

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015-001964

Philip Ethier and Jeanne Ethier,

Appellants,

v.

Fairfield Memorial Hospital; Guy R. Bibeau, M.D.; Tuomey
Medical Professionals, Inc; And Pee Dee Emergency Medical
Associates, PA,

Defendants,

Of whom Guy R. Bibeau, M.D., is the Respondent.

RECORD ON APPEAL – VOLUME II

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1 liable than Doctor Bibeau, but the verdict clearly, by the
2 verdict form and under the instruction that you gave, is for
3 Jean Ethier on the loss of consortium claim. The verdict
4 form in question number---

5 THE COURT: Well, you know, my, my position has been
6 and is, and I've seen some support in recent cases, that
7 while a consortium claim is a separate case and can be
8 decided inconsistently, I understand that, but the cases
9 have said recently that the failure of the main case results
10 in a failure for the consortium case.

11 MR. PROFFITT: I would respectfully disagree. I don't
12 know if you read my Rule 59 memo yet, but it's clear that
13 that is not the case I would submit.

14 THE COURT: Now, there's a couple cases that say that
15 fairly clearly I think, but that's okay.

16 MR. PROFFITT: All right. I'm not sure if I know
17 which -- do you know about the name of the case you're
18 talking about?

19 THE COURT: Well, I'll, I'll -- my law clerk is not
20 with me today.

21 MR. PROFFITT: Okay.

22 THE COURT: He's got them and I've read them --

23 MR. PROFFITT: Yeah.

24 THE COURT: -- and -- because it came up in another
25 case. Not this one.

1 MR. PROFFITT: Okay.

2 THE COURT: That issue I've had in other cases.

3 MR. PROFFITT: Yeah.

4 THE COURT: In fact, I've got one right now I'm trying
5 to -- the plaintiff wants to try the consortium case first
6 in a separate trial, and then trial -- try the main case and
7 I'm of the opinion we can't do that because we've got to
8 decide the main case first. If the, if the main case fails,
9 as far as I'm concerned, there's not a consortium case.

10 MR. PROFFITT: Yeah, that's -- I, I would respectfully
11 submit that that is, I believe, wrong, but---

12 THE COURT: Well, it may. I'm just telling you what
13 I've seen in the cases.

14 MR. PROFFITT: Okay. But let me go ahead and explain
15 why I think that's wrong.

16 THE COURT: All right.

17 MR. PROFFITT: First of all, the verdict form, we
18 believe, is unambiguous and straightforward. It says Doctor
19 Bibeau is negligent. Then there's a question number
20 eight---

21 THE COURT: Well, I think my instructions to the jury
22 were that they were to issue -- they were to award damages
23 and have no concern about the percentage of negligence
24 issue. In other words, they were just suppose to give us a
25 damage figure.

1 MR. PROFFITT: Right.

2 THE COURT: We were to apportion what would happen with
3 the damages later. I think that was my instructions to the
4 jury.

5 MR. PROFFITT: Right. I don't think you ever asked the
6 jury to decide any kind of comparative negligence for Mrs.
7 Either. That, that comparative negligence---

8 THE COURT: well, I didn't ask a separate question. I
9 didn't find it necessary. I felt, once they made a finding
10 of comparative negligence and made a determination of the
11 percentages of negligence, there's never been a -- never was
12 an allegation in the case that Mrs. Ethier was somehow
13 negligent in what she did. The question was whether or not
14 her husband was negligent and the jury found seventy
15 percent.

16 MR. PROFFITT: Right. So you're right. Exactly.
17 That's, that's correct. The jury did find that Phil Ethier
18 was comparatively negligent. The jury was never asked to
19 determine on behalf of Mrs. Ethier. It would not have been
20 proper for---

21 THE COURT: So your position is that, that even though
22 he has no right to recover whatsoever, she can recover on
23 the consortium claim period?

24 MR. PROFFITT: Absolutely.

25 THE COURT: And there is no consideration of how

1 negligent the person she's taking under is?

2 MR. PROFFITT: Absolutely.

3 THE COURT: Okay.

4 MR. PROFFITT: And the reason for that---

5 THE COURT: I understand your position.

6 MR. PROFFITT: All right. The reason for that is
7 because, just for the record, is because loss of consortium
8 in South Carolina is a separate and independent claim. It
9 does not rise or fall with the directly injured plaintiff's
10 case. That's what the cases say.

11 I would cite you to the McCracken case, the McCall case
12 that say that law -- that negligence of, of one spouse or
13 the acts of one spouse are not imputed to another. That's
14 what those cases say. McCracken was '85, I think, 1985.

15 Furthermore, if you look at foreign cases where they
16 have directly addressed this issue, whether or not, in a
17 loss of consortium claim, the directly injured plaintiff's
18 negligent affects the loss of consortium claim, the Courts
19 say that loss of consortium is separate and independent
20 saying no, there's no effect.

21 It's only in states where the loss of consortium is
22 derivative, which is, I think, how Your Honor is seeing the
23 loss of consortium claim as derivative, that it flows from
24 and is related to the directly injured plaintiff.

25 THE COURT: I understand what you're saying, but the

1 two cases I'm talking about are South Carolina cases.

2 MR. PROFFITT: Okay.

3 THE COURT: But go ahead.

4 MR. PROFFITT: All right.

5 So, anyway, in South Carolina, the loss of consortium
6 claim is separate and independent, it is not derivative,
7 and, therefore, the impact on Jeanne Ethier's verdict is
8 nothing from Phil's verdict. It does -- they're not
9 related. They're completely separate and independent, and
10 it's just -- there's no effect on it and that's---

11 THE COURT: Okay. I'll hear from the defense on that.

12 MR. LINDEMANN: Just real quickly, Your Honor. I
13 believe one of the cases that Your Honor is referring to is
14 a case that came out in 2007 from the Supreme Court called
15 Lee versus Bunch.

16 What's interesting in that case was---

17 THE COURT: Yes, sir.

18 MR. LINDEMANN: ---it's a comparative case as well with
19 the exact same percentages of fault we have here.

20 THE COURT: Yes, sir.

21 MR. LINDEMANN: Seventy percent for the plaintiff,
22 thirty percent for the defendant. That was a motorcycle
23 accident case.

24 But what's key there is the Supreme Court actually
25 cited to, and this was a unanimous decision I may add from

1 the Supreme Court since -- with Justice Pleicones writing
2 it. It actually quotes to an Am Jur article and this is
3 what it says.

4 It says "generally a plaintiff's spouse's claim for
5 loss of consortium fails if the impaired spouse's claim
6 fails whether the claim is considered separate and
7 independent from the impaired spouse's claim or derivative
8 in nature." Again it says whether and it says essentially
9 whether or not it's considered separate, independent, or
10 derivative.

11 THE COURT: That, that is one of the cases I saw.

12 MR. LINDEMANN: And it cites another case called Smith
13 versus Ridgeway and it says there, holding, "husband can not
14 recover on loss of consortium because the jury found that
15 the wife was not entitled to recover on her strict liability
16 claim."

17 I do want to, just to be protected on the record for
18 this in the event Your Honor agrees with plaintiff's
19 position, and I don't suggest that you, you do, but I just
20 want to make certain that we're covered on this --

21 THE COURT: I understand.

22 MR. LINDEMANN: -- that -- because they're arguing to
23 the Court that they're entitled to the full \$250,000 that
24 the jury awarded Mrs. Either on the consortium claim.

25 If Your Honor were to grant their motion and, and

1 consider this issue, we would ask the Court also then to
2 factor in, number, number one, that there's an allocation of
3 liability that needs to be done because Section 15-38-15,
4 and this took place post July 2005, so that applies, I know
5 Your Honor's familiar with the, with the language, but it
6 point blank says "a defendant whose conduct is determined to
7 be less than fifty percent at fault shall only be liable for
8 the percentage of indivisible damages by the jury or fact
9 finder."

10 They're making a big deal out of the fact that this
11 statute talks about defendants and here we have a plaintiff
12 and a defendant. Bottom line, they're all tortfeasors.
13 Plus if you factor in Subsection D, the General Assembly
14 said "a defendant shall retain the right to assert that
15 another potential tortfeasor, whether a party or not,
16 contributed to the alleged injury or damages or may be
17 liable for any and all damages alleged by any other party."

18 Here we have two tortfeasors a jury found, Mr. Ethier,
19 Doctor Bibeau. Doctor Bibeau's less than 50 percent at
20 fault. Therefore, at most, he should be liable for
21 thirty percent of the damages. Thirty percent of 250 is
22 \$75,000.

23 In addition to that, Your Honor, and we submit this
24 with our initial memorandum to the Court, be happy to hand
25 up another copy, this is a covenant not to execute that was

1 entered into by the Ethiers with Fairfield Memorial Hospital
2 who was a defendant just until prior to trial. It's a
3 settlement for \$100,000 and there was an apportionment
4 agreed to between the hospital and the Ethiers that they
5 can't -- they're obviously bound by where \$40,000 would be
6 apportioned to Mrs. Ethier's consortium claim.

7 So, again, if Your Honor's gonna find that their
8 argument is right, the 250 needs to be reduced to 75, which
9 is thirty percent of that number, and needs to be further
10 reduced to \$35,000 because that is a mandatory setoff under
11 the Contribution Act. It's not even discretionary with the
12 Court based upon 15-38-50, and I'd cite the cases of Ellis
13 v. Olander, which is the key case for that.

14 THE COURT: Okay.

15 MR. LINDEMANN: So, ultimately, Your Honor, at best, if
16 Your Honor agrees with their position, judgment should be
17 reduced to \$35,000. But I'm saying that solely to protect
18 my record on that particular point.

19 I think Your Honor's exactly correct. I think the Lee
20 versus Bunch case supports your initial ruling and we would
21 ask that Your Honor affirm -- deny the new trial motion and
22 affirm the verdict as you have entered it.

23 Thank you, Your Honor.

24 THE COURT: Yes, sir.

25 MR. PROFFITT: Your Honor?

1 THE COURT: Let's make it quick.

2 MR. PROFFITT: I will.

3 THE COURT: I've got a lot of lawyers back there
4 chomping at the bits to get to talk to me.

5 MR. PROFFITT: All right.

6 THE COURT: I don't blame them.

7 MR. PROFFITT: On the lead Bunch case, I would simply
8 refer Your Honor to Page 17 -- 16 and 17 of our memo.
9 There's a Footnote 5. That statement in Lee was dicta.
10 They were not even addressing that issue because the Court
11 said -- they already had a verdict for the defense. It was
12 a verdict for plaintiff -- I mean verdict for defense on the
13 directly injured plaintiff. verdict for defense on the---

14 THE COURT: I didn't say they were holdings. I said
15 there was language---

16 MR. PROFFITT: Right.

17 THE COURT: ---in two recent cases---

18 MR. PROFFITT: Right.

19 THE COURT: ---that would lead one to believe---

20 MR. PROFFITT: Yes.

21 THE COURT: ---that our Supreme Court takes that
22 position---

23 MR. PROFFITT: But---

24 THE COURT: ---and as he pointed out, that was a
25 unanimous decision. Nobody took exception to that language

1 in there.

2 MR. PROFFITT: Well, I would, I would submit that they
3 weren't addressing that issue. It is dicta. And if you
4 look at the Am Jur provision that they cite, if you look in
5 that footnote I referred you to, Footnote 5, I've looked at
6 every one of those cases, and it is -- Am Jur fails to draw
7 the distinction that the case law draws, which is, if it's a
8 derivative Court, a derivative state where loss of
9 consortium flows from the directly injured case, it rises or
10 falls with that directly injured plaintiff's cases. If it's
11 a separate independent Court or state, like we have in South
12 Carolina, which has been said since the 1920s, since the
13 1920s, it does not rise or fall. It's totally separate and
14 it does not rise or fall with a directly injured claim and
15 that the Am Jur is just wrong.

16 If you go look at those case, they're cited in that
17 footnote---

18 THE COURT: I'll take a look at it.

19 MR. PROFFITT: ---and completely wrong.

20 One final point on 15-38-15, that doesn't apply at all,
21 at all. That statute doesn't apply in anyway whatsoever to
22 this case. This is a one plaintiff, one defendant case,
23 and -- or one directly injured plaintiff versus defendant
24 case, and it does not apply at all in any way, shape, or
25 form to effect a verdict. We completely disagree with their

1 analysis of the damages apportioned.

2 THE COURT: All right. Thank you, gentlemen.

3 MR. PROFFITT: Thank you, Your Honor.

4 THE COURT: Thank you, Your Honor.

5 MR. PROFFITT: Thank you very much.

6 THE COURT: Have a safe trip home.

7

8

9 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh 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 the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Fairfield County, South Carolina, on the 6th day of July, 2015.

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

August 5th, 2015



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SIXTH JUDICIAL CIRCUIT
COUNTY OF FAIRFIELD) CASE NO.: 2013-CP-20-0012

PHILIP ETHIER AND JEANNE)
ETHIER)
) TRANSCRIPT OF RECORD
vs.)
) (DAY 1.- VOLUME I)
GUY R. BIBEAU) (Pages 1 - 127)

MARCH 30, 2015
WINNSBORO, SOUTH CAROLINA

BEFORE THE HONORABLE ROGER COUCH

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16TH Circuit Court Reporter

I-N-D-E-X

WITNESSES:	Direct	Cross	Re-Direct	Re-Cross
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Philip Ethier				
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VOIR DIRE AND JURY SELECTION

7

1 THE COURT - All right, ladies and gentlemen, I
2 thank you for your cooperation. We're about to begin the
3 trial of the case of Philip Ethier and Jeanne Ethier as
4 plaintiffs against the defendant, Guy R. Bibeau, MD.
5 Before we begin this trial, we're going to go through a
6 series of questions with you similar to what we did in the
7 qualification process. I'll be asking questions of you and
8 if you have a response to those questions, I'll be asking
9 that you stand to respond to that. The questions will
10 apply to this case and this case alone. It is necessary
11 that you tell the truth again to these questions or give me
12 full information, because this information again will be
13 used by the litigants in making jury selection decisions,
14 and I'll be making decisions concerning your qualification
15 to serve in this case. Now, to tell you just a little bit
16 about this case, very little, but I do want you to know
17 what it's about and what it involves, because this may
18 affect your answers to the questions that I'm about to ask
19 you. The case involves allegations made by the plaintiff.
20 It is as a result of a treatment procedure that occurred on
21 April 10 of 2011. The plaintiff, Philip Ethier, sought
22 medical treatment at the Fairfield Memorial Hospital. The
23 treating physician, apparently, he alleges was Dr. Bibeau.
24 He alleges that Dr. Bibeau failed to properly treat him or
25 use the appropriate standard of care in treating him, and

1 that he was negligent as a result of that, and that he
2 suffered injuries as a result of that negligence and is
3 claiming damages for that negligence. That's the claim of
4 the plaintiff. The defendant has denied the negligence and
5 denies that it is responsible for the injuries that is
6 suffered -- have been suffered by the plaintiff. So that's
7 what this case is about, and those are the people that are
8 involved in it and the approximate time and the location
9 where it occurred. Again, I give you that information so
10 that you can more fully answer the questions I'm about to
11 ask. Now, also, I'm going to ask before I begin my
12 questioning that the attorneys involved in this case
13 introduce themselves to you and if their clients are
14 present in the courtroom, that they introduce those
15 individuals to you as well so that you can, perhaps, put a
16 face with the name. So first of all, for the plaintiff,
17 I'll ask that the attorneys introduce themselves to the
18 jury panel.

19 MR. PROFFITT - My name is David Proffitt, and I'm
20 with Proffitt and Cox law firm in Columbia, and along with
21 Ron Cox, I represent Philip and Jeanne Ethier, the
22 plaintiffs in this case.

23 THE COURT - If you folks will stand, face the
24 jury panel so that they can put a face with that name.

25 (WHEREUPON, MR. AND MRS. ETHIER COMPLY)

1 THE COURT - Thank you very much. You can be
2 seated. And for the defense?

3 MR. SMITH - Thank you, Your Honor. May it please
4 the Court. Good morning. My name is Murrell Smith, and
5 I'm from Sumter, and I represent Mr. Guy Bibeau who is
6 seated -- seated right here -- stand up, Dr. Bibeau.

7 (WHEREUPON, DR. BIBEAU COMPLIES)

8 MR. SMITH - And also -- and my law partner David
9 Holler back there and Stanley Myers from Lexington. We're
10 the lawyers representing Dr. Bibeau.

11 THE COURT - All right, thank you very much. Now,
12 ladies and gentlemen, it is important, as I said, that the
13 information you give us is truthful, honest and complete
14 information. For that reason I am going to again ask that
15 the clerk swear you in concerning the responses you're
16 about to give to these questions. Madam, Clerk, could you
17 place this jury panel now under oath.

18 (WHEREUPON, JURY PANEL IS DULY SWORN BY THE
19 DEPUTY CLERK)

20 THE COURT - All right, now, if there was any
21 member of the potential jury panel who either failed or
22 refused to take the oath just administered by the clerk
23 please stand.

24 (NO RESPONSE)

1 THE COURT - The record will reflect that all
2 potential jurors have been sworn in this case. Now, is
3 there any member of this jury panel who has ever been
4 related by marriage or are you related by blood to either
5 the plaintiff, Philip Ethier, and Jeanne Ethier or to the
6 defendant, Guy R. Bibeau? If that's true, please stand.

7 (NO RESPONSE)

8 THE COURT - Is there any member of the jury panel
9 who has ever had a close social or a personal relationship
10 with either the plaintiffs, Philip and Jeanne Ethier, or
11 the defendant, Guy R. Bibeau? If that's true, please
12 stand.

13 (NO RESPONSE)

14 THE COURT - Now, as to the attorneys involved in
15 this matter, has any member of the jury panel ever been
16 related by marriage or are you related by blood or have you
17 ever had a close social or a personal relationship with any
18 of the attorneys that are involved in this matter? If
19 that's true, please stand.

20 (NO REPSONSE)

21 THE COURT - Has any member of the jury panel ever
22 been represented by any of the attorneys that are involved
23 in this case or have they ever appeared on the other side
24 of some legal matter from you? If that is true, please
25 stand.

1 (NO RESPONSE)

2 THE COURT - Now, does any member of the jury
3 panel know or have any family or business relationship with
4 any persons employed by the following law firms: Proffitt
5 & Cox, LLP in Columbia, Lee, Erter, Wilson, Holler & Smith
6 in Sumter, South Carolina or the firm of Moore Taylor in
7 West Columbia, South Carolina? If that's true, please
8 stand.

9 (NO RESPONSE)

10 THE COURT - Now, I'm going to go over a list of
11 individuals who have been identified to me as possible
12 witnesses in this case. Listen carefully, because there is
13 a good number of these individuals, and, in fact, I may end
14 up saying some of these names twice, but I'll try to cover
15 everybody to be sure I've covered them all, so listen
16 carefully to the people who have been identified to me as
17 possible witnesses in this matter. First of all, Jeremiah
18 Holleman, MD. He's with the Sanger Heart and Vascular
19 Institute in Charlotte. Carl Adams, MD of Durango,
20 Colorado. Scott Joplin, (sic) MD, of Old Saybrook,
21 Connecticut, Tammy Chen, MD, with the Southern Psychiatric
22 Practice in Rock Hill, South Carolina, Mark Porter, MD, of
23 Metrolina Neurological Associates in Rock Hill, South
24 Carolina, Sanjay Nandurkar, MD, of Piedmont Interventional
25 Spine & Pain Center in Lancaster, Eric Weinstein, MD, of

1 Summerville, South Carolina, Charlie Dorn Smith, III, MD,
2 of Florence, South Carolina, Dr. Oliver Wood, a PHD from
3 Columbia, South Carolina, Joel Leonard of Leonard &
4 Associates in Columbia, Shelene Giles of FIG Services in
5 Hendersonville, North Carolina, Gerald Johnson, MD, of Pee
6 Dee Emergency Medical Associates in Manning, Angie Johnson
7 of Pee Dee Emergency Medical Associates in Manning, South
8 Carolina, Samantha Anthony, CNA, Jerilyn Wadford, RN, in
9 Columbia, Rhonda Gwynne, LPN, in Winnsboro, George Duquette
10 of Chester, South Carolina, Lorraine Duquette of Chester,
11 South Carolina, Jeffrey Gaskill of Indian Trail, North
12 Carolina, Kathleen Gaskill of Indian Trail, North Carolina,
13 Dr. Carl Adams, Todd Keith, Registered Nurse, Dr. Larry
14 Canty, with Medical Director at Fairfield Memorial, Michael
15 Williams, CEO of Fairfield Memorial, Marc Harari -- it's H-
16 a-r-a-r-i, a PHD, Jennifer Kimbrell, Tammy Chen, NaMetris
17 Blount, a PHD with Palmetto Counseling and Consulting,
18 David Sward, a masters in education and a professional
19 counselor, Karen Thompson, RN, Joel Leonard, vocational
20 consultant, Dr. Gerald Johnson, or Angie Johnson with Pee
21 Dee Emergency Medical, Eric Weinstein, an MD, Dorn Smith,
22 an MD, Rhonda Gwynne, an RN, registered nurse, Jerilyn
23 Wadford, an LPN and Patti Locklair. Now, as to the
24 individuals that I just identified as possible witnesses in
25 this case, has any member of the jury panel ever been

1 related by marriage or are you related by blood or have you
2 ever had a close social or a personal relationship with the
3 people that I've identified as possible witnesses? If
4 that's true, please stand.

5 (JUROR STANDS)

6 THE COURT - Ma'am, your name and number?

7 JUROR - Teresa Killian, juror 72. I used to work
8 at Fairfield Memorial Hospital with Mike Williams.

9 THE COURT - So you knew him from that employment?

10 JUROR - Yes, sir.

11 THE COURT - You no longer work there. Is that
12 right?

13 JUROR - Right.

14 THE COURT - Okay. How long ago did you work
15 there?

16 JUROR - It's been about three, four years ago.

17 THE COURT - I see. Now, ma'am, if that person
18 were to be a witness in this case and you were seated on
19 the jury, would that fact affect your ability to be fair
20 and impartial to both the plaintiff and the defendant in
21 case?

22 JUROR - No, sir, it wouldn't. I could be fair.

23 THE COURT - All right. Okay, thank you, ma'am,
24 you can be seated. Anyone else?

25 (NO RESPONSE)

1 MR. SMITH - Judge, may we approach for a second?

2 THE COURT - Yes, please do.

3 (WHEREUPON, BENCH CONFERENCE WAS HELD OUT OF THE
4 HEARING OF THE JURY WHICH WAS NOT REPORTED.)

5 THE COURT - All right, I have been informed of
6 one other witness. His name is Adam Gladden. He's an
7 investigator. Now, as to that particular witness, has any
8 member of the jury panel ever been related by marriage or
9 are you related by blood or have you ever had a close
10 social or a personal relationship with a witness by the
11 name of Adam Gladden? If that's true, please stand.

12 (NO RESPONSE)

13 THE COURT - Does any member of the jury panel
14 have any moral, religious or personal or political beliefs
15 that would prevent you from serving as a juror in this
16 case? If that's true, please stand.

17 (NO RESPONSE)

18 THE COURT - Has any member of this jury panel
19 ever been a party, either a plaintiff or a defendant in a
20 civil lawsuit? If that's true, please stand.

21 (NO RESPONSE)

22 THE COURT - Has any member of the jury panel or a
23 member of your immediate family ever been employed in a
24 field of medicine? If that's true, please stand.

25 (JURORS STAND)

1 THE COURT - I'll begin with you, sir. Name and
2 number?

3 JUROR - 130, Michael Urias.

4 THE COURT - Yes, sir. Your situation?

5 JUROR - My mother works for the VA Hospital in
6 Columbia as a nurse.

7 THE COURT - All right, would the fact -- I'm
8 sorry?

9 JUROR - As a nurse.

10 THE COURT - As a nurse. Thank you. Now, if you
11 were seated as a juror in this case, would that affect your
12 ability to be fair and impartial to both the plaintiff and
13 the defendant?

14 JUROR - No, sir, it would not.

15 THE COURT - All right, thank you. You can be
16 seated. Sir, your name and number?

17 JUROR - Paul Marshall, 80.

18 THE COURT - Your situation?

19 JUROR - I've got a nephew who's an MD.

20 THE COURT - All right, would that fact affect
21 your ability to be fair and impartial to both the plaintiff
22 and the defendant in this case?

23 JUROR - (Indicating no)

24 THE COURT - Have to answer verbally.

25 JUROR - No.

1 THE COURT - Have to get you on tape. Thank you.

2 You can be seated. Name and number, sir?

3 JUROR - Keith Stocker, 122.

4 THE COURT - Yes, sir.

5 JUROR - My wife is a chiropractor; my dad was a
6 chiropractor; my sister is a chiropractor.

7 THE COURT - I see. Well, now, if you were on the
8 jury, would that affect your ability to be fair and
9 impartial to both parties?

10 JUROR - No.

11 THE COURT - Thank you, sir. Name and number,
12 ma'am?

13 JUROR - Kathleen Markowitz, number 79. I'm a
14 nurse.

15 THE COURT - Yes, ma'am, your -- you said you were
16 a nurse?

17 JUROR - (Indicating yes)

18 THE COURT - You no longer do that?

19 JUROR - No, I do longer ---

20 THE COURT - Okay, would that fact affect your
21 ability to be fair and impartial to both sides?

22 JUROR - No.

23 THE COURT - Thank you, ma'am. Name and number,
24 please, ma'am?

1 JUROR - Connie Pete, 102, my daughter's a nursing
2 assistant ---

3 COURT REPORTER - She needs to speak up, Judge.

4 THE COURT - You have to speak up a little louder.
5 She says she can't get you down.

6 JUROR - Connie Pete, 102, my daughter is a CNA at
7 -- with Greenwood Nursing Home.

8 THE COURT - All right, now, would that fact
9 affect your ability to be fair and impartial to both sides
10 in this matter?

11 JUROR - (Indicating no)

12 THE COURT - Thank you, ma'am. Sir, name and
13 number?

14 JUROR - Robert Caldwell, number 28.

15 THE COURT - Yes, sir.

16 JUROR - My wife is a retired nurse.

17 THE COURT - All right, would that affect your
18 impartiality in this matter?

19 JUROR - No, sir.

20 THE COURT - Thank you, sir. Anyone else?

21 (NO RESPONSE)

22 THE COURT - Is there any member of the jury panel
23 who's had any life experiences that would make it difficult
24 for you to sit on a jury and be impartial to anyone who
25 claims to have been injured and comes into court asking for

1 monetary damages? If you've had such an experience in the
2 past, please stand.

3 (NO RESPONSE)

4 THE COURT - Has any member of the jury panel had
5 any experiences with a medical professional such that it
6 would cause you to -- it could affect your ability to be
7 fair and impartial in this case? If that's true, please
8 stand.

9 (NO RESPONSE)

10 THE COURT - Is there any member of the jury panel
11 who is a member of the Chester Second Baptist Church in
12 Chester, South Carolina? If that's true, please stand.

13 (NO RESPONSE)

14 THE COURT - Is there any member of the jury panel
15 or a member of your immediate family who has ever been
16 employed or been a patient in or treated by any of the
17 following medical professionals: Fairfield Memorial
18 Hospital, Jeremiah Holleman, MD, of The Sanger Heart
19 Institute, Karen Thompson, a RN, Mark Porter, an MD with
20 Metrolina Neurological, Sanjay Nandurkar, an MD with
21 Piedmont Interventional Spine & Pain, Marc Harari, a PHD,
22 Jennifer Kimbrell, AMED Home Health, Tammy Chen, an MD,
23 NaMetris Blount, a PHD with Palmetto Counseling, David
24 Sward, a counselor, Rhonda Gwynne, an RN, or Jerilyn
25 Wadford, an RN? So if you have been employed by or been

1 treated by or been a patient of any of those medical
2 professionals, please stand.

3 (NO RESPONSE)

4 THE COURT - Has any member of the jury panel
5 gotten any information from any source such that it has
6 caused you to already form or express an opinion concerning
7 any issue that might be involved in this trial? If that's
8 true, please stand.

9 (NO RESPONSE)

10 THE COURT - Is there any member of the jury panel
11 who has had any medical or legal education, training or
12 experience? If that's true, please stand.

13 (JURORS STAND)

14 THE COURT - Name and number, please, ma'am.

15 JUROR - Linda Albowicz, juror 2.

16 THE COURT - Yes, ma'am, and your situation?

17 JUROR - I worked as a dental hygiene instructor
18 and I taught ethics and juris prudence.

19 THE COURT - I see. Okay. Now, ma'am, would that
20 fact affect your impartiality if you were to sit on the
21 jury in this case?

22 JUROR - I don't believe so.

23 THE COURT - Well, I have to know for sure. Do
24 you think it would affect your -- could you be impartial
25 given that training?

1 JUROR - Yes.

2 THE COURT - All right. Thank you very much.

3 Name and number, sir?

4 JUROR - Keith Stocker, 122.

5 THE COURT - Yes, sir.

6 JUROR - I worked for a radiology group in Fort
7 Smith, Arkansas years ago.

8 THE COURT - I see. Would that affect your
9 ability to be fair and impartial, sir?

10 JUROR - I don't believe so, no.

11 THE COURT - Thank you. Ma'am, you said you
12 worked at Fairfield at one time. What'd you do there?

13 JUROR - I'm a certified nurse assistant.

14 THE COURT - I see. Would that affect your
15 impartiality in this matter?

16 JUROR - No, sir, it won't.

17 THE COURT - Thank you, ma'am.

18 COURT REPORTER - What was her number, Judge?

19 THE COURT - Your number, please, ma'am? I'm
20 sorry; we didn't get it. The lady standing before her.

21 JUROR - Oh, I'm sorry. 72.

22 THE COURT - I'm sorry. Thank you, ma'am. You
23 can be seated. Your name and number, again?

24 JUROR - Kathleen Markowitz, number 79.

1 THE COURT - And you'd indicated you'd been a
2 nurse in the past.

3 JUROR - I'm a nurse, yes.

4 THE COURT - Okay, is that the training you're
5 talking about?

6 JUROR - Yes.

7 THE COURT - And you've told me that would not
8 affect your impartiality. That still true?

9 JUROR - Yes.

10 THE COURT - Thank you. Name and number?

11 JUROR - I have a bachelor's degree in healthcare
12 administration.

13 THE COURT - I see. Would that affect your
14 impartiality, ma'am?

15 JUROR - No, sir.

16 COURT REPORTER - What was her number again?

17 THE COURT - Your number again?

18 JUROR - 102.

19 THE COURT - Thank you.

20 CLERK - One more, Judge.

21 THE COURT - Oh, I'm sorry. Yes, sir, in the
22 back. Name and number?

23 JUROR - Robert Caldwell, number 28. And I don't
24 know what this answers, but I'm a former board of director
25 of Fairfield Memorial Hospital.

1 THE COURT - I see, but you're no longer in that
2 position.

3 JUROR - No. No, sir.

4 THE COURT - Now, would that fact affect your
5 impartiality in this case?

6 JUROR - No, sir.

7 THE COURT - Thank you, sir. I'm going to ask
8 about several medical conditions. Listen carefully to the
9 conditions. I'm asking you concerning any member of the
10 jury panel or any member of your immediate family, if they
11 have ever undergone by-pass procedure, suffered from an
12 occlusion of any of the arteries as a result of an
13 aneurysm, suffered any nerve damage, suffered from
14 depression or anxiety. If you or a member of your
15 immediate family has ever suffered from any of those
16 conditions, please stand.

17 (JURORS STAND)

18 THE COURT - Name and number, sir?

19 JUROR - Keith Stocker, number 122.

20 THE COURT - Your situation?

21 JUROR - My father-in-law had quadruple by-pass
22 surgery at Richland Memorial.

23 THE COURT - All right, as far as you know, would
24 that affect your impartiality in this case, sir?

25 JUROR - No.

1 THE COURT - Thank you. Ma'am, name and number?

2 JUROR - Juror number 72, my daughter's been going
3 through depression.

4 THE COURT - All right, would that affect your
5 impartiality in the case, ma'am?

6 JUROR - No, sir, it won't.

7 THE COURT - Thank you. Sir, your name and
8 number?

9 JUROR - Juror number 137, Tommy Walton.

10 THE COURT - Yes, sir. Yes, sir.

11 JUROR - My sister had triple by-pass at
12 Provident.

13 THE COURT - All right, as far as you know, would
14 that affect your affect your impartiality in this case?

15 JUROR - No, sir.

16 THE COURT - Thank you. Sir, name and number?

17 JUROR - Number 82, Bobby Mason.

18 THE COURT - Yes, sir.

19 JUROR - I've had herniated disc with nerve damage
20 associated with it.

21 THE COURT - I see. Would that affect your
22 impartiality in the case?

23 JUROR - No, sir.

24 THE COURT - Thank you. Ma'am, name and number?

25 JUROR - Kathleen Markowitz, number 79.

1 THE COURT - Yes, ma'am.

2 JUROR - I suffer from depression and anxiety.

3 THE COURT - All right, will that affect your
4 impartiality in the case?

5 JUROR - It might.

6 THE COURT - All right, if it affects your
7 impartiality I need to know.

8 JUROR - Yes.

9 THE COURT - If it would, then I'm going to ask
10 you to sit down. You no longer have to answer my
11 questions.

12 JUROR - Okay.

13 THE COURT - I'm going to exclude you from the
14 trial.

15 JUROR - Okay.

16 THE COURT - Have a seat, please. Name and
17 number, ma'am?

18 JUROR - Connie Pete, 102. Father and sister have
19 had aneurysms.

20 THE COURT - All right, will that affect your
21 impartiality in this case?

22 JUROR - No, sir.

23 THE COURT - Thank you, ma'am. Anyone else?

24 (NO RESPONSE)

1 THE COURT - Has any member of the jury panel or a
2 member of your immediate family, are they either currently
3 taking prescription pain medication or been required in the
4 past to take prescription pain medications for a period of
5 time of two months or longer? If that's occurred, please
6 stand.

7 (JURORS STAND)

8 THE COURT - Yes, sir. Name and number?

9 JUROR - Number 82, Robert Mason.

10 THE COURT - Yes, sir.

11 JUROR - When I had my herniated disc, I was on
12 pain medication for extended period of time.

13 THE COURT - I see. That's no longer the case.

14 JUROR - No, sir.

15 THE COURT - All right, so would that affect your
16 impartiality in this case?

17 JUROR - No, sir.

18 THE COURT - Thank you, sir. Name and number,
19 sir?

20 JUROR - Lewis Humphries, 65. I take some pain
21 medicine for arthritis.

22 THE COURT - All right, would that fact affect
23 your impartiality in this case?

24 JUROR - No, it wouldn't.

1 THE COURT - Thank you, sir. Name and number,
2 sir?

3 JUROR - Gerald Moody, 89.

4 THE COURT - Yes, sir.

5 JUROR - You talking about my family, too?

6 THE COURT - Well, immediately family. Either you
7 or your immediate family, wife, children, immediate family.

8 JUROR - Well, my sister takes pain medication for
9 degenerative bone disease or whatever it is.

10 THE COURT - I see. Would that affect your
11 impartiality in this case, sir?

12 JUROR - No, it wouldn't.

13 THE COURT - Thank you. Name and number, sir?

14 JUROR - James McGrew, 84.

15 THE COURT - Yes, sir.

16 JUROR - I take Tramadol for arthritic conditions
17 and bad knee.

18 THE COURT - I see. Would that affect ---

19 JUROR - No, sir.

20 THE COURT - --- your impartiality in this case?

21 Thank you, sir. Ma'am, name and number?

22 JUROR - Connie Pete, 102, pain medicine for
23 arthritis.

24 THE COURT - All right, would that affect your
25 impartiality in the case, ma'am?

1 JUROR - No, sir.

2 THE COURT - Thank you. Sir, name and number?

3 JUROR - 138, Keith Ward. My wife takes
4 medications for arthritis.

5 THE COURT - I see. Would that affect your
6 impartiality in this case?

7 JUROR - No, sir.

8 THE COURT - Thank you, sir. Is there any member
9 of this jury panel who has previously served on jury duty
10 in a case that was tried in a court of law? If that's
11 true, please stand?

12 JUROR - Is that ever?

13 THE COURT - Ever. Yes, sir. Name and number,
14 sir?

15 JUROR - Keith Stocker, 122.

16 THE COURT - All right, was it a civil trial or a
17 criminal trial?

18 JUROR - It was a civil trial, drunk driving.

19 THE COURT - Did it go to a verdict?

20 JUROR - Yes, it did.

21 THE COURT - All right. Would that fact affect
22 your ability to be fair and impartial though in this case?

23 JUROR - No, sir.

24 THE COURT - Thank you. You can be seated. Sir,
25 name and number?

1 JUROR - Number 137, Thomas Walton.

2 THE COURT - And was that a civil or a criminal
3 trial?

4 JUROR - Civil.

5 THE COURT - And did the case go to a verdict?

6 JUROR - Yes, it did.

7 THE COURT - All right, would that experience
8 affect your ability to be fair and impartial in this case?

9 JUROR - No, sir.

10 THE COURT - Thank you. Ma'am, name and number?
11 The lady right here..

12 JUROR - Kathy Rabb, 106.

13 THE COURT - Yes, ma'am.

14 JUROR - I believe it was a criminal trial.

15 THE COURT - All right, did that case go to a
16 verdict?

17 JUROR - I believe it did. It's been long ago.

18 THE COURT - Has it been a long time?

19 JUROR - Yes, sir.

20 THE COURT - All right, would that affect your
21 ability to be fair and impartial in this case?

22 JUROR - No, sir.

23 THE COURT - Thank you. Sir, name and number?

24 JUROR - Gerald Moody, 89.

25 THE COURT - Yes, sir.

1 JUROR - I was on a DUI trial, Magistrate Court
2 though.

3 THE COURT - I see. Well, that's okay. I just
4 wanted to know if you've had experience on a jury panel and
5 whether or not that would affect your ability to be
6 involved in this case as a jury.

7 JUROR - No, it won't.

8 THE COURT - Thank you, sir. Name and number,
9 please, ma'am?

10 JUROR - Connie Pete, 102, criminal trial.

11 THE COURT - And did it go to a verdict, ma'am?

12 JUROR - (Indicating yes)

13 THE COURT - And would that affect your
14 impartiality to serve in this case?

15 JUROR - No, sir.

16 THE COURT - Thank you. Sir, name and number?

17 JUROR - 138, Keith Ward. I served in court in a
18 civil trial.

19 THE COURT - Civil trial. Did that go to a
20 verdict, sir?

21 JUROR - Yes, sir.

22 THE COURT - And would that affect your
23 impartiality if you were selected in this trial?

24 JUROR - No, sir.

1 THE COURT - Thank you, sir. Name and number,
2 sir?

3 JUROR - 28, Robert Caldwell.

4 THE COURT - Yes, sir.

5 JUROR - It was criminal.

6 THE COURT - Did it go to a verdict?

7 JUROR - It didn't, sir.

8 THE COURT - And would that affect your
9 impartiality if you were selected here?

10 JUROR - No.

11 THE COURT - Thank you, sir. Is there any member
12 of the jury panel who is aware of any bias or prejudice
13 that you might have, either for or against either the
14 plaintiffs or the defendants in this case? If that's true,
15 please stand.

16 (NO RESPONSE)

17 THE COURT - Is there any member of the jury panel
18 who is a member of or a contributor to a group which has as
19 its primary concern the promotion of law enforcement and/or
20 victim's rights or any group which sponsors efforts to
21 reform the judicial systems? These groups would include
22 but not be limited to groups such as Mother's Against Drunk
23 Driving, Students Against Drunk Driving, Citizens Against
24 Violent Crime, The South Carolina Trooper's Association or
25 The South Carolina Sheriff's Association or other

1 organizations as I described? If that's true, please
2 stand.

3 (NO RESPONSE)

4 THE COURT - Does any member of this jury panel
5 know of any reason whatsoever why he or she should not
6 serve as a juror in this case, with particular emphasis
7 being placed upon your ability to be both fair and
8 impartial to both the plaintiff and the defendant? If you
9 know of such a reason, please stand.

10 (NO RESPONSE)

11 THE COURT - Additional questions from the
12 plaintiff at this time. Are there any?

13 MR. PROFFITT - No, Your Honor.

14 THE COURT - Any from the defense?

15 MR. SMITH - No, sir, Your Honor.

16 THE COURT - All right, I'm going to declare that
17 the remaining members of the jury panel are qualified to
18 serve as jurors in this case. We'll be selecting two
19 alternates in this case. I'll be asking the clerk to
20 prepare a list of potential jurors. Let me explain to you
21 how this works. You know, when I first started practicing
22 law we had an oak barrel and we put everybody's name in the
23 oak barrel and the law required we had a blind person come
24 and pull the names out of the barrel, and that's how we
25 went about selecting a list of people from which we struck

1 a jury. Now we use computer program, so I'm instructing
2 the clerk to have the computer prepare a random list of
3 your names on a jury list. We're going to give that to the
4 lawyers, give them a chance to study that and then they'll
5 be in a position to exercise the strikes that they're
6 allowed by law to take in selecting a jury. So we're going
7 to prepare that list, and I'm going to hand that to the
8 attorneys, and we'll take a short break here in the
9 courtroom. You can remain seated. You can step outside if
10 you'd like to smoke or use the restroom, but make yourself
11 -- come straight back to the courtroom when you're finished
12 so that we'll be in a position, once they've studied the
13 list, to strike the jury. So don't leave the courthouse;
14 be present, because as soon as they finish, we'll be
15 striking the jury in this case. You'll have to be present
16 for that strike. (Pause) All right, I will instruct you
17 that we'll be picking the jury from the first 20 names on
18 the list with each side having four strikes. We'll pick
19 the alternates with -- the first alternate from jurors 21
20 through 23, each side having one strike, the second
21 alternate from jurors 24 through 26, each side having one
22 strike. You may step back to the jury rooms if you'd like
23 to consider the list, and at this time we'll take a short
24 recess. Again, I'll instruct you, you can move about;
25 don't leave the courthouse. We'll be calling you back into

1 sessions when we're ready to proceed. Court's in recess at
2 this time.

3 (WHEREUPON, RECESS IS TAKEN)

4 THE COURT - All right, let's come to order.
5 Plaintiff ready to proceed with jury selection?

6 MR. PROFFITT - Yes, Your Honor.

7 THE COURT - Defense ready?

8 MR. SMITH - Yes, sir, Your Honor.

9 THE COURT - All right, ladies and gentlemen of
10 the jury, let me caution you about one thing. You're going
11 to hear the attorneys and the clerk using numbers for
12 jurors during this strike process. Let me caution you,
13 these numbers in no way relate to your jury numbers. These
14 are the numbers assigned to the list by the computer..
15 They're random, so it doesn't indicate that we're talking
16 about any particular juror number that we're talking about,
17 you or anyone else. Again, it's random numbers selected by
18 the computer that we're using in jury selection. So at
19 this time, Madam Clerk, I'll authorize you to proceed with
20 jury selection.

21 DEPUTY CLERK - Okay. Plaintiff strikes first.

22 MR. PROFFITT - Plaintiff strikes number 11.

23 MR. SMITH - Defendant strikes number 14.

24 MR. PROFFITT - Plaintiff strikes number 13.

25 MR. SMITH - Defendant strikes number 5.

1 MR. PROFFITT - Plaintiff strikes number 19.

2 MR. SMITH - Defendant strikes number 17.

3 MR. PROFFITT - Plaintiff strikes number 20.

4 MR. SMITH - Defendant strikes number 12.

5 DEPUTY CLERK - And this will be for the

6 alternate.

7 THE COURT - First alternate will be from 22 to
8 24, one strike each. Excuse me, 20 to 20 ---

9 DEPUTY CLERK - 21 to 23.

10 THE COURT - Right, 21 to 23. I'm sorry, I
11 misspoke.

12 MR. PROFFITT - Plaintiff strikes number 21.

13 MR. SMITH - Defendant strikes number 22.

14 THE COURT - Second alternate.

15 MR. PROFFITT - Plaintiff strikes number 25.

16 MR. SMITH - Defendant strikes number 24.

17 DEPUTY CLERK - Okay. As I call your name, if
18 you'll come down and have a seat in the jury box.

19 THE COURT - Be sure to confirm the strikes with
20 them before we call the names.

21 DEPUTY CLERK - Okay. The defendant has stricken
22 -- I mean the plaintiff -- excuse me -- has stricken number
23 11, number 13, number 19 and number 20.

24 MR. PROFFITT - Yes, ma'am.

1 DEPUTY CLERK - Okay. The defendant has stricken
2 number 5, number 12, number 14 and number 17.

3 MR. SMITH - Yes, ma'am.

4 DEPUTY CLERK - Okay. The alternates, the
5 defendant has stricken number -- I mean the plaintiff has
6 stricken -- excuse me -- number 21, and the defendant has
7 stricken number 22 for the first alternate.

8 MR. SMITH - Yes, ma'am.

9 DEPUTY CLERK - The second alternate, the
10 plaintiff has stricken number 25, and the defendant has
11 stricken number 24.

12 MR. PROFFITT - Yes, ma'am.

13 MR. SMITH - Yes, ma'am.

14 THE COURT - All right, ladies and gentlemen, the
15 clerk is going to call the roll of those who have been
16 selected as jurors. When your name is called, bring with
17 you any personal belongings you brought into the courtroom.
18 If you'll step down to this gentleman here, he'll have you
19 have a seat in the jury box. Call the roll of those who
20 have been selected.

21 DEPUTY CLERK - Teresa Killian, Connie Pete,
22 Shawna Cason, Kayla Stewart, Austin Smith, Tara Brown,
23 Linda Albowicz, Misty Beam, Sandra Carmichael, ---

24 THE COURT - You can have a seat once you're
25 there.

1 DEPUTY CLERK - --- Cynthia Botts, Michael Usher
2 and Kathy Rabb. Our alternate will be Shikierra Harrison
3 and Sandra Mitchell.

4 THE COURT - All right, any objections to the jury
5 selection process from the plaintiff?

6 MR. PROFFITT - None from the plaintiff, Your
7 Honor.

8 THE COURT - And from the defense?

9 MR. SMITH - No, sir, Your Honor.

10 THE COURT - All right. Ladies and gentlemen,
11 those of you who have been selected on the jury, I'm going
12 to ask that the bailiff let you have a seat in the jury
13 room for just a moment. While you're doing that, let me
14 caution you, don't discuss anything about this case while
15 you're outside of the courtroom. I'm going to give you
16 some more specialized instructions in just a few minutes,
17 but as you step back, don't talk about anything involved
18 with the case, the people involved, the issues involved.
19 Again, I'll talk to you more about that in a few minutes,
20 but I'll ask you to have a seat back in the jury room for
21 just a few minutes. Thank you.

22 (WHEREUPON, JURY PANEL EXITS THE COURTROOM)

23 THE COURT - All right, ladies and gentlemen,
24 those of you who have not been selected on this jury panel,
25 at this time I'm going to excuse you from any further

1 responsibility to this Court. This term of Court is
2 convened for the trial of this case. So you weren't
3 selected in this case, so that means this ends your service
4 on the jury for this week. The good news is you get credit
5 for a full week of jury service for being here, so that may
6 be of some help to you later on. The bailiff will check
7 you out as you leave, and I want to thank you very much
8 again for your presence and your willingness to come
9 forward and serve. Your presence has allowed us to go
10 forward with our business, and again, thank you very much
11 for your attention to your duty. At this time you're free
12 to go.

13 (WHEREUPON, REMAINING JURY PANEL EXITS THE
14 COURTROOM)

15 THE COURT - While they're doing that, if I could
16 get you gentlemen to step up for just a second.

17 (WHEREUPON, BENCH CONFERENCE WAS HELD WHICH WAS
18 NOT REPORTED.)

19 THE COURT - Go ahead and tell them to bring the
20 jury in.

21 (WHEREUPON, JURY ENTERS THE COURTROOM)

22 THE COURT - All right, the record will reflect
23 that the jury has returned to the courtroom. Ladies and
24 gentlemen, let me explain a couple of things to you. At
25 this time -- we're going to break for lunch. We're a

1 little bit late on lunch, but we're going to break for
2 lunch at this point in time, and as you leave the
3 courthouse, and you're going to find every time that you
4 leave the courthouse I'm going to give you the same
5 instructions concerning your behavior while you're away
6 from this courthouse. When you return, you're going to
7 take an oath to decide this case based upon the law and the
8 evidence. The only place that you're going to hear the
9 evidence in this case is in this courtroom from this
10 witness stand by witnesses who've been sworn to tell the
11 truth and by any documents or evidence that comes into the
12 record through that testimony or by agreements of the
13 lawyers. That's the only evidence in this case. The only
14 place you're going to hear law that's applicable to this
15 case will be also in this courtroom, and I'll be giving you
16 the law at the close of the trial. I'm going to instruct
17 you that it would be a violation of your oath for you to
18 try to gather any information outside of this courtroom
19 from any source whatsoever concerning the matters involved
20 in this case. Now, you know, I'm kind of old, but I do
21 know that you can pick up a computer or a tablet and with a
22 few strokes of your finger gather information about just
23 about anything in the world if you want to gather
24 information about it, but I will tell you that that would
25 be improper for you to do in this case. Also, it would be

1 improper for you to listen to, read or watch any media
2 reports about this case. I don't anticipate that they will
3 happen, but if they do, you should not watch or listen to
4 or read those. We've gone to a lot of trouble to select a
5 jury with an open mind concerning this case. I want you to
6 keep that open mind throughout the trial until you've heard
7 all the arguments by the lawyers, until you've heard all
8 the testimony from the witnesses, until you have reviewed
9 all the evidence that's been introduced and you've heard my
10 charge on the law. Only then will you have all that you
11 need to begin a discussion about this case. And I hope you
12 realize even the most innocent conversation that you might
13 have among yourselves about the issues involved in this
14 case or the personalities involved in the trial or any
15 other matter that might come up during the case, that such
16 a conversation of that might begin to color your decision
17 in this case and right now you haven't heard the first word
18 of testimony or seen the first piece of evidence in the
19 case, so don't discuss the case with anyone, don't allow
20 anyone to discuss it with you until I ask you to begin your
21 discussions about this case, and I'm only going to do that
22 at the close of the trial when I tell you to begin your
23 deliberations. Again, I want you to keep an open mind
24 about all of the matters involved in this case until I ask
25 you to begin to make up your mind, and that will be in the

1 deliberations at the close of the trial. Now, every time
2 you leave the courthouse, I'm going to give you similar
3 instructions; I'm going to check every time you come back
4 to the courthouse whether or not you've been able to follow
5 my instructions and I'm -- I'm directing you or instructing
6 you to follow them, so please be in a position to tell me
7 you've followed my instructions in regards to your behavior
8 during this trial. And, again, my instructions will be,
9 don't attempt to gather any information about the case on
10 your own; don't discuss the case with anyone; don't allow
11 anyone to discuss it with you; don't listen to, watch or
12 read any media reports about this case, and last but not
13 least, should anyone try to contact you concerning your
14 service on this jury panel during any of our breaks from
15 Court, I will tell you as I told you earlier, an attempt to
16 influence a jury's decision is a crime in this state; I
17 want you to report that to the Court; I'll take the
18 appropriate action should someone try to influence your
19 decision in this matter. So those are my instructions.
20 They're not complicated. I hope you'll be in a position to
21 be able to follow them throughout this trial. Now, we're
22 going to break at this time, and I'm going to take up some
23 matters with the lawyers hopefully that will speed things
24 up, allow us to get through some questions in advance
25 before we start the trial. So I'm going to do that this

1 afternoon. I'm going to ask that you report back to the
2 courthouse at 3:30 this afternoon. We should be in a
3 position to start shortly thereafter. The bailiffs, as you
4 leave, will tell you where to come, where to report, so you
5 report back to that location; be here at 3:30 in the
6 afternoon concerning that. In the meantime, you're free to
7 go and have lunch. Now, if somebody at home, family,
8 friend, whatever, ask you about what's going on at the
9 courthouse, it's okay to tell them you've been selected to
10 serve on the jury, but that's where the conversation stops.
11 You go talk about something else. You might mention to
12 them if you choose to, you might talk to them about it once
13 it's over, but that's it. All right, hope you have a great
14 lunch, and the bailiffs will show you out. Thank you very
15 much.

16 (WHEREUPON, JURY EXITS THE COURTROOM)

17 THE COURT - Any objections to my preliminary
18 instructions to the jury from the plaintiff?

19 MR. PROFFITT - No, sir.

20 THE COURT - Any from the defense?

21 MR. SMITH - No, sir, Your Honor.

22 THE COURT - All right, we'll break til 2:30.

23 We're in recess til that time. We'll resume at that time.

24 Thank you very much.

25 (WHERUEPON, COURT IN RECESS FOR LUNCH)

1 (WHEREUPON, JURY ENTERS THE COURTROOM)

2 THE COURT - The record will reflect the jury has
3 returned to the courtroom. I hope everyone had a good
4 break and at this time we're going to begin the trial of
5 the case. When you left I gave you some instructions
6 concerning your behavior while you were away from the
7 courthouse. If any of you were unable to follow those
8 instructions in any way, I'd ask that you now stand.

9 (WHEREUPON, NO RESPONSE)

10 THE COURT - It appears that all jurors have been
11 able to comply with my instructions thus far. I told you
12 upon your return that you would be taking an oath
13 concerning your duties and responsibilities as jurors in
14 this case, and I will ask the Clerk now to administer that
15 oath. Madam Clerk?

16 (WHEREUPON, JURY PANEL IS DULY SWORN BY THE CLERK
17 OF COURT)

18 THE COURT - Now, if there was any member of the
19 jury panel who either failed or refused to take the oath
20 just administered by the Clerk, I'd ask that you now please
21 stand.

22 (WHEREUPON, NO REPOSE)

23 THE COURT - All right, the record then will
24 reflect that all jurors have been sworn concerning their
25 responsibilities in this case. Now, before we begin the

1 plaintiff is allowed to go first in the opening comments,
2 followed by the defense, and also later as we begin the
3 presentation of evidence the plaintiff will be allowed to
4 go first followed by the defense. Once we've completed the
5 presentation of all evidence, both sides will be allowed to
6 make a closing argument; once that's completed, I charge
7 you on the law; once I've charged you on the law, the case
8 will be placed in your hands for your deliberations and
9 your verdict. So at this time the plaintiff may proceed.

10 MR. PROFFITT - Thank you, Your Honor. Ladies and
11 gentlemen, every emergency room physician in South Carolina
12 must identify and diagnose medical conditions which
13 threaten the life or limb of a patient. Emergency room
14 physician must identify all the possible diagnosis that
15 apply in that particular case; they have to do a sufficient
16 and proper exam and they have to, if necessary, refer the
17 patient for further diagnostic test or to a specialist in
18 their appropriate field. The evidence will show in this
19 case that Dr. Guy Bibeau on April 10th, 2011 failed to meet
20 the required standard of care; he failed to do a proper and
21 sufficient exam of Phil Ethier; he failed to order the
22 right diagnostic test or refer him to a specialist for
23 further treatment, and he failed to consider the necessary
24 possible diagnosis. Instead, what Dr. Bibeau did after a
25 very quick and insufficient exam was conclude that Phil had

1 a spider bite, and so he prescribed a steroid medication
2 and a couple of pain medications and he sent him on his
3 way. In fact, Phil did not have a spider bite, and because
4 of Dr. Bibeau's negligence, as the evidence will show, Phil
5 was unable to be diagnosed with what he truly had, which
6 was an aneurysm behind the knee, an aneurysm in what's
7 called the popliteal artery. Now, as a result of that
8 missed diagnosis and that missed opportunity, Phil to have
9 non-emergency surgery so that if this had been caught
10 quickly and dealt with in the next few days after it
11 should've been found by Dr. Bibeau, he would've had non-
12 emergency surgery, a very -- and all likelihood had been
13 fine. Instead, 45 days went on; Phil developed the
14 popliteal aneurysm behind the knee was not addressed (sic);
15 it continued to throw off blood clots. What an aneurysm
16 does -- I'll show you an exhibit in a minute that
17 illustrates this -- but an aneurysm is like a balloon in
18 your artery, and the blood swirls around in there and it
19 makes hard concrete-like blood clots that are on the side
20 of the walls of that artery, and they'll -- they'll stick
21 there for a while, and then every now and then they'll
22 break off. Sometimes they break off a lot and quickly, and
23 sometimes they'll break off slowly, but they're going to
24 break off. And so what happened was, over that period of
25 time, the artery threw off clots; doctors don't know

1 exactly when that happened, as far as did it happened over
2 a two day period, did it happen over a 45 day period, but
3 it threw off clots and by the time Phil was caught (sic) --
4 when he had another episode of the severe pain that he
5 experienced on April 10th, 2011 it was -- he was in much
6 more critical and serious condition, and that's what has
7 led him to have chronic pain in his leg. He's got nerve
8 damage and muscle damage in his leg from what's called
9 compartment syndrome. Compartment syndrome. That's
10 something where the -- once tissue in the body is deprived
11 of blood, blood flow, that -- and then it's -- and then the
12 blood flows back in, it causes the tissue to swell, it
13 swells up and you actually kill nerve and muscle tissue as
14 a result of that. That's why Phil has chronic, permanent
15 severe pain in his right leg that requires him to use
16 narcotic pain medications all day and all night long. Now,
17 I want to introduce to Phil and Jeanne. They're sort of --
18 would you stand up for a second.. He's sort of stuck behind
19 the screen there. This is Phil Ethier; he's 56 years old
20 now. This is his wife, Jeanne Ethier. They live in
21 Chester, South Carolina. You can sit down now. This is my
22 partner, Ron Cox. We'll be trying the case together on
23 behalf of Phil and Jeanne. Phil and Jeanne are originally
24 from Massachusetts. They grew up there and moved to North
25 Carolina, I believe, in about 1997. Jeanne is an RN, a

1 registered nurse, at a psychiatric hospital in -- at the
2 psych ward in the hospital in Rock Hill. Phil is an LPN.
3 He did work in some other fields before that, but licensed
4 about -- at the age of 32 he's been a LPN, a licensed
5 practical nurse. Now, as of April 10th, 2011, Phil had just
6 taken a job with Fairfield Memorial Hospital in the ER as
7 an LPN, so he had just started working in the hospital.
8 Now, that Sunday afternoon -- it was April 10th, 2011, Phil
9 and Jeanne go to church there in Chester, and they come
10 home from church and Phil, as usual, goes out to feed the
11 dogs. He's walking across his grassy backyard toward the
12 dog pens about in some high weeds and sort of -- they live
13 in a very wooded area; he's got some -- couple of acres or
14 whatever and he's got some trees and bushes and high grass
15 and all that -- walking across to his dog pen to feed the
16 dogs and he feels a really severe pain in his right leg,
17 the lower right leg. He doesn't know what it is; never had
18 anything like that before. Was one of the worst pains he'd
19 ever felt. His leg turned purple, turned dark colors, very
20 discolored and it hurt really, really bad. He felt
21 pressure and pain in the leg and the foot. Phil goes back
22 in the house, takes a Tylenol, doesn't really know what's
23 going on; he's always been a big tough guy; you're going to
24 see that when you see him on the stand; he's always been
25 the big strong guy that thinks he can, you know, tough it

1 up, do anything. So he goes in the house; the leg is cold;
2 the leg is cold, and it's purplish and it's got severe pain
3 and pressure, and he puts it in a tub, a tub of hot water
4 to try to warm it up, and he rubs it and he massages it and
5 takes some Tylenol and it sort of eases off a little bit,
6 then it gets worse again and eases off. Finally after
7 about three hours and a half or so he goes to the ER and he
8 chose to go to Fairfield Memorial Hospital where he'd just
9 gotten job, go to Fairfield's ER. So he drives from
10 Chester, he and Jeanne; Jeanne drives him from Chester to
11 the Fairfield ER. Walk in the door, first thing he tells
12 the receptionist, the person that checks you in there at
13 the desk, is he's got right lower leg pain; it's in the
14 records; you'll see it. He goes back; they take him back
15 fairly quickly; he sees a CNA by the name of Samantha
16 Anthony, a certified nurse assistant. Samantha Anthony,
17 the certified nurse assistant -- she's not a RN; she's just
18 a CNA, but she did the triage on Phil, and you'll see in
19 the record her notes and her comments about what he said.
20 He was reporting the pain and the pressure; she noted what
21 she called ecchymotic coloring on the leg, a discoloration
22 of the leg, and asked him some questions about -- she that
23 he was unloading a truck. Actually, he was sort of walking
24 across the yard to feed his dog, but whatever, he was
25 outside walking in the yard. And she notes the pain and

1 the pressure and gets him back to see Dr. Bibeau in a
2 fairly short period of time, 10 or 11 minutes they're back
3 to see Dr. Bibeau. Dr. Bibeau came in the room and he
4 looked at the triage record and saw where the pain and the
5 pressure reported; Samantha Anthony, the CNA, had taken the
6 foot pulses; there are two foot pulses on the side and the
7 top of the foot that you'll hear about. She took those;
8 found them to be normal, even though she admits she's very
9 inexperienced in taking foot pulses, but nevertheless she
10 did that. And Dr. Bibeau when he came in the exam room, he
11 was in there very briefly. Phil remembers it being about
12 five minutes that Dr. Bibeau saw him. Dr. Bibeau remembers
13 it being about 10 minutes that he saw Phil, but regardless,
14 it was a brief exam. Dr. Bibeau believes -- has testified
15 that he believes he took the foot pulses, but there's
16 absolutely no record of that at all. There's no
17 documentation that he took the foot pulses at all. Phil
18 said Dr. Bibeau never took his foot pulses. The only
19 person that did that was Samantha Anthony. Also, Dr.
20 Bibeau admits that he never took the popliteal pulse.
21 That's the one up behind your knee. That's where the
22 aneurysm was. There's a popliteal pulse behind your knee.
23 He didn't take that. So after Dr. Bibeau did a brief exam,
24 touched the side of Phil's leg, he noted that the right leg
25 was cooler than the left leg and foot, but he didn't take

1 any pulsés or anything, do anything with the left foot or
2 leg, he gave Phil -- he said, oh, looks like a spider bite,
3 looks like a spider bite, and he gave Phil the steroid pain
4 medications and Phil was out of the ER just a very few
5 minutes later. The total time in the ER was 50 minutes,
6 but he only saw Dr. Bibeau a very few minutes. He was
7 discharged shortly after that and went home. The pain
8 medications didn't really help that much. You'll see in
9 the records where the -- Phil when he left the ER the pain
10 recording of a level five which if you've ever -- if the
11 doctor's ever asked you how much is your pain on a scale of
12 one to 10 with one being, you know, nothing, okay, or zero
13 being nothing, 10 is the worst pain you can possibly
14 imagine. Phil, according to the record, was reporting pain
15 of -- a pain a level of five in the ER and it probably had
16 been worse than that at home, but -- but when he left the
17 ER he still had the pain level of five. So he goes home;
18 he takes the pain medication that he was given and tries to
19 deal with it; calls back to the ER at about 3:00 or 4:00
20 that morning, in the night, middle of the night, and asks
21 again, you know, this pain's not easing off, do I need to
22 do something, do I need to come back, and another doctor,
23 Dr. Canty, apparently, looked at the records and checked
24 briefly, apparently, and told Phil, no, it's okay, Dr.
25 Bibeau seen you, you just have to give it some time, it's a

1 spider bite. All right. Now, from April 10th to May 25th,
2 2011 is the 45 day period when Phil did not get any
3 treatment. The first couple of weeks it improved some, but
4 it was a slow improvement, and he went back during that
5 period and he talked to Dr. Bibeau again informally in what
6 I call a curbside consultation, and he just -- he works in
7 the ER and Dr. Bibeau was working in the ER one day and at
8 the nursing station Phil's sitting there and he asked Dr.
9 Bibeau again about the -- about his leg. And Dr. Bibeau
10 glanced at the leg and Phil showed him a black toe; took
11 off his shoe and sock and showed him a black toe where the
12 tip of the third toe was black, and Dr. Bibeau looked at
13 that and just said, oh, it looks like it's healing up,
14 looks good, give it time, give it some more time, give it
15 time. That's the message that Phil kept getting. Phil did
16 the same kind of curbside consult, which people in the ER
17 do all the time. Anybody that works for a doctor probably
18 does it all the time, but he did the same kind of consult
19 with three other doctors, including Dr. Canty during that
20 period, but mainly in the first part of that period, first
21 couple of weeks. After that the leg did improve. The leg
22 and the foot improved and Phil believed that Dr. Bibeau was
23 right. He believed Bibeau, Dr. Bibeau, and he trusted Dr.
24 Bibeau, and he believed him to be correct, because what Dr.
25 Bibeau said was happening is exactly what did happen; he

1 got better and it was taking time, but he was getting
2 better. Pain was diminishing, going away, the color was
3 returning to normal, there was no pressure feeling in the
4 leg anymore, he was getting -- it was all good, and so he
5 believes Dr. Bibeau was correct. Well, on May 25th, 2011
6 when he's sitting in the recliner late one night around
7 midnight, he had the same sensation again, the really,
8 really severe pain that just sends shock waves through your
9 body, same kind of pressure, same thing he felt before.
10 Well, this time Phil went to Chester hospital and he was
11 promptly diagnosed with an ar -- acute -- what they call
12 acute arterial blockage in the leg; it was a blood clot.
13 His legs were -- blood clots in his leg. He was
14 transferred very quickly that same day, that same morning,
15 to Charlotte -- Carolinas Medical Center in Charlotte where
16 he had to undergo emergency surgery just a couple of days
17 later. They tried some clot-busting techniques first.
18 Now, I show you what's been marked as Plaintiff's Exhibit 1
19 for identification. This is a chart that shows how Phil's
20 right lower leg had become blocked. The arteries in the
21 leg had become blocked over that 45 day period, and again
22 the doctors don't really know if that happened shortly
23 before May 25th or if it occurred gradually over that time.
24 You don't -- they can't really say on that point. But the
25 point is that some time during that period when he believed

