and treating my patients. Yes, sir.
Q: Okay. All right. Your status at the hospital is you're a team leader; correct? I know you're an independent contractor, but you direct the nursing care to a large degree for your patients?
A: A leader is a different perspective. You know, different people have different perspective. I consider nurses as my friends. I wouldn't consider me as a leader leader per se, but we -- it's a group, sir. It's a team effort. All the nurses are part of the team.
Q: As the leader of the team, you implement the plan and they follow through on the plan?
A: My job is to write certain orders that I -- I believe the patient needs.
Q: Plan of care?
A: Yes, sir.
Q: They follow the plan?

A: They carry it out. Yes, sir.
Q: You made the plan; they follow it?
A: If you put it that way, yes, sir.
Q: Okay. Dr. Myat, let's talk about a typical day. I asked you in your deposition about a typical day. You say you get up at six a.m. with your wife and you eat breakfast?
A: Yes, sir. My wife -- right before she goes to work, we have breakfast together. Yes, sir.
Q: She's a family physician?
A: Yes, sir.
Q: She works here in Sumter with Dr. Shuchinda and Lilavivat?
A: No, sir. She works in Manning, sir.
A: Oh, I'm --
A: She used to work here.
Q: She works in Manning?
A: She works in Manning now.
Q: Where does she work in Manning?
A: Family Health Center in Manning.
Q: Okay. I guess when I took your deposition she worked with Dr. Shuchinda and Lilavivat?
A: She was doing part-time there before. Yes, sir.
Q: Okay. And her specialty is family physician?
A: Yes, sir.
Q: Okay. You have not had to hire anyone to help you to do

chores inside or outside of your house?

A: No, sir. My wife and my sister-in-law does that.

Q: I think you testified about this on direct. You sit in the chair from roughly six in the morning until 6:30 at night and watch TV?

A: When my wife goes to work at seven -- 7:30, she goes to work and pretty much I sit in the chair until she comes back at six -- 6:30.

Q: Okay. Your injury was to your left knee?

A: That's correct, sir.

Q: You didn't injure any other body part?

A: No, sir.

Q: You don't do exercise for any other body part?

A: No, sir.

Q: You don't do any exercise at all?

A: Well, I can't. If you do exercise, it requires some degree of knee bending, sir.

Q: Can you do pull-ups?

A: Pull-ups?

Q: Pull-ups.

A: Well, you might have to bend your knees for pull-ups. Yes, sir.

Q: You have to bend your knee to do pull-ups?

A: Are you talking about this?

A: No. A pull-up where you grab -- where you grab something

above your head --

A: Oh, I don't do that, sir. I know what you're talking about.

Q: Pull-up? Chin-up?

A: Okay. No, sir.

Q: Palms out, this is chin-up? Pull-up?

A: I don't do that, sir.

Q: You could do it though?

A: I could do that. Yes, sir.

Q: Okay. Dips? What is a dip?

A: Push-ups?

Q: No. Dips, bars. You do upper body exercise?

A: No, sir. I don't do that, sir.

Q: But you could?

A: I could.

Q: You're not injured?

A: I'm not injured in upper body, sir.

Q: You don't go to the Y? You don't work out?

A: No. I don't go to the Y, sir.

Q: You don't do any chores at the house?

A: Well, if I'm having a good day, I help them out with dishes.

Q: Okay. You're telling me now you do chores at the house?

A: I think I told you before too, sir, that I -- you know, when I -- when I have a good day, I help them with out with

cleaning dishes, sir.

Q: You told me -- actually, you told me on page 37 of your deposition that you don't do any chores. Do you want to look at that?

A: I -- I --

Q: I can go through this quickly. You said you --

A: Yes, sir. I --

Q: -- you don't -- you don't cook. You never have cooked?

A: No, I don't, sir.

Q: Your wife does the laundry?

A: My wife does the laundry, yes, sir.

Q: Your sister-in-law does the vacuuming. And she's also a doctor? Your sister-in-law?

A: Yes, sir.

Q: And she works in Manning?

A: Yes, sir.

Q: Okay. She's a hospitalist at Clarendon --

A: Yes, sir.

Q: -- Memorial?

A: Uh-huh.

Q: No one has children in the house?

A: No, sir.

Q: Your sister-in-law does the vacuuming and the sweeping?

A: And the yard work, sir.

Q: And the yard work. And you said they share the dishes

and the cooking?

A: They do share the cooking and dishes, yes, sir.

Q: Okay.

A: And I help them out with dishes when I have a good day, if I can.

Q: Your chore though -- your one chore is you did say you take care of your checkbook?

A: I used to, sir. Now, it's just mostly direct payment.

Q: But you do balance your checkbook?

A: Oh, I look at the checkbook, yes, sir.

Q: You don't do any grocery shopping?

A: No, sir.

Q: You can drive a car?

A: I could.

Q: You can drive a car safely?

A: Yes, sir, if I'm having a good day. Yes, sir.

Q: You don't have any limitations on your ability to drive a car?

A: I have -- I have limitations getting in and out of the car, sir.

Q: Dr. Myat, a human being is an animal, is it not? We're animals?

A: Yes, sir.

Q: And as animals, we need to exercise to survive, don't we?

A: Survive, I don't know, but you do need exercise if you

can. Yes, sir.

Q: To thrive, we need exercise?

A: That's what -- that's why -- that's what we educate our patients all the time. Yes, sir.

Q: Exactly.

A: Yes, sir.

Q: You have to do things. That's what we do. We're animals. We're made to run and to do things like that; right?

A: Yes, sir.

Q: Even when we're injured, we -- if you take a perfectly good limb, an arm, a leg, and you cast it or you put it in an immobilizer or the person just stops moving it, the muscle will go away, won't it?

A: Well, you won't stop moving it unless you have a problem, sir. You won't just do it just because you wanted to.

Q: Maybe.

A: So to speak.

Q: You would hope so?

A: You certainly would hope so, sir.

Q: But if you stopped using it for whatever reason, the muscle will go away?

A: Physical inactivity can certainly cause muscle to waste.

Q: Not only can cause, it will every time cause? Your muscle will not stay healthy if you don't use it?

A: That's correct, sir.

Q: Okay. You were given home exercises?
A: Exercise as tolerated, yes, sir.
Q: Okay. You were given exercises to do at home by Dr. Cucé?
A: Just to do whatever you can tolerate, as tolerated.
Q: Okay. They also taught you at physical therapy how to do exercises to preserve the muscles in your leg?
A: Yes, sir. Yes, sir.
Q: And you don't do those?
A: Physical therapy? I was done with physical therapy, sir.
Q: Have you ever heard of the Blade Runner?
A: Yes, sir.
Q: The South African runner?
A: Yes, sir.
Q: Unfortunately, he was involved in a shooting with his girlfriend, but that's entirely separate. He was one of the fastest humans in the world and he had no legs from the knees down.
A: You're talking about Mr. Pistorius. Yes, sir.
Q: That's it. I couldn't remember his name. Thank you.
A: Yes, sir.
Q: You went to doctors here in Sumter, but you haven't been to doctors anywhere else?
A: I saw two -- two doctors, sir.
Q: All right. You saw Dr. Cucé?

A: Yes, sir.

Q: He sent you to a functional capacity evaluation, Todd -- Philip Lowe in Florence.

A: Yes, sir.

Q: He's a physical therapist. Then he sent you to Todd Warrick?

A: Yes, sir.

Q: And Dr. Warrick said whatever he said?

A: Yes, sir.

Q: And then you've seen nobody else?

A: I saw Dr. Strobel, sir.

Q: You went back and saw Dr. Strobel one time?

A: Yes, sir.

Q: And you --

A: He told me not to come back, sir.

Q: Well, we'll see what the record says about what Dr. Strobel told you. Okay?

A: Okay.

Q: But why don't we go with what the doctor said as opposed to what you tell us the doctor said?

A: All right.

Q: Do you agree with that?

A: Yes, sir.

Q: Okay. But you haven't sought a second opinion?

A: I don't need a second opinion, sir. Can I explain?

Q: Have you been to anybody else to find out if there's something that can be done?
A: I was told by two of Tuomey's orthopedists --
Q: Okay.
A: I don't -- they can't do anything --
Q: We're going to hear from Tuomey's orthopedist. You don't need to tell us what he said.
A: Yes, sir.
Q: He's testifying next.
A: Okay.
Q: Okay. His testimony will be though he said that you would benefit from occupational therapy?
MR. PADGET: Objection, Your Honor.
THE COURT: Okay. On what basis?
MR. PADGET: He's asking Dr. Myat what Dr. Cucé will testify to next.
THE COURT: Okay.
MR. HOLLER: I'll rephrase it.
THE COURT: Okay. I'll sustain it based on that.
MR. HOLLER: Is the questionnaire in evidence?
MR. PADGET: Not yet.
MR. HOLLER: Do you have it?
MR. PADGET: Yeah. I've got a copy if you want it.
BY MR. HOLLER:
Q: This will be introduced into evidence shortly.

A: Yes, sir.
Q: But I'm going to ask you about a two-page document and I'm going to let you look at it first.
A: Yes, sir.
Q: Tell me when you're finished looking at it.
(WHEREUPON, there was a pause in the proceedings.)
A: Yes, sir.
Q: You've seen that document before?
A: Yes, sir.
Q: Okay. You delivered this to Dr. Cucé's office on the day that you saw Philip Lowe?
A: Yes, sir.
Q: Okay. And you asked him to fill it out?
A: Yes, sir.
Q: And he did and he signed it?
A: Yes, sir.
Q: One of the questions that he was asked on this page that he signed says -- that you asked him to fill out -- do you recommend that the patient become involved in any of the following? This date is May 14th, 2012. So we are some eleven months' post date of injury.
A: (No verbal response.)
Q: Say yes for me?
A: Yes.
Q: Okay.

A: Yes, sir.
Q: Thank you.
A: Sorry.
Q: And you're doing fine. I just need an answer. Do you recommend the patient become involved in any of the following? He checked physical therapy?
A: Yes, sir.
Q: You've been to physical therapy, but here he's telling you you need more physical therapy?
A: This is a form he filled out and he never told me anything about this.
Q: He gave you the form, didn't he?
A: He did.
Q: And he signed it?
A: He filled it out. He filled out that form for me, sir.
Q: And he signed it?
A: He did, sir. He did.
Q: And it says you'd benefit from physical therapy?
A: He -- we didn't discuss anything about what he filled out, sir.
Q: He gave you the form that said you would benefit from physical therapy?
A: He did, sir.
Q: He expected that you would be a good compliant patient; correct?

A: This is not to follow up. This is not one of the follow-up visits, sir.
Q: This is one of the follow-up -- well --
A: No, sir. This is not for the treatment, sir. This is not treatment-related issues and he never told me what to do.
Q: Does this document that Dr. Cucé signed say that you would benefit from physical therapy?
A: It does, sir. Yes, sir.
Q: In May of 2012?
A: Yes, sir.
Q: Did you ever go for physical therapy after May of 2012?
A: I was -- I was already done with physical therapy in January of 2012. He was aware of it, sir.
Q: He signed a document May 2012 that said you would benefit from physical therapy. Dr. Myat, my question is simply this. After he gave you this piece of paper that said you could benefit from physical therapy, did you ever get physical therapy? It's simple. Yes or no?
A: He never told me to go to physical therapy, sir. We were -- we were already done with physical therapy, sir.
Q: Okay. We'll hear from him in a second.
A: Yes, sir.
Q: Here, you're given a piece of paper that you asked for that says you would benefit from physical therapy in May of 2012. My question is simple. After May of 2012 after Dr.

Cucé said you would benefit from physical therapy, did you ever go back to physical therapy?

A: I'm just simply explaining to you that --

Q: Dr. Myat, tell me if you went to physical therapy and then if you want to explain, you can try to explain, but don't tell me what Dr. Cucé said because he's about to testify.

A: He said I --

Q: No.

A: We were done with physical therapy in January of 2012. And he did fill that out in May of 2012. I agree with that. Yes, sir. I'm not disputing that he's not filled it out. I'm just stating --

Q: After --

A: -- that he never told me.

Q: After May of 2012, did you ever go to physical therapy?

A: No, sir.

Q: Dr. Cucé said you would benefit from a work-hardening program. After May of 2012, did you ever go to a work-hardening program?

A: I don't know what it means, sir. But he did fill it out and he checked the mark. Yes, sir.

Q: If you don't know what it means, then you don't know what it is, which means you should explore it so maybe it can help you go back to work? Do you agree with that?

A: He never told me anything about any of that, sir.

Q: He gave you a piece of paper that he signed that said you'd benefit from it.
A: That's a copy that I obtained from his office later on, sir.
Q: After May of 2012, did you ever go to a work-hardening program? Yes or no?
A: No, sir.
Q: Job modification. After May of 2012, did you ever go for any training in job modification? How you could better get to your patients, sniff what you have to sniff, touch what you have to touch, where you have professionals who train you in things and, as you describe, you don't know that much about?
A: No, sir.
Q: Psychological counseling. Do you agree with me that this form filled out in May of 2012 says you would benefit from psychological counseling?
A: It did say that, sir. Yes, sir.
Q: After May of 2012, did you ever receive psychological counseling?
A: No, sir.
Q: Have you ever received psychological counseling?
A: No, sir.
Q: You have never sought -- other than going back to Dr. Cucé's medical partner for one visit, you've never sought a second opinion from any orthopedist or anybody else --

A: Dr. --

Q: -- other than the doctors that you -- that we've talked about?

A: Dr. Cucé's partner was my second -- in a sense was a second opinion, sir. He's the second orthopedist I saw, sir.

Q: An orthopedist you saw in the same practice. You haven't gone to another practice for a second opinion?

A: No, sir. I was told not to. There was no need to. They said there's -- there's nothing else they could do, sir.

Q: Okay.

MR. HOLLER: Judge, I move to strike what the doctor is telling him that's not consistent with the testimony.

THE COURT: I'll grant your motion.

MR. HOLLER: Thank you.

BY MR. HOLLER:

Q: You -- Dr. Myat, you never got a second opinion from another doctor not connected with that orthopedic practice?

A: No, sir.

Q: You have access, don't you?

A: I have insurance. Yes, sir.

Q: And that's not my question. You have a condominium in Myrtle Beach?

MR. PADGET: Objection, Your Honor, as to the relevance of that.

THE COURT: Well, go ahead. I mean I assume it's about

access.

MR. PADGET: I don't know the relevance of Myrtle Beach.

THE COURT: I'll overrule the objection. Go ahead.

MR. HOLLER: Thank you.

BY MR. HOLLER:

Q: You have a -- Myrtle Beach has more people than Sumter?

A: Yes, sir.

Q: Okay. The traffic is worse?

A: Yes, sir.

Q: More people means more sick people means more hospitals means more doctors means more choice?

A: Yes, sir.

Q: That's what I'm saying. Okay? When you came to Sumter, we hadn't had an infectious disease in ten years I heard you say?

A: That's my understanding, sir.

Q: Okay. So in Sumter, our choices for infectious disease, there's not many?

A: No, sir.

Q: Not until you came; right?

A: That's correct, sir.

Q: So if you go to Myrtle Beach where you have a condo, there's a lot more choices of orthopedists?

A: They -- they have orthopedists. They may have more orthopedists. That's correct, sir.

Q: And you'd have access to them if you had a place to stay if you want to get an appointment at the beach?
A: Yes, sir.
Q: You have a place in New York; correct?
A: Yes, sir.
Q: You don't rent it out. You could stay there?
A: Yes, sir.
Q: New York is a medical mecca. If you want to find the latest and best trained physicians that could possibly help you get back to work, that would be an excellent resource to start from, wouldn't it?
A: They have a lot more doctors.
Q: They have an awful lot of doctors. And you're familiar with the area?
A: Yes, sir.
MR. HOLLER: Court's indulgence.
THE COURT: Okay.
MR. HOLLER: Dr. Myat, thank you for your patience. I've got just a few more questions.
THE PLAINTIFF: Uh-huh.
BY MR. HOLLER:
Q: You testified that when you went back to work seeing patients --
A: Yes, sir.
Q: -- at Tuomey that you started -- I believe you said your

wife pushed you around in a wheelchair?

A: Yes, sir.

Q: And you progressed from the wheelchair to a scooter?

A: Yes, sir.

Q: And by use of the wheelchair and then the scooter, you were able to access the patient rooms to do the things you needed to do.

A: My wife helped me, sir. Yes, sir.

Q: Well, she helped you with the wheelchair. Did she help you with the scooter too?

A: Yes, sir.

Q: Okay.

A: She helped me.

Q: And then you said you went from the scooter to a four-pronged cane. That would be one cane with four feet?

A: Walker first.

Q: I'm sorry. Walker?

A: Yes, sir.

Q: You're right. You went to the walker?

A: Yes, sir.

Q: And then from the walker you progressed to a cane that had the four feet on it?

A: Yes, sir.

Q: And then from that you went to a single cane?

A: Yes, sir.

Q: And then you went to no cane?
A: No cane. I was on my own, sir.
Q: But you never went back, did you? You never went back down -- you never went back to the cane. You never went back to the four-pronged cane, did you?
A: I've already done it, sir, and I knew what was required of me.
Q: But you didn't -- you didn't go back to a four-pronged cane?
A: No, sir.
Q: You didn't go back to a scooter?
A: No, sir. That was temporary.
Q: And you didn't go back to a wheelchair?
A: No, sir.
Q: The pain that you've described to this jury that you're in -- what medication do you take to relieve it?
A: I take pain medicines. I take Tylenol and Motrin.
Q: Over-the-counter?
A: Over-the-counter, yes, sir.
Q: And that's all you've taken since 2012?
A: Initially, I was taking Percocet and my body doesn't -- doesn't agree with that, sir.
Q: When you still had an open wound on your knee that was closed by sutures, you took Percocet?
A: Yes, sir.

Q: But once you got off the surgical pain medication and the immediate healing of the skin, you went to nonnarcotic Tylenol and Motrin?

A: Yes, sir. I had an adverse reaction to that medicine. Yes, sir.

Q: Okay. I'm sorry. The adverse reaction was to the narcotic pain medication?

A: To the narcotic pain medicine, yes, sir.

Q: Okay. So the only thing that you take now is Tylenol and Advil?

A: And Motrin. Motrin.

Q: Well, Advil and Motrin are the same?

A: Yes, sir.

Q: Aren't they?

A: Yes, sir.

Q: Okay. Tylenol and Advil over-the-counter? Nothing else for pain?

A: (No verbal response.)

MR. HOLLER: Thank you, Dr. Myat.

THE PLAINTIFF: Thank you, sir.

MR. PADGET: I should be brief, Your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. PADGET:

Q: Dr. Myat, Dr. Cucé, an orthopedist from Tuomey, or Dr.

Strobel, an orthopedist from Tuomey -- did they ever tell you you need to go see other doctors, better doctors in bigger cities?

MR. HOLLER: Objection. Hearsay.

MR. PADGET: They're Tuomey employees, Your Honor.

MR. HOLLER: Judge, that's -- that's not an exception.

THE COURT: All right.

MR. PADGET: Judge, it goes to his state of mind, not the truth of whether or not they actually told him, which is not hearsay by definition.

THE COURT: He's testified that he didn't go anywhere else, that they told him they'd done all they could do for him. He's already testified to that. I'll allow the question. Go ahead.

BY MR. PADGET:

Q: Dr. Myat, you can answer it. Did any doctor tell you you need to see other doctors?

A: No, sir.

Q: Did you follow all the recommendations made by Dr. Cucé and your other treating physicians?

A: I haven't missed a single thing that he told me to do, sir.

Q: Did you -- Mr. Holler asked you a bunch of questions about did you see anybody from Tuomey spill any water. Did you spill any water in that area --

A: No, sir.
Q: -- on that morning?
A: No, sir.
Q: Do you have -- did you remember slipping on water that morning, a liquid substance?
A: I feel I slipped on water that ultimately caused the fall, sir.
Q: And no matter whether you had been at the nurses station before or after, do you have any knowledge as to whether or not -- when you departed from the nurses station, if you did, do you have any knowledge of whether or not a nurse or nurse tech was preparing any water trays in that area after you initially left the nurses station that morning after speaking with Nurse Whitehouse?
A: I don't remember, sir. I just remember they usually prepare water usually around four -- 4:30, but I don't remember that particular day, sir.
Q: Okay. But you don't know what was going on at the nurses station after you left?
A: No, sir.
Q: You have -- do you have privileges to practice medicine at Tuomey?
A: I don't understand.
Q: I'm sorry. Back in 2011 when this occurred, did you have privileges to practice medicine at Tuomey Hospital?

A: Yes, sir. That's where I was working. Yes, sir.

Q: Did you have permission from Tuomey Hospital to be on their premises?

A: Yes, sir. Yes, sir.

Q: When you were treating your patients at Tuomey, did you make the clinical decisions?

A: Yes, sir. I have to for my patients.

Q: The hospital did not control your conduct in making those clinical decisions, did they?

A: No, sir. It's all on my own.

Q: If any doctor had recommended to you to continue physical therapy, would you?

A: Oh, I would have. I would. I want to get better, sir.

Q: The seven months that you did participate in physical therapy, did you ever try to stop?

A: I was there every single day, sir. I didn't miss a day, sir. The records should show this, sir.

MR. PADGET: Your Honor, may I approach?

THE COURT: Yes, sir.

BY MR. PADGET:

Q: The form Mr. Holler asked you questions about Dr. Cucé filled out -- he wrote something here on the second page.

He wrote: Dr. Myat is a hard-working gentleman with a strong work ethic. He's not been able to work at full capacity due to his injury and this will likely be permanent.

Did you see that on the form?

A: It's on the same form. Yes, sir.

MR. PADGET: That's all the questions I have, Your Honor.

THE COURT: Okay. You can step down.

THE PLAINTIFF: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. PADGET: Your Honor, next we'd like to publish the video deposition of Dr. Frank Cucé.

THE COURT: Okay.

MR. PADGET: If I may approach, I believe the deposition is up here.

THE COURT: All right. Okay. Does anyone need a break before we do this? It's going to last for about an hour and a half.

MR. PADGET: It might take me four or five minutes to get it set up. It might be a good time.

THE COURT: Does anybody need a break? All right. We'll take a ten-minute break. I'll remind you don't discuss the case.

(WHEREUPON, the jury exited the courtroom at 2:57 p.m.)

(WHEREUPON, there was a break in the proceedings from 2:57 p.m. until 3:35 p.m.)

THE COURT: Are you ready for the jury now?

MR. PADGET: Can we talk for a second about this video?

THE COURT: Okay.

(WHEREUPON, a bench conference was held off the record.)

THE COURT: All right. So are you ready for the jury?

MR. PADGET: We're ready, Your Honor.

THE COURT: Okay.

(WHEREUPON, the jury entered the courtroom at 3:38 p.m.)

THE BAILIFF: Your Honor, all the jurors are present in the courtroom.

THE COURT: Okay. You may proceed.

MR. PADGET: Thank you, Your Honor. At this time, we'd like to publish the video deposition of Dr. Frank Cucé.

THE COURT: Okay.

(WHEREUPON, the deposition of Dr. Frank Cucé was played via videotape in open court with portions muted as follows.)

THE VIDEOGRAPHER: My name is David Campbell, Every Word Incorporated. The date today is April 30th, 2015, and the time is approximately 17:57:28. This deposition is being held at RMH Orthopedics and Sports Medicine located at 2006 South Campus Drive, Suite 200, Harrisonburg, Virginia.

The caption of this case is Win Myat versus Tuomey Regional Medical Center in the Court of Common Pleas, State of South Carolina, County of Sumter, Case Number 2012-CP-43-2030. The name of the witness is Dr. Frank Cucé, M.D.

At this time will the attorneys please identify themselves and the parties they represent, after which our

court reporter, Michelle Landis, of Every Word, Incorporated, will swear in the witness and we can proceed.

MR. PADGET: This is Bill Padgett. I represent the plaintiff, Dr. Myat, in the case.

MR. HOLLER: This is David Holler. I represent Tuomey.

THE DEPOSITION COURT REPORTER: Raise your right hand. Do you solemnly swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE DEPOSITION COURT REPORTER: The witness has been sworn.

MR. PADGET: Thank you. Dr. Cucé, this is Bill Padget. We've spoken previously. As you know, I represent Dr. Myat in the case. Good afternoon to you.

THE WITNESS: Good afternoon.

DR. FRANK CUCÉ, being first duly sworn, testified via videotape as follows:

DIRECT EXAMINATION

BY MR. PADGET:

Q: And you were Dr. Myat's treating and orthopedic surgeon subsequent to the injury he suffered on July the 6th, 2011?

A: Yes.

Q: Is that -- is that correct?

A: Yes.

Q: Doctor, just by way of a little bit of background if you

would, as an orthopedic surgeon, could you please give us the benefit of your educational background, starting with where you graduated from college?

A: Sure. I graduated from LaSalle University in Philadelphia. I went to medical school at Des Moines University in Iowa. Subsequent to that, I had six years of training to include rotating internship, one year of general surgery, and four years of orthopedic surgery at Delaware Family Medical Center outside of Philadelphia. And I've been a practicing orthopedic surgeon, board-certified for the last 16 years.

Q: And, Doctor, where all have you practiced medicine?

A: So I have had -- I'm licensed in four states: Pennsylvania, North Carolina, South Carolina, and Virginia. I've practiced in all of those states.

Q: In July of 2011, were you employed by Tuomey Hospital?

A: Yes.

Q: And you were practicing orthopedics and orthopedic surgery at Tuomey at that time?

A: Yes.

Q: Doctor, I understand you currently -- and the date is April the 30th of 2015. Currently you no longer practice in Sumter at Tuomey. When did you leave there?

A: I left in -- in or around July or August of 2013.