1 it to be a spider bite and was told it was a spider bite
2 that the three arteries in this leg -- and I'm going to
3 ahead and throw the names out there, because you'll hear
4 them at some point during the trial -- the anterior tibial,
5 the posterior tibial and the peroneal, just sort of the
6 three main arteries in the bottom of your leg -- had all
7 become clogged with clots, and so when he finally -- when
8 this happened again, he was far worse off than if it had
9 been repaired, you know, early on, right after -- or
10 shortly after April 10th, 2011. Here you see where on the
11 diagram there's an occlusion of the posterior tibial artery
12 there, an occlusion of the anterior tibial artery and the
13 peroneal artery. This is the aneurysm I was talking about.
14 See how the blood vessel expands like a balloon and those
15 are the blood clots that are forming inside it, and they --
16 they sit there for a while and then they sit there for a
17 while and then they get thrown off at some point and they
18 go down your leg. They don't go back to your heart. They
19 don't -- they don't go down to the bottom of the foot and
20 circle back up to the heart. That's a vein situation.
21 These are arteries. So what happened here is that the
22 blood clot that occurred on April 10th, 2011, went down to
23 his toe, his third middle toe, and that's what caused that
24 black spot. The blood clot went down to the artery,
25 farthest point it could go, and it killed off the very end

1 of his toe, and eventually that skin sloughed off on the
2 end of his toe. So that's a sign that he had the -- that's
3 what occurred on April 10th, 2011 was the -- was a blood
4 clot going down into the toe. All right, now the doctor
5 that Phil saw in Charlotte is Dr. Jeremiah Holleman; he'll
6 be one of the first witnesses you hear, one of the early
7 witnesses. He's the one who did the procedures, he and his
8 associate, Dr. Roush, but this exhibit, and Dr. Holleman
9 will be able to explain it better than I can, but
10 essentially the first thing they tried was to put a
11 catheter or a wire into the artery, and then you slide the
12 dialator and sleeve over it and you insert it down through
13 the artery. I believe they're doing this at your hip. See
14 where the catheter placed up here in your hip near the
15 groin area, and they slide it down through there and try to
16 bust the clot loose with medication or with the wire
17 itself, so they're trying to poke through that clot and get
18 it to break loose with medication or with the wire. And
19 you'll hear Dr. Holleman tell you how they could not do
20 that, that there were such a sufficient amount of clots and
21 the clots were so hard in these arteries by this point that
22 they could not clear the anterior tibial or the posterior
23 tibial -- excuse me -- or the peroneal, two of them they
24 couldn't clear at all, and they're still not clear. The
25 anterior tibial and the peroneal arteries in Phil's leg as

1 he sits here today are totally clogged. They are --
2 they'll never work again. The posterior tibial artery, the
3 third one, they did manage to get through a little bit and
4 restore some blood flow during two procedures. There was
5 one done in the evening and one done the next morning, and
6 they did get some blood flow restored. So -- but in the
7 course of all that they -- Dr. Holleman decided that the
8 clot-busting medications were not going to work, that
9 surgery had to be done, so he did what's called a femoral
10 by-pass graft procedure. That's the full name of it, but I
11 just call it a femoral by-pass graft procedure. And that
12 procedure they actually take a piece of a vein -- they
13 harvest a piece of vein from your leg and they tie it back
14 together and route around, make an artery out of it; they
15 reverse it and then make an artery out of it so that you
16 have blood flow to your foot and lower leg, so that's what
17 that's what they have to do. When they do that, they have
18 to cut you from way up your hip, way up on the inside of
19 your leg all the way down almost to your ankle. It's a
20 very invasive procedure and a very prolonged procedure and
21 that -- Phil actually had a complication during the
22 procedure, which is a known complication. He had a kink
23 that occurred in the new artery that they made, so they
24 make a new artery and he had a kink that occurred in that,
25 and the doctor had to go back in and spend another two or

1 three hours in surgery to fix that. Now, as I eluded
2 earlier and said earlier, the reason that Phil has
3 permanent problems now is that the compartment syndrome and
4 the loss of blood flow for that period of time, what's
5 called ischemia -- you'll probably hear doctors say that --
6 ischemia, decreased blood flow, loss of blood flow, and so
7 when that happens, then when you -- when the blood flow is
8 restored to that area, it's like pumping too much blood
9 back into the muscle and tissue at one time and it causes
10 it to swell, and that creates pressure and it's like a --
11 sort of like a cycle, more blood means more pressure, more
12 pressure means more blood and it just builds in a cycle and
13 will cause the nerves and the muscle damage in the leg. I
14 want to just show you a couple of photos. You'll see more
15 later, but -- now as a result of the compartment syndrome,
16 you can't let that stay that way. If you do, it's a
17 certainty that your muscles and your nerves will die, so
18 what the doctors do is they do a fasciotomy. It's where
19 they cut the skin and the muscle -- the covering that goes
20 over the muscle, the fascia, they cut it so that it can
21 release the pressure. And so what that causes is -- here's
22 a picture of what Phil's leg looked like in the hospital.
23 That's a -- that's part of the fasciotomy where they cut
24 your leg open so that the muscles and tissue can expand and
25 then as they heal up, the theory and the hope is that they

1 will heal and the pressure will go down and the blood flow
2 will be restored normally and it will be okay. Here's a
3 photo of Phil's leg. Which way you turn these (sic) -- and
4 you can see the inside of the leg where they had to cut the
5 leg to do the surgery. Here's another photo of Phil's leg.
6 You can see the -- that's the inside where they did the
7 femoral by-pass graft procedure. Here briefly is another
8 picture of Phil's leg with the vacuum device on it. It's
9 called a vac device. You have to actually put something on
10 it to try to pull out the infection and keep the wound
11 breathing and not let it get infected, so they put a device
12 on it that sucks on it constantly, and it's called a vac
13 device. Here's another photo of that, so that's on the
14 side of Phil's leg. He had to wear that vac device for
15 four months, about four months after the surgery. Now, --
16 I mean just to orient you further so that you'll understand
17 some of this better I hope when the doctor -- the doctors
18 begin to testify about it -- what you'll learn from
19 testimony of the different physicians is that Phil's
20 peroneus longus muscle, which is sort of a muscle on the
21 side of your leg, on his right leg, is now fibrous tissue.
22 It's just dead. There's no muscle there anymore; it's just
23 dead tissue. So that muscle was destroyed by the
24 compartment syndrome and the decreased blood flow. The
25 anterior tibialis muscle is the -- in the front of the leg

1 -- okay, see that one -- it's the red muscle there in this
2 diagram -- and it's also in Phil's right leg is just dead
3 tissue, fibrous tissue; it's not muscle. It doesn't work
4 like a muscle. It's just filling space. It's not a
5 muscle. Here's the diagram that shows the sural nerve and
6 the common peroneal nerve. You'll hear from a physician
7 named Dr. Porter who will talk to you about those. The
8 common peroneal nerve is the one that's actually a motor
9 nerve. It moves your foot up and down. The sural nerve is
10 one that's a sensory nerve and it's for sensation, but what
11 Dr. Porter will tell you is that both of those nerves are
12 dead due to the compartment syndrome that Phil experienced.
13 Now, what that means is is that Phil's got foot-drop. It's
14 called -- his right foot has foot drop, and he cannot take
15 his -- pretend my hand is the foot. He cannot take his
16 foot and lift it up and down like this, and he can't move
17 it side-to-side, so it's sort of just a -- like a club.
18 It's just -- you can't move it around like a regular foot.
19 So what happens is, is he walks along like over these wires
20 or on carpet sometimes his foot will drag and trip him and
21 he stumbles causing him to fall or nearly fall and catch
22 himself all the time. So that foot-drop is also a result
23 of the damaged muscles and nerves in the leg. And the
24 other long-term effect that Phil continues to suffer from
25 today, four years later and will continue to suffer from in

1 the future for the rest of his life, is the chronic pain,
2 the chronic pain that just never goes away; it's never gone
3 away since he had the surgery. He's been on pain
4 medication since the surgery of one form or another; some
5 made him sick and some he had to stop taking, but he's been
6 on pain medication all the time since the surgery and he's
7 now staying on narcotic pain medication, currently taking
8 Percocet three times a day, a strong form of Percocet three
9 times a day. That's how he has to deal with it. All
10 right, after the recovery period -- and Phil -- Phil went
11 back to work in December, 2011, middle of December, 2011.
12 So surgery's May 25th, 2011; about December 16th, 2011 he
13 goes back to work, about seven months later. That's how
14 long his recovery period was initially. He goes back to
15 Fairfield Hospital, goes back to work in the ER as an LPN
16 with his disability, with the chronic pain, but he can't
17 take pain medication. He can't take that narcotic
18 medication and work, especially in the medical field. So
19 Phil was not able to do that, but he's the big tough guy,
20 and he did not want to quit working; he wanted to stay
21 active; he wanted to get his life back, and he wanted to
22 keep going, so he goes back to work in the ER. First time
23 he sees Dr. Bibeau in the ER they have -- they see one
24 another in the nurses' station, and Dr. Bibeau turns around
25 -- and Phil will tell you about this -- he says, so that's

1 what happened to you, no wonder I couldn't figure it out,
2 referring to Phil's problem being that he never figured out
3 that there was a blood vessel problem in his leg that day.
4 Now, understand that Dr. Bibeau did not have to figure out
5 it was a popliteal aneurysm. Let me repeat that. He did
6 not have to figure out that it was a popliteal aneurysm.
7 That's not what he had to do. What he had to do, the
8 evidence will show, is figure out that it was a blood
9 vessel problem, a blood vessel abnormality that needed
10 further referral to a vascular surgeon or he needed to send
11 him for an ultrasound or a CT angiogram, which is a form of
12 CT scan they do where they put dye in your arteries and
13 figure out what's going on with your arteries or your
14 veins. That's all Dr. Bibeau had to do. He didn't have to
15 figure out the whole story and decide what needed to be
16 done and go do it. No. All he had to do was figure out it
17 was a blood vessel problem and get Phil to the right
18 specialist, and that's what Dr. Bibeau failed to do. Now,
19 from -- so Phil goes back to work, and he tried to work in
20 the ER, and he did his full-time schedule in the ER, but he
21 really couldn't physically handle that, especially since he
22 can't take the pain medications during the day. So he
23 would go to work, drive to work, and, you know, not take
24 the medications during the day or during whatever shift he
25 was working. If he was working at night, he wasn't taking

1 the medications at night, but whenever he's at work he
2 can't take that. So um -- but then when he would -- and
3 then the pain would get worse and worse all day and
4 disability and the, you know, his foot would get tired, his
5 leg would get tired and he would drag it more and he'd trip
6 more, stumble more, pain get worse, then he'd go home and
7 try to take the pain medication, take whatever narcotic
8 pain medication he could; sometimes it would help and bring
9 the pain under control a little bit so he'd get some sleep.
10 A lot of times it didn't; a lot of times it would not help
11 because he was in such a cycle and it had gotten so intense
12 that it really couldn't knock it down, so Phil would take
13 it, try and go to sleep and couldn't sleep and then he'd
14 have to get up and do it all over again, just go back to
15 work in pain again. That was the cycle of his life. All
16 the things that he had enjoyed and all the things that he
17 used to do in his life, as far as working around the house,
18 camping, hiking, bowling, going for walks around the
19 neighborhood with his wife, fooling with those dogs,
20 building dog rungs, built a porch on the back of his house
21 at one point years ago, carpentry projects, working on his
22 cars, all the stuff that guys do and that big strong Phil
23 did, couldn't do it anymore. He would just come home and
24 collapse on the couch and just stay there and hoped the
25 pain went away long enough for him to get two hours of

1 sleep. He never, or rarely ever, and even to this day
2 rarely sleeps with Jeanne in the same bed. They -- he
3 tosses and turns so much and is still in such pain at times
4 that he bothers her. So they don't -- he sleeps in the
5 recliner most of the time. All right, the -- in March,
6 2013 Phil decided he could not -- just couldn't do the ER
7 job anymore. It was too physically demanding; he was on
8 his feet way too much, and he just couldn't do it. So he
9 left Fairfield Hospital, but he didn't go sit on the couch
10 somewhere; he stills wants to make it happen; he still
11 wants to work. The man's worked his entire life and he
12 still wanted to work. So he took a job with Gentiva Home
13 Health, a home health agency as an LPN, and -- where you go
14 to people's house. You know, what home health is; you
15 drive around in the car and you go to people's houses and
16 give them shots or check on them or whatever. So that's
17 the job he got. It started out with like 35 visits a week,
18 a full-time load, trying to do a full-time load with the
19 home health; couldn't do it. Gradually but back to 28 and
20 then less and less visits per week, and it was the same
21 cycle. He got into this cycle where he could not manage
22 it. I mean he would have the pain all day long and then go
23 home and try to subdue it with the pain medication; it
24 wouldn't work and he couldn't get any sleep, and it really
25 started to affect him mentally and emotionally more than

1 ever, so he -- that's when he started to get depressed.
2 He'd had periods of depression throughout all this, but he
3 would rally back and really try to come back and make a
4 fighting go of it, but in that -- toward the end of 2013
5 and up into March 2014 it really got to him, and you'll see
6 the doctors talk about suicidal ideation, severe major
7 depression, anxiety disorder and they put him on anti-
8 depressants and medications to try to treat that and help
9 him get through that. Now, a turning point for Phil,
10 because I believe Phil came very close to taking his own
11 life at some point there toward the end of 2013 into 2014
12 when he really couldn't take it anymore.

13 MR. HOLLER - Judge, excuse me, can I note an
14 objection to personal opinion of counsel.

15 THE COURT - Objection's noted.

16 MR. PROFFITT - Thank you, Your Honor. He got to
17 see Dr. Chen, Dr. Tammy Chen -- that's a psychiatrist. Dr.
18 Chen used to work at Rock Hill Hospital with Jeanne Ethier,
19 and worked with her about three years I think. So Jeanne
20 and -- helped Phil get into to see Dr. Chen who has a very
21 case-load and she agreed to see Phil, and she's the one who
22 sort of took a look at the whole picture and really took
23 some time with Phil, whereas the other doctors sort of, you
24 know, I'm treating your nerve damage and your muscle
25 damage, and I'm your family physician, I will prescribe you

1 pain medication once in a while, but that's it, I don't
2 really look at the mental health aspects of it, the
3 psychiatric end of it, and I'm your neurologist and I'll
4 treat that part of it, but nobody's really taking a
5 comprehensive look. Well, Dr. Chen came in, and you'll
6 hear from her video deposition how she looked at the whole
7 picture and helped him deal with it and determine that he
8 was no longer able to work. So Phil is not working now;
9 he's not worked since March 2014. He cannot work, because
10 of a cycle, that cycle that I've talked about a couple of
11 times where he tries to work without pain medications and
12 drive without that, those narcotic meds, and you simply
13 can't do it. He just gets into a cycle where it's a
14 downward spiral, which is exactly what would happen again,
15 according to Dr. Chen, if he were to go off the pain
16 medications and try to go off the anti-depressants. He
17 would have the same kind of problem again, get in that same
18 downward spiral. Now, Dr. Scott Jolin and Dr. Carl Adams
19 will talk with you and you'll hear from them on the -- on
20 what Dr. Bibeau did wrong. And I just want to introduce
21 you to these concepts -- this concept. These are the basic
22 -- I call them the five or six P's of a vascular event, the
23 five or six P's of a vascular event (sic) or a blood vessel
24 problem. The pain -- now we've talked about the pain --
25 that the polar, which means it's something your -- your

1 limb is cooler or colder than the other limb. Paresthesia
2 -- I'm sorry -- pallor or change in color where the skin is
3 a discoloration; there's something going on. It's either
4 white or it may be a discolored color like purplish.
5 Paresthesia is when it's numb or tingling. Pulselessness
6 is when you have no pulse, like in your foot. If they'd
7 taken foot pulses and found no pulse, then that would've
8 been one of the signs, one of the P's, and then paralysis
9 or paresis -- paresis means weakness, just weakness in the
10 limb. Now, of those six P's, only the last two are not at
11 issue, and Dr. Jolin will explain to you -- he's been a ER
12 physical forever -- and Dr. Jolin will explain to you that
13 with -- with that information alone, even without really
14 doing much of an exam, just looking at the record in front
15 of him and what the patient was saying and what the nurses
16 had found at Fairfield Memorial, the first four of those
17 P's are met, and that's automatically at the top of the
18 list -- automatically at the top of the list of possible
19 diagnosis should be a blood vessel problem. That's at top
20 of the list. And that -- you'll also hear the doctors talk
21 about how even if you don't have a pulse, that it does not
22 mean there is no blood vessel problem. That's one of the
23 indications that just because you have a pulse -- and
24 they'll explain that to you -- is that you can still have a
25 blood vessel problem. Now, the evidence will show you, as

1 I mentioned earlier, that Dr. Bibeau just did not do a
2 sufficient exam and he did not consider a blood vessel
3 problem. He has testified at his deposition that the only
4 three things he thought about as far as possible diagnosis
5 for Phil Ethier on April 10th, 2011 was number one, was
6 trauma, something traumatic happened to it. Has he injured
7 it somehow, something ran over it, or something hit or he
8 hit the leg on something, some kind of trauma. That was
9 his first possible diagnosis. The second possible
10 diagnosis was chemical exposure to the skin, that somehow
11 some chemical had fallen on the skin, spilled on the skin,
12 come into contact with the skin and that was causing the
13 discoloration and the pain, maybe it was chemical exposure
14 of the skin. The third one he thought about and the one
15 that he decided was probable spider bite; it's a spider
16 bite. Those are the three that he thought about. He never
17 thought about it being a blood vessel problem, never
18 thought about it being a blood vessel problem, when all the
19 indications were that it was a blood vessel problem, and
20 there was no report of a spider bite. Phil never reported
21 a spider bite; Jeanne never reported a spider bite; Phil
22 never found a spider bite; no nurse ever found a spider
23 bite; Dr. Bibeau never found a spider bite; there was no
24 spider bite, and yet still spider bite was a diagnosis;
25 after a quick and insufficient exam, spider bite, see ya

1 later, spider bite, you're out of here. So that's -- so
2 Dr. Bibeau failed to meet the standard of care in that
3 regard. You'll also hear the doctors talk about the
4 complications that would not have occurred if Phil had been
5 treated in a timely manner, if he'd been properly diagnosed
6 and the problem -- the true problem -- just blood vessel
7 problem, don't have to identify the aneurysm, just blood
8 vessel problem, blood vessel issue. If that had been
9 identified and he'd been referred somewhere or sent for
10 further testing, ultrasound or CT angiogram, then he
11 would've had the surgery promptly and would not have had
12 all these complications. He would not have had the nerve
13 and muscle damage. His muscles and nerves would not be
14 dead in his leg. He would not have the chronic pain
15 syndrome. He would not have had a seven-day hospital stay
16 as opposed to a much shorter hospital stay if he get the
17 surgery on a non-emergency basis. He wouldn't not have had
18 -- he would not have had to wear that vac device for four
19 months; he would not have had to stay out of work for seven
20 months for a recovery period; he would not have two
21 arteries in his leg that are clogged to this day,
22 permanently clogged arteries in his leg; he would still
23 have pretty good arteries. But because he was -- it was
24 not timely diagnosed, all those problems and injuries and
25 damages flowed from that. Now, Phil has incurred medical

1 expenses; he's incurred lost income. You'll hear from an
2 economic loss expert, a fellow named Dr. Oliver Wood;
3 you'll hear from a fellow named Joel Leonard who is a
4 vocational expert who will talk about Phil's inability to
5 work given his current medical and psychiatric condition.
6 And I think Dr. Wood will talk to you about how Phil's
7 economic damages, which include his lost income, that over
8 the rest of his life he has now lost the ability to earn
9 six hundred ninety-four thousand dollars counting lost
10 income as well as future medical care costs that Dr. Wood
11 calculated. Phil's medical bills are around a hundred and
12 ninety-five thousand dollars. That's what he's incurred so
13 far. But from that figure you'll eventually -- and you'll
14 hear testimony from a lady named Shelene Giles, and Shelene
15 will talk to you about how she calculated what it would've
16 costs to have the proper surgery or to have the surgery if
17 it had been done in the period shortly afterward with not
18 all these complications that flowed from it and could've
19 had no complications, that if that had happened, it
20 would've costs anywhere from thirty-six thousand to forty-
21 six thousand dollars for the surgery, so we don't dispute
22 that Phil would've had some medical costs -- he would've
23 had to have some surgery at that time at some point, but he
24 would not have incurred all these other expenses. But by
25 far, ladies and gentlemen, the big damage in Phil's case is

1 just the fact that he has the permanent chronic pain that
2 it requires a narcotic pain medication all day every day
3 and the fact of the right foot drop and that disability
4 that flows from it and the impact that it has on his life
5 and Jeanne's life. And so at the end of this case when I
6 come back in front of you, I'm going to ask you to award
7 them a verdict of five million dollars to the two of them
8 for all their economic and uneconomic damages. Thank you
9 very much.

10 MR. HOLLER - Objection, Judge, move to strike
11 that comment on the amount, also, Judge, move to strike the
12 personal opinion based upon Rule 3.4, ethics rule, subpart
13 (b).

14 THE COURT - You wish to be heard on that?

15 MR. PROFFITT - I don't believe I said anything
16 improper, but which comment exactly was it?

17 MR. HOLLER - Judge, it's unethical to offer his
18 personal opinion which he did multiple times.

19 THE COURT - You objected to it on one occasion,
20 and ---

21 MR. HOLLER - I understand, Judge.

22 THE COURT - --- I will strike that statement from
23 the record.

24 MR. HOLLER - Thank you. And as to the amount in
25 an opening statement.

1 his body -- in his body from his heart, and that's his toes
2 and his feet, and that's by feeling the pulses on his feet.
3 Both the nurses and Dr. Bibeau felt the pulses on his feet.
4 And after the blood goes through the tissue, it comes back
5 to the heart, it's pushed back to the heart, and that's
6 through the veins, and that's called capillary refill.
7 That's if you -- if you pull your finger back on your vein
8 on your wrist, the vein is not visible, but when you remove
9 your finger, you can see the blood fill back in. Same is
10 true for fingernails and your toenails. It's after the
11 blood is passed through the tissue is it coming back to the
12 heart, and when -- when Mr. Ethier's foot was checked on
13 April the 10th, 2011, there was both good blood flow to the
14 foot and from the foot. Thus, being in an emergency
15 department, there was no reason to look further upstream
16 because you knew you had good blood supply downstream.
17 We've -- a couple of comments. One, we've spent a lot of
18 time working while y'all weren't in the room, and I hope
19 you understand that. Judge Couch has done a very good job
20 and he's kept us working. We've marked some exhibits that
21 we've all agreed on that you'll see. This is one of those
22 documents that's in evidence. Let me mention, too, for a
23 moment that from time to time we may walk up and talk to
24 Judge Couch or you may be asked to leave the room while we
25 talk. As Judge Couch mentioned to you, we are simply

DR. CARL ADAMS--DIRECT-- BY PROFFITT

1 informed me that you've decided to proceed without note-
2 taking, so we'll proceed in that fashion. At this time the
3 plaintiff will be presenting its evidence first, as I told
4 you yesterday. You may call your first witness.

5 MR. PROFFITT - Thank you, Your Honor. Plaintiff
6 calls Dr. Carl Adams.

7 THE COURT - If you'll come forward, sir, to my
8 left and be sworn, please.

9 DR. CARL ADAMS, AFTER BEING FIRST DULY SWORN,
10 TESTIFIES AS FOLLOWS -

11 THE COURT - Have a seat in the witness stand,
12 please, sir. Once you're seated, state your name, please.

13 DR. ADAMS - Carl Ward Adams.

14 THE COURT - Thank you. Mr. Proffitt, your
15 witness.

16 MR. PROFFITT - Thank you

17 DIRECT EXAMINATION

18 BY MR. PROFFITT -

19 Q Good morning, Mr. Adams, how are you doing?

20 A Very well; good morning.

21 Q All right, if you would, Dr. Adams, just tell us a
22 little bit about your background as far as your educational
23 background and medical education.

24 A I went to The University of Texas, so we say, Hook 'em
25 Horns, went to University of Texas Medical School,

1 graduated in 1981. Did one year of an internship in a military hospital which is called Tripler
2 Army Medical Center in Honolulu, Hawaii. Did four years of general surgery at University
3 of Colorado, Fitzsimmons Army Medical Center in Denver, Colorado. Did one year of
4 trauma surgery at Fort Ord. Two years of cardiovascular-thoracic surgery and surgical and
5 surgical critical care at Lanterman Medical Center at USC-F in California.

6 I was on active duty for eighteen years. After Desert Storm, got out of the military,
7 went into private practice in Honolulu, Hawaii. Left Hawaii in 2001 and came to Colorado.
8 Currently, half time in private practice and in the military reserve.

9 Q And how many years have you been a cardiovascular or thoracic surgeon?

10 A Thirty-five years.

11 Q Are you board certified in anything?

12 A I'm board certified in trauma general surgery and board certified in cardiovascular
13 and thoracic surgery. I was board certified in critical care until 2006, but didn't renew
14 because I do that every day.

15 Q What does board certification mean? Explain to the jury what that is.

16 A Board certification is you complete a residency training accredited program. And
17 after you complete that training, that you pass a written examination. And then you take an
18 oral board examination. At the completion of those two, written, oral examinations, you
19 become board certified. I finished up all that in 1987, but now every ten years we re-certify.
20 In other words, we provide the American Board of Thoracic Surgery and the American
21 Board of Surgery a case list of how many cases we do, what our activities are as far as
22 education, expert witness, CME, continuing medical education. And then we have to take a
23 written examination.

24 Q Where are you licensed as a doctor currently?

1 A I'm currently licensed in Colorado, California, and I have worldwide credentials with
2 the military.

3 Q What's your rank in the Army Reserve?

4 A I'm a Brigadier General.

5 Q Doctor Adams, tell us a little bit about your experience as far as emergency medicine
6 with regard to vascular issues.

7 A Right. I'm not an emergency room physician. You know, emergency room
8 physicians are the people that are there 24/7. I am a consultant to the emergency room,
9 particularly for trauma. In other words, a triage nurse, someone who knows a patient's
10 coming to the hospital emergency room via the EMS emergency medical services, they'll call
11 us directly to meet the patient if it's a trauma, like a gunshot wound, a car accident, blunt
12 trauma. And then on the other hand, emergency room physicians who have questions, need
13 some expertise in the field of cardiac, vascular, thoracic, which is lung, or trauma surgery
14 will call us directly and ask for assistance. So, we go down and see the patients and help the
15 emergency room physician.

16 Q Doctor, do you believe that your training, education and experience qualify you to
17 talk as an expert witness about emergency medicine with regard to vascular issues?

18 A Absolutely.

19 Q Have you done that in past cases?

20 A Yes.

21 Q Have you been admitted as an expert in that kind of thing in past cases?

22 A Yes.

23 Q About how many cases do you review per year as an expert witness?

24 A I do about 100 to 150 cases of reviews. In other words, I'll get calls from attorneys to
25 review charts, not only to defend doctor, but as plaintiffs, as a patient's been injured. And I

1 do work for the medical board of Colorado, the department of regulatory assistance and for
2 California, I work for the medical board there. So, probably 100 to 150 per year.

3 Q When you say you work for the medical board, what do you mean?

4 A Handle complaints from patients about physicians, that they received bad care.
5 Complaints about hospital care from patients. And physicians complaining about other
6 physicians.

7 Q What percentage of your testimony or work in cases is plaintiff versus defending
8 doctors?

9 A Well, I review a lot of cases per year and it averages out 50-50 for defense-plaintiff,
10 but what comes forward is mostly plaintiff. So, I'd say generally 60 to 70 percent just
11 plaintiff; the rest is defense. And some of that's also just causation. I'm asked to come to
12 court and testify why someone's heart stopped after receiving a large dose of potassium.

13 Mr. Proffitt: Your Honor, plaintiff would tender Doctor Adams as an expert in
14 cardiovascular and peripheral vascular surgery, including medical conditions that affect the
15 vascular system of the body. We would also tender him as an expert witness in emergency
16 medicine with regard to the standard of care required of an emergency room physician in the
17 assessment and diagnosis of vascular issues.

18 Mr. Holler: Without objection.

19 The Court: Ladies and gentlemen of the jury, let me just briefly explain what we're
20 doing right now since this is our first witness and there are going to be other expert witnesses
21 tendered later on during the trial.

22 Generally, under the rules of evidence that govern the introduction of testimony in a
23 courtroom, lay witnesses are not allowed to state their opinions or conclusions concerning
24 matters. They are required to testify as to the facts would in their knowledge. There's an
25 exception to that general rule for witnesses who are qualified as experts within some field,

1 science, profession or calling. And as to those witnesses who are qualified by the courts to
2 be experts in those fields, within their fields of expertise, they are allowed to state their
3 opinions and their conclusions. They are also allowed to tell you the reasons why they hold
4 or have formulated those opinions or conclusions.

5 Now, later on, when I charge you concerning the law at the end of the trial I'll give you
6 some additional instructions as to how you might treat testimony given by all witnesses,
7 including experts. But at this time this witness has been tendered as an expert within his
8 profession. Without objection from the defense, I am qualifying him as such. That will give
9 him an opportunity then to state his opinions within his field, and also the reasons or the basis
10 for those opinions.

11 You may proceed.

12 Mr. Proffitt: Thank you, Your Honor.

13 **RESUMPTION OF DIRECT EXAMINATION BY MR. PROFFITT:**

14 Q Doctor Adams, tell the jury what you were asked to do in this case, as far as your
15 review and analysis of it.

16 A Basically, I was asked to review a series of medical records from the initial
17 emergency room visit and the subsequent surgical procedure done approximately six and a
18 half weeks later with regard to what a reasonably trained physician would do to arrive at
19 diagnosis of a vascular injury or insult in an emergency room setting.

20 Q What generally have you reviewed? You don't have to list everything you looked at,
21 but just give the jury an idea of what you've looked at as far as depositions and other
22 information.

23 A I've reviewed probably every person who was in this case, including the emergency
24 room nurses, the patient, his wife, expert testimony, Doctor Bibeau's testimony; additional
25 emergency room physician testimony, my own testimony, and the medical records are pretty

1 much complete of the first hospital emergency room visit that afternoon; discharge
2 instructions. I reviewed imaging studies, which included an CTA, which is an angiogram
3 which was performed on the Mr. Ethier's leg when he presented in May with the thrombosis.

4 Q Now, Doctor Adams, do you charge for you time in doing all this work?

5 A I charge \$550 per hour to review records and to render an opinion.

6 Q Approximately how many hours did you put into this case?

7 A Ten-plus hours.

8 Q And you're charging for your time being here today, of course?

9 A That's correct.

10 Q Travel time and all that?

11 A Correct. It's all inclusive.

12 Q You've taken time away from your practice to be here?

13 A Correct.

14 Q Doctor Adams, tell us generally, what is the role of an ER physician as you
15 understand it, just generally.

16 A The role of a ER physician is to rapidly assess a patient and to rule out any life-
17 threatening injury, life-threatening injuries. Then, after that's done, is to perform a complete
18 physical examination, a thorough one that will elicit a more probable than not diagnosis. In
19 other words, we make a diagnostic tree, a differential diagnosis that you've probably heard,
20 that will list maybe the top five things this could be in this type of disease process. When
21 patients come in with infections, then you try to rule out the top five bacteria or viruses that
22 affect them. If they come in with a trauma situation, you want to rule out the first life-
23 threatening injuries and then you'll make a diagnostic tree. Is the heart okay, are the lungs
24 okay, et cetera, et cetera, et cetera.

1 Q Now, Doctor, let's turn specifically to this case. Do you have the ER record with
2 you, or I can give you a copy. I'll hand you what's been marked as Plaintiff's Exhibit 22.

3 Doctor, what is this exhibit?

4 A This first one is Fairfield Memorial Hospital, we call it the registration or billing sheet
5 or face sheet that says that Phillip came into the emergency room on April 10, 2011.

6 Q And what time was he coming there? Do you see that on the top right, I believe?

7 A (no response)

8 Q Up there, the top right, does it say 4:30, 16:30?

9 A Yeah, I see it.

10 Q And that's?

11 A Roughly 4:30.

12 Q And when he presented to the emergency room what was he telling the person who
13 checked him as far as admitting diagnosis?

14 A Lower right leg pain.

15 Q All right, Doctor. Now, if you'll flip over a couple of pages. Actually, let's start
16 with the triage record and figure out what the triage person found with Phil.

17 A This is a standard triage form, most of the hospitals use this. This is what we call an
18 intake form generally done by an RN or an LPN. The patient's stable, not having CPR. The
19 nurse actually sits down in a little room and talks to the patient. And basically it says chief
20 complaint: Fifty-two year old male complains of right foot pain since 1:00. Patient states he
21 was, I think, moving – and I can't exactly read it – but his truck---

22 Q Okay.

23 A --- when his right foot started to turn ecchymotic. He complained of pressure.
24 Patient states the pain started getting worse, worse around 3:30. Patient has a refill of,
25 capillary refill of 1.8 seconds, two-plus right pedal and right dorsalis pedal pulses.

1 Q Doctor, I will show you what's been marked as Plaintiff's Exhibit 23 which has some
2 highlighting on it. Are these marks on here, can you see it on the screen?

3 A I can.

4 Q Are these indicating where there are reports of pain or pressure?

5 A Correct. A nurse records this and then calls me on the phone, if I'm in the hospital
6 and says I have a patient that has pain in his foot, pressure, was ecchymonic. The first thing
7 I think about because I'm a vascular surgeon is a vascular problem.

8 Q Okay.

9 A Acute onset of pain at 1:00.

10 Q What does ecchymonic mean?

11 A Ecchymonic, Ecchymosis, it means bruising or discoloration. It can be either purple
12 to red. When it's red it's called erythymia or erythymia. But ecchymonic means purplish.

13 Q On the capillary refill and the foot pulse, let's talk about that. Is the foot pulse of plus
14 two normal or abnormal?

15 A To me it means that the pulses are present. We use plus one to plus four, and usually
16 we have to compare it to the other side.

17 Q Okay.

18 A I would say that plus two is present.

19 Q Now, what about capillary refill, a second. What does that mean?

20 A That's good. A second is good. Anything greater than three seconds we're
21 concerned.

22 Q Okay.

23 A If patients don't have heart failure.

24 Q Now, what's your understanding of who did the triage of Phil Ethier on April 10,
25 2011?

1 A This was the triage nurse, Jacqueline.

2 Q Was it her or Samantha Anthony, the CNA?

3 A She signed it off. The depositions reveal that Anthony filled it out.

4 Q That Samantha Anthony actually filled it out?

5 A Correct.

6 Q And Samantha Anthony is a certified nurse assistant?

7 A Correct.

8 Q Alright, Doctor. Let's take a look at the page which is the physician history taken by

9 Doctor Bibeau.

10 A I got it.

11 Q Is this the page you're looking at?

12 A Correct.

13 Q Is this where Doctor Bibeau recorded his findings?

14 A Correct.

15 Q And the page we just looked at was the triage record which the CNA did?

16 A Correct.

17 Q And this is Doctor Bibeau's findings?

18 A Correct. And this is what is called a focused emergency room record. In other
19 words, you'll see at the very top it says lower extremity problem. When a patient focuses on
20 a problem to the intake nurse, the triage person-- We have chest pain protocol, we have foot
21 pain protocol, we have back pain protocol. This is for someone who complains of lower
22 extremity pain, this is a lower extremity problem.

23 Q Now, what do you glean from this? What do you learn from this about Phil's
24 situation on April 10?

1 A That he relates that he's had the pain since 1:00; his foot is cold, numb, ecchymotic,
2 with severe pain.

3 Q Is he complaining about the foot and leg or just one?

4 A It's the foot and the leg.

5 Q Let's go ahead and look at this Plaintiff's Exhibit 24. Do these arrows indicate, for
6 instance, the right leg and foot? Is that where he recording that the right leg and foot was
7 talked about?

8 A Correct.

9 Q And there we have cold. Correct?

10 A Correct.

11 Q And up here we have another report of what?

12 A Pain.

13 Q And what about this?

14 A Numb.

15 Q And what is this word here, again?

16 A Ecchymotic.

17 Q Now, what does it say down here in this paragraph right here, here where I'm
18 pointing?

19 A No wheezing or edema.

20 Q What does that mean?

21 A The document indicates wouldn't expect him to be wheezing or have edema unless he
22 suspected an allergic reaction.

23 Q Does the document also indicate severe pain---

24 A Correct.

25 Q ---where I'm pointing here?

1 A Correct.

2 Q Doctor, let's look at the page marked physical exam. Do you see that one?

3 A Got it.

4 Q Who completed this page on April 10?

5 A Doctor Bibeau.

6 Q What, if anything, do you glean from this page?

7 A This is again a pertinent, positive standard form. In other words, you're supposed to
8 mark everything that's pertinent. You're supposed to check off that you've checked each
9 system. This went to a focused examination of the right foot. And basically, I consider it
10 an adequate examination of a patient. It comes in with sentinel, physical findings of a
11 vascular problem.

12 Q We're going to talk about that in a minute in more detail. What-- Can you read
13 Doctor Bibeau's writing there in the middle of the page?

14 A Yes. He notes that the right foot has livedo reticularis, colder than the other foot, left
15 foot.

16 Q Let's look at this demonstrative exhibit number 25. Is this the same page?

17 A Correct.

18 Q So, what he's saying right here in that handwriting is right foot is livedo reticularis
19 pattern, cooler than left foot?

20 A Correct.

21 Q And what is livedo reticularis?

22 A What I think he was trying to explain that it may be patchy or blotchy in distribution.
23 In other words, there's areas of whiteness with areas of redness and blueness. It's not the
24 right word to use for a vascular injury.

1 Q Now, up here in the highlighted section where it says vascular, is there anything noted
2 in there at all?

3 A No.

4 Q Is there a place there to fill out foot pulses?

5 A Correct.

6 Q Is there a place there to fill out for a popliteal pulse?

7 A Absolutely.

8 Q Is there a place there to fill out femoral pulse?

9 A Correct.

10 Q And those are all blank?

11 A Correct.

12 Q So, what does that tell you about whether or not Doctor Bibeau checked for any of
13 those particular pulses?

14 A They were not done.

15 Q All right. Doctor, I want you to talk to the jury for a minute about what are the P's of
16 a vascular event? Tell us about those.

17 A Well, the first one is acuteness. You know, it's not a P. It precedes all the four P's
18 that we talked about. But generally if you're walking along or doing something and then,
19 you know, you have an acute pain in an extremity, whether it's your foot, your leg, your
20 fingertips, generally the first thing is pain. Then you may get pallor, which means it sort of
21 turns white or a different color. You may get paresthesia, which is the tingling or the pain.

22 And then pulselessness. Pulselessness is the end result of a vascular occlusive event,
23 if you have a single artery supplying a distal extremeity. In other words, if I clot off the
24 main leg artery, the femoral artery up high in my thigh, my leg is going to be pulseless.
25 There will be pallor, light-ish. You'll have pain, you'll have paresthesia.

1 Q What is paresthesia?

2 A Paresthesia is the numbness or tingling.

3 Q Which of this symptoms, the pain, the polar? The polar is coolness. Correct?

4 A Some people have five, which is the polar, which is cold.

5 Q What about paralysis, or paresis, or weakness?

6 A Sure, that's one of them.

7 Q Now, of those indications, which ones, just looking at the written ER record, were
8 present on April 10, 2011?

9 A He presented with pain.

10 Q All right.

11 A He had evidence that he had ecchymosis, which is pallor or change in color. He had
12 documentation that he had coldness of his foot. And then he had paresthesia, numbness and
13 tingling.

14 Q Okay. The only thing he didn't present with is pulselessness or paralysis or paresis?

15 A That's correct.

16 Q Okay.

17 A Which are signs of the P's.

18 Q Okay. Now, if-- Can you have a foot pulse-- Or can you have a blocked artery or a
19 blood vessel problem if you have a pulse in your foot?

20 A Absolutely.

21 Q And how?

22 A For our upper extremity, for our hand and for our lower extremeity, our leg, God was
23 nice enough to give us a couple of arteries. In your leg, below the kneed, you have a single
24 artery coming out, the popliteal artery, which branches into three arteries. And one artery
25 runs along the front of the leg, called the anterior tibial artery. One runs posteriorly, called

1 the posterial tibial artery. And the one that runs between those two on a lateral sheath, called
2 the perineal artery. In your arm you have radial and ulnar arteries.

3 So, what we look at as vascular surgeons is if someone has an acute event that clots
4 off a main artery, it's pretty obviously that you're going to be pulseless in those three
5 arteries. But, because in popliteal artery disease the first thing that happens is a sentinel
6 embolic phenomena where a person will get a single piece of plaque or blood clot, as the
7 defense attorney stated, a hard piece of plaque or blood clot. It will go down one of those
8 arteries and just for a little while that artery will go into a spasm because it's not getting
9 blood flow, and you'll get a couple of the P's. You'll get the pain, you'll get the paresthesia,
10 you'll get the pallor, and you may get the type of discoloration like you got hit with a little
11 baseball bat or something.

12 You'll also get later on demarcation, and demarcation means that wherever that
13 artery's supplied, that area of tissue will die, the skin will necrose; just the skin, not the toe
14 or the whole meat of the toe because that means that all three arteries have to blocked off in
15 the digital arteries. But just that isolated embolic phenomena to a single vessel in a tree of
16 three can still give you the presence of pulses because it's an embolic event, not an occlusive
17 event.

18 Q So, by embolic event versus occlusive event, you mean an embolis is something
19 that's flowing through the artery, trying to get through the artery?

20 A Correct.

21 Q And the occlusiveness is when it's actually blocked it?

22 A Correct.

23 Q Now, you mentioned the black toe. So, the black toe that Phil would have
24 experienced in this case, the whole end of the toe is not going to fall off, is it?

25 A That's correct.

1 Q What's going to come off the end of that toe?

2 A The superficial skin.

3 Q So, he's not going--- You have a photo of the toe like we saw earlier that the defense
4 attorney put up, you're not going to see half the toe missing or a big chunk out of the end of
5 the toe?

6 A That's correct.

7 Q Now, Doctor Adams, was Phil medically stable upon discharge on April 10, 2011?

8 A Yes.

9 Q Is that in fact indicated here on the physical exam done by Doctor Bibeau down here
10 at the bottom?

11 A Correct.

12 Q Does that say--- Has he checked the box for stable?

13 A Correct.

14 Q So, was Phil in any immediate threat of a life-threatening event at that point?

15 A No.

16 Q What was he in danger of?

17 A If not rapidly diagnosed, he could have gone on to have a thrombotic event and lose
18 his leg if not treated properly.

19 Q So, he had something that needed to be addressed in the very near future, but it's not
20 like he's gonna drop dead of a heart attack in the next thirty seconds?

21 A Correct. Or lose his leg in the next twenty-four to forty-eight hours.

22 Q Now, Doctor Adams, I know that you have various opinions that you've already
23 talked about some and we're going to talk about some more. Are all of your opinions that
24 you have stated today stated to a reasonable degree of medical certainty?

25 A Yes.

1 Q Let's talk first some in a little more detail about the lack of a proper exam. What do
2 you believe and assert that Doctor Bibeau failed to do in the way of a proper exam, a
3 vascular exam of that lower leg on April 10?

4 A Looking at the medical record it is my opinion that this isn't a family practice
5 physician, emergency physician, or a vascular surgeon issue. This is just the taking of a
6 basic physical examination that we are taught as medical students for a focused examination
7 for someone who comes in with pain in his right lower leg or foot. So, if you call me, and
8 I'm a fourth-year medical student rotating in the hospital as an emergency room physician,
9 I'm going to go down and do a complete examination of the patient which includes an
10 accurate history and physical examination. And part of my history is, okay, your foot started
11 hurting at 1:00. What were you doing, were you running, did you have a history of cramping
12 in your leg, were you moving boxes. Just get a little bit of information rather than just jump
13 to the diagnosis of spider bite, which I don't see how it works in the diagnostic tree here.

14 And then you would do a vascular exam. You would put your hands in the groin and
15 feel the pulses of the groin. Put your hands quickly behind the artery, the popliteal artery
16 behind their knee, and then compare it to the left side. And then make a little tree and say
17 okay, pulses are plus two or plus three is strong, equal bilateral throughout. And be a little
18 bit more specific with the examination of the skin.

19 Neoticularis, that's great, that's a nice Latin word, but what does it mean? Is it
20 because he's had a bite or he's had a clot? What does the toe look like? What's the
21 temperature? I mean, you actually can measure the temperature with a thermometer, or a
22 little cuff and see if we can get a pressure. Simple vascular, easy procedures to do.

23 Q Okay. I'll show you what's been marked as Plaintiff's Exhibit 24. Is this the little
24 diagram where the pulses could have been noted?

25 A Absolutely.

- 1 Q Is anything noted there?
- 2 A Nothing.
- 3 Q And is this the exam that was done by Doctor Bibeau?
- 4 A Correct.
- 5 Q Now, you mentioned the pulses. Let's make sure the jury understands which pulses
- 6 you're talking about. Here's a little stick figure of a man. Let's focus on the pulses in the
- 7 lower extremities. You mentioned the femoral. Is that illustrated here?
- 8 A Correct.
- 9 Q And that's in the groin area?
- 10 A Correct.
- 11 Q And here we've got the popliteal, that's behind the knee?
- 12 A Correct.
- 13 Q And down here at the bottom, we have the two foot pulses. Is that right?
- 14 A Correct.
- 15 Q One's on the side of the ankle. Right?
- 16 A Correct.
- 17 Q And one's on top of the foot?
- 18 A Correct.
- 19 Q So, to do a proper exam, do you need to check those pulses on both limbs to compare
- 20 them?
- 21 A Correct.
- 22 Q Was that done in this case?
- 23 A No.
- 24 Q Is there any indication from Doctor Bibeau that he ever checked the pulses at all on
- 25 the left leg?

- 1 A Only according to his deposition, but not in the record.
- 2 Q Did he even claim to check the left leg?
- 3 Mr. Holler : Objection to leading.
- 4 The Court: I overrule the objection. You may proceed.
- 5 Q Did he even claim to check the left leg at all?
- 6 A No.
- 7 Q Did he claim to check the foot pulses on the right foot?
- 8 A No.
- 9 Q He did claim that, didn't he?
- 10 A He said he doesn't remember, but he claimed he did it. But it's not recorded, so it's
- 11 not done.
- 12 Q Why is if it's not recorded, it's not done? What does that mean?
- 13 A That means if you're doing a physical examination and it's vascular exam that you
- 14 would, as a physician, you felt the pulses, you're going to fill out the little stick guy that's in
- 15 here and put down the pulses yourself.
- 16 Q Okay. Doctor Adams, is it your opinion that the failure to do a proper vascular exam
- 17 was a breach of the standard of care required of Doctor Bibeau as an emergency room
- 18 physician?
- 19 A Yes, based upon the presenting complaints of pain, acute pain, pallor, pulselessness,
- 20 paresthesia, ---
- 21 Q All right.
- 22 A ----color, pain.
- 23 Q Let's talk for a minute about the spider bite. Now we saw in Plaintiff's Exhibit 25,
- 24 which again, this is the physical exam done by Doctor Bibeau. Correct?
- 25 A Correct.

1 Q And down here at the bottom it says clinical impression?

2 A Probable spider bite.

3 Q Probable spider bite, okay. So, that's Doctor Bibeau's diagnosis. Right?

4 A Correct.

5 Q Is there anything in the ER record in your mind that would have led to a conclusion of
6 a spider bite?

7 A No.

8 Q Is there any report in the materials you've reviewed and the records you've looked at
9 that indicates Phil Ethier reported any kind of spider bite?

10 A No.

11 Q Is there any indication in any of the materials or medical records that indicate Jeanne
12 Ethier who was there at the ER that day reported any kind of a spider bite?

13 A None.

14 Q Is there any indication in the records that any of the nurses or nursing staff who were
15 involved in Phil's care ever said anything that led to any kind of a remark about a spider bite
16 or a spider bite mark?

17 A None.

18 Q So, where did the spider bite idea come from? Do you have any idea?

19 A I don't.

20 Q Is it your opinion, Doctor Adams, that the conclusion that this was a case of a
21 probable spider bite is a breach of the standard of care for an emergency room physician in
22 this circumstance?

23 A Yes.

1 Q Doctor Adams, let's talk now about a possible diagnosis considered by Doctor
2 Bibeau. Tell us first of all, and this term may come at some point in the trial, and I want the
3 jury to understand it, what is a differential diagnosis?

4 A A differential diagnosis is based upon the patient's, you asking the patient questions
5 in response to their complaints, is making it top five or top ten possible what it could be.

6 Q So, it's a word for possible diagnosis?

7 A Correct.

8 Q And what were the possible diagnoses that you recall Doctor Bibeau saying he
9 considered?

10 A Spider bite.

11 Q Do you recall him talking about chemical exposure to the skin?

12 A Possible chemical exposure, unknown blunt force trauma.

13 Q So, trauma. So were there three things he thought about?

14 A Right.

15 Q There was the trauma. Right?

16 A Possible chemical exposure, spider bite.

17 Q Is there anything indication in the record, in the medical record or anything you've
18 read about this case that indicates that there was any kind of trauma to Phil's right leg and
19 foot?

20 A None.

21 Q Is there anything in the medical record or what you've read in this case that indicates
22 there was any kind of chemical exposure to the skin on the right leg and foot of Phil Ethier?

23 A No.

24 Q What diagnosis must be on the list of possible diagnoses in this circumstance with
25 Phil Ethier as shown in the medical record on April 10?

1 A Based upon the recorded triage and based upon what the patient states, you thinking
2 at an acute event that involves vascular events. When you have the P's outlined and it's an
3 acute event and the foot has discolored and he has pain, you have to think of a vascular issue
4 right off the bat.

5 Q Did Doctor Bibeau, according to his deposition, even think of a possible vascular
6 event or a blood vessel problem with regard to Phil Ethier?

7 A No.

8 Q In fact, did he deny even ever thinking about that?

9 A Correct.

10 Q And would it be or is it a breach of the standard of care for an emergency room
11 physician to fail to even think about or consider a diagnosis of a blood vessel problem in this
12 case?

13 A It is because this is a basic medicine, first aid, medical student type of scenario. A
14 patient comes in with an acute event in their leg or foot that has pain, paresthesia, change in
15 color and coolness is vascular.

16 Q Now, Doctor Adams, let's move on and talk for a couple of minutes about what
17 diagnostic test or what needed to be done in Phil's case that was not done. What would a
18 reasonably competent emergency room physician have ordered, or what steps would he have
19 taken in Phil's case if he had realized this was a blood vessel problem?

20 A Well, the first thing, he's going to have to have done a hands-on, physical
21 examination to feel if there's something there. I mean, we know that was 3.4 centimeters
22 across, so it could have been felt by a physician trained to do an examination. And then an
23 ultrasound is where you start. And then once you know that there's something there, like an
24 aneurysm, or a cyst, then you do an angiogram or a CAT scan.

25 Q Just to make sure, what's an ultrasound?

1 A An ultrasound is basically just putting a probe on the skin that sends sound waves that
2 come back, like with a submarine or an airplane, like radar, and gives you an image.

3 Q Do you believe that this popliteal aneurysm existed on April 10, 2011?

4 A Absolutely.

5 Q You believe that because why?

6 A Because when he presented six weeks later that the aneurysm was a 3.4 , had a wall
7 of clot in it, and we know as vascular surgeons that popliteal artery aneurysms grow very
8 slowly, and they're usually on both sides. In this case we know it's only on one side. But
9 they change over time.

10 Q And would an ultrasound, do you believe, have revealed the existence of the
11 aneurysm behind the knee?

12 A Absolutely.

13 Q Now, what was the other test you mentioned?

14 A The CTA or angiogram.

15 Q Tell the jury what that is.

16 A That is where the-- I know that Fairfield can't do a CTA, so they would have to
17 transport him to another hospital. It where they inject dye into your veins and then it's
18 picked up on a CAT scan going down through the arteries. It's called a flush-out CTA.

19 Q Would the CTA or the angiogram have revealed the existence of the aneurysm behind
20 the knee?

21 A Right. Actually, I believe it would have shown the aneurysm and it probably would
22 have shown an anterior tibial artery that may have been occluded.

23 Q Why do you believe it was that artery?

1 A Because that's where generally when you get pain in your foot, that's the first artery
2 that will give you a significant amount of pain. If it's posterior tibial or it's perineal, the
3 bottom of your foot hurts.

4 Q Okay.

5 A Just the bottom.

6 Q Doctor Adams, is it your opinion that it was a violation of the standard of care by
7 Doctor Bibeau to not order any further diagnostic tests in this case?

8 A I do.

9 Q Let's talk about what's the other thing that Doctor Bibeau could have done to insure
10 that Phil get proper care on April 10, 2011?

11 A Pick up the phone and call for a vascular consult and ask to set up the patient to be
12 evaluated semi-urgently.

13 Q If you had received a call from Doctor Bibeau or the staff there at Fairfield, but
14 Doctor Bibeau, and been told the circumstances and the condition that we've talked about
15 here for the last few minutes, ---

16 A Uh-huh.

17 Q ---what would you have told Doctor Bibeau about whether or not you needed to see
18 Phil?

19 A I would have told Doctor Bibeau to start the patient on Heparin and send him over to
20 a hospital as soon as possible that could do a immediate study or a CTA. And the reason I
21 would Heparinize him is because we know that the first thing that popliteal arteries do is they
22 send off a clot, and then that clot blocks off one of the arteries. And then behind that artery
23 blood stagnates, and that becomes clotted off.

24 So, as a vascular surgeon you want to make sure you keep those arteries open. So, I
25 would have Heparinized the patient.

1 Q Now, Doctor Adams, is it your opinion that the failure to refer Phil for a vascular
2 consultation was a violation of the standard of care required of an emergency room
3 physician?

4 A I do.

5 Q Now, let's talk for a couple of minutes about the issue of the black toe and Phil's
6 reporting of it to Doctor Bibeau within the next two weeks or so after that. I want you to
7 assume that Phil did that. There's contention about that, whether or not that ever happened.
8 They said no, we say yes. But I want you to assume for the purpose of these questions that
9 Phil did go to Doctor Bibeau and while he was at the nurse's station, and show him his foot
10 and point out the little black tip on the toe, and show him the leg.

11 What should Doctor Bibeau in your opinion have done at that point?

12 A Got him a vascular consult.

13 Q And why is that?

14 A Because that means he'd had an embolic phenomena. The main thing you would
15 have to have to find out where the embolism came from. Again, by definition, atrial
16 fibrulation causes this in older people.

17 Q You're talking about heart stuff?

18 A Heart stuff. Or it could be something like an aneurysm in your abdomen or groin or
19 popliteal artery.

20 Q And again, the tip of the black toe, that's a sign of where the clot went down and
21 killed off a little bit of the end of the toe and the skin sloughed off?

22 A Correct.

23 Q Not the whole toe, the whole toe didn't fall off?

24 A Correct.

1 Q Doctor Adams, was it your opinion that it was a violation of the standard of care for
2 Doctor Bibeau not to take some kind of affirmative action if Phil told him after, you know,
3 days after the event, here's my leg again, still having some pain, here's this black toe, is that
4 a violation of the standard of care for an emergency room physician?

5 A Yes.

6 Q Does it matter whether or not at that point Phil had gone back in and formally filled
7 out as a patient again?

8 A No.

9 Q Could Doctor Bibeau have told Phil go register as a patient, I think we need to take a
10 more thorough look at this?

11 A Absolutely.

12 Q Is that what Doctor Bibeau should have done?

13 A Right. That's what I would have done.

14 Q Doctor Adams, let me ask you a couple of questions about the notion that if Phil had
15 gone to another physician, not an ER physician, but another physician, found himself a
16 family physician and gone there, what is your opinion on whether or not that family
17 physician two or three days later, or a week later, two weeks later, should have been able to
18 identify a vascular event or a blood vessel problem in Phil if he had been confronted with the
19 same, with what you know of the medical record?

20 A Sure. Recently trained family practice physicians or internists would have found this.

21 Q So, that later family physician had the same duty and should be able to identify this,
22 just like Doctor Bibeau. Is that correct?

23 A Correct.

24 Q So, how is the notion that a later family physician should be able to do that and
25 Doctor Bibeau, who is a board certified family physician, should not? How does that jibe?

1 A It doesn't.

2 Q Doctor Adams, I want to read you the definition of gross negligence in South
3 Carolina.

4 Mr. Holler: Objection. Judge, I think we need to be heard on this.

5 The Court: All right. Ladies and gentlemen of the jury, I'm going to ask you to step
6 back into the jury room for a minute while I discuss something with the attorneys. As
7 always, when you leave the courtroom, I will instruct you not to discuss anything about the
8 case until I've asked you to begin deliberations. You may retire to the jury room at this time.

9 (Whereupon the jury exited the courtroom)

10 The Court: Yes sir?

11 Mr. Holler: Judge, the question was whether Doctor Bibeau's actions were
12 negligent, and that is a finding of fact for the jury based upon the law as you give it to them,
13 not something that is to be offered by testimony. That is a finding that the jury makes under
14 the law. To determine gross negligence, I would imagine, and I can ask this in voir dire, I
15 don't think it would be-- It's not something that has a use in medicine, it's only in the
16 courtroom that it's determined.

17 The Court: All right. I'll hear you.

18 Mr. Proffitt: Your Honor, I think under the rule, 701 to 705, one of those rules talks
19 about how an expert is allowed to express opinion on the facts in the case, allowed to tell the
20 jury what he thinks the ultimate outcome is, what the ultimate problem is. I think it's more
21 than proper to allow Doctor Bibeau - sorry - Doctor Adams to testify about gross negligence
22 and whether or not this goes beyond the mere existence of simple negligence. And of course,
23 from my side, this goes to the statutory cap, so it's important for us to establish that.

24 The Court: You had not completed framing the question yet. I don't know if you
25 were going to ask him for a legal conclusion as to whether or not whatever's been described

1 constituted gross negligence or whether you're going to ask him a more factually based
2 question as opposed to a legal conclusion. We didn't get there. And I understand why you
3 stopped him. I don't have a problem with that. But I would have a problem with the
4 question in which you were asking this witness as to whether or not what he observed
5 constituted gross negligence.

6 Mr. Proffitt: Right. But I had, specifically the question was asked on Page 82 – I'm
7 sorry – 85 and 86 in his deposition.

8 The Court: Well, I don't know that. I'm just saying that at this point in time, I will
9 tell you that where I would prefer the question to go would be-- I don't have a problem with
10 you asking a factually-based question, but if you're going to say here's the definition of gross
11 negligence, and does this fit that definition.

12 Mr. Proffitt: Oh, okay. Well, then I----

13 The Court: I don't want you to do that.

14 Mr. Proffitt: No, I will certainly ask---

15 The Court: If that's where you're going. How was it asked in the definition? I don't
16 know.

17 Mr. Holler: It was asked, is this what the law defines as gross negligence, was this
18 negligence above that, gross negligence.

19 The Court: Well, I'll not let him do that but he can describe factually whether or not
20 he thinks this is more than simply being negligent or this was a willful act. You know, he
21 can state what his observations are from the record, ---

22 Mr. Proffitt: All right. I'll---

23 The Court: ---but I'm not going to let him define it as gross negligence. He's---

24 Mr. Proffitt: I will not---

25 The Court: ---not a legal expert.

1 Mr. Proffitt: I will not talk about the legal definition of gross negligence.

2 Mr. Holler: We've got one legal expert in the courtroom.

3 The Court: Well, no, we've probably got a couple, that's all right.

4 (laughter)

5 I probably get the last say on that, let's put it that way.

6 (laughter)

7 The Court: Do you understand where we are?

8 Mr. Proffitt: I do.

9 Q Do you, Doctor?

10 A I do.

11 The Court: Let's bring the jury in.

12 (Whereupon the jury entered the courtroom)

13 The record will reflect that the jury has returned to the courtroom. I will allow the
14 examination to continue according to my instructions. You may proceed.

15 Mr. Proffitt: Thank you, Your Honor.

16 Q Doctor Adams, we're talked about several breaches of the standard of care in the last
17 few minutes. Correct?

18 A Correct.

19 Q We had the breach you talked about where there was not a proper vascular exam
20 done.

21 A Correct.

22 Q And we had the discussion about the breach of the standard of care where there was
23 no referral to a vascular surgeon or a vascular consultation, no further diagnostic testing
24 done.

25 A Correct.

1 Q That was a breach of the standard of care by Doctor Bibeau.

2 A Correct.

3 Q And was there also some testimony about it was a breach of the standard of care for
4 him to reach the conclusion this was a spider bite on this record?

5 A Correct.

6 Q And we also talked about the black toe follow up in the next two weeks or so?

7 A Correct.

8 Q Were all of those breaches of the standard of care the cause or the proximate cause of
9 Phil's injuries and damages that flowed from that?

10 A Yes.

11 Q Doctor Bibeau (sic), let me ask you, do you believe that in this instance this is gross
12 negligence on the part of Doctor Bibeau?

13 Mr. Holler: Objection. Judge, I thought that's what we discussed wouldn't be asked.

14 The Court: Ladies and gentlemen of the jury, I'll ask you to step back to the jury
15 room again. As always, I'll ask you not to discuss anything about the case until I've asked
16 you to do so.

17 (Whereupon the jury exited the courtroom)

18 Yes sir, your objection?

19 Mr. Holler: The question was is this gross negligence, and that's exactly what, what I
20 understood your ruling to be would not be asked.

21 The Court: What I would prefer that you ask, and I'm not going to tell you how to
22 ask the questions, but the way I would allow you to ask the questions would be if you want to
23 ask him if those constituted a breach of the standard of care and if simple negligence is
24 failure to do as an ordinary, reasonable physician would have done. Now, you can ask him
25 whether he knows, understands the standard of care to be. He's an expert on the standard of

1 The Court: I don't have any problem with him testifying in that fashion.

2 Mr. Proffitt: Yes sir.

3 The Court: Objections? We'll see how it goes?

4 Mr. Holler: We'll see how it goes.

5 The Court: (chuckling) Very good.

6 Mr. Holler: I hope you'll help me practice law, too.

7 The Court: (chuckling) Well, no, I'm not trying to help anybody practice law, but I
8 can keep popping the jury in and out or we can get to the bottom line.

9 Mr. Proffitt: I'll take all the help I can get.

10 The Court: I'm not saying it's the only way to do it. But this gentleman is an expert
11 in the standard of care. I'll certainly let him testify as to what level he thinks this breach of
12 the standard of care might have arisen to.

13 Mr. Proffitt: Okay. I'll---

14 The Court: It'll be up to him to decide.

15 Mr. Proffitt: Just so we're straight, I'm planning to ask him does this rise above the
16 level of simple negligence in the standard of---

17 The Court: I don't know what he's going to say. We're going to find out. Let's call
18 the jury in.

19 (Whereupon the jury entered the courtroom)

20 (Car alarm blaring)

21 The jury has returned to the courtroom. I'll allow the examination to continue at this
22 time. I'll let you decide if you want to compete or not.

23 Mr. Proffitt: We've got the horn blaring, but I think everyone can hear me if we
24 speak up.

1 Q Doctor Adams, do you have an opinion on whether or not the breaches of the standard
2 of care that we've talked about for the last little while are more than simple breaches of that
3 standard?

4 A I do.

5 Q Tell me about your opinion.

6 A My opinion is that the breaches in the standard of care for Doctor Bibeau failed to
7 make an appropriate diagnosis by not performing a thorough physical history examination
8 and arriving at a proper diagnosis I consider to be a severe departure from the standard of
9 care.

10 Q Thank you, Doctor. Let's move on, Doctor, to the events that occurred from April 10,
11 2011 to May 25, 2011. Tell us what you believe was going on during that period with Phil's
12 vascular condition in his lower, right leg. What was happening?

13 A Well, basically, the sentinel embolic event occurred in April. What happens is that
14 for whatever reason the aneurysm will start to shed clot. It may not do it in one day, it may
15 do it over several days, what we call clot burden. In other words, there was enough shedding
16 of clot that went down the tripartation branches, those three branches we talked about earlier
17 that come off the popliteal artery: the anterior tibial, the posterior tibial, and the perineal
18 branch. That had totally occluded his flow to his leg and he presented with an acute
19 ischemic event.

20 Q On May 25?

21 A Correct.

22 Q Doctor Adams, do you know, or is anyone able to tell when the clots would have shed
23 off and clogged the arteries? Could that have occurred early, say, in late April, 2011? Was it
24 in mid-May, 2011? Was it May 23 or 24, 2011? Do you know?

1 A No one can say. It's at that point at which that there was a full occlusion and loss of
2 enough supported flow to the leg that he presented with symptoms.

3 Q Does it matter exactly when it occurred?

4 A No.

5 Q Was it inevitable that it was going to occur at some point?

6 A It's going to occur.

7 Q Okay.

8 A Popliteal arteries either present with acute rupture. In other words, they'll explode in
9 the back of your knee. You'll come in with a dead leg. Or they'll thrombose by shedding
10 distally.

11 Q So, is the crucial point that there was a missed opportunity in Phil's case?

12 A Correct.

13 Q Doctor Adams, I'll ask you to come down and tell the jury about Plaintiff's Exhibit
14 One.

15 (Whereupon witness exits witness stand)

16 Q What does this medical illustration illustrate?

17 A Basically, it's an anatomical diagram of---

18 Q Stand over here where the jury can see you.

19 A Of the knee and the lower extremity demonstrating where the aneurysm is, but
20 actually it's a little bit lower; it's in the fascia, it's a little high. And then it shows what
21 arterial supply should be, and then it shows the evidence of occlusion of the arteries.

22 Q What is this diagram over here to the left?

23 A This is actually what's called a negative from the CTA film. This is a angiogram
24 showing that he has the aneurysm that comes down, which is the distal portion of the femoral

1 artery, actually called the popliteal artery as it branches off and then re-branches, giving flow
2 down to the foot.

3 Q All right.

4 A So, I think-- It says here anterior tibial artery, the perineal branch, and posterior
5 tibial branch. What it shows it's cut off. We call that abrupt cut off, you know, sort of like
6 tccht, which means the clots have shed and the thromboses have been building up front and
7 behind.

8 Q Thromboses are what?

9 A Blood clots.

10 Q Blood clots, all right. And what is that diagram to the right?

11 A It shows that the aneurysm, basically the wall sort of stretches out like a tire, a
12 balloon, and then clot layers itself on the inside of the artery.

13 Q All right.

14 A It's like a blueberry.

15 Q Doctor Adams, does this Exhibit Number One accurately illustrate the medical
16 condition of Phil's leg as of May 25, 2011?

17 A Absolutely.

18 Q Did it help you, aid you in testifying to the jury and explaining your testimony to the
19 jury?

20 A Right.

21 Q All right.

22 A The reason it does is because it shows that there's cut off, cut off of arteries. And
23 when we see cut offs of arteries it means that it's been shed, been showering blood clots
24 down. Because there's not one artery that's completely occluded, like up here, and there's no

1 rupture. So, this is a chronic malcondition that's built up to a point to where his leg is not
2 getting the proper blood supply.