Q: And how long had you practiced at Tuomey Hospital?

A: I was there approximately six years.
Q: And where are you currently employed?
A: Currently, I am at Sentara RMH Medical Center in Harrisonburg, Virginia.
Q: Before you came to treat Dr. Myat on July the 6th, 2011, for his injuries, did you know him as a fellow physician practicing at Tuomey?
A: Yes, I did.
Q: And what did you understand his specialty to be?
A: Infectious disease.
Q: And did you have an opportunity to consult with Dr. Myat in treatment of your patients?
A: Yes. We worked together on patients at the hospital that required orthopedic care as well as infectious disease care.
Q: And you had an opportunity to treat patients with Dr. Myat. Can you tell me about those experiences with regard to Dr. Myat's performance of his duties?
A: Sure. Generally speaking, Dr. Myat was a pleasure to work with, always available, very knowledgeable, and we enjoyed having him there as an infectious disease specialist to help with the care of our patients.
Q: Did Dr. Myat -- were you familiar with his reputation at Tuomey?
A: Yes. He had a very good reputation at Tuomey.
Q: And what were the reasons that -- in your mind that he

had a good reputation while he practiced at Tuomey?

A: For the same reasons. Very knowledgeable, always did a good job, was always available to help with the patients. He also took care of, from what I understand, HIV patients in his office outside of the hospital.

Q: Did you trust Dr. Myat in the care of your patients?

A: Yes, I did.

Q: When did -- going back to July the 6th, 2011, when Dr. Myat suffered his injuries to his -- his left knee and leg, when did you first learn -- or do you have a recollection of when you first learned that Dr. Myat had been injured?

A: He had called me that morning from the emergency room after slipping and falling and injuring the knee, and I recall seeing his x-rays and then seeing him in the emergency room shortly after that.

Q: So you saw him and saw his x-rays the same day as his injury?

A: Yes.

Q: Do you recall specifically what Dr. Myat told you about what caused his injury to his left leg?

A: He told me he had slipped on something wet on the floor at the hospital and landed directly onto his knee.

Q: Did he describe the severity of the blow to his knee?

A: He said it was a hard fall and I just recall seeing him in the emergency room. He was in a lot of pain.

Q: You reviewed x-rays of Dr. Myat's knee. What did those x-rays reveal?

A: The x-rays showed a fracture of the kneecap at its inferior pole, which was displaced.

Q: Doctor, in lay terms, what does that mean?

A: So that means the bottom portion of his kneecap fractured off and was separated from the rest of the kneecap.

Q: Was there also an associated injury to the -- to the tendon?

A: The piece that had broken off was attached to the patella tendon. The patella tendon itself was okay and during the surgery I removed the small piece of the bone and reattached the tendon to the -- to the remaining piece of healthy kneecap.

Q: Doctor, we have obtained Dr. Myat's medical records from -- from Sumter Orthopedics there at Tuomey and have -- I believe we've marked those as Exhibit 1. Do you have that?

A: Yes.

Q: Is that a complete copy of your -- your records from Sumter Orthopedics in the care and treatment of Dr. Myat?

A: Yes.

MR. PADGET: David, at this time subject to any objection you can certainly bring up at the appropriate time, we'd move for the admission of Exhibit 1, the Sumter Orthopedic records into evidence.

MR. HOLLER: No objection as to authentication. An objection as to admissibility.

MR. PADGET: Understood.

BY MR. PADGET:

Q: Doctor, looking on Exhibit 1, your records, if you'd turn to the page that's 3002 of your operative report?

A: Yes.

Q: If you would, take a look at that and tell us -- and describe for us the surgery you performed on Dr. Myat's left knee that day?

A: Sure. Again, he had a fracture of the inferior pole of the patella. In surgery, the piece was too small to put pins and wire in the way we would normally do if the fracture was sort of in the middle of the kneecap. And so what I needed to do was remove the small piece of bone and then reattach the patella tendon to the remainder of the kneecap. And I did this through drill holes that were placed longitudinally through the kneecap and sutured the tendon and tied the sutures on the superior pole of the patella.

Q: Dr. Myat was under general anesthesia at this time?

A: Yes.

Q: During the surgery?

A: Yes.

Q: How long approximately did your surgery last?

A: The tourniquet time was 66 minutes. So typically -- so

it was about over an hour.

Q: The surgery itself -- how did it go?

A: The surgery went well.

Q: After the surgery, did you schedule a follow-up visit with Dr. Myat?

A: Yes. He was seen periodically after surgery. Initially to remove his stitches and then eventually once there was sufficient healing of the kneecap to the tendon, then we could start physical therapy and range of motion.

Q: So the first appointment it appears you had was on July the 25th, 2011? I believe that's page 3019 of Exhibit 1.

A: Okay. Yes, I have it.

Q: Is this a copy of your July 25th, 2011, office notes?

A: Yes.

Q: Did you conduct an examination at that time of Dr. -- Dr. Myat?

A: Yes.

Q: Just briefly, Doctor, what was -- was there anything notable about your examination?

A: His incision was healing well. He had some swelling, some atrophy of his quadriceps, and he was neurovascularly intact and we checked for Homan's sign. Homan's is checking for a blood clot and that was negative.

Q: And at this time, would Dr. Myat -- was his leg immobilized?

A: Yes. And we also placed him in a brace at that time to keep his leg straight to allow the patella tendon to heal to the kneecap.

Q: And was Dr. Myat prescribed and taking pain medication for his injury?

A: Yes. He was taking Tylenol with codeine.

Q: Are these patella injuries, Doctor, that is injuries to the kneecap -- are they particularly painful?

A: They're -- they're painful because they involve the bone and they also involve the knee joint and so, yes, they are painful.

Q: So pain would be a common symptom and occurrence after a surgery like Dr. -- an injury and surgery that Dr. Myat had undergone?

A: Sure.

Q: Doctor, you next saw Dr. Myat it appears -- if you'd turn to page 3017? It looks like on August the 24th, 2011; is that right?

A: Yes.

Q: Okay. Did you conduct -- this would have been roughly a month later and would that be a typical follow-up timeframe at this point in time in Dr. Myat's recovery?

A: Yes. It's typical because it's six weeks after surgery, which is the usual allotted time for the tendon to heal to the bone.

Q: Did you conduct an examination -- a physical examination of Dr. Myat at that time?

A: Yes.

Q: And what was notable?

A: He obviously had stiffness of his joint. So his range of motion was stiff. His vascular exam was normal and his neurologic examination was normal.

Q: Was -- was Dr. Myat using a walker or any other device to assist him to try to get up and around at this time?

A: I note that he was using a walker.

Q: And what was the -- what was the plan at this point as far as follow-up goes?

A: So the plan was to start his rehab and then follow up in a months' time.

Q: Did -- did you order that Dr. Myat -- or advise him that he should undergo physical therapy?

A: Yes.

Q: And to your knowledge, did he do that?

A: Yes.

Q: Did Dr. Myat undergo all the physical therapy sessions that you ordered him to do?

A: To my knowledge, yes.

Q: Okay. Generally speaking, I'm asking was he cooperatives in the course of treatment that you had advised him would be best?

A: Yes, he was.
Q: Now, at the third follow-up visit -- page 3050 of Exhibit 1, September 21st, 2011, Doctor, do you see that note?
A: Yes.
Q: And what did -- three months out from Dr. Myat's injuries, what was your assessment at that time?
A: I was very concerned because his range of motion was not good. It was poor and he showed muscle atrophy of the quadriceps. His motion was only to 15 degrees of flexion or bending and I was very concerned at that point because he was three months after surgery.
Q: And when you say his range of motion was reduced zero to 15, could you describe for us, you know, what that measurement is depicting?
A: So zero degrees would be extension or the leg is straight and 15 degrees would be how much he could bend the knee.
Q: And what is the -- what is the total expected range of motion for a healthy knee?
A: A healthy knee could be 135 to 140 degrees of flexion. Typically, after a surgery, we like to get to 120 degrees to perform most activities of daily living.
Q: And when you're referring to activities of daily living, Doctor, what are you referring to there?
A: Normal activities that somebody would do in the course of a day, you know, walking, squatting, bending, stooping.

Q: Just basic stuff?
A: Basic stuff.
Q: All right.
A: Getting in and out of a car, for example.
Q: And -- and 120 degrees is sort of a target after a surgery of this nature for someone to make a recovery and be able to perform those activities of daily living?
A: Yes.
Q: An MRI, an image, was taken it looks like pursuant to your order around about that time. If you'd turn to page 3004? Wrong one. At this time, Doctor, well, did you -- did you recommend to Dr. Myat to undergo a second -- the second procedure?
A: Well, I had recommended the MRI to make sure that the tendon was healed enough so that I could do the second procedure, which I did recommend to him, which was manipulation of the knee under anesthesia to help him gain his flexion.
Q: And is that -- the record of that procedure on page 3000 there in Exhibit 1?
A: Yes.
Q: And could you describe for us, Doctor, what you do during a manipulation procedure under general anesthesia like this?
A: Sure. Once the patient is anesthetized and can't feel any pain and is asleep, we gently take the knee to a barrier

and gently push through the barrier to break up the scar tissue, and it's a maneuver that occurs several times to allow for the most gain of flexion that's possible. And you have to obviously be careful that you don't rip the tendon or cause other damage while you're doing it; so it's a very monitored and deliberate maneuver.

Q: Well, why are patients put under general anesthesia before doing the manipulation?

A: It would hurt too much if you did it while they were awake.

Q: And as a result of that, Doctor, what range of motion was achieved at that time?

A: So he started at about zero to 30 degrees and we got him down to 100 degrees of flexion.

Q: And after this manipulation procedure in October of 2011, was there a subsequent office visit November 8th, 2011? I think it's documented on page 3013.

A: Yes.

Q: And you saw Dr. Myat back in your office at that time?

A: I did.

Q: And what -- and what did you -- what were your findings at this visit?

A: So I noticed that he was still walking with a limp, that he still had swelling in the knee. He still had atrophy of the quadriceps. His ability to bend was to 80 degrees and

passively I was able to get him to 90 degrees.

Q: Doctor, what does quad atrophy -- what does that mean?

A: Basically, the muscle shrinks down. It loses its -- its size.

Q: And what causes that -- that muscle to shrink?

A: Essentially disuse because he wasn't bending the knee and, because he wasn't bending the knee, this caused the muscle to become smaller and weaker obviously.

Q: And why did Dr. Myat report that he was unable to bend the knee?

A: Basically, he was telling me that it was painful and it was -- it was painful -- hurt -- it was essentially painful for him to move. That in turn caused scar tissue formation and swelling.

Q: And at this time, Doctor, would it be -- would it be common -- for a patient who suffered an injury like Dr. Myat and had undergone this surgery and this manipulation now, would it be common for them to have to deal with pain?

A: It is common. We try to keep the patients comfortable. Obviously, we can't take all the pain away, but we try the best that we can do in order for them to continue with their rehab.

Q: At this point in time, Doctor, did you have any reason to -- to doubt Dr. Myat as far as the extent or severity of pain that he was reporting?

A: No.

Q: The next visit -- it looks like that was about a month later, December the 9th, 2011, page 3011?

A: Yes.

Q: And did you see Dr. Myat again about a month later on December the 9th?

A: Yes.

Q: And did you do -- conduct a physical examination at that time?

A: I did.

Q: And what was -- what was going on -- notable about your exam that day?

A: He had some mild swelling. His range of motion was zero to 90 degrees. His ligaments were stable. His strength was not normal, but improving it 4-/5, with 5/5 being normal. And he still favored his left side when he ambulated.

Q: When you say ambulated, Doctor, does that mean walk?

A: Yes.

Q: So Dr. Myat favored his left side when he walked?

A: Yes.

Q: Under treatment there down at the bottom of your office note there, Doctor, could you read for us under patella fracture what your treatment was at that time?

A: Sure. I have reviewed his outpatient physical therapy plan of care. At this point, I have encouraged him to

continue with ambulation and strengthening exercises. I do feel that he will always have a deficit. However, his active range of motion and overall condition has improved since the last visit. We will continue with therapy. I will see him in four weeks' time.

Q: Doctor, when you made note that at this point roughly six months out from his surgery where you wrote I do feel he will always have a deficit, what were you referring to there?

A: Deficit meaning I don't -- I didn't feel that he would regain normal range of motion, that he would probably not regain normal muscle strength and probably not regain the normal size of the quadriceps.

Q: And that was your opinion as to a reasonable degree of medical certainty most probably in December of 2011?

A: Right.

Q: You saw Dr. Myat again it looks like after the first of the year for a sixth follow-up appointment on January the 9th, 2012? I believe it's documented on page 3009 of the records.

A: Yes.

Q: And you saw Dr. Myat then. And what was -- you conducted an examination. What did you find at that point in time when you conducted the physical exam of Dr. Myat?

A: At that point, he had some hypersensitivity to his skin overlying the knee joint. His motion was zero to 90 degrees actively, which is what he could do. I could get it to about

100 degrees passively. His ligaments were stable. His strength increased to 4/5.