3 Q Explain to the jury again since we're got this diagram out, how you could still have a
4 foot pulse even though there's a blockage.

5 A Because there's a branch up here, called geniculat branches are on your knee, and
6 those branches have collateral flow down. And if you have reconstitution here, you see
7 there's artery missing, but there's reconstitution of flow, which means it's coming back
8 around. So, you can still have a pulse. You may have a thready pulse or decreased pulse, but
9 you'll still have a pulse, but the foot's ischemic.

10 Q Okay. Thank you.

11 Mr. Proffitt: We will move Plaintiff's Exhibit One into evidence.

12 The Court: Is there an objection?

13 Mr. Holler: Yes sir. We believe it would be demonstrative but not into evidence
14 itself.

15 The Court: And?

16 Mr. Proffitt: Doctor Adams testified that the exhibit accurately illustrates Phil's
17 condition in this particular phase as a visual aid to the jury in understanding his testimony
18 and in understanding this case and I would submit that it is admissible as a piece of evidence.

19 Mr. Holler: Again, Judge, we think it's appropriate as demonstrative evidence, but it
20 was created by Mr. Proffitt, a one-page medical illustration. And again, we use
21 demonstrative evidence all the time to demonstrate what we're talking about, but not proper
22 to be received into evidence.

23 The Court: I'll allow it to come in as a demonstrative aid, but not be admitted into
24 the record.

25 Mr. Proffitt: All right. Thank you.

1 The Court: But you may use it as a demonstrative aid.

2 Mr. Proffitt: All right.

3 The Court: Because he says it accurately describes it and it is useful in this
4 testimony.

5 Mr. Proffitt: Thank you, Your Honor.

6 Q Doctor Adams, I would ask you to come down again.

7 (Whereupon witness exited witness stand)

8 Doctor, if you would, I am going to show you what has been labeled as Plaintiff's
9 Exhibit Two which is a medical illustration and I want you to tell us what is this exhibit
10 showing us.

11 A It shows basically how we perform thrombolysis of a contralateral---

12 Q Step over here.

13 A Oh, I'm sorry. How we perform thrombolysis with a clot busting procedure from the
14 other side of the leg.

15 Q How do you do that? If you'll come over here and point to this and explain to the
16 jury how you do a clot busting procedure, and how it was done in Phil's case.

17 A Well, basically knowing that the clot was on the right lower extremity, you access the
18 left groin. And we put a guide wire up and turn it. It has a little coil on it and we can flip it
19 down. Then we place a catheter right above the level where we suspect the clot to be. Then
20 we infuse a thrombolytic agent called TPA, a retrobase, to try to break the clot.

21 Q That's medicine?

22 A Correct. And we do it intravenously, because you've seen how they puncture the skin
23 over here and guide the wire over, put the catheter right about there, and we drip it in at a
24 certain rate per hour. And then every couple of hours we go back and take pictures and see if

1 we're opening up the arteries. And in this case there was very little progression of resolution
2 of the clot.

3 Q So, did the TPA and the medicine you tried to infuse into the vein, into the artery do
4 any good?

5 A No.

6 Q It was not able to break the clots loose at all?

7 A Correct.

8 Q And what do these diagrams on the right show us?

9 A Basically this is sucking out a clot. We have an aspiration device, or dripping clot in
10 with the medication.

11 Q And Doctor Adams, does that exhibit accurately illustrate what was going on with
12 Phil's right leg as of May 25, 2011?

13 A Correct.

14 Q Did it aid you in helping the jury understand your testimony?

15 A Yes.

16 Mr. Proffitt: Plaintiff would move this into evidence as a demonstrative exhibit.

17 Mr. Holler: No objection.

18 The Court: Without objection it'll be allowed as demonstrative exhibit. You may
19 proceed.

20 (Whereupon Plaintiff's Exhibit Number Two was admitted into evidence without
21 objection.)

22 Q All right, Doctor Adams. Now that the jury can see the exhibit really well, tell us
23 what this exhibit shows us.

24 A Basically, because the thrombolytic agents didn't work and you have reestablish flow
25 to the leg, the only thing you can do now is to bring blood from a normal artery above the

1 aneurysm down below the aneurysm to an artery that's soft enough to get a graft in. And we
2 call that a bypass graft/exclusion technique. In other words, we're gonna put sutures around
3 both of these arteries that go into the aneurysm and just tie it off. But we gonna create a
4 bypass like when you get off a freeway and then go back to a side road and get back on the
5 freeway later on after a car accident. That's exactly what we do. And we use what's called
6 a reverse piece of saphenous vein. So we take the vein out and then we turn it around
7 because there's not been enough blood flow going that way, we want it to go this way. So
8 we reverse the saphenous vein and do what's called an anastomosis. The anastomosis then
9 shows then that we bypassed circulation – here's the aneurysm – from inflow to outflow.
10 And it goes down below the level of the kneecap.

11 Q And is that the procedure that Doctor Jeremiah Holleman performed on Phil?

12 A Correct.

13 Q And again, that was after he had a couple of the blood clot busting efforts?

14 A Correct.

15 Q And when you do that procedure, how invasive is it?

16 A It's surgery. It's very invasive.

17 Q How far do you generally cut someone on their leg when you do that kind of
18 procedure?

19 A We make an incision basically from above the area down below, and where our
20 entrance point is distally.

21 Q Okay.

22 A So, basically it's three incisions, plus harvesting the vein.

23 Q All right, Doctor. Did Plaintiff's Exhibit Three, the femoral bypass graft procedure
24 exhibit, aid you in talking to the jury and explaining your testimony to the jury?

25 A It did. The other thing I just might add is that he had to have what is called a

1 re-do because he had a graft kink afterwards. So, the second surgical procedure that was
2 performed in addition what is called the fasciotomy. was the revision of the anastomosis of
3 the vein graft. He had what was called a vein graft kink issue.

4 Q So, in other words, Doctor Holleman repaired the artery by using the vein?

5 A Correct.

6 Q And then shortly after surgery what happened?

7 A He lost his pulse in his foot and then the foot became ischemic again. And the only
8 reason that is, is that there was a problem with the anastomosis up here and the anastomosis
9 down here.

10 Q What is an anastomosis?

11 A The joining of the two arteries together.

12 Q So, what did Doctor Holleman have to do in the second procedure with regard to the
13 graft?

14 A He had to shorten the piece of vein into another arteriotomy, another opening of the
15 artery and sewing it back.

16 Q So, he had to reconnect the vein to the artery again---

17 A Correct.

18 Q ---because it just got a little kink in it?

19 A Correct.

20 Q Is that a known complication of this kind of procedure?

21 A Yes.

22 Q Doctor Holleman didn't do anything negligent, did he?

23 A No. But he recognized it fast and operated.

24 Q But it meant that there were two procedures that Phil had to undergo that day. Right?

25 A Correct.

1 Mr. Proffitt: Plaintiff would, if I didn't do it already, move that in as a demonstrative
2 exhibit.

3 The Court: What number was that, number three?

4 Mr. Proffitt: Yes sir.

5 Mr. Holler: No objection.

6 The Court: It will be allowed as a demonstrative exhibit. You may proceed as
7 number three.

8 (Whereupon Plaintiff's Exhibit Number Three was admitted into evidence without
9 objection.)

10 Q Doctor Adams, tell us, what is Plaintiff's Exhibit Four showing?

11 A Basically, if I'm sent a patient that has a popliteal artery aneurysm or a femoral
12 aneurysm, or a renal artery aneurysm, our new technology, we can basically exclude the
13 aneurysm from the inside out. I think we have a piece of the graft we can show if you'd like.

14 Q Yeah, sure, if they don't mind.

15 A The plaintiff's, defense's graft. And what we do is we poke a hole in the artery above
16 or we can poke a hole from the other side and we put a guide wire through. And then we put
17 a wire through the aneurysm itself. Here's the aorta up here. And we have, the sheath goes
18 over a balloon and I can guide this through into the aneurysm, and then blow this thing up,
19 and then it pops out and excludes the aneurysm. So, there's no rupture and no extravasation
20 of the blood clot causing the emboli later on. This is like the graft we put inside the abdomen
21 for your right and left leg. And this is a graft we use called an excluder graft.

22 Q Thank you, Doctor. So, to be sure the jury understands, this procedure was not
23 performed on Phil. Correct?

24 A Phil could not have this procedure because he had an acute embolic event.

25 Q What do you mean acute embolic event?

1 A Because if you knocked off a couple of the arteries that we could not use the excluder
2 device because we have to use a bypass graft to get blood flow down.

3 Q All right.

4 A So, now instead of something elective that we could have done that wouldn't have
5 caused him to have an embolic phenomenon, we now have to do a bypass graft to get blood
6 flow to muscle that's being choked because it's not getting blood flow.

7 Q Was there a possibility if Phil's condition had been accurately and timely diagnosed
8 on April 10, 2011, as a blood vessel problem and he had gone to see a vascular surgeon,
9 would this have been a possible surgery that he could have had?

10 A Most of the major medical centers now after 2009 do this; we do this now.

11 Q As far as the invasive nature of it, would Phil have been cut from his, up on the hip
12 area near the groin all the way down to his ankle?

13 A Nope, one puncture.

14 Q Where would the puncture be?

15 A Either here on the left side if we're gonna go over the bifurcation, or here and go
16 down.

17 Q Because his situation was so critical, you couldn't do this, this could not have been
18 done?

19 A Correct.

20 Q Okay.

21 A This is what we call elective treatment on a stable popliteal artery aneurysm.

22 Q Phil had gone way beyond that?

23 A Correct.

24 Q Doctor, does Plaintiff's Exhibit Four accurately depict the procedure you described as
25 a graft extent placement?

1 A Yes.

2 Q Did it aid you in talking to the jury and helping them understand your testimony?

3 A Yes.

4 Mr. Proffitt: Plaintiff would move to use it and admit it as a demonstrative exhibit.

5 Mr. Holler: No objection.

6 The Court: Without objection, it'll be so admitted for demonstrative purposes.

7 (Whereupon Plaintiff's Exhibit Number Four was admitted into evidence without objection.)

8 Q Thank you, Doctor Adams. You can sit down now.

9 (Whereupon witness returned to witness stand)

10 Q One brief question, Doctor Adams. Did you calculate some surgical costs and assist
11 in the providing of surgical costs for both the invasive, the more invasive procedure that was
12 done, and the less invasive procedure we just saw on the exhibit?

13 A I did. I have done-- We use a California, which is pretty much based upon the
14 United States average of what it costs to do this intravascularly, which is what we saw in the
15 last set, or we can do it open.

16 Q All right. And did you provide procedure codes and the technical information to
17 calculate those costs?

18 A I did.

19 Q And you provided that to me?

20 A I did.

21 Q Briefly, Doctor Adams, what is a wound vac?

22 A A wound vac is a.... (chuckling) We always laugh when we say wound vac because
23 it's not really a vacuum cleaner. It's a suction device. But it's based upon leeches. Leeches
24 provide a little suction when they're laid on skin. A wound vac adds a positive pressure to
25 the wound and it sucks out the juices or pus or dead skin, and it keeps the skin together. And

1 it's more of a sterile way to treat a wound. So, wound vacs have pretty much taken over
2 leeches and is much progress.

3 Q Is this a picture of a wound vac being used?

4 A That's it.

5 Q And is this another photo of it---

6 A That's it.

7 Q ---on Phil's leg?

8 A Correct.

9 Q Doctor Adams, I want to ask you some questions on whether or not you have an
10 opinion on complications and problems that Phil could have avoided if he had been
11 accurately and timely diagnosed on April 10, 2011, in the ER at Fairfield Hospital by Doctor
12 Bibeau. And before I ask you that, I want to ask you, are all the opinions you're about to talk
13 to us about stated to a reasonable degree of medical certainty?

14 A Yes.

15 Q Let me ask you first about the thrombolysis or blood clot busting procedures that
16 were done May 25 and 26, 2011. Right?

17 A Correct.

18 Q What were those procedures again? That's where they?

19 A Thrombolysis and try to bust a clot. So, if this aneurysm had been identified and
20 treated he wouldn't have had the emergency room visits with an acute thrombotic event. He
21 wouldn't have had the Herparization. He wouldn't have had the emergency transfer to a
22 hospital.

23 Q Just to be clear, you're talking about the Chester hospital on May 25?

24 A Correct.

25 Q He would not have had that event?

1 A Correct.

2 Q And he would not have had to have an angiogram. He would not have had to have
3 the 36 hours of clot busting therapy. He wouldn't have had emergency bypass surgery, nor
4 the complications of Compartment Syndrome. And most importantly, he would not have the
5 foot trauma as a result of the Compartment Syndrome.

6 Q Let's go back and talk about those a little bit in detail. You mentioned the Compartment
7 Syndrome. What is Compartment Syndrome?

8 A Compartment Syndrome develops if there is a significant lack of blood flow to
9 muscle groups. It can occur in any extremity. It can occur in your head. If you have a blood
10 clot in your head, you get Compartment Syndrome. In other words, there's no place for
11 tissue to expand if it's caught in a closed space. So, the muscles get tight and the fascia
12 actually kill themselves.

13 Q And what is done to relieve Compartment Syndrome?

14 A For the head, you drill a hole in the head for compartments. You take a knife and you
15 slice through the fascia and let the muscles pop out.

16 Q I'll show you what's been marked as Plaintiff's Exhibit 13. Is that where the
17 fasciotomy was done?

18 A Correct. The technical word for decompression of a compartment is called a
19 fasciotomy.

20 Q And that had to be done because Compartment Syndrome occurred due to the acute or
21 critical nature of Phil's condition on May 25?

22 A Correct.

23 Q What did the Compartment Syndrome cause with regard to his nerves and muscle
24 damage?

1 A Well, the most common nerve that's injured in Compartment Syndrome in the lower
2 extremity is the perineal nerve or sural nerve, and it causes a foot drop. And it's irreversible
3 because it means that that area of the muscles pressed on the nerve bundle causing that nerve
4 bundle not to get enough oxygen or blood supply.

5 Q After the nerves have been damaged that way, do you have pain, do you not have
6 pain? What happens?

7 A Some people can get what's called RSD reflex, sympathetic dystrophena. In other
8 words, the pain will be shooting up their leg, or they'll have chronic pain at the site of the
9 injury.

10 Q Doctor Adams, were the muscles also damaged in Phil's leg?

11 A Correct.

12 Q And what damaged the muscles, what caused that?

13 A It's the Compartment Syndrome itself. Some of the muscles will lose their ability to
14 contract over time and become scarred.

15 Q And again, if he had been timely diagnosed and treated and sent for non-emergency
16 surgery, would he have had that Compartment Syndrome and nerve and muscle damage?

17 A No.

18 Q Is this the muscle that was damaged, shown on Plaintiff's Exhibit 20?

19 A Yes.

20 Q Is that one of the muscles that was damaged, I mean?

21 A Correct.

22 Q Is this the other muscle that was damaged in the lower leg shown on Plaintiff's
23 Exhibit 19, anterior tibialis?

24 A Correct.

25 Q What's your understanding of the muscles in Phil's leg as we sit here today?

1 A That he's lost significant muscle mass and that he has injury to his foot because of the
2 foot drop with the nerve injury.

3 Q Is that nerve and muscle damage why Phil can't move his foot up and down and side
4 to side?

5 A Correct.

6 Q So, his foot is just like a big thing on the end of his leg?

7 A Right. We call it club foot. No disrespect.

8 Q And Doctor Adams, I'll show you what's been marked as Plaintiff's Exhibit 18 and
9 point out, is this the sural nerve running down the leg that you were talking about?

10 A Right.

11 Q And that's a sensory kind of nerve?

12 A Yes. The perineal and the sural are also sensory and the inner veins, some of the
13 muscles in the anterior tibialis.

14 Q And up here, is this showing the common perineal nerve?

15 A Correct.

16 Q Doctor Adams, is it your opinion to a reasonable degree of medical certainty that the
17 proximate cause, or the cause of these complications that we've been talking about was the
18 failure to accurately and timely diagnose Phil's condition back on April 10?

19 A Correct.

20 Q Would Phil have had a seven-month recovery period if his condition had been
21 accurately and timely diagnosed on April 10?

22 A No.

23 Q And how long would his recovery might have been?

24 A A day or two.

1 Q Would he have had a seven-day hospital stay if his condition had been accurately and
2 timely diagnosed on April 10?

3 A No.

4 Q How long would he normally have had a hospital stay?

5 A Overnight.

6 Q Would he have two permanently clogged arteries in his leg if his condition had been
7 accurately and timely diagnosed on April 10?

8 A No.

9 Q So, as we sit here today, Phil, instead of having three arteries only has one repaired
10 one in his lower leg?

11 A Correct.

12 Q What are the chances over his lifetime that may have to be repaired again, it may fail
13 at some point, the repaired artery?

14 A Because of his age he's looking at probably fifteen to twenty years if he takes care of
15 himself and he won't have to have anything done. But he will have to have something done
16 later on, maybe angioplasty or a reverse graft.

17 Q So that's something that Phil faces in his future?

18 A And also a possible amputation if there's acute thrombosis again because he doesn't
19 have any reserve in his leg anymore.

20 Q He's on his last artery. Right?

21 A Correct.

22 Q And would he have been on the last artery if his condition had been accurately and
23 timely diagnosed on April 10, 2011, by Doctor Guy Bibeau?

24 A No.

25 Mr. Proffitt: Just a minute, Your Honor.

1 Q You don't think a spider bite could cause this?

2 A No.

3 Q Do you always find a bite when a spider bites someone?

4 A In my practice, yes.

5 Q A caterpillar, you always find a bite?

6 A I don't recall for a caterpillar bite.

7 Q Any type of insect bite?

8 A I can recall for brown recluse, for Rocky Mountain spider bites.

9 Q And you always find---

10 A Tarantula bite. I always find the bite because usually there's an area of arethema
11 where he's been inoculated with venom.

12 Q Does it take some period of time before that bite can be found, for it to swell?

13 A Sure. It depends on the spider, the amount of venom that was invenomated.

14 Q So, we're talking about three to four hours?

15 A Sure.

16 Q It make ten or twelve hours before that bite can be found?

17 A In my opinion, the spider bite diagnosis is ridiculous.

18 Q I understand that. But it make ten or twelve hours before the bite becomes noticeable
19 and present?

20 A The spider bite, there was no spider bite.

21 (Pause)

22 The Court: Any other questions?

23 Mr. Holler: Yes sir.

24 Q Doctor Adams, your testimony is the only explanation was a blood clot-- Well, two
25 blood clots because you've said you believe the blood clot went to a toe. Right?

1 RE-DIRECT EXAMINATION

2 BY MR. PROFFITT:

3 Q To meet the standard of care on April 10, 2011, did Dr. Bibeau
4 have to diagnose the popliteal aneurysm or simply diagnose a possible
5 blood vessel problem that needed further diagnostic testing or referral to a vascular
6 consult?

7 A All he needed to do was to have a diagnosis of a vascular insufficiency problem
8 and refer this patient in a timely fashion to a specialist.

9 Q Thank you.

10 Mr. Proffitt: Nothing further.

11 The Court: Anything to follow up on that
12 question?

13 Mr. Holler: No, sir.

14 The Court: All right, sir, you may step down. Thank you very much.
15 I assume you wish to excuse the witness?

16 Mr. Proffitt: We do, Your Honor.

17 The Court: Any objection?

18 Mr. Holler: None.

19 The Court: You're free to go, sir. Thank you very much.

20 Dr. Adams: Have a pass, a highway pass?

21 The Court: I wish I could grant those. I can't.

22 All right, ladies and gentlemen of the jury we will now take a break, a very late
23 lunch.

24 I'm sorry we had some scheduling problems and hopefully we've worked around
25 that. I'll ask you to be back in the jury room at 3:30. We should be in a position to

1 resume thereafter. As always when you leave the
2 courthouse, you know my instructions, don't attempt to
3 gather any information, don't listen, watch or read media
4 reports, don't discuss the case with anyone, don't allow
5 anyone to discuss it with you. Please return it if anybody
6 tries to contact you.. Back in the jury room at 3:30.
7 Thank you very much.

8 THE COURT - All right, we're in recess until that
9 time. Thank you very much.

10 MR. PROFFITT - Thank you.

11 (WHEREUPON, LUNCH RECESS TAKEN.)

12 THE COURT - You can be seated. All right,
13 plaintiff ready to proceed?

14 MR. PROFFITT - We are, Your Honor.

15 THE COURT - Defense ready?

16 MR. HOLLER - Yes, sir, Your Honor.

17 THE COURT - All right, bring the jury in.

18 (WHEREUPON, JURY RETURNS TO THE COURTROOM)

19 THE COURT - All right, the record will reflect
20 the jury has returned to the courtroom. If any of you had
21 any difficulty in complying with my instructions during
22 your absence from the courthouse, please stand. (no
23 response) It appears that all jurors have complied with my

DR. JEREMIAH HOLLEMAN -- DIRECT -- BY MR. PROFFITT

1 instructions thus far. At this time the plaintiff may call
2 its next witness.

3 MR. PROFFITT - Plaintiff calls Dr. Jeremiah
4 Holleman.

5 THE COURT - Come forward and be sworn.

6 JEREMIAH HOLLEMAN, AFTER BEING FIRST DULY SWORN,
7 TESTIFIES AS FOLLOWS -

8 DEPUTY CLERK - Please be seated.

9 THE COURT - Sir, once seated I'm going to ask
10 that you state your name, please.

11 DR. HOLLEMAN - Yes, sir. Jeremiah Henry
12 Holleman, Jr.

13 THE COURT - Thank you. Your witness, counsel.

14 MR. PROFFITT - Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. PROFFITT -

17 Q Dr. Holleman, if you would, please, introduce yourself
18 to the jury by telling them about your medical and
19 educational background, your ---

20 A Sure. My name's Jeremiah Henry Holleman, Jr., -- I go
21 by Jerry -- I'm a native of Mississippi; I intended the
22 State University for my undergraduate degree. I attended
23 Tulane University for my medical school degree. After
24 completing medical school in 1971 I did a general surgery
25 residency at the University Hospital in Jackson,

1 Mississippi for five years, spent two years in the navy and
2 then following a tour of duty in the navy I returned the
3 University of Mississippi for one-year fellowship of
4 peripheral vascular surgery.

5 Q All right. And where are you currently employed?

6 A I'm currently employed at the Sanger Clinic in
7 Charlotte.

8 Q And how long have you been a vascular surgeon in total
9 years?

10 A I completed my fellowship in 19 -- July of 1979.

11 Q Okay, so ---

12 A Through the present.

13 Q All right, so that's 30-some years? '79.

14 A Sure.

15 Q I think it's 36 years. Does that sound right?

16 A Thirty-six years sounds right.

17 Q All right. And are you board certified in anything?

18 A I'm board certified in general surgery, which at the
19 time of my board certification that included vascular
20 surgery.

21 Q Okay. And are you -- you still remain board certified
22 today? I know you have to renew it every so often.

23 A Correct. I'm -- I'm certified through 2018 I believe.

24 Q Okay. Where are you currently licensed to practice
25 medicine?

1 A North Carolina.

2 MR. PROFFITT - Plaintiff would tender Dr.
3 Holleman as an expert in peripheral vascular medicine and
4 surgery and medical conditions affecting the vascular
5 system of the body, including Phil's condition from April
6 10th, 2011 to the present.

7 MR. HOLLER - Without objection..

8 THE COURT - All right, without objection he'll be
9 certified by the Court as an expert in that field. I've
10 explained what that means, so you may proceed at this time.

11 MR. PROFFITT - Thank you, Your Honor.

12 Q Dr. Holleman, if you would, just give the jury a brief
13 summary of what you understood had -- Phil's condition on
14 April 10th, 2011. Let's start there.

15 A Okay. My understanding is that April the 10th Mr.
16 Ethier presented to the Fairfield Emergency Department with
17 a seven or eight-hour history of right foot pain.

18 Q Okay. Did he also report pressure, ---

19 A You know, here again, from his -- my recollection of
20 the record did -- he had talked about pressure -- there's a
21 description of coolness; there's a description of -- the
22 description of livedo reticularis, a modeling.

23 Q All right, all right. And did Phil subsequently
24 present to Chester Memorial Hospital on May 25th, 2011?

25 A Correct.

1 Q Okay, and what, just briefly, did the Chester Hospital
2 ER records tell you? You've reviewed those. Correct?

3 A Right. The Chester ER records indicated, as I recall,
4 that he had had sudden onset of pain the evening before and
5 seven or eight-hours later -- think that would be the seven
6 or eight-hours -- seven or eight-hours later presented to
7 the Chester Emergency Department with excruciating pain,
8 cold foot, clearly acutely ischemic foot.

9 Q All right. And what happened subsequent -- is that
10 when you got involved, when Chester called you?

11 A Correct. I think they -- Chester called a general
12 surgeon on call who correctly indicated that he didn't deal
13 in vascular work and suggested they call a vascular surgeon
14 in Rock Hill who, well, was not in a position to accept
15 transfers and they contacted us and we did accept him in
16 transfer.

17 Q Okay. And where is your -- what hospital was he
18 transferred to?

19 A He was transferred to Carolina's Medical Center in
20 downtown Charlotte.

21 Q And that's where you primarily practice?

22 A That's where I primarily practice.

23 Q All right. Now, when Phil -- when you first saw Phil
24 on May 25th, 2011, it was the morning hours around 8:00 or
25 so?

1 A That is correct.

2 Q And what was his condition then?

3 A His foot was clearly acute ischemic; it was cool. I
4 don't recall the color, but it was cool; it was without
5 pulses. He was having pain.

6 Q Okay. And what did you do for him there in those
7 first hours? What happened?

8 A I think they have already given him a dose of Heparin
9 in Chester and then we gave him another dose of Heparin.
10 We obtained the CT angiogram, which demonstrated that he
11 had a popliteal aneurysm and occlusion of all three of the
12 tibial blood vessels. We subsequently carried him to the
13 angiography suite where we tried to open -- open this acute
14 ischemia -- this acute ischemia of the leg.

15 Q Okay. All right. Is that when you did the first
16 thrombolysis, the clot-busting procedure?

17 A Correct. The first -- the first thrombolysis was
18 associated with that first angiographic procedure.

19 Q All right, Dr. Adams -- I'm sorry -- Dr. Holleman, if
20 you'll step down off the stand and come down here. And if
21 you would -- this is -- I'm showing you what's been marked
22 at Plaintiff's Exhibit 1, and if you could, maybe, come
23 over here and stand over here where I am so all the jurors
24 can see and just tell the jurors -- first of all, tell them
25 what this diagram here is and what it means.

1 A Well, this image here is the image from the angiogram
2 which was obtained in the angiography suite, or it's like
3 our catheterization lab or angiography suite at Carolina's
4 Medical Center.

5 Q And tell us again what a CT angiogram is.

6 A A CT angiogram is a technique where a CT scan, which
7 the CT stands for computerized tomography, but CT
8 angiography is a technique where using a CT scan we can
9 inject dye into a vein and get images of the artery. It's
10 a -- you know, it's been a tremendously useful technique,
11 but in very short order it gives us very good images of the
12 arteries injecting dye into the veins which is much more
13 straight-forward and much more quickly accomplishment, much
14 safer procedure than going straight to an arterial stick,
15 so the CT was our -- was the diagnostic test that let us
16 know what was going on, that let us know that we needed to
17 go to the angiography suite or we in some way need to
18 restore the blood-flow to his foot and help us have a
19 clearer understanding of what would be involved.

20 Q Okay. And again, this is an actual shot from the CT
21 scan itself?

22 A No. This is a shot from the angiogram.

23 Q Oh, okay.

24 A This is a -- a cath lab image.

25 Q Okay. And what does that show?

1 A This would've been one of the first images that we
2 would've obtained. You can faintly see the knee joint
3 right here, so this is the lower leg down to about the
4 ankle. This dark grey structure here is his popliteal
5 artery. This structure here is part of the popliteal
6 aneurysm that he had. It looks much smaller on this image
7 than it would have on the CT angiogram, because in addition
8 to what you see here, which is where it open and carrying
9 blood, there's a wider section which actually has
10 thrombosed or clotted blood in it. So this is the
11 popliteal aneurysm. This is a relatively normal popliteal
12 artery. This is his anterior tibial artery, which comes
13 down here and abruptly stops. Now, this is -- this artery
14 right here is called the tibial peroneal trunk. It comes
15 down; it's usually an inch or two in length and gives off
16 two branches. Peroneal artery, which is this one right
17 here, which kind of just disappears, and then the posterior
18 tibial artery, which is this one over here, it's blocked in
19 its origin, so it's occluded in this portion, but then
20 through collateral circulation -- if you look closely you
21 can see these little twigs out here, which are what we call
22 collateral arteries that allow the circulation to go around
23 the blockage. So these collateral arteries carry the blood
24 and consequently the die around the blockage down at this

1 portion of the posterior tibial artery, which on a
2 subsequent film farther down goes down to his foot.

3 Q So where -- are the yellow arrows the occlusions or
4 blockages?

5 A Yes. These yellow arrows here are the blockages.

6 Q Okay. All right.

7 A This one -- this one here actually starts up here.

8 Q Okay. And are they shown also on the -- the drawn
9 diagram that's next to the CT?

10 A Yes. Let's see -- the diagram is really a pretty good
11 representation of this -- of this angiographic image.

12 Q Okay. So you've got an occlusion of the anterior
13 tibial and occlusion of the posterior tibial?

14 A Right. Anterior tibial is occluded here; the peroneal
15 is occluded here. The posterior tibial is occluded here.
16 There's -- this drawing demonstrates a collateral artery
17 which is carrying blood around the blockage.

18 Q Okay. And what's the diagram on the first side, the
19 circle?

20 A The circle actually is a diagram of a popliteal -- of
21 an aneurysm of some sort, and I -- in this case I'm
22 assuming it's the popliteal artery, and here again -- I'm
23 going to switch sides -- there's normal artery above;
24 there's normal artery below. There's a channel that blood
25 is going through and then there's a lining of the blood

1 vessel just -- of stuff. This can be -- it can be fresh
2 clot; it can be a little organized clot; it can be lipids,
3 but it's just stuff.

4 Q All right. All right, doctor, if you'll stay right
5 there and I'll put on the easel what's been marked as
6 Plaintiff's Exhibit 2, and is -- does this show the basic
7 steps in the catheterization procedure?

8 A It does.

9 Q I know it's simpler than the actual procedure, but ---

10 A Sure. Well, initially we have to gain access to the
11 circulation. We have to get a needle and is subsequently a
12 wire and then a catheter into the artery, and so for
13 reasons that we can go into, but I'm not sure it really
14 changes the story here much, it's more straight-forward and
15 safer to go from the other side, from the opposite side of
16 the injury, go up to the aortic bifurcation, direct the
17 catheter up and over and then work from this side to try to
18 improve -- do your first image -- and then try to improve
19 this side.

20 Q Okay.

21 A And so that's -- and this is presentation of the
22 needle going into the artery, then the wire goes into the
23 artery, and then a catheter is use to direct this wire up
24 and over bifurcation and another catheter goes over and
25 then a larger catheter which is called a sheath, which is

1 larger enough to work through and remain stable. Usually
2 goes from here to about right here.

3 Q Okay. Now, what was the purpose of doing this? What
4 were you trying to accomplish?

5 A We were trying to relieve this acute ischemia, this --
6 relieve acute occlusion.

7 Q Okay. And an ischemia or occlusion is what?

8 A Ischemia is inadequate blood supply and occlusion is
9 blockage.

10 Q Okay. All right. And the first procedure occurred
11 approximately when, when you tried to do this?

12 A The first procedure was in the afternoon of, I
13 believe, the 25th.

14 Q Okay. All right, and did you -- once you have the
15 needle and the sheath and all that in there, are you
16 administering medication?

17 A We are. Initially we're -- of course this whole
18 procedure is done with a alum coagulant known as Heparin so
19 that we don't form clots while we're working inside the
20 artery trying to open clots up, but our -- our intent was
21 to get a wire across the blockages -- if we could get
22 across these two major ones -- the anterior tibial and the
23 posterior tibial are more important than the peroneal, so
24 we can get up -- our initial attempt was to try to get a
25 wire across the posterior tibial and the anterior tibial,

1 drip a drug into the -- this wire -- it's a wire with --
2 it's kind of a leaky wire. It's -- if you can imagine a
3 tightly-wound spring. It's kind of a -- it's a wire that's
4 also kind of a catheter, because -- so there's a segment to
5 that wire that the drug comes through the interstices of
6 the catheter, so it's like a -- it's like a tube that ends
7 in a very fine coiled spring, and so as you enter your drug
8 into it, then the drug leaks out through the parts of the
9 spring into the clot ---

10 Q All right.

11 A --- so this clot -- the goal is to dissolve the clot,
12 and at the same time we're allowing this drug to go down
13 stream into these smaller arteries down here and -- which
14 is -- and here again, the goal is to allow that drug to
15 open up some of those smaller arteries, if possible, that
16 improves the run-off.

17 Q Okay. Run-off being circulation?

18 A Run-off is the -- the run-off is the avascular bed
19 distal to what we're working with. Tree -- an arterial
20 systems are very -- kind of like -- you can imagine a tree
21 in the wintertime. You know, you have a trunk and you have
22 all the branches, and if you've got -- if you cut off all
23 the branches, then there's not much place -- there's not
24 much area for the blood to run through. So the blood runs
25 more easily and more completely if you have the complete

1 tree than it does if you've just got a small portion or,
2 you know, a limb, so there's -- there's just more cross-
3 sectional area for blood to go through. Just the tissue
4 distally is better perfused. Grafts are -- tend to be --
5 have better patency because they're higher flows to the
6 graft, because there's more blood going through the graft.

7 Q Okay. All right, Dr. Holleman, were you able, using
8 this catheter procedure, to break through the blockage on
9 any of the arteries on that first attempt?

10 A On the first attempt, -- well, our first -- our first
11 objective was to get a wire across these arteries, because
12 they -- the way that these procedures are down is that if
13 you get a wire across this lesion, across the area you're
14 working with, then you can safely put your catheter
15 through, because the catheter -- the wire holds the
16 catheter in place, so if you just -- if you -- if you just
17 have the open catheter, which is like a tube with the, you
18 know, opening in the end, if you don't have it protected in
19 some way, as you pass it forward, it kind of -- they'll --
20 likely to snow-plow the blood vessel or scrape it or in
21 otherwise injure the artery and create situations where it
22 would be worse than it was to begin with. So in any of
23 these angiographic interventions, our goal is always to get
24 the wire across first and then whatever catheter we plan to
25 get across second. So on the posterior tibial the wire

1 crossed easily; on the anterior tibial the wire did not
2 cross easily, and, in fact, we spent a fair amount of time
3 hammering away, pecking away, and it was just like
4 concrete, it would not - it was not going ---

5 Q What about the peroneal artery, the third one that you
6 tried?

7 A The peroneal artery, also tried, and the wire would
8 not go through the peroneal.

9 Q So two of them were blocked in a very hard obvious
10 manner with blood clots.

11 A Correct.

12 Q And one of them was not blocked -- was partially
13 blocked but you got the wire through.

14 A Well, the other one was part -- was completely blocked
15 but blocked with soft kind of jelly-like clot. Well, the
16 presumption it was soft and jelly-like clot, because the
17 wire just fell through.

18 Q Okay. All right, now you did that about in the
19 afternoon of May 25th, 2011.

20 A Correct.

21 Q Was this attempted again?

22 A As a standard part of this, you really don't know what
23 you've accomplished until you look again. So our usual --
24 our practice has been to look again, depending on what the
25 situation is, either 12 or 24 hours later. Mr. Ethier was

1 -- you know, had significant ischemia and so we chose to
2 look again in approximately 12 hours later and Dr. Roush
3 who was my partner was doing cath lab work at that time, so
4 he was the operating surgeon in the cath lab the second
5 procedure.

6 Q Okay. And that was the morning of the 26th.

7 A Correct.

8 Q Now, did Dr. Roush have any better luck than you did
9 in breaking through the clots on any of the artery -- the
10 two that were clogged?

11 A What he discovered was that the posterior tibial had
12 partially opened up. It had not completely opened up.
13 There was a channel of blood going through the posterior
14 tibial artery; there was now a distal pulse on that
15 posterior tibial artery, but it was still not a normal
16 artery. He tried to take a balloon and kind of clean it up
17 and make it more -- more closely to normal, but he was not
18 able to get the wire back through the clot at that point,
19 and so rather than risking injuring the artery further,
20 after persisting a while to try to get a wire through, it
21 felt like this -- this was not going to be amenable to the
22 thrombolytic procedure for this part of the procedure and
23 we were going to have to do something else to get him -- to
24 get Mr. Ethier a durable result to overcome this ischemia.

1 Q All right, now, as of the morning of that second day,
2 what was the plan then? What were you going to do then?

3 A The morning with the next day our intention was to
4 carry him to the operating room and to do a bypass from the
5 superficial femoral artery to the posterior tibial artery.

6 Q All right, and if I'll get you to review Plaintiff's
7 Exhibit 3 ---

8 A Sure.

9 Q --- and is this the exhibit that represents the bypass
10 graft procedure?

11 A This represents the bypass graft procedure.

12 Q Okay, if you'll come over here again.

13 A Sure. So a bypass graft is like a bypass around the
14 city. You go -- you take a -- the graft material which is
15 like a bypass around the city, connect it to the normal
16 artery above the problem and then connect it again to the
17 normal artery below the problem, and so our goal at that
18 time was to take the vein out of his same leg -- veins have
19 one-way valves that only allow the blood to go back toward
20 the heart, so you have to reverse the vein. So we took the
21 lower end of the vein and put it up to the groin so the
22 blood would be able to go down, and so the one-way valves
23 would be oriented to allow the blood flow to go, so it's a
24 reversed saphenous graft, and then we connected -- we
25 dissected out the artery above the aneurysm and then we

1 dissected the posterior tibial artery down below the
2 aneurysm and then -- so this graft end from above the
3 aneurysm to below the aneurysm and tied off the aneurysm so
4 that clots wouldn't come out of the aneurysm anymore.

5 Q All right. And you were working on the posterior
6 tibial artery, the one good artery he had left ---

7 A Correct.

8 Q --- in the lower leg?

9 A Right.

10 Q Okay. Those two other arteries in the lower leg,
11 what's their condition today?

12 A They're occluded today. They -- once these arteries
13 are occluded under the circumstance they don't open up,
14 which is why -- another reason that we would like to have
15 gotten the anterior tibial artery open. It's -- you know,
16 one artery will carry all the blood that you really have to
17 have, but if something happens to that artery some time,
18 you know, over the next years, then the leg would be in
19 trouble again, so ideally, you'd like to have two arteries
20 open, but he does not.

21 Q All right. And when you say the other two arteries
22 are occluded, you mean blocked.

23 A Blocked.

24 Q There's no blood flow through them.

25 A Correct.

1 Q All right. All right, Dr. Holleman, one other
2 question before you get back in the chair. I'll show you
3 what's been marked as -- actually Dr. Holleman ---

4 THE COURT - One second. He has one more
5 question.

6 Q One more question.

7 A Oh, I'm sorry.

8 Q One more question. This diagram is what, shows what?

9 A This diagram again shows the femoral artery. This is
10 a different form of access. This is what we call antegrade
11 access. That's going from the same side but aiming it down
12 rather than coming from the opposite and aiming it up. So
13 antegraded access. This is the popliteal aneurysm; this is
14 the -- these are the run-off vessels, anterior tibial,
15 peroneal, both tibial arteries. This is the -- another --
16 again, a diagram of a popliteal aneurysm. This is ---

17 Q Step back just a little bit so all the jurors can see
18 you. I'm sorry.

19 A Sure. Sorry about that. So this shows -- actually --
20 ever so slight imperfection here. This doesn't really show
21 the wire going through this graft. Normally this wire
22 should be well below the graft; a wire should be coming
23 through this device well below the graft and it's to insure
24 that it doesn't harm the artery by bouncing around, but
25 this is what we call a stint graft or a endograft. It is a

1 GORE-TEX graft that's wrapped very tightly, stuffed into a
2 very small catheter, but it also has attached to it a frame
3 of a metal called nitinol. Nitinol is a very interesting
4 alloy that at room temperature it's very soft, but at body
5 temperature it becomes very firm, so -- but it -- and it's
6 also very springy. You can just take it and just -- it --
7 you know, you can bend it a thousand times and it doesn't
8 break, and so it's very durable, very springy, and it
9 maintains its regular strength. If you crunch it, it
10 springs back. So this GORE-TEX graft is fused to this
11 nitinol stint and it's packed into a sheath; it's, you
12 know, probably smaller than a typical pencil, and it can be
13 passed down through the artery, in this situation through
14 the aneurysm, and then it can be released so it expands to
15 its natural size. And if you've sized it properly, it will
16 exclude the aneurysm and restore flow to the leg below.

17 Q All right, and is this is a less -- this grafting
18 stint placement as shown in Plaintiff's Exhibit 4, is this
19 a less invasive procedure than the bypass graft procedure
20 that you actually had to do on Phil?

21 A It is.

22 Q All right. But this -- this procedure was not done on
23 Phil. Right?

24 A That's correct.

25 Q He had the more invasive one.

1 A Correct.

2 Q Okay. And, Dr. Holleman, what is your opinion on
3 whether it was a -- the best idea was to do this procedure
4 for Phil or the open bypass graft procedure, at that point
5 where he was on -- May 25th, 2011.

6 A Yes, I -- our point -- that, you know, he was in -- we
7 felt like he was in otherwise reasonably good health, in
8 spite of being a smoker -- as far as we were aware he did
9 not have significant heart disease, he did not have
10 significant lung disease, didn't have other debilitating
11 factors -- we expected him to be around for a long time.
12 So our goal was to provide him safely with the most durable
13 procedure that we could. Our experience -- and I think the
14 experience of most other -- in the vascular surgeons -- is
15 that while these endografts work quite well most of the
16 time in the short-term, there simply is not a 20 or 30-year
17 history in -- our thinking is for somebody who's in
18 otherwise good health, this is a better, smarter, more
19 durable choice.

20 Q The bypass graft procedure.

21 A To do the bypass graft.

22 Q All right, but either one could be done and surgeons
23 may have different ideas, but they're both appropriate
24 medical care.

1 A They're both reasonable choices, and I think either
2 would be within the standard of care for vascular surgery.
3 Part of the decision comes down to a conversation with the
4 patient.

5 Q All right. Thank you, Dr. Holleman. You can return
6 to the stand. All right, Dr. Holleman, I understand you're
7 not offering opinions here today about whether or not Dr.
8 Bibeau did anything wrong or did anything right. You're
9 not really testifying at all about the standard of care for
10 -- that Dr. Bibeau was required to meet as an emergency
11 room physician.

12 A That's correct.

13 Q Okay. But do you still have some opinions about the
14 vascular condition of Phil's leg as the records have shown
15 you and as the material you reviewed as shown you about
16 from April 10th, 2011 coming into the future?

17 A I do.

18 Q All right. Tell us what you believe -- well, let me
19 ask you this first. In your opinion, on April 10th, 2011,
20 at the time he was discharged from the ER there at
21 Fairfield Hospital, was Phil Ethier medically stable?

22 A Yes.

23 Q All right. Was his limb or his lower leg in any
24 immediate threat or serious injury to the leg at that
25 point?

1 A Probably not an immediate threat to the whole leg.

2 Q All right. Was it something that had to be addressed
3 in the near future, that needed to be addressed soon?

4 A Well, he had a -- I mean it's like he had a ticking
5 time-bomb, and nobody -- it would be impossible at that
6 time to know what soon was. I mean it's possible -- the --
7 looking back at the events, most likely event that occurred
8 is on April the 10th he threw a clot from the aneurysm to
9 his leg further down.

10 Q Okay. Yes, that's what I want you to explain for the
11 jury.

12 A Right.

13 Q What is your opinion on what happened to Phil's leg on
14 April 10th, 2011 going forward until you met him on May 25th,
15 2011?

16 A From reviewing the records it seemed that -- there's
17 little question that he experienced pain with the onset of
18 this episode. There seems to be little question that there
19 was some form of bluish discoloration on a part of his foot
20 or part of his leg. Little question that his pain was of
21 sudden onset; there's little question that later he
22 developed -- did have that popliteal aneurysm, he developed
23 these other episodes of acute ischemia, so ---

24 Q Did -- did he have the popliteal aneurysm on April
25 10th, 2011?

1 A He certainly would've had a popliteal aneurysm on
2 April 11th. (sic)

3 Q All right. And -- go ahead.

4 A And I think the most likely thing -- you know, and
5 based on what we know and what we know about the natural
6 history of these various events is he almost certainly
7 threw some -- a clot of some sort, or a thrombus or
8 embolus. Embolus is any kind of particle moving in a blood
9 vessel that moves downstream. Clot, of course, would be
10 involving clotted blood, but in my mind there's little
11 question that on April 10th or 11th that he threw a clot from
12 this popliteal aneurysm, it went distally into that right
13 leg.

14 Q Distally meaning?

15 A Somewhere beyond the aneurysm.

16 Q Okay.

17 A I think from what has happened subsequently and I
18 think from the records, it's not entire -- one of two
19 things almost certainly happened. In my view, the most
20 likely thing that happened is that this clot, like these
21 clots typically do, is not one episode but when it happens,
22 it's kind of like a burst of large clots and smaller clots,
23 so I think the most likely thing that happened is that a
24 small clot lodged in the arteries to his toes, larger clot
25 was stuck in the anterior tibial artery.

1 Q Okay. All right. And then it became more acute as of
2 May 25th, 2011.

3 A Actually the blood circulation from his posterior
4 tibial artery took over, and I think between April the 10th
5 and May 25th his foot was not really critically ischemic.
6 There was some -- apparently I think from Mr. Ethier's
7 deposition he had a -- the tip of one toe became black and
8 sloughed off I think, so the likelihood is that there was
9 some kind of an acute vascular injury to the tip of that
10 toe, which as that toe healed, that skin turned black and
11 fell off. I think that -- that supports the idea that
12 embolus went to his toe; where an embolus just strictly
13 stopping at the anterior tibial artery would not cause that
14 because the circulation from the other artery would take
15 over and help provide perfusion of the foot.

16 Q Is that why from the period of April 10th, 2011 and a
17 couple of weeks after that when it seemed to get better to
18 Phil and things seemed to gradually improve, is that what
19 was going on, is that the collateral arteries were helping
20 carry the flow?

21 A Right. The collateral arteries opened up, and the
22 fact is any one of the three arteries can carry all the
23 blood the foot needs, and so once the collaterals open up,
24 then the acute injury or the symptoms of the acute injury
25 improve. We -- you know, that's something that we -- a

1 phenomenon that we regularly see, and then for -- you know,
2 if there had been no further emboli, his foot would've been
3 just fine, but that was not what happened. What happened
4 was he did have another embolic episode and his foot and
5 leg was not just fine.

6 Q Okay. Do you believe that there was a missed
7 opportunity for Phil to get care on a non-emergency basis?

8 A I think that the signs and symptoms of an acute
9 arterial problem existed on April the 10th, and had anyone
10 chosen to do a very simple diagnostic test and an
11 ultrasound, then the ultrasound would've demonstrated that
12 popliteal aneurysm and he would certainly have gotten
13 elective repair of that popliteal aneurysm which would've
14 averted all these subsequent complications.

15 Q Okay. All right. Dr. Holleman, let's talk about the
16 complications for just a couple of minutes. Would Phil, if
17 he had been accurately and timely diagnosed back on April
18 10th, 2011 and referred to a vascular surgeon or sent for an
19 ultrasound or a CT angiogram, would he have had to have the
20 two clot-busting procedures that you described for us a few
21 minutes ago?

22 A He would not have.

23 Q Okay. And why not? Why would he not have to have
24 that?

25 A Well, he was not acute ischemic at that time.

1 Q Okay. And ischemic means blocked. Right? Reduced
2 blood flow.

3 A Ischemic means an inadequate -- it means inadequate
4 blood supply to the point that there's being -- that damage
5 is being done to the tissue.

6 Q Okay. Would he have had to following the surgery had
7 the compartment syndrome and the fasciotomy that went with
8 that?

9 A He would not have.

10 Q Okay. And would -- and why not? Why wouldn't he have
11 to have the compartment syndrome? Why would that -- that
12 not have occurred?

13 A He would not have had any of the things that cause
14 compartment syndromes. Compartment syndrome is a condition
15 in which the pressure in the muscle is increased, and
16 muscle -- muscles don't just sit in the body loosely.
17 Muscles are all swashed around by something called fascio.
18 Fascio is a -- very much the same thing as the grizzle on a
19 steak.

20 Q Okay.

21 A And so it's a very dense firm connective tissue which
22 really does not expand, so when something causes the muscle
23 to swell and the surrounding fascial compartment can't
24 enlarge, then the pressure goes up in the muscle to the
25 point that the muscle -- and the blood supply to the muscle

1 then becomes compromised, and then the muscle, you know,
2 responds to this as it would for any other circumstance
3 without an adequate blood supply, but the pressure from the
4 muscle -- the three thing -- the three basic causes of
5 compartment syndrome: one is fracture, which he didn't
6 have; one can be a blockage to a vein, and so the blood
7 going out of the compartment is blocked and the pressure
8 goes up and the artery continues to flow, the vein does
9 not; the third condition, which is what Mr. Ethier had was
10 following -- it's called reperfusion following ischemia.
11 So what happens, when tissue has an inadequate blood supply
12 or has ischemia as -- forgive me if I keep lapsing into,
13 you know, jargon, but -- because it's a term that I -- that
14 accurately reflects what's happening, but the tissue has
15 prolonged ischemia or inadequate blood supply, then that
16 causes damage to the tissue, may not be enough damage to
17 kill the tissue, but it can cause damage to the tissue, and
18 the tissue responds to most injuries by swelling. I mean
19 if you burn your hand, then it'll swell. If you twist your
20 ankle, it'll swell. If you have an ischemic injury to a
21 blood vessel and then blood is restored, then that injury
22 will cause that blood vessel to -- that muscle to swell.
23 Well, in the compartments of the leg, there's a limit as to
24 how much it can swell. That -- and so once it gets beyond
25 that limit, then you've got the compartment syndrome, and

1 if you don't relieve the pressure, then the muscle will
2 die.

3 Q Okay. And that's when you do what you call the
4 fasciotomy?

5 A That is correct.

6 Q Okay. And is this -- Plaintiff's Exhibit 13, does
7 this show where you opened his leg for the fasciotomy to
8 relieve the pressure?

9 A That shows where we opened the leg to relieve the
10 pressure, and, this, of course, is several weeks later and
11 there's been some healing, but that's basically -- that's
12 the best shot of it anyway.

13 Q Would the leg have been even larger than it is shown
14 in this picture earlier on?

15 A Oh, it's hard to get a respective on that picture.
16 The muscle would certainly been swollen, whether it is
17 larger than that, it'd be hard for me to say.

18 Q Did his leg swell up to like what seemed like enormous
19 size?

20 A His leg would be -- would've been swollen to much
21 larger size.

22 Q Okay. All right. All right, and Dr. Holleman, again,
23 if he'd been timely diagnosed and referred as needed, that
24 wouldn't have happened to him.

25 A That's correct.

1 Q All right, and it's -- you believe that to a
2 reasonable degree of medical certainty.

3 A I do.

4 Q And are all the opinions on the questions I'm asking
5 you here today stated to a reasonable degree of medical
6 certainty?

7 A Yes, they are.

8 Q Okay. And that it's more probable than not that all
9 these complications we're talking about would not have
10 occurred if he'd been timely diagnosed.

11 A Right.

12 Q Okay. All right, would he have the -- as long of a
13 hospital stay -- would he have had to stay in the hospital
14 seven days if he'd had those non-emergency surgeries?

15 A Possibly yes, possibly no. You know, three to seven
16 days is not unusual hospitalization for this kind of
17 surgery, depending on how things go.

18 Q Okay. All right. What about the seven-month-long
19 recovery period? Would his recovery have been as difficult
20 or as long if he'd had the surgery on a non-emergency
21 basis?

22 A No. The likelihood is within four to six weeks he
23 would've been essentially normal.

24 Q All right. And what about the permanent damage to the
25 nerves and muscles in his leg that resulted from a

1 compartment syndrome? Would he have suffered from those or
2 had that complication, those complications, if he'd been
3 timely diagnosed back on April 10th, 2011?

4 A He would not have had he sought attention and, you
5 know, somebody arranged to have this elective popliteal
6 aneurysm repair.

7 Q Okay. So if he'd been -- if he'd been diagnosed in
8 the ER on April 10th, 2011 and properly referred somewhere,
9 that wouldn't have happened to him.

10 A Correct.

11 Q Okay. All right, would -- Dr. Holleman, would he have
12 the permanent foot drop that he still has today if he'd
13 been timely diagnosed on April 10th, 2011 and referred to a
14 vascular guy or ordered for diagnostic tests?

15 A No.

16 Q No, he would not have that ---

17 A No, he would not have that.

18 Q Okay. Would he have the permanent and chronic foot
19 pain and leg pain that he still has today if he'd been
20 timely diagnosed and referred to a vascular surgeon or for
21 further diagnostic testing on April 10th, 2011?

22 A He would not have.

23 Q Dr. Holleman, what is your opinion on future care that
24 Phil may need as far as his -- the condition of his leg and
25 foot with regard to the vascular issues?

1 A I think that -- that his graft should be eval -- a
2 durable graft -- I think that he -- you know, anyone with a
3 bypass graft it would be in his best interest to have an
4 ultrasound once a year or every other year now to -- for
5 that -- for that probably from now on.

6 Q Okay. Do you believe that the graft is likely to last
7 his lifetime, or is there a chance that it may fail at some
8 point?

9 A The likelihood is that this graft -- I'm sorry -- with
10 a -- excuse me -- the likelihood is that this graft will
11 last him a lifetime.

12 Q Okay. Do you have any estimate on the percentage
13 chance that it might fail based on studies and your
14 knowledge of these things?

15 A I would think that he would probably have a -- a --
16 maybe a 70 to 80 percent chance of having a patent graft
17 without any kind of intervention. If he has an
18 intervention maybe a 50/50 chance of preserving the graft
19 for the rest of his life, so probably a 10 or 15 percent
20 chance of the graft failing.

21 Q Okay.

22 A About a 10 or 15 percent chance of the graft requiring
23 intervention to keep it working.

24 Q Okay. So 10 or 15 percent chance that it might fail
25 entirely ---

1 A Correct.

2 Q --- and a 10 or 15 percent chance that it might just
3 need some work or some revision.

4 A Right.

5 Q Okay. One other complication, as you told us earlier,
6 the two arteries -- two of the arteries in Phil's lower leg
7 are still completely blocked.

8 A Correct.

9 Q All right. Would he have two completely blocked
10 arteries in his lower leg if he'd been timely diagnosed and
11 referred to a vascular consult or referred for further
12 diagnostic test on April 10th, 2011?

13 A Chances are he -- it's quite possible he would still
14 have those two arteries blocked. I mean it's not -- you
15 know, if he had not -- I mean the likelihood is that by the
16 time anybody got to those arteries, that procedure, that
17 was going to a chronic clot, and that was not going to come
18 out easily, so ---

19 Q Okay.

20 A --- I think at that point ---

21 Q He might still have that.

22 A He might still have those two arteries occluded.

23 Q Okay. All right. All right, doctor, have you -- once
24 again, are all the -- all the opinions you've expressed

1 here today stated to a reasonable degree of medical
2 certainty?

3 A They are.

4 MR. PROFFITT - Thank you, Dr. Holleman, I don't
5 have anything further.

6 THE COURT - You may cross examine.

7 CROSS EXAMINATION

8 BY MR. HOLLER -

9 Q Dr. Holleman, good afternoon. I'm David Holler; I
10 introduced myself earlier. A few questions for you. The -
11 - the physician-patient relationship is a partnership.
12 Would you agree with that?

13 A Yes.

14 Q That when you ask a -- when you ask a patient to do
15 something, you expect them to do it.

16 A Based on -- I would like to think that they would do
17 it. Based on what happens across the country, that
18 frequently does not happen.

19 Q Okay. Well, there's an issue of patient compliance.

20 A Okay.

21 Q Okay. And there are things that get in the way of
22 compliance. Understanding. Right?

23 A Sure.

24 Q So there's an educational component when you deal with
25 your patients, when any physician deals with their

1 THE COURT - All right, the record will reflect
2 that the jury has returned to the courtroom. Juror
3 Shikierra Harrison, if you'll raise your hand, please.

4 (WHEREUPON, JUROR COMPLIES)

5 THE COURT - You are now a member of the regular
6 jury. You're no longer an alternate. This morning when
7 Mr. Usher appeared, he had been up all evening sick and
8 having problems, so I did not allow him to come in the jury
9 room you; I didn't want that spread among the rest of the
10 jury, so now you have been made a part of the regular jury.
11 You understand that?

12 JUROR - Yes.

13 THE COURT - All right, thank you, ma'am. All
14 right, I trust everyone had a good evening. If anyone had
15 any difficulty in complying with my instructions over
16 night, I'd ask that you please raise your hand or stand.

17 (NO REPSONSE)

18 THE COURT - It appears that all jurors have been
19 able to comply with my instructions thus far. Yesterday
20 afternoon when we stopped we were receiving evidence from
21 the plaintiff; we'll continue to do that at this time. The
22 plaintiff may proceed.

23 MR. PROFFITT - Thank you, Your Honor. The
24 plaintiff calls Phil Ethier.

25 THE COURT - Come forward, sir, to be sworn.

PHILIP ETHIER -- DIRECT -- BY MR. PROFFITT

1 PHILIP ETHIER, AFTER BEING FIRST DULY SWORN,
2 TESTIFIES AS FOLLOWS -

3 THE COURT - Have a seat, please, sir.

4 Once seated, state your name, please.

5 MR. ETHIER - My name is Philip Ethier.

6 THE COURT - Thank you. Counsel, your witness.

7 MR. PROFFITT - Thank you.

8 THE COURT - Yes, sir.

9 DIRECT EXAMINATION

10 BY MR. PROFFITT -

11 Q Good morning, Phil. How are you doing?

12 A Good morning. Nervous.

13 Q That's okay. All right, Phil, if you would, I just
14 want you to introduce yourself to the jury by telling them
15 where you grew up and where you were raised?

16 A I'm 56 years old. I was born in Massachusetts. We
17 moved to North Carolina, actually, I believe it was 1997,
18 somewhere around there. We stayed there -- it was actually
19 earlier than that. We were there for 13 years, and we've
20 been in South Carolina for about four years.

21 Q Okay. All right, tell us a little bit about your
22 education. Where'd you go to high school?

23 A Went to high school at Blackstone Regional High
24 School; I dropped out in ---

25 Q Where was that?

1 A That's in Blackstone, Massachusetts.

2 Q Okay. Go ahead.

3 A I dropped out -- I wanted to be a pitcher. I was an
4 athletic-type person, so I made the varsity baseball team,
5 I believe, when I was in the eighth grade, but in the 9th
6 grade I broke my wrist, my right wrist -- I was a pitcher -
7 - so that pretty much ended my baseball career, so -- we
8 come from a pretty poor family, so I dropped out of school
9 and went to work ---

10 Q All right.

11 A --- in tenth grade.

12 Q Tenth grade. Okay. Did you eventually go back and
13 get your high school diploma?

14 A Yes, I did. I went back and got my GED.

15 Q When did you do that?

16 A I can't say the exact date, um ---

17 Q When you were still in your teens or about 20 or ---

18 A No, it was my 20s, early 20s, mid 20s.

19 Q All right, what were you doing for work during that
20 period in your late teen years, early 20s?

21 A I was a foreman at a plastic factory. They made like
22 saran wrap. We actually sold to saran wrap through
23 actually that company, but, you know, they would put
24 whatever company's name on it that bought it from the
25 company.

1 Q All right. And about how long did you work there?

2 A I worked there between 11 and 12 years.

3 Q All right. And what -- what did you do next, as far
4 as your work career?

5 A I got offered a job actually with the pastor of my
6 church to go work for a company called Catifac. We made
7 prototype machinery and I was an electrical technician, I
8 wire-up the machinery. Pretty much -- it was experimental
9 machinery. The company would ask us to build a machine
10 that would do a certain thing, ---

11 Q Okay.

12 A --- and the engineers would design the machine and
13 we'd build it from scratch.

14 Q All right. And was it about 1990 when you got into
15 nursing, when you started going to LPN school?

16 A Yes, it was.

17 Q And about how old were you then?

18 A Oh, I believe I was probably about 29, about -- maybe
19 even in the early 30s.

20 Q Okay. All right. And where'd you go to LPN school?

21 A I went to LPN school at Amherst Valley Vocational
22 Technical High School.

23 Q All right. And what is an LPN?

24 A An LPN is a licensed practical nurse.

25 Q How long did you go to school for that?

1 A I went to school for that for one year.

2 Q All right. And after you got out, did you get a job
3 as an LPN somewhere?

4 A Yes, I did.

5 Q Where'd you work up there in Massachusetts at first?

6 A My first four to five years I worked in the nursing
7 home.

8 Q In Massachusetts?

9 A In Massachusetts.

10 Q Okay. And then did you move down to North Carolina?

11 A Then we moved down to North Carolina.

12 Q Okay. Who are you married to?

13 A I'm married to my wife, Jeanne Ethier sitting over
14 there.

15 Q Okay. How long have you guys been married?

16 A Twenty-eight years four days ago.

17 Q Okay. All right. What does Jeanne do?

18 A Jeanne is an RN.

19 Q A registered nurse?

20 A Yes, she is.

21 Q And what kind of nurse is she?

22 A She's a psychiatric nurse.

23 Q And where does she work?

24 A She works at Piedmont -- I believe it's Piedmont
25 Hospital in Rock Hill.

1 Q Okay. All right.

2 A In the psychiatric unit.

3 Q Now, once you moved to North Carolina and were working
4 as an LPN, what kind of LPN jobs did you have?

5 A I believe my first LPN job in North Carolina I worked
6 at a nursing home for four to five years.

7 Q Okay. And what did you do at the nursing home? What
8 were your general duties?

9 A I was a floor nurse, so I would do patient dressings,
10 give them shots if they needed shots, write notes on them.
11 That was probably the biggest job, because working as an
12 LPN is writing notes.

13 Q Okay.

14 A I do rounds with the CNAs. That's when I do my
15 assessments. I would -- it was easier for me to work right
16 along-side the CNA and help them change the patients
17 because then I could actually look at them, so I -- that's
18 the way that I worked. Not all nurses do it that way, but
19 that's the way that I worked.

20 Q Okay. And did you work in some other places in North
21 Carolina, some other types of facilities?

22 A Yes, I did take a little break from nursing for a
23 while, and I worked construction for a couple of years.

24 Q Okay. And then what?

1 A Then I realized it was too hot and it didn't pay
2 enough money to be working outside in the heat, so I went
3 back into nursing.

4 Q Okay. And what kind of places did you work then?

5 A I believe after that there I went to ---

6 Q Or just the types of places. You don't have to
7 remember the names.

8 A Okay, it was nursing homes, doctor's offices, that
9 type of -- and I worked in an urgent care and they pretty
10 much were closing up, so I left there and ---

11 Q Okay.

12 A --- I went to work for a private doctor.

13 Q Okay, so the urgent care was like one of these
14 doctor's care places?

15 A Yes. Yes, people who went there for colds, or if they
16 couldn't -- they -- it was actually company called ECIM
17 which was East Carolina Internal Medicine. It was a big
18 facility. They have a lot of doctors that work there, so
19 they have a lot of patients, so if a patient couldn't get
20 in to see a doctor, what they would do is they would come
21 to the urgent care.

22 Q Okay. All right, and you moved to South Carolina in
23 about 2010?

24 A Yes, sir.

25 Q And where in South Carolina do you live? What city?

1 A I live in Chester, South Carolina.

2 Q Okay.

3 A Oh, I actually worked at Port Human Services also

4 after the ECIM?

5 Q Okay, and what's Port Human Services?

6 A Port Human Services is a non-profit organization.

7 They pretty much take care of the people that who are in

8 need, people who don't have insurance, people with drug

9 issues, ---

10 Q Okay, and that was ---

11 A -- I ran a methadone clinic couple days of week,

12 dispensed methadone and ---

13 Q That was an LPN job?

14 A That was LPN job.

15 Q All right. Now, when you moved to South Carolina, did

16 you continue to work as an LPN?

17 A Yes, I did.

18 Q Okay. And what was your first job in South Carolina,

19 what type of job?

20 A My first job in South Carolina was working for a Home

21 Health as an LPN.

22 Q All right. And did you eventually take a job with

23 Fairfield Memorial Hospital?

24 A Yes, I did.

1 Q Okay. And do you remember, approximately, when you
2 started working as an LPN there?

3 A I'm a little nervous and confused. I cannot -- on the
4 exact there I'm not sure.

5 Q Okay. Was it about March, 2011, late March, 2011?

6 A That sounds right.

7 Q Okay. All right. And where were you going to work
8 there in the hospital?

9 A In the emergency room.

10 Q Okay. Was that the first time you'd ever worked in
11 any kind of ER setting?

12 A Yes, it was.

13 Q All right. So what's the date of the incident that
14 we're -- that we've talked about all week so far?

15 A April 10th, 2011.

16 Q All right. And so how long had you been there at the
17 hospital? Were you still doing orientation?

18 A I believe I was still on orientation, yes.

19 Q Okay. All right, and do you know what you were making
20 per hour at the hospital?

21 A I believe it was \$16.50 an hour.

22 Q Okay. All right. Now, Phil have you worked your
23 entire life?

24 A I've always worked. I started working when I was
25 probably nine years old working at a zoo. My friend's

1 father owned a zoo, and I worked at a zoo from nine til I
2 was probably 15 or 14. I worked at a restaurant as a
3 short-order cook for a period.

4 Q Have you ever been without a job since you were like
5 15, 16 years old?

6 A Maybe for a month or so -- with - so -- maybe even
7 three months -- I was out on workmen's comp, I believe,
8 when I got hit by a patient, but besides that I always
9 worked.

10 Q All right. Now, Phil, tell us a little bit about your
11 health before all these things happened to you in April,
12 2011. How was your health?

13 A I believe I was in great health. I was very, very
14 athletic, gym four or days a week, jogger, hiker, played -
15 loved playing softball, I played softball on a church
16 softball team. Me and my wife used to hike all the time,
17 fishing, boating, camping, volleyball. I mean it was just
18 -- it's the way that we lived.

19 Q Okay. Did you ever have any chronic leg pain?

20 A No, I did not.

21 Q Did you ever have any chronic pain of any kind?

22 A Not -- well, no.

23 Q All right. Were you able to do pretty much anything
24 you wanted to do as far as activities or work-related
25 things?

1 A No, I was say just about anything I wanted to do.

2 Q Okay. All right, now did you -- I think you said you
3 worked construction for a couple of years at some point.

4 A Yes, sir.

5 Q Do you remember falling in a ditch in about the year
6 2000?

7 A Actually we were working in the ditch putting in
8 piping for the drainage system and the -- they're supposed
9 to put in a steel cage around you to protect you and they
10 were in a rush, so they didn't do that and part of the
11 ditch collapsed in on me.

12 Q Okay. And were you injured by that?

13 A I did hurt my -- I -- my foot got sucked in -- where
14 they actually hit my foot with a shovel -- when they were
15 pulling me out and my boot stayed in the dirt and I did
16 have some leg spasms and some back pain.

17 Q Okay. And did you receive some treatment for that?

18 A I went to the emergency room, and they -- they pretty
19 much just sent me home, then they actually called me back
20 and said don't go to work until you see another doctor,
21 because there might be something there.

22 Q All right, so did you receive some medical treatment
23 and heal up?

24 A Yes, I did. When I went back to the other doctor he
25 said there was nothing and he sent me back to work.

1 Q All right. And so you just had some back strain that
2 went away?

3 A Yes, and some sciatica they -- a nerve in the back and
4 the leg.

5 Q And that was in the year 2000?

6 A In the year 2000, yes.

7 Q Okay. And after that healed up, did you have any more
8 back pain or leg pain or anything like that ---

9 A No, I did not.

10 Q --- until all this happened?

11 A No, I did not.

12 Q All right, Phil, do you have high blood pressure?

13 A Yes, I do.

14 Q Okay. And have you had that for a number of years?

15 A On and off.

16 Q And have you monitored that yourself at times and ---

17 A I monitor it all the time myself.

18 Q Take your own blood pressure?

19 A Yes, I do.

20 Q Okay. All right, Phil, tell us a little bit -- and
21 you mentioned some of this -- but tell us a little bit
22 about your hobbies and recreational activities that you
23 would do before all this happened, before you were --
24 before April, 2011.

1 A Like I said, I would jog, go to the gym, play
2 volleyball, swim. I've got a swimming pool, which I really
3 can't get in anymore. I've gone in it probably twice over
4 the last ---

5 Q Yes.

6 A --- four years.

7 Q Okay. Did you do carpentry jobs around the house?

8 A Oh, yes, I've actually -- I built a -- I believe it's
9 a 10 by 30 deck, built a deck on the back of my house; I
10 put in a sliding glass door on my house. I put hardwood
11 floors in my house. I built a -- I believe it's like a 40
12 by 10 deck on the front of the house, ---

13 Q Okay.

14 A --- and I built that alone. I don't -- I like working
15 alone. It's the way I am.

16 COURT REPORTER - I'd ask that he speak into the
17 mic.

18 Q Yes. Phil, speak into the mic so the court reporter
19 can hear you well. All right, do you -- were you able to
20 do things around the house like mowing the yard, washing
21 the car?

22 A I love to work out in the yard. I was always working
23 in the yard; I always had a garden. I built a 13 by 27
24 greenhouse. I was actually starting to grow palm trees.
25 Once I found our palm trees would grow around here, I did

1 studying and learned how to grow them, and actually me and
2 my wife used to live in Myrtle Beach would steal some of
3 the seeds off the palm trees once in a while.

4 Q All right. Did you chop your own firewood?

5 A Yes. I cut my own firewood and chopped my own
6 firewood.

7 Q All right.

8 A We have a fireplace and we -- to supplement the
9 heating in the house.

10 Q Yes, okay. All right, did you raise dogs at some
11 point?

12 A Yes, we used to have a -- a small dog business, a
13 Yorkie business, actually small -- we raised them and we
14 lived around Camp Lejeune in North Carolina, so they pretty
15 much went as fast as we could get them.

16 Q What kind of dogs were they?

17 A Mainly Yorkies, little tiny Yorkies. We did the
18 teacup ones, the little two, three, four-pounders. A lot
19 of the marines would buy dogs for their wives or their
20 girlfriends before they went overseas.

21 Q Yes.

22 A So we pretty much even had a waiting list. We had a
23 very, very good name, so -- that we had no problem selling
24 dogs.

1 Q Okay. All right, Phil, were you the kind of dog that
2 often helped others, as far as ---

3 A Oh, I'd be the first one out there.

4 Q --- odd jobs and things your brother-in-law might need
5 around the house or whatever?

6 A Oh, yes, I would -- I absolutely just loved -- that's
7 my thing. I just -- I was the type of person who would
8 start at 6:00 o'clock in the morning and end at 9:00
9 o'clock at night.

10 Q Always on the go?

11 A Always on the go.

12 Q Okay. Before all this happened.

13 A Before all this happened.

14 Q All right. Phil, let's talk about -- let's move to
15 the date of this incident, this visit to the ER ---

16 A Yes, sir.

17 Q --- on April 10th, 2011. I want you to tell the jury
18 where you had been that morning and what -- what you were
19 doing that day?

20 A Me and my wife had gone -- we went to church ---

21 Q Where do you go church?

22 A We were going to Chester Second Baptist Church in
23 Chester.

24 Q Okay.

1 A We had gotten home from church, and they were actually
2 having a cookout next door. My sister lives next door, my
3 older sister and my brother-in-law, and we were going to
4 have a cookout that day and had company coming over, so I
5 went -- I told them instead going right over there after
6 church I was going to go take care of my dogs, and so when
7 I got home, I changed up my church clothes and I was going
8 out to the back to get dog food to feed my dogs, and I felt
9 a very sharp pain in my leg.

10 Q All right. Okay, Phil, I'll show you on the screen
11 here what's been marked as Plaintiff's Exhibit 36. What's
12 that a picture of?

13 A That's actually a picture of me standing on my back
14 deck taking a picture of pointing to the pathway that leads
15 right in front of the dog pins.

16 Q Okay, so this is sort of where you were walking that
17 Sunday morning?

18 A Yeah.

19 Q Okay. And you're standing on the deck taking that
20 picture out into your yard?

21 A Yes, I was.

22 Q Okay. And is this another picture? What is this?

23 A It's pretty much the same picture, but I'm not
24 standing on the deck at that time.

1 Q Okay. And that -- that I just showed you was
2 Plaintiff's Exhibit 37. Let me show you Plaintiff's
3 Exhibit 38. What's that a picture of?

4 A That's me standing on my back porch taking a picture
5 of my shed and part of my back yard.

6 Q Okay. All right, and what's this a picture of,
7 Plaintiff's Exhibit 39?

8 A Pretty much the same thing, the dog path where we --
9 where I went. If you see it, there was a palm tree there
10 on the left, that right outside the palm tree there's a
11 straight path probably about three, four feet wide, and
12 that's where my dog pins line up.

13 Q Okay. All right, so you're walking out to the shed
14 around or to the dog pin area to feed your dogs, and what
15 happened, you felt a sharp pain? Tell me what happened.

16 A I just -- just out of nowhere I just -- my leg was
17 just screaming out in pain, one of the worst pains I've
18 ever felt in my life.

19 Q Did you look at your leg?

20 A I looked and my leg and it was a purplish color; I
21 felt it; it was cold.

22 Q Okay.

23 A I was -- it was cramping.

24 Q What did you do?

1 A I had no idea what was going on. I -- I started
2 rubbing it at that time and then I went back into the
3 house.

4 Q Okay. What'd you do there?

5 A I -- first thing I did is I took a couple aspirin that
6 were sitting right there.

7 Q Okay.

8 A Started massaging my leg. I don't know if I had
9 filled up the tub or not at that time, but I kept massaging
10 my leg and it was cold, very, very cold, so I was filling
11 up the tub with hot water, you know, I wanted to soak my
12 leg, and I found some Tylenol -- I'm not sure if it was
13 before or after I had soaked it. I soaked it like and kept
14 massaging it trying to make it feel better.

15 Q Okay.

16 A It did start feeling a little bit better.

17 Q Okay.

18 A And that's pretty much what went on, let the medicine
19 kick in, see if it would help, see if it would go away.

20 Q And about what time was that? Right after church or
21 so, 1:00 o'clock or so?

22 A It was between 1:00 and 1:30. I can't exactly what
23 time it was. It -- that's just giving it a rough guess.

24 It -- you know, takes 15 minutes, 20 minutes to get home
25 from church, and by the time I changed up and got outside -

1 - I'm not exactly sure what time church got over so -- and
2 all this time I've had -- they're an estimate, but, you
3 know, they're fairly close.

4 Q Okay. All right. And when did you go to the ER?

5 About what time did you go to the ER?

6 A I believe I went to the ER about 3:00 o'clock.

7 Q Okay. And what ER did you go to?

8 A I went to Fairfield Memorial ER.

9 Q Did anyone go with you?

10 A Yes, I had my wife drive me, wasn't able to drive.

11 Q All right. And what happened when you walked in the
12 door to the ER? Who did you see?

13 A When I walked in the door in the ER, the first thing I
14 did was approach the window and told them I needed to be
15 seen. They told me to sign and have a seat.

16 Q Okay. What did you tell the lady there at the front
17 area?

18 A At that point nothing, because she just told me to
19 sign in and have a seat.

20 Q Okay. Did you tell her anything about leg pain?

21 A I did a few minutes later. After probably four or
22 five minutes she pulled us into a little side room, myself
23 and my wife, and she started asking me questions why I was
24 there. I told her I was there because I had right leg
25 pain.

1 Q Hang on. You talking about the CNA that took you back
2 into triage?

3 A No, I'm talking about the admission lady.

4 Q Oh, okay. All right.

5 A She took a picture of my license, started to ask where
6 I lived, got all my information, just -- she pretty much
7 admitted to the emergency room.

8 Q What was your leg looking like at that point?

9 A It was still purplish; it was cold; it was still
10 hurting.

11 Q It was the leg and the foot or just the leg?

12 A It was the leg and the foot. And that's why I told
13 her when I checked in that my leg was killing me.

14 Q Which leg?

15 A My right lower leg.

16 Q All right. What happened next after you talked to the
17 lady up front and she does all the paperwork, then what
18 happened?

19 A Then she told me to go have a seat. Because I work
20 there I know what happens, is that she pushes a little
21 buzzer and ---

22 Q Well, now you're talking about what you knew later.

23 A Okay. All right.

24 Q Let's don't go there for now. Let's -- stick to what
25 you're doing that day.

1 A Okay. I went and I had a seat in the waiting room
2 until the triage person came back and got me.

3 Q Okay. Now, did you know the triage person at the
4 time?

5 A No, I did not.

6 Q Did you subsequently learn who she was during the
7 course of this lawsuit?

8 A Yes, I did.

9 Q Okay, what's her name?

10 A Her name is Samantha Anthony.

11 Q All right, so -- but you'd never met her before that?

12 A No, I had not.

13 Q Didn't know her.

14 A No.

15 Q Did you really know anyone at the hospital?

16 A That day that I went in I did not recognize anyone.

17 Q How many days had you been there for orientation so
18 far? Do you remember?

19 A It was April 10th. I believe I started there on March
20 31st, so I probably worked there -- actually worked with
21 people, because it was some classroom teaching, maybe four
22 days, five days.

23 Q Okay. All right, so you didn't really know anybody in
24 the ER.

25 A No. I did not.

1 Q And, of course, you'd never met Dr. Bibeau ---

2 A No, I did not.

3 Q --- at that point. All right, so you -- what
4 happened? You're taken back to triage by Ms. Anthony.
5 Correct?

6 A That's correct.

7 Q Tell me what happened in triage?

8 A She took my vital signs, asked me why I was there,
9 asked me what my pain level was. I told her it was about -
10 - it was extreme pain, and it was probably about seven or
11 an eight. She asked to take a look at my leg, asked me if
12 I had any allergies, what medications I was on, if I had
13 any medical history, which I told her I did have -- I had a
14 skin cancer on my nose, and I told her I had hypertension,
15 a risky hypertension.

16 Q Right. Did you um -- did Ms. Anthony look at the foot
17 and leg?

18 A Yes, she asked me to take off my shoe and sock and to
19 pull up my pants leg so that she could take a look at it.

20 Q All right. Did she touch you? Did she do anything
21 touching you?

22 A She did lift up my foot and I believe she took my
23 pedal pulses. That's what I remember.

24 Q All right. So she took your foot pulses?

1 A I believe were only taking one pulse. The only one I
2 remember her taking was the pedal pulses, the one on the
3 top.

4 Q Okay. But you don't deny that she may have taken both
5 of them?

6 A No, I don't deny that she may have taken both.

7 Q And did she take the two foot pulses on the right
8 foot?

9 A Yes, she did.

10 Q Okay. Did she ever take any foot pulses on the left
11 foot?

12 A No, she did not.

13 Q Did she ever take any pulses anywhere else, behind the
14 knee on either leg?

15 A No, she did not.

16 Q Did she take any pulses up near your hip or groin
17 area?

18 A No, she did not.

19 Q Okay. All right. Did you -- did you have a primary
20 care physician at that point?

21 A I had been to Blue Granite a couple of weeks prior to
22 that.

23 Q And what for?

24 A The hospital actually sent me down there for a pre-
25 exam before I got hired, because my blood pressure was

1 high. They sent me down there to get some medications for
2 blood pressure and to -- so that when they finished the
3 exam up my blood pressure would be okay to a point where
4 they could me.

5 Q Stay near the mic. Mr. Ethier, I'll show you what's -
6 - or Phil, I'll show you what's been marked as Plaintiff's
7 Exhibit 22, a page from that exhibit. You see where I'm
8 pointing down here where it says family doctor?

9 A Yes, I do.

10 Q What does that say?

11 A That says Blue Granite.

12 Q All right. And is that the page that -- does this say
13 it's a triage record?

14 A Yes, it is.

15 Q What's your understanding of what Blue Granite is?

16 A Blue Granite is -- from what I understand, the
17 hospital put Blue Granite there, and I believe the hospital
18 owns Blue Granite. Blue Granite is kind of an overflow for
19 people who don't have money or insurance so they won't take
20 up the time at the emergency room; they'll send them to
21 Blue Granite, and that's run by a nurse practitioner.

22 Q Okay. To your knowledge, was there any doctor
23 available at Blue Granite?

24 A No, a doctor did not work at Blue Granite.

1 Q Okay. If you needed to see a doctor you came to the
2 hospital or Blue Granite, where'd you go?

3 A If you would have to see the doctor, you have to go to
4 the emergency room.

5 Q Okay. Phil, did -- during triage, were you ever
6 examined by anyone other than Samantha Anthony?

7 A Examined? Dr. Bibeau examined me quickly.

8 Q During triage, when that initial ---

9 A During triage, no one. Samantha Anthony was the only
10 person with me besides my wife.

11 Q Okay. Did Jerilyn Wadford, a registered nurse at the
12 hospital, ever examine you during triage?

13 A She did not.

14 Q Did Jerilyn Wadford ever take any foot pulses on you
15 on either foot or leg?

16 A No, she did not.

17 Q Did a nurse named Rhonda Gwynne ever take any foot
18 pulses on you?

19 A No, she did not.

20 Q Did she take a foot pulse or any kind of pulse on the
21 right leg?

22 A No, she did not.

23 Q Did she take a -- did Rhonda Gwynne ever take a foot
24 pulse of any kind on the left leg?

25 A No, she did not.

1 Q Did Rhonda Gwynne ever come into triage or do anything
2 during triage while you were there to you?

3 A No, she did not.

4 Q Okay. And who were the only people that were involved
5 in the process of triage there at the hospital on that
6 afternoon with you?

7 A Samantha Anthony.

8 Q And who else was in the room?

9 A My wife.

10 Q All right. Okay, did you ever tell Samantha Anthony
11 that you had been bitten by a spider?

12 A No, I did not.

13 Q Did you ever tell Dr. Bibeau that?

14 A No, I did not.

15 Q Did you ever tell nurse Rhonda Gwynne or nurse Jerilyn
16 Wadford that you'd been bitten by a spider?

17 A I hadn't seen Ms. Wadford that day, but no I did not.

18 Q Okay. Did you ever see any kind of spider bite mark
19 on your leg?

20 A No, I did not.

21 Q Okay. All right, so after your triage by Ms. Anthony,
22 then what happened?

23 A Ms. Anthony had me walk across the hall to what they
24 call exam room number 2. It's got a stretcher and a
25 curtain that goes across, and she had me set on the

1 stretcher and told me she was going to get the doctor. She
2 actually put me on a blood pressure monitor, because she
3 was concerned about the blood pressure because it was high,
4 and I do get situation when my high blood pressure -- I'm
5 sure my blood pressure is high right now; I'm nervous.

6 Q Okay. All right. All right, so she takes you the
7 exam room where Dr. Bibeau's going to see you or a doctor
8 is going to see you.

9 A That's correct.

10 Q Okay. And who walked in?

11 A Dr. Bibeau walked in.

12 Q And did you know him at the time?

13 A No, I did not.

14 Q Okay. And what did Dr. Bibeau say or do? What
15 happened?

16 A Dr. Bibeau introduced himself as being a doctor.
17 Asked me what happened, you know, what had happened. I
18 pretty much told the same thing I said earlier, I was in
19 the backyard and my leg turned cold and pain was
20 incredible, absolutely -- I've had pain worse one time and
21 that's when I had a kidney stone, but besides that's it's -
22 - it was ranking pretty close to that.

23 Q Okay. All right, did you tell the doctor what color
24 your leg had been?

1 A Yes, I told him that it was ecchymotic or a purplish
2 color from the knee down to the toes. The toes were
3 definitely a lot darker than -- that's where -- it was
4 pretty -- really dark purple.

5 Q Okay. All right. Now, and what did Dr. Bibeau do?

6 A Dr. Bibeau looked at it in a -- gave me the impression
7 that he had seen that a thousand times.

8 Q Why do you say that?

9 A Well, he just looked at it -- didn't -- there was
10 nothing -- he just looked at it and he put his hand on the
11 front of my leg and then the side and said something, well,
12 that it was, you know, definitely it felt cool. He said
13 you probably got a spider bite, I'm going to give you some
14 prednisone, explained what the prednisone was for.

15 Q Which is what? What is prednisone?

16 A It's a steroid; it's going to help relieve
17 inflammation, swelling, discoloration, that he was going to
18 give me some Percocet.

19 Q What is Percocet?

20 A Percocet is a narcotic pain medicine -- and said, you
21 know, uh -- that I'll -- I'm going to give you a couple of
22 prescriptions to take home with you, you know, take the
23 medicine as directed and, you know, give it a little bit of
24 time, it should be better.

1 Q Okay. Where do you recall Dr. Bibeau touching you on
2 the leg or foot?

3 A I believe he touched me on the side of the calf and
4 right on the front shin.

5 Q Okay. Do you recall Dr. Bibeau taking your foot
6 pulses?

7 A He never touched my -- never took my pulses at all.

8 Q So is the only person that ever took your foot pulses
9 on the right foot that day in the ER Samantha Anthony?

10 A That was correct.

11 Q Did Dr. Bibeau take the foot pulses on your left foot?

12 A No, he never looked at my left foot.

13 Q Did he take any kind of popliteal pulse behind the
14 knee on either leg?

15 A No, he did not.

16 Q Did he do any kind of femoral pulse on either leg up
17 in the groin or hip area?

18 A No, he did not. I actually still had my pants on, so
19 they never even had put me in a gown.

20 Q Okay. So did you just pull your pant leg up?

21 A I just pulled my pants leg up.

22 Q Were you wearing long pants or did you have on shorts?

23 A I had long pants on.

24 Q Okay. All right. Okay. Up until that point when Dr.
25 Bibeau walks in and says it looks like it's probably spider

1 bite, had anybody in that ER ever said the word spider
2 bite?

3 A Not that I can recall, no.

4 Q Did you ever tell Dr. Bibeau that you thought you'd
5 been bitten by a spider?

6 A No, I did not.

7 Q Did you ever tell anybody in the ER you'd ever been
8 bitten by a spider?

9 A No, I did not.

10 Q Did you ever call the ER ahead of time and tell them
11 you thought you'd been bitten by something and you're
12 coming in?

13 A No, I did not.

14 Q Now, how long do you think Dr. Bibeau's exam lasted
15 when he's in the room with you examining you or talking to
16 you?

17 A It was under five minutes.

18 Q Okay, so was it a very brief time?

19 A Oh, it was a very brief time. He did more time
20 writing than he did talking or examining.

21 Q Okay. Did he do anything else other than what you've
22 told us? He sort of comes in, says hi, you give him some
23 descriptions, he touches your leg on the side and the
24 front; anything else that he did to examine you?

1 A Not pretty much besides telling me it was going to
2 take a little bit of time, what medication he was going to
3 give me, asked me if I had any allergies to any medication,
4 and like I said, he looked at it and he seemed like he look
5 -- seen the same thing a thousand times, so it actually
6 made me feel better. I felt pretty good. It was like,
7 okay, God -- thank God it's only a spider bite, so I was
8 actually very happy that he gave me that diagnosis.

9 Q All right. Did you believe Dr. Bibeau when he said
10 that?

11 A Oh, I believe and trusted him a hundred percent.

12 Q Okay. Phil, do you believe and trust doctors all the
13 time?

14 A Up to that point I did.

15 Q Okay. Is that what you did as an LPN for years since
16 your early 30s?

17 A I always had to trust doctors.

18 Q All right. At that point, Phil, had you ever heard of
19 a thing called an aneurysm in the popliteal artery?

20 A No, I had not.

21 Q Did you know what the popliteal artery was?

22 A I did not.

23 Q Did you know that you were having some kind of
24 vascular event or a blood vessel problem? Did you have any
25 suspicion of that?

1 A No, I've never seen one. No, I never have.

2 Q Never known anybody that something like that happened
3 to before?

4 A No, I do not.

5 Q Okay. And what did Bibeau tell you again, that -- as
6 far as what to do?

7 A Once again, he asked me if I had any allergies to
8 medication, to take the medication and give it a little bit
9 of time and make sure I follow-up with my blood pressure,
10 because it was high.

11 Q Okay. All right. And what happened next?

12 A He walked out of the room.

13 Q Okay. And then what happened?

14 A I don't know much longer -- a few minutes later one of
15 the -- an LPN came in and gave me prednisone and Percocet.

16 Q Is that that the nurse you later learned to be Rhonda
17 Gwynne?

18 A That's correct.

19 Q Did you know her at the time?

20 A I -- I think I may have seen her in passing once. I
21 don't really remember her. When I walked in that day I
22 didn't recognize anybody.

23 Q Okay. All right, and did Ms. Gwynne discharge you?

24 A Yes, she did.

1 Q All right. And what did she do during the discharge?
2 What did she do or say?

3 A The discharge took about 30 seconds. She walked in;
4 she said doc wants you to follow-up, make sure you get that
5 blood pressure checked because -- I mean because it's high
6 and sign here, please. And we did that -- she gave me a
7 clipboard and I signed it as we were walking out of the
8 door.

9 Q Okay. Did you -- what did you understand her to say
10 as far as following up with a doctor? What were you
11 supposed to follow-up about?

12 A My blood pressure.

13 Q All right. Did you believe that you were supposed to
14 follow-up with regard to a spider bite?

15 A No.

16 Q Did she ever tell you that?

17 A No.

18 Q Did Dr. Bibeau ever tell you, specifically, to follow-
19 up with your family doctor about a spider bite?

20 A No, they never even did a treatment for a spider bite.
21 They did nothing, didn't even look for one.

22 Q So after -- after he's looked at you and decided it's
23 a spider bite, you just sort of walk out the door 10
24 minutes later?

25 A Yes, about that.

1 Q Okay. After he said it was a spider bite, did any of
2 the nurses come back in and do any further examination to
3 try to find some kind of bite mark?

4 A No, they did not.

5 Q Did any of the nurses come back in and do any kind of
6 further treatment or analysis or anything to do -- to try
7 to figure out if it's a spider bite?

8 A No, I never got as much as a band-aid or nothing.

9 Q Did you ever see Dr. Bibeau again after he talked with
10 you the five minutes or so in the exam room?

11 A That day? No.

12 Q Okay. Not that day. All right, so what happened?
13 You're discharged and what happened then?

14 A Then I went home and on the way home we stopped at CVS
15 Pharmacy; it was almost 6:00 o'clock, so it was getting
16 close to the time the pharmacy closing, so we -- this is a
17 drive-up window, and I handed them the prescription and
18 they weren't very happy with me.

19 Q Yes.

20 A I actually had two prescriptions to give them, and
21 when I went to hand them one, I kind of got an attitude, so
22 instead of handing them both of them, I just handed them
23 one, and I believe that one there was for the Percocet and
24 Hydrochlorothiazide or is a water pill which helps to bring
25 the blood pressure down. I'm not sure exactly which one I

1 gave them, but I know it was for the Percocet because of
2 the pain and they did fill it, and then the following
3 morning I had the other prescription filled at Walmart.

4 Q Okay. All right, now -- I forgot to ask you this
5 earlier, but why did you go to Fairfield Hospital when you
6 lived in Chester? What made you do that?

7 A I believed that Fairfield Hospital was a very good
8 hospital; I was working there; I was proud to be working
9 there.

10 Q So you just went where you were going to be working.

11 A I went to where I was going to be working.

12 Q Okay. All right.

13 A Or where I actually was working.

14 Q Right. Okay, now, so you pick up your pain
15 medications and you head for home. What happened next?

16 A I pretty much stayed in the recliner and lifted my leg
17 up because it was throbbing. It hurt. The pain was pretty
18 excruciating.

19 Q Had the pain gotten any less from the time you entered
20 the ER until you left the ER?

21 A Oh, absolutely no, not. They had given me the pain
22 medication and discharged me within like seven or eight
23 minutes after giving me the medication.

24 Q Okay. All right, and what happened? You're in the
25 recliner, you rested there. What happened next?

1 A I did the best I could to rest and sleep. It was a
2 very, very, unrestful night. Leg was throbbing, hurt, kept
3 it up. Color may have gotten a little bit better, because
4 when I massaged it, it seemed like it got a little bit
5 better; I mean it made it feel better.

6 Q Okay.

7 A It's like anything, if you bump yourself and you rub
8 it, it does make it feel better. You can't feel bad and
9 good at the same time, so that's why you rub it.

10 Q Okay.

11 A So I massaged it and it made it feel a little better
12 and --

13 Q All right, did you ever call back to the ER any time
14 that night after the ---

15 A Well, the following ---

16 Q --- after you had been there?

17 A I was seen I believe it was on -- whatever day it was
18 that -- 12 -- about 12 hours later I called back the ER
19 about 3:00 o'clock in the morning.

20 Q Okay. So that would've been like 3:00 a.m. the
21 morning of the 11th of April?

22 A That's correct.

23 Q And who did you speak with?

24 A Well, actually a nurse. I don't -- I know -- so I
25 can't say a nurse, because nurses and CNAs work there.

1 Someone answered the phone -- and a receptionist -- someone
2 answered the phone and I told them that I was ---

3 Q What department were they in?

4 A It was the nursing department.

5 Q Did you call the ER number or did you call the main
6 hospital number or what?

7 A I called the ER number.

8 Q Okay. All right, go ahead.

9 A I told them that I had been seen there earlier during
10 the day and I got a diagnosis of a probable spider bite, I
11 was still having a lot of pain and discoloration and asked
12 them if I should come back in. They said, well, the doctor
13 was sleeping at the time, he was going to be getting up at
14 4:00 o'clock to check on some lab results or whatever, so
15 to call back then.

16 Q Okay. And what happened next?

17 A So I called back at 4:00 o'clock in the morning, and I
18 believe it was Dr. Canty. I cannot say for a hundred
19 percent sure. Again, I was new at the hospital. I'm
20 almost positive it was Dr. Canty that I spoke with.

21 Q Was it Dr. Larry Canty?

22 A Dr. Larry Canty.

23 Q What was his position in the ER that you learned
24 later?

25 A I later learned that he was the medical director.

1 Q Okay. And what happened in the phone call with Dr.
2 Canty?

3 A Dr. Canty asked me kind of like what happened; I told
4 him that I was seen there for a probable spi -- I got a
5 diagnosis of a probable spider bite. I told him what
6 medications that Dr. Bibeau had put me on, and he said,
7 well, just follow Dr. Bibeau's instructions and give it
8 time.

9 Q Okay. All right.

10 A I asked him if I should go back into the ER to be
11 checked, and he said no.

12 Q Okay, so he just told you ---

13 A He said follow Dr. Bibeau's instructions.

14 Q And just give it some time.

15 A And give it time.

16 Q All right. All right, anything else happen that --
17 sort of immediately there on April 10th or 11th as far as
18 contacting the hospital or anything like that?

19 A Nothing I recall, no.

20 Q Okay. All right, now, Phil, I want to turn your
21 attention to sort of the period after April 10th, 2011 and
22 talk about up until May 25th, 2011 when you had another
23 acute episode. So tell the jury sort of what happened in
24 those first few days with your leg and what was going on
25 with it, in your leg and your foot?

1 A It was doing what Dr. Bibeau said it was going to do,
2 it was starting to getting a little better. The color came
3 back a little bit more each day. The pain got a little bit
4 less each day. The tip of my toe had turned black, like it
5 -- when they said the tip of the toe, I heard it described
6 in this courtroom as being the whole toe. It was like a
7 blood blister at the tip of my toe.

8 Q Okay, so just the very end of it.

9 A It was the very end. It was like having a blood
10 blister on it, like you would get one on your finger or
11 anywhere else. That's -- and that's why I said the tip --
12 that's why I said the tip of my toe like turned black.

13 Q Okay. All right. Did you go to any other doctors
14 outside the hospital or the ER?

15 A No, I did not.

16 Q Okay. Didn't follow-up with any other doctors.

17 A No, I did not.

18 Q Okay. And why did you not follow-up with another
19 doctor outside the hospital?

20 A Because I worked at the hospital and I seen doctors
21 almost every day.

22 Q Okay. What doctors do you recall seeing there in the
23 hospital in those first couple of weeks or so after April
24 10th, 2011.

1 A Dr. Bibeau again, where I had pulled up my -- I
2 actually -- and again when I heard it discussed earlier
3 they say it's a hallway conversation, this is not a hallway
4 conversation. Any conversation I had with a doctor was
5 actually done behind the nurses' station or in the nurses'
6 station behind glass where patients could not hear. We
7 would have downtime where there would not be any patients
8 in there. Usually if my foot was hurting, I would pull my
9 shoe off and I would rub my leg and I would rub my foot,
10 and Dr. Bibeau was sitting there one time and looked -- and
11 I pulled down my sock and showed him my foot and my leg and
12 said, you know, it's still hurting and, you know, my toe's
13 a little black, and he said, well, is it getting better,
14 and I said yes, he said, well, okay, well, good, let's give
15 a little more time and you should be all set.

16 Q All right. And that was Dr. Bibeau that you had that
17 conversation with?

18 A Yes. I also had a conversation very similar to that
19 with Dr. Canty.

20 Q All right. All right, Phil, I'm going to hand you
21 what's been marked as Plaintiff's Exhibit 42. What is this
22 document?

23 A This is a little scrapbook that I actually just kind
24 of kept for myself. If I was to hand it to the jury, you
25 probably wouldn't be able to read it, because it's written

1 same thing, but it wasn't interesting like his, so I just
2 like of like ---

3 Q Okay.

4 A --- was -- didn't mean a whole lot.

5 Q Okay, so um -- so, Phil, during that period from April
6 10th, 2011 to May 25th, 2011, did the leg or did the leg not
7 continue to improve?

8 A Oh, it improved to just about to the point where it
9 was actually a hundred percent better.

10 Q All right, and during that time, what did you believe
11 about Dr. Bibeau's diagnosis?

12 A I believe Dr. Bibeau was a hundred percent right. I
13 believed what he told me. I did what he asked me to do, as
14 well as taking medication, steroids and the pain
15 medications ---

16 Q Okay.

17 A --- and I believe and trusted him. I worked with
18 doctors in the ER and I believed in my job, and I believed
19 in people that I worked with.

20 Q All right. Now, you mentioned and you told us about
21 the encounter with Dr. Bibeau after-the-fact, and your
22 notes show it was approximately when that you showed Dr.
23 Bibeau and Dr. Canty the black -- the tip of the black toe?

24 A End of April, somewhere middle Ap -- end of April.

1 Q All right. Okay. Did you talk with any other doctors
2 besides Dr. Canty or Dr. Bibeau in the ER during this
3 period?

4 A Yes, I did.

5 Q And who were those doctors?

6 A That was Dr. Keith and it would be a Dr. Suess.

7 Q All right. And tell us what happened with Dr. Keith?
8 How did that come about?

9 A It was pretty much the same thing. We were behind the
10 nurses' station; we were having some downtime. I worked
11 the 7:00 at night til 3:00 o'clock in the morning shift,
12 so, you know, there was times that -- certain times of the
13 night it was -- really wasn't busy, so we would be just
14 kind of sitting around and talking, whatever, and I would
15 have my shoe off and rubbing my leg and I let him know what
16 happened, told him, and I got pretty much the response, is
17 it getting better, yes, well, good, just keep doing it, it
18 takes time.

19 Q All right. Did Dr. Keith -- is that the one you're
20 talking about now?

21 A That was Dr. Keith, yes.

22 Q Yes. Did Dr. Keith actually examine you any way
23 formally?

1 A No. I think I -- I believe I lifted my pants leg up,
2 maybe dropped by sock down a little, but he didn't see my
3 black toe or anything really, nothing like that, no.

4 Q Did you have the same kind of encounter with Dr.
5 Suess?

6 A Yes.

7 Q And did Dr. Suess examine you formally or anything
8 like that?

9 A No, he did not, just kind of looked over at me and ---

10 Q Did you ever register as a patient again at the ER to
11 get seen formally?

12 A No, I did not.

13 Q Did you think that was necessary?

14 A No, I did not.

15 Q All right. Now, Phil, are you -- you're not saying
16 that Dr. Canty or Dr. Keith or Dr. Suess were your treating
17 doctors, are you?

18 A No, I am not.

19 Q Who was your treating doctor on April 10th?

20 A Dr. Bibeau.

21 Q Okay. Did you still consider him to be your treating
22 doctor after he had discharged you from the ER?

23 A Yes, because Dr. Ke -- Canty actually told me to do
24 what Dr. Keith has -- I mean what Bibeau -- he told me to

1 do -- take the medications like Dr. Bibeau had told me to
2 do and give it time like Dr. Bibeau said.

3 Q Yeah. But you admit you never went back in and did
4 paperwork again and formally registered as a patient at the
5 ER?

6 A No, I did not.

7 Q All right, and did Dr. Bibeau ever suggest that at any
8 point when you were talking to him in that second
9 conversation, that you go in and register as a ---

10 A No, he did not.

11 Q --- patient. All right. Did you obtain any refills
12 of the pain medication, the Percocet medication that they
13 gave you that first time?

14 A No, I did not.

15 Q So it's just the one prescription.

16 A Yes, sir.

17 Q All right, so ---

18 A I also -- I'm sorry.

19 Q Did -- did you work at regular schedule after April
20 10th, 2011?

21 A I may have missed a couple of days, but yes, I did
22 work a regular schedule.

23 Q All right, and I'll hand you what's been marked --
24 well, let me just show it to you -- what's been marked

1 Plaintiff's Exhibit 35. What is this document? Can you
2 see it?

3 A Yes, sir.

4 Q What is that document showing us?

5 A It seems to be my pay-stub history from the hospital.

6 Q All right. And does this show where I'm pointing
7 where you're getting paychecks for 4/8/11? See that?

8 A Yes, sir.

9 Q And you see where it's got a paycheck for 4/22/11?

10 A Yes, sir.

11 Q And a paycheck for 5/5/11?

12 A Yes, sir.

13 Q Paycheck for 5/20/11?

14 A Yes, sir.

15 Q And then we've got a paycheck for -- what is that? Is
16 that 6/3/11?

17 A 6/3/11, (indicating yes).

18 Q Okay. And then what's the next date you got a
19 paycheck after that?

20 A 12/15.

21 Q Of what year?

22 A Of 2011.

23 Q All right. All right, so, Phil, let's turn to May
24 25th, 2011.

25 A Yes, sir.

1 A Last note -- (witness mumbling)

2 COURT REPORTER - He needs to speak in the mic.

3 A From what I see it's ---

4 Q Phil, try to turn a little bit ---

5 MR. SMITH - Judge, I can't hear a word. I'm

6 sorry.

7 THE COURT - You're going to have to ---

8 A I -- I -- I believe ---

9 THE COURT - --- turn more toward the microphone.

10 A I believe the last date I have written in here is

11 7/18/11.

12 Q Okay. So July 18th, 2011.

13 A Yes, sir.

14 Q And all those notes in that period were when you're

15 sort of sitting around in the recliner recovering?

16 A That's correct.

17 Q All right, Phil, let's go back to May 25th, 2011. Tell

18 us again what was going on, what happened that day.

19 A Like I said, I don't remember exactly what the day was

20 like. It was just a -- one of my regular days, and it was

21 either very late at night or early in the morning; I really

22 don't know what time it was. It could've been 11:30 at

23 night; it could've been 1:00 o'clock in morning. I really

24 don't know what time it was. It was just late. I --

25 again, I worked the 7:00 at 9:00 o'clock (sic) -- 7:00 at

1 night until 3:00 a.m. shift at the hospital. That was my
2 regular shift, so for me to be up at 1:00, 2:00, 3:00
3 o'clock in the morning is average, and my wife also was
4 sleeping when I would come in most nights, so I wouldn't go
5 into the bedroom to wake her up, so I was watching TV with
6 my legs up on the recliner and the exact same symptoms came
7 back again.

8 Q Okay. Now, at that point before those symptoms came
9 back again, what'd your leg look like?

10 A My leg was normal.

11 Q So it was pretty much -- the color was pretty much
12 back to normal.

13 A It was pretty much back to normal.

14 Q But you're still having some cramps and stuff if you
15 walked a lot.

16 A If I walked a lot I had some cramps.

17 Q Okay. All right. So you feel the pain in your leg
18 late at night. What -- what next?

19 A As soon as I felt it I got scared. I mean I thought I
20 was going to die. I think the first thing I did was pray.

21 Q Okay.

22 A Second thing I did is I got up and I took a Percocet
23 that I had leftover, ---

24 Q Okay.

1 A --- because I did not want to -- I couldn't even think
2 about facing that pain again.

3 Q Okay.

4 A It was -- it was just so overwhelming to even think
5 about going through that pain again.

6 Q Was it the same kind of pain you had earlier?

7 A Yes, it was. It was identical.

8 Q All right. And what did your leg look like when you
9 looked at it then?

10 A It was turning purplish and cold.

11 Q Okay. And did you believe at that point that it was a
12 spider bite?

13 A At that point I knew that it was not a spider bite.

14 Q Okay. So you knew that was no longer the spider bite
15 problem.

16 A That's correct.

17 Q Okay. All right, what happened next?

18 A I did a lot of praying, made a couple of phone calls,
19 I believe, just to try to find out where I -- where I
20 should go, you know, ---

21 Q Okay. Right.

22 A --- and then I waited for the Percocet to wear off to
23 a point to where I could drive, because, you know, it did
24 affect me, made me pretty dizzy, and so as soon as it wore

1 off to a point where I knew I could drive, I woke my wife
2 up and told her I was going back to the emergency room.

3 Q All right. And so where'd you go that time to the
4 emergency room?

5 A That time I went to Chester -- Chester Memorial
6 Hospital.

7 Q And do you remember about what time it was you
8 might've gotten to Chester Hospital?

9 A I don't remember exactly what time it was. I know I
10 had to stop a few times, because I was having really bad
11 pains in my legs and bad cramps, so I had stopped a few
12 times a few minutes each time. When I got there, I
13 definitely said a good long prayer before I went in ---

14 Q Okay.

15 A --- and then I went into the emergency room and signed
16 in.

17 Q Okay. And what happened next?

18 A Again, I signed in, filled out the paperwork, they he
19 had me wait in waiting room until I get called back by a
20 triage nurse.

21 Q All right. And what happened next?

22 A She came in and took my vitals, took a look at my leg
23 and left the room kind of quickly and got the doctor.

24 Q Okay. And what happened next?

1 A Doctor came in; she looked at my leg; she felt behind
2 my knee; she said ---

3 MR. SMITH - Objection to the hearsay, Judge.

4 THE COURT - I'm going to instruct the witness not
5 to quote what people may have said in treatment unless the
6 lawyer specifically thinks there's exception to the
7 hearsay.

8 MR. ETHIER - Yes, sir. I'm sorry.

9 Q All right. Yes. Just tell us what happened next, but
10 don't really say exactly what the doctor told you.

11 A The nurse, like I said, did the vital signs, a quick
12 history, seen what my leg looked like and she had put a --
13 had me put a johnny on before she actually even came into
14 the triage.

15 Q The dress -- the gown or whatever?

16 A A gown so you could actually see both legs this time.

17 Q All right.

18 A And she -- when she seen what was going on, she left
19 and got the doctor.

20 Q Okay. All right, did -- what was your understanding
21 of what was -- your problem was there at the ER?

22 A At that time I had no idea.

23 Q Okay. After the doctor comes in and talks with you,
24 what's your understanding of what's going on with your leg?

1 A Well, she did an exam on me and she said that I had a
2 popliteal ---

3 MR. SMITH - Objection to the hearsay ---

4 Q Don't say what she said, just ---

5 THE COURT - Again, I will caution the witness ---

6 A Okay. I -- she felt behind my ---

7 Q Wait, wait ---

8 THE COURT - Sir, just wait a second. Sir, just
9 one second.

10 MR. ETHIER - I'm sorry.

11 THE COURT - Please don't quote what they said.
12 You understand what I'm saying?

13 MR. ETHIER - Yes, I'm sorry. I just ---

14 THE COURT - All right. Thank you. You may
15 proceed.

16 Q What's your understanding of what was wrong -- what
17 your problem was?

18 A That I had a popliteal aneurysm.

19 Q All right. Some kind of blockage in your leg?

20 A A blockage of an artery.

21 Q All right. And what happened next?

22 A I was -- how can I say this, um ---

23 Q Before you -- before you go there -- let me -- strike
24 that question. Let me ask you this. What did you tell the

1 doctor when you were talking to her there in the ER at
2 Chester?

3 A I told her that the same thing that had happened
4 before and they said it was a spider bite.

5 Q Okay. And what ---

6 A Or a probable spider bite.

7 Q Okay. And what did you tell her about the way the leg
8 had looked in the hours before you came to the ER as far as
9 its description?

10 A Cold, purple, painful, painful (sic), numbness.

11 Q Okay. Is that the same thing that you had reported on
12 April 10th, 2011 to Dr. Bibeau?

13 A Yes, sir, it is.

14 Q Okay. All right. So, okay, once that they had -- you
15 identified some kind of arterial blockage there at the ER,
16 what happened next? What'd they do for you?

17 A They had called the surgeon of the hospital and asked
18 if he would take me to be a patient ---

19 Q Okay.

20 A --- and I was denied.

21 Q Okay. And what next?

22 A So I -- they called around until they found a surgeon
23 that would take me.

24 Q Okay, do you know what kind of vascular -- what kind
25 of surgeon they were looking for?

1 A A vascular surgeon.

2 Q All right. And where were you eventually transferred?

3 A The Charlotte main hospital in Charlotte, North
4 Carolina.

5 Q How did you go there?

6 A By ambulance.

7 Q On the road.

8 A On the road.

9 Q Did -- and who was the doctor that began treating you
10 there at Charlotte?

11 A I don't -- Charlotte was Dr. Jeremiah Holleman, the
12 doctor -- yes, Mr. Holleman, Dr. Holleman.

13 Q Okay. All right. Okay, now, tell us what happened
14 when you get up to Charlotte. You're at the hospital. Did
15 you go in the ER?

16 A At that point I believe I was transported to the ER.
17 I had -- I had been given quite a few different
18 medications.

19 Q Okay. What medications were you given?

20 A I know that they started a Heparin drip on me.

21 Q What is Heparin?

22 A Heparin is a anticoagulant. Stops ---

23 Q Is that the blood thinner?

24 A It's a blood thinner. It doesn't let the blood -- it
25 doesn't let the blood coagulate.

1 Q Okay.

2 A I was given Demorral.

3 Q What is Demorral?

4 A Demorral is a narcotic pain medication. I was given
5 Morphine.

6 Q Okay. All right. Do you know about what time you got
7 to hospital up there in Charlotte?

8 A Between 9:00 and 10:00 I'm going to guess.

9 Q All right. All right, so what happened in Charlotte
10 as far as getting admitted? Were you admitted into the
11 hospital?

12 A I was admitted. Like I said, that was very, very
13 blurry. I was under a lot of medication, so I -- it was
14 pretty blurry.

15 Q All right. Now, Dr. Holleman was here yesterday and
16 he walked us in detail through all the surgeries that were
17 done on you. Tell us, Phil, what you remember about the
18 procedures that were done.

19 A Well, I remember the first one was quite -- I'm sorry
20 -- it was quite uncomfortable because they had to cut me in
21 the groin, in the left groin, and that one did not exactly
22 tickle.

23 Q Is that when they did the CT angiogram?

24 A Yes. They stuck needles in the groin and then they
25 cut me open and ran a wire ---

1 Q All right.

2 A --- in me.

3 Q Okay. All right. And what do you remember about the
4 other procedures?

5 A I remember them doing it again the following morning -
6 --

7 Q Okay.

8 A --- the same -- well, they didn't cut that time. They
9 had a -- they left a port so that they could reuse it.

10 Q Okay.

11 A They had -- they also told me -- Dr. Holleman -- I'm
12 sorry; I can't say that. I was told I was going to be
13 given -- I was asked to sign a form to give them permission
14 to do a TPA on me.

15 Q Okay. And what is your understanding of what a TPA
16 is?

17 A TPA is a clot buster.

18 Q Okay. So is that when the doctors were trying to --
19 as they described to us yesterday -- trying to bust the
20 clot with medication or with the wire?

21 A That's correct. It's a very, very dangerous
22 medication, because it can kill you as fast as it can heal
23 you.

24 Q Okay. All right. Now, do you remember anything about
25 the open femoral bypass graft procedure that was done?

1 A Well, I was scheduled to have -- Dr. -- I had a
2 discussion and I was asked which procedure I wanted to have
3 done.

4 Q So you had some discussions with Dr. Holleman?

5 A Yes, I did.

6 Q Okay. And, ultimately, was the open procedure done,
7 the femoral ---

8 A It was required to be done at that point.

9 Q All right. Did they actually move your surgery up a
10 little bit?

11 A Yes, I was scheduled to have surgery at 11:00 o'clock
12 that morning, and they came in -- a doctor came in -- I'm
13 not sure which one it was -- it was one of the surgeons --
14 came in to explain to me what was going to be going on that
15 day and what to expect, and he looked at my foot and he
16 said you're ---

17 MR. SMITH - Objection, Judge, to hearsay.

18 A He looked at my foot.

19 THE COURT - I'll caution you again, sir. You
20 can't quote what's said.

21 MR. ETHIER - Yes, sir.

22 A He looked at my foot.

23 THE COURT - Thank you. You can say what's done,
24 but you can't say what was said. Thank you.

25 MR. ETHIER - Thank you. I'm sorry.

1 MR. PROFFITT - Thank you, Your Honor.

2 Q Okay. Okay, do you remember anything about the --
3 after your first surgery with the open femoral bypass graft
4 procedure, what happened to you?

5 A I had woken up in the recovery room and I was
6 screaming.

7 Q And what ---

8 A I was in pain. I was in extreme pain.

9 Q And you -- did you tell the personnel that?

10 A Oh, I was -- actually the personnel came over to me
11 and had told me to be quiet and told me ---

12 MR. SMITH - Objection.

13 Q Yeah, don't ---

14 A Oh, I'm sorry. I was approached by someone in the
15 emergency and asked not to be yelling out ---

16 MR. SMITH - Objection. Judge, objection ---

17 THE COURT - Let's move on to a different
18 question. Thank you.

19 MR. PROFFITT - Yeah, let's move on. All right,
20 very good.

21 A I was yelling out in the emergency room.

22 Q Okay. All right, Phil, what was your time like there
23 in the hospital for those -- was it seven days you were
24 there?

25 A Seven days, yes.

1 Q And just tell the jury a little bit about what that
2 was like in the hospital?

3 A They had me on a liquid diet, constipated because of
4 all the narcotic medication. I don't think I had a bowel
5 movement for like six days. I had a wound vac which is --
6 I believe you've seen a picture of it -- but it's actually
7 also a box that is the actual vac itself, so you have to,
8 either carry it or strap it to you, and of course, I had
9 all the staples and stitches in the leg, so I was pretty
10 much in agony the whole time I was in the hospital.

11 Q Were you taking pain medication all throughout that
12 time?

13 A I was on a Morphine pump.

14 Q Okay. Now, Phil, let's turn to the period of -- let's
15 talk about the months from sort of June, 2011 when you got
16 out of the hospital until December, 2011 when you went back
17 to work. Okay?

18 A Yes, sir.

19 Q Tell me in those first few weeks and months what was
20 your life like at the house? What did you do?

21 A I lived in the recliner. I couldn't -- I had a -- I
22 had a walker that I would use to get up and use the
23 bathroom, and my wife would buy frozen dinners so if I was
24 home alone, I would pop a frozen dinner in the microwave
25 and I pretty much lived in the recliner.

1 Q Okay.

2 A The first two weeks my mother did live with me to help
3 me out.

4 Q Okay. All right, was Jeanne still going to work?

5 A Yes, she was.

6 Q Okay. Did she -- did she work more or less while you
7 were trying to recover?

8 A She was working anything they would offer her to help
9 money-wise.

10 Q Okay. All right. Were you able to go outside and
11 walk around much or ---

12 A At that -- which point are you ---

13 Q Well, sort of early in the process.

14 A Early in the process, no, I was not.

15 Q Later on could you go outside on the porch?

16 A Yes, later on I could.

17 Q All right. What kind of pain or discomfort did you
18 experience during those months? Describe that for us.

19 A It was horrid. It was terrible. It would -- the
20 easiest way to explain it is if I was to take a tourniquet
21 and put it on your knee area around your leg, tighten it as
22 tight as I could tighten it, sit there for five minutes and
23 then you tell me what it feels like.

24 Q Okay.

25 (WHEREUPON, WITNESS CRYING)

1 MR. PROFFITT - You want to take a break, Phil?

2 THE COURT - Why don't we just take a general

3 break. I was going to do that at 11:00 o'clock anyway.

4 Ladies and gentlemen of the jury, we're going to take a

5 short break, allow you to step back to the jury room. I'm

6 going to ask you as always not to discuss anything about

7 the case during the break. You may retire to the jury

8 room. Thank you very much.

9 (WHEREUPON, JURY EXITS THE COURTROOM.)

10 MR. ETHIER - Sorry, Your Honor.

11 MR. PROFFITT - It's all right.

12 THE COURT - We'll be in recess for about ten

13 minutes. Thank you very much. Let me caution you sir, --

14 put this on the record -- we're in the middle of your

15 testimony; you should not discuss your testimony with

16 anyone during the break. You understand that?

17 MR. ETHIER - Yes, sir,

18 THE COURT - Thank you.

19 (WHEREUPON, RECESS TAKEN)

20 THE COURT - Ready to go forward?

21 MR. PROFFITT - Yes, sir.

22 THE COURT - Defense ready?

23 MR. SMITH - (No response)

24 THE COURT - Mr. Smith, you ready?

25 MR. SMITH - Oh, yes, sir. I'm sorry.

1 THE COURT - Okay. That's all right. Let's bring
2 the jury in if they're ready.

3 (WHEREUPON, JURY ENTERS THE COURTROOM)

4 THE COURT - All right, the record will reflect
5 that the jury has returned to the courtroom. You may
6 proceed, Mr. Proffitt.

7 MR. PROFFITT - Thank you, Your Honor.

8 Q All right, Phil, when we left off we were talking
9 about the time period of June, 2011 to December, 2011
10 before you went back to work.

11 A Yes, sir.

12 Q When did you begin experiencing the foot drop after
13 your surgery?

14 A As soon as I knew I could walk again.

15 Q And describe for the jury what the foot drop was like
16 at that time back in 2011.

17 A You just can't move your foot. It's just -- it's just
18 there. There's no -- I can't move it side to side. I can
19 push down; I cannot lift it back up. There's just no -- I
20 just cannot lift up, ---

21 Q Okay.

22 A --- so it's just there and ---

23 Q All right. Did you receive some home health care
24 during the months of the recovery there?

1 A Yes, I had a home health nurse come in and change my
2 wound vac dressing an average of three nights a week.

3 Q Okay. And let me just use these photos. Phil, I show
4 you what's been marked as Plaintiff's Exhibit 6. What is
5 that photo?

6 A That's a photo of the incision that they made for the
7 graft itself.

8 Q Okay. Do you have any idea when that was taken,
9 approximately?

10 A That one there looks like it was taken in the hospital
11 bed while I was still in the hospital.

12 Q I show you what's been marked as Plaintiff's Exhibit
13 Number 5. What is that photo?

14 A That is another one. Looks like it was probably taken
15 in the hospital bed, because evidently the staples and
16 stitches are still in.

17 Q Okay. What about Plaintiff's Exhibit Number 6, oh,
18 no, I'm sorry, number 10?

19 A That's just me sitting in the chair watching TV.

20 Q Okay, is this at home?

21 A That's at home. I had to wear that brace, because,
22 again, my foot just drops, so ---

23 Q Okay. And what's the black and tube thing on your ---

24 A That black thing is a foam -- it's about an inch-thick
25 and they cut it to the size of the wound, and what they do

1 is they put it over the wound, and then they take a sheet
2 of plastic -- sticky plastic and they put it over that and
3 then they -- there's a hose there, they cut a hole in it
4 and they put the hose to it and that hose hooks up to the
5 vacuum system and the vacuum system starts, it squeezes the
6 foam down til it's just about flat, and it keeps a constant
7 pressure on the wound, so it takes up any drainage, any
8 blood, any infection that may come in.

9 Q Okay. All right, and Plaintiff's Exhibit Number 9, is
10 that another shot of the same thing?

11 A Yes, that's probably -- I don't know exactly -- I
12 believe that was actually taken in the hospital bed also, -
13 --

14 Q Okay.

15 A --- because I can see how big my leg was at the time.
16 It was quite huge.

17 Q All right. What about this photo, Plaintiff's Exhibit
18 Number 13?

19 A That one there was ---

20 Q Stay close to the mic.

21 A That one there was -- I believe I took that one
22 myself, and that was after the wound vac had come off. I
23 was doing a wet and dry dressing. I think I was doing it
24 myself daily.

25 Q Okay. And what about Plaintiff's Exhibit Number 5?

1 A That was in the middle of changing the wound vac. I
2 used to take the -- the nurse would really, really hurt
3 when she came in and took the wound vac off, because they
4 would just come in and they would just rip it off to kind
5 of debride it, so I actually got permission and a
6 prescription from my family doctor to get lidocaine so I
7 would shoot myself with the licodaine to numb myself up,
8 and then I would take the dressing off, I would clean the
9 dressing myself and clean the wound myself and get
10 everything ready so when she would come in, she would just
11 have to put the foam back on and the plastic on and start
12 the wound vac up.

13 Q All right. All right, Plaintiff's Exhibit Number 12,
14 who is this?

15 A That's me in not too good of a mood.

16 Q All right, are you sitting in your recliner?

17 A I'm sitting in my recliner.

18 Q Plaintiff's Exhibit Number 11, what is this?

19 A That was a picture of me when I was starting to heal
20 up. I was probably -- I don't know how far into it. I was
21 on the heal.

22 Q Okay. Does your leg -- it looks like the leg swelling
23 has gone down some?

24 A The leg swelling has gone down some; the wound is
25 closed up some.

1 Q All right. Plaintiff's Exhibit Number 15. What do we
2 see here?

3 A That's the picture of the scar of -- that I have on my
4 leg.

5 Q Is this several months later?

6 A At this point I cannot tell. I had my shoe on. It
7 was definitely two or three weeks. It was -- actually
8 because of the size of my leg I would have to say it was at
9 least a month or two after.

10 Q Plaintiff's Exhibit Number 14.

11 A And that was prior -- just prior to them discontinuing
12 the wound vac.

13 Q Okay, and then finally, Plaintiff's Exhibit Number 15.

14 A Again, that's pretty much -- I don't see the wound vac
15 on, so they had probably just switched me over to a wet and
16 dry dressing at that point.

17 Q Okay. All right, Phil, what was your -- your daily
18 routine during that period of June to December, 2011? Just
19 briefly describe a day in the life of Phil during that
20 period?

21 A Setting -- live in that recliner, watch TV, read
22 books, scribble notes, uh ---

23 Q Where would you sleep?

24 A I slept in the recliner. I could not sleep in the
25 bed.

1 Q Why not?

2 A I tossed and turned all night; I would get cramps
3 really bad, so I went in the recliner, at least I could get
4 my leg up, and again, I was keeping my wife up all night,
5 so that pretty much then become my bed.

6 Q Okay. All right, did -- this time period from June to
7 December, 2011, did it affect your relationship with
8 Jeanne?

9 A Oh, yes, it did.

10 Q And how so?

11 A To this day we have no sexual relations; we do not
12 hike anymore; we don't play volleyball anymore; we don't go
13 to the gym anymore; we don't ---

14 Q Okay. All right. Now, Phil, let's look at the time
15 period from when you did return to work in December, 2011
16 up until March, 2013. Let's talk about those months, that
17 15-month period. When you returned to work, did you return
18 to a normal schedule?

19 A I believe it was a normal schedule, yes.

20 Q Okay. Did you still have the foot drop?

21 A Yes, I did.

22 Q Okay. Were you having to wear a brace at that time or
23 not?

24 A Yes, I still wear the brace.

25 Q No, back -- back then.

1 A Yes, I wore the brace.

2 Q And would you -- were you still on pain medication?

3 A Yes, I was. I was still taking narcotic pain
4 medication.

5 Q Did your leg hurt, continue to hurt during that period
6 when you were working at the hospital?

7 A Especially while I was at work, because I could not
8 take the pain medication while I was at work.

9 Q Okay. So how would you do that? Tell the jury how
10 you managed your main medication and your pain during those
11 15 months at the hospital.

12 A When I was working I didn't manage the pain. I just
13 had the pain and I worked forward.

14 Q Why could you not take the pain medication while at
15 work?

16 A You cannot work while under the influence of a
17 narcotic pain medication.

18 Q All right. So when you would go to work, you just
19 wouldn't take it.

20 A I just wouldn't take it.

21 Q All right. And would you take it when you came home?

22 A Oh, yes, I would definitely take it when I came home.

23 Q Okay. And did it help when you came home?

24 A Sometimes it did, depending on how bad of a day it was
25 at work; sometimes I would take it and it would have little

1 to no effect. I'd get home and just crash, just -- I was
2 done for the day.

3 Q Okay. Now, outside of work, what was your life like
4 there at home? What were you -- were you doing anything at
5 home?

6 A I tried. I tried to do as much as I possibly could.
7 I tried exercising as much as I possibly could using rubber
8 bands, tried the rubber bands on the leg and the foot
9 trying to -- trying to prove the doctors wrong, that it
10 would never go away.

11 Q Okay.

12 A I -- Dr. Holleman -- sorry -- I was doing a lot of
13 exercising as much as I could to try to keep the leg
14 healthy, because I was told that I only had one good artery
15 and that I had to keep that artery healthy.

16 Q Okay. All right. And you continue to exercise even
17 today?

18 A Oh, yes, I do.

19 Q All right. Phil, were you able to go out and do
20 carpentry jobs in your yard during that period?

21 A No, I could not.

22 Q Okay. Did you work on your car or chop firewood
23 during that period?

24 A No, I could not.

1 Q Okay. What was a typical day like? Say, the day you
2 had to work, what was your -- how would your day go? Tell
3 us your day.

4 A Depending on what shift I was working -- sometimes I
5 did work the day shift, so if I got called in -- if I was
6 working my regular shift I -- pretty much spend most of my
7 time in the recliner. That's ---

8 Q Is that normal ---

9 A Take pain medication, because I would -- I was -- I
10 pretty much would take it in the morning. That's when I
11 had less pain was in the morning, but what -- as soon as it
12 started getting bad and the foot drop started kicking in, I
13 would take the pain medication and -- as long as it wasn't
14 too close to work time -- and let it wear off and then go
15 to work.

16 Q Okay. Which doctor was it that was prescribing your
17 pain medication at that point?

18 A It was Dr. Johnson.

19 Q Okay. And he was your family physician ---

20 A My family physician.

21 Q --- at that point?

22 A Yes, sir.

23 Q Okay. Had Dr. Johnson been your family physician
24 before all this happened?

25 A No, he was not.

1 Q All right. Did you have a family physician when all
2 this happened in April, 2011?

3 A No, I did not.

4 Q All right, now, Phil, when you returned there to work
5 at Fairfield Hospital, did you at some point bump into Dr.
6 Bibeau again?

7 A Uh, yes, I did.

8 Q Okay. And tell us about your sort of first encounter
9 when you saw Dr. Bibeau again in the ER. What happened?

10 A My first encounter with Dr. Bibeau in the ER, I had
11 walked behind the nurses' station to where he was sitting
12 and I had no idea what I was going to say or what I was
13 going to do and how I was going to react. Dr. Bibeau
14 turned around and looked at me and said, no wonder I
15 couldn't figure out what was going on, or no, that's what's
16 happened, no wonder I couldn't figure out what was -- I --
17 I'm sorry, I'm -- can I say that?

18 Q Tell us what Dr. Bibeau said.

19 A Dr. Bibeau said to me, so that's what happened; no
20 wonder I couldn't figure it out.

21 Q And what did you say?

22 A I didn't say anything, my head spun; I thought I was
23 going to pass out.

24 Q What did you do?

25 A I wanted to kill him for a second.

1 Q But you didn't.

2 A No, I walked out the back room and I called my wife
3 and told her, you're not going to believe what Dr. Bibeau
4 just said to me.

5 Q And what did you tell your wife?

6 A I told her he -- that what he said is, so that's what
7 your problem was, no wonder I couldn't figure it out.

8 Q Okay. Were you angry at that point?

9 A I was angry; I was very, very upset, yes, extremely.

10 Q Did you ever have any further conversations with Dr.
11 Bibeau at all about your situation?

12 A Not that I recall.

13 Q All right. Now, as time went on at Fairfield Hospital
14 there from December, 2011 to March, 2013, were you able to
15 continue working a full-time schedule?

16 A No, I had to cut back on my hours.

17 Q And why did you have to cut back?

18 A Because the pain was getting to a point where I could
19 not handle it anymore, and it started getting to my head.

20 Q Okay. How much did you cut back?

21 A I believe I cut back to like 24 hours a week, maybe
22 even less than that, maybe 20.

23 Q All right. All right, and so how were you doing
24 mentally and emotionally during that time?

25 A I was spiraling emotionally.

1 Q You'd have some good days and then some bad days?

2 A Some good days and some bad days, and, of course, it
3 would all have to do with how busy it was at work. If it
4 wasn't a really busy night at work and we get to sit down a
5 lot more, it was a better day, it was a better night; I'd
6 be able to go home, take the pain medication and it'd
7 worker longer, I'd get fairly a good night sleep.

8 Q Okay. At some point did you decide that you just
9 couldn't handle the job at Fairfield anymore?

10 A Yes.

11 Q And where did you go to work after Fairfield?

12 A I went to work for Gentiva Home Health.

13 Q And why did you do that?

14 A I knew it'd be a lot less time on my feet and probably
15 a lot less demanding.

16 Q What did you do at Gentiva Home Health as an LPN?

17 A I went home to home. Seventy percent of home health
18 is education when it comes to nursing, teaching diabetics
19 about -- new diabetics about how to take their medication,
20 what to look for, that type of thing. The other times
21 mainly giving shots and dressing changes.

22 Q Okay. And when you first started there, how many
23 visits a week were you doing?

24 A I signed a contract to do at least 35 visits a week.

25 Q Okay. Do you remember what you made per visit?

1 A I made twenty-five fifty per visit.

2 Q Twenty-five dollars and fifty cents per visit?

3 A Yes, sir.

4 Q Now, were you able to continue working that -- that 35
5 visit a week schedule or did you have to cut back?

6 A I had to cut back.

7 Q And why was that?

8 A Because again the pain. I could not handle the pain,
9 and mentally I was declining quickly.

10 Q Okay. Were you able to take the pain medication when
11 you went to work?

12 A No, I could not take it, because I could not drive
13 while taking the narcotic pain medication.

14 Q Okay. Could you do your job while you're taking a
15 narcotic pain medication?

16 A No, I cannot do my job while taking narcotic pain
17 medication.

18 Q Was this a day shift job?

19 A This was a day shift job.

20 Q Now, so would you just -- how would you handle the
21 pain medication and your pain management during this period
22 when you're working for Gentiva for about a year?

23 A I just went to work in pain everyday, and when I got
24 home, I would take my pain medication, pray that it would
25 work.

1 Q Did it work sometimes?

2 A Sometimes it did; sometimes it didn't.

3 Q Sometimes it did; sometimes it didn't?

4 A Sometimes it was just the pain was just so out of
5 control that the pain medication wasn't strong enough to
6 handle the pain.

7 Q Okay. When -- on days like that were you able to get
8 any sleep?

9 A I would try. Didn't get much but I would try. I'd do
10 my best.

11 Q All right. Where were you sleeping at that point in
12 that time period?

13 A I still sleep on the couch or the recliner. I don't -
14 - I very rarely sleep in the bedroom.

15 Q All right. Were you using your leg brace for the foot
16 drop?

17 A Sometimes I do; sometimes I don't.

18 Q No, I'm talking about from March, 2013 to March, 2014
19 when you're working for Gentiva. That's the period we're
20 talking about.

21 A Oh, yes, yes.

22 Q Okay. All right. Now, Phil, what happened in sort of
23 December, 2013 toward the end of that year? How were you
24 doing mentally and emotionally by that point?

1 A At that point I became -- starting getting some
2 suicidal ideations. I was wondering if it was worth living
3 anymore.