He continued to walk with a limp. At that point, I had also helped him to learn how to walk by trying to show him that he could apply full weight on the -- on the leg, and he seemed to do okay with that. And --

Q: Do you recall if Dr. Myat reported any pain when he tried to put more weight on his leg?

A: I don't recall that. I'd have to look at my notes about that.

Q: That's okay, Doctor. We're moving -- moving along here with your --

A: Okay.

Q: -- with your treatment. There in January of 2012, could you review your treatment notes? It appears you were recommending Dr. Myat use a splint at this time.

Q: All right. Yeah. I had written that he had not retained a Dynasplint yet. So it was obviously something that I had ordered prior to this. And a Dynasplint is essentially a brace that can help to regain motion, either with extension or with flexion, by wearing it for certain periods of time during the day.

Q: And did Dr. Myat agree to get the splint and undergo therapy while wearing the splint?

A: Yes.

Q: And to your knowledge, did he -- did he do that therapy and utilize the splint as you recommended?
A: Yes.
Q: You saw Dr. Myat again it looks like about a month later, February the 8th, 2012, page 3007 of Exhibit 1.
A: Yes.
Q: And at this point in time, Doctor, did you conduct your physical exam?
A: Yes.
Q: And what did you find?
A: Essentially, he was still ambulating with a limp. His motion essentially hadn't changed. It was zero to 95, and his strength hadn't changed.
Q: Did -- during this visit, Doctor, going down your treatment notes, did Dr. Myat inquire about any additional surgical procedures?
A: Yes. He inquired about a lengthening procedure, which would lengthen the quadriceps and allow for the knee to bend a little further.
Q: And, Doctor, did you recommend that he undergo that procedure?
A: I did not.
Q: And why not?
A: I was concerned that, you know, given the -- given his course after the first surgery and having to require a

manipulation, i.e. a second surgery, that adding insult to injury would probably not be the best thing to do for him.

Q: You saw Dr. Myat again it looks like about two months later, April the 16th, 2012; is that right?

A: Yes.

Q: It's page 3005 of Exhibit 1, Doctor, your office notes.

A: Yes.

Q: In reviewing the history section of that note, Doctor, what did Dr. Myat report to you in April of 2012?

A: That he was still using the Dynasplint. That he still had loss of endurance. I noted that and he noted that he still walked with a limp. And he had pain in the right hip down into the thigh and into the right knee.

Q: Okay.

A: And he felt that he was compensating on his right side because of the injury to his left side.

Q: Doctor, was this the first time Dr. Myat had reported the pain on his -- on his right leg?

A: To my knowledge, yes.

Q: And when you -- when you say he reported that he -- you believe that he was compensating, what do you mean by that?

A: Because he wasn't -- because he didn't feel that his left leg was normal and he could use it normally and because of pain, I'm assuming he was putting most of the weight on his right side to allow for less weight on the left side.

Q: Did you report or did you conduct a physical exam?

A: Yes.

Q: Did you -- did you note any muscle atrophy of his left leg on that exam?

A: Yes, I did. He continued with muscle atrophy as compared to the contralateral side.

Q: And what does that mean, Doctor? There was atrophy on the left side compared to his right side leg?

A: Correct.

Q: And what is that indicative of?

A: Again, that the quadriceps did not regain size and mass equal to the normal right leg.

Q: And, Doctor, if you would, down under your treatment notes down at the bottom, could you read your impression at that time?

A: Yes. At this time, we have discussed his condition at length. My opinion is that he will have a permanent impairment in regards to range of motion. He will also likely have permanent impairment in regards to endurance and muscle atrophy. He is ten months out from his injury and surgery. We will continue with the Dynasplint for an additional two months. That will bring him to the one-year anniversary of his injury and likely MMI. He was given a permanent disability placard for his vehicle. I will see him in two months' time. Questions were answered to their satisfaction.

Q: Doctor, what -- you made mention of MMI. What is that?
A: So that stands for maximum medical improvement and essentially in layman's terms as good as it's going to get.
Q: Okay. Is that typically measured about one year out from the injury?
A: It depends on what you're treating, but in this case a year is very typical.
Q: Where you write there at the bottom of your note, my opinion is that he will have permanent impairment in regards to range of motion, did you hold that opinion to a reasonable degree of medical certainty at that time?
A: Yes.
Q: And what did you base that opinion on at that time?
A: Just that he had -- it had been ten months after surgery, that he had been through physical therapy, he was using his splint, and the odds are that he wasn't going to get back to normal range of motion.
Q: You also wrote that he will also likely have permanent impairment in regards to endurance and muscle atrophy. Did you hold that opinion to a reasonable degree of certainty at that time?
A: Yes.
Q: And what did you base that opinion on, Doctor?
A: Also the fact that it had been ten months from the surgery, that he was sort of plateauing, and he continued to

have issues with walking distances and the leg tiring, and I just didn't think at that point with his muscle atrophy that it was going to improve.

Q: Did you have -- at this point in time, Doctor, in April of 2012, did you have any reason to doubt Dr. Myat -- Dr. Myat's reports of his limitations with his leg?

A: No.

Q: Did you have any reason to believe that Dr. Myat wasn't giving his therapy regimen his best efforts?

A: No.

Q: You gave Dr. Myat at this time a permanent disability placard for his vehicle?

A: Yes.

Q: You didn't give him -- it wasn't a temporary placard? It was permanent?

A: Correct.

Q: Okay. And did you believe that was necessary at that time?

A: Yes.

Q: In May of 2012, did you refer Dr. Myat to a physical and occupational therapist, Lowe's Therapy in -- in Florence?

A: Yes.

Q: And what was the purpose of that referral to the physical therapist, Doctor?

A: Basically to sort of objectify his -- his issues, his

loss of motion, his loss of muscle strength, endurance, to help quantify what he could get back to doing.

Q: Doctor, what -- what objective standards -- what standards are utilized by physicians or physical therapists in performing an impairment evaluation?

A: There are several books that are put out by the American Medical Association that follow very strict guidelines. There are multiple tables within this book. There are different ways to get impairment ratings. Range of motion, strength, muscle atrophy are -- are examples. And based on the objective findings of the physical therapist who is giving the test, those measurements are then used to quantify a percentage of impairment based on the tables that are put out by the AMA.

Q: And this is the guidelines put out by the AMA. In your opinion, Doctor, are those a reliable source of establishing permanent impairment ratings?

A: Sure. Absolutely.

Q: Did you -- you referred Dr. Myat to Mr. Philip Lowe, the physical therapist at Lowe's Therapy in Florence?

A: Yes.

Q: So you sent him there?

A: Yes.

Q: And the report of Mr. Lowe has been marked as Exhibit 3 to your deposition. Have you reviewed that report?

A: Yes. It's Exhibit 4 here.

Q: Thank you very much, doctor. Exhibit 4. Have you -- you said you have reviewed that report?

A: Yes.

Q: Doctor, I'm just going to read from paragraph two of page 1 of Mr. Lowe's report and then just ask you some questions about it. Okay?

A: Okay.

Q: Mr. Lowe writes:

The Guides to the Evaluation of Permanent Impairment, Fifth Edition, was used to estimate impairment. He, referring to Dr. Myat, has significant pain and decreased strength and loss of range of motion and gait disturbance and atrophy in his left lower extremity. All of these are ratable impairment.

The method that best describes his impairment would be manual muscle testing, table 17-8, page 532, allows for a 17 percent lower extremity impairment due to weakness of his extensors and a 12 percent lower extremity impairment due to weakness of the flexors. The impairments are added together to equal a 29 percent lower extremity impairment.

Doctor, did you review that section of Mr. Lowe's report?

A: Yes.

Q: And did -- did you agree with his findings about the quantification and extent of Dr. Myat's impairment?

A: Yes.
Q: Is Mr. Lowe's evaluation of the extent of Dr. Myat's impairment consistent with your evaluations and treatment of Dr. Myat over the approximately eleven months since his injury at the time Mr. Lowe did his evaluation?
A: It's very consistent with decreased strength, loss of motion, gait disturbance, atrophy. Very consistent.
Q: And do you hold that opinion to a reasonable degree of certainty that Dr. Myat suffers a 29 percent lower extremity impairment rating?
A: Yes.
Q: Do you have any reason to doubt the nature and methods utilized by Mr. Lowe in arriving at the quantification of Mr. -- excuse me -- of Dr. Myat's impairment rating?
A: No.
Q: Turning to page 3021 of Exhibit 1, Doctor, the Sumter Orthopedic -- your notes, did you see Dr. Myat again in June of 2012?
A: Yes.
Q: And at this point in time, you were approximately a year out from the injury?
A: Yes.
Q: Do you believe at this point in time -- well, let me ask, Doctor, was this the last time that you saw and treated Dr. Myat in June of 2012?

A: Yes. I just don't have it in front of me.
Q: Are you looking for the note?
A: Yeah.
Q: Sure. It's page 3021 of Exhibit 1.
A: Okay. I have it.
Q: And it appears that Dr. Strobel saw Dr. Myat in 2013, but this note in 2012, June of 2012, was the last time you treated Dr. Myat; is that right?
A: Yes.
Q: And at this point, it's roughly a year out from his injury?
A: Yes.
Q: At this point in time, Doctor, did you believe Dr. Myat had reached maximum medical improvement?
A: Yes.
Q: And what did Dr. Myat report at this visit in June?
A: He stated that he continued with pain, that he continued with problems with endurance, and still walked with a limp.
Q: And at this point in time in June of 2012, did you have any reason to doubt the severity or extent of the injuries that Dr. Myat -- or problems that Dr. Myat was reporting to you?
A: No.
Q: Did you conduct a physical examination?
A: Yes.

Q: And what did it reveal?

A: His range of motion was zero to 90 degrees. There was pain at 90 degrees. There was less swelling of the knee. He had a severely antalgic gait or painful limp. He favored his left side. He didn't bend his knee very much when he walked and his muscle strength was noted to be weak at 3+/5.

Q: And, Doctor, at this time a year out where his range of motion is 90 degrees, how -- how did that impact Dr. Myat's ability to perform his activities of daily living?

A: Right. So our goal is 120 degrees. He's at 90 degrees; so he certainly would be limited in doing certain things.

Q: What type of limitations what you expect with only a 90-degree range of motion?

A: He's going to have difficulty going up and down steps, difficulty possibly getting in and out of cars. Obviously, squatting, stooping, those kinds of things, let alone sport activities.

Q: And that's just with the range of motion? Was -- was Dr. Myat also reporting lack of endurance?

A: Correct.

Q: And lack of muscle strength as well?

A: Yes.

Q: And, doctor, if you would, could you read for us your impressions under the plan section of your note?

A: Sure. At this time, he is a year out from his injury.

Unfortunately, Dr. Myat has had a less than optimal result from his injury. It is my medical opinion that he will have difficulty in continuing his medical practice as an infectious disease specialist due to the fact that he is not as mobile as once before and does not have the endurance and strength of that extremity.

I have advised that he continue with his present treatment course of pain regimen, topical creams. We did discuss the possibility of a lengthening type procedure. However, I would be very concerned that he might lose what he already has and he understands this. I'll see him on an as-needed basis.

Q: All right. Doctor, going -- going back up here, you said unfortunately Dr. Myat has had a less than optimal result from his injury. What did you mean by that?

A: Again, he's left with less than optimal range of motion, muscle strength, endurance, and was left with muscle atrophy as well.

Q: Has he fully recovered?

A: No.

Q: And what are his limitations going forward?

A: Well, from the time that I saw him last or --

Q: Well, sir, we'll get back to that in the second.

You go on to write it is my medical opinion that he will have difficulty in continuing his medical practice as an

infectious disease specialist due to the fact he's not as mobile as once before and does not have the endurance and strength of that extremity.

Doctor, was that your opinion in June of 2012?

A: Yes.

Q: Did you hold that opinion to a reasonable degree of medical certainty?

A: Yes.

Q: If Dr. Myat reports that he is in the same or worse condition than he was -- as he was in June of 2012 when you last saw him, would that still be your opinion today?

A: Yes.

Q: And do you also hold that opinion to a reasonable degree of medical certainty?

A: Yes.

Q: At this point, did you recommend any further surgery?

A: No, I did not.

Q: Did you believe there was anything else that you or anyone else in the medical community could do for him to further his rehabilitation?

A: No.

Q: He was as good as he was going to get in June of 2012?

A: Yes.

Q: Doctor, if you would, turn to Exhibit 2, the attending physician statement. Do you have that?

A: Yes.

Q: Is this a two -- two-page form that you filled out at the request of Dr. Myat?

A: Yes.

Q: When you completed this form, did you make reference and review your medical records over your course of treatment over roughly the past year when you prepared this statement?

A: Yes.

Q: On page 2 at the bottom, is that your signature?

A: Yes.

Q: And this was dated May 14th, 2012?

A: Yes.

Q: Going back to page 1, you listed a number of diagnoses. What were those?

A: Fractured patella, stiff joint, knee pain, knee arthritis.