4 Q Okay. And why was that? Why did you feel that way?

5 A Because I knew I was going to be in pain the rest of
6 my life.

7 Q Okay. And were you still trying to work? You're
8 still at Gentiva.

9 A I was still working, yes.

10 Q Okay. And -- but you cut back your schedule by then.

11 A Yes, I had cut back my schedule.

12 Q All right. And did you report your -- I mean were you
13 depressed?

14 A Oh, I was very depressed; I was suicidal.

15 Q Okay. Were you -- did you report that depression to
16 your doctors, to Dr. Johnson?

17 A I had reported depression to Dr. Johnson from day one.
18 He had put me on Klonopin. I had been on Klonopin since
19 the first visit with Dr. Johnson.

20 Q Okay. And what is Klonopin?

21 A Klonopin is an anti-psychotropic ---

22 Q Anti-depressant medication?

23 A Anti-depressant, tranquilizer-type medication.

24 Q Okay.

25 A And I was scheduled to take that twice a day.

1 Q Okay. All right. Now, do you remember a visit to Dr.
2 Johnson in December, 2013 when it was sort of a bad visit?

3 A Yes, I do.

4 Q Tell us about that visit.

5 A I went to see him and I had a total breakdown in his
6 office.

7 Q Okay, what do you mean by that?

8 A Pretty back what the jury was excused for, but I
9 couldn't stop. I just -- I was going -- I wanted to kill
10 myself; I didn't want to live anymore.

11 Q Okay. All right. And did you eventually speak with a
12 doctor named Mark Harari?

13 A Yes, I -- actually realizing the position I was in and
14 that Dr. Johnson didn't do a whole lot for me when it came
15 to my medical issues -- my mental issues -- I'm sorry -- I
16 did some research on the computer and I found a
17 psychologist or a psychiatrist in Columbia.

18 Q Okay. And did you go see that psychologist in
19 Columbia?

20 A Yes, I did.

21 Q All right. And what's your understanding of what that
22 psychologist said about your mental health condition there
23 at the end of 2013?

24 MR. SMITH - Object to the hearsay, Judge.

1 THE COURT - Don't think he can state as to what
2 the doctor said.

3 MR. PROFFITT - No, I asked him what his
4 understanding was of the diagnosis the doctor made of him,
5 not what the ---

6 THE COURT - I'll allow him to state what his
7 understanding of the diagnosis was.

8 A My understanding of the diagnosis is I was suffering
9 from major depression.

10 Q All right. All right. All right, and did you
11 continue to work for the next few months up until about
12 March, 2014?

13 A Yes, I did.

14 Q Okay. And what happened in about March, 2014, as far
15 as your mental healthcare? Who did you see?

16 A I was actually given a list of different doctors to
17 call, and I had made phone calls and either I didn't get
18 return calls or they refused to take me.

19 Q Are you talking about psychiatrists?

20 A Psychiatrists.

21 Q Okay. All right, and how did you come to see Dr.
22 Tammy Chen?

23 A My wife actually worked with Dr. Tammy Chen before,
24 and she was not accepting patients, but I called her up and

1 I let her know that my wife used to work with her, and so
2 they let me go in to see her.

3 Q Okay. And what did -- what did you tell Dr. Chen
4 about your mental health condition and how you were doing
5 at that point and ---

6 A I told her I was having suicidal ideations, I was
7 falling apart, and I needed help for -- I -- I just didn't
8 care anymore.

9 Q Okay. Did you give her some background and some
10 history about your whole situation and what had happened to
11 you?

12 A I believe I did.

13 Q Okay. Did she ask you lots of questions about
14 everything?

15 A Oh, yes.

16 Q Okay. And what did Dr. Chen do for you as far as
17 medications? Did she help you with that?

18 A I don't remember exactly what it was she prescribed,
19 because I actually had Dr. Nandurkar also prescribing me a
20 medication for pain and nerves.

21 Q Okay. So Nandurkar, just so the jury's clear, is the
22 doctor who was giving you your pain management and pain
23 medication. Correct?

24 A That's correct.

1 Q And Dr. Chen is a psychiatrist who was prescribing
2 medicine for your depression, for your anxiety. Correct?

3 A That's correct.

4 Q Okay. All right. Now, Phil, did you -- when did you
5 stop working?

6 A I believe it was March 31st, somewhere around there.

7 Q Of what year?

8 A 2014.

9 Q All right. Phil, on your mental health issues, did
10 Dr. Chen help you?

11 A Dr. Chen saved my life.

12 Q And why do you say that?

13 A Because I want to live now.

14 Q Okay. Did -- she helped you get on the right
15 medications?

16 A Yes, because the doctors were not working with each
17 other very well. I was -- actually at one point I had one
18 doctor give me a medication, which is Gabapentin and
19 another doctor giving me Zoloft, and the two of them do not
20 mix and that can actually kill you, and I didn't even
21 realize it and I was - started getting sick and then I was
22 feeling well, and then I looked it up and so I had to stop
23 it and so they had to change the medication around, because
24 the doctors were not communicating with each other. What
25 Dr. Chen did, is not only did she take care of me with my

1 medication mentally, but she also kind of coordinated all
2 the doctors together, so they all worked together.

3 Q All right. Did Dr. Chen recommend that you stop
4 working?

5 A Yes, she did.

6 Q Okay, and why did she recommend that? What's your
7 understanding of that?

8 A Because the pain issue was never going to go away and
9 the psychiatric issue was going to be a major problem. I
10 had been -- was understanding I was going to have major
11 depression for the rest of my life.

12 Q Okay. Did you want to quit working?

13 A Absolutely not.

14 Q As we sit here today, do you want to work?

15 A I would much rather be at work than be here right now.

16 Q All right. All right, before all this happened, Phil,
17 how long did you plan to work? What age did you try to
18 plan to work to?

19 A I was probably planning on working til I was about 70.

20 Q I'm going to hand you what's been marked as
21 Plaintiff's Exhibit 42. What is this document? I'm sorry,
22 Plaintiff's Exhibit 41.

23 A Those are a lot of the different doctor visits that
24 I've had.

25 Q Okay. What's titled on this document here at the top?

1 A Medical Bills of Philip Ethier.

2 Q All right. So let's just sort of -- we're not going
3 to go through every single item on this list, but I want
4 you to point out for the jury -- you've got the hospital on
5 here.

6 A Fairfield Memorial Hospital, right.

7 Q And you've got Bibeau and Chester Regional ---

8 THE COURT - You're going to be better if you move
9 behind the microphone to talk so we can hear what you have
10 to say.

11 MR. ETHIER - Okay, I'm sorry.

12 THE COURT - Thank you.

13 MR. ETHIER - Thank you.

14 Q And then you've got various care related to your
15 hospital stay there at Charlotte Hospital?

16 A Yes, sir.

17 Q Okay, and then tell us again who Dr. Eric Johnson is?

18 A Dr. Eric Johnson was my primary care doctor.

19 Q All right. And if we look on the next page, who's Dr.
20 Porter? What is Dr. Porter?

21 A Dr. Porter was my neurologist.

22 Q Okay. And Hanger Prosthetics. What's that about?

23 A That was about my brace.

24 Q Okay. And you've got some pharmacy bills?

25 A Yes, sir.

1 Q And Dr. Holleman, is that the doctor we heard from
2 yesterday who did your surgery ---

3 A Yes, it is.

4 Q --- in Charlotte? Okay. And is Dr. Timothy Roush one
5 of Dr. Holleman's associates?

6 A Yes, it is. He is; I'm sorry.

7 Q All right. Then you've got Dr. Nandurkar down here.
8 Did you see him?

9 A Yes, sir.

10 Q And, again, who is that doctor?

11 A He is my pain management doctor.

12 Q Okay. And so this exhibit as we see here has dates
13 and costs of the visits?

14 A Yes, sir.

15 Q All right. And if we flip over to the last page,
16 we've got Dr. Harari? Is that the doctor you talked about
17 a few minutes ago?

18 A Yes, sir.

19 Q Okay, and then we've got Dr. Tammy Chen?

20 A Yes, sir.

21 Q Okay. And Demetrius Blount, a counselor?

22 A Yes, sir.

23 Q Saw her a few times?

24 A Yes, sir.

25 Q Okay. And who's Dr. Taormina down at the bottom?

1 A That's the - that's the vascular surgeon I've been
2 seeing for following up on my ultrasounds. I have another
3 one scheduled for the 17th of April of this year.

4 Q The ultrasound of your leg?

5 A For me leg, yes.

6 Q All right. And what's the total we see here in the
7 column there?

8 A That's a hundred and ninety-five thousand and one
9 dollars and zero cents.

10 Q Okay. And have you had a chance to review all the
11 bills that are attached to this exhibit?

12 A Yes, sir, I have.

13 Q Okay. Do those bills appear to be the bills that were
14 sent to you or issued in your case by this various
15 providers listed in this list?

16 A Yes. The only one that I didn't believe that we did
17 miss was a Dr. Crawford who was my plastic surgeon.

18 Q Okay. All right. Well, so we're clear ---

19 A Yes.

20 Q --- did you have any plastic surgery?

21 A No, I did not, but he treated me for the wound.

22 Q Okay, so what was the purpose of possibly seeing Dr.
23 Crawford back at that time right after the surgery?

24 A He believed that the wound would close up on its own -

25 --

1 MR. SMITH - Objection ---

2 A --- without plastic surgery.

3 MR. SMITH - --- Objection what he believed ---

4 THE COURT - I will ---

5 A He ---

6 THE COURT - --- sustain the objection.

7 MR. PROFFITT - It's fine. We'll move on.

8 Q Okay. Phil, were all of these bills necessarily
9 incurred in your case in the care you received?

10 A Yes.

11 Q All right, Phil, as we sit here today, what
12 medications are you continuing to take now in this present
13 time?

14 A Right now I take Percocet and the dose is 10 grains
15 and 325 -- well, 10 325, the 10 would be the Oxycodone and
16 the 325 would be the Tylenol mix.

17 Q Okay, how often do you take that?

18 A I take that three times a day.

19 Q All right. And what else?

20 A I take Valium.

21 Q How often do you take the Valium?

22 A I take the Valium -- it's as needed, but it's twice a
23 day, 10 milligrams.

24 Q Okay. And what else? Anything else?

25 A I take Klonopin, one milligram twice a day.

1 Q Okay. Do you still take Prozac?

2 A I take Prozac 60 milligrams daily.

3 Q Okay. Anything else? Is that it?

4 A Lovastatin for the high blood pressure and
5 hydrochlorothiazide.

6 Q Okay. All right. All right, Phil, I need to ask you
7 just a couple of questions that I forgot to ask you earlier
8 about this notebook. At the time you were deposed in July,
9 2013, had you found the notebook, or did you remember it?

10 A I didn't remember that it existed.

11 Q All right, and at that deposition, did you testify
12 that you did not even believe you had any notes?

13 A Yes, I did.

14 MR. SMITH - Objection to the leading, Judge.

15 Q Well, tell us what you said at the deposition about
16 whether or not you had any notes.

17 THE COURT - He's rephrasing the question. I'm
18 going to ask him to do so. Thank you.

19 Q Tell us what you said at the deposition about whether
20 or not you had any notes?

21 A I believe I said I didn't keep a calendar or notes of
22 it, so I really can't be exact on the dates, or something
23 to that effect.

24 Q And was that the truth at your deposition, as far as
25 your memory was ---

1 A Yes, it was the truth.

2 Q As far as your memory was at that time.

3 MR. SMITH - Objection. Judge, objection to the
4 bolstering. That's a jury determination to determine
5 whether it's true.

6 THE COURT - I'll allow the question.

7 A Could you repeat the question, please?

8 Q At the time of your deposition, was that the truth to
9 the best of your knowledge and memory about whether or not
10 you had any notes?

11 A Yes, absolutely.

12 Q And did you later find these notes?

13 A Yes.

14 Q Okay. All right. Phil, I want you just to talk for
15 just a few minutes about sort of what you are -- you know,
16 what your life is currently. Let's start this way. What
17 are we looking at here with Plaintiff's Exhibit 26?

18 A That's my leg if I was to show it to you right now.

19 Q So that's the current condition of your right leg?

20 A I believe I took that picture maybe a week ago.

21 Q Okay. And what about Plaintiff's Exhibit 27?

22 A I took the picture the same day.

23 Q All right, is that showing the other side of your leg?

24 A That's showing the other side of my leg.

25 Q Plaintiff's Exhibit 28.

1 A Same thing, the inside of my leg just another angle.

2 Q How about Plaintiff's Exhibit 29?

3 A That was just a close-up of it.

4 Q Okay. All right. I want to show you a few photos
5 that you provided for us. What are we looking at here at
6 Plaintiff's Exhibit 34?

7 A Just that -- the way that we -- some of the things
8 that we used to do. That's me carrying my daughter on my
9 shoulder. I'm not sure where it is, the bottom one anyway
10 -- if that was Carowinds or -- that could've been Disney
11 World, or it could've been Universal Studios. I really
12 don't know. The top one ---

13 Q Is ---

14 A This was at Disney World, me and my wife I believe.

15 Q Okay. Is this several years ago?

16 A This is before the incident happened.

17 Q All right. So all of these photos we're looking at
18 now are pre- ---

19 A Are prior to -- these two are anyway, yes.

20 Q Are all these photos we're looking at prior to April,
21 2011?

22 A I haven't seen the other ones yet, so ---

23 Q They are. All right, what about this photo? What
24 about ---

1 A I believe it was one at Carowinds and another one at
2 Disney World at a different time.

3 Q All right. What are we looking at here in this --
4 this page of the photos ---

5 A That's me catching a catfish on the top at a -- we
6 used to like -- so we were always very big campers, so we
7 actually owned one of those campers there, and we had a --
8 it was a year-round place and we went for six years, so I'd
9 be out fishing or boating. I had a boat down there and ---

10 Q Where's there? Where you talking about?

11 A That was in North Carolina. That was a -- actually I
12 forgot the name of the bay, but it was right next to
13 Emerald Isle and ---

14 Q On the coast of North Carolina.

15 A Yes, and that was a catfish I had just caught, and the
16 other one was a little baby shark that I don't know why I
17 took a picture of it, because I'm not too proud of it.

18 Q Okay. Do you still like to fish?

19 A I love to fish.

20 Q Do you go fishing very much anymore?

21 A No.

22 Q Are you able to -- there's a -- I think in one of the
23 earlier photos we saw a little lake behind your house?

24 A Yes, I have a lake behind my home.

1 Q Did you used to be able to go out on a boat in that
2 lake?

3 A Yes, I used to have a 16-foot flat bottom and a 10-
4 foot flat bottom.

5 Q Okay. Do you still have those boats?

6 A No, the 10-foot actually got stolen, and the 16-foot I
7 sold after the incident?

8 Q Why'd you sell it?

9 A Because I couldn't -- I tried going out in it one time
10 and I almost fell out of it, so I just sold it.

11 Q And so you don't go out on the lake anymore and fish
12 on the boat?

13 A No, I do not.

14 Q All right, what is this photo we're looking at here
15 from Plaintiff's Exhibit ---

16 A That's just me playing with a couple of the dogs up
17 near the dog pins.

18 Q Okay. What about the bottom one?

19 A That's me and my wife. I'm not sure if that was at
20 Cape Cod or -- that probably was at Cape Cod, because it
21 looks like I had a patriots shirt on, so ---

22 Q Okay. All right. And what about these photos?
23 What's this?

24 A That's my trucks with my kennels. It's a -- that's
25 what was the name of my business that I had for my dogs,

1 and that's my daughter holding one of -- just one of the
2 pups that we had. The top one is just one of the ones of
3 when we were camping one time.

4 Q Okay. Did you used to do a lot of camping?

5 A Oh, yes.

6 Q Did you use to hike a lot?

7 A All the time.

8 Q Have you been camping since all this happened since
9 you've recovered?

10 A I have been a couple of times to Lake Wateree.

11 Q Okay. Did you -- how long did you stay?

12 A One to two days.

13 Q Okay. Did you hike anywhere when you were there
14 camping or ---

15 A No, we just had a pop-up. We'd pull in; we would just
16 -- I'd sit from shore and fish off whatever camp it was.

17 Q Have you -- have you taken some -- a couple of
18 vacations since all this happened?

19 A Yes, we have taken a couple of cruises.

20 Q Okay. Why do you take a cruise?

21 A Because it's no work to do, and I can take a pain pill
22 whenever I want and lay down whenever I want. I don't have
23 nothing to clean and I don't have any cooking to do. It's

24 ---

1 Q Okay. All right, what's this photo here, Phil, the
2 top one?

3 A The top one is just a picture of my house, partial
4 picture of my house. It's decorated for Christmas.

5 Q Okay. Did you put all those decorations up?

6 A Yes, I did.

7 Q Do you still do that?

8 A No.

9 Q Why don't you do that anymore?

10 A I cannot climb on any ladders and I just don't care.

11 Q All right, what about the bottom photo? What's that?

12 A That's a picture of my wife, myself, my daughter in
13 Florida with my mother playing miniature golf.

14 Q Okay. And what about that photo? What's that?

15 A That was just a picture when I lived in North
16 Carolina. We had -- we had horses and goats and cows and
17 chickens and ducks and rabbits and ---

18 Q All right. Do you still have any of those animals
19 now?

20 A We have a few dogs and a cat.

21 Q Do you plan to get any cows or horses ---

22 A No, sir.

23 Q --- or chickens? Why not?

24 A I can't take care of them anymore.

1 Q All right, Phil, tell the jury whether or not you
2 continue to have any chronic pain now.

3 A My pain is just as bad now as it was back then ---

4 Q If you don't take the pain medication?

5 A --- if I do not take the pain medication.

6 Q Does the pain medication always knock it down to where
7 it doesn't hurt at all or does it ---

8 A Oh, no, doesn't always pain (sic), but it drops it
9 down to probably around a two or three.

10 Q Okay, so you can live with it.

11 A I can live with it.

12 Q You're making it.

13 A Yes, sir.

14 Q Okay. What about the foot drop?

15 A I fall a lot.

16 Q Okay. Even today?

17 A Even today. I trip and fall all the time.

18 Q All right. Is it -- what is your understanding as to
19 whether or not the foot drop is going to continue for the
20 rest of your life?

21 A As far as I understand, it's going to continue the
22 rest of my life; it's never going to get better.

23 Q Okay. What about the pain?

24 A The pain is going to be chronic. It's chronic pain;
25 it's never going to get better.

1 Q All right, what about the leg brace? Do you still
2 wear a leg brace?

3 A Yes, I do.

4 Q All right. Did you recently get a new one?

5 A Yes, I did.

6 Q Okay. Was it better or worse than the old one?

7 A Worse when I try to drive, because I can -- it covers
8 the whole bottom of my foot, so I cannot bend my foot down
9 at all, where the other one only covered half my foot, so
10 if I was driving and my foot was to get up to step on the
11 brake, I could pull it up and allow it to happen. Now if
12 that happens with the one I have on now, I can't feel the
13 top of my foot, so I can't feel that I'm stuck.

14 Q Yes, okay. All right. What about just walking with
15 the new brace? Is it better or worse than the one you used
16 to have?

17 A I think it's better than the one I used to have.

18 Q Okay. Is it -- are you -- is it your understanding
19 you're going to need some kind of a leg brace like that the
20 rest of your life?

21 A As far as I understand, I will need it for the rest of
22 my life.

23 Q All right. Phil, how often do you drive?

24 A I try -- I try to get everything done at one time, so
25 I probably drive about once a week.

1 Q All right. Now, do you still have depression?

2 A Yes, I do.

3 Q Do you still have anxiety disorder?

4 A Yes, I do.

5 Q Okay. And are you still taking pain medication that
6 you described earlier for those conditions?

7 A I take ---

8 Q I mean, not pain medications, medications?

9 A Yes, I take Valium. I take Prozac and I take
10 Klonopin.

11 Q Do you -- do you worry about the future?

12 A I'm always worried about the future. I have
13 nightmares. I wake up wondering if my leg is still there.
14 I have dreams, nightmares about the leg, wondering what my
15 wife's going to do if I'm not around anymore.

16 Q Has this ---

17 A The side affects bother me a lot, because the
18 medication makes me very nauseous; constipation is a non-
19 stop issue. I know it's not a pretty thing to talk about,
20 but narcotic pain medication makes the constipation
21 terrible.

22 Q Do -- what is your understanding of the instructions
23 that you've been given with the various medications you're
24 on as far as whether or not you're supposed to drive?

1 A It tells me if it affects me at all I'm not supposed
2 to drive.

3 Q And is that why you don't drive much?

4 A That is why I do not drive much.

5 Q When you do drive, are you on the pain medication?

6 A No, I am not.

7 Q How do you work that? I mean you just work your
8 schedule out that way or what do you do?

9 A I don't work.

10 Q No, I mean as far as I'm not going to take my pain
11 medication because I'm going to go be driving today?

12 A That's exactly what I would do. I would try to plan
13 my day around it or plan my medication around -- if I have
14 to be at a doctor's appointment, if it's 11:00 in the
15 morning I just will not take any pain medication until
16 after I get home from the doctor's appointment. If it's in
17 the afternoon, I can take one in the morning, and by the
18 time the afternoon comes around it's worn off enough so I
19 can drive safely, ---

20 Q Okay.

21 A --- because I can be in trouble for driving under the
22 influence of a narcotic just like the influence of alcohol,
23 so ---

24 Q All right. So you avoid doing that?

25 A And I avoid it at all cost of doing that.

1 MR. PROFFITT - All right. One moment Your Honor.

2 THE COURT - Yes, sir.

3 Q All right, Phil, does the -- your current condition
4 today, is there any on-going impact with your relationship
5 with Jeanne?

6 A We have not had a sexual relationship since this
7 incident has happened.

8 Q All right, and what about besides the physical
9 relationship, how has it affected your relationship with
10 Jeanne, if it has?

11 A We used to be like best friends; now we're more like
12 companions.

13 Q Okay. All right. Now, Phil, I want to turn your
14 attention back one more time to the deposition that you
15 gave back in July of 2013. At that deposition did you
16 remember talking to Dr. Bibeau in that second encounter,
17 the follow-up that's reflected in your notebook that we
18 talked about earlier?

19 A At the deposition, no, I do not believe -- I believe I
20 said if I ran into him I talked to him, but I -- I could
21 not say for sure if I did or not.

22 Q All right. And at that deposition were you doing your
23 dead-level best to tell the truth as you knew it at that
24 time and as you remembered it at that time?

25 A Absolutely, I tried my best.

1 MR. PROFFITT - All right. Thank you, Phil, I
2 don't have any further questions at this point.

3 THE COURT - You may cross examine.

4 MR. SMITH - Judge, can I approach real quick.

5 THE COURT - Yes, sir.

6 (WHEREUPON, BENCH CONFERENCE IS HELD IN THE
7 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE JURY
8 WHICH WAS NOT REPORTED.)

9 THE COURT - Ladies and gentlemen of the jury,
10 we're going to take a short break before we begin the cross
11 examination. As always, when I let you step back to the
12 jury room you know I'm going to ask you not to talk about
13 the case until I've asked you to begin deliberations. You
14 may retire to the jury room. Thank you very much.

15 (WHEREUPON, JURY EXITS THE COURTROOM.)

16 THE COURT - All right, we'll have about a five
17 minute break. I'll stay on the bench. You may move about,
18 but do not discuss your testimony.

19 MR. ETHIER - Yes, sir.

20 THE COURT - Thank you. We'll be in recess
21 briefly.

22 (WHEREUPON, RECESS TAKEN)

23 (WHEREUPON, EXHIBITS MARKED FOR IDENTIFICATION AS
24 DEFENDANT'S EXHIBITS 11 AND 12.)

1 THE COURT - All right, ladies and gentlemen of
2 the jury, we're going to stop at this point in time. It's
3 just a few minutes before 1:00 o'clock. We'll stop for our
4 lunch break. I'm going to ask you to be back in the jury
5 room at 2:00 o'clock. We should be in a position to start
6 shortly thereafter. You know what I'm going to tell you as
7 far as your duties when you leave the courthouse. Don't
8 attempt to gather any information on your own. Don't
9 listen to, watch or read media reports; don't discuss the
10 case with anyone; don't allow anyone to discuss it with you
11 and, please report any efforts by anyone to talk with you
12 about this case. All right, we're going to start again, as
13 I said, at 2:00 o'clock. Hope you have a good lunch break.
14 You're free to go at this time. Thank you very much.

15 (WHEREUPON, JURY EXITS THE COURTROOM.)

16 THE COURT - All right, again, I will caution you,
17 you are in the midst of your testimony. It would be
18 improper to discuss that testimony with anyone during the
19 break. We'll resume at 2:00 o'clock. Thank you very much.

20 MR. SMITH - Thank you, Your Honor.

21 MR. ETHIER - Your Honor, I'm not allowed to even
22 speak with my attorney?

23 THE COURT - Can't talk about this testimony.

24 MR. ETHIER - Okay.

1 MR. PROFFITT - For the record, Your Honor, we
2 will not go to lunch with the Ethiers. They will go to
3 lunch by themselves.

4 THE COURT - Oh, that's fine.

5 MR. ETHIER - Yes, we go to McDonalds every night
6 so ---

7 THE COURT - Thank you.

8 (WHEREUPON, LUNCH RECESS TAKEN.)

9 THE COURT - All right, plaintiff ready to
10 proceed?

11 MR. PROFFITT - Yes, Your Honor.

12 THE COURT - Defense ready?

13 MR. SMITH - Yes, sir, Your Honor.

14 THE COURT - Let's bring the jury in, Mr. Bailiff.

15 (WHEREUPON, JURY RETURNS TO THE COURTROOM.)

16 THE COURT - The record will reflect the jury has
17 returned to the courtroom. I trust everyone had a good
18 lunch break. If there's anyone who had any difficulty in
19 complying with my instructions while you were away from the
20 courthouse, please stand.

21 (NO RESPONSE)

22 THE COURT - It appears that all have been able to
23 comply with the instructions. When we stopped before
24 lunch, the defense was in the process of cross examining
25 this witness. Mr. Smith, you may proceed.

1 A That's correct.

2 Q And then you -- and then you went and had surgery,
3 bypass surgery. Is that right?

4 A That's correct.

5 Q Now, I think I heard you say this. You had surgery
6 and then you had a complication with the surgery; you had
7 to go back again for a second one. Is that right?

8 A Yes, I don't know -- I mean I was -- I knew I went
9 back in for second one; I woke up in agonizing pain and I
10 was yelling and the next thing I know someone came in, had
11 put something in the needle or in my IV and I was back out.

12 Q Okay.

13 A The next thing I knew I woke up in my room.

14 Q All right, and so you went through the recovery; we
15 heard about that, and you came back to work at Fairfield.
16 Is that right?

17 A Yes, sir.

18 Q And then you say that the first time that you -- when
19 you saw Dr. Bibeau you didn't know -- well, you don't know
20 whether it was first time or some time later, do you?

21 A It was the first time I had seen him since I come
22 back.

23 Q When was that? Do you recall?

24 A I don't recall.

25 Q Do you recall what year?

1 A Was probably the same year I went back. I -- I really
2 -- I -- no, I can't recall. I'm sorry.

3 Q Okay. And so he made this supposed admission to you
4 that he -- no wonder he couldn't figure it out.

5 A Yes.

6 Q And he did it in the nurses' station, didn't he?

7 A Yes, he did.

8 Q And the nurses' station is -- is where doctors and
9 nurses and are all sitting waiting on patients. Is that
10 right?

11 A They're doing a lot of things in the nurses' station.
12 It's a buzz -- it's a bee's nest in there usually.

13 Q All right. So what nurses overheard this?

14 A I have no idea who I was working with at the night.
15 (sic) My head was spinning. After he said what he said, I
16 didn't -- I didn't even know what day it was; I didn't know
17 who I was; I didn't know anything. I was just -- I went
18 blank. I just -- I had so much anger in me and so much --
19 so much anger. I just walked out of the room.

20 Q Okay. And so -- and so at that point you just walked
21 out of the room and called your wife.

22 A Yes.

23 Q You didn't go home and record it in your scratch pad
24 then.

25 A No.

1 Q So you record in your scratch pad when you get
2 discharged from the emergency room but not when a doctor
3 supposedly says, no wonder I couldn't figure it out.

4 A Nothing happened. I didn't do anything. I went back
5 to work. That was the end of it. It was no longer
6 discussion until these proceedings.

7 Q And you worked with Dr. Bibeau for a fair amount of
8 time after this, didn't you?

9 A Yes, I did.

10 Q And you continue -- y'all worked together as a team.

11 A Yes, I'm a Christian and I forgave him.

12 Q Okay. And so you are -- and so y'all were -- you were
13 part of the triage process and the discharge process when
14 you were working with Dr. Bibeau. Right?

15 A Yes.

16 Q Okay. Now, in here I'm looking at these medical bills
17 that have been marked as Plaintiff's Exhibit Number 41.

18 Let me hand you these, please, sir. And these are the
19 medical bills you're asking to be awarded. Is that right?

20 A I don't know what my attorney is asking me to be
21 awarded. I believe this is what he went over with me. It
22 looks -- it looks familiar, yes.

23 Q Well ---

24 A He did go over this with me.

PHILIP ETHIER -- REDIRECT -- BY MR. PROFFITT

1 A No, I do not. Now I do, yes. Please call us with any
2 further questions or problems you have and we will be happy
3 to address them for you.

4 Q All right. Phil, did you continue to improve from
5 April 10th, 2011 to May 25th, 2011?

6 A Yes, I did.

7 Q Did you ever suspect that you had a blood vessel
8 problem until the second acute episode on May 25th, 2011?

9 A No, I did not.

10 Q Did you ---

11 A I believed Dr. Bibeau.

12 Q That was my next question. Did you believe and trust
13 in Dr. Bibeau to have given you an accurate and proper
14 diagnoses on April 10th, 2011?

15 A Absolutely. I trusted all the doctors I worked with.

16 Q You were asked why you did not record the comment in
17 your scratch pad that Dr. Bibeau made to you after you
18 returned to work. Do you recall that?

19 A Yes, I do.

20 Q Is there any chance that you're ever going to forget
21 that comment for the rest of your life?

22 A No, there is not.

23 MR. PROFFITT - No further questions, Your Honor.

24 THE COURT - Re-cross?

25 MR. SMITH - No, sir, Your Honor.

DR. SCOTT JOLIN -- DIRECT -- BY MR. PROFFITT

1 DR. SCOTT JOLIN, AFTER BEING FIRST DULY SWORN,
2 TESTIFIES AS FOLLOWS -

3 THE COURT - Once you're seated, sir, state your
4 name, please.

5 DR. JOLIN - Scott Jolin.

6 THE COURT - Thank you. Mr. Proffitt, your
7 witness.

8 MR. PROFFITT - Thank you.

9 DIRECT EXAMINATION

10 BY MR. PROFFITT -

11 Q Good afternoon, Dr. Jolin. How are you?

12 A I'm fine, thanks, Mr. Proffitt. How are you?

13 Q I'm good. Dr. Jolin, if you would, introduce yourself
14 to the jury by telling them a little bit about your medical
15 and educational background?

16 A Sure. Hello everyone. I graduated from the Tufts
17 University School of Medicine.

18 Q You might want to get closer to the mic. Is it
19 working?

20 A Sorry.

21 THE COURT - You can push that over toward the
22 jury and it might help a little bit. There you go.

23 MR. PROFFITT - Is it on?

24 DR. JOLIN - It's on.

1 A I graduated from the Tufts University School of
2 Medicine in 1989. I then performed a medical surgical
3 internship at a small community hospital outside of
4 Boston called Newton-Wellesley Hospital. I then
5 performed a three-year residency in emergency medicine
6 and that was at the Georgetown -- in Georgetown
7 combined programmed in PC. After that I went on to be
8 the associate residency program director at Yale
9 University School of Medicine. It was in emergency
10 medicine.

11 MR. PROFFITT - Hang on, Dr. Jolin. They're
12 having trouble hearing - want to make sure the jury
13 can hear.

14 (WHEREUPON, DISCUSSION HELD REGARDING THE
15 MICROPHONE WHICH WAS NOT REPORTED.)

16 THE COURT - Just speak more into the mic if you
17 would.

18 DR. JOLIN - Test.

19 MR. PROFFITT - That's better. Just try to stay
20 close to it.

21 A Where would you like me to resume?

22 Q I believe it was the professorship at Yale.

23 A After residency I accepted a position at the Yale
24 University School of Medicine, and also the Yale
25 Hospital. I was the associate residency program

1 director in emergency medicine. After six years I
2 became the residency program director, and I worked at
3 Yale for a total of twelve and a half years. After
4 that I entered the world of community hospital
5 emergency medicine. And I've been working at three
6 community hospitals since then.

7 Q So, how many years total do you have as a practicing
8 emergency room physician?

9 A After graduation from residency, twenty-two years.

10 Q Is that essentially what you've spent your entire
11 career doing?

12 A Yes, that is my career.

13 Q Are you board certified in anything?

14 A I'm board certified in emergency medicine, yes.

15 Q And the jury's heard this a couple of times, but just
16 briefly explain what board certification is for an
17 emergency room physician.

18 A Sure. It entails a residency in the specified field
19 of emergency medicine, followed by passing a written
20 board examination certification, followed by passing
21 an oral board certification examination. And then
22 that has to be renewed every ten years. So, that's
23 another examination that I have to pass in 2003 and in
24 2013.

25 Q Where are you licensed as a medical doctor?

1 A I am licensed in the state of Connecticut.

2 Q Have you ever testified at trial or at depositions as
3 an expert in emergency medicine?

4 A I have.

5 Q About how many times?

6 A Around fifteen depositions and perhaps five or six
7 trials.

8 Q And at those trials you were admitted as an expert in
9 emergency medicine?

10 A Yes, I was.

11 Q Dr. Jolin, do you review cases for attorneys in
12 litigation about emergency medicine?

13 A I do.

14 Q About how many of those do you do in a year?

15 A Probably about fifteen to twenty per year.

16 Q And do you review them for both plaintiff and
17 defendant?

18 A I do.

19 Q Are you charging for your time here today?

20 A I am.

21 Q What's your hourly rate?

22 A \$375 per hour.

23 Q And you're taking time away from your practice and
24 your work to be here?

25 A I am.

1 Q And you took time away from your practice and work to
2 review records and be deposed earlier up in
3 Connecticut?

4 A Yes.

5 Mr. Proffitt - Plaintiff would tender Dr. Jolin
6 as an expert in emergency medicine; he's going to
7 testify about the standard of care required of an
8 emergency room physician, including vascular issues.

9 The Court - Any objection?

10 Mr. Holler - No sir.

11 The Court - Without objection, he will be
12 qualified as such. I've explained that to the jury,
13 so you may proceed at this time.

14 Mr. Proffitt - Thank you, Your Honor.

15 Q Dr. Jolin, if you would, just explain to the jury what
16 I asked you to do in this case.

17 A Initially, you asked me to review the records to
18 render an opinion if the standard of care was met in
19 the evaluation of Mr. Ethier on the emergency
20 department visit of April 10, 2011.

21 Q Without say -- you know, without going into detail on
22 everything you've looked at, just give the jury of
23 what materials you have looked at.

24 A Sure. The medical records from April 10, 2011, from
25 Fairfield Memorial and May 25, from Chester Hospital.

1 I have reviewed over the past two years deposition
2 transcripts from various involved experts and parties
3 in this case.

4 Q Have you reviewed Dr. Bibeau's deposition?

5 A I have.

6 Q Did you review Fairfield's deposition, among others?

7 A Yes.

8 Q Dr. Jolin, what generally is the role of an emergency
9 room physician in his job or her job?

10 A Well, the primary role is to rule out the greatest
11 treatable life -- life or limb threat.

12 Q That's the overriding goal of the ER job?

13 A That's exactly it.

14 Q Dr. Jolin, I want to talk for a few minutes about the
15 information that you gleaned from the Fairfield
16 Hospital ER records that was available to Dr. Bibeau
17 on April 10, 2011. Okay? We're looking at
18 Plaintiff's Exhibit Number 22. Look down here where
19 it says admitting diagnosis. What does that say right
20 there?

21 A Lower left leg pain.

22 Q Lower what?

23 A I think it's right. Lower right leg pain, RT.

24 Q Do you need a copy at your ---

25 A That'll be helpful. Thank you.

1 Q Dr. Bibeau, if you'll turn first to the triage record.
2 What information is available to Dr. Bibeau on April
3 10, 2011 that you gleaned from this triage record done
4 by the certified nurse assistant?

5 A The triage states from the CNA that the patient is a
6 52 year old male who complained of right foot pain,
7 and it started at 1300, which is 1:00 p.m. in the
8 afternoon. He stated he was unloading his truck after
9 his right foot started to turn ecchymotic, which is a
10 bluish-purplish color, and complained of pressure.
11 The patient stated that he started -- I can't read the
12 term -- oh, getting worse at around 3:30 in the
13 afternoon, 1530, and his capillary refill as performed
14 by the triage person was one second and he had two-
15 plus right pedal and right posterior tibial pulses,
16 which are the two major pulses in the foot.

17 Q All right, if I can show you Plaintiff's Exhibit 23.
18 Is this the same document with some highlighted areas
19 on it that point out the pain and pressure reports?

20 A Yes, it is.

21 Q Does this appear to be accurate?

22 A Yes.

23 Q Does it also show the cap refill and the pulses on the
24 foot?

25 A Yes, it does.

1 Q Points to that. All right, Dr. Bibeau, let's look at
2 the page that was filled out by Dr. Bibeau. One back
3 from the one we were looking at. Do you see that one?

4 A Yes.

5 Q Tell us what you gleaned from this page.

6 A Dr. Bibeau noted that the history of the present
7 illness was that that patient had right foot pain
8 since 1300, 1:00 o'clock. It was cold, it was numb,
9 ecchymotic, and the patient was in severe pain.

10 Q Okay.

11 A And he documented right leg as the chief area of
12 complaint.

13 Q So, does this page of the ER record indicate that Dr.
14 Bibeau was looking at both the leg and the foot?

15 A I believe so, yes.

16 Q Okay. Look up here. See where my finger's pointing?

17 A Yes.

18 Q Right. See where my other finger's pointing?

19 A Leg, yes.

20 Q Right leg?

21 A (No response)

22 Q Let me show you this exhibit. Does this help? D Can
23 you point out where the pertinent information is ---

24 A It does.

1 Q Okay. So, do we have the right leg and foot right
2 here?
3 A We do.
4 Q What about this report right here?
5 A Cold.
6 Q This one?
7 A Severe pain.
8 Q That's a quote?
9 A Apparently, yes.
10 Q That's what it says here, severe pain?
11 A Severe pain, yes.
12 Q What's that word?
13 A Ecchymotic, which is a purplish-blue color.
14 Q What about the wheezing?
15 A He documents lower on the record that there's no
16 wheezing or parenchymal edema.
17 Q What does that tell you?
18 A I think he was -- he was trying to elucidate if this
19 could possibly be an allergic reaction.
20 Q Okay.
21 A Which that would be two signs or symptoms of an
22 allergic reaction.
23 Q What were there any signs or symptoms of an allergic
24 reaction?
25 A No, he documented none.

1 Q And what does this tell us?

2 A The word, numb.

3 Q Okay. What is this up here?

4 A Pain.

5 Q Okay. All right, Dr. Jolin, let's take a look at Dr.

6 Bibeau's physical exam page. Do you see the page?

7 A I do.

8 Q Is the page I'm now laying down the same page with

9 some highlights?

10 A Yes, it is.

11 Q What do we see here as far as what Dr. Bibeau is

12 telling us of his physical exam of Mr. Ethier, Phil?

13 A What he observed was the patient had, his right foot

14 had a pattern of livedo reticularis. And he also

15 noted that the right foot was cooler than the left

16 foot.

17 Q Okay. So, again, we have a report of coolness?

18 A Yes.

19 Q And what is livedo reticularis? What do you take that

20 to mean?

21 A It is a very, non-specific pattern, a lacy pattern

22 that is a purplish-pink color, and it's directly

23 underneath the skin. It is, as I said, non-specific

24 and it can be associated with over a hundred different

25 types of medical conditions.

1 Q And up here where we see the highlighted area for
2 vascular, is there anything filled in on any of those
3 blanks where you can fill out vascular information or
4 pulses?

5 A No, there's no documentation whatsoever under the
6 vascular examination section.

7 Q Is there a place in that area to put the foot pulses?

8 A Oh, yes.

9 Q Is it the where -- is it where I'm pointing, the
10 dorsi-pedi and the post tib?

11 A Right. There's a place for femoral, popliteal, dorsi,
12 dorsi-pedi, which is dorsalis pedis, and post tib,
13 which is posterior tibial.

14 Q And when we're talking about those pulses, we'll take
15 a look at Plaintiff's Exhibit 31, where are the two
16 foot pulses?

17 A There's one -- one on the inside of the ankle.

18 Q This one?

19 A Posterior tibial, right. And then there's one on the
20 top of the foot. This diagram has it further down
21 than it should be. It should be closer to the ankle
22 joint, but on the top of the foot.

23 Q Okay.

24 A The dorsal aspect.

25 Q All right. And what about this?

- 1 A That's a popliteal pulse, which is behind the knee.
- 2 Q And what about this one up here?
- 3 A The femoral pulse, which is in the groin.
- 4 Q And are those pulses on both limbs, both legs?
- 5 A Yes.
- 6 Q So you've got two sets of them, right, that you can
- 7 take?
- 8 A That's correct.
- 9 Q Is there any indication in the ER record that Dr.
- 10 Bibeau took any of those pulses that you just listed?
- 11 A No.
- 12 Q And this is where he would record it, correct, if he
- 13 took those?
- 14 A Exactly, that's the section.
- 15 Q And then down here at the bottom of this page, what do
- 16 we see as the clinical impression or diagnosis?
- 17 A Probable spider bite.
- 18 Q And over here -- and that's the diagnosis Dr. Bibeau
- 19 came to. Correct?
- 20 A Exactly.
- 21 Q Now, down below that, what does it say as far as
- 22 Phil's condition there at the ER and upon discharge?
- 23 A Well, two boxes are checked, both improved and stable.
- 24 Q So was Phil Ethier medically stable when he was
- 25 discharged from the ER on April 10, 2011?

1 A Not really. He was not in any threat of dying.

2 Q Okay. So, there's no immediate threat to life or limb
3 at that -- no immediate threat.

4 A To life.

5 Q Right.

6 A But there is immediate threat to limb.

7 Q Well, now, is it immediate in the sense that it's
8 going to occur in the next five minutes, or is it
9 imminent in that he needs to see someone in the very
10 near future?

11 A He needs to see someone in the -- he could see someone
12 immediately or he could see someone probably within a
13 day or maybe two at the most.

14 Q But when he was discharged from the ER he was
15 medically stable; he was not about to have a heart
16 attack or drop dead in the next five minutes.

17 A That's correct.

18 Q And that's what Dr. Bibeau reported.

19 A That's correct.

20 Q All right, Dr. Jolin, let me use our little P chart
21 here. I'm trying to squeeze it all in, but can you
22 see that?

23 A I can.

24 Q What is that?

1 A You're showing a piece of paper that has the six signs
2 and symptoms and physical findings collectively placed
3 together known as the six P's of arterial vascular
4 insufficiency.

5 Q And those are what? What's the list?

6 A Number one is pain, which is a symptom. Number two
7 is polar, which stands for cool or coldness. It's
8 also known as poikilothermia. That's a fancy,
9 scientific name of saying cold, which is also a
10 symptom, which is what a patient can complain about or
11 it's a sign which the physician can document on a
12 physical examination and then there's pallor, or color
13 change, which is a sign, something that the physician
14 can note on examination. And number four is
15 paresthesia, which stands for numbness or tingling,
16 which is mostly a symptom that the patient would
17 complain about, but the physician can test for
18 sensation in the affected area. Number five is
19 pulselessness, which I think we've discussed already.
20 And along with that goes capillary refill, which is --
21 I think we discussed that -- it's when you can assess
22 the perfusion or the blood supply of each toe by
23 gently pinching the nail end of the toe, the nail bed,
24 and measuring approximately how long it pinks back up
25 again, because when you pinch it, it blanches and then

1 you release it, and the toe nail becomes pink again.
2 Normal is less than two seconds. So, that's a sign;
3 that's a physical finding that the physician would
4 note, or the health care provider, I should say.
5 And then number six is paralysis or paresis, which
6 essentially means weakness. In other words, the
7 patient has some sort of weakness of the affected area
8 compared to, perhaps, his other side which is
9 unaffected.

10 Q Of this list and based on the ER record that we just
11 looked at, just the written record itself, which of
12 these P's are reflected in that record?

13 A Four out of the six.

14 Q And those four are what?

15 A The pain; the polar, the coolness; the pallor or
16 change in color; and number four, the paresthesia, the
17 numbness and tingling.

18 Q What's your understanding of who took the foot pulses
19 that's shown in the triage record?

20 A It was the CNA.

21 Q Was her name Samantha Anthony?

22 A I believe it was, yes.

23 Q Was she very experienced at taking foot pulses?

1 A No, she was, I believe, if I remember correctly, she
2 was a student, or some sort of -- a nurse in learning
3 and education.

4 Q Is there evidence in the record, in the written ER
5 record that Dr. Bibeau ever took foot pulses?

6 A No.

7 Q Now, Dr. Bibeau, I'm going to ask you some questions
8 about several different issues. And I'm going to ask
9 you, first of all, are all the opinions that you're
10 going to state in your testimony coming up stated to a
11 reasonable degree of medical certainty?

12 A Yes, they are.

13 Q The first issue I want to discuss with you, doctor,
14 whether or not there was a proper exam done of Phil
15 Ethier for a vascular issue? Talk to me about that.

16 A Sure. We went over the record briefly a few minutes
17 ago. Essentially, the vascular section of the
18 documentation of the physical exam is left blank.
19 There are some aspects of the vascular exam as
20 performed by the CNA which she documented.

21 Q All right. Now, what -- how would you do a proper
22 vascular exam if Phil is reporting to you as an ER
23 physician?

24 A The first part is -- the first aspect is observation,
25 so in other words to look at the affected area.

1 That's where you would note either pallor or color
2 change, that's number one. Secondly, palpation, in
3 other words a physical, hands-on examination of the
4 affected area. In that aspect you can gauge coolness,
5 the degree of coolness. You can test for paresthesia,
6 which is the numbness and tingling. You can obtain
7 pulses. And you can also ask the patient to move
8 their foot around so you can -- and assess for muscle
9 weakness.

10 Q Okay. And do you need to take the pulses on both
11 limbs and compare them?

12 A Well, you should. If it's abnormal, then yes. We
13 have another side that is normal, so it's very helpful
14 to -- for a comparison.

15 Q Even if the foot pulses were normal on April 10, 2011,
16 does that mean that Phil Ethier was not having a blood
17 vessel problem?

18 A No, it does not. In fact, when I heard him speak
19 today about his presentation, and when I actually just
20 read the -- Dr. Bibeau's first several lines, and also
21 in conjunction with the CNA's triage assessment, and
22 essentially a physical exam, although, yes, it's
23 proper to do one, but based upon just those two
24 collections of statements, an arterial vascular
25 problem needs to be diagnosed until proven otherwise.

1 Q Okay. Now, which statements are you talking about,
2 Dr. Jolin?

3 A I think I can go to Dr. Bibeau's statement, and that
4 is right foot pain, including coldness, numbness and
5 ecchymosis, and then the word -- the phrase again,
6 severe pain.

7 Q Okay. Wait a minute. Let's let the jury catch up
8 with us. So, you're looking at the...

9 A The four lines, essentially.

10 Q Okay.

11 A So, right foot pain, and then it has the timing, since
12 1:00 o'clock, the limb, the right - the right
13 extremity is cold, numb, ecchymonic, with severe pain.
14 So, essentially right there is four out of the six
15 P's. And of course, a physician should perform an
16 adequate physical examination, but with that evidence
17 in front of me as it is right there, the number one
18 entity on my list, the differential diagnosis is an
19 arterial vascular problem which needs to be ruled out.

20 Q Okay. So, just looking at that alone, those few lines
21 right there, an ER physician should have been able to
22 conclude, a reasonably competent ER physician should
23 have been able to conclude that there was a blood
24 vessel problem of some sort going on?

1 A Exactly. As the physician obtains the history from
2 the patient, from the first moment that the patient
3 begins speaking, the physician, in his mind, or in her
4 mind, is developing a differential diagnosis. And
5 that changes by the second based upon any further
6 information that the patient is able to tell them.
7 And so, the emergency physician thinks about the
8 greatest treatable threat to life or limb first. It's
9 a different way of thinking than being in a family
10 medicine clinic where physicians sometimes will
11 approach it as most probable diagnosis and not the
12 most serious diagnosis, which is fine; it's a
13 different way of thinking, but in the emergency
14 department we approach it as the greatest treatable
15 threat to life or limb. And so, therefore, in this
16 case, as I was listening to Mr. Ethier explain his
17 account of what happened, I was trying to develop a
18 differential diagnosis as he was speaking in real time
19 and I developed one, but at the top, the greatest
20 treatable threat to limb is an arterial vascular
21 problem, which definitely needs to be investigated
22 based on what he said today and his memory of what
23 happened and the medical record which was documented
24 in real time back in 2011.

1 Q Okay. Now, -- so, at the top of your list would be
2 some kind of vascular problem?

3 A Right.

4 Q Now, what is your understanding of whether Dr. Bibeau
5 ever considered a vascular problem or a blood vessel
6 problem in the ER when treating Phil that day on April
7 10, 2011?

8 A Well, since he didn't pursue that diagnosis I would
9 have to say he didn't consider it.

10 Q What did he testify about that?

11 A I believe he said, if remember correctly that he did
12 consider it, but there's no evidence that he
13 investigated it.

14 Q Okay, let's take a look at that. I want to refresh
15 your memory of Dr. Bibeau's deposition. We'll start
16 with this part right here.

17 A Would you like me to read it or just paraphrase it?

18 Q Well, let's just look at. I'll read it. I'll save
19 you the effort. Tell me what differential diagnosis
20 you considered other than spider bite if any? And
21 Doctor Bibeau answered: Possibly contact with some,
22 you know, some chemical. That's what it says?

23 A Yes.

24 Q Okay. You mean like spilling something on the skin?
25 He answered, yes.

1 A Yes.

2 Q All right. What else? I considered acute injury,
3 although I didn't see any signs of trauma.

4 Mr. Holler - Judge, excuse me. Can I note an
5 objection. We're publishing a portion of a party's
6 deposition here without notice as required by the
7 rule, so that we could also ask for the corresponding
8 parts that would respond to this; they should be
9 contemporaneously published. I'm not sure why we're
10 publishing Dr. Bibeau's deposition here with an
11 expert. There was certainly the notice requirement --

12 -

13 Mr. Proffitt - This is material that Dr. Jolin
14 has reviewed and considered. I'm merely refreshing
15 his memory. We can just let him look at it and I can
16 go from there. I don't have to read it.

17 Mr. Holler - He's publishing it to the jury.

18 Mr. Proffitt - I'll let him read it.

19 The Court - Okay. Hand it up, let him read it.

20 Mr. Proffitt - Sure. I'll be glad to.

21 Q Just read that part right there.

22 A So, the question is: Tell me what differential
23 diagnosis ---

24 Q No, no, no. I'm sorry. Read it to yourself.

25 A Oh, I'm sorry.

1 Mr. Holler - Judge, I need to be clear on my
2 objection. There's points -- there's other places in
3 this deposition that respond and further elaborate ---

4 The Court - Oh, I sustained your objection and
5 I've asked him to let him read whatever he wants him
6 to read; then I'll let him question him. I've heard
7 him testify that he has reviewed this deposition in
8 preparation for trial.

9 Mr. Holler - Which is appropriate.

10 The Court - So, I'll allow him to look over it
11 again before he asks questions. You may do so; you
12 may read the deposition.

13 A (Witness complies) I have read it.

14 Q Okay. Now, has that refreshed your memory?

15 A It has, yes.

16 Q Now, what did Dr. Bibeau testify at his deposition or
17 the differential or possible diagnoses that he
18 considered on April 10, 2011 in Phil's case?

19 A He considered three diagnoses. He considered spider
20 bite. He considered a chemical toxin of some type.
21 And he also considered an acute injury.

22 Q Okay. And was there any evidence in the record, in
23 the ER record about any acute injury or trauma to the
24 foot or leg?

25 A No.

1 Q Did Dr. Bibeau agree with that?

2 A He apparently did, yes. I agree with that, yes.

3 Q Was there any evidence in the ER record of any
4 chemical exposure to the skin?

5 A No.

6 Q And did Dr. Bibeau agree with that?

7 A Apparently, yes.

8 Q That's what he concluded. Right?

9 A Yes, and I agree also.

10 Q And so, the conclusion he reached was what?

11 A The third potential diagnosis, which he listed, which
12 was spider bite.

13 Q And according to that, did he ever think about
14 vascular events, vascular occlusion, blood vessel
15 problem, anything like that?

16 Mr. Holler - Objection, Judge. At some point in
17 time we're interpreting what's inside the mind of Dr.
18 Bibeau. He's being asked what Doctor Bibeau was
19 thinking. That's going a bit beyond.

20 The Court - Rephrase the question, please.

21 Q According to the testimony of Dr. Bibeau that you just
22 reviewed, is there any indication that he ever
23 considered the possible diagnosis of any kind of
24 vascular event or blood vessel problem on April 10,
25 2011?

1 A On this page that I just read there was no indication
2 that he considered a vascular problem.

3 Q All right. Dr. Jolin, does the -- do you understand
4 that Dr. Bibeau claims that he took Phil's foot pulses
5 but did not document it on the record anywhere?

6 A Correct.

7 Q Do you recall that testimony?

8 A Yes.

9 Q Does the fact -- let's assume for a moment that Dr.
10 Bibeau did take Phil's foot pulses, even though
11 there's no evidence of that and Phil says it didn't
12 happen. Let's assume for a moment that he did. Does
13 the fact ---

14 Mr. Holler - Objection, leading.

15 The Court - I guess to finish the question, and a
16 leading question is one that suggests an answer. I
17 haven't heard him suggest an answer, so I'm not going
18 to rule on that until I hear the whole question.

19 Q Does the fact that Dr. Bibeau, assuming he did take
20 the foot pulses, mean that he considered any kind of a
21 vascular diagnosis or a blood vessel problem? Does
22 that standing alone mean anything?

23 A No, it's part of a good physical examination..

24 Q But it doesn't tell you what kind of diagnosis he
25 considered, does it?

1 A No, it doesn't.

2 Q Now, Dr. Jolin, let's talk for just a couple of
3 minutes about the infamous spider bite. Is there any
4 record, is there any indication in this record that
5 we've looked at with your testimony here today, and
6 repeatedly over the last few days where Phil Ethier
7 reported any kind of a spider bite to anybody at the
8 hospital?

9 A No, there isn't.

10 Q Is there any indication that Jeanne Ethier reported
11 any kind of a spider bite to anybody at the hospital?

12 A No.

13 Q Is there any indication that the CNA Samantha Anthony,
14 the RN, Jerilyn Watford, or the LPN, Rhonda Gwynne,
15 ever saw any kind of spider bite, spider bite mark
16 evidence on April 10, 2011?

17 A No.

18 Q Is that anywhere in the record?

19 A No.

20 Q Where is the only place in the ER record where the
21 words, spider bite, are mentioned?

22 A The diagnosis.

23 Q Who made that diagnosis?

24 A Dr. Bibeau did.

1 Q What is your opinion on whether or not the ER record
2 that we looked at would lead to a conclusion of spider
3 bite? Tell me what your opinion is on that.

4 A I can't arrive at that diagnosis based upon the
5 record.

6 Q And why not? Why is it not a spider bite in your
7 opinion?

8 A The rule in emergency medicine is to make the
9 diagnosis of a spider bite there has to be some --
10 more evidence than just a physical examination. There
11 has to be some, either a specimen where the patient
12 will sometimes bring in the spider with them; that
13 happens. Or now with cell phones and cameras, they
14 take a picture of it. I would expand it to, if I
15 could find two fang marks on the affected area I would
16 say that that's good evidence that there's a spider
17 bite.

18 Q Anything like that found here?

19 A No, no. And also another point is is that many
20 insects can cause bites and stings. If there's no
21 direct evidence of any such insect or critter or
22 whatever, then really it's just a possible diagnosis.
23 You can't arrive at that conclusion based upon that.
24 You have to also consider other things.

1 Q Dr. Jolin, was it a breach of the standard of care for
2 Dr. Bibeau to conclude that it was a probable spider
3 bite?

4 A Yes. There's no evidence to make that conclusion.

5 Q Was it a breach of the standard of care required of a
6 reasonably competent emergency room physician for him
7 to not consider the possible diagnosis of a blood
8 vessel problem?

9 A Yes. It was a deviation from the standard of care.
10 It shouldn't have been considered as the top, possible
11 diagnosis.

12 Q Okay. And was it a deviation from the standard of
13 care or a breach of the standard of care of a
14 reasonably competent emergency room physician for Dr.
15 Bibeau not to do a proper vascular exam?

16 A It was. Although, as I said, it was not crucial in
17 this case. The entity of the possible arterial
18 vascular problem should have been investigated just
19 based upon the history.

20 Q The history given by Phil?

21 A The history given by Mr. Ethier as recorded by Dr.
22 Bibeau and Samantha Anthony.

23 Q Okay. All right, now, what in your opinion should Dr.
24 Bibeau have done if he had realized there was a

1 vascular problem or a blood vessel problem? What
2 needed to be done?

3 A Two options, and I'm not sure if they were available
4 that evening at Fairfield Memorial Hospital. But one
5 -- the definitive diagnosis could have been made by a
6 CAT scan called a CAT scan angiogram of the arteries
7 of the leg, and that involves injecting dye into the
8 patient's vascular system, and then obtaining a CT
9 scan, CAT scan, that basically, the x-ray slices up
10 the patient's leg as the dye flows through the leg.
11 That would have shown that -- that would have shown
12 the popliteal aneurysm at the time, but that wasn't
13 absolutely necessary. The other option would have
14 been to contact a vascular surgeon and explain to the
15 vascular surgeon the presentation of the patient and
16 what's going on, and the fact that the patient needed
17 to be seen urgently by a vascular surgeon and
18 evaluated.

19 Q All right. And was there another possible diagnostic
20 test that might have been able to have been done at
21 Fairfield Hospital, the ultrasound?

22 A Well, yeah. I'm not sure if the -- the ultrasound
23 probably would've been helpful in this case, but the
24 definitive study would have been an angiogram.

25 Essentially what happened at the May 25th, visit, in

1 other words, the emergency physician performed the
2 physical examination and actually was able to palpate
3 the popliteal aneurysm on a physical exam.

4 Q Now, you're talking about at Chester Hospital on May
5 25.

6 A Chester -- I'm talking about May 25. But essentially
7 the same thing could have happened in that
8 presentation and that would have been another -- I
9 shouldn't say -- an angiogram at that point or a
10 referral to a vascular surgeon, and at that point that
11 physician obtained the appropriate referral to a
12 vascular surgeon and sent Mr. Ethier by ambulance to
13 Carolinas Medical Center.

14 Q So, what happened on May 25, 2011, could have been the
15 same thing that happened on April 10, 2011, if Dr.
16 Bibeau had accurately and timely diagnosed the
17 possible blood vessel problem?

18 A That's correct. Yes, they were just -- they were
19 almost -- I mean, in terms of medicine, they were
20 identical visits. Same problem, maybe slightly
21 different in terms of presentation or findings, but
22 that's what -- what happened on May 25th should have
23 happened on April 10.

24 Q Okay. Now, is it your opinion that it was a breach of
25 the standard of care of a reasonably competent

1 emergency room physician for Dr. Bibeau not to refer
2 him to a vascular consult or for further diagnostic
3 testing?

4 A It was definitely a breach of the standard of care.

5 Q Okay. And you hold all those opinions you've been
6 talking about to a reasonable degree of medical
7 certainty?

8 A Yes, I do.

9 Q Dr. Bibeau -- sorry. Dr. Jolin, do you believe that
10 the popliteal aneurysm actually existed on April 10,
11 2011?

12 A It did to some extent, yes.

13 Q And did Dr. Bibeau on April 10, 2011, have to reach
14 the definitive conclusion of popliteal aneurysm, or
15 did he simply have to recognize there was a blood
16 vessel problem that needed further study and
17 treatment?

18 A No, he just needed to recognize that there was a
19 possible arterial vascular problem and then either
20 investigate it with a study or discuss it with a
21 vascular surgeon. He did not have to make the
22 diagnosis of a popliteal artery aneurysm. There was -
23 - obviously, given the presentation, there was some
24 sort of limitations in arterial flow to the patient's
25 right leg, subsequently proven to be from the

1 popliteal aneurysm and a blood clot forming in the
2 aneurysm and then flowing into the patient's right
3 third toe, but he didn't have to make that diagnosis.
4 That blood clot came from somewhere in the closed
5 system between the patient's heart and his foot, but
6 as long as he referred him to a vascular surgeon for
7 the appropriate valuation and study, he didn't have to
8 do that that night.

9 Q All right. Dr. Jolin, let's move on and let me ask
10 you a couple of questions about the visit that Phil
11 had with Dr. Bibeau from about April 10th, sometime
12 between April 10th and about April 25th, 2011. You
13 were here for Phil's testimony. Correct?

14 A Yes.

15 Q And you've heard the back and forth about whether or
16 not that visit ever occurred. Correct?

17 A Yes.

18 Q I want you to assume for a moment that the visit did
19 occur, or the encounter at the nurses' station did
20 occur. What should Dr. Bibeau have done at that point
21 as a reasonably competent ER physician who had
22 previously seen Phil for what he thought was a spider
23 bite issue?

24 A If he perceived that there was an emergent or urgent
25 type of situation, then he should have urged Mr.

1 Ethier to re-register as an official patient and be
2 seen officially, because these are what we call
3 curbside consultations. In other words, there was no
4 official visit. However, he had been -- there had
5 been one documented patient-physician relationship in
6 the medical record, and therefore, that should have
7 encouraged to officially occur again. The other
8 possibility is to say, well, it is appearing to look a
9 little better, but did you see a primary care
10 physician; did you follow up as we talked about, or as
11 we told you. So, there had to be -- even though there
12 wasn't a specific patient-physician encounter beyond -
13 - with Mr. Ethier and Dr. Bibeau beyond the first
14 visit in the emergency department on April 10th, the
15 physician has some moral responsibility -- they've
16 taken an oath to be -- to help patients, essentially.
17 There should have been some sort of encouragement to
18 follow up.

19 Q All right. Do you believe that it was a breach of the
20 standard of care required of a reasonably competent ER
21 physician to not do anything, assuming that what Phil
22 has said is true, and that the encounter at the
23 nurses' station did occur?

24 A I do, with the caveat that I explained, and that is,
25 since there's no -- there is no specific patient-

1 physician relationship the second time, but it should
2 have been -- it should have been encouraged to -- some
3 visit should have been encouraged, whether it be re-
4 registering in the emergency department or seeing a
5 primary care physician.

6 Q Okay. And why is that? Why do you say that?

7 A Well, the, it sort of goes back to the original
8 presentation and that is -- and it's difficult to
9 answer that in isolation, but essentially, the first
10 time around, the first visit an arterial vascular
11 problem should have been considered. And this would
12 have been over time observation of the toe
13 specifically. You would expect that if the patient
14 threw a blood clot from some area in his circulation
15 to the toe, that eventually that tip of the toe, that
16 artery, the end artery would, the skin that it
17 supplied would die and it would slough off. In other
18 words, it would just sort of fade away and then
19 regenerate, so this was -- even though it was getting
20 better, which was great, there was some evidence that
21 there was an evolution here and follow up should have
22 been encouraged ---

23 Q Okay.

24 A --- more than just suggested.

1 Q All right. Let me ask you this, Dr. Jolin. If Phil
2 had seen a family care physician outside the hospital,
3 not the emergency room doctors that he has testified
4 that he spoke with in curbside consult, but if he had
5 gone to a family physician, a primary care physician
6 outside the hospital in the few days after the April
7 10th, 2011, visit or within a week or so, and given
8 with the presentation he had on April 10th, do you
9 believe that the family care physician should have
10 recognized a blood vessel problem?

11 A I would hope so, yes.

12 Q Okay. All right, so, that family care physician, if
13 he'd seen him, should have recognized it and would it
14 have been required under the standard of care to do
15 that, do you think?

16 A Well, since I'm not a family physician, I can't
17 specifically comment on that, but I would hope that
18 any primary care physician should have recognized
19 that.

20 Q Okay.

21 A And then the appropriate referral could have been --
22 or the appropriate study could have been performed.
23 Either one would have met the standard of care.

24 Q All right. And is it your understanding that Dr.
25 Bibeau himself is a board certified family physician?

1 A I believe he is.

2 Q And has been so for years?

3 A I believe so, yes.

4 Q So, just as that family care physician outside the
5 hospital should have recognized it a few days later --
6 Right? ---

7 A Right.

8 Q --- should Dr. Bibeau have done that on April 10th,
9 2011?

10 Mr. Holler - Objection. I think he's now
11 testifying as a family care physician which he just
12 said he wasn't.

13 The Court - I'll ask you to rephrase the
14 question.

15 Q Do you believe that the family care physician, a
16 reasonably trained family care physician should have
17 been able to recognize a blood vessel problem if Phil
18 had gone to see him within the next several days or so
19 after April 10th, 2011 ---

20 Mr. Holler - Same objection.

21 Q --- given the presentation that you ---

22 Mr. Holler - He just said he could not testify
23 about the standard of care for a family care physician
24 when he was asked the question and we objected.

1 Mr. Proffitt - I don't think he -- I'm asking him
2 what a reasonable physician -- let me try it another
3 way. Let me ask it this way.

4 The Court - All right.

5 Q Dr. Jolin, would a physician with an MD be able, in
6 your opinion, to recognize a blood vessel problem
7 given the presentation - and if the presentation is
8 the same as shown in the ER record that we've been
9 talking about for the last few minutes?

10 A I would expect most specialties to be able to do that.
11 There are certain specialties that I would not expect
12 that.

13 Q Okay. Would a regular MD, a plain old family doctor
14 that might be down the street anywhere here in
15 Winnsboro or any other small town in South Carolina?

16 A I would hope so, yes.

17 Q Okay. Dr. Jolin, you testified that there were a
18 number of deviations from the standard of care, the
19 required standard of care for a reasonably competent
20 emergency room physician in this case. Correct?

21 A Yes.

22 Q How much of a deviation from that standard of care
23 would you -- how would you characterize it, as far as
24 it a small deviation, is it a large deviation? Talk
25 to me about that.

1 A Yeah. I would categorize it as a substantial
2 deviation. I think the problem of leaping to the
3 diagnosis of a probable spider bite without any
4 evidence whatsoever and without any apparent
5 consideration beyond two other different -- two other
6 diagnoses within the differential diagnosis, which
7 could have been easily ruled out by history, which
8 they were, and I agreed that there was no indication
9 of any chemical spill or of any trauma, so, that's
10 essentially ruling them out, but then just considering
11 the third diagnosis of a probable spider bite, I
12 believe that that's egregious.

13 Mr. Proffitt - One moment, Your Honor. (Pause)

14 Thank you, Dr. Jolin, that's all the questions I have.

15 The Court - Mr. Holler, you may cross-examine.

16 Mr. Holler - Thank you, Your Honor.

17 **CROSS EXAMINATION BY MR. HOLLER:**

18 Q Dr. Jolin, David Holler. How are you?

19 A Fine, thank you, Mr. Holler, how are you?

20 Q I spoke with you briefly this morning. Good, good.

21 Now, you testified about something that I want to make
22 clear, just one point before we get started. And that
23 was the tip of the toe died, sloughed off and re-grew?

24 A Apparently, yes.

25 Q And that's your medical opinion?

1 A It does.

2 Q And a patient has a responsibility to follow the
3 instructions they're given.

4 A They do.

5 Q And that's the patient's responsibility solely.

6 A Correct.

7 Q And the ER physician has no way to force the patient
8 to be compliant with they leave.

9 A They cannot force compliancy, no. That's the
10 patient's decision.

11 MR. HOLLER - Thank you, Dr. Jolin.

12 DR. JOLIN - You're welcome, sir.

13 The Court: Re-direct.

14 Mr. Proffitt: Just briefly.

15 The Court: Yes sir.

16 RE-DIRECT EXAMINATON BY MR. PROFFITT:

17 Q Dr. Jolin, did that same discharge form that he was
18 referring to also say call or return to the ER if you
19 need to or if you're worse?

20 A I believe it did, yes.

21 Q Now, you were asked on cross examination, if a patient
22 comes into the ER and says I am Jesus, you're supposed
23 to write it down in the chief complaint section?

24 A Uh, ---

25 Q You write down what they say?

1 A Yes. Yes. I've seen it written there, yes.

2 Q And if a patient had come into the ER, if Phil had
3 come into the ER, and said I had a spider bite, it
4 would have been written down, wouldn't it?

5 A It should have been, yes.

6 Q Okay. Is there any evidence that you're aware of that
7 he had any kind of a spider bite in that sneaker that
8 he put on inside his house before he walked out to his
9 dog pin?

10 A No.

11 Q Any evidence of any spider bite mark on the toe?

12 A No.

13 Q Is there any evidence that you've heard, that you're
14 aware of in the ER record that there was any kind of
15 call by Phil or anyone on Phil's behalf to the ER
16 before he got there, talking about a spider bite?

17 A No.

18 Q Dr. Jolin, is it still your opinion that the four P's,
19 four of the six P's were met as shown in the first few
20 lines of the physical exam record that Dr. Bibeau did
21 on April 10th, 2011?

22 A Yes.

23 Q Is it still your opinion that there were the various
24 and numerous breaches of the standard of care by Dr.
25 Bibeau who did not act as a reasonably competent ER

1 physician on April 10th, 2011, in all the ways we
2 talked about earlier?

3 A Yes, my opinion is the same.

4 Q In the failure to do a proper vascular exam?

5 A Yes.

6 Q In the failure to consider a vascular problem or a
7 blood vessel problem as a possible diagnosis?

8 A Yes.

9 Q That's a breach?

10 A Yes, it is.

11 Q And in the failure to order additional diagnostic
12 tests or refer for a vascular consult?

13 A Correct.

14 Q And all that occurred on April 10th. 2011?

15 A Correct.

16 Q And was April 10th, 2011, the key date?

17 A It was. It was the sentinel event.. I mean, that type
18 of visit is what emergency physicians look for. In
19 other words, there could have been a diagnosis made or
20 at least a referral to a specialist who could have
21 made the definitive diagnosis. The vascular surgeon
22 could have made the diagnosis, repaired the aneurysm,
23 and then we wouldn't be here discussing any more
24 events today. It would have been cured, essentially.

1 Q And what do you mean by saying that's the kind of
2 event that an emergency physician lives for?

3 A It would have made a difference in the patient's life.

4 Q Because so many times, all you get in the ER are colds
5 and flus, and just really minor things, just routine
6 stuff. Right?

7 A Well, we help those patients, too. But I think the
8 point is, is that when a patient has a life
9 threatening or a limb threatening situation and we can
10 actually do something about it and reverse it, that's
11 the, that's why emergency physicians exist.

12 Q That's why you went to medical school, isn't it?

13 A Well, yes, that was -- I learned that I wanted to go
14 into emergency medicine while I was in the tail end of
15 medical school, but in general, you go to medical
16 school to help -- to become a physician so you can
17 help people.

18 MR. PROFFITT - All right, thank you, Dr. Jolin.
19 I don't have anything further.

20 A You're welcome.

21 The Court - Re-cross.

22 Mr. Holler - Very briefly.

23 RE-CROSS EXAMINATION BY MR. HOLLER:

24 Q When Mr. Ethier walked out, he wasn't in a life or
25 limb threatening situation on April the 10th 2011?

1 THE COURT - I'll let you ask that.

2 MR. DUQUETTE - Sorry.

3 MR. COX - All right, thank you, Your Honor.

4 THE COURT - All right, you wish to ask another
5 question?

6 MR. SMITH - No, sir, I quit.

7 (WHEREUPON, LAUGHING)

8 THE COURT - All right, thank you. All right, you
9 may step down. Thank you, sir.

10 MR. DUQUETTE - You're welcome.

11 THE COURT - All right, plaintiff may call its
12 next witness.

13 MR. PROFFITT - Play a video, Your Honor.

14 THE COURT - All right, ladies and gentlemen, we
15 have another deposition by video. We'll set it up. Should
16 take just a moment. We're probably getting pretty good at
17 this I hope. (Pause) You ready?

18 MR. PROFFITT - (Indicating yes)

19 THE COURT - All right, come to order please. You
20 may proceed.

21 MR. PROFFITT - Plaintiff would call Samantha
22 Anthony by video.

23 THE COURT - Samantha Anthony?

24 MR. PROFFITT - (Indicating yes)

TO AWR ✓

Page 1

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD
PHILIP ETHIER and JEANNE ETHIER,
Plaintiffs,
vs. CASE NO. 2013-CP-20-12
GUY R. BIBEAU, M.D.,
Defendant.

VIDEO
DEPOSITION OF: SAMANTHA ANTHONY
DATE: March 16, 2015
TIME: 4:13 PM

LOCATION: Law Offices of Proffitt & Cox
140 Wildewood Park Drive, Suite A
Columbia, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: AMY R. COPE,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES
Fast, Accurate & Friendly
Charleston, SC Hilton Head, SC Columbia, SC
(843) 722-8414 (843) 785-3263 (803) 731-5224
Greenville, SC Myrtle Beach, SC Charlotte, NC
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STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * *

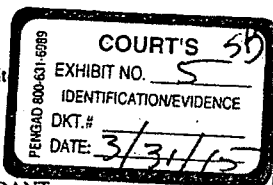
THE VIDEOGRAPHER: We are now on the record. Today's date is March the 16th, 2015. The time is 16:13. This is the video deposition of Samantha Anthony taken by counsel for the plaintiff. The location is Proffitt and Cox, 140 Wildewood Park Drive, Suite A, Columbia, South Carolina.

My name is Alan Metts, legal videographer representing A. William Roberts, Jr., & Associates. This deposition is taken in the matter of Philip Ethier and Jeanne Ethier, Plaintiffs, versus Guy R. Bibeau, MD, Defendant. Case Number 2013-CP-20-12. Pending in the Court of Common Pleas, the state of South Carolina, the County of Fairfield.

Page 2

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ALSO PRESENT:

Alan Metts, videographer

(INDEX AT REAR OF TRANSCRIPT)

Redacted transcript of
Video as presented to jury
Highlighted / Underlined

Page 4

Will counsel now introduce yourselves for the record.

MR. PROFFITT: My name is David Proffitt and I represent the plaintiffs.

MR. SMITH: My name is Murrell Smith and I represent Dr. Bibeau.

THE VIDEOGRAPHER: And will the court reporter now please swear in the witness.

SAMANTHA ANTHONY
being first duly sworn, testified as follows:

EXAMINATION

BY MR. PROFFITT:

Q. Good afternoon, Ms. Anthony. How are you doing?

A. I'm doing well. How are you?

Q. I'm very well. Again, my name is David Proffitt and I represent the plaintiffs in this case. And we're here today to question you about some events that occurred on April 10th, 2011 regarding the care provided by Dr. Bibeau at Fairfield Memorial Hospital on April 10th, 2011. Do you understand that?

A. Yes, sir.

Q. Okay. If you would just introduce yourself to the jury by telling them your name and

Portions were redacted
from video

1 (Pages 1 to 4)

ROA-0798

1 where you live now.

2 A. Samantha Anthony. I live in Elgin,
3 South Carolina.

4 Q. Okay. And where did you grow up more
5 or less?

6 A. I grew up in the Carolinas the -- most
7 of my life.

8 Q. Okay. Where did you go to high school?

9 A. I was at Ridgeview in Columbia.

10 Q. All right. What were you doing as of
11 April 10th, 2011, as far as education?

12 A. I was at USC as a student.

13 Q. In what?

14 A. In nursing.

15 Q. Okay. And had you worked in any kind
16 of medical position before that, before April 10th,
17 2011?

18 A. As a certified nursing assistant.

19 Q. Okay. Where had you worked as a
20 certified nursing assistant?

21 A. I had worked at UniHealth Post Acute
22 Care.

23 Q. Is that a nursing home?

24 A. That is a -- considered a long-term
25 skilled facility, I want to say. So they have

1 what I worked in the beginning. But I worked every
2 weekend, Saturday and Sunday, 11:00 AM to 7:00 PM.

3 Q. Okay. And what departments did you
4 work in?

5 A. I worked on the floor, the medical
6 surgical floor, as well as the emergency room.

7 Q. Okay. And how much of the time did you
8 work in the emergency room, approximately?

9 A. I'd say about 95 percent of the time.

10 Q. Okay. And do you remember how long you
11 worked at Fairfield Hospital?

12 A. I believe it was shy of a year and a
13 half.

14 Q. So about October 2011?

15 A. Yes, sir.

1 rehab facilities there.

2 Q. Okay. And what did you do there,
3 basically?

4 A. I assisted with activities of daily
5 living or --

6 Q. All right.

7 A. -- ADLs, if you will.

8 Q. Okay. When did you begin working at
9 Fairfield Memorial Hospital?

10 A. About nine months after I started
11 working at --

12 Q. Does March 2010 sound right?

13 A. Probably.

14 Q. Okay.

15 A. I was going to say April, but I didn't
16 think so.

17 Q. Okay. All right. And what were you
18 hired at Fairfield Hospital as, what kind of
19 employee?

20 A. A certified nursing assistant --

21 Q. Okay.

22 A. -- as I think part time.

23 Q. Okay. And what -- when did you work,
24 what days of the week?

25 A. In the beginning -- I cannot tell you

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 Q. Ms. Anthony, were you in nursing school
6 in April 2011?

7 A. Yes, sir.

8 Q. Okay. And what year were you in
9 nursing school?

10 A. I was -- 2011, I was in my third year.

11 Q. All right. And how many clinical
12 courses had you had in nursing, hands-on kind of
13 courses I'm talking about, in nursing as of April
14 2011?

15 A. I was on my second.

16 Q. Okay. Where was your first one?

17 A. It was at Lexington Medical Center.

18 Q. Okay. And what did you do in that
19 hands-on clinical course at Lexington Medical
20 Center?

21 A. Primarily reviewed charts.

22 Q. Okay. Did you have any hands-on
23 patient work at all?

24 A. To my knowledge or to my memory, I
25 don't recall.

Page 9 1 Q. Okay. All right. And that would have 2 been in fall of 2010? 3 A. Yes, sir. 4 Q. Okay. Now, what were you doing in 5 spring of 2011 as far as hands-on clinical courses 6 in your nursing program? 7 A. I was learning the core foundation of 8 nursing on the surgical trauma ICU -- 9 Q. Where -- 10 A. -- at Richland. 11 Q. At Palmetto Richland? 12 A. Yes, sir. 13 Q. In Columbia? 14 A. Yes, sir. 15 Q. Okay. And what were you doing as far 16 as hands-on patient care at that time at Palmetto 17 Richland? 18 A. Everything that you need to build a 19 strong foundation in nursing. The assessments, the 20 calling other people that you need to call to get 21 things taken care of, what you need to report to 22 other people -- 23 Q. Okay. 24 A. -- the normal findings, the expected 25 things, the --	Page 11 1 eight-hour shift? 2 A. The full -- no, you didn't ask me how 3 many times I had done the vital signs. 4 Q. Oh, okay, I'm sorry. Well, let's do it 5 that way. 6 A. Yeah. 7 Q. How many times had you done the vital 8 signs per day during those Saturdays? 9 A. Vital signs were every hour. 10 Q. All right. All right. Now, let's move 11 to talking about your duties at Fairfield Hospital, 12 Fairfield Memorial Hospital. What were you doing 13 in the ER on -- at Fairfield as of April 10th, 14 2011, what were your duties there generally? 15 A. I would triage patients. I would 16 assist in the flow of getting them in, getting them 17 to a room. Getting them transferred, if need be. 18 Cleaning the room, prepping for the next one. 19 Q. Okay. All right. And tell the jury 20 about the triage area there at the hospital, what 21 size it is and what it's like. 22 A. It's about a four by five or six room 23 that has two chairs, a Dinamap to use to take vital 24 signs on, a scale. A small table that had a small 25 scale for when you weighed babies and stuff.
Page 10 1 Q. Okay. What unit were you working in? 2 A. The surgical trauma intensive care 3 unit. 4 Q. Okay. And were the patients in there 5 sedated or not sedated? 6 A. Sedated. 7 Q. Okay. So when you took the vitals and 8 those kinds of things, you were doing those on 9 sedated patients? 10 A. Yes, sir. 11 Q. Okay. And how many times would you 12 take the vitals or do an assessment of the sedated 13 patient? 14 A. Sometimes hourly, sometimes every 15 15 minutes depending on how quickly they were out 16 of surgery. 17 Q. Okay. And what about on a daily basis 18 though, how many times a day were you doing the 19 basic vital signs when you did the full assessment 20 on those Saturdays when you worked? 21 A. It was every hour -- 22 Q. Okay. 23 A. -- as per the standard. 24 Q. I thought you testified earlier it was 25 about once or twice a day you would do that in an	Page 12 1 Q. Okay. You're describing the triage 2 room? 3 A. Correct. 4 Q. Okay. It's basically a small room? 5 A. Correct. 6 Q. All right. All right. Ms. Anthony, 7 let me hand you what's been marked for 8 identification as Plaintiff's Exhibit for trial 22. 9 Do you recognize that document? 10 A. Yes, sir. 11 Q. What is that document? 12 A. It is the admission paperwork. 13 Q. Okay. And there's several pages to it. 14 What does it appear to be when you look through the 15 entire document? 16 A. An ER visit -- 17 Q. Okay. And who is -- 18 A. -- documentation. 19 Q. -- and who is the patient in that ER 20 visit? 21 A. Philip Ethier. 22 Q. All right. And if you look there on 23 the first page of the Exhibit 22, down where it 24 says: Admitting diagnosis. What does it say there 25 on that first page?

BY MR. PROFFITT:

Q. All right. Ms. Anthony, are these records that you have routinely seen when you worked at the ER department in Fairfield Hospital?

A. Yes, sir.

Q. All right. Is this first page we're looking at -- what is this first page we're looking at?

A. A demographics form.

Q. Okay. And did you see a demographics form on a daily basis at the hospital?

A. Yes, sir.

Q. Okay. And did you use a demographics form on a daily basis at the hospital?

A. I used a demographics form on everyone.

Q. Okay. All right. Who filled out the demographics form at the hospital?

A. I don't know. A female at the front office that would see you when you came in initially --

Q. Okay.

A. -- and would check you in.

Q. All right. But this demographics form would be seen by you as well?

A. After they were done, yeah.

Q. Okay. All right. So if we look at the first page of this exhibit, what is the -- there in the block where it says: Admitting diagnosis, what does that say?

BY MR. PROFFITT:

Q. You may answer the question.

A. Just what it says?

Q. Yes, ma'am.

A. Lower right leg pain.

Q. Okay. All right. Now, if we flip through the record here, turn to the page that's for the triage record. And if we look at that record is that the record that would have been done by the person who did the triage at the hospital on Mr. Ethier?

A. Yes, sir.

Q. Okay. And who was the registered nurse who was on duty during this visit at Fairfield

Hospital?

A. Jerilyn Wadford.

Q. All right. And who is the licensed practical nurse or the LPN that was on duty this time?

A. Rhonda, I think it's just Gwynn.

Q. Rhonda Gwynn?

A. (Nods head up and down).

Q. Okay. And who does this record show that the doctor was for Mr. Ethier?

A. Dr. Bibeau.

Q. Okay. All right. So if we look at the triage record, is this a form or a record that you completed?

A. Yes, sir.

Q. Okay. Is there anything on this page that's not your handwriting or your information?

A. The date and the signature.

Q. Okay. Who is the signature of?

A. That is Jeri's.

Q. Jerilyn Wadford?

A. Yes, sir.

Q. Okay. All right. And who does it say there at the top was accompanying Phil to the ER that day?

A. The wife.

Q. All right. Do you remember her name?

A. No, ma'am -- no, sir.

Q. All right. And what time did Phil arrive at the triage area?

A. 16:40.

Q. Which is what in regular time?

A. 4:40 PM.

Q. All right. And did you take his vitals?

A. Yes, sir.

Q. All right. And are the vitals normal?

A. Except for the blood pressure, yes, sir.

Q. Okay. So his blood pressure was up?

A. Yes, sir.

Q. All right. Did -- did Ms. Wadford participate in the triage of Mr. Ethier on that date?

THE WITNESS: I do not recall.

BY MR. PROFFITT:

Q. All right. Do you recall testifying earlier that she did not participate in that triage?

THE WITNESS: In that specific one, I know what question you're referring to, but I said that I did not recall if she was -- in this particular instance, if she had walked in the room with me or not, but I made a generalization.

BY MR. PROFFITT:

Q. Okay. Did she usually help you with the triage?

A. No, sir.

MR. SMITH: Objection to the relevance. Go ahead.

BY MR. PROFFITT:

Q. Did she -- and you do or do not recall whether or not she helped you this day on Mr. Ethier?

A. I do not recall.

Q. Okay. But usually she would not?

A. Yes, sir.

MR. SMITH: Object to the relevance.

BY MR. PROFFITT:

Q. All right. All right. Ms. Anthony, if you would look there at the box where it says: Chief complaint. And if you just would just read

under the skin.

Q. Okay. All right. And when he was complaining of pressure, complaining of pressure where?

A. I would presume it would be his right foot.

Q. Okay. Was it also in the leg?

A. If it were I would have written it.

Q. Okay. So you just had him reporting it as the right foot?

A. Yes, sir.

Q. Okay. All right. And then it started getting worse around 3:30, that's what you wrote, correct?

A. Yes, sir.

Q. Okay. Now, tell us about the capillary refill; what is that testing for?

A. Blood flow.

Q. All right. And what did you -- where did you test the capillary refill?

A. On the right toenail.

Q. Okay. And it says within one second. What is -- is that normal, is it not normal?

A. It is normal.

Q. Okay. And what about the pedal, the

that to us.

A. 52-year-old male complaining of right foot pain since 13:00. Patient states he was unloading his truck when his right foot started to turn ecchymotic, complained of pressure. Patient states pain started getting worse around 15:30.

Patient had cap refill within one second with two plus right pedal and right post-tib pulses.

Q. Okay. Now -- so at 13:00 that would be 1 o'clock, right --

A. Yes, sir.

Q. -- in the afternoon? So that's about three and a half hours or so before he came to the ER?

A. Yes, sir.

MR. SMITH: Objection to the leading.

BY MR. PROFFITT:

Q. How many hours is it before he came to the ER?

A. It is three hours and 40 minutes later.

Q. Okay. All right. Now, you said the right foot started to turn ecchymotic. What does that mean exactly?

A. It is a bruising or a discoloration

right pedal pulse; what is that?

A. That's an artery that you can feel or palpate to pulse to. The right pedal is right on top of the foot.

Q. Okay. And did you feel that pulse?

A. Yes, sir.

Q. And what was pulse again?

A. Plus two, which is normal.

Q. That's normal, okay. What's abnormal? Tell us the scale.

A. Absent is a zero. Plus one is a threading. Plus two is normal. Plus three is bounding. Plus four is probably dehydration or something of the sort. But as far as what it actually means, I can't recall.

Q. All right. All right. And then what about the post-tibular pulse?

A. Same thing, that one is just behind the ankle.

Q. All right. Was that also on the right foot?

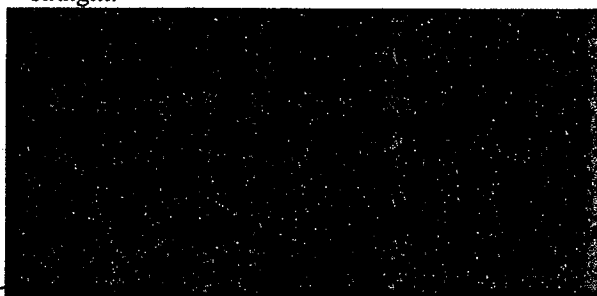
A. Yes, sir.

Q. Okay. And what was that pulse?

A. Plus two.

Q. All right. So that was normal

1 according to your assessment that day?
 2 A. Yes, sir.
 3 Q. All right. How many times at that
 4 point in your position as a certified nurse
 5 assistant had you taken foot pulses?
 6 A. At Fairfield?
 7 Q. At Fairfield.
 8 A. I don't recall.
 9 Q. Was it a few times, many times, do
 10 you --
 11 A. I don't recall if I did it at all at
 12 Fairfield.
 13 Q. Okay. So it --
 14 A. Other than this instance, of course.
 15 Q. Okay. How experienced do you think you
 16 were at taking foot pulses at that point in your
 17 career?
 18 A. My career was pretty
 19 inexperienced/nonexistent at that time, but I feel
 20 confident in my pulse-taking abilities. Though,
 21 like I said, it was an inexperienced beginning.
 22 Q. Okay, fair enough. All right. Did
 23 Mr. Ethier report pain to you during the triage?
 24 A. Yes, sir.
 25 Q. Okay. And what did you record his pain

1 level as?
 2 A. Moderate.
 3 Q. And what is that on a scale of 1 to 10
 4 that you had circled?
 5 A. For him it was a 5.
 6 Q. Okay. All right. Ms. Anthony, I'll
 7 hand you what has been marked for identification as
 8 Plaintiff's Exhibit 23. And what I want you to do
 9 is just hold that up, sort of put it to one side so
 10 the videographer can tape it and then I want you to
 11 help me look at it.
 12 A. Okay.
 13 Q. Hold it up so he can -- hold it up
 14 straight.
 15 
 24 All right. Ms. Anthony, if you would
 25 look at -- and I just want you to help the jury

1 understand what we've been talking about for the
 2 last few minutes.
 3 A. Okay.
 4 MR. PROFFITT: Can you see that?
 5 THE VIDEOGRAPHER: Yeah.
 6 BY MR. PROFFITT:
 7 Q. Okay. All right. If you look at it
 8 and see that top part where the box that says:
 9 Capillary refill and pulses on right foot; do you
 10 see that?
 11 A. Yes, sir.
 12 Q. With the arrow?
 13 A. Yep.
 14 Q. Is --
 15 A. Oh, yep.
 16 Q. Okay. Is that pointing to the area of
 17 the report where we just talked about the capillary
 18 refill and foot pulses?
 19 A. Yes, sir.
 20 Q. All right. And if you look over there
 21 where it has the box -- there are a couple of boxes
 22 marked pressure. Is that pointing to areas of the
 23 form where you're reporting that there was
 24 pressure?
 25 A. Yes, sir.

1 
 2 BY MR. PROFFITT:
 3 Q. Well, you tell what the pressure
 4 reports -- what are you reporting about pressure?
 5 A. That there was a complaint of it.
 6 Q. Okay. All right. And then what about
 7 the boxes with the arrows that show reports of
 8 pain, are those accurately pointing toward the
 9 reports -- the sections of the report that show the
 10 reports of pain?
 11 
 12 THE WITNESS: Yes, sir.
 13 BY MR. PROFFITT:
 14 Q. Okay. You can put it down now, thank
 15 you.
 16 A. Uh-huh.
 17 Q. All right. Ms. Anthony, down at the
 18 bottom of the form it mentions family doctor Blue
 19 Granite; do you see that?
 20 A. Yes, sir.
 21 Q. What is Blue Granite?
 22 A. Blue Granite is a -- I don't know what
 23 you call it now. It was a community, not quite
 24 clinic, sort of a half point between clinic and
 25 family doctor.

1 Q. Is it an operation that was run by
2 Fairfield Memorial Hospital?

3 A. Yes, sir.

4 Q. Okay. Do you know if there was even a
5 physician available at that clinic?

6 A. I know very little information about
7 that clinic, sir.

8 Q. Okay. All right. Ms. Anthony, did you
9 take the popliteal pulse of Phil Ethier on April
10 10th, 2011, the popliteal pulse behind the knee?

11 A. No, sir.

12 Q. All right. Is there any indication in
13 this record anywhere that anyone took the popliteal
14 pulse behind Mr. --

15 MR. SMITH: Objected to -- she doesn't
16 have the ability to answer it.

17 THE WITNESS: Of the full record?

18 BY MR. PROFFITT:

19 Q. Yes, ma'am.

20 A. I don't know, I haven't looked through
21 it.

22 Q. All right. Look through it for me and
23 see if you see any indication in there where any
24 mention of a popliteal pulse being taken.

25 A. I will go ahead and agree that I would

1 not know where on this doctor's form to even look
2 for something like that.

3 Q. Okay. All right. Well, let's just
4 stick to your triage record then, that's fine. Is
5 there any indication on your triage record that
6 anyone took the popliteal pulse?

7 A. I did not take the popliteal pulse.

8 Q. Okay. Did Nurse Wadford take the
9 popliteal pulse?

10 A. Possibly, I don't know. It wasn't
11 during this triage.

12 Q. It wasn't on the triage, right?

13 A. It wasn't during the triage, no, sir.

14 Q. Is there any other record or page in
15 this record that shows Nurse Wadford took the
16 popliteal pulse?

17 A. I do not know.

18 Q. Look through the record and tell me if
19 you see any.

20 A. I would not be knowledgeable in reading
21 charts at this time. Are you asking for my opinion
22 currently as a nurse?

23 Q. I'm asking you as a -- your opinion as
24 a nurse, if you want to -- yeah, is there any
25 indication in this record that Nurse Wadford ever

1 took the popliteal pulse of Phil Ethier on April
2 10th, 2011?

3 MR. SMITH: I object to her providing
4 opinion testimony.

5 BY MR. PROFFITT:

6 Q. Oh, no, I'm not asking you for your
7 opinion. I'm asking you as a fact: Is there
8 anywhere in this record that Nurse Wadford or Nurse
9 Gwynn, while you're looking, ever took the
10 popliteal pulse of Phil Ethier on April 10th, 2011?

11 MR. SMITH: I object, she's not
12 qualified to answer this question. She's talking
13 about the testimony and examination in records that
14 she filled out, not what someone else did. You
15 need to ask them that question, so I object to
16 this.

17 THE WITNESS: Among other things I
18 can't read Rhonda's handwriting, so...

19 BY MR. PROFFITT:

20 Q. Okay. All right. Fair enough, we'll
21 move on. Is there any indication, Ms. Anthony, in
22 the triage record that you completed that either
23 Nurse Wadford or Nurse Gwynn ever took the foot
24 pulses of Phil Ethier on April 10th, 2011?

25 A. Between 16:40 and 16:51, no.

1 Q. Okay. All right. Ms. Anthony, did you
2 ever see any spider bite mark on Phil Ethier's leg
3 or foot -- right leg or foot on April 10th, 2011?

4 A. I don't recall.

5 Q. Is there any indication in the record
6 that you ever saw a spider bite mark on his leg or
7 foot?

8 A. I would not be even qualified to think
9 to look for that, so I --

10 Q. That's not what I asked you --

11 A. -- I didn't look for it.

12 Q. -- no, that's not what I asked you. Is
13 there any indication in the triage record on April
14 10th, 2011 that you ever saw any spider bite mark
15 on Phil Ethier's right leg or foot on that date?

16 A. No, sir, but --

17 Q. Okay.

18 A. -- there's also nothing in here that
19 says that I assessed his skin for integrity.

20 Q. All right. If you had seen a spider
21 mark on Phil Ethier's right leg or foot on that
22 date, would you have noted it?

23 [REDACTED]
24 THE WITNESS: I wouldn't do a full skin
25 assessment on him. I would not have felt the need

1 to look everywhere for a small spider bite, sir.

2 BY MR. PROFFITT:

3 Q. No, I'm not talking about everywhere,
4 I'm talking about on his right leg or foot. You
5 looked at his right leg or foot, right, correct?

6 A. I checked his cap refill and how strong
7 his pulses were.

8 Q. And you were looking at his right leg
9 and foot, correct?

10 A. Yes, sir, but that's a very small
11 amount of skin that even needs to be visualized to
12 do those assessments.

13 Q. Did you see, according to this record,
14 any indication of a spider bite mark on Phil
15 Ethier's leg on that date?

16 A. I did not write anything about a spider
17 bite --

18 Q. Okay.

19 A. -- no, sir.

20 Q. If you'd seen a spider bite mark on
21 that date would you have written it down?

22 A. I doubt I would have because I am not
23 qualified to say whether it's a spider bite or not.
24 I would say that something might have the
25 appearance of a bite.

1 A. If he did then I would probably -- I
2 would more than likely have written it down. Like
3 I said, I was really good into direct quotes and
4 writing specifically what the patient would say.

5 Q. All right. So Mr. Ethier and
6 Mrs. Ethier never told you anything about a spider
7 bite, did they?

8 A. No, sir.

9 Q. Okay. And again is there any
10 indication in this record where you have marked
11 down that he had any kind of spider bite in the
12 triage record?

13 A. In the triage record there's nothing
14 even insinuating a bite.
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1 Q. All right.

2 A. Or that it would have two small
3 puncture wounds. I would not be able to actually
4 say that someone would have a bite or not.

5 Q. All right. Ms. Anthony, I'm going to
6 hand you your deposition. And I'll direct your
7 attention to page 56. Do you remember being
8 deposed in the past?

9 A. Yes, sir.

10 Q. Do you remember that deposition being
11 held on April 11th, 2014?

12 A. Sure.

13 Q. Okay.

14 A. Okey doke.

15 Q. Okay. If you'll look at page 55 there
16 at the bottom.

17 A. Yes, sir.

18 Q. I'll ask you -- I'll read the question,
19 you read the answer.

20 A. Okay.

21 Q. Okay. It says my question is: All
22 right. When you're doing the triage of Mr. Ethier
23 on April 10th, 2011, that afternoon, did he tell
24 you or did his wife tell you that he had suffered a
25 spider bite? And what's your answer?

JEANNE ETHIER -- DIRECT -- BY MR. PROFFITT

1 THE COURT - Can I ask that the representative for
2 the attorney approach for just a moment.

3 JEANNE ETHIER, AFTER BEING FIRST DULY SWORN,
4 TESTIFIES AS FOLLOWS -

5 (WHEREUPON, BENCH CONFERENCE WAS HELD IN THE
6 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE JURY
7 WHICH WAS NOT REPORTED.)

8 CLERK - We need you to state your name for the
9 record and speak into the mic.

10 MRS. ETHIER - Jeanne Ethier.

11 THE COURT - Mr. Proffitt, you may proceed. I
12 believe she's under oath now.

13 MR. PROFFITT - All right, thank you, Your Honor.

14 THE COURT - Yes, sir.

15 DIRECT EXAMINATION

16 BY MR. PROFFITT -

17 Q Good morning, Jeanne. How are you?

18 A I'm here; thank you.

19 Q Are you nervous?

20 A Yes.

21 Q Don't be nervous. Introduce yourself to the jury and
22 tell them how long you've been married to Phil.

23 A I've been married to Phil for 28 years.

24 Q All right, and where are you from originally?

25 A Massachusetts.

1 Q All right, your voice is really soft, and I don't hear
2 these speakers working.

3 A Hello.

4 THE COURT - You need to get a little closer.

5 Q Get a little bit closer.

6 A (Witness complies)

7 Q All right, where are you from now.

8 A Massachusetts originally.

9 Q And so you and Phil both grew up in Massachusetts?

10 A Yes.

11 Q Okay. And when did you move to North Carolina
12 approximately?

13 A In 1997.

14 Q Okay. And when did you move into South Carolina,
15 approximately?

16 A 2010, April, 2010.

17 Q Okay, and what's your job? What do you do for a
18 living?

19 A I'm a registered nurse on a psychiatric unit.

20 Q Okay. And what hospital do you work at?

21 A Piedmont Medical Center, Rock Hill.

22 Q How long have you worked there?

23 A Since I moved here, April, 2010.

24 Q Okay. And how long have you been an RN?

25 A 1995.

1 Q Okay. And how long did you go to school to be an RN?

2 A I did the LPN course for one year and then I -- they
3 started a fast-track where you can just -- if you were an
4 LPN, they will fast-track you for one more year so you can
5 complete your RN, so I did two years and became an RN with
6 a few extra courses to go from an LPN to an RN.

7 Q Okay. And how did Phil go to school to be an LPN?

8 A The regular one-year course.

9 Q All right. And that was up in Massachusetts.

10 A Yes.

11 Q Okay. Now, have you ever been any kind of an
12 emergency room nurse or anything like that?

13 A No.

14 Q What have you done your entire career?

15 A I've been a psychiatric nurse and before that the
16 developmentally delayed patients.

17 Q And what do you do all day as a psychiatric nurse at
18 Rock Hill hospital.

19 A We do medication administration, suicide assessments
20 and group therapy.

21 COURT REPORTER - She needs to speak up a little
22 bit.

23 MRS. ETHIER - Okay.

24 Q If you could speak up a little bit more. All right,
25 Jeanne let me ask you a few questions about Phil before all

1 these events happened to him after April of 2011. Tell us
2 what Phil was like as far as his work and activities and
3 lifestyle, just general.

4 A Before the activity? (sic)

5 Q Before all this happened.

6 A We were outdoors people; Phil would always be outside,
7 very active, over-active, you know, like a jack of all
8 trades, working outside, fixing things, fixing cars, fixing
9 the house.

10 Q All right. Did he build you a back porch at one
11 point?

12 A The front and the back, yes.

13 Q Okay. Did he build some dog rungs and dog pins?

14 A Yes.

15 Q Okay. Did he have a garden?

16 A Yes, he had a large garden.

17 Q Okay. Did he like to mow the yard, work in the yard
18 and do that kind of thing?

19 A Yes. Anything outside Phil was == everything outside.
20 That's what he loved to do.

21 Q All right. Did he help friends and neighbors who
22 needed some help from him?

23 A Yes, he was always helping my brother-in-law or
24 whatever; they were two peas in a pod; anything that they
25 needed, they would work and help other people as well.

1 Q Okay. Did you -- did you guys go camping and hiking
2 very much?

3 A Oh, yeah, we -- our life was outside. So we would go
4 camping, hiking, walking, jogging, everything that you can
5 think of that you do outside, that's where we were.

6 Q And you've got one daughter. Right?

7 A Yes.

8 Q Okay, what's her name?

9 A Kianna (phonetic).

10 Q Okay. How old is she now?

11 A She's 22.

12 Q Okay. Still lives at home I think?

13 A Yes.

14 Q All right, so you're always on the go. Right?

15 A That's right, yes.

16 Q Okay. All right, Jeanne, I want you to think back to
17 April 10th, 2011 and just tell us what you recall happening
18 that day, as far as Phil going to the ER.

19 A Okay. Um, Phil told me that something was wrong with
20 his leg, his leg was killing him, I needed to take him to
21 the hospital. So we went to Fairfield Memorial Hospital
22 emergency room. And so we went in there and he was seen
23 by, you know, the staff that took the vital signs and then
24 um ---

25 Q Did you know who that person was at the time ---

1 A No.

2 Q --- that did the triage?

3 A No.

4 Q Did you later learn it was a lady named -- a CNA or a
5 certified nurse assistant named Samantha Anthony?

6 A Yes.

7 Q Okay, go ahead.

8 A And then when we went there, they took the vitals, she
9 took the vitals and looked at the leg; she left the room,
10 then Dr. Bibeau came in, looked at his leg, felt his leg
11 and then he left the room. And then shortly after that a
12 nurse came in and gave my husband some pain medicine and
13 said we'd be leaving soon.

14 Q Okay. Did you see the leg that day?

15 A (No response)

16 Q Did you see the leg that day, Jeanne?

17 A Yes, when we were in the emergency room.

18 Q And what did it look like?

19 A It was -- from the knee down his leg was discolored
20 and dark, and his right third toe had a um -- it was an odd
21 color and it had a black tip on it like a blood blister.

22 Q Okay. You remember seeing that at the ER?

23 A Yes. I didn't see it before then.

24 Q All right. So you're putting in -- or Dr. Bibeau
25 comes in and what did Dr. Bibeau do again?

1 A Oh, he looked at the leg; he touched the leg, and then
2 he left the room.

3 Q Okay. Do you recall what he said at any time?

4 A I don't.

5 Q Do you recall what Phil might've said to him?

6 A I don't.

7 Q Okay. All right. Did you at any point see a nurse by
8 the name of Jerilyn Wadford or any other nurse, nursing
9 person besides Samantha Anthony, that first lady in triage?

10 A I don't.

11 Q Never saw anybody else?

12 A There was a nurse who came to give Phil the medication
13 when we were -- after Dr. Bibeau saw -- saw us.

14 Q Okay. All right, that would be Rhonda Gwynne as you
15 now know?

16 A Okay, yes.

17 Q Okay, but Jerilyn Wadford, did you ever see Jerilyn
18 Wadford?

19 A No, I did not.

20 Q Did Jerilyn Wadford ever touch Phil?

21 A No, she did not.

22 Q Did she ever examine Phil?

23 A No, she did not.

24 Q Okay. All right. All right, did you, Jeanne, ever
25 tell anybody at the ER that Phil had had a spider bite?

1 A No, sir.

2 Q Did you ever hear Phil say anything like that?

3 A No, sir.

4 Q Did you ever hear or know of Phil making any kind of
5 call to the ER before he went in to say that he had had a
6 spider bite?

7 A No, sir.

8 Q Did that ever happen at all?

9 A No, sir.

10 Q Okay. Did you -- to your knowledge did any nursing
11 person who examined Phil at all find any kind of spider
12 bite?

13 A No, sir.

14 MR. SMITH - Objection to what the nurse -- they
15 can testify what they found, Judge. She doesn't know that.

16 MR. PROFFITT - I asked ---

17 THE COURT - You'll have to lay a better
18 foundation for knowledge of what the other nurses might've
19 known or found.

20 MR. PROFFITT = Okay.

21 THE COURT - I haven't heard a foundation like
22 that, so I'll sustain the objection.

23 MR. PROFFITT - Thank you, Your Honor.

24 Q Jeanne, you were in the room when Samantha Anthony was
25 -- the CNA was examining Phil?

1 A Yes.

2 Q Okay. Did you -- did you hear what she said to Phil?

3 A I did not.

4 Q Okay. So you don't recall what she said?

5 A I do not.

6 Q All right. Was any kind of a spider bite ever found
7 on Phil later?

8 MR. SMITH - Judge, same objection with the
9 foundation.

10 THE COURT - I'm not sure exactly how you're --
11 who you're asking may have found it. And so ---

12 MR. PROFFITT - I'm asking ---

13 THE COURT - --- I'm going to sustain the
14 objection at this point.

15 MR. PROFFITT - Okay.

16 Q Jeanne, did you ever see or find any spider bite on
17 Phil's leg at any time on April 10th, 2011 or later?

18 A No, sir.

19 Q All right, Jeanne, did -- you're there in the exam
20 room with Dr. Bibeau. Right?

21 A Yes.

22 Q Okay. Did you know Dr. Bibeau?

23 A No.

24 Q Had you ever seen him before?

25 A No.

1 Q To your knowledge, had Phil ever seen him before?

2 A I'm not sure if at that time, because I know he was
3 working in the hospital so I don't know.

4 Q All right. Did you -- did you trust Dr. Bibeau at
5 that point?

6 A Well, yes, he was a doctor, and that's all we -- we
7 trusted -- yes, we trusted Dr. Bibeau.

8 Q All right. As an RN for years, have you trusted
9 doctors for years?

10 A Yes.

11 Q Have you believed doctors for years?

12 A Yes.

13 MR. SMITH - Judge, objection to the leading.

14 THE COURT - Overruled.

15 A Yes.

16 Q You have believed doctors for years?

17 A Yes.

18 Q And, in fact, is that what nurses do all day long?

19 A Yes, sir.

20 Q Now, Jeanne, tell us what you remember about the days
21 after April 10th, 2011, up until he had his second episode
22 on May 25th 2011. What -- what happened in that period?

23 A Well, um during the first couple of weeks the black
24 tip of the toe had sloughed off and Phil still had a little
25 bit of pain, but he eventually, gradually improved, and he

1 said he was talking to the doctors at work and they said
2 give it time.

3 MR. SMITH - Judge, objection to what the doctors
4 said.

5 THE COURT - I'll sustain that objection.

6 Q Go ahead. Tell us what else you remember from that
7 time period.

8 A So then -- and he gradually improved and we -- it was
9 my understanding that Phil was to give it time so that, you
10 know, his leg could heal. So he went out and bought a foot
11 massager for his foot, and we were giving it time.

12 Q All right.

13 A And that's what we did.

14 Q All right. Did Phil tell you that he was checking in
15 and following up with doctors there at the ER?

16 A Yeah, he was -- yeah, he was talking to the doctors
17 when ---

18 MR. SMITH - Judge, objection. That's bolstering
19 and corroborative, cumulative.

20 THE COURT - I'm going to ask you to ask her more
21 specifically when this may have occurred, so I'm going to
22 ask you to rephrase the question.

23 MR. PROFFITT - All right.

1 Q Jeanne, there in the days um -- in that first couple
2 of weeks or so after all this happened and still it started
3 to improve more like you just testified about; ---

4 A (Indicating yes)

5 Q --- what did Phil tell you, if anything, about what he
6 was asking or doing in the ER with regard to his leg?

7 A It was my understanding that when they had downtime
8 behind the nurses' station, you know, with doctors, that
9 Phil would ask questions on, you know, look it (sic) I'm --
10 I need some information, what do you think about this, just
11 like an opinion, and it was always my understanding to give
12 it more time.

13 MR. SMITH - Judge, objection to what she --
14 that's double hearsay to what she understands and what was
15 told to her.

16 MR. PROFFITT - Your Honor, she can ---

17 THE COURT - I'll let her testify as to what her
18 understanding was, and your question was what he told her,
19 so I'm going to allow it to go forward.

20 MR. PROFFITT = All right.

21 Q Jeanne, I'll hand you what's been marked as
22 Plaintiff's Exhibit 45. Do you recognize that document?

23 A Yes.

1 Q And just to move things along, are those some of the
2 discovery responses that plaintiff provided to defendant
3 over the course of this case?

4 A Yes.

5 Q All right, and if you would, look in the list of
6 documents that's provided there on the second page I think.

7 A (No response)

8 Q You see where I'm talking about?

9 A (No response)

10 Q It says the following documents are enclosed in hard
11 copy ---

12 A Yes.

13 Q --- with these responses?

14 A Yes, first page, yeah.

15 Q All right. Sorry, the first page. What does it --
16 read to us the tab 45 and tab 46. What do those say?

17 A Tab 45, handwritten notes by Phil Ethier.

18 Q Okay. What about tab 46?

19 A Tab 46, typed version of Phil Ethier's notes.

20 Q All right. And is it your understanding that that is
21 the pages -- what's the date of that document? On the next
22 page.

23 A January 6th, 2014.

1 Q Okay. And is it your understanding that's the copies
2 of pages that were taken from the notebook admitted earlier
3 as Plaintiff's Exhibit 42?

4 A Yes, sir.

5 Q Okay. So that was produced to defendant more than
6 year -- or 15 months ago.

7 A Yes, sir.

8 Q Okay. All right, Jeanne, let's turn to May 25th, 2011
9 and the Chester hospital events and all that. Let me ask
10 you about that. What do you recall about that day? What
11 happened?

12 A Phil told me he was going -- this is -- I think it was
13 in the middle of the night or so -- I don't know. He told
14 me he was going to the hospital, his leg was killing him
15 and he knew something was wrong. He said he'd call me
16 later and let me know what's happening.

17 Q Okay, and what happened next?

18 A Then I got a call saying that he was going to be
19 transferred to CMC, so I drove to Chester Hospital and I
20 asked if I could drive him to Charlotte, and they told me
21 that it was a medical emergency and that he had to go by
22 ambulance.

23 Q Okay. And what happened next?

24 A So then he had surgery at CMC.

25 Q What was that like? You get to CMC ---

1 A Okay, and then ---.

2 Q --- on May 25th, 2011?

3 A Yes, and then I believe after he had the surgery he
4 was in his room. Is that what you -- when I was in the ---

5 Q Well, what I want you to tell the jury about is what
6 it was like for you to go to Charlotte Hospital knowing
7 that your husband was about to have emergency surgery. How
8 were you feeling?

9 A Oh, well, yeah, it was -- in shock. I mean I didn't
10 even know who I was for a while. You know, it's just a
11 shock, just total shock, disbelief, scared, overwhelmed.

12 Q Okay.

13 A It was just horrible.

14 Q Okay. And did he have some procedures there at the
15 Charlotte Hospital that we've heard about earlier?

16 A Yes.

17 Q Okay. And did he eventually have the femoral bypass
18 graft surgery ---

19 A Yes.

20 Q === a couple of days later?

21 A Yes, sir.

22 Q Okay. And were you there for -

23 A Yes.

24 Q --- at the hospital all this time?

25 A Most of the time.

1 Q Okay. All right. What was Phil like there in the
2 hospital during those days, during the week he was there?

3 A Okay. He had -- he just looked horrible. I could
4 barely really even look at him. He had -- both hands had
5 IVs in them; his leg was huge. He had all staples and
6 stitches down one side of -- the wound vac on the other
7 side, and he just didn't ---

8 Q Okay.

9 A He just looked horrible. I couldn't believe that my
10 husband looked like that.

11 Q All right.

12 A And we didn't know if he was going to lose his leg or
13 we didn't know what was going to happen.

14 Q All right. All right, now, Jeanne, let's talk some
15 about the months after he's out of the hospital, sort of
16 from June to December, 2011. Tell us what was going on
17 during that period. What do you recall about that period?

18 A (WITNESS CRYING)

19 Q It's okay.

20 A When Phil came home, he went into -- he had to stay in
21 a chair for over four months. And so it was really hard to
22 see him, (sic) because he was always so overactive ---

23 Q Okay.

24 A --- and so I would have, you know, both coffee tables
25 on each side of the chair so he could have things like, you

1 know, his notebooks and his food, snacks and stuff so that
2 he couldn't get up, so I just had to make sure everything
3 was around him.

4 Q Okay. All right.

5 A And he just looked horrible and was just shocking.

6 Q Okay. And what was his demeanor or how was he was
7 doing himself?

8 A He was doing horrible. He just had trouble sitting in
9 a chair and it was -- really all in shock, and it was just
10 horrible, so depressing, hopeless. Hopeless.

11 Q Did you still have to go to work?

12 A Yes. Actually I had to -- when there was more hours I
13 had to fill-in, because I -- we had to stay afloat. I mean
14 I had to do what I had to do.

15 Q All right. Now, did Phil gradually improve over those
16 months and the wound started closing up and all that?

17 A Yes.

18 Q Okay. And as things went on, I mean how did he do
19 later on when he sort of was able to get out of the chair
20 more and was recovering more there toward the fall of 2011?
21 Tell us about that.

22 A Phil worked really hard to get himself back together.
23 He -- he -- with everything he had -- I mean he tried and
24 he would practice, you know, walking and do some bends. It
25 was my understanding that the doctor told him if he could

1 walk longer periods, that he would be able to return to
2 work, so I had no idea he was walking four point five
3 miles, but that's how much he wanted to go back to work.
4 And the doctor gave him -- Dr. Johnson gave him a lifetime
5 disability plate as well to help him.

6 Q Okay. All right. Was Phil still having any pain
7 during this period?

8 A Phil was having excruciating pain, and he was just on
9 pain medication every time he needed it.

10 Q Okay. All right, now at some point Phil returned to
11 work. Right?

12 A Yes.

13 Q There sort of middle of December, 2011?

14 A Yes, sir.

15 Q All right. And where did he return to work? Where'd
16 he go?

17 A Fairfield Memorial Hospital.

18 Q Okay. And how'd that go there at the beginning? How
19 was he doing?

20 A Well, when he was there he would try to do his job. I
21 mean he was getting through. He couldn't take his pain
22 medicine, so when he would come home he would be -- he
23 would be -- he'd have to take his pain medicine and go to
24 bed. I mean he could barely even talk. Our relationship
25 over time was wearing thin.

1 Q Okay. Where did Phil usually sleep?

2 A Well, Phil -- he sleeps on the couch or the chair
3 because of his leg. He doesn't sleep in the room up to
4 this day.

5 Q Okay. And why did he sleep in the couch or a chair?
6 Why does he do that?

7 A Because his foot, it just tingles and pain and he
8 can't -- he has to like keep it elevated sometimes and it
9 just bothers him. Like he has like spasms and stuff during
10 the night.

11 Q Okay.

12 A And it's easy -- it just helps him. He's got like a
13 little incline from the recliner or the side of the couch.

14 Q Okay. All right. Now, Jeanne, do you remember
15 receiving a phone call from Phil some time after he started
16 back at -- started back at Fairfield Hospital in the ER?

17 A Yes.

18 Q Okay. And when Phil called you, was he happy, was he
19 upset? How was he?

20 A Phil was irate. Phil said == well, ==

21 MR. SMITH - Objection, Judge, this ---

22 A --- wait a minute. Okay.

23 MR. SMITH - --- is corroborative and it's
24 bolstering, and I object to it. May I approach?

25 THE COURT - Yes.

1 (WHEREUPON, BENCH CONFERENCE WAS HELD IN THE
2 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE JURY
3 WHICH WAS NOT REPORTED.)

4 THE COURT - Ladies and gentlemen of the jury,
5 this is one of the occasions I need to discuss something
6 with the attorneys outside of your hearing, so I'm going to
7 ask you to step back the jury room. As always, I'll ask
8 you not to discuss the case while you're in the jury room
9 until I ask you to do so. You may retire to the jury room.

10 (WHEREUPON, JURY EXITS THE COURTROOM)

11 THE COURT - All right, I think you've already
12 stated your objection on the record.

13 MR. SMITH - Yes, sir, Your Honor. Oh, you want
14 me to restate it?

15 THE COURT - Well, no, that's okay. I think you
16 put it on the record. I just want to find -- what answer
17 are you expecting to elicit by the question?

18 MR. PROFFITT - I am expecting Jeanne Ethier to
19 testify that Phil Ethier called her just immediately after
20 he had the phone conver == had the conversation with Dr.
21 Bibeau in the ER where Dr. Bibeau told him, so that's why I
22 couldn't figure it out, no wonder -- that's what was wrong
23 with you, no wonder I couldn't figure it out, that he
24 immediately picked up the phone ---

1 THE COURT - This was the conversation after his
2 after the surgery, when he first saw him ---

3 MR. PROFFITT - This is after the surgery. He's
4 gone back to work at Fairfield Memorial; it's the first
5 time he's seen Dr. Bibeau, and they have this conversation
6 very brief at the nurses' station that Phil testified
7 about.

8 THE COURT - This is not the curbside consult.

9 MR. PROFFITT - No, no, this is not the curbside
10 consult. This is where -- and ---

11 THE COURT - And you expect her to testify that he
12 called her and said he had seen the doctor and?

13 MR. PROFFITT - That he had seen Dr. Bibeau -- had
14 just seen him. He did this right after he talked to Dr.
15 Bibeau -- Phil, as he testified sort of freaked out and was
16 very angry about it. He immediately picked up the phone
17 and called his wife and said you won't believe what Dr.
18 Bibeau just told me. He was upset and was excited and
19 angry and he told her == he repeated what Dr. Bibeau said
20 to him, and that's what she's going to testify to. That's
21 admissible under hearsay exception.

22 THE COURT - All right. Yes, sir?

23 MR. SMITH - Judge, that's hearsay; it's
24 corroborative; it's bolstering, and the admissibility he's
25 trying to say is either a present sense impression or

1 excited utterance, and that is not what it is, and
2 foundation is not there. I object to it.

3 THE COURT - Anything further?

4 MR. PROFFITT - No, sir.

5 THE COURT - I'll sustain the objection.

6 MR. SMITH - Thank you.

7 MR. PROFFITT - All right.

8 THE COURT - All right. Let's bring the jury
9 back.

10 (WHEREUPON, JURY ENTERS THE COURTROOM)

11 THE COURT - All right, the record will reflect
12 the jury's returned to the courtroom. I sustained an
13 objection. You may proceed.

14 MR. PROFFITT - Thank you, Your Honor.

15 Q Jeanne, let's turn to the time period when Phil
16 eventually resigned from Fairfield Hospital. Do you recall
17 that he resigned in about March, 2013 or so?

18 A Yes, sir.

19 Q Okay. And why did he have to resign from the
20 hospital?

21 A Working on his feet for that amount of time constantly
22 was too much. It just was too much for him, and he
23 couldn't take his pain medication while he was at work.

24 Q Okay. And what did Phil do next as far as a job?
25 Where did he go?

1 A So he -- he found a job that he thought if he wasn't
2 on his feet so much it would, you know, really help him and
3 so he got a job at Gentiva Home Health.

4 Q Okay. And what's your understanding of what Phil did
5 with the home health job?

6 A He would drive to different houses and do different
7 treatments on patients, patient teaching and different
8 things like that.

9 Q Okay. And did he eventually -- did he at first carry
10 a full-time patient load there with Gentiva?

11 A Yes, he did and then he had to cut his hours down
12 because he had no life when he was working. He thought
13 Gentiva Home Health would be helpful and he wouldn't be in
14 so much pain, but he still -- when he came how he'd have to
15 take pain medication, and he was basically living in pain,
16 and so he cut his hours down so that he wouldn't be working
17 so much so he could take his pain medication and decrease
18 his pain.

19 Q All right. Now, what was Phil's mental attitude or
20 mental outlook during this period as you go into sort of
21 late 2013 and up into early 2014? How was he doing
22 mentally?

23 A Phil -- everything was taking its toll. Phil had
24 tried everything. He really wanted to work, and he was
25 just feeling like a loser. I mean he wasn't able to keep a

1 full-time job because of the pain, and so his self-esteem
2 was really dropping, and I believe that he was suicidal.

3 Q Okay. All right. Now, at some point, Jeanne, did you
4 try to get him some help and help him find a psychiatrist?

5 A I did not. He looked himself, and when he asked me
6 who the best psychiatrist was, I told him I personally feel
7 Dr. Chen from Rock Hill is, you know, one of the best, but
8 there are no openings and there are no openings for months
9 in Rock Hill. So Phil started with Columbia looking for
10 help, and there was no -- nothing available for months in
11 Columbia either.

12 Q Okay.

13 A So he told me he called -- can I ---

14 Q Go ahead.

15 A He told me he called Dr. Chen's office and he got an
16 appointment.

17 Q All right. Now, you have worked with Dr. Chen
18 previously?

19 A I did. I've worked with Dr. Chen when I started there
20 until she left for her own practice.

21 Q There at the Rock Hill hospital.

22 A At the Rock Hill -- Piedmont Medical Center. I had no
23 outside contact with Dr. Chen. I strictly have a -- had a
24 professional relationship with her. We were not friends.
25 We weren't social buddies. It was strictly a professional

1 relationship. She was the most concerning, caring
2 psychiatrist that you'll ever find.

3 Q Okay. All right, do you believe that Dr. Chen helped
4 Phil?

5 A I believe Dr. Chen saved my husband's life, yes,
6 because no one else was listening to him when he was crying
7 for help.

8 Q Okay.

9 A And Dr. Chen is the only one who took the time to
10 review everybody's records to find out just what was going
11 on. Nobody else had time for that, and that's the kind of
12 person Dr. Chen is, not because I had any other kind of
13 relationship with her besides a professional relationship
14 from Piedmont Medical Center.

15 Q Okay. All right. Jeanne, let's sort of move into the
16 present and talk about how things are now with Phil and
17 with you. Does Phil still continue to suffer from the
18 chronic pain?

19 A Yes, Phil -- our whole life is based on pain.
20 Whatever we do it's depending on the pain. I spend a lot
21 of time by myself, because he's in a lot of pain. We can't
22 do the things we used to do. We were both outside people,
23 and now I'm the one doing things alone.

24 Q Okay. Does he still take the pain medication every
25 day?

1 A Yes, he takes it as he needs it, you know. He tries
2 to take it the way it's prescribed to him.

3 Q Okay. Does he still suffer from the foot drop?

4 A Yes, he does. He wears the brace when he needs it and
5 his foot is always in pain. It just depends what level.
6 Is it low, high, medium?

7 Q Okay. All right. Have you seen Phil stumble because
8 of the foot drop?

9 A Yes. When Phil's foot gets tired and -- you know,
10 after walking for a little bit it'll get tired, yes.

11 Q Okay. Do you worry about the future?

12 A All the time.

13 Q Why? What are you worried about?

14 A The uncertainty of the future, the way my husband
15 tries and he just doesn't feel, you know, like he can
16 supply our needs. That's all.

17 Q Jeanne, how is -- how has Phil's condition and
18 situation affected your marriage?

19 A For a while I mean really it was non-existent. When
20 he'd come home from work he would just go take his pain
21 medication. There was little communication. He was just
22 suffering in himself, and so we really barely, you know,
23 had a communication.

24 Q All right. Is it better than it used to be?

1 A It is better than it used to be, yes, thanks to Dr.
2 Chen for helping and stepping in.

3 Q Okay. All right. Has there been any effect on the
4 physical relationship between you and Phil?

5 A Well, because of the pain medication we do not have a
6 sexual relationship.

7 Q Okay. Has there been any impact on sort of the
8 emotional relationship that you had with Phil? Is it like
9 it was before all this happened?

10 A No. Every day is different. I mean we live day-to-
11 day. We used to be really close and be partners. I mean
12 he was my companion. I mean since then I do things alone;
13 he does things alone. He has to take his pain medication
14 and go to sleep often. I mean I love my husband.

15 Q All right. Have you tried to do any more camping in
16 the recent past?

17 A You know, -- we did. Well, not this, but, you know,
18 we went camping a few times for one or two nights.

19 Q Okay. And how'd that go? Was it like it was in the
20 past?

21 A Well, no, not in the past because I do things alone;
22 Phil will fish off the thing at Lake -- Lake Wateree, but
23 no we don't -- I don't have a companion. We used to walk,
24 jog, hike, anything outside. I mean we were just outside
25 people.

1 Q Okay. Jeanne, do you still love Phil?

2 A Yes, I love Phil very much.

3 MR. PROFFITT - Thank you. I don't think I have
4 anything further, Your Honor.

5 THE COURT - All right, ladies and gentlemen of
6 the jury, at this point in time we're going to break for
7 your lunch. As you leave the courthouse, I'm going to give
8 you the same instructions I've given you every time you've
9 left the courthouse, that's not to discuss the case with
10 anyone, not allow anyone to discuss the case with you,
11 don't attempt to gather information on your own; should
12 anyone try to contact you about the case in your absence,
13 please report that; don't listen to, watch or read media
14 reports about the case. I'll ask you to be back in the
15 jury room at 1:30. We should be in a position to resume
16 thereafter. Thank you very much. You're free to go to
17 lunch at this time.

18 (WHEREUPON, JURY EXITS THE COURTROOM.)

19 THE COURT - Ma'am, you're in the middle of your
20 testimony and it would be improper for you to discuss your
21 testimony with anyone during the break. Do you understand
22 that?

23 MRS. ETHIER - Yes, sir.

24 THE COURT - All right, we're in recess until
25 1:30. Thank you very much.

1 MR. PROFFITT - For the record, Your Honor, we're
2 not going to lunch with them.

3 THE COURT - Okay, very good. Thank you.

4 MRS. ETHIER - I didn't want to anyway.

5 (WHEREUPON, LUNCH RECESS TAKEN)

6 THE COURT - All right, plaintiff ready to
7 proceed?

8 MR. PROFFITT - Yes, Your Honor.

9 THE COURT - Defense ready to proceed?

10 MR. SMITH - Judge, one second. I'm sorry.

11 THE COURT - All right, that's quite all right.

12 (WHEREUPON, BRIEF PAUSE)

13 MR. SMITH - Yes, sir, Your Honor. We're ready.

14 THE COURT - All right. I want to go over with
15 the parties the question concerning the admissibility of
16 the diary book. I told you I'd take that under advisement.
17 I've had the chance to look at that. I will put on the
18 record that this morning I was approached by counsel --
19 both counsel in chambers and at that time the plaintiff
20 urged the additional grounds of Rule 801(D)(1)(B) to
21 sustain the Court's original ruling allowing the diary into
22 the record. In addition, the plaintiff suggested to the
23 Court the possibility of removing the diary from the record
24 and simply having portions of it -- having them read into
25 the record, that that diary did not be presented to the

1 jury as an exhibit once the case goes to the jury. Of
2 course, the defense opposed that motion and the Court
3 reconsideration of the matter altogether. Have I correctly
4 stated what occurred this morning, Mr. Proffitt?

5 MR. PROFFITT - Yes, Your Honor.

6 THE COURT - Is that correct, Mr. Smith?

7 MR. SMITH - Yes, sir, Your Honor.

8 THE COURT - All right, I have reviewed my ruling
9 based on the additional grounds urged by the plaintiff as
10 well as the opposition by the defense to the admission of
11 the diary in question. The Court originally allowed the
12 diary to come in primarily under Rule 803 and I would -- my
13 -- the basis of my ruling was number one, that it was a
14 present sense impression at the time it was made, number
15 three under 803 that it was a statement of the declarant's
16 then-existing state of mind and/or mental feelings, pain
17 and bodily health would be included, then also number five
18 under that rule as a memorandum or record concerning a
19 matter about which the witness once had knowledge but now
20 was == had insufficient recollection to allow them to
21 testify fully and accurate. I have reviewed that, as well
22 as the additional grounds urged by the plaintiff. At this
23 time it would be my ruling that the diary is -- the
24 statements made in the diary are admissible, however, the
25 Court is aware of the admonition in 803(5) that states if

1 admitted the memorandum or record may be read into
2 evidence, but may not itself be received as exhibit unless
3 offered by an adverse party. Now, that limitation doesn't
4 exist on the other exceptions to Rule 803 or other grounds
5 for admitting statements under Rule 803, and however I am
6 sensitive to that concern by the plaintiff. At this point
7 in time it appears that the diary has been used for
8 testimony from the plaintiff primarily in which portions of
9 it were presented to the jury. There were portions placed
10 on the overhead projector, but it was portions that were
11 being read by the plaintiff during his testimony that were
12 being presented to the jury at that time, and of course the
13 rule allows for that record to be read into the evidence
14 itself. So the Court's not changing its ruling in the
15 matter concerning the admissibility of the statement and I
16 will also -- and I do agree that the additional grounds
17 offered by the plaintiff are correct, however, that would
18 apply as far as I can tell simply to the portion of the
19 diary which deals with a statement made by the plaintiff to
20 the defendant doctor what would be known as the curbside
21 consult, and there is some question as to that particular
22 statement whether it, in fact, was made. There also has
23 been some question as to when this statement was made, as
24 whether it was a recent fabrication or made by improper
25 influence. So I would accept that as additional grounds

1 for it being admissible, however, at this time I am going
2 to make the ruling that the document itself will now be
3 marked as a Court's Exhibit. It will not be presented to
4 the jury, unless the -- at the close of all testimony the
5 plaintiff would like to make additional motions concerning
6 certain portions of it. I'll reconsider once all the
7 evidence has been presented, if necessary. So that's my
8 ruling at this point in time. I've not changed the ruling,
9 however, I will place the diary on the Court's Exhibit list
10 and at this time the document itself will not be presented
11 to the jury.

12 MR. PROFFITT - Thank you, Your Honor.

13 THE COURT - Anything further concerning that
14 matter?

15 (WHEREUPON, NO RESPONSE)

16 (WHEREUPON, DIARY/NOTEBOOK IS MARKED AS COURT'S
17 EXHIBIT NUMBER 11.)

18 THE COURT - All right, ma'am, you need to resume
19 the stand.

20 (WHEREUPON, MRS. ETHIER RETAKES THE STAND.)

21 THE COURT - All right, are you ready to proceed?

22 MR. SMITH - Yes, sir, Your Honor.

23 THE COURT - You may call the jury.

24 (WHEREUPON, JURY ENTERS THE COURTROOM)

1 THE COURT - All right, the jury has returned to
2 the courtroom. I trust everyone had a good lunch. If
3 anyone had any difficulty in complying with my instructions
4 during your break, please stand.

5 (WHEREUPON, NO RESPONSE)

6 THE COURT - It appears that all have been able to
7 comply with my instructions thus far. At this time the
8 defense will be given the opportunity to examine the
9 witness. Mr. Smith?

10 MR. SMITH - Thank you, Your Honor. May it please
11 the Court.

12 THE COURT - Yes, sir. You may proceed.

13 CROSS EXAMINATION

14 BY MR. SMITH -

15 Q Good afternoon, Mrs. Ethier.

16 A Good afternoon.

17 Q Let me just ask you a few questions if you would.

18 You've been married to your husband for how long?

19 A Twenty-eight years.

20 Q Twenty-eight years. And when y'all moved to South
21 Carolina, you were aware that he had high blood pressure,
22 weren't you?