Q: And the symptoms that you -- that you reported -- what were those that Dr. Myat was suffering?

A: Pain, swelling, weakness, limp, loss of endurance.

Q: And below you said see office notes, op notes, and patient notes. Are those the notes that we've been through today?

A: Yeah. That's PT notes, for physical therapy notes.

Q: All right, I see. The office notes and the op notes -- those are the notes that we've discussed today thus far?

A: Yes.
Q: Turning to page 2 up at the top, could you read for us what you wrote under the question, please describe the specific physical or mental limitations and restrictions the patient is experiencing?
A: Patient has difficulty with ambulation, standing, bending, stooping, range of motion, secondary to pain. Has been depressed because he cannot work.
Q: Did Dr. Myat report to you that he was -- that he was depressed that he was unable to work?
A: Yes, he did.
Q: Going down the form, Doctor, there's a -- there's recommendations that can be made and some checkmarks. Can you -- can you indicate what you checked and what you wrote under that section?
A: Sure. I checked off physical therapy, work-hardening program, job modification, psychological counseling.
Q: And you made a note. It looks like has been involved in physical therapy, Tuomey rehab?
A: Yes.
Q: So Dr. Myat had been ongoing physical therapy per your recommendation?
A: Yes.
Q: In going down further down the page, Doctor, page 2 there of Exhibit 2, it writes please provide any additional

information you would feel would assist us in evaluating this patient. Do you see that section?

A: Yes.

Q: And what -- what did you write there in that section?

A: Dr. Myat is a hard-working gentleman with a strong work ethic. He has not been able to work at full capacity due to his injury, which will likely be permanent.

Q: And, Doctor, was that your opinion to a reasonable degree of medical certainty in May of 2012?

A: Yes.

Q: And if Dr. Dr. Myat reports today that he's still undergoing pain, still having the same or worse limitations with his left leg, would your opinions be the same today?

A: Yes.

Q: Do you hold that opinion to a reasonable degree of medical certainty?

A: Yes.

MR. PADGET: Let's take a break and go off the record for just a moment.

THE VIDEOGRAPHER: Going off record at 18:49:47.

(WHEREUPON, there was a pause in the questioning.)

THE VIDEOGRAPHER: We're back on the record it 18:51:22.

MR. PADGET: At this time, in accordance with our off-the-record discussion, I would move for the admission of Exhibit 2, Dr. Cucé's attending physician statement.

MR. HOLLER: No objection as to authenticity. Object to the admissibility into evidence.

BY MR. PADGET:

Q: Doctor, going back to Exhibit 1, the Sumter Orthopedics records, it looks like after June of 2012 Dr. Myat was seen by Dr. Strobel. Do you know Dr. Strobel?

A: Yes. He was my former partner.

Q: And have you reviewed Dr. Strobel's November 1st, 2013, office note?

A: Yes.

Q: Did you review Dr. Strobel's -- the results of his physical examination?

A: Yes.

Q: And what was notable about his exam?

A: The major thing that stuck out was the range of motion he documented was zero to 30 degrees, which is considerably less than when I saw Dr. Myat.

Q: Was there anything in Dr. Strobel's note that altered any of your opinions from earlier in your treatment from June of 2012 about Dr. Myat's condition?

A: No.

Q: His exam limitations would have been consistent with -- with -- with the injuries and opinions that you had -- had given us earlier?

A: Yes.

Q: Did Dr. Strobel recommend any further surgery for Dr. Myat at this time?

A: No, he did not.

Q: At this point, after reviewing Dr. Strobel's record from November of 2013, is there any medical treatment or surgery otherwise you believe that would have assisted Dr. Myat further in his recovery?

A: No.

Q: Doctor, your opinion to a reasonable degree of certainty was the July 6th, 2011, fall that Dr. Myatt suffered at the hospital that morning was the cause of the permanent impairment that you have opined to?

A: Yes.

Q: And was the July 6th, 2011, fall and subsequent injuries -- was that the precipitating event that gave rise to Dr. Myat's -- your opinion that Dr. Myat would have difficulty in -- in continuing to practice medicine as an infectious disease specialist?

A: Yes.

Q: And you hold those opinions to a reasonable degree of medical certainty?

A: Yes.

Q: Do you have any reason to believe that Dr. Myat at any point in time has been feigning any injury or the extent of any of his injuries?

A: No.

Q: Doctor, do you believe that you could perform your duties as a physician if you could not walk more than a few -- more than a couple of minutes without being in serious pain?

A: I doubt it.

THE CLERK: Judge?

THE COURT: Yes?

A JUROR: Can we use the restroom?

THE COURT: Hold on just a minute. Can we stop that?

(WHEREUPON, the video was stopped.)

MR. PADGET: Yeah. Judge, I think actually that was the end of my exam. We were right at the end of my exam. This would be a good time.

THE COURT: Okay. Go ahead.

A JUROR: Thank you.

THE COURT: Does anybody else need to go?

(WHEREUPON, several jurors exited the courtroom.)

(WHEREUPON, there was a pause in the proceedings until the jurors returned to the courtroom.)

THE COURT: Okay.

(WHEREUPON, the video resumed playing as follows.)

MR. PADGET: Thank you, Doctor. I neglected earlier to tender Dr. Cucé as an expert in the field of orthopedics and orthopedic surgery. Do you have any objection?

THE WITNESS: None.

MR. HOLLER: None.

MR. PADGET: All right. Dr. Myat sends his regards. Thank you, Dr. Cucé. I don't have any further questions at this time.

THE WITNESS: Sure. Thank you.

MR. HOLLER: Dr. Cucé, just a few questions. I think we'll be done here fairly quickly.

CROSS-EXAMINATION

BY MR. HOLLER:

Q: You talked about your conversations with Win Myat about how he fell when he fractured his patella; correct?

A: Yes.

Q: Have you seen the -- let me ask some questions first. What is -- where is the coccyx, c-o-c-c-y-x?

A: That's the tailbone. It's at the end of the spine.

Q: Okay. We call it the tailbone, but if humans ever had a tail, that's where it would have left the body?

A: Yes.

Q: Okay. And that's in the back end -- the backside of someone?

A: Yes.

Q: And sacrum? What is sacrum? Or sacral?

A: Yeah. The sacrum is where the tailbone attaches. So it's the bottom of the spine below the lumbar spine.

Q: Can you look and read what Dr. -- you said you talked to

Dr. Myat, but what he recorded in the emergency department as to how he fell? What was the mechanism of his fall?

A: Where would you like me -- do you what me to read it?

Q: Right here. Yes.

A: Sure. This 39-year-old Asian male physician was in the hospital this morning on one of the nursing units and slipped on some water and landed on his left knee and coccyx. He had severe pain in the knee and coccyx.

Q: Okay. And the work-up looks like they actually tried to rule out a fracture -- a patella fracture, which in fact did happen, and also a sacral or coccyx fracture?

A: Where?

Q: And I'll let you see that as well. I'm sorry.

A: Okay.

Q: Help me understand how someone can fall on their tailbone and have a possible fracture and how someone can land on their kneecap in the same fall?

A: I mean I don't know. I wasn't there. I didn't see it.

Q: None of us were there. None of us saw it.

A: Okay. I mean clearly the knee had to have hit hard in order to fracture.

Q: No question he fractured the patella.

A: So he obviously landed directly onto the knee at some point and it's possible he landed on the knee and then fell backwards and hit his coccyx.

Q: Okay. That would have to be a two-motion type of fall though? He couldn't hit the two at the same time?
A: I don't see how you could do that at the same time.
Q: Okay. Now, you don't know what the condition of the floor was where Win Myat fell?
A: Absolutely I don't.
Q: You don't know whether there was water there?
A: No.
Q: You don't know whether any Tuomey employee knew there was water there before he slipped?
A: No.
Q: You don't know whether the water was plainly visible, if it was there, that someone could see it and avoid it?
A: No.
Q: Okay. You don't know if Dr. Myat had something in his hands that was blocking his view when he walked through the area?
A: I don't.
Q: Okay. You don't know any of the facts on how water came to be there and how he may have stepped in it?
A: No.
Q: Okay. It looks like he certainly had a fracture and you did two procedures on him, one a surgical repair and one to try to get him some range of motion back?
A: Yes.

Q: And you've been asked about -- you've used this word disability a couple of times. You said you gave him a disability -- a permanent disability placard. That's a hangtag he puts in his car?

A: Right.

Q: And that allows him to park close to the front door of Walmart or whatever store?

A: Right.

Q: And you would do that for any patient who had difficulty in walking?

A: No. I don't do it for every patient. They have to have a documented reason. So most -- most of the time in my practice I deal with patients who can't walk distances because of arthritis, trauma, anything having to do with the musculoskeletal system that really limits their ability to walk.

Q: You also talked about your opinion to a reasonable degree of medical certainty that he would have difficulty in doing his job as an infectious disease specialist?

A: Yes.

Q: And you said you worked with him from time to time, but you don't know exactly -- you have a general idea of what his -- he has to go see his patients?

A: Sure. Yeah.

Q: Most of his patients he sees in an office setting? Or --

I'm sorry. The hospital or office setting?

A: Right.

Q: He doesn't go out on the field in an ambulance?

A: No.

Q: So after you did the surgery on him, there was a time when you gave him medication? That would be pain medication?

A: Correct.

Q: And it would have been prudent for him not to work while he was taking narcotics?

A: You know, that's a very difficult question to answer. I think that if you're taking narcotics and it's affecting your ability to do your job, yeah, that's true. Certain mild narcotics -- people can still function and take pain medication as well.

So I don't typically recommend it if they're driving or if they're operating heavy machinery and I certainly think that if they're taking it on a scheduled dose, you know, probably they wouldn't be able to do their job. If they're taking it intermittently and occasionally, I think then that's probably okay.

Q: When was the last time you gave Win Myat a narcotic pain medication?

A: I don't know.

Q: Take a look at your records. I see that July 25th you certainly gave him Tylenol 3?

A: Okay.

Q: It looks like September 21st he had Tylenol 3. So my question would be did you give him any narcotic or Tylenol 3 or something stronger after September of 2011?

A: After September? Do you know what page September of 2011 was?

Q: Certainly.

A: Here's August.

Q: It's 3015.

A: Yeah. Okay. So -- so he was on Tylenol 3 in September of 2011. Is that what you're asking?

A: Yes.

A: Was he taking that?

Q: Well, you were asking him what his medications are and he was telling you he was on Tylenol 3 I'm assuming. It says current medications.

A: Right. It says current medications, list reviewed and reconciled with the patient.

Q: And it doesn't go like -- and what I'm asking you is did you give him anymore Tylenol 3 after that September 21st, 2011, visit? All the references I see are Motrin and Tylenol.

A: Right. So then, no.

Q: Okay.

A: I did not.

Q: So he's not taking any narcotic medication at any point

by your prescription after September 21st, 2011?

A: Yeah. Not from me.

Q: Okay. And you're not -- and your chart doesn't note if anybody else is giving him prescriptions?

A: Right. I don't think so.

Q: Now, let's talk about the difference between the term impairment and disability. We referenced that AMA guidelines. You referenced them earlier, but you sent Win Myat over to Philip Lowe, who did an impairment rating; correct?

A: Right.

Q: Did he use the Fifth Edition? I have the Third, the Fourth, and the Sixth Edition that's here.

A: Okay.

Q: But I don't have the Fifth, but they're generally --

A: They're similar.

Q: They're certainly similar. The Fifth -- I think the Fifth was replaced so quickly with the Sixth that I didn't get a chance to buy it. That's all. Maybe I'll go back and look for one. But he used the Fifth guide and he used a nationally recognized publication to give him a 29 percent permanent impairment to his left lower extremity?

A: (No verbal response.)

Q: Is that the yes?

A: Yes.

Q: And there's no -- there's no impairment to any other part

of his body?

A: To my knowledge, no.

Q: Okay. So Phil Lowe didn't take him out of work?

A: No, I don't think so.

Q: Okay. Phil Lowe didn't place any restrictions on Win Myat, what he could and could not do?

A: No, I don't think he did.

Q: Okay. I know from going through your records, which we've just gone through thoroughly, you never took Win Myat out of work?

A: No, I don't think I did.

Q: You never placed him on any restrictions and said you cannot do this?

A: I don't think so.

Q: Okay. In fact, I think it's Number 2, the two-page document?

A: Uh-huh.

Q: Is that right? Right at about eleven months -- this -- this was May 14th, 2012?

A: Uh-huh.

Q: You filled out a two-page -- this two-page document --

A: Uh-huh.

Q: -- at Dr. Myat's request?

A: Yes.

Q: That's the same day that he went -- May 14th, 2012, is the

same day that Win Myat went to see Philip Lowe at Lowe's Physical Therapy for his functional capacity evaluation?

A: Okay.

Q: And you did not see him in the office that day. I'm assuming you just got the paperwork?

A: I guess.

Q: There's not a medical record from that day?

A: Oh, no.

Q: Okay. And on the second page of this document that you filled out and signed, you said -- do you recommend the patient becomes involved in any of the following. It says please check as many as apply. One you checked was physical therapy?