23 A Yes.

24 Q And you were aware that he was not seeing a during
25 that doctor, weren't you?

1 A When he went for a job he would be assessed.

2 Q Okay. So but when y'all moved here to South Carolina
3 I think you were here -- he didn't -- he hadn't seen a
4 doctor in three years or so he said -- is that right? --
5 before this event.

6 A He went to Blue Granite when he got his physical at
7 Granite for Fairfield Memorial.

8 Q Yes, ma'am. Okay. So you were familiar about him
9 going to Blue Granite.

10 A This is what I -- yes.

11 Q Okay. And you were aware that they'd place him on
12 blood pressure medication.

13 A Yes, sir.

14 Q And that he only did that for a week and then stopped
15 taking it again. Is that right?

16 A Yes, sir, he was trying to monitor it with diet and
17 exercise.

18 Q Okay. And he continued to smoke at that time. Is
19 that right?

20 A No, he has stopped smoking as soon as he had the
21 surgery. He has not picked up one cigarette since then.

22 Q Yes, ma'am, but I'm talking about before that he was
23 smoking, ---

24 A Yes, sir.

1 Q --- and he was smoking over a pack a day he said. Is
2 that right?

3 A I didn't sit with him for every cigarette. I don't
4 now.

5 Q All right, fair enough. Now, you've been a nurse for
6 how long?

7 A A long time, 1989.

8 Q 1989?

9 A As an LPN.

10 Q And you've worked in the medical field all that time?

11 A Psychiatry.

12 Q Psychiatry. Okay. And so you -- the entire -- your
13 entire career, you've been involved with psychiatry. Is
14 that right?

15 A Entire career, psychiatry, never medical.

16 Q Yes, ma'am. And so during that time you're familiar
17 with all types of psychiatric conditions in patients with
18 all types of conditions.

19 A Yes, sir.

20 Q And you were working at this time when y'all moved to
21 South Carolina to the psychiatric unit or floor at Piedmont
22 Medical. Is that correct?

23 A Yes, sir.

1 Q All right. And when you were there you dealt with
2 patients with all types of psychiatric problems, didn't
3 you?

4 A Yes, sir.

5 Q And some patients were able to deal with their
6 psychiatric problems and continued living life. Is that
7 right?

8 A Yes, sir.

9 Q Okay. And some of them -- some patients were -- some
10 of your patients were able to overcome their psychiatric
11 problems, are they? (sic)

12 A That's an individual statement. I don't know how to
13 answer that.

14 Q Okay. But you've had some patients who've been able -
15 - have had success in their treatment ---

16 A Success in treatment ---

17 Q --- and y'all have discharged them from the hospital.

18 A Yes, ---

19 Q Okay.

20 A === with psychotherapy and medications, yes.

21 Q Yes, ma'am. And part of what you do is this is a
22 field where you work as a team with the doctors and
23 everybody over there in the hospital. Is that right?

24 A When you're hospitalized, yes.

1 Q Okay. When they're hospitalized and y'all work --
2 you're part of a healthcare team which involves you, the
3 nurse, the physician and psychologist and the patient. Is
4 that right?

5 A Yes.

6 Q Okay. And it's -- the patients to -- when doctors or
7 healthcare professionals give them instructions, it's up to
8 the patients to follow those instructions in your field,
9 isn't it?

10 A Yes.

11 Q That's a very critical part of the treatment of
12 patients that you care for. Is that right?

13 A Yes.

14 Q And when we -- when we looked at this -- I think I
15 heard you say earlier that -- that Dr. Chen was the best
16 doctor that you knew. Is that right?

17 A That was my opinion.

18 Q And you worked with Dr. Chen for two or three years up
19 on the psychiatric floor at Piedmont.

20 A Yes, sir.

21 Q Okay. And I think you -- I heard you earlier say that
22 Dr. Chen -- that your husband -- you recommended Dr. Chen;
23 your husband got the appointment. Is that right?

24 A Yes. I did not recommend Dr. Chen, no. I told my
25 husband, Dr. Chen had no openings. No psychiatrist in Rock

1 Hill had openings. That's why he started in Columbia
2 calling psychiatrists.

3 Q All right, ma'am, let me mark this as Defendant's
4 Exhibits Number 14.

5 (WHEREUPON, DOCUMENT MARKED FOR IDENTIFICATION AS
6 DEFENDANT'S EXHIBIT NUMBER 14.)

7 Q All right, just from what we heard earlier through
8 testimony, your husband went to see Dr. Chen some time in
9 March of 2014. Is that right?

10 A Yes, sir.

11 Q All right. Let me show you what's been marked as
12 Defendant's Exhibit Number 14. And let me ask you this.
13 Now, is this a fax -- you were working at Piedmont at the
14 time. Is that right?

15 A Yes, sir.

16 Q And this is a facsimile to Dr. Chen's office from
17 Jeanne Ethier. Is that right?

18 A Yes, sir.

19 Q And this is your hand-writing on here. Is that right?

20 A Yes, sir, that was me.

21 Q All right, and you sent this fax to Dr. Chen's office.

22 A Yes, sir.

23 Q Okay. And that was dated on January 15th, 2014. Is
24 that right?

25 A Yes, sir.

1 MR. SMITH - Judge, I move to enter that in as
2 Plaintiff's (sic) ---

3 THE COURT - Any objection?

4 MR. PROFFITT - No objection.

5 MR. SMITH - --- Defendant's Exhibit Number 14.

6 THE COURT - It'll be admitted as marked. You may
7 proceed.

8 (WHEREUPON, DOCUMENT MARKED INTO EVIDENCE AS
9 DEFENDANT'S EXHIBIT NUMBER 14.)

10 Q All right, so some two months before your husband went
11 to go see Dr. Chen, you were faxing a letter. Is that
12 correct?

13 A I faxed this letter when my husband asked me to,
14 because he wasn't feeling well enough to drive to fax it
15 himself, so I said, let me fax it for you, I'm going right
16 to work now, so I faxed whatever information that he
17 needed. I did not talk to Dr. Chen; I faxed it.

18 Q Okay. All right, but let's -- let's continue reading
19 this, Mrs. Ethier. It says, Dr. Chen, here's my husband's
20 psychological eval, thank you, Jeanne Ethier. Right?

21 A Right.

22 Q And then at the bottom you wrote lawyer, David
23 Proffitt, didn't you? You were telling Dr. Chen ---

24 A No, that's not -- that's not my -- down the bottom
25 here, this not my writing.

1 Q That's not your hand-writing.

2 A That's not my hand-writing down at the bottom.

3 Q Okay.

4 A I -- office, Gentiva, that's not my -- that's not my -
5 - whatever is down the bottom is not my hand-writing.

6 Q I see. So -- so on here this -- I see the numbers,
7 but when you look at lawyer, that's not your hand-writing?
8 That does not look like your hand-writing right above?

9 A No, that -- that is not my hand-writing.

10 Q Okay. And so office -- and so in January of 2014,
11 before -- two months before Dr. Chen saw your husband, she
12 was able to know where your husband worked and who the
13 lawyer was. Is that right?

14 A I have no idea.

15 MR. SMITH - Okay. Thank you, Mrs. Ethier.

16 MRS. ETHIER - Here, here's your paper.

17 MR. PROFFITT - Nothing further.

18 THE COURT - You may step down, ma'am.

19 MRS. ETHIER = Thank you.

20 THE COURT = Plaintiff may call its next witness.

21 MR. PROFFITT - Your Honor, our final witness will
22 be Mr. Ethier. We just need to recall him briefly. I want
23 him to show the leg brace to the injury.

24 THE COURT - All right.

1 MR. HOLLER - Judge, I would make my Rule 611
2 objection.

3 THE COURT - Yes, sir.

4 MR. HOLLER - And I'll be happy to discuss it.

5 THE COURT - All right, I'll ask the jury to step
6 back to the jury room while we do that. Ladies and
7 gentlemen, don't discuss anything about the case until I
8 ask you to begin deliberations.

9 (WHEREUPON, JURY EXITS THE COURTROOM.)

10 THE COURT - Yes, sir.

11 MR. HOLLER - Judge, I'm sorry, Rule 611(D) deals
12 with the recall of witnesses. Judge, I would be interested
13 in what the basis on the recall of a witness that's already
14 fully testified and we have cross examined.

15 THE COURT - Mr. Proffitt?

16 MR. PROFFITT - The only basis is I forgot to ask
17 him to show his leg brace to the jury when he was on direct
18 and cross the first time. I'm not going to ask him any
19 questions except, would you please show the jury your leg
20 brace, have him remove his shoe and show them the leg brace
21 on his foot and leg.

22 THE COURT - That's the purpose?

23 MR. HOLLER - May I confer with counsel just very
24 briefly, Your Honor.

25 THE COURT - Yes, sir.

1 (WHEREUPON, DISCUSSION IS HELD BETWEEN COUNSEL
2 WHICH WAS NOT REPORTED.)

3 MR. HOLLER - Judge, it may be re-appropriate --
4 may be appropriate to re-call the plaintiff during reply,
5 but I think it would be inappropriate to re-call him during
6 the plaintiff's case in chief. Obviously, its in your
7 discretion under Rule 611(D). Again, there may be a number
8 of issues, but if we're just going to recall witnesses
9 every time Mr. Proffitt thinks of something he didn't think
10 of before, I just don't think that's a proper way to do it.
11 He's limited generally in scope to things that were brought
12 out in cross examination.

13 MR. PROFFITT - I hesitate to wait until reply
14 because I don't know that we're going to have any reply
15 testimony, and I -- I simply forgot to do it during the
16 first time he was on the stand. It will say 30 seconds.

17 THE COURT - All right, I'll allow you to call him
18 simply for that purpose, no other questions other than to
19 demonstrate the leg brace.

20 MR. PROFFITT - Thank you, Your Honor.

21 THE COURT - Let's bring the jury in.

22 (WHEREUPON, JURY RETURNS TO THE COURTROOM.)

23 THE COURT - All right, the jury has returned to
24 the courtroom. You wish to call ---

1 MR. PROFFITT - I wish to recall Philip Ethier
2 simp -- for the simple purpose of showing the leg brace to
3 the jury.

4 THE COURT - All right, Mr. Ethier, you may step
5 to the stand. Mr. Ethier, I'll remind you that you've been
6 placed under oath in this case. Do you acknowledge that
7 you're still under oath?

8 MR. ETHIER - Yes, sir.

9 THE COURT - Thank you, sir. Have a seat in the
10 witness stand.

11 PHILIP ETHIER, AFTER BEING QUESTIONED BY THE
12 COURT REGARDING ACKNOWLEDGING HIS OATH FURTHER TESTIFIES AS
13 FOLLOWS -

14 MR. PROFFITT - If I could, Your Honor, I believe
15 -- I'm not sure they can see it from up there. It may
16 better if he just sits here and the jury can ---

17 THE COURT - All right, since you're going to ask
18 him about the leg brace -- and that's all I'm allowing --
19 you may proceed.

20 DIRECT EXAMINATION

21 BY MR. PROFFITT -

22 Q Sit down here ---.

23 MR. PROFFITT - If the jury would be allowed to
24 stand if they need to to see this. I don't ---

1 THE COURT - Whatever it takes for them to be able
2 to see. It's a demonstrative question I believe. All
3 right, you may proceed.

4 Q All right, Phil, if you would just roll your pant leg
5 up and pull your shoe off so they can see the brace.

6 A (WITNESS COMPLIES) I can't pull my shoe off unless I
7 take the brace off.

8 Q Okay. Do that.

9 A (WITNESS COMPLIES)

10 Q Okay, and then just strap it onto your leg so they see
11 what it looks like on your leg. No, no, no.

12 A Oh. I'm sorry. (WITNESS COMPLIES)

13 Q All right, stand up. Walk over there and walk back.

14 A (WITNESS COMPLIES)

15 Q Of course, you don't have your shoe on, so -- you
16 don't normally limp that much because you don't have your
17 shoe on. Right?

18 A Yes, it's just a different level, so ---

19 Q Right. Okay.

20 MR. PROFFITT = That's all, Your Honor.

21 THE COURT - All right. Defense wish to ask any
22 questions at this time?

23 MR. HOLLER - No, sir.

24 THE COURT - All right.

25 MR. PROFFITT - Your Honor, the plaintiff rest.

1 THE COURT - All right. Ladies and gentlemen of
2 the jury, there's some matters that I need to discuss with
3 the attorneys at this point in time. Again, I'm going to
4 ask you to step back to the jury room but not to begin any
5 discussions until I ask you to do so. You may retire to
6 the jury room.

7 (WHEREUPON, JURY EXITS THE COURTROOM.)

8 THE COURT - All right, before we begin any
9 motions I will announce that I am not granting the defense
10 motion for a mistrial in the matter. I am taking the
11 position that the Court has the right to withdraw evidence
12 as I did. I'm using as authority Collins & Son Fine
13 Jewelry Incorporated vs. Carolina Safety Systems
14 Incorporated in part and the inherent right of the Court to
15 rule on evidentiary questions that are presented during the
16 trial. I will, however, if the defense wishes to request
17 any type of limiting instruction to the jury I will
18 certainly listen to your suggestions in that regard and
19 will do everything I can to try to explain to the jury how
20 they should consider that evidence without commenting on
21 it. So if you wish any type of limiting instruction, let
22 me know before I instruct the jury and I'll be glad to
23 consider that. Now, motions?

24 MR. HOLLER - Yes, sir, Your Honor.

25 THE COURT - Yes, sir.

1 MR. HOLLER - Judge, I'll try to be as concise as
2 possible, and certainly I can share whatever notes I have.
3 There are 14 issues in which we would like to make a motion
4 for directed first. First, Judge, we'd move for a directed
5 verdict on any claim of malpractice for encounters or
6 conversations after April the 10th, 2011. The testimony to
7 this jury is that there was no physician-patient
8 relationship. In fact, while there was some discussion
9 from the plaintiff's experts, there was never anything that
10 was, quote, clear, end quote, that would give actionable
11 duty for a hallway encounter or curbside encounter or
12 however you might term that. So we would move to strike
13 allegations of malpractice for anything beyond the April
14 10th, 2011 encounter. And, Judge, again, I can do them all
15 14 at a time an entertain responses to them or we can do
16 one at a time.

17 THE COURT - Let's do them one at a time. Hear
18 from the plaintiff as to the -- any claims of malpractice -
19 = what I'll call curbside consult. I think that's what
20 it's been referred to.

21 MR. PROFFITT - Right. Your Honor, I believe it's
22 a question for the jury. I believe our experts did testify
23 that a reasonable doctor in that same position would've
24 taken some action at that point if it is, in fact, true
25 that that encountered occurred, and that in failing to do

1 THE COURT - Come forward, please.

2 Ma'am, if you'll come to my left and be sworn
3 over here where this lady's standing, please. Thank you.

4 JERILYN WADFORD, AFTER BEING FIRST DULY SWORN,
5 TESTIFIES AS FOLLOWS -

6 THE COURT - Ma'am, once you're seated I'd ask
7 that you state your name and get as close to that
8 microphone as you can so we can hear you.

9 MS. WADFORD - Okay.

10 CLERK - The chair won't move; you'll just have to
11 slide up ---

12 THE COURT - The chair won't move, so you'll have
13 to slide up in the chair.

14 MS. WADFORD - Okay.

15 THE COURT - Thank you, ma'am.

16 MS. WADFORD - Yes, my name is Jerilyn Ann
17 Wadford.

18 THE COURT - Thank you, very much. Mr. Smith,
19 it's your witness.

20 DIRECT EXAMINATION

21 BY MR. SMITH -

22 Q Good afternoon, Ms. Wadford, how are you?

23 A Okay.

24 Q And you go by the name Jeri?

25 A Yes, I do.

1 A I don't -- I don't look at that when I'm looking at
2 the patient and asking them for their -- any problems.

3 Q Where is this filled out?

4 A At the time -- this is filled out up at the front
5 desk, like business office fills this out.

6 Q Yes, ma'am. Okay. And so that's not part -- that's
7 not something that becomes a part of the patient's file
8 during the emergency room triage process or treatment or
9 examination of the patient.

10 A No, not that I recall.

11 Q Okay. All right, now let's turn to page 1592 if you
12 would for me, please, ma'am.

13 A (WITNESS COMPLIES)

14 Q And tell the jury what 1592 is.

15 A 1592 is a triage record as it states.

16 Q Okay. And is -- tell -- did you fill out this triage
17 record?

18 A No, I did not.

19 Q Do you know who filled out this triage record?

20 A It was -- I believe it was Samantha Anthony.

21 Q All right. And sometimes when people come into the
22 emergency room, do -- who -- does other people besides you
23 do the triage of patients?

24 A Yes, they do.

1 Q Okay. And do you ever follow-up on the triage of the
2 patients?

3 A No, I -- since I have my signature on it, I would
4 follow-up on the -- what's stated on here.

5 Q Okay. So when you -- if you sign something, what does
6 that mean to you, sign this sheet?

7 A That's means I've reviewed the information that's on
8 the sheet.

9 Q And reviewed it -- reviewed it in which way?

10 A Verified the information as correct.

11 Q From the patient?

12 A From the patient.

13 Q Okay. And so when you look through this sheet what's
14 been marked 1592, does this show that you signed the sheet?

15 A Yes, it does.

16 Q And it's down at the bottom of the sheet?

17 A That is my signature.

18 Q Okay. So does that -- does that mean that you had a -
19 = took a history and then an assessment of Mr. Ethier?

20 A Yes.

21 MR. COX - Your Honor, objection to the leading.

22 THE COURT - I'll overrule the objection. You may
23 proceed.

1 Q And so on April 10th, 2011 -- let's go through this
2 sheet a little bit -- did you independently verify all this
3 information?

4 A Yes.

5 Q And tell the jury how you would've verified this
6 information.

7 A I would go to the patient and -- and ask what, you
8 know, is -- you read this and see if it -- you know, did
9 you -- what was your issue, what was your problem, what
10 happened or tell me what happened, and I would go ahead and
11 -- according to this, cap refill was checked, so I would
12 check for the refill, the cap refill and also the right
13 pedal and right post tibial pulses.

14 Q Okay. So if -- if this chart -- if you access
15 something or the patient told you something different than
16 what was written on this chart, tell the jury what you
17 normally would do.

18 A If there's anything different on this chart I will
19 just line it out, initial it and put what the correct
20 information is that I found.

21 Q Okay. So on April 10th, 2011, did you go through this
22 information with Philip Ethier?

23 A According to this, yes.

24 Q Okay. All right, well, let's talk about this a little
25 bit; let's talk about what you went through with him. If

1 you'll look up at the top of this, it talks about how he
2 arrived into the emergency room. Is that right?

3 A Correct.

4 Q Would you have verified that with him?

5 A I would've seen him walk.

6 Q Okay. And then you go through the vital signs with
7 him?

8 A Not necessarily. I would look at the vital signs.

9 Q And see if they were still similar to what ---

10 A I would -- I would look at the vital signs to see what
11 they were, to see if there's any issues.

12 Q And how about when we look through this, the chief
13 complaint. Tell the jury what you would do to verify this
14 chief complaint.

15 A I would ask, I'd said, so you have some right foot
16 pain and it started about 1300 or 1:00 o'clock, you were
17 unloading a truck and when you felt your right foot started
18 (sic) to turn ecchymotic and you had -- you were
19 complaining of some pressure and the pain started getting
20 worse around 3:30 or 1530 and then ===

21 Q All right, and ---

22 A --- I would check the cap refill as it states here.

23 Q All right, now, let me talk to you about the chief
24 complaint. You would ask him if that was his complaints.

25 A Yes.

1 Q Okay. Now, the term ecchymotic and the term pressure,
2 is that something that you observed or is that something
3 the patient told you?

4 A Well, according to this, it says the patient stated.

5 Q Okay. So that means that's what came from Mr. Ethier
6 and not what your observations were.

7 A Correct.

8 Q All right. And then throughout this, with the pain
9 assessment, did you perform a pain assessment of Mr.
10 Ethier?

11 A That would be asking him on a pain scale, yes.

12 Q And what was his response to you on that?

13 A His response was that it's his right foot, it's
14 moderate pain, it started about 1300 and the type of -- the
15 way he describes the pain was the pressure, and the pain
16 scale was about a five out of a zero to ten.

17 Q And all that would've been independently verified by
18 you?

19 A Yes. Excuse me, yes.

20 Q I'm sorry. Do you need some water?

21 A Yes.

22 THE COURT - We've got some right here.

23 MS. WADFORD - Thank you.

24 Q Better?

25 A Yes.

1 Q All right, and so when you go through this, also these
2 boxes up here at the top where it says mental status and
3 respiration and skin, did you independently verify all that
4 too?

5 A Just by looking at the patient you could tell all that
6 information.

7 Q And when you go through his mental status, was how at
8 that time? (sic) What was the mental ---

9 A Alert and oriented.

10 Q Yes, ma'am.

11 A He could answer my questions.

12 Q Yes, ma'am. And then when you went through, did you
13 check his skin?

14 A It says it's warm and dry.

15 Q Okay. And would you -- where would you have checked
16 the skin where it was warm and dry?

17 A Well, if he's complaining of right foot pain, I would
18 look at it to see if it's warm and dry and feel it.

19 Q And so you would've felt Mr. Ethier's right foot on
20 April 10th, 2011 in the triage room?

21 A Well, when I felt for the pulses, the pedal pulse, I'm
22 feeling the foot.

23 Q Yes, ma'am. And the notation that is on there and
24 what you found on April 10th, 2011 as to the condition of
25 his foot was what?

1 A His foot was warm and dry and he had pedal pulses.

2 They were present and they were normal.

3 Q Okay. And when you go through here and you observe a
4 patient's foot or -- would you look if it was discolored or
5 if it was a different color would you notate that on the
6 record?

7 A Yes.

8 Q And -- when -- you had an opportunity to observe Mr.
9 Ethier's foot on April 10th, 2011.

10 A Correct.

11 Q Had an opportunity to observe his toes on April 10th,
12 2011?

13 A Yes.

14 Q And when you had an opportunity to observe his leg on
15 April 10th, 2011, his right leg?

16 A Well, that I can't say for sure, but it's the right
17 foot, because the documentation says the right foot.

18 Q And, well, did he complain ---

19 A But if I'm looking at the right foot, the leg's there,
20 so ===

21 Q Yes, ma'am.

22 A Sorry.

23 Q You would assume that you -- when you look at a foot,
24 you look at the leg.

25 A Yeah, the leg's there, yes.

1 Q Yes, ma'am. And to -- was he making any complaint of
2 right leg pain on April 10th, 2011 during the triage
3 process?

4 A According to the documentation it's only his right
5 foot.

6 Q Okay. And was the -- and so if he was complaining of
7 right leg pain would that be recorded by you on here?

8 A Yes.

9 Q All right. And the fact that there's no documentation
10 right leg pain means what to you?

11 A That he complained about his right foot pain.

12 Q Okay. And when you went through -- when you look at
13 the leg or foot and you look at a color, if there was a
14 different color, blue, purple, red, black, would you notate
15 that?

16 A Yes.

17 Q And when you go through and looking at these boxes up
18 here which is on skin, you've got a number of different
19 choices. Is that right?

20 A Correct.

21 Q And ---

22 A Correct.

23 Q --- tell the jury what those choices are that you
24 could've documented that day?

1 A That it was pale, meaning it's white-looking,
2 diaphoretic, sweaty, or it was cyanotic meaning blue or
3 purple.

4 Q And did you check any of those on that day?

5 A No, it's -- no, it's not checked.

6 Q Okay. Let me ask you this. When you're going through
7 this -- through this triage, are you carefully observing
8 all the conditions that Mr. -- that the patients complain
9 of at that time?

10 A Yes.

11 Q All right. And at any time during your observation or
12 examination of Mr. Ethier, did you notice any black toes?

13 A Well, according to this there was no black toe,
14 otherwise I would've -- it would've been noted as such.

15 Q Okay. And a black toe, does that -- is that something
16 of importance to you?

17 A Well, a black toe is really contradictory to what this
18 says, because the pulses in his foot were normal; they were
19 good. The nail beds == well, cap refill which is less than
20 one second, it was very good. And when you check for the
21 nail beds, you're checking the toes -- oh, sorry -- you're
22 checking the toes to see if there's good blood flow, good
23 circulation, and if you've got good pedal pulse and the cap
24 refill is good, there should be -- I mean there shouldn't

1 be a black toe. If I had seen one, it would've been
2 charted as such.

3 Q Okay. Well, let's go through this. Now, you
4 independently checked the pulses. Is that right?

5 A Yes.

6 Q And would you have signed this if you did not check
7 the foot pulses or capillary refill?

8 A No. No.

9 Q And through this -- now, I know this jury's heard a
10 lot of them -- but tell them how you check a foot pulse.
11 Let's talk about the pedal pulses and the post tibial
12 pulses.

13 A Okay, to check the pedal pulse, you would just -- this
14 is the top of my foot, you would just put your two fingers
15 on top of the foot and press lightly and see if you feel a
16 pulsation. To check the posterior tibial, it would be
17 putting your -- putting your fingers by the ankle and -- of
18 the same foot -- and feel for pulses also.

19 Q All right, and when you did that on April 10th, 2011 to
20 Mr. Ethier, what did you determine the foot pulses were?

21 A Plus -- plus two.

22 Q And what does plus two mean to you?

23 A It was normal.

24 Q Okay. And do you -- tell the jury -- did you check
25 the capillary refill?

1 A Yes.

2 Q And tell the jury how you checked capillary refill?

3 A By pressing down on the nail bed, pressing down on the
4 nail bed and letting it go very quickly and see how fast
5 the nail bed returns back to the nice pink color ---

6 Q All right, ---

7 A --- so when you're pressing down it's white and when
8 you let it go, it'll come back to normal.

9 Q And at that time did you verify Mr. Ethier's capillary
10 refills on April 10th?

11 A Yes. Yes, it's within one second.

12 Q And what does that mean to you?

13 A That it was good.

14 Q And when you have pulses, the post tibial and pedal
15 pulses and capillary refill, what does that tell you as a
16 nurse?

17 A That tells me that I have good blood circulation, good
18 blood flow. Blood comes from the heart; the heart pumps
19 blood and it's in your most distal portion as your foot, so
20 it takes a little bit longer to get there, but if I've got
21 good blood circulation, you know, and a good capillary
22 refill, then the circulation and the blood flow is good to
23 that particular extremity.

24 Q All right. And have you checked foot pulses before
25 April 10th, 2011?

JERILYN WADFORD -- CROSS -- BY MR. COX

1 BY MR. COX -

2 Q Good afternoon, Ms. Wadford. My name's Ron Cox. Let
3 me ask you first of all, I think you were asked this
4 briefly when you first started testifying, but I want to
5 make sure I understood and the jury understood your answer.
6 Is it correct to say that you don't have any independent
7 recollection in your memory of this ER visit by Mr. Ethier,
8 and that you're relying through your testimony only on
9 what's documented in the record?

10 A That is correct.

11 Q And when -- let me ask you this. You've had a chance
12 to look over the record. Is it correct to say that no
13 member of the nursing staff at Fairfield Memorial Hospital
14 on April 10th took a popliteal pulse of Mr. Ethier. Is that
15 correct?

16 A I can't say that for sure. All I can say is what's
17 documented here on this triage page; it shows that it was
18 not -- popliteal pulses weren't checked.

19 Q And there's no indication anywhere in the record that
20 any member of the nursing staff at Fairfield Memorial took
21 a femoral pulse, is there?

22 A Correct.

23 Q And when Mr. Ethier was seen by Dr. Bibeau, you did
24 not go in the exam room.

25 A I don't recall being in the exam room.

1 Q And so you don't know if Dr. Bibeau took a popliteal
2 pulse of Mr. Ethier's right leg.

3 A No, I don't.

4 Q You don't know if Dr. Bibeau took a femoral pulse of
5 Mr. Ethier's right leg.

6 A That's correct.

7 Q You don't know if Dr. Bibeau took a pedal pulse of his
8 right foot.

9 A I was not there, so I can't say yes or no.

10 Q You don't know if he took the posterior tibial pulse
11 either. Is that correct?

12 A I can't -- if he's documented, then he's taken it.

13 Q Okay. Well, you don't know what ---

14 A I mean I did not physically see him do that.

15 Q Okay. And if he didn't document it, then that means
16 he didn't do it. Right?

17 A I would assume.

18 Q Now, -- I just want to make sure we're clear. You
19 were asked a lot of questions about this document which is
20 the nursing triage record for Mr. Ethier. Right?

21 A Correct.

22 Q This is a page of the bates number 1592 ---

23 A Yes.

1 Q --- and there is a lot of information that Mr. Smith
2 was just asking you about that's recorded on this form.
3 Correct?

4 A Correct.

5 Q And all the writing that's on this form, the only
6 thing on here that's your handwriting is your signature at
7 the bottom. Correct?

8 A Yes.

9 Q Now, on this form there's no indication that Mr.
10 Ethier gave a history of a spider bite, is there?

11 A I don't see anything written on this triage record.

12 Q And you don't have any independent recollection.
13 Correct?

14 A It was a long time ago.

15 Q And there's nothing anywhere on the triage record that
16 shows that there was -- any member of the nursing staff
17 identified a spider bite. Is that correct?

18 A Could you repeat that question?

19 Q There's nothing anywhere in the triage record to show
20 that any member of the nursing staff identified a spider
21 bite.

22 A All this talks about is right foot pain.

23 Q Okay. And there's no identification of a spider bite.
24 Correct?

25 A I don't see anything on here.

1 (WHEREUPON, JURY RETURNS TO THE COURTROOM)

2 THE COURT - All right, I've overruled an
3 objection. You may proceed.

4 MR. COX - Thank you, Your Honor. May I approach
5 the witness and enter exhibit that's been marked as
6 Plaintiff's Exhibit 46.

7 Q Ms. Wadford, I'd like to draw your attention to --
8 well, first of all, is this a -- one of the nursing
9 policies and procedures from Fairfield Memorial Hospital
10 where you work?

11 A It appears to be.

12 Q Let me draw your attention to the paragraph 3 under
13 general guidelines, and doesn't the policy say that initial
14 assessment must be documented for each patient arriving to
15 the emergency department and a triage note shall be written
16 and signed by a registered nurse only? Is that what it
17 says?

18 A According to this policy, yes.

19 Q Thank you.

20 MR. COX - Your Honor, plaintiffs would offer
21 Plaintiff's Exhibit 46 into evidence.

22 MR. SMITH - Objection, Your Honor.

23 THE COURT - Over your objection.

24 MR. SMITH - Sir?

25 THE COURT - Your objections are noted.

1 MR. SMITH - Yes, sir, but I object to it being
2 introduced into evidence, Your Honor. It's cumulative;
3 she's testified and that's -- I think we're going to have
4 to take up -- there's other issues contained in that.

5 THE COURT - She's acknowledged the existent of
6 that and has published the appropriate portion. Sustain
7 the objection; it'll be made an exhibit.

8 MR. COX - Thank you, Your Honor.

9 (WHEREUPON, DOCUMENT MARKED INTO EVIDENCE AS
10 PLAINTIFF'S EXHIBIT NUMBER 46.)

11 Q Now, Ms. Wadford, we went over the fact that on that
12 triage note from Mr. Ethier the only writing anywhere on
13 that page that is yours is the signature. Correct?

14 A Yes.

15 Q And even though the hospital policy requires that a
16 triage note shall be written and signed by a registered
17 nurse only. (sic) Right?

18 A According to that policy.

19 Q And isn't true that you don't have any idea what Mr.
20 Ethier's foot or leg looked like on April the 10th, 2011,
21 because you weren't even in the room.

22 A That is incorrect.

23 Q Isn't it true that you signed off on this triage and
24 if you now admit that you signed off on it, that could cost

1 you your job because you violated the hospital policy,
2 didn't you?

3 MR. SMITH - Judge, objection to that for same
4 reasons we discussed earlier.

5 THE COURT - It's noted. She may answer the
6 question.

7 A I'm not sure.

8 MR. COX - Thank you, Your Honor. No further
9 questions.

10 THE COURT - Re-direct.

11 RE-DIRECT EXAMINATION

12 BY MR. SMITH -

13 Q Ms. Wadford, ---

14 A Yes.

15 Q --- nursing policies -- these are policies and
16 procedures. Right?

17 A That is correct.

18 Q And these are used as guides for nursing at the
19 hospital. Is that right?

20 A That is correct.

21 Q And is every policy and procedure at the hospital able
22 to be followed by you when you see an emergency room
23 patient?

24 A By the letter?

25 Q Yes, sir. Yes, ma'am.

1 A No.

2 MR. SMITH - Thank you.

3 MR. COX - Nothing further, Your Honor.

4 THE COURT - All right, you may step down, ma'am.

5 Thank you.

6 MR. SMITH - Judge, may she be excused, so she can
7 go enjoy her vacation?

8 THE COURT - Any objections?

9 MR. COX - No, objection, Your Honor.

10 THE COURT - Ma'am, you're free to go. Thank you
11 very much for coming today.

12 MS. WADFORD - Okay, thank you.

13 THE COURT - The defense may call its next
14 witness.

15 MR. SMITH - Defense calls Rhonda Gwynne?

16 THE COURT - Come forward, please, ma'am, to my
17 left and be sworn.

18 RHONDA GWYNNE, AFTER BEING FIRST DULY SWORN,
19 TESTIFIES AS FOLLOWS =

20 CLERK = State your name for the record.

21 MS. GWYNNE - My name is Rhonda Gwynne.

22 THE COURT - Thank you. Mr. Smith, your witness.

23 MR. SMITH - Thank you, Your Honor. May it please
24 the Court.

25 THE COURT - Yes, sir.

1 overlap by 30 minutes, and by that when he would come on,
2 he would get a report from the current shift, which may
3 have been me, may have been Ms. Wadford, we would count the
4 narcotics and then we would go. I never worked with him as
5 a nurse. It was just passing off the duties of the shift.

6 Q All right, on April 10th, 2011, what involvement --
7 what was your role in his emergency room visit during that
8 time?

9 A Well, I know I gave him some medication that Dr.
10 Bibeau ordered and I -- when it was time for him to be
11 discharged, I gave him his discharge instructions.

12 Q Okay. Did you see him during the triage process?

13 A No.

14 Q Did you see -- were you in the room when Dr. Bibeau
15 examined him?

16 A No.

17 Q And you're -- and the first interaction you had with
18 him was ---

19 A When I gave him the medication that Dr. Bibeau
20 ordered.

21 Q Okay. And what is on page 1593 -- do you see that
22 page?

23 A I do.

24 Q All right. And at that point, do you have any
25 handwriting on 1593?

1 A I would say 23 years.

2 Q Okay. And so let's walk through the discharge
3 patients (sic) and specifically discharge instructions with
4 Mr. Ethier here. Did you -- were you -- what kind of nurse
5 was he at the hospital?

6 A He's the same thing I am, an LPN. He was; I don't
7 know what he is now.

8 Q Okay. And to your knowledge, at that time was he --
9 when he was orienting and being taught, was he giving
10 discharge instructions to patients?

11 A He held the same position that I now do, and that was
12 part of my duties, so I never worked with him, so I can't
13 say what he did but it would be an RN and an LPN and I'm
14 sure that RN didn't do everything.

15 Q Okay. All right. Well, let's go through the
16 discharge instructions and turn to 1595 for me, please,
17 ma'am.

18 A 1595 (WITNESS COMPLIES)

19 Q Yes, ma'am. Now, tell me, is that -- 1595 -- is that
20 something that you would have given to Mr. Ethier?

21 A It is.

22 Q And tell me on April 11th, 2011, do you have an
23 independent recollection of having a discussion with Mr.
24 Ethier about what's been marked as 1595, this sheet?

25 A On April the 11th?

1 Q April 10th. I'm sorry.

2 A April 10th. I would given him that sheet of paper,
3 which I did, and I would've said, Philip, these are your
4 discharge instructions, Dr. Bibeau has diagnosed you as
5 probable spider bite. He's given you two prescriptions.
6 One's for Voltaren; one is for Percocet; you're to take
7 them as directed; a work excuse was given for one day; he
8 was told to follow-up with his doctor this week; he signed
9 the form saying he received this form.

10 Q All right. Did you tell him personally to follow-up
11 with his doctor on here?

12 A I did. I did.

13 Q Okay. And you would've done that when you went
14 through this?

15 A Yes.

16 Q Do you have an independent recollection of having that
17 discussion with Mr. Ethier?

18 A I do.

19 Q And tell the jury exactly what you told him during
20 that time.

21 A I told him that not only do you need to be seen for
22 your foot, but I notice your blood pressure was elevated
23 when you came in, and it was also elevated upon departure.
24 It was not as high the second time, but it was still

1 elevated. I told him you need to follow-up not only for
2 your foot but for your blood pressure.

3 Q Did you tell him where to follow-up?

4 A I noted that his doctor was the Blue Granite Clinic
5 but I remember sharing with him that I work through the
6 week at a doctor's office and we have four doctors on staff
7 and at that time one nurse practitioner, and I remember
8 telling him we take new patients.

9 Q Okay. And at that point did he act as if he
10 understood the instructions?

11 A He gave me the impression that he was going to follow-
12 up.

13 Q Okay. And in here you had him sign that?

14 A I did. I gave him another piece of paper, too, that
15 was the hospital fact sheet describing events about your
16 visit that day, and this would be a sheet of paper that he
17 should be familiar with, too.

18 Q Yes, ma'am. But let's go back to 1595 for me at the
19 end. Is that his signature at the bottom?

20 A It is.

21 Q Did he sign that in your presence?

22 A He did.

23 Q And did you note his vital signs? Is that your
24 handwriting?

25 A That is my handwriting.

DR. GUY BIBEAU -- DIRECT -- BY MR. MYERS

1 MR. MEYERS - Good morning, Your Honor. Thank
2 you. We'd call Dr. Guy Bibeau.

3 THE COURT - Thank you, Mr. Meyer. Yes, sir, come
4 forward to my left, please sir and be sworn.

5 DR. GUY BIBEAU, AFTER BEING FIRST DULY SWORN,
6 TESTIFIES AS FOLLOWS -

7 THE COURT - All right, sir, once you're seated,
8 state your name, please.

9 DR. BIBEAU - My name is Guy Bibeau.

10 THE COURT - Thank you. Mr. Meyers, your witness.

11 MR. MEYERS - Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. MEYERS -

14 Q Dr. Bibeau, please forgive me if I go back and forth
15 between Mr., Guy and Doctor. Okay?

16 A Okay.

17 Q How about introduce yourself to this jury.

18 A Yeah, I'm Guy Bibeau. I am a physician. I've been
19 practicing medicine since 1983, about 28 years.

20 Q This is a bad question for seniors, but how old are
21 you, Dr. Bibeau?

22 A 55.

23 Q Where do you live?

24 A I currently live in Colleyville, Texas which is a
25 northern suburb of Fort Worth, Texas.

1 A He reported that the pain was a little better when he
2 got there. I don't know how much the aspirin helped, how
3 much the Tylenol helped, how much any other measures he
4 took might've helped.

5 Q Did you tell him that you were treating him for a
6 spider bite?

7 A Yes.

8 Q Did he object to you treating it as a spider bite?

9 A No, he did not.

10 Q Did he seem to agree with you that it needed to be
11 treated as a spider bite?

12 A He certainly didn't express any disagreement.

13 Q Did you have any reason to believe that this man had
14 suffered any sort of vascular problem?

15 A No, I did not, because he had good pulses, good
16 capillary refill. He also didn't have the kind of
17 discoloration you would expect for arterial disease, for
18 decreased flow through an artery. You normally expect the
19 extremity to be pale, cold, absent pulses, poor capillary
20 refill, and I didn't see anything of that nature.

21 Q Now, with regards to the spider bite, do you recall
22 whether Mr. Ethier himself told you that he thought he had
23 been bitten by a spider?

24 A It's now been four years since this took place. I
25 believed so and I said that in my deposition.

1 Q Okay. Now, doctor, I'm going to hand to you what's
2 been marked and entered as Plaintiff's Exhibit 23. Do you
3 recognize that document?

4 A Yes, sir, I do. It's the triage record.

5 Q Now, are any of your notes on that document there?

6 A No, that's the note made up entirely by the -- you
7 know, by the triage person and the signature of the RN is
8 at the bottom.

9 Q Okay. I'm going to hand to you what's been entered as
10 Plaintiff's Exhibit 25. Do you recognize that document?

11 A Exhibit 25, yes, I do.

12 Q What is that document?

13 A That is the area where the physician documents the
14 physical exam.

15 Q Now, doctor, there's been some -- there's been some
16 testimony about whether or not you properly documented that
17 form. Is it your testimony that you checked for the
18 pulses?

19 A I did, but I'm not -- it's very difficult to document
20 every normal finding you have. I'm very good about
21 documenting any abnormalities I find.

22 Q Now, after -- or after the triage nurse saw him, about
23 how long as far as time-line, did you walk in to see him?

24 A It was within a few minutes I believe.

1 Q Did you think that his pulse or anything would've
2 changed, or did it, in fact, change from when the triage
3 nurse took it?

4 A I would not think so.

5 Q So is it your testimony that you normally document
6 only if it's something abnormal?

7 A Yes.

8 Q So is it safe to say that the reason you didn't
9 document on that form is because ---

10 MR. PROFFITT - Object to the leading, Your Honor.

11 THE COURT - Ask you not to lead. Rephrase,
12 please.

13 MR. MEYERS - I'll rephrase.

14 Q Why didn't you document on Plaintiff's Exhibit 25
15 there, Dr. Bibeau?

16 A I emphasize documenting abnormalities. I try to think of
17 all the pertinent positives. I believe I checked the
18 pulses, but I did not -- I just did not look to see those
19 boxes in that particular location.

20 Q All right. So from the time that Mr. Ethier presented
21 until the time that he left, how much time had passed?

22 A I'm estimating roughly between five and ten minutes.

23 Q When you finished your observation, what happened
24 next?

1 A Next, the LPN, Rhonda Gwynne, went to the -- into the
2 room and gave him some medications.

3 Q Now, at any -- did you -- during your observations in
4 that period that you were there, did you observe Mr. Ethier
5 walk?

6 A I did. He walked in and walked out.

7 Q All right. At any time did you suspect that he had
8 suffered or may have suffered any sort of aneurysm?

9 A No, sir, I did not.

10 Q How about his skin tone? How did that appear to you?
11 We talked about there not being any -- any black on the
12 toes but overall his right leg. How did that seem?

13 A It -- it looked good. The leg looked fine.

14 Q Now, all right, there's been testimony about the five
15 Ps that you look at during the ER. Are you familiar with
16 those five Ps?

17 A I am.

18 Q Did any of those five Ps cause you any concern during
19 your observation of Mr. Ethier?

20 A There was definitely pain.

21 Q Did he appear to suffer any sort of life-threatening
22 problems in your observation?

23 A No, he did not.

24 Q If you had noticed any sort of discoloration or any
25 other problems, what, if anything, would you have done?

1 A If I had noticed any discoloration of the skin, then
2 that would've pointed toward a possible problem with poor
3 blood flow to the foot. In that case you have to know
4 where it originates from, so you would feel behind the
5 knee, not just for aneurysms but just to make sure you can
6 feel a pulse there, and then go up to the femoral artery,
7 which is in the groin, and feel for a pulse there.

8 Q Okay. Now, after you left or before you left, did you
9 instruct Mr. Ethier at all about any follow-up care?

10 A Yes. It is important to follow-up and I did advise
11 follow-up with the primary care physician within one week,
12 you know, for that pain, because things can change. You're
13 thinking more of an acute problem such as a bite or injury
14 or some kind of chemical or toxin exposure. If you're
15 talking about pain that has been going on for four hours,
16 you're still thinking of that if you treat with medications
17 appropriate for that diagnosis and the patient steadily
18 gets better and it resolves over a few days. If it doesn't
19 get better, then the diagnostic possibilities definitely
20 change.

21 Q Okay. Now, as an ER doctor, is it important for you
22 to instruct a patient to follow-up with his or her primary
23 care doctor?

24 A Yes, it is.

25 Q Why is it important, Dr. Bibeau?

1 A Because, you know, a disease process can evolve. You
2 know, as an ER physician you're typically seeing a patient
3 at the onset of the problem, but disease processes in
4 general are very non-specific at the onset and they tend to
5 clear themselves over time.

6 Q When you instructed Mr. Ethier to follow-up with his
7 primary doctor, did you have any reason to believe that he
8 didn't have access to one?

9 A No, I -- I felt that he would have access and he -- I
10 felt that he had a level of knowledge that was higher than
11 you see in your average patient; he was a nurse.

12 Q Well, you said he was able to communicate. When you
13 gave him those instructions, did he say, doctor, I can't --
14 I can't follow-up with a doctor?

15 A Rhonda Gwynne, the LPN, handed the instructions, but I
16 don't recall him saying that.

17 Q Has anyone told you that he said, well, doctor, he
18 can't follow-up with his primary doctor, so he can't follow
19 your instructions?

20 A No.

21 Q Now, there's been some testimony about Mr. Ethier
22 calling back in after his visit on April 10th, 2011. Did
23 you ever receive a phone call from Mr. Ethier after April
24 10th, 2011?

25 A No, I did not.

1 Q Did you ever do anything to treat Mr. Ethier after
2 April 10th, 2011?

3 A No, I did not.

4 Q Now, are you aware of any doctor speaking to Mr.
5 Ethier after April 10th, 2011?

6 A I'm not aware of that or any documentation to that
7 effect.

8 Q Now, Mr. Ethier testified that he eventually came back
9 to work. Do you recall that testimony?

10 A I do.

11 Q Do you recall his testimony about seeing you in the
12 nurses' station?

13 A Yes, I do.

14 Q Did he ever make the comment to you so -- about his
15 foot and you then making a comment, so that's why I
16 couldn't figure it out?

17 A No, I did not make that comment. I do remember him
18 showing me the photo.

19 Q Was it a photo or was it his actual leg?

20 A I remember him showing me a photo of what happened. I
21 do not remember what I said, if I said anything, but I know
22 I did not make that statement.

23 Q Had Mr. Ethier presented himself to you after April
24 10th, 2011 with any sort of change in his circumstances,
25 what would you have done?

DR. GUY BIBEAU -- CROSS -- BY MR. PROFFITT

1 Q Doctor, one final question. As far as the protocol at
2 the hospital, had a patient who had previously been seen at
3 the ER called back to the ER about a complaint, would it
4 have been documented?

5 A If they -- are you talking about speaking with a
6 physician ---

7 Q Yes, sir.

8 A It would be proper if a physician did that for them to
9 put a notation in the medical record and to time it and
10 sign it.

11 Q In sitting here today, have you seen any sort of
12 documentation that would reflect that Mr. Ethier called
13 back after April 10th, 2011?

14 A No, there's none in the record.

15 MR. MEYERS - Thank you. No further questions.
16 Please answer any questions Mr. Proffitt might have.

17 THE COURT - Mr. Proffitt, your witness.

18 MR. PROFFITT - Thank you, Your Honor.

19 THE COURT = Yes, sir.

20 CROSS EXAMINATION

21 BY MR. PROFFITT -

22 Q Good morning, Dr. Bibeau. How are you doing?

23 A Good morning.

24 Q All right, Dr. Bibeau, you're a board certified family
25 physician. Correct?

1 A Yes, sir.

2 Q And you've got something like four years of
3 undergraduate degree at Clemson. Microbiology?

4 A Yes.

5 Q And you've got four years of medical school down at
6 USC?

7 A Yes.

8 Q And you've got almost three years or four years in
9 residency?

10 A Three years.

11 Q Three years. So you've got a total of 11 years in
12 medical education?

13 A Correct.

14 Q And how many years does an LPN have in medical
15 education?

16 A About a year.

17 Q About a year. All right. So you're the more educated
18 guy in this entire relationship, aren't you?

19 A Yes, sir.

20 Q Okay. And, Dr. Bibeau, would you agree with me that
21 first and foremost duty of an ER physician is to diagnose
22 the most treatable and most threatening life or limb
23 problem that a patient has when they come in?

24 A That's true.

1 Q That's true. That's what you do when you're in the
2 ER. Right?

3 A Yes.

4 Q And you've been in the ER a number of years. Right?

5 A Correct.

6 Q And you've moonlighted there for a number of years.

7 A Yes.

8 Q Right? You didn't work full-time there, but you
9 moonlighted at a couple of hospitals. Right?

10 A Yes.

11 Q And if you failed to do that, if you failed to rule-
12 out the most treatable and the most threatening life or
13 limb problem, that's a violation of the standard of care,
14 is it not? You agree with that.

15 A Yes, sir.

16 Q Okay. And in order to find out whether something is
17 threatening to the life or limb, you've got to do a proper
18 exam, don't you?

19 A Yes, sir.

20 Q And if you don't do a proper exam, that's a violation
21 of the standard of the care, isn't it?

22 A Yes, sir.

23 Q And you also have to take an adequate history on the
24 patient. If you don't do that it's a violation of the
25 standard of care, is it not?

1 A Yes, sir.

2 Q All right. And if you -- you have to spend enough
3 time with the patient. Right?

4 A Enough time to -- for the particular problem.

5 Q Right. And if you don't spend enough time with the
6 patient, that's a violation of the standard of care for an
7 ER physician.

8 A Yes, sir.

9 Q Okay. And when you're in the ER as their physician in
10 the ER, you have to consider all the appropriate possible
11 diagnoses that are raised by that patient's condition,
12 don't you?

13 A Yes, sir, and those -- the differential diagnosis
14 comes to you by way of your history and exam. Your exam
15 rules out certain diagnostic possibilities.

16 Q Exactly. And if you fail to consider all of the
17 appropriate possible diagnoses of the patient who's sitting
18 in front of you, that would be a violation of the standard
19 of care, would it not?

20 A Yes, sir.

21 Q All right. Now, Dr. Bibeau, I show you what we've
22 looked at before. On this Plaintiff's Exhibit 44 -- can
23 you see that?

24 A Yes.

1 Q All right. You've got five or six symptoms there.
2 You've got pain, polar, pallor, paresthesia, which is the
3 numbness or the tingling. Right?

4 A Right.

5 Q And you've got pulselessness or paralysis or paresis
6 which is the weakness of the paralysis. Right?

7 A Exactly.

8 Q Okay. No dispute from you, is there, that when Phil
9 came into ER he was reporting pain?

10 A Yes, that's true.

11 Q All right. And when you -- when you're -- Mr. Meyers
12 showed you the exhibit a second ago, we looked at all the
13 pain reports in the triage record.

14 A Correct.

15 Q You saw those, didn't you?

16 A I saw those.

17 Q So we have the triage, got pain. Several reports of
18 pain all over it. Correct?

19 A Correct.

20 Q Absolutely no dispute we had pain.

21 A Right.

22 Q All right. And did we also have polar?

23 A No, we did not have coldness. We had a very slight
24 difference in temperature.

1 Q Okay. So there's a difference in temperature. We had
2 coolness, and, in fact, your physical exam record, that's a
3 finding you made. Right?

4 A Correct.

5 Q You said right foot cooler than left foot. Right?
6 Correct?

7 A Correct.

8 Q Here -- it's right here where I'm pointing. Correct?

9 A Correct.

10 Q So you found a cooler foot. That's polar, is it not?
11 It's not freezing, but it's cooler, isn't it?

12 A It's a matter of degrees. It's slightly cooler.

13 Q So we've got cooler. All right. Then we've got
14 paresthesia, and we have -- we have that in this case,
15 don't we? We have Phil reporting that he was numb in the
16 right leg and foot.

17 A Yes, that's a complaint he made.

18 Q That was a -- there we have it again. You've seen it
19 before. There it is, numb. You see that?

20 A Yes.

21 Q That's what he's telling you. He's telling you --
22 and, in fact, Phil himself was telling you, cold, numb and
23 ecchymotic. Right?

24 A Is that on there?

1 Q Sure. Here we go. This is your -- this is a page you
2 filled out. Right? Plaintiff's Exhibit 24?

3 A Cold, numb and ecchymotic, yes.

4 Q Cold, numb and ecchymotic. That's what he's telling
5 you about his right leg. Correct?

6 A Correct.

7 Q And up here you circled, right leg, did you not?

8 A I'm not sure why I circled leg.

9 Q Well, did you not circle leg because he was
10 complaining about the leg?

11 A No, sir. He was complaining about the foot.

12 Q Well, but you circled leg, and you note foot as well.
13 Right?

14 A I know.

15 Q And you circled leg.

16 A That's right.

17 Q And that's because on that day standing in the
18 emergency room or seated on that exam table Phil Ethier
19 told you it was right leg, did he not?

20 A No, sir, he didn't.

21 Q So you're -- did you circle that R?

22 A I did.

23 Q And did you circle the leg?

24 A I did.

25 Q Those are your pen marks.

1 A But it doesn't -- we're talking about -- it says right
2 foot pain since 1300 hours.

3 Q Are those your pen marks on Plaintiff's Exhibit 24
4 which is part of the ER record for Phil where you circle
5 the R and you circled the leg?

6 A Yes, sir.

7 Q And Phil didn't take your pen and do that. He didn't
8 take your hand or your pen and circle that on that form,
9 did he? You did that.

10 A That's correct.

11 Q And -- so this is four years ago, and you're going to
12 sit here today and tell us later that it wasn't a leg
13 issue, you just thought it was a foot thing, even though
14 you circled right leg on the form itself that day as he sat
15 it front of you telling you it was the leg?

16 A I documented right above it that it is right foot pain
17 and I wrote all that out myself.

18 Q And you documented right below it that it was right
19 leg pain as well, did you not?

20 A I may have made a mistake as far as what I circled,
21 but he came in for right foot pain.

22 Q Well, the document says what it says, doesn't it?

23 A (No response)

24 Q All right, Dr. Bibeau, now, let's go back to our P
25 chart, our symptom chart here. We've talked about the

1 pain; we've talked about the polar. You said it was cool.
2 You also report Phil saying it's cold; we've talked about
3 he paresthesia, the numbness. He said it was numb. Right?

4 A Correct.

5 Q You had a history that he had numbness in his right
6 leg and foot within the last couple of hours.

7 A Yes.

8 Q Okay. Now, let's talk about the pulselessness. Did
9 you find any pulselessness?

10 A No.

11 Q Did you check the foot pulses?

12 A Yes.

13 Q And how do you know you checked the foot pulses?

14 A Um ---

15 Q You don't know that you checked the foot pulses, did
16 you?

17 A I know -- I know that I observed capillary refill when
18 I pushed in on the feet. I know that I reviewed the pulses
19 checked by the RN student.

20 Q All right. And at the time you didn't even know that
21 Samantha Anthony had done the triage, did you? You thought
22 Jerilyn Wadford had done it. Did you not?

23 A I thought so.

24 Q That's what you said at your deposition, didn't you?

25 A (No response)

1 Q And you talked about ---

2 COURT REPORTER - He needs to answer verbally.

3 Q Answer affirmatively.

4 A Yes.

5 Q Did you say at your deposition that Jerilyn Wadford
6 checked the pulses?

7 A Yes.

8 Q And you trusted her.

9 A Yes.

10 Q She's thorough; she's excellent.

11 A Yes.

12 Q But actually, the one that did it was Samantha
13 Anthony.

14 A That's true.

15 Q And you know now that Samantha Anthony was just a
16 nursing student, just a CNA, very inexperienced at doing
17 foot pulses at all. Correct?

18 A Not correct. She's a -- you know, an RN student and
19 she's -- you're looking at someone -- you're not looking at
20 someone with the intelligence of a career nursing
21 assistant; you're looking at someone who's on her way to be
22 a registered nurse.

23 Q Nevertheless, you know that Samantha Anthony has
24 testified that she was very inexperienced at doing foot
25 pulses. You're aware of that.

1 A I'm aware of that.

2 Q And you were not aware of that on April 10th, 2011,
3 were you? Because you didn't know Samantha Anthony did
4 this ---

5 A No, sir, I didn't ---

6 Q --- but now we know that what's in this ER record on
7 the triage record is unreliable, isn't it?

8 A No, we don't know that, because Jerilyn Wadford
9 testified under oath that she checked the pulses and the
10 capillary refill.

11 Q She sure did; she sure did. But she never -- there's
12 also testimony that she never touched Phil in a single
13 instance, isn't there? You sat here and heard it.

14 A I heard Mr. Ethier say that.

15 Q All right. Dr. Bibeau, you say you checked the foot
16 pulses; you believe you did, but you're not sure. Correct?

17 A Correct.

18 Q And on your form, on the part of the physical exam
19 form, the Plaintiff's Exhibit 25 shown here, there's a
20 place to put the pulses, is there not? All these little
21 yellow boxes.

22 A Yes, there is.

23 Q There's a place to put a foot pulse on the right and
24 the left. Right?

25 A Correct.

1 Q And there's a place to put a femoral pulse.

2 A Correct.

3 Q And there's a place to put a popliteal pulse.

4 A Correct.

5 Q And there's not a single thing filled out there, is
6 there?

7 A No, there's not. He did -- he had good capillary
8 refill, and you can access that rapidly just by pushing on
9 the foot and seeing -- you know, like I did when I touched
10 his feet -- and seeing that it rapidly corrects. Blood
11 flow to the foot was not a problem for him on that day.

12 Q Is there a place on here to put poor or to note the
13 capillary refill?

14 A Yes, sir.

15 Q Is there anything in that blank?

16 A No. I observed it; I don't document all my normals.

17 Q You don't document all your normals. I heard that.

18 Well, Dr. Bibeau, you're looking at the right leg and foot.
19 Correct? That's sort of a --- that's the focal point of
20 your entire examination. Right?

21 A The right foot. Correct.

22 Q So is it not important that you note your findings at
23 least for that -- for what you're looking, even if you
24 don't do the popliteal pulse, even if you don't do the

1 femoral pulse? Isn't it important to note that you
2 actually took the foot pulses on that patient?

3 A I try to note all my pertinent normals, also, but I
4 emphasize the abnormalities.

5 Q And there's -- but there's nothing in the record that
6 shows that you checked the foot pulses other than your
7 testimony that you did so four years later sitting here
8 today?

9 A Yes, sir.

10 Q And you've had thousands of patient encounters since
11 then. Correct?

12 A Correct.

13 Q At the hospitals where you've worked you've seen tons
14 and tons of patients, haven't you?

15 A I have.

16 Q Now, Dr. Bibeau, you testified about a phone call that
17 you supposedly received or information about the phone call
18 which was supposedly received from Rhonda Gwynne. Correct?

19 A Correct.

20 Q You never received that phone call.

21 A No, I didn't.

22 Q And you don't know who Rhonda Gwynne got that
23 information from.

24 A That's correct.

1 Q And there's nothing in the record to show that Rhonda
2 Gwynne got it from Phil or anybody else. Right?

3 A That's correct.

4 Q And you have no idea where that came from, whether it
5 came out of the blue or what happened, where that came
6 from.

7 A That's correct.

8 Q All right. And so -- Dr. Bibeau, let me understand
9 this. Is it that you hear some rumor and some statement
10 that you don't even know where it's coming from, no source
11 for it at all and somehow you're already forming in your
12 mind that that's going to be your diagnosis? Is that how
13 you operate?

14 A No. No, it um -- it gives you some information that
15 you can put in the back of your mind when you talk with
16 him.

17 Q Well, it seems like, based on what the record that we
18 have, that you immediately jumped to the spider bite
19 conclusion, and you jumped to that apparently because you
20 got some rumor of a call that somebody's coming ---

21 MR. MEYERS - Objection, Your Honor, he's ---

22 Q --- in with a spider bite.

23 A That's -- that's not ---

24 THE COURT - Just one second. We have an
25 objection.

1 A That's not true at all.

2 THE COURT - Just one second, sir.

3 MR. MEYERS - Your Honor, he's mischaracterizing
4 the testimony. No one said anything about jump. I mean I
5 understand it's cross examination, but, you know, to
6 characterize it as jumping to conclusion, that's a
7 mischaracterization.

8 THE COURT - He's on cross examination. I'll
9 allow the question, and I'll allow the defendant to fully
10 answer. Yes, sir, you may proceed.

11 MR. PROFFITT - Thank you, Your Honor.

12 A It's not true at all. When he came in, he came in
13 with the acute onset of pain. He could very -- he could
14 pinpoint it to 1:00 pm when he was outdoors. Now we're
15 hearing walking in the yard. That's the type of scenario
16 in which -- under which a person could be bitten or step on
17 something or, you know, twist an ankle, have that type of
18 thing happen, so I was thinking about those kind of acute
19 events that could've happened because of the acuity of the
20 pain and where he was.

21 Q All right. Again, and you've jumped to that
22 conclusion -- it's what -- did you not?

23 A No.

24 Q All right. Now, Dr. Bibeau, you would agree with me
25 that it's not necessary to have a -- you can still have a

1 blood vessel problem if you have a pulse in the foot. You
2 agree with that?

3 A You could still have a blood vessel -- yes, it's
4 possible to have a blood vessel problem.

5 Q You can have some kind of a blockage, something going
6 on with an aneurysm in your blood vessels and still have a
7 normal foot pulse. Like the doctors told us earlier,
8 there's three arteries that flow down the leg. Right?

9 A You can't have any significant degree of blockage with
10 a normal pulse. It's possible to have an aneurysm that is
11 A-symptomatic and have the normal pulse.

12 Q But you can have some kind of a blockage in one of the
13 arteries and still you'll have a normal foot pulse because
14 there's flow through the other arteries. There's no
15 dispute about that. That's basic vascular system medicine,
16 isn't it?

17 A I'd defer to vascular surgery on that.

18 Q Well, you wouldn't disagree with me that your own
19 expert, Dr. Smith, says that, would you?

20 A That would be fine.

21 Q Okay, and you wouldn't ---

22 A I would agree with him.

23 Q Well, and -- good. And you wouldn't agree -- you
24 wouldn't disagree with Dr. Adams who was here, the vascular
25 expert from our side that said that, that you could have a

1 normal foot pulse and still have a blockage going on. You
2 don't disagree with that, do you?

3 A No, sir.

4 Q And you don't disagree with Dr. Jolin who said the
5 same thing, do you?

6 A No, sir.

7 Q And you don't disagree with Dr. Holleman, the treating
8 surgeon who said the same thing.

9 MR. MEYERS - Objection, Your Honor. He's -- he's
10 improperly pitting the witnesses against each other.

11 THE COURT - I'll ask you to move on.

12 MR. PROFFITT - All right. Thank you, Your Honor.

13 THE COURT - Let's not compare testimony between
14 the witnesses.

15 MR. PROFFITT - All right.

16 Q Now, Dr. Bibeau, you did not ever consider a blood
17 vessel problem as a possible diagnosis in Phil Ethier's
18 case.

19 A I did not consider it after the history and exam that
20 I felt were good enough to rule out the problem, because
21 he, in fact, had good circulation to the foot, ---

22 Q Right.

23 A --- good blood flow.

1 Q Right. Even though we've talked about our P chart
2 here, even though we've got pain, polar or coolness, pallor
3 or change in color ---

4 A No, you don't. Pallor is pale. Pale is white.

5 Q So you think -- you think it's only pale.

6 A That is not correct.

7 Q All right, and if other doctors say differently, you
8 disagree with those doctors?

9 MR. MEYERS - Same objection, Your Honor.

10 MR. PROFFITT - I think I'm allowed to explore his
11 knowledge of what ---

12 THE COURT - I'm going to sustain the objection.

13 MR. PROFFITT - Very good. Thank you.

14 Q So, Dr. Bibeau, in your mind the only possible -- you
15 can't have just a change in color. Is that what you're
16 telling me?

17 A It's not change in color. Pallor describes -- pallor
18 means pale; it means white. It doesn't mean any change in
19 color.

20 Q But in terms of diagnosing a potential blood vessel
21 problem, a change in color, other than just pallor, can
22 also indicate a blood vessel problem. That's true, isn't
23 it?

24 A It's true that red color can mean hyperemia,
25 vasodilation. It's true that cyanosis, bluish

1 discoloration is usually more of a venis problem, like a
2 clot in the veins.

3 Q So it's true that a change in color can indicate a
4 blood vessel problem. Correct?

5 A Not an arterial problem. When you're talking about
6 pallor, you're talking about pale, light, from decreased
7 blood-flow.

8 Q All right. Now, Dr. Bibeau, you never considered a
9 blood vessel problem as a possible diagnosis. Right?
10 You've testified to that.

11 A I did a history and exam, and after he had good
12 circulation to the foot I then removed it from the
13 differential.

14 Q You never considered a blood vessel problem as a
15 possible diagnosis. You never even thought about that.
16 That didn't enter your mind, did it?

17 A Not after the exam.

18 Q Okay. The only things you considered were chemical
19 exposure to the skin. You thought about that, didn't you?

20 A Yes, sir.

21 Q And you thought about trauma, some kind of acute
22 trauma, that he bumped the leg or something like that.

23 A Yes, sir.

24 Q And you thought about spider bite.

25 A Yes, sir.

1 Q But you never thought about a blood vessel problem;
2 there on April 10th, 2011, that never crossed your mind.

3 A Not after the exam showed that he had good blood flow
4 to the foot.

5 Q Answer yes or no. You never thought about a blood
6 vessel problem on April 10th, 2011.

7 A I answered the question.

8 Q Answer yes or no. You never thought about a blood ---

9 MR. MEYERS - Objection.

10 Q --- vessel problem on April 10th, 2011 ---

11 MR. MEYERS - Objection, Your Honor.

12 Q --- as a possible diagnosis.

13 THE COURT - I've got an objection. Just one
14 second. Yes, sir.

15 MR. MEYERS - Your Honor, he is allowed to respond
16 either way, so if counsel's trying to tie him down yes or
17 no, I accept that, but he is allowed to give a response.

18 THE COURT - I'll instruct the witness that if the
19 question calls for a yes or no answer, that may be
20 appropriate, however, you have the right to explain your
21 answers fully. If you have any difficulty in doing that,
22 let me know; I'll be sure you have an opportunity to fully
23 explain any answer you give.

24 DR. BIBEAU - Okay. Yes, sir.

25 THE COURT - You may proceed.

1 A Then the answer would be no, not after my exam
2 documented no impaired blood flow to the foot.

3 Q Very good. And, Dr. Bibeau, you never checked --
4 we've gone over the foot pulses, which we've talked about
5 those -- you never checked them. You say you checked them,
6 but it's not in the record. Correct?

7 A It's not in the record.

8 Q And you never checked the popliteal pulse.

9 A No.

10 Q And you never checked any pulses on the right leg.
11 I'm sorry, on the left leg, the other leg.

12 A That's correct.

13 Q You never checked the popliteal, the femoral or the
14 foot pulses on the left leg.

15 A Right.

16 Q You did no comparison of the pulses on the leg. You
17 only say, even though it's not in the record, that you
18 checked the foot pulses on the right foot.