A: Right.

Q: So as of May the 11th, 2012, Win Myat may have benefited and improved if he had had more physical therapy?

A: Okay.

Q: That's your opinion on that day; correct?

A: Well, I mean obviously he had been involved in therapy and, you know, I was just making the person who would read this report understand that he's been in physical therapy. Whether -- you know, he wasn't at MMI at this point.

Q: You would find him at MMI your very next visit?

A: Right.

Q: Which was about five weeks later?

A: Right. So, you know, he wasn't at MMI. So my job is to try to get people back to work, try to get them back to the things that they were doing prior to their injury.

Q: Certainly.

A: So, you know, I'm checking off the things that I think might be beneficial.

Q: Will you agree with me that after May the 14th, 2012, Win Myat never returned to physical therapy?

A: I don't know that for a fact, but if you tell me, I guess.

Q: I can -- I can assure you and we'll show you all the records, but he did not to my knowledge, and we've asked for all records and I think we have them.

A: Sure.

Q: He did not return to physical therapy?

A: Okay.

Q: Okay. So as of May 14th, 2012, you also thought he would -- could benefit from a work-hardening program?

A: Right.

Q: What's a work-hardening program?

A: So a work-hardening program is a physical therapy session or sessions where the patient's job is replicated at the physical therapy place in order for them to mimic the things that they would do on their normal workday.

Q: It helps them deal with the pain?

A: Yeah. Well, it allows them to do those activities that they're going to be required to do at work and allows them to sort of practice them before they go back to work.

Q: Fair enough. Okay. You also checked something on here that something that Win Myat could benefit from becoming involved in would be job modification?

A: Right.

Q: So if it's difficult to walk to go see a patient's room, he could learn how to use a walker, a wheelchair, a scooter?

A: Right. Or change. For example, I've known doctors who have -- who were obese and can't really move from room to room and so the doctor kind of sits in one room and then the patient's kind of circle versus the doctor going into different rooms.

Q: There are doctors -- there are medical doctors who go see patients in a hospital in an office setting who have physical limitations, aren't there?

A: I'm sure there are.

Q: And do you think that compromises their ability to be a good doctor?

A: No.

Q: Okay. They're not -- I'm assuming that this doctor with impairment is not on pain medication as we've seen Dr. Myat wasn't on after September 21st, 2011?

A: Right.

Q: Okay. And you also put down psychological counseling?
A: Correct.
Q: That he could benefit from that. Now, based upon the information that you have, he hasn't been to physical therapy after May of 2012. He hasn't been to a work-hardening program. We don't know what he did in terms of job modification?
A: Correct.
Q: Okay. And you don't know that he's been to any psychological counseling?
A: No, I don't.
Q: Okay. The AMA guidelines -- the Sixth Edition actually has an interesting -- and I'll show it to you if you want me to. It has an interesting illustration of the difference between impairment, which Philip Lowe and you agreed was the appropriate way to do it and found a 29 percent impairment to his lower extremity, and disability. And the AMA Sixth actually uses Christopher Reeve, the actor who played Superman, as an illustration of the difference between impairment and disability. Are you familiar with that?
A: Yes.
Q: And I'll be happy to show it to you in here if you want.
A: Sure.
Q: But it talks about Christopher Reeve was in a terrible accident where he literally broke his spine and he was even

unable to breathe for himself. So he couldn't move. He was essentially close to a hundred percent impairment.

A: Okay.

Q: But this example in the AMA Guidelines Sixth Edition goes on to say that he was hardly disabled. He ended up raising hundreds of millions of dollars for spinal injury research, led a productive life, and even returned to acting in some limited roles. So there's a distinction between impairment and disability?

A: Right.

Q: And would it be fair to say that someone with a higher --

MR. PADGET: David, let me just launch an objection as to the statements associated with the question. Go ahead.

MR. HOLLER: Okay.

BY MR. HOLLER:

Q: It would be fair to say that someone with a higher level of education should be more adaptable than someone with a lower level of education?

A: Sure. They can find a different job or something like that.

Q: My job was to go to work and sling a sledgehammer and break rocks and that's all I know how to do. If I hurt my back or hurt my leg, I'm limited?

A: Right.

Q: But if I have an internal medical degree or internal

medical specialty degree in infectious disease, a specialty degree --

A: Sure.

Q: -- there's a lot of things that I could probably do?

A: Sure.

Q: Okay.

(WHEREUPON, the videotape was stopped.)

MR. PADGET: Your Honor, at this point, we've got a couple of objections we've got to take up.

THE COURT: Okay. Do you want to do it now?

MR. PADGET: If the Court would prefer, I believe there's five primary objections over the next couple of pages. I'm happy to play whatever we can from the video, but one solution Mr. Holler and I discussed was perhaps having his associate just simply -- David pose the question and his associate read the answers of Dr. Cucé.

THE COURT: What page are you on right now?

MR. HOLLER: Judge?

MR. PADGET: We're right up to pages 60, Judge.

MR. HOLLER: Page 60, line 11, and also there's not a contemporary objection to this in this deposition.

THE COURT: Okay. What about that?

MR. PADGET: Your Honor, my understanding of the rule is even a video deposition, all objections are preserved except those as to the form of the question. So, for example,

relevancy and prejudice and everything else are certainly preserved so as to not make video depositions one continuing objection after another.

THE COURT: Did y'all make that stipulation at the beginning?

MR. HOLLER: We did not. *De benne esse* depositions are live.

THE COURT: Okay. And can you tell me what line that you objected to on page 60?

MR. PADGET: Your Honor, my objection was -- was earlier there on page 59. I don't believe I made the contemporaneous objection on page 60. Your Honor, may we approach?

THE COURT: Yes.

(WHEREUPON, a bench conference was held in the presence of the jury but out of the hearing of the jury off the record.)

THE COURT: Okay.

MR. PADGET: Your Honor, subject to the objections we've discussed and which we'll put on the record later, I'll continue playing the video.

THE COURT: Okay.

(WHEREUPON, the videotape resumed playing as follows.)

BY MR. HOLLER:

Q: Any -- whether you're assessing an impairment or whether you're assessing a disability, there's always a component of

A: Yes and no. I mean I think, again, there's subjective and objective and I think the objective findings, for example that FCE that Mr. Lowe did, helps to quantify and I believe it said in there that he gave a consistent effort. It says the examinee was able to complete all test activities. Management of symptoms were controlled to an acceptable level. Overall, the examinee was consistent in effort, and that's something that I look at. It's something that the therapist who does the test looks at because if they're not giving, you know, consistent effort, then we're concerned that there might be a malingerer.

Q: A malingerer? Someone who is not giving their best efforts?

A: Right.

Q: Someone who has some interest not to recover?

A: Correct.

Q: Not to get well?

A: Which is why I think that, you know, when I was asked those questions earlier by the other attorney that I feel that I have no reason to believe that he would do that.

Q: Would it be fair to say that -- that anytime you treat a patient, if there are issues of secondary gain, it's best that you know about that? In other words, if there's a Workers Compensation claim pending, that's information that's better for you to know so you can assess it?

A: As far as an impairment is concerned or --

MR. PADGET: I'll object to the question. Go ahead.

BY MR. HOLLER:

Q: Any time you're -- in orthopedics, you get a lot of cases that are involved in legal claims?

A: Right.

Q: Be it Workers Comp, personal injury or otherwise?

A: Sure.

Q: Okay. And so there's an interaction between the legal world and the -- and the -- and the medical world, if you will?

A: Right.

Q: And we talked about this briefly before we started your deposition. The functional capacity evaluation that Philip Lowe did really doesn't further the medical care --

A: Right.

Q: -- of Win Myat. It really just kind of documents where he is in terms of the range of motion --

A: Right.

Q: -- and muscle strength?

A: It quantifies it.

Q: It quantifies it?

A: Yeah.

Q: But it doesn't make him better and it's not something you would order just as part of his treatment regimen?

A: Right. It's not for treatment.
Q: Not for treatment?
A: Yeah.
Q: That's what I'm trying to say.
A: Okay.
Q: And that's because issues of secondary gain can be important in rendering care to a patient?
A: Okay.
MR. PADGET: I object to the question as well. Go ahead.
BY MR. HOLLER:
Q: If there had been -- the judge will take up this stuff later.
A: Sure.
Q: If there are issues of secondary gain, whether a patient has a claim pending of any type, is that information that you would like to know that could be useful in your evaluation and treatment of a patient?
A: Sure. I mean I guess any information on the patient I'd like to know, of course.
Q: The more information you have, the better?
A: Sure.
Q: Now, twice you've been asked about -- not about impairment, but about disability, first with a disability placard that you called a permanent disability placard.
A: Well, I don't call it that. That's what it's called.

Q: I understand that. But it uses this word disability and we talked about the distinction between impairment and disability. Also, you said that he would have difficulty in the future and that falls within the definition of disability, but difficulty in the future being an infectious disease doctor. Okay?

A: Okay.

Q: That there are specialties in medicine that do indeed deal with determining disability and determining whether someone is disabled or to what degree they are disabled?

A: Okay.

Q: Is that correct?

A: I guess. Yeah.

Q: Would you agree that's not necessarily what you're trained in?

A: It's definitely not what I'm trained in.

Q: It's outside of your area of expertise?

A: Yes.

Q: But certainly you work with people who do that and you supply information, you supply treatment, you assist with impairments in those types of patients, and you're a component of what a disability determiner would use in trying to assess disability?

A: My -- my involvement with disability claims in my practice is -- and this is what I tell insurance. Any of my

patients who are applying for disability -- I tell them I don't make any determination of disability. I send my notes to whoever is asking for them and that's that. I don't make the determination. My involvement is -- the extent of my involvement is my notes and my medical documentation.

Q: Right. And the AMA guidelines -- and I'll turn this if you want me to to page 20, it says impairment is the first step down the path of determining disability to what -- to whatever extent it might be. Okay?

A: Okay.

Q: The person or group of people who make a determination of disability would also want to know about issues of secondary gain, would they not?

A: I guess they would. I mean it's not what I do, but I'm assuming they would.

(WHEREUPON, there was a pause in the questioning as a portion was muted.)

Q: -- significant in making a determination of disability? Again, you've been asked twice to offer -- he can't do his work as an infectious disease doctor and he got a permanent disability placard.

A: Well, so let me clarify that. It's called a disability placard. It's not called an impairment placard. I can't change what it's called. So that's -- I didn't say that.

Q: I know. You are asked that question. Okay?

A: So that's -- that's that. As far as this is concerned, my opinion was that he would not be able to work at full capacity. I didn't say he couldn't work at all. I just said that he would not be able to work at full capacity due to his injury.

Q: So you didn't take him out of work?

A: Right. I didn't make that determination.

Q: If the person who is making a determination as to disability -- okay -- would want to consider reasons why a patient wouldn't want to get well, a private policy could be a factor in that, could it not? That's the type of -- that's the type of information that person would rely upon, whether they had a personal injury claim, whether they had a Workers Compensation claim?

A: You're saying the person that is -- right.

Q: As an expert.

A: Right. Would need to know --

Q: That it -- that they would want to know about any information relating to secondary gain, be it a Workers Compensation claim or be it a lawsuit or be it a --

A: Sure. I guess they would. I mean I don't do that. You'd have to ask that person, but I would assume that they would want that information.

Q: Well, you said in rendering your care to a patient, you would want to know that information. The more information,

the better?

A: Sure.

Q: Okay.

MR. PADGET: David, let me just lodge an objection as to relevancy as to that entire line of questioning and a Rule 403 objection as well.

MR. HOLLER: That's -- you're noted.

BY MR. HOLLER:

Q: And you also indicated that in treating your patients as an orthopedic surgeon, that's information that you reasonably rely upon and factor into your assessment, whether someone has a personal injury claim or Workers Compensation claim or some other type of claim?

A: Sure.

Q: Okay. And it's reasonable for orthopedic surgeons to rely upon that type of information, to receive it, assimilate it, and use it as simply part of their assessment and treatment?

A: I wouldn't disagree with that.

Q: Okay. That -- that's an evidentiary thing that I had asked about.

A: Okay.

Q: Okay. So you didn't find Win Myat disabled?

A: No.

Q: You didn't take him out of work?

A: No.
Q: You didn't tell him not to work?
A: No.
Q: You didn't limit him from work?
A: Let me -- let me qualify that. I'm pretty sure that I gave him out-of-work notes initially on, especially right after the surgery.
Q: When he's on narcotics and he's still got sutures?
A: Right.
Q: Absolutely.
A: I don't -- to be honest with you, I don't recall if and when he went back to any capacity at all. I don't know. All I remember is him saying that he couldn't do his job. That's what he kept stressing, that he couldn't do what he was doing prior to his injury.
Q: But you're not the guy who found him disabled?
A: No.
MR. PADGET: Object to the question. Go ahead.
BY MR. HOLLER:
Q: And you're not the guy who took him out of work?
A: No.
Q: You're not the guy who told him he couldn't work?
A: No.
Q: You treated him. He's got a 29 percent impairment to his left leg and you recommended a handful of things in May of

2012 that he could do that would hopefully get him better and then a week -- a month later you found him at maximum medical improvement?