19 A Correct.

20 Q All right. Now, Dr. Bibeau, is there anything in the
21 record -- and we've been over and over and over this all
22 week long with so many witnesses, but is there anything in
23 this ER record other than your statements that says Phil
24 ever reported a spider bite to you?

25 A Nothing else in the record.

1 Q Is there any indication in the nurses' triage record
2 that any nurse or nursing staff ever saw a spider bite mark
3 or mentioned a spider bite in any form or fashion in this
4 ER record?

5 A No.

6 Q So you're the only person, it's only your handwriting
7 that says probable spider bite. Is that not true?

8 A That's correct.

9 Q So this is you where it says clinical impression.
10 Right?

11 A That's correct.

12 Q And where it says probable spider bite. You wrote
13 that.

14 A Right.

15 Q That's nowhere else in the record.

16 A Right.

17 Q Now, Dr. Bibeau, is it not true that the normal
18 indications of a spider bite would be some burning pain at
19 the site where the mark was, where the fang marks were?
20 You would expect to see that?

21 A Yes, you're -- well, you may not always see that.
22 With a brown recluse spider bite you see a good bit of
23 inflammation. With a black widow spider bite a person can
24 have violent cramping, can get pancreatitis, get very ill
25 from it. I've seen a lot of people who felt they were

1 bitten by spiders, were outdoors where they probably are
2 exposed to spiders but did not have a visible bite.

3 Q All right. But there was no spider bite mark you ever
4 found on Phil's leg or foot or anywhere else on his body on
5 April 10th, 2011.

6 A No.

7 Q None whatsoever.

8 A No.

9 Q There was no itching. Itching is another symptom of a
10 spider bite, isn't it?

11 A That's correct.

12 Q And where was no report of itching by Phil on that
13 day.

14 A No. What there was was livedo reticularis, which is a
15 non-specific finding associated with inflammation.

16 Q Right. And it's also a discoloration to that right
17 foot. Correct?

18 A Not an indicator of primary vascular disease.

19 Q That -- I understand your testimony about that, but
20 that's -- discoloration to the right foot that has to do
21 with the arteries in the vascular system.

22 A It has to do with capillaries, small vessel disease.
23 It indicates inflammation. There's a very broad
24 differential and generally it doesn't indicate arterial
25 disease.

1 Q And Phil as a matter of fact though told you that his
2 leg had been purple earlier, that his leg was darker.

3 A I don't remember him saying that it was darker earlier
4 and had changed color. I don't remember any of that.

5 Q All right. And, doctor, as far as normal signs of a
6 spider bite, you might expect to see some wheezing or
7 something like that. Correct?

8 A If you had an anaphylactic reaction, ---

9 Q Some kind of allergic reaction.

10 A --- allergic reaction you could get wheezing; you
11 could get angioedemas, swelling in the throat, tongue. You
12 could also get hives, not just at the site but elsewhere.

13 Q And Phil had no wheezing, did he?

14 A No, sir, there was no sign of allergic reaction.

15 Q And he had no throat swelling or anything like that,
16 did he?

17 A No, sir.

18 Q No sign of that.

19 A (No response)

20 Q All right. He had no muscle contractions or stomach
21 cramps or anything like that that might indicate a spider
22 bite, nothing like that.

23 A No, no indication of black widow bite.

1 Q Okay. So the only indication he had that you thought
2 indicated a spider bite was pain but not pain at a site --
3 at a site of a bite mark.

4 A Yes, sir.

5 Q All right. Now, and you never -- you never directed
6 your nursing staff there at the hospital to do any kind of
7 a spider bite protocol, institute any kind of spider bite
8 treatment.

9 A They don't really share the nursing protocols with us,
10 and I don't know what protocols they have.

11 Q You never went to the nurses and said, this fellow
12 needs to be treated for a spider bite, do what you need to
13 do. You never did that, did you?

14 A No, sir.

15 Q In fact, what you did was you discharged him. You
16 said, slam, bam, thank you, ma'am, you're out of here,
17 you're good to go. That's what you did, didn't you?

18 A No, sir, I treated him what I thought was
19 appropriately for a non-venomous spider bite.

20 Q All right. But you never told the nurses do any kind
21 of spider bite treatment or protocol. You never told them
22 that.

23 A No.

1 Q Now, -- and you never ordered any kind of vascular
2 tests or any vascular consult or any kind of ultrasound or
3 CT angiogram, none of that.

4 A No, not with good blood flow to the foot.

5 Q Never ordered it. All right. Now, Dr. Bibeau -- and
6 it's -- it's undisputed - right? -- that at the time he
7 left the ER on April 10th, 2011 at about 5:20 or so, that
8 Phil was medically stable, wasn't he?

9 A That's true.

10 Q In fact, you documented that here on your physical
11 exam record, didn't you?

12 A Correct.

13 Q Says stable.

14 A Yes.

15 Q So he's not in any immediate threat at that point.
16 Right?

17 A That's correct.

18 Q Okay. And you were aware, were you not, Dr. Bibeau,
19 by the time of your deposition in August, 2013 that Phil
20 testified he actually did call back to the ER and talk with
21 a person he believed to be Dr. Canty at about 3:00 in the
22 morning?

23 A I heard that he said that.

24 Q Yes. You knew that in August ---

25 A Yes.

1 Q --- 2013.

2 A I knew that, but it's difficult for me to believe
3 that, because I know Dr. Canty and I know that he would
4 document that phone call in the medical. (sic)

5 Q But you don't control what Dr. Canty does or does not
6 do.

7 A I don't control what he does, but I -- it's impossible
8 for me to believe that that happened.

9 Q All right. Now, Dr. Bibeau, I'll show you what's been
10 marked as Plaintiff's Exhibit 32. And is this a calendar
11 of your work schedule at the hospital?

12 A Yes, it is.

13 Q All right. And is it the calendar for April, 2011?

14 A It is.

15 Q All right. And does it show you working on April 10th,
16 as you've discussed and as we know?

17 A Yes.

18 Q Right?

19 A (Indicating yes) Right.

20 Q And does it also show you working for 24 hours on
21 April 19th?

22 A It does.

23 Q And does it show you working for 24 hours on April
24 22nd?

25 A Yes.

1 Q All right. Now, Dr. Bibeau, is it not true that Phil
2 came back to you at some point after he'd seen you, while
3 you're sitting there at the nurses' station, and had that
4 curbside consult with you, show his black toe to you, the
5 tip of the black toe, pulled up his pant leg and showed the
6 leg to you again?

7 A No, he didn't. I wish he had, because when -- you
8 know, it's like we explained before, if pain continues,
9 then it's not a spider bite. I mean if it's more than
10 three days out, you're thinking of more things. Just the
11 fact that it persists beyond three days makes you think of
12 more things. I wish he had followed up with me or someone
13 else.

14 Q And if Phil -- if it's true that Phil came back to you
15 and had that informal consultation and sat there at the
16 nurses' station and pulled up his pant leg and showed you
17 the tip of the black toe, that's a violation of the
18 standard of care for you not to do something at that point,
19 is it not?

20 A No, it is not a violation. If he had done that, I
21 would've told him, sign in and see me or see someone else.

22 Q You would've told him to do something.

23 A Exactly.

24 Q And if you -- if that occurred as Phil testified and
25 you failed to tell him to see someone and you failed to

1 tell him to take further action, that would be a violation
2 of the standard of care. Correct?

3 A Yes, if it had occurred.

4 Q And -- because you were -- you had treated him for
5 that problem.

6 A Yes.

7 Q Now, Dr. Bibeau, as I understand one of your defenses
8 is that Phil should've followed up with somebody else; he
9 should've gone to a family doctor like you told him to do.
10 That's what you say.

11 A Yes.

12 Q All right. And if he'd gone to see that family doctor
13 -- let's say he went to a family doctor on April 13th or 14th
14 or a few days after that, if he'd gone to see a family
15 physician and had those same symptoms, even though somewhat
16 diminished, it's your belief that that doctor should've
17 recognized it was a blood vessel problem.

18 A That doctor would be thinking of other things. At
19 that point if he had seen me, I would've ordered basic lab
20 work, and because there is pain in that extremity that we
21 don't know where it's coming from, I would -- I would've
22 ordered an imaging study, so I have to think that another
23 family practitioner would've done the same.

24 Q You would've expected that doctor to do that.

25 A Exactly.

1 Q And he would've been going to that doctor with the
2 same symptoms he had on April 10th, 2011. He'd have the
3 pain. Right?

4 A Exactly, but the differential diagnosis -- your
5 diagnostic possibilities change when you go from acute pain
6 to persistent chronic pain. They're different diagnoses
7 you ---

8 Q But he would've been going to that same doctor -- to
9 another doctor with the pain and the coolness in the foot
10 and the pallor or the change in color and the numbness and
11 the tingling, and that doctor you believe should've
12 diagnosed him. If he'd done that, you believe that doctor
13 would've diagnosed him with a blood vessel problem.

14 A Yes, sir.

15 Q And you had the same symptoms on April 10th, 2011 and
16 you failed to diagnose him with a blood vessel problem.

17 A The differential diagnosis is very different when a
18 person has an acute presentation when he is seeing you four
19 hours after his first symptoms. If it's vascular it's
20 going to declare itself. There was good circulation to the
21 foot, but if this is a blood vessel problem, it's not just
22 going to disappear. When it persists you start thinking,
23 could it be that, could it be rheumatologic, could there be
24 some mass there somewhere we're not seeing, and that's when
25 you start imaging and doing further testing.

1 Q I understand that, but at the same time, he -- if he's
2 at the doctor three or four days later or shortly
3 thereafter it's the same basic presentation and you missed
4 it, did you not? On April 10th, 2011, you missed that
5 diagnosis.

6 A On April 10th, 2011 in my opinion I don't see any
7 evidence that there was symptoms, no clear-cut evidence
8 that were symptoms from that aneurysm.

9 Q All right. Isn't it a fact, Dr. Bibeau, that you
10 missed the diagnosis on April 10th, 2011 and that's what
11 created this cascade of horrible events that Phil has (sic)
12 now suffering from, all the pain and the problems and the
13 compartment syndrome and the surgery, all that flowed from
14 your failure to diagnosis on April 10th, 2011, did it not?

15 A No, it's not true.

16 MR. PROFFIT - All right. Thank you, Dr. Bibeau.
17 I don't have anything further.

18 THE COURT - Re-direct, Mr. Meyers.

19 MR. MEYERS = Thank you, Your Honor.

20 RE-DIRECT EXAMINATION

21 BY MR. MEYERS -

22 Q Dr. Bibeau, just a couple follow-up. Do you recognize
23 this as being Mr. Ethier's journal?

24 A Yes. Yes.

1 Q Now, on cross examination -- if I could get you to
2 read it -- now, on cross examination you looked at
3 Plaintiff's Exhibit 32. Do you remember that?

4 A Yes.

5 Q Now, is this an accurate depiction of the days that
6 you were working and not working at the Fairfield Memorial?

7 A You know, in general it's going to be true; there are
8 occasions when there are last minute changes, but ---

9 Q Now, ---

10 A --- I probably worked those shifts.

11 Q Now, take a look for me the week of April 24th here
12 where my index finger is.

13 A Yes. Right.

14 Q Is it showing you working on April 25th?

15 A No. April 25th -- I worked one week on, one week off
16 at Toumey. April 25th I started my week of working at
17 Toumey.

18 Q Okay, so it is fair to say that you didn't work at all
19 at Fairfield Memorial Hospital the week of April 24th?

20 A Right. The week starting the 25th, starting on Monday.

21 Q So, do you recall Mr. Ethier's testimony that he
22 talked to you and Dr. Canty on April 25th, 2011? Do you
23 recall that?

24 A That was in his notebook.

1 Q So according to -- is it true or is it not true that
2 you would have talked to Mr. Ethier the week of April 25th,
3 2011?

4 A It would've been impossible, because I was in Sumter
5 at the time.

6 Q Okay. Now, going back you testified -- or on cross
7 examination you were asked whether or not you spent enough
8 time. On April 10th, 2011 ---

9 A Yes.

10 Q -- did you properly evaluate Mr. Ethier?

11 A Yes, I felt I did. The evaluation starts when you see
12 the patient come through the door. You -- you know, you
13 observe how they look, do they look to be in any kind of
14 distress, do they appear to be comfortable walking? You
15 review the triage note and see what the nurse found, see
16 what the vitals signs are, are there any red flags going up
17 there, and you do that before you examine the patient.

18 Q Is it your testimony that you spent sufficient time to
19 diagnose Mr. Ethier?

20 A It is.

21 Q Now, did Mr. Ethier -- do you have any evidence that
22 when his pain occurred that he was anywhere else other than
23 Fairfield County?

24 A I'm sorry ---

1 Q Based on your information that you had at the time of
2 when Mr. Ethier complained of his problems --

3 A Right.

4 Q --- do you have any evidence that he was anywhere
5 other than Fairfield County when the onset of his problem
6 occurred -- or I'm sorry -- in South Carolina when the
7 problem occurred?

8 A Yes, that's true, yes.

9 Q Okay. Didn't say that he was back in Massachusetts
10 when the onset occurred.

11 A True.

12 Q How common are spiders in Fairfield County?

13 A Very common.

14 Q How common are spiders in just overall in South
15 Carolina?

16 A Very common.

17 Q So when he came in and you diagnosed him with a spider
18 bite, was that common or uncommon for you to do that?

19 A I've seen a lot of them.

20 Q Now, you stated that he came to you with a foot pulse
21 issue. You remember that testimony?

22 A Um, I'm not sure ---

23 Q Or with a foot problem, came in because you diagnosed
24 him with a foot problem.

25 A Yes. Right.

1 Q Now, what is your routine when an individual comes in
2 complaining of foot pain?

3 A There is pretty much history and exam, ---

4 Q All right, ---

5 A --- I checked him -- vascular status, checking the
6 blood flow.

7 Q Is checking the pulse part of that routine?

8 A Generally, yes.

9 Q Is palpating the foot part of that routine?

10 A Right.

11 Q Did you examine Mr. Ethier for problems with his foot?

12 A Yes.

13 Q Did you deviate at all from your diagnostic routine
14 when you evaluate any foot pulse problem?

15 A No.

16 Q Now, -- and also when you check for a foot problem,
17 you also -- but when you say the pulse -- I want to make
18 sure the jury understands -- where exactly is the pulse in
19 the foot that you're looking for?

20 A If you're looking at the dorsum -- the dorsum of the
21 foot is the top of the foot, so if you're palpating right
22 here, that's the dorsalis pedis. When you get to the lower
23 leg, if you look at the angle, the mid-line side of the
24 ankle and you feel just below that boney prominence, that's
25 the posterior tibial pulse.

1 MR. MEYERS - And I'm looking now for Plaintiff's
2 Exhibit 23, I think.

3 MR. SMITH - 22.

4 MR. MEYERS - 22?

5 MR. PROFFITT - Here's 22.

6 Q I'm sorry, Dr. Bibeau. It was sticking to a sheet.
7 Now, I want to point to you the box. Does that say
8 clinical impression?

9 A Yes.

10 Q Now, underneath that, your final diagnosis was
11 probable spider bite.

12 A Probable spider bite and hypertension.

13 Q Now, before you got there, you had to actually go
14 through several other checks, did you not?

15 A Right.

16 Q So did -- did you look at the pedal again?

17 A Right.

18 Q Was there any problem there?

19 A No, no swelling.

20 Q How about the bursitis or arthritis? Was there any
21 problem there?

22 A No, I didn't see any evidence of that.

23 Q Did you observe any tendonitis?

24 A No.

25 Q Did you note any vascular occlusion?

1 A No.

2 Q Did you notice any deep venis -- deep thrombosis? I'm
3 sorry.

4 A No.

5 Q Any lumbar radiculopathy?

6 A No.

7 Q How about any sort of strain?

8 A No, no history of any of those things.

9 Q So it's your testimony that you went through all of
10 these clinical impressions before you diagnosed him with a
11 probable spider bite.

12 A Yes.

13 Q So it's your testimony that you spent sufficient time
14 before you reached that conclusion?

15 A Yes.

16 MR. MEYERS - One moment, Your Honor..

17 THE COURT - Yes, sir.

18 Q Doctor, finally, in your clinical impression did you
19 note that Mr. Ethier was stable?

20 A Yes.

21 Q What does stable mean?

22 A Stable means vital signs are stable. It's generally
23 airway breathing, circulation. Airway's fine, breathing's
24 fine, vitals are fine and he's able to walk out.

1 Q When you decided to release him from the ER, is it
2 your testimony that you had performed a proper standard of
3 care?

4 A Yes, it is.

5 MR. MEYERS - Thank you. No further questions.

6 THE COURT - Re-cross.

7 MR. PROFFITT - Just briefly, Your Honor.

8 THE COURT - Yes, sir.

9 RE-CROSS EXAMINATION

10 BY MR. PROFFITT -

11 Q Dr. Bibeau, the only three things you thought about on
12 that day were chemical exposure to the skin. Correct?

13 A Yes.

14 Q Trauma, some kind of acute trauma to the lower leg.
15 Correct?

16 A Yes.

17 Q And spider bite.

18 A Yes.

19 Q That's it.

20 A After documenting normal vascular exam.

21 MR. PROFFITT - Thank you. Nothing further.

22 THE COURT - You may step down. Thank you very
23 much. Ladies and gentlemen of the jury, we're going to
24 take a short break, about a ten minute break or so. As
25 always, you know when you leave the courtroom I ask you not

DR. ERIC WEINSTEIN -- DIRECT -- BY MR. HOLLER

1 to discuss anything about the case until I ask you begin
2 deliberations. You may retire to the jury room. Thank you
3 very much.

4 (WHEREUPON, JURY EXITS THE COURTROOM)

5 THE COURT - Court will be in recess briefly.
6 Thank you.

7 (WHEREUPON, RECESS TAKEN)

8 THE COURT - Defense ready to proceed?

9 MR. HOLLER - Yes, sir.

10 THE COURT - Plaintiff ready?

11 MR. PROFFITT - Yes, sir.

12 THE COURT - All right, let's bring in the jury.

13 (WHEREUPON, JURY RETURNS TO THE COURTROOM)

14 THE COURT - All right, the record will reflect
15 the jury has returned to the courtroom. At this time the
16 defense may call its next witness.

17 MR. HOLLER - Your Honor, we call Dr. Eric
18 Weinstein.

19 THE COURT - Come forward, sir, to my left and be
20 sworn, please.

21 DR. ERIC WEINSTEIN, AFTER BEING FIRST DULY SWORN,
22 TESTIFIES AS FOLLOWS -

23 THE COURT - Sir, once you're seated please state
24 your name.

25 CLERK - Speak into the mic.

1 DR. WEINSTEIN - My name is Eric Weinstein.

2 THE COURT - Thank you. Mr. Holler, your witness.

3 DIRECT EXAMINATION

4 BY MR. HOLLER -

5 Q Dr. Weinstein, I went to school right down the road at
6 Blythewood Elementary and Hanberry Bethel Middle School.
7 The accent I'm hearing from you doesn't sound like it's
8 from this area.

9 A No, it's really hard for me to get rid of it. Some
10 words like water I still say and chocolate -- I just can't
11 get in rid of that, though I've been in South Carolina for
12 a while.

13 Q Okay. Where are you from?

14 A Born in Brooklyn, grew up in New Jersey.

15 Q And you're here as an expert. Tell us how -- how you
16 came to be qualified as an expert?

17 A Well, after graduating high school in Parsipanny, New
18 Jersey I went to college in New Orleans at Tulane. I got a
19 degree in physics. I went back to New Jersey in Rutgers,
20 two years in Newark and two years in Camden, New Jersey for
21 medical school, did a year of general surgery internship in
22 New Rochelle, New York, and then I did an emergency
23 medicine residency in Harlem, Spanish Harlem, Air Force
24 sponsor residency, then after that I did two years active
25 duty at Malcolm Grove Medical Center in Andrews Air Force

1 where the Air Force One is based, and then I came to South
2 Carolina in '93.

3 Q And you -- since you've been in private practice, if
4 you will, you've spent your career where?

5 A In Florence for seven years, and then I was in
6 Walterboro at Colleton Medical Center for seven years and
7 then been in Florence since 2007.

8 Q What qualifications are available to you in terms of -
9 - amongst your peers?

10 A I'm a residency trained board certified emergency
11 physician.

12 Q What does that mean, to be board certified?

13 A Yes, sir. We -- you do a residency in emergency
14 medicine and then you sit for written boards, and then you
15 have to take the oral boards, and then every ten years you
16 have to be recertified to maintain it. And now we have to
17 take classes every year to continue medical education, have
18 to go to conferences and take tests and stuff.

19 Q And we've been through this process a little bit
20 before, but have you ever been qualified as an expert in
21 the state or federal courts of South Carolina before?

22 A Not federal courts but county courts.

23 Q And your specialty is?

24 A Emergency medicine.

25 Q And you do that full-time.

1 A Yes, sir.

2 Q Okay.

3 MR. HOLLER - Your Honor, we would offer Dr.
4 Weinstein as an expert in emergency medicine.

5 THE COURT - Any objection?

6 MR. PROFFITT - No objection.

7 THE COURT - Without objection he'll be qualified
8 as such and I've explained that to the jury so you may
9 proceed, Mr. Holler.

10 Q Dr. Weinstein, there's been a number of medical
11 records -- well, let me ask it a different way. What has
12 been made available to you in order for you to render your
13 opinion to this -- in this matter, in this case?

14 A The initial complaint, the responses to the complaint,
15 the medical records from Fairfield, Chester, Carolina
16 Medical Center in Charlotte and all the depositions of all
17 the people you've seen.

18 Q So lay people including medical testimony?

19 A Yes, sir.

20 Q Experts?

21 A Yes.

22 Q When I say lay people, people who aren't medical but
23 are family members and such?

24 A Yes, the family of Mr. Ethier.

1 Q Okay. And I don't want you to give me the opinion,
2 but do you have an opinion as to whether or not Guy Bibeau
3 on April the 10th, 2011 acted within the standard of care
4 for emergency room physicians?

5 A I do.

6 Q Okay. If you would, tell us how you arrived at that
7 opinion based upon the information that was available to
8 Dr. Bibeau.

9 A The duty of the emergency physician is to take a
10 history, and that includes any information that you can
11 gather. It can include the -- what the nurses tell you on
12 the way to the room, if you have a computer access to
13 records, all records, what EMS will tell you, what the
14 nurses will tell you. I work in Florence, but I don't live
15 in Florence, so it's small like Winnsboro, and everybody
16 knows everybody, so like I know this person from church, I
17 know the family, went to school with them, they bring their
18 kids in, and that's -- all that information comes in. I
19 don't have to substantiate it; I don't have to verify it,
20 but it's all part of my thought process in the history.
21 Then you go in the room and you ask questions pertinent to
22 the chief complaint. Now, what we do in the emergency
23 department is a little bit different than your doctor's
24 office. We do a problem focused exam, problem focused
25 history, so you get that information, and then you look

1 for past medical history, past surgical history, allergies,
2 medications, and then within the social history, like do
3 they smoke, do they drink. Then you do your physical exam,
4 start with the vital signs. And the physical exam to me
5 starts as soon as I come in contact with the patient, could
6 be when I see them walk in through the emergency
7 department, it could be when I first enter the room. If
8 I'm in the room first, let's say EMS comes in, then it
9 begins with I first encounter the patient my physical exam
10 starts. And I can learn a lot just by -- just in
11 conversation with somebody, shrug their shoulders, they
12 move their head, they move their eyes, my cranial nerve
13 exam is started. I watch their respiratory pattern; I
14 watch the way they move their arms and their hands. That's
15 how it all starts. A lot of times it's as simple as I can
16 watch somebody adjust the sheets on the bed with one hand
17 but not the other, so then you know that they have some
18 problem with that arm, and then my physical then goes to
19 that side. And then you -- you use ancillary aids like any
20 lab tests, urine tests, x-rays, ultrasound, CAT scans, MRIs
21 and then there's also the medical decision-making part
22 where I institute therapy and they either get better or it
23 get worse. If they get better it's both diagnostic and
24 therapeutic. There's a reason why I gave the medicine;
25 there's a reason why I gave the IV fluid. Like if

1 Q When we started about your opinion, Dr. Weinstein, you
2 talked about did you have an opinion as to whether -- I
3 didn't ask you what it was -- but whether you had opinion
4 as to whether Dr. Bibeau's emergency care on April 10th,
5 2011 was within the standard of care, and you told me you
6 had an opinion. Can you please tell this jury what your
7 opinion is and why?

8 A I think Dr. Bibeau followed the standard of care. He
9 took an adequate history; he took a -- he performed an
10 adequate physician exam; the documentation was adequate; he
11 arrived at a reasonable diagnosis within four hours of
12 presentation, and he realized that this could be very
13 different as times goes on, and he -- he encouraged -- he
14 encouraged Mr. Ethier to follow-up; Mr. Ethier signed
15 discharge instructions that he understood it; Mr. Ethier
16 gave these instructions in his previous positions in
17 doctor's offices and urgent cares. He gave that -- he gave
18 those instructions when he was in orientation. They
19 explain to you what the discharge process is in
20 orientation. I've been == I've watched == I've watched it;
21 I've been there for the orientation process. So he
22 understood that, and if -- if he had come back within those
23 -- if he came back within the first 43 days, maybe
24 something different would've happen, and it did, and I'm
25 sorry -- sorry that he didn't come back. Dr. Bibeau, Dr.

1 Canty -- I work with Dr. Suess; he sends me patients from
2 Williamsburg, and I think there was a Dr. Keith also that
3 were in the depositions that he talked to, and we're all
4 kind of -- we're all kind of -- I don't know if the word's
5 geeky or nerdy -- but if somebody comes to me and says I
6 got a blue toe or I got a black toe, I'm stopping what I'm
7 doing and I want to see that. And everybody that works in
8 the emergency department is going to want to see it also,
9 because it's unique, it's different. If that happened,
10 something would've been done.

11 Q That's significant.

12 A That's significant.

13 Q Take me if you will -- I believe this is part of 22 --
14 it's in the records, of course. This is the emergency
15 department discharge sheet. You see that?

16 A Yes, sir.

17 Q Okay. And this would be something that is filled out
18 by Dr. Bibeau?

19 A Yes, his handwriting is just a little bit better than
20 mine.

21 Q Okay.

22 A For the record.

23 Q And again, straightforward, what is his diagnosis?

24 A He says probable spider -- probable spider bite. It's
25 not -- it's not an absolutely that's what it is, because

1 Q When you write down things in the medical encounter,
2 when a doctor documents certain things, what's the most
3 critical things that doctors should write in the chart?

4 A Real pertinent positives, pertinent negatives. I
5 think that that's the most important thing, what -- what
6 would you want to know if the patient came back, what do I
7 want to know when the patient comes back.

8 Q What is your assessment of Dr. Bibeau's documentation
9 in the chart?

10 A It tells me everything I need to know as a doctor. It
11 may not tell everything that attorneys need to know, but it
12 tells me everything I need to know, what was going on then.
13 So I think it's adequate. Now, could he have like checked
14 off every box and done all that? Yeah, but it's still --
15 in the end it wouldn't have made -- be any different to me.

16 Q Dr. Weinstein, I want your opinions to be based upon
17 what your understanding and training is in the medical
18 community for an emergency physician. When you see,
19 evaluate and treat a patient and they walk out the door,
20 how long, if at all, is that your patient after they leave
21 you?

22 A Maybe 48 hours, 72 hours, because I have my initial
23 impression and my role is it life or limb-threatening, and
24 if they go past three days and it wasn't life or limb-
25 threatening, then I did my job. Right? I made sure it

1 wasn't life or limb-threatening. Did I figure out exactly
2 what was wrong? No, but I made sure that there wasn't any
3 life or limb-threatening problem. The next part of that is
4 they've got to follow-up, and if they don't follow-up as I
5 asked, then it's on them, and I'm sorry that that didn't
6 happen here, but it's all on them. And if they assume that
7 it's curbside consult thing -- if they assume that that
8 curbside consult is their medical care, then I'm done, then
9 my responsibility's done. If you assume that that's your
10 care, then that's your care, and you kind of follow what I
11 wanted you to do even though it wasn't what I wanted you to
12 do, but in your mind you did, then I'm done. If that's the
13 care -- it's like going to the internet and you're googling
14 and you're making your own diagnosis, if that's what you're
15 going to do for your care, then that's on you, I'm sorry.

16 Q And I think that was my next question. Let me make
17 sure that we're -- that I'm hearing the information that I
18 wanted to make sure you said. If you treat a patient,
19 evaluate based on the conditions that are then present,
20 you've given diagnosis and treatment and that patient
21 leaves you and then has new on-set symptoms, in this case
22 increased pain with use of narcotics, and consults with
23 another physician, what does that do with your -- to your
24 relationship with that patient?

DR. ERIC WEINSTEIN -- CROSS -- BY MR. PROFFITT

1 If there was anyone who was unable to comply with my
2 instructions during your absence from the courthouse,
3 please stand.

4 (NO RESPONSE)

5 THE COURT - It appears that all jurors have been
6 able to comply with my instructions. When we broke the
7 direct examination of this witness had been completed, and
8 at this time, Mr. Proffitt, are you going to do the cross
9 examination?

10 MR. PROFFITT - Yes, sir.

11 THE COURT - You may proceed.

12 MR. PROFFITT - Thank you, Your Honor.

13 THE COURT - Yes, sir.

14 CROSS EXAMINATION

15 BY MR. PROFFITT -

16 Q Good afternoon, Dr. Weinstein.

17 A Good afternoon, Mr. Proffitt.

18 Q Dr. Weinstein, you have testified as an expert witness
19 in a == a number of times before, haven't you?

20 A Yes, sir.

21 Q But you've never testified on behalf of an injured
22 patient against a doctor, have you?

23 A No, sir.

24 Q Never.

25 A No, sir.

1 Q Never done that in your entire life.

2 A I've never testified, no.

3 Q You've reviewed one case for a plaintiff, didn't you,
4 for an injured patient?

5 A I've been offered -- two times I was offered by the
6 plaintiff and I recused myself because I either knew the
7 case or I knew the doctor, and that's happened before with
8 a defense as well. I get cases and I can't because I -- I
9 either know the case or I know the doctor.

10 Q Right. But you've never testified for a patient.

11 A No, sir.

12 Q All right. Now -- and you're charging to be here,
13 like all the expert witnesses with seen.

14 A Yes.

15 Q You're charging two hundred and fifty dollars an hour.

16 A Yes, sir.

17 Q Okay. Now, Dr. Bibeau (sic) it's true, is it not,
18 that an emergency room physician must identify the most
19 treatable and the most life-threatening == threat to life
20 or limb. Right? That's your job.

21 A I think there's two parts to that question. Certainly
22 the second part is true. The most treatable, you know,
23 that -- I'm not sure I understand that part.

24 Q Well, let's simplify it. You have to identify a
25 threat to life or limb in the ER if there is one.

1 Q Not necessarily. And there's no indication and Dr.
2 Bibeau himself said there's no -- he didn't take a
3 popliteal pulse, there's no popliteal pulse taken.

4 A He did not check the popliteal pulse.

5 Q And there's no indication anywhere, either from his
6 testimony or from the ER record that he ever checked
7 anything to do with the left leg, that he did not check the
8 pulses in the left leg at all.

9 A He did not check the pulse in the left leg. He
10 checked profusion in both legs, but he did not check pulses
11 ---

12 Q Did not check the pulses.

13 A --- in either leg.

14 Q All right. And you would agree with me, Dr.
15 Weinstein, that there's nothing in the record that says
16 anything about spider bite, other than Dr. Bibeau's
17 handwriting that that's his diagnosis.

18 A That's accumulation of the entire visit.

19 Q There's nothing in the written ER record that says
20 spider bite other than where Dr. Bibeau wrote it on his
21 clinical impression.

22 A Correct.

23 Q And, of course, it's undisputed that Dr. Bibeau did
24 not refer Phil for any kind of vascular consultation.
25 Correct?

1 A Correct.

2 Q He did not refer Phil for any kind of follow-up with -
3 - I mean -- I'm sorry -- any kind of an ultrasound or CT
4 angiogram, nothing like that.

5 A Correct.

6 Q Okay. Now, it's also your belief, Dr. Weinstein, that
7 Phil was medically stable when he walked out of the ER
8 there on April 10th, 2011.

9 A Yes.

10 Q He was not in any immediate threat of losing that limb
11 at that moment.

12 A Correct.

13 Q It could happen later but not then.

14 A Yes.

15 Q All right. And you do believe that the popliteal
16 aneurysm actually existed on April 10th, 2011.

17 A Yes.

18 Q And yet Dr. Bibeau never checked the popliteal pulse,
19 never felt the popliteal aneurysm. Correct?

20 A Correct.

21 MR. PROFFITT - Dr. Weinstein, I think that's all
22 I have. Thank you very much.

23 DR. WEINSTEIN - Thank you.

24 THE COURT - Re-direct?

25 RE-DIRECT EXAMINATION

DR. CHARLES SMITH -- DIRECT -- BY MR. HOLLER

1 MR. PROFFITT - Nothing further, Your Honor.

2 THE COURT - All right, you may step down, sir.

3 Thank you very much.

4 DR. WEINSTEIN - Thank you.

5 THE COURT - You can give that back to the
6 attorney.

7 DR. WEINSTEIN - Thank you.

8 THE COURT - Thank you. The defense may call its
9 next witness.

10 MR. HOLLER - Dr. Charles Dorn Smith.

11 THE COURT - Sir, if you'll come forward to my
12 left and be sworn, please. Thank you.

13 DR. CHARLES DORN SMITH, AFTER BEING FIRST DULY
14 SWORN, TESTIFIES AS FOLLOWS -

15 THE COURT - Once you're seated, sir, please state
16 your name.

17 DR. SMITH - Yes, sir. Charlie Dorn Smith, III.

18 THE COURT - Thank you. Mr. Holler, your witness.

19 DIRECT EXAMINATION

20 BY MR. HOLLER -

21 Q Dr. Smith, you're being offered as an expert, and I do
22 hear a twang in your voice that I'm accustomed to. Where
23 are you from?

24 A Turbeville, South Carolina.

1 Q What significance, if any, is there to the fact that a
2 actual puncture wound, fang mark or other foreign body was
3 not found on Mr. Ethier's foot?

4 A None. You know, it's ideal and nice if you find it,
5 but again if you go to the beach and you're walking down
6 the beach and you get bite -- those things we call them
7 noseeums -- the reason they call them noseeums is because
8 you don't see them, and it's not -- unfortunately, it's not
9 unusual -- they'd been outside particularly this time of
10 the year and have an insect bite or something and you come
11 in later and you realize you've got a whelp or something
12 that's itching or hurting or - and realize that you'd been
13 bit but you couldn't tell exactly - there was no fang mark,
14 if you will.

15 Q As a vascular surgeon who interacts with emergency
16 room physicians, based upon the history that was provided
17 on April the 10th, 2011, what would your expectations be for
18 an emergency room physician conducting a vascular exam?

19 A I think he conducted a vascular exam. I mean from the
20 standpoint that it's well-documented in the chart, you
21 know, what - that that the fact that there were palpable
22 pulses and normal capillary refill, and that being said,
23 that's as good of a screening vascular exam as you can do.
24 That's all you need to do quite frankly.

1 Q Based upon the history and presentation of Mr. Ethier
2 on April the 10th, 2011, what is your opinion as to whether
3 or not Guy Bibeau acted in the standard of care as an
4 emergency room physician?

5 A I think he did act within the standard of care of an
6 emergency room physician. He saw Mr. Ethier; he saw that
7 he had a problem; he made a diagnosis, and he asked -; he
8 treated it and he asked him to follow-up.

9 Q Okay. Let me stop there, and I want to ask you about
10 a few conditions as they relate to vascular problems, ---

11 A Yes, sir.

12 Q --- blood supply ---

13 A Yes, sir.

14 Q --- and I should not use the word vascular. Okay.

15 A Right.

16 Q What happens when a part of the body no longer gets
17 blood flow?

18 A Well, it doesn't do very well. Long story short, the
19 very first thing you see usually as a general rule is loss
20 of blood flow and it gets painful. And if it progresses
21 over a period of time it - I guess the way I always think
22 about it is like looking at a grape on a grapevine. You
23 may have this nice big plump, juicy, scuppernong grape, but
24 if you don't go eat or someone doesn't come by and pick it

1 MR. HOLLER - Judge, we're ready to go forward.

2 THE COURT - All right, very good. Bring the jury
3 in.

4 (WHEREUPON, JURY ENTERS THE COURTROOM)

5 THE COURT - You may proceed, Mr. Holler.

6 DIRECT EXAMINATION

7 BY MR. HOLLER (CONTD.) -

8 Q Dr. Smith, do you have an opinion as to whether or not
9 an embolic event happened in Mr. Ethier on April the 10th,
10 2011?

11 A Yes, sir, I do have an opinion.

12 Q And what is that opinion and why do you hold that
13 opinion?

14 A I do not think that Mr. Ethier had an embolic event on
15 that day in April. The reason I think that that is true is
16 simply because of the fact that he had no evidence of
17 arterial insufficiency and that evidence be he had palpable
18 pulses and he had normal capillary refill, that that being
19 the case if this event had occurred prior to him coming to
20 the hospital it wouldn't have dissolved on its own during
21 that four-hour period of time or six-hour window from the
22 time the acute event occurred til the time he got to the
23 hospital. That just doesn't happen.

1 Q Based upon the presentation on April the 10th, 2011, do
2 you have an opinion whether Dr. Bibeau performed an
3 adequate vascular examination?

4 A I do have an opinion. And again I think he did do an
5 adequate vascular evaluation by virtue of the fact that
6 when we talk about all the Ps of arterial occlusion,
7 probably if you rank them, the most important one is
8 pulseless and if you've got normal capillary refill with
9 normal dorsalis pedis and normal posterior pulses, you
10 don't have acute arterial occlusion.

11 Q As a expert in vascular surgeon and expert in
12 emergency medicine relating to vascular surgical issues, do
13 you have an opinion as to whether the diagnosis of probable
14 spider bite was appropriate on April the 10th, 2011?

15 A It was not an unreasonable diagnosis.

16 Q Was it within the standard of care?

17 A It was within the standard of care.

18 Q Do you have an opinion as to whether or not Mr. Ethier
19 had a portion of his == one or more of his toes that
20 mummified and fell off?

21 A There's been no evidence of that that I've seen. I've
22 read the depositions, and I've read where people have said
23 that, but when you look at the picture -- this the first
24 time I'd seen the picture sitting in Court here, but that's
25 normal. That -- I don't see any evidence that he's even

DR. CHARLES SMITH -- CROSS -- BY MR. PROFFITT

1 that there's blue or modeled or dark toe, and in addition
2 to this, if you look, the -- they talk about the pulses on
3 the right, they're -- they call them reduced at the
4 dorsalis pedis, the posterior tibial, which is markedly
5 different than the exam six weeks earlier at Fairfield.

6 Q This is a classical presentation of someone who has a
7 blood supply problem with their lower leg?

8 A Yes, sir.

9 Q Okay. Is there any indication at all there was a
10 blood supply issue to Mr. Ethier's lower leg on April the
11 10th, 2011?

12 A No, sir.

13 MR. HOLLER - Please answer any questions, Mr.
14 Proffitt may have.

15 DR. SMITH - Thank you.

16 THE COURT - Your witness, Mr. Proffitt.

17 MR. PROFFITT - Thank you, Your Honor.

18 THE COURT - Yes, sir.

19 CROSS EXAMINATION

20 BY MR. PROFFITT -

21 Q Good afternoon, Dr. Smith; how are you doing?

22 A I'm well, Mr. Proffitt; how you doing?

23 Q Good. Dr. Smith, you've testified as an expert in
24 several cases over the past several years.

25 A Yes, sir.

1 Q And it's my understanding 90 percent of your work has
2 always been for the doctor.

3 A That's correct.

4 Q Always testify for the doctor.

5 A That's because that's what I've been asked to do. I
6 have been asked by you to testify for you.

7 Q Okay. All right, and you charge five hundred dollars
8 an hour ---

9 A Yes, sir.

10 Q --- for your time? Okay. Dr. Smith, would you agree
11 with me that in the ER setting the ER physician has to
12 accurately examine and properly examine the patient in the
13 ER to determine what the conditions are that that patient
14 may have based on what is being presented to him?

15 A Yes, sir.

16 Q And if you fail to do that it's a violation of the
17 standard of care.

18 A Yes, sir.

19 Q And the ER physician has to go through an adequate
20 history. Right?

21 A Yes, sir.

22 Q And he has to go -- take enough time with the patient.

23 A Yes, sir.

1 Q And the ER physician must identify all the possible
2 diagnoses that are raised by a particular patient's
3 physician. Right?

4 A Yes, sir.

5 Q And if you fail to do any of those things, it's a
6 violation of the standard of care. Right?

7 A Yes, sir.

8 Q Now in this particular case on our famous P chart ---

9 A Yes, sir. (Witness laughing)

10 Q This thing on? Had the pain. Right?

11 A Yes, sir.

12 Q Had the polar?

13 A Well, it was cool, but it wasn't cold.

14 Q It was cool. Right?

15 A Yes, sir, but just because you -- don't y'all know the
16 old saying, cold hands, warm heart? That doesn't mean your
17 wife has an acute arterial occlusion of her hand, does it?

18 Q Had the cool on April 10th, 2011.

19 A Cool, but not cold.

20 Q It was a cooler right foot than the left. Right?

21 A Yes, sir.

22 Q On the pallor or the change in color, you had a change
23 in color.

24 A There was a change in color, but it wasn't pallor. It
25 was not -- it was not light.

1 Q But change in color can also indicate a vascular event
2 or a blood vessel problem.

3 A It can, but pallor itself means a lighter skin almost
4 anemic-looking, if you will.

5 Q But change in color also can indicate a blood vessel
6 problem.

7 A Depends on what the change in color is, but, yes.

8 Q And you understand that Samantha Anthony, the one that
9 wrote the note on the triage record, ---

10 A (Indicating yes)

11 Q --- at her deposition, which the jury's heard,
12 testified that really what she was trying to say in a more
13 accurate term was modeling.

14 MR. HOLLER - Objection, pitting. Objection. I
15 think he's pitting at this point, Judge.

16 THE COURT - No, he's said if he agreed that
17 that's what she said in the deposition. I'll overrule the
18 objections. I'm assuming -- lay a foundation if he
19 reviewed the deposition again.

20 Q Have you reviewed the deposition of Samantha Anthony?

21 A I think I have, but I'd have to look at it. There
22 have been so many. I don't remember her name; I'll be
23 honest with you.

24 Q Okay. Well, the CNA, the CNA who did the triage.

25 A Okay, all right, sir.

1 Q All right, and do you recall that at her deposition
2 she testified that actually what she meant was modeling was
3 the more appropriate term of what she was trying say Phil
4 Ethier's leg looked like on April 10th, 2011?

5 A Yes, sir.

6 MR. HOLLER - Judge, -- excuse me -- objection.

7 THE COURT - Just one second.

8 MR. HOLLER - At this point there's two
9 depositions, a discovery deposition, and then Mr. Proffitt
10 took the for-use-at-trial deposition. I think it would be
11 fair to have a query as to whether he's seen the for-use-
12 at-trial deposition. It was just taken a few days before
13 we started this trial.

14 MR. PROFFITT - Your Honor, she said this at both
15 depositions.

16 THE COURT - Did she say the same thing at both
17 depositions?

18 MR. HOLLER - Mr. Smith attended those, and he's
19 telling me no.

20 MR. PROFFITT - She said that at her first
21 deposition and her second deposition.

22 MR. HOLLER - And I would object to it as ---

23 MR. PROFFITT - But I can move on.

24 THE COURT - Let's move on.

1 Q All right, now, Dr. Smith, the paresthesia, the
2 numbness, that was present on ---

3 A Yes, sir.

4 Q --- on April 10th, 2011. And then the pulselessness,
5 the CNA found pulses normal.

6 A Oh, yes, sir.

7 Q And Dr. Bibeau did not document that he took the
8 pulses.

9 A But he also testified that he doesn't have to document
10 his normals.

11 Q And he -- but he -- you just testified earlier that
12 pulses in this case are most important.

13 A Absolutely.

14 Q Most important.

15 A I did.

16 Q And yet Dr. Bibeau did not document this most
17 important pulse.

18 A Yes, sir.

19 Q He didn't do that, did he?

20 A No, sir.

21 Q And there's a blank on the form him to do that.

22 A Yes, sir.

23 Q And so if it's not written on that form, it never
24 happened, did it?

25 A No, sir.

1 Q All right. Is it your understanding, and isn't it
2 true, Dr. Smith, that Dr. Bibeau testified the only
3 diagnoses he considered on April 10th, 2011 were chemical
4 exposure to the skin, acute trauma to the lower leg or
5 spider bite? That was it.

6 A He did, but he also stated that that was after he'd
7 done his evaluation and found a normal vascular exam, a
8 normal capillary refill, and even Mr. Ethier in his
9 deposition states that Dr. Bibeau examined him and checked
10 and touched his leg.

11 Q Mr. Ethier says he touched his leg; Mr. Ethier denies
12 that any pulses were taken by Dr. Bibeau, did he not?

13 A I don't remember that, but I -- I do remember he said
14 that he -- his leg was touched by Dr. Bibeau.

15 Q But that's all he said, he touched; he didn't say ---

16 A Okay.

17 Q --- he denied that the pulses were taken.

18 A I won't dispute that.

19 Q All right. Now, -- and is it not true, Dr. Smith,
20 that it's your opinion that Dr. Bibeau had to consider a
21 vascular event or a blood vessel problem as one of the
22 possible diagnoses on April 10th, 2011?

23 A I think he did.

1 Q I'm asking you did he have to consider that? Not
2 whether he did or not. He's already testified he did not
3 considerate it.

4 A I think again, when you walk in the room to look at
5 any patient, again, you start sizing them up from the time
6 you walk in the door, and so, yes, the short answer to that
7 is, when you walk in the door, again, if you're having
8 chest pain, are you having gas or are you having a heart
9 attack? So that -- so you do need to look through your
10 whole repertoire of what your diagnoses are.

11 Q You're not answering my question.

12 A I apologize.

13 Q Did Dr. Bibeau have to consider as one of the possible
14 diagnoses on April 10th, 2011 a blood vessel problem?

15 A Yes, sir.

16 Q And he -- he has testified that he did not do that.

17 A What I heard him testify early today was, he testified
18 that he did not think of a vascular event after he did his
19 exam and looked at what was charted and everything else.

20 Q Okay. All right. Now, at Chester on May 25th, 2011,
21 you were asked some questions about that. Right?

22 A Yes, sir.

23 Q And at Chester on that date they took the pulses in
24 the left leg. Correct?

25 A They did.

1 Q And they took a popliteal pulse.

2 A Yes, sir, they did.

3 Q And none of that was done on April 10th, 2011 by Dr.
4 Bibeau, was it?

5 A No, sir.

6 Q Now, about the spider bite. No dispute from you that
7 the only place in this entire ER record that the spider
8 bite is mentioned is by Dr. Bibeau under the clinical
9 impression.

10 A Yes, sir.

11 Q It's never mentioned anywhere else in the record?

12 A No, sir.

13 Q No mention at all of any spider bite mark or anything
14 like that?

15 A No, sir.

16 Q And you talked about -- we've heard about noseums,
17 and we've heard about ticks and we've heard about chiggers
18 and we've heard about mosquitos, but what Dr. Bibeau talked
19 about on April 10th, 2011 wasn't a noseums, was it?

20 A No, sir.

21 Q And it wasn't a chigger.

22 A No, sir.

23 Q And it wasn't a tick.

24 A No, sir.

25 Q It was a spider.

1 A He said possible or probable spider bite.

2 Q Probable spider bite.

3 A That's correct.

4 Q So all this ---

5 A It was not definitive.

6 Q All right. So all this stuff about noseemus and ticks
7 and chiggers, that's just meaningless, isn't it?

8 A I wouldn't say it's meaningless, but it's -- it's an
9 opinion.

10 Q Yes, sir. Now, Dr. Smith, it's undisputed that Dr.
11 Bibeau did not order any vascular consultation on April
12 10th, 2011. Right?

13 A Yes, sir, that's correct.

14 Q And he did not order any CT angiogram on April 10th,
15 2011?

16 A It wasn't indicated.

17 Q He didn't order any ultrasound on April 10th, 2011?

18 A Wasn't indicated.

19 Q I didn't ask you if it was indicated; I asked you if
20 he did.

21 A He did not, and it was not indicated.

22 Q All right. Now, it's also your opinion, is it not,
23 Dr. Smith, that Phil when he left on April 10th, 2011 was
24 medically stable.

25 A Yes, sir.

1 Q He was not going to walk out the door and drop dead 30
2 seconds later.

3 A No, sir.

4 Q But he needed to be seen.

5 A Yes, sir.

6 Q Okay. And he wasn't seen until May 25th, 2011 when the
7 second episode happened.

8 A That's right.

9 Q He wasn't seen officially.

10 A No, and that's kind of, you know, mind-boggling that a
11 medical professional wouldn't seek better medical help and
12 care for themselves if they're concerned about it.

13 Q All right, Dr. Smith, is it your opinion or is it not
14 your opinion that -- strike that --

15 A (Witness laughing) I'm sorry.

16 Q It's my understanding that it's your opinion, Dr.
17 Smith, that Phil would not have suffered all the horrible
18 complications that followed April 10th, 2011 if he had had
19 timely, non-emergency surgery to repair the popliteal
20 aneurysm behind the knee.

21 A The short answer to that is, is that the odds of him
22 having those complications and problems would've been
23 dramatically less. It's just like any time you operate on
24 anybody, anything can happen, and that's why -- I mean it's
25 like getting struck by lightning. I don't know anybody

1 that's personally been struck by lightening, but I read
2 about it in the emergency room.

3 Q I understand that. Dr. Smith, you believe that he had
4 the popliteal aneurysm on April 10th, 2011.

5 A Oh, yes, sir, I do.

6 Q It absolutely existed.

7 A Yes, sir.

8 Q And a popliteal aneurysm throws off clots.

9 A Yes, sir, that's one of the ways they present.

10 Q Right. And if that had been timely identified on
11 April 10th, 2011 and diagnosed or that they were referred to
12 a vascular consult or for further testing or -- further
13 tests and had had the non-emergency surgery, he would not
14 have had the compartment syndrome, would he?

15 A The odds of him having the compartment syndrome
16 would've been markedly less. There is no way to say for
17 certain that he would not have had, but his odds of having
18 it would've been dramatically less.

19 Q What -- and isn't it true that it's your opinion that
20 his odds of having the compartment syndrome and all the
21 other complications ---

22 A Sure.

23 Q --- is about ten percent.

24 A That's correct.

1 Q It's a 90 percent chance that he would not have had
2 the compartment syndrome.

3 A I think that's a fair statement.

4 Q 90 percent chance that he would ---

5 A That's right.

6 Q --- not have had the permanent nerve damage and
7 permanent muscle damage in his leg.

8 A I also think if they'd operated on him in Charlotte
9 that the odds of him having those complications would've
10 been a lot less also.

11 Q Okay. A 90 percent chance that he would not have the
12 foot drop.

13 A I think that's a fair statement.

14 Q And 90 percent chance that he would not have the
15 chronic permanent pain that requires him today to take pain
16 medications, a narcotic pain medication called Percocet
17 three times a day.

18 A If you say so.

19 Q No, I'm asking you.

20 A Yes, sir. Well, I mean ===

21 Q Ten per ---

22 A --- yeah. I mean if you extrapolate it down the line,
23 that's right, but there's no way to say that, because
24 everybody's pain's different. I mean I may cut off your

1 leg and you don't even need Tylenol. Other people they
2 stump their toe and they want a Morphine drip.

3 Q I'm not talking about the subjective nature of pain.
4 This jury has heard ---

5 A I understand that. Well, you are; you're asking me to
6 extrapolate down the line, and I can't do that.

7 Q Assume for me, Dr. Smith, that Phil Ethier has been in
8 constant pain since April 10th, 2011, since May 25th, 2011;
9 it's not ending today. And let's don't debate how bad the
10 pain is or anything.

11 A Sure.

12 Q It's your opinion that there's a 90 percent chance
13 that if he'd had the non-emergency surgery on a timely
14 basis and if he'd been properly diagnosed on April 10th,
15 2011, that he would not have that pain whatever level it
16 is.

17 A Well, it certain -- that's certainly a possibility of
18 that, yes, sir.

19 Q It's a 90 percent chance he would not have it.

20 A I don't know the answer to 90 percent. I think the
21 risk of him having the complication would've been probably,
22 you know, 10 percent of him having the complication from
23 that standpoint. Whether or not he would've had the pain
24 or the other things that go along with it, that's -- no one
25 knows that. Only God knows that.

1 (WHEREUPON, COURT'S EXHIBIT THIRTEEN AND FOURTEEN
2 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

3 THE COURT: All right, a couple of matters that I
4 need to put on the record concerning issues that were
5 raised yesterday afternoon. First of all, there was a
6 question or concern about the caps of Three Hundred and
7 Fifty Thousand Dollars imposed by Code Section 15-32-220 on
8 non-economic damages, and I have reviewed that statute and
9 also some cases involving some claims of loss of
10 consortium, and I do find that both the plaintiff Phillip
11 Ethier and his wife who have separate Three Hundred and
12 Fifty Thousand caps on non-economic damages as to each of
13 their claims under the statute that is based on the fact
14 that the cap is awarded to a person suffering personal
15 injury.

16 Personal injury is defined as bodily injuries and
17 also defined as loss of consortium claims under the statute
18 and there are numerous cases which indicate loss of
19 consortium claims are separate and distinct causes of
20 action so I'm going to allow that to be a separate cap on
21 that.

22 The other question that I took under advisement
23 had to do with the Code Section 15-32-320 that has to do
24 with the level of proof required in order for the defendant
25 to be held liable in this matter.

PLAINTIFF'S CLOSING ARGUMENT BY MR. PROFFITT

1 sure I had that right. You all talked about it yesterday
2 and I'm not sure now that came out.

3 MR. COX: Well what we talked about is letting
4 them if they're gonna flip their argument ---

5 THE COURT: They're gonna flip their argument.

6 MR. COX: --- we agreed to that as long as they
7 don't duplicate and two arguments.

8 THE COURT: All right. Bring the jury in.

9 (WHEREUPON, JURY REENTERS COURTROOM.)

10 THE COURT: All right, the record will reflect
11 the jury has entered the courtroom. Anybody had any
12 difficult in complying with my instructions over the
13 weekend please stand?

14 It appears that all have been able to comply with
15 my instructions thus far. At this time we will begin the
16 closing arguments by counsel. Plaintiff will be going
17 first.

18 Mr. Proffitt.

19 MR. PROFFITT: Thank you, your Honor.

20 THE COURT: Yes, sir.

21 CLOSING ARGUMENT BY MR. PROFFITT:

22 MR. PROFFITT: Good morning, ladies and
23 gentlemen. Ladies and gentlemen, Phil and Jeanne Ethier's
24 lives changed forever on April 10th, 2011. They got up
25 that day and they didn't know what was going to happen that

1 day. They went to church like always on that Sunday and
2 they came home and they were gonna have a cookout like
3 always on that Sunday. And they didn't know that their
4 lives were about to change forever and they didn't know
5 that on May 25th that it was going to change forever. But
6 after May 25th as those days turned into weeks and those
7 weeks turned into months, they knew that their lives would
8 never be the same again.

9 They came to realize that Phil would never walk
10 again; that he'd never walk normally again. They knew that
11 Phil would never be pain free again. Imagine having to go
12 to sleep every night knowing that you were gonna wake up in
13 pain praying constantly that the narcotic pain medication
14 would work and continue to work and that you won't become
15 addicted to it. But slowly and inevitably the giant wheel
16 of pain and disability and depression crushed Phil. He
17 struggled mightily. He put his shoulder to that will - to
18 that wheel and he tried it and he tried it and he tried it
19 just like Job did in the Bible.

20 He prayed and he worked and he worked and he
21 prayed for two and a half years, first at Fairfield
22 Memorial Hospital and then later at Gentiva Home Health.
23 But it was a cycle and a battle that he's destined to lose.
24 Eventually the weight of it all crushed him and nearly
25 killed him. The cycle of working in pain and then getting

1 off and having no relief or rest because the pain
2 medication wouldn't control the pain every night drove him
3 to the edge mentally.

4 Doctor Johnson noted that pain and depression but
5 just said you're trying to escape from reality. You just
6 want to escape from reality, that's all you're looking for.
7 The only reality that Phil was trying to escape from was
8 the fact that he was in such pain and the escape he was
9 trying to make is that he was almost about to commit
10 suicide. That's how far he went. He was about to kill
11 himself because he was so despondent.

12 But then he saw Doctor Harari there in 2013, late
13 2013 down in Columbia, a psychologist, and Doctor Harari
14 diagnosed him with major depression. Then he saw Doctor
15 Chen and with his wife's help he managed to see Doctor
16 Tammy Chen a psychiatrist that you heard from by video
17 testimony. And Doctor Chen gave him a glimmer of hope.
18 She looked at everything and she listened to him and
19 gathered records and paid attention and she reached out a
20 helping hand just like a doctor's supposed to do and she
21 gave him hope and she saved his life.

22 Phil saw saved but he was not healed. He was not
23 made whole and he cannot be made whole. As Jeanne told you
24 and as Phil told you their lives still revolved around his
25 pain and his disability as they had for years now. And

1 whether they have a good day or a bad day depends on Phil's
2 condition. Some days are okay, other days are not so okay.
3 Some days Phil can skip the medication briefly and take
4 himself to the store, drive around, and do some chores and
5 groceries. He can walk around the yard and feed the dog.
6 He can rock on the porch. A lot of days it's bad. It's
7 awful. The pain dominates him despite the fact that he's
8 on the pain medication. And the depression kicks in and
9 the old refrain about what might have been and what could
10 have been. And when Jeanne comes home sometimes their
11 tempers are short. They don't have a relationship like
12 they used to. Tempers flare up sometimes and nerves just
13 like the damaged nerves in Phil's leg become raw at times.
14 But they still love one another and they still struggle to
15 return to the way things were but they'll never be able to
16 do that. This is how they are and this is how they know
17 they're always going to be. And it didn't have to be that
18 way. It did not have to be that way. And it's that way
19 because of the negligence of Doctor Guy Bibeau on April
20 10th, 2011.

21 Like all of us do Phil and Jeanne but especially
22 Phil relied on Doctor Bibeau. He'd spent twenty-four
23 years, Phil had, spent twenty-four years as a LPN, a
24 licensed practical nurse, taking doctor's orders, following
25 doctor's orders, believing the doctor and trusting in the

1 doctor and that's exactly what he did this time. All
2 Doctor Bibeau had to do was do a proper exam and to make
3 sure that he considered all the possible diagnoses and he
4 did not do that.

5 But Doctor Bibeau did not have to heal Phil.
6 I want you to fully understand that. We are not saying
7 that Doctor Bibeau had to diagnose that popliteal aneurysm
8 on April 10th, 2011. All Doctor Bibeau had to do was
9 recognize that it was a blood vessel problem and get him on
10 to the proper specialist or refer him for the appropriate
11 test. He just had to recognize the basic issue and he
12 didn't do that. By his own admission and his own testimony
13 he never even considered the number one diagnosis of a
14 blood vessel problem. And because of that Phil and Jeanne
15 are sitting here in the courtroom today and Phil and Jeanne
16 are in the shape that they're in today and the shape that
17 they will be in for the rest of their lives.

18 Now, ladies and gentlemen, I want to talk with
19 you briefly about some points of law that you're going to
20 hear about. His Honor will instruct you on the law but I
21 want to briefly mention just a couple of things. The first
22 is our burden of proof in this case. This is a civil case;
23 it is not a criminal case. As you know in a civil case the
24 plaintiff has the burden of proving its case by a
25 preponderance of the evidence. And that's just a big

1 word that means slightly more than fifty percent.

2 So if you imagine these scales, the lady justice
3 that holds the scales, and sometimes she's got a blind fold
4 on, and when the case starts out those scales are equal.
5 They're just like - they're perfectly equal. If the
6 plaintiff's evidence and testimony tips the scales ever so
7 slightly, just barely in our favor, then we win, we
8 prevail. We don't have to prove our case by ninety percent
9 or ninety-five percent or eighty percent. It's fifty-one
10 percent. If you use a football analogy barely over the
11 fifty yard line, the plaintiff wins. That's what we have
12 to do to win in the case and to prevail and for you to
13 award damages that you believe flowed from Doctor Bibeau's
14 negligence.

15 Now the standard - The plaintiff also has the
16 burden of establishing the standard of care by expert
17 testimony. And you've heard about that for six days now.
18 The standard of care of a reasonably confident emergency
19 room physician. So number one, we gotta establish the
20 standard. Number two, we have to show that Doctor Bibeau
21 in his actions failed below that standard; that he was
22 careless or negligent and did not meet the required
23 standard of a reasonably competent ER physician in this
24 setting and on these facts. The third thing we have to do
25 is prove that the damages that Phil has flowed from Doctor

1 Bibeau's negligence; that his negligence approximately
2 caused Phil's damages and his injuries and Jeanne's damages
3 and her injuries.

4 Now let's talk for a moment. Let's start with
5 the standard of care. You've heard this all week about how
6 the standard of care and all the doctor's agree about this.
7 All the plaintiff's experts Doctor Adams and Doctor Jolin.
8 And the defense experts Doctor Smith and Doctor Weinstein.
9 They all agree about the standard of care that should have
10 been met in this case. And that is that Doctor Bibeau had
11 to identify a life or limb threatening serious injury. He
12 had to identify an injury that was a threat to life or
13 limb. And in treating that life or limb threatening injury
14 he had to do a proper exam, a proper vascular exam. And he
15 had to consider the possible diagnoses that were raised by
16 that - by Phil's condition. And if necessary he had to
17 refer Phil to the - to a further specialist. He had to
18 refer him to a vascular guy or do the proper diagnostic
19 test. That's the standard of care that had to be met in
20 this case that must be made. All the doctor's agree on
21 that so that part's easy. We know that the standard is.

22 Now, Doctor Bibeau breached that standard in the
23 ways that we've talked about here for the last six days and
24 all the witnesses have discussed. And as you've seen many
25 many times - here's our famous "P" chart. These are the

1 symptoms and signs of a vascular event of a blood vessel
2 problem. And I'm not gonna put those exhibits on the
3 presenter again where it shows the ER record with the pain
4 and the numbness and the discoloration and all the symptoms
5 that Phil was reporting. You've seen that numerous times
6 and you'll have the ER record, the unadorned ER record back
7 in the jury room with you and you can look at it for
8 yourself. You can pass it around among yourselves back
9 there. And you will see all the notations that you've seen
10 on the screen for several days now.

11 Pain undisputed. All the doctor's agree that
12 Phil had pain. Phil reported that he had severe pain.
13 Phil reported that it was the worst pain that he ever had
14 in his life and he came to the ER and told them that.
15 That's not what ended up on the ER record by that point
16 when he had some medication that kicked in but he reported
17 that. He testified that he reported that to the ER, severe
18 pain in his right lower leg and foot.

19 Polar: That's the coolness or the coldness.
20 And you'll see in the ER records and the witnesses' have
21 all talked about that the right foot was cooler than the
22 left foot. It's another sign of a blood vessel problem.
23 All the doctor's agree about that. All the doctor's, all
24 the defense experts and plaintiff's experts. Pallor or
25 change in color: That's the one where it's either turning

1 a little bit white or it's a change in color. And you will
2 recall that I ask all the witnesses, you know, pallor also
3 means a change in color, it doesn't just mean white. It
4 means a discoloration, something different about the leg.
5 Its purplish like Doctor Bibeau said it was. Or it's
6 discolored somehow. That's an indication of a blood vessel
7 problem going on.

8 Our experts testified to that that there was a
9 change in color. So did Doctor Chen their vascular expert
10 on the defense side he testified to the same. Doctor
11 Weinstein, that's one that he didn't want to admit. He
12 admitted it in his deposition cause you remember we read
13 into some of the - some of his deposition when I cross-
14 examined him he said it was met back then but when it came
15 to trial he was trying to say oh no only two of them are
16 met. But in his deposition he said four of these Ps were
17 met. Regardless there was a change in color. You will see
18 it in the records and you heard it from the witness stand
19 and you heard it from Phil.

20 Paresthesia: That's the numbness. You will see
21 in there where it says cold, numb, ecchymotic. Ecchymotic
22 or modeling being the discoloration. Numbness: There is
23 no dispute that there was numbness of the symptom. Now,
24 all the doctors agree to that. Now the pulselessness you
25 heard I believe every doctor testified that you can have a

1 blood vessel problem and still have a normal foot pulse.
2 And why is that? As Doctor Adams explained to you it's
3 because you got - and God gave us - three arteries in your
4 leg. You got three arteries in your leg and if one of 'em
5 gets blocked up the other two are still working.

6 Doctor Adams you will recall testified that he
7 thinks the clot that Phil was experiencing on that day was
8 most likely an anterior tibial artery. But the posterior
9 tibial artery with a posterior tibial pulse on the side of
10 the foot, posterior tibial artery, posterior tibial pulse;
11 that artery was still working that day. So that's why
12 allegedly there was a normal foot pulse in the ER that day
13 on April 10th, 2011. But it did not mean that there was no
14 blood vessel problem. And it did not definitively rule out
15 the possibility of a blood vessel problem.

16 Furthermore the information we have on the foot
17 pulses taken that day was done by Samantha Anthony. You
18 saw her testimony by video and she's the certified nurse
19 assistant who was in nursing school who testified, and
20 admitted honestly, that she was inexperienced at taking
21 foot pulses and never remembered taking a foot pulse at
22 Fairfield Hospital before. She's the one who took that
23 foot pulse. It's her writing on that triage page and only
24 her writing except for the RN's signature. And you did
25 hear from Nurse Wadford, Jerilyn Wadford, who came in and

1 said well I checked behind her on everything. I ask all
2 the questions again and I checked all the issues again.
3 But, that's in dispute. Phil and Jeanne say that Jerilyn
4 Wadford never saw Phil that day, never touched Phil that
5 day; never did any kind of examination, never checked any
6 foot pulses. Nurse Wadford said she did. And as you saw
7 from the hospital policy that was admitted