A: Yeah. I'm sure I referenced that in my notes prior to that as I recall from reading today that I would make most likely a year or twelve months maximum medical improvement. So the fact that it was five weeks later, I guess that's true.

MR. HOLLER: Thank you, Dr. Cucé.

THE WITNESS: Sure.

MR. PADGET: Doctor, just a couple of follow-up questions in reference to that.

REDIRECT EXAMINATION

BY MR. PADGET:

Q: In this case, under my earlier questioning you gave opinions -- your opinions about Dr. Myat's ability to work in May and June of 2012; is that correct?

A: Yes.

Q: And your opinions were specific to him and his situation; is that right?

A: Yes.

Q: You didn't take into consideration Christopher Reeve or Superman or any other celebrity in the course of giving those opinions, did you?

A: No. You know, everybody is individual. You know, everybody deals with things differently. You know, I don't

know if Christopher Reeve was depressed or not. I don't know how we dealt with his situation. I don't know him personally. He's dead now, but I mean everybody is an individual. Everybody's issue is specific to themselves and how people respond to that is different.

Q: But the impairment rating, the 29 percent impairment rating to the lower body initially assigned by Mr. Lowe, which you have also agreed with, that's an objective evaluation of the extent of his impairment in light of his injury?

A: Yes, it is.

Q: When you saw Dr. Myat in June of 2012, in your notes June 21st of that day, you opined that it was your belief that he would have difficulty in performing his job duties as an infectious disease specialist then and into the future; is that correct?

A: Yes.

Q: When you observed -- when Dr. Myat worked and assisted you with your patients in a hospital, would Dr. Myat routinely do physical exams of his patients?

A: Sure.

Q: That would be something that an infectious disease doctor would have to do every day in treating all of their patients, wouldn't they?

A: Yes.

Q: Many of those patients in the hospital would be in

hospital beds; right?

A: Yes.

Q: And do you believe -- did you give any consideration as to the difficulties it would be for Dr. Myat or any other infectious disease specialist in performing exams in that environment if they were confined to a wheelchair?

A: It would be very difficult.

Q: And if it was difficult for a patient -- a doctor to perform an effective physical exam, would you have concerns about their ability to continue to perform their job?

A: Yes.

Q: If they could not do that, would that pose a risk to their patients?

A: Sure.

Q: Mr. Holler asked you a number of questions about whether or not a doctor or you would want to know a patient's motivation as part of getting some of their permanent impairment or disability evaluations completed, what their motivations were in doing that. Do you recall those questions?

A: Yes.

Q: Would you agree or do you believe that if -- for example, if one of your patients who was working was making over a half million dollars a year, but they could not work and would make substantially less, do you believe they'd have substantial

motivation to go to work?

A: I would.

Q: Yeah. Going back to Exhibit 1, your last note June of 2012, it was your opinion to a reasonable degree of medical certain that Dr. Myat will have difficulty in continuing his medical practice as an infectious disease specialist. That was your opinion in June of 2012?

A: Yes.

Q: To a reasonable degree of medical certainty?

A: Yes.

Q: If Dr. Myat is still suffering from the same conditions today, is that your opinion today?

A: Yes.

MR. PADGET: That's all the questions I have. Thank you, Doctor.

THE WITNESS: Thank you.

MR. HOLLER: Thank you, Doctor.

(WHEREUPON, the video tape ended.)

THE COURT: Okay. Anything else we need to do today?

MR. PADGET: Nothing further from the plaintiff, Judge.

THE COURT: Okay.

MR. HOLLER: Judge, can we approach about scheduling?

THE COURT: Sure.

MR. HOLLER: Briefly.

(WHEREUPON, a bench conference was held in the presence

of the jury but out of the hearing of the jury off the record.)

THE COURT: Okay. Ladies and gentlemen, we're going to quit for today. I need y'all back at 9:30 in the morning and we'll start earlier than that and we'll resolve the issues and get started right back at 9:30 and hopefully the plan is you should get this case tomorrow.

I'll remind you though you can't discuss it yet. When you get home, you can't do any research. I'll see you at 9:30 in the morning. If you have an emergency, call us.

(WHEREUPON, the jury exited the courtroom at 5:28 p.m.)

THE COURT: Okay. I'll see y'all at nine o'clock. We'll have motions and any potential charges that y'all want submitted, you give me.

MR. HOLLER: Thank you, Judge.

THE COURT: I'll look over them with you then.

MR. PADGET: Judge, real quick can I just put the sections on the record we played of that video?

THE COURT: Sure.

MR. PADGET: And didn't play.

THE COURT: Okay.

MR. PADGET: And, Judge, I just want to -- for the record, we took up the objections that began around page 60 of Dr. Cucé's deposition. What we actually didn't play after our discussion at the bench was beginning on page 66 at line 25

through page 67 on line 18. That was muted.

Additionally, on page 68 at line 12 was muted and on page 68 as well, line 23 was muted. The --

MR. HOLLER: It was 22 through 25.

MR. PADGET: I'm sorry.

MR. HOLLER: You really -- you didn't start it back up until it was right there. But it's fine.

MR. PADGET: Okay. That's fine.

MR. HOLLER: Line 20 -- page 68, 22 through 25.

MR. PADGET: It was 22 through 25. Okay. That's accurate. The -- but I just want to note for the record that the objections that we lodged by way of our motion *in limine* that was -- this video deposition transcript was submitted as part as it relates to the other objections beginning on page 60 through the remainder as detailed in the motion *in limine*. I just wanted to raise that we made the contemporaneous objection while playing the video as well for the record.

THE COURT: Okay. And the record will so reflect.

MR. HOLLER: Judge, also that we -- we made our arguments that the disability income should come in as to Dr. Cucé's opinion and you've ruled that it should not.

THE COURT: Right. Okay. Thank you all. I'll see all in the morning.

(WHEREUPON, the transcript of the deposition of Dr. Frank Cucé was marked as Court's Exhibit Number 1.)

(WHEREUPON, the proceedings adjourned for the day at 5:31 p.m.)

--- CONTINUED IN VOLUME III OF III ---

State of South Carolina	)	Court of Common Pleas
	)	Third Judicial Circuit
County of Sumter	)	Case No. 2012-CP-43-02030
	)	
Win Myat,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Transcript of Record
	)	(Volume III - Day 3 of 3)
	)	
Tuomey Healthcare Systems,	)	
	)	
Defendant.	)	
	)	

Aug. 31 - Sept. 2, 2015
Sumter, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Judge; and a jury

A P P E A R A N C E S:

William R. Padget, Esquire
Francis Hinson, Esquire
Attorneys for the Plaintiff

David Cornwell Holler, Esquire
Attorney for the Defendant

Krystal J. Smith
Court Reporter

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SEPTEMBER 2, 2015

(WHEREUPON, the proceedings resumed at 10:12 a.m.)

THE COURT: I have asked the bailiff to ask the jury to select a foreperson. So that's what they're doing right now and then they'll -- I found out they do better when they do it than when I do it.

MR. HOLLER: Judge, a matter of housekeeping. Yesterday afternoon at the conclusion of the evidence, the plaintiff rested. There were, however, several offers of exhibits in Dr. Cucé's deposition that were -- that were not ruled upon.

THE COURT: Okay.

MR. HOLLER: I believe there was a two-page document. The first exhibit I believe was the entirety of the medical records I think from all sources.

MR. PADGET: The first was just the Sumter Orthopedic records.

MR. HOLLER: Okay.

MR. PADGET: That's the only one that was actually moved into admission at the deposition was the Sumter Orthopedic.

THE COURT: Was the what? I'm sorry. I didn't hear that.

MR. HOLLER: That's the -- the Sumter Orthopedics office notes and so forth. When they were offered during Dr. Cucé's deposition, we stipulated to the authenticity of the documents, but not to their admissibility.

For the reasons we discussed before, we would oppose the admission again because it has information in there that may or may not have been interpreted that could be misinterpreted by the jury. And the example I used, for example, was a negative Tinel's sign. It has to do with the wrist in carpal tunnel syndrome, but they could read a Tinel's sign being negative as something awful because there's no testimony to tell them what these records mean.

That's the point. Much of the information documented in any medical encounter is not necessarily relevant to the issues at hand, if you follow it. So we would oppose the admission of the records themselves. Dr. Cucé is the best evidence and he's testified and he certainly used those records to refresh his recollection.

The second document that was discussed has already been used in court. Either way, Judge, whether it comes in or not, but I think it's something that was discussed and we probably should put into evidence.

THE COURT: Okay. What?

MR. HOLLER: Dr. Cucé's two-page document where he filled out the questionnaire, which was in May 2012.

THE COURT: All right.

MR. HOLLER: If you recall.

THE COURT: Do we have that document?

MR. PADGET: Sure. Sure.

THE COURT: Tell me what -- what's your -- the plaintiff's position?

MR. PADGET: I am -- I am -- well, obviously, as it relates to Dr. Cucé's office notes that there's no objection as to any authenticity. That has been dealt with already.

As I construed Mr. Holler's argument, his argument is essentially under Rule 403 that the risk of the jury getting confused is -- outweighs any value -- probative value that the notes have. We think the notes have a lot of probative value because they track his progression of his recovery.

And then the last doctor's note made by Dr. Cucé says -- says word for word at a time -- this time he's a year out from his injury. Unfortunately, Dr. Myat has had less than optimal result from his injury. It is my medical opinion he will have difficulty in continuing his medical practice as an infectious disease specialist due to the fact he's not as mobile as once before and does not have the endurance and strength of that extremity. I am advising that he continue with his present treatment course of pain regimen and topical creams. We discussed the possibility of a lengthening-type procedure. However, I would be very concerned he might lose what he already has and he understands this. I'll see him on an as-needed basis.

That is very probative information. These are his office notes. I would -- I would strongly submit that the probative

value of the type of information Dr. Cucé's opinions and notes of his conditions during the recovery and then ultimately which he -- which he writes in there, which have been properly authenticated, far outweigh the risk of them turning to a particular page in the notes and saying, well, he's got a particular neurological sign and I know what that means. That means something else. I think the risk of that really is quite -- is very small, and for that reason we'd ask for the admission of the office notes.

THE COURT: Okay.

MR. PADGET: As it relates to the attending physician statement, I'm -- we're okay with the admission of that so long as the references -- there's two -- two references to disability on that. They're stricken through. I've already taken the liberty of striking through to that on this copy. I don't have an objection to this coming in other than that.

THE COURT: Okay. And your objection to the records coming in is under 403 or under 801 or what?

MR. HOLLER: Judge, the best evidence rule. Those are the records of the physician used to recollect what his encounters were in his office and that the records in and of themselves are of good assistance to Dr. Cucé, but not necessarily to the jury.

Judge, I appreciate the help, but my offer wasn't -- my objection wasn't as to 403. You could certainly say 403, but

that's not the basis of it. Dr. Cucé has testified. Throwing his records again at a minimum would be bolstering. He's already testified. His testimony was clear. So we don't need to put his findings on a piece of paper and admit it several times.

THE COURT: Well, doesn't that come under 803(5)?

MR. PADGET: They're certainly not hearsay, Judge.

MR. HOLLER: Well, Judge, he's testified.

THE COURT: They're records, recorded recollections; right? A memorandum of -- isn't it 803(5)? Doesn't it come under that?

MR. HOLLER: Well, Judge, it's not hearsay. He's testified.

THE COURT: I understand, but the record itself is -- the record itself is what you're arguing about getting in, not his testimony; right? And doesn't -- 803(5), a memorandum of record concerning a matter about which a witness once had knowledge of, but has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory? Isn't that exactly what (5) covers?

MR. HOLLER: It says --

THE COURT: If admitted, the memorandum of record may be read into the evidence, but may not itself be received as an exhibit unless offered by an adverse party.

MR. HOLLER: Correct.

THE COURT: Okay. So doesn't -- doesn't that paragraph cover exactly what we're talking about?

MR. HOLLER: It covers the exclusion of it, yes.

THE COURT: Right.

MR. PADGET: That's only addressing it as hearsay. There's -- there's no -- there's been no objection as to hearsay.

THE COURT: Well, I mean that's what I was asking. What's his objection based on? And he said it's based on the best evidence rule, but --

MR. PADGET: Which I looked up. It means only the -- it's the legal principle that only the original document can come in, which by the way does not appear anywhere in the South Carolina Rules of Evidence.

THE COURT: I understand. I mean it's argued it's the best evidence rule, but normally what happens -- what really happens is under hearsay (5). Technically, it is hearsay unless it's under one of the exceptions. It is under one of the exceptions.

MR. HOLLER: But the exceptions --

THE COURT: If it comes in under business records and, of course -- and under (6) -- it can come in under (6).

MR. HOLLER: But you would have to redact the subjective opinions and judgments.

THE COURT: Right. That's -- and so technically to come under -- medical records comes under (6), but the question is is there any opinions in it.

MR. HOLLER: Which is exactly what he seeks to put in the record.

MR. PADGET: And I think the purpose of that rule, Judge, was to protect where you have no opportunity to cross-examine the witness about the nature of the opinion. So I couldn't just bring the record in and say, ah ha, we win, we got the record.

Here, they've had the opportunity to cross-examine the witness who generated the report. It's his report. It's his note. It's his report that he generated.

THE COURT: Right. And of course, that's exactly -- he's testified about his opinion, just -- just the same thing that's in his notes. He testified about it, didn't he?

MR. PADGET: The other thing is, he's employed by Tuomey.

THE COURT: Right. And he doesn't --

MR. PADGET: The thing as --

THE COURT: He is an adverse party. The adverse party is the one that's trying to bring it in, isn't it? Under (5)? He's the one that's trying to bring it in. He's the adverse party.

MR. HOLLER: He's not the adverse party. Dr. Cucé is his -- Dr. Cucé is more his patient that he is our employee. We

pay him as an employee. We have no control over how he practices medicine. Zero control.

THE COURT: Okay.

MR. PADGET: Well, the rule under 801(d)(2) doesn't make any reference to whether or not they can control what he says. It simply is if the statement is offered against the party and is the party's own statement either through an individual representative capacity or the statement in which the party has made an adoption or belief in its truth or -- oh, goodness -- a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of a relationship.

I mean it comes in under three of the four of those or by definition it simply isn't hearsay. As long as he's an employee by definition, we don't even get to 803 or (5) or the other exceptions. By definition, it is not hearsay.

MR. HOLLER: The employment of Dr. Cucé is completely unrelated to the employment of the nurses and staff that run the hospital. They employ him through a separate legal entity to which he operates an orthopedic practice.

MR. PADGET: There's no evidence of that.

MR. HOLLER: Well --

MR. PADGET: He testified he's their employee.

MR. HOLLER: So he's not -- well, Judge, that's a fiction.

THE COURT: Okay. Well, he's -- you know, he's testified to all of this that's in this record anyway.

MR. HOLLER: Yes, sir.

THE COURT: I'm going to allow it in. I mean I don't know what, if any, effect the jury is going to give to it, but, you know, in the whole scheme of things I don't think it really matters under one of these exceptions. It probably is the best one, you know.

Normally, subjective opinion comes in as to who shot who and how it came in effect and not dealing with diagnosis and treatment.

Okay? What else?

MR. HOLLER: And obviously, Judge, just for the record to protect it, you say under 803(5) it would be used and read into the evidence, which would be Dr. Cucé's testimony, but by rule not admitted.

THE COURT: Okay.

MR. HOLLER: And, Judge, at that point, the plaintiff would need to rest.

MR. PADGET: That we do.

THE COURT: Okay.

MR. HOLLER: Judge, we would move for a direction of verdict.

MR. PADGET: Before -- can I get this part?

MR. HOLLER: I'm sorry.

MR. PADGET: Before we get into that?

MR. HOLLER: Yes.

MR. PADGET: Judge, in accordance with our discussion just now, the Sumter Orthopedics office notes are now marked as Plaintiff's Exhibit 16 --

THE COURT REPORTER: 18.

MR. PADGET: -- and the attending -- I'm sorry, 18. It helps when you get the number right -- 18. And the attending physician statement with the disability reference redactions is now 19.

THE COURT: Okay. All right. I'm ready.

(WHEREUPON, Plaintiff's Exhibit Number 18, Sumter Orthopedic medical records, and Plaintiff's Exhibit Number 19, questionnaire, were admitted into evidence.)

MR. HOLLER: Judge, we would move for a direction of verdict on a number of matters.

First, Dr. Myat testified that the hospital was his place of employment, that he had a financial benefit. He went there for his own purposes rather than the purposes of the landowner, which in this case is the hospital. We would move for a direction of verdict that he is a licensee rather than an invitee.

Secondly, as to premises liability, there are two theories in which the landowner is responsible for someone's slip and fall. One, that an agent or employee of the

defendant placed water on the floor. Two, that the -- that the substance was on the floor long enough such that the landowner knew or should have known that it was in -- that it was on the floor.

Judge, as to -- I'll start backwards. As to constructive notice, there is absolutely no evidence that this substance that Dr. Myat slipped on was on the floor for any appreciable amount of time. In the constructive notice, there's no facts from which a jury could decide under constructive notice that the Tuomey employees should have known that the substance was there.

MR. PADGET: I can make that part easy.

THE COURT: Okay.

MR. PADGET: Your Honor, we have not put up a case on constructive notice. We have put up a case on prong one of the *Wintersteen* in that the defendant's agents caused or created the danger.

THE COURT: Okay.

MR. PADGET: As discussed in our charge conference.

THE COURT: All right.

MR. PADGET: And so --

THE COURT: I'll grant your motion on constructive notice.

MR. HOLLER: Thank you. Judge, as to evidence that a Tuomey employee placed water on the floor, there is no

evidence that a Tuomey employee did that. There's no set of facts from which a jury could reach the conclusion.

Mr. Whitehouse testified over objection that his guess -- it was more probable than not that a Tuomey employee put the -- would have been responsible for the spill versus some other person who could've come in there. Judge, that is not a fact. That is a guess, an opinion.

Every circumstantial charge that we looked at this morning prior to starting -- I have Judge Anderson's charge here. Every definition of circumstantial evidence is that the evidence is a fact from which an inference can be drawn to reach another fact.

Mr. Whitehouse's testimony that is more probable than not a Tuomey employee is not a fact. It is a guess. And this is speculation, conjecture, whatever definition you would -- you would seek.

I will hand up a list of citations, Judge, that essentially say that submission of speculative, theoretical or hypothetical views to a jury is not authorized. That -- and, Judge, I will make this argument as thorough as you wish, but I also do not was wish to waste the Court or the jury's time.

THE COURT: Okay.

MR. HOLLER: I would like to offer these citations, as well as our brief on motion for summary judgment, which we argued Monday a week ago, and the other arguments that we've

made throughout the trial so we don't have to repeat everything.

Judge, our position is there are no facts to connect the dots. The mere fact that Tuomey employees filled water coolers at other times, that they might have done it on this day, is not sufficient to create a question of fact for the jury.

THE COURT: Okay.

MR. HOLLER: I would offer these citations, Judge, in addition to our brief on our motion for summary judgment. I'd offer this as Court's Exhibit 2.

(WHEREUPON, Court's Exhibit Number 2, citations, was marked.)

MR. HOLLER: Finally, Judge, I would also renew our -- our offer -- we had offered the collateral source private disability policy under 703 for the cross-examination of Dr. Cucé and we still believe that was admissible under 703. We would renew that objection to the exclusion of that evidence.

THE COURT: Okay. Do you want to respond to any of that, Mr. Padget?

MR. PADGET: Yes, Your Honor. As Your Honor well knows, directed verdicts are governed under Rule 50. I always like starting with the rules. They're there for a reason.

Rule 50 says motion for directed verdict shall be granted when the question presented to the Court is only one of the

law. What is the law?

In this case, their basis for directed verdict is that the evidence submitted is insufficient to arise to show liability. And in getting there, Your Honor, in getting to that thing, the Court -- this jury has been wrangling with all week and hopefully will continue to wrangle with it as the Court's been wrangling with it.

Inherently in evaluating the evidence that we presented, the Court has to weigh that evidence about whether or not the facts that we've submitted -- and I'll detail some of those in a moment, but whether or not the facts we have submitted to this jury give rise to an inference that it was a Tuomey employee that spilled water on the floor that morning.

And our position is at this stage in light of the evidence we've submitted, there is sufficient facts that form inferences upon which the jury could reasonably arrive at that conclusion of liability.

We haven't come that far from summary judgment. The Court we believe properly denied summary judgment based upon the deposition testimony that was submitted and, quite candidly, the evidence that's been submitted over the last two days in court has been much stronger than the evidence we submitted at the summary judgment stage. The testimony from these witnesses, frankly, for us was much better than we got in their depositions. And I want to go over some of that

evidence.

Obviously, our legal position is liability under the *Wintersteen* case, premises liability, prong one. Did they -- did they create the danger? And so is there an inference here in this case, which could all be drawn in our favor at this stage, under the rules that it was, in fact, a Tuomey employee that created that spill?

There is, of course, evidence of the spill. Kathy Sapp has testified that she observed -- that she described in this area -- I would describe it as a four to five -- six-inch diameter patch of water right next to the nurses station. That she walked up there and observed it and that when she did, Dr. Myat said I slipped on water and fell. So we have -- there is facts that the water was on the floor that day for the purposes of this motion.

She further said -- I wrote down that she and her co-officer, really the only two visitors that there's been any evidence of being on the floor, did not cause that spill. That was her testimony.

She also testified, unprompted I would point out, that the spot of water on the floor looked as if ice had melted. That was her description. And the size and the description and the location. She also had no recollection of any other visitors or third parties in that area at or before the time of the fall.

Nurse Whitehouse testified. He testified there are four nurses and two nurse techs employed by Tuomey working on Unit 3 South that night. The only physician that he recollected being present on the floor at or near that time was Dr. Myat. There was -- he had no recollections of any third parties being in the area or around the nurses station at or around that time.

He testified that visitors have limited access during this time due to the -- due to the visitors hours. That Tuomey employees routinely prepare ice and water at the patient kitchen using two carts right adjacent to the location of the fall routinely every morning about the time leading up to the fall. That the ice and water in the patient kitchen is the nearest source of water, the location of water at this part of the floor. He also testified there are no other sources of water nearby.

I also asked him if there was any other environmental sources, if there was a roof leak or anything like that that could have caused it, and he said no.

So the only water source that's nearest to this is exclusively used by Tuomey employees and is not accessible to visitors. It's literally behind a locked door. There's also a sign. If you look at Exhibit 2 -- I'm sorry -- Exhibit 3, there's a purple sign above the nurses station on both sides above the door. No patients or visitors allowed around or

through the nursing station.

So Tuomey policy is not only should patients and visitors stay away from the nurses station, there's even signage there to enforce that policy.

The -- he agreed that the water on the floor constituted a dangerous condition. There's no dispute about that in this case. He also testified and he gave his opinion -- under Rule 701, he gave his opinion about the likelihood of whether or not it was a Tuomey employee or somebody, which frankly there is no evidence of, created this spill. There is a reasonable inference that someone created that spill. It was put there by a person. There are no other water sources around. There is no other explanation in evidence.

And in this case, judging all that, his opinion, which we believe the jury can accept, was that it was likely a Tuomey employee that created that hazard. We think that fits precisely within the providence of the evidence standard.

Mary Yates, the safety officer, testified that it was Tuomey policy to clean up spills. That Tuomey policy prohibits nurses from having drinks at the nurses station, one other potential cause of the water, an employee having a drink at the station, and that that too is a violation of the policies there, which we think could be construed to be negligent. But she regularly observes nurses having drinks at the nurses station in violation of the policy and she agrees

that water on the floor is a dangerous condition.

Dr. Myat testified as it relates to liability that the nurses and nurse techs again routinely prepared water from the patient kitchen that morning, as they do every morning, and that they usually begin that around four a.m. every morning. And he also testified that he did not cause the spill.

There is evidence of nine people on the floor that morning according to the testimony. Dr. Myat says it wasn't me. The two corrections officer -- one corrections officer said it wasn't the two of us. Nurse Whitehouse says it wasn't me. All that leaves of people that have -- there is testimony in evidence that were on the floor. The only people there according to the testimony and evidence are Tuomey employees. Those are the only people left.

Again, there was testimony that visitors regularly come and go, but this specific morning the only evidence in this record is that there is affirmative recollections of people being present are those people, and the only people who haven't got on the stand and denied that it wasn't me -- the only people left on the floor again were those nurses.

Using this standard -- I've given a lot of thought to this standard this week. I know Your Honor was reversed on a directed verdict in that criminal matter, which certainly is a very different standard, a very different standard of having to show substantial evidence.

But the burden of proof in a civil case is a preponderance of the evidence where the legal theory of liability is creation of the danger. This is quite possibly the lowest hurdle that any party in any case would have to get over in making out a liability case.

Is there a preponderance of the evidence that nurses from Tuomey -- nurse techs from Tuomey created that condition? Is there circumstantial evidence? And we certainly believe there is strong circumstantial evidence that I've just recited. They were the only people around that routinely deal with the water and ice at that location. Everyone else is excluded by policy. No one else was seen.

So, Your Honor, applying that very lenient standard, the lowest standard that I've contemplated, we believe there is strong circumstantial evidence to have juries make the decision that they are tasked with. What are the facts and the inferences in this case? What do they render? For that reason, we would ask that directed verdict be denied as it relates to prong one.

As I mentioned earlier as to constructive notice, we have not made a constructive notice case, and -- and we did not ask for any jury charges on constructive notice. So obviously we have no objection to the Court granting the directed verdict to that extent.

As it relates to the evidentiary objections the Court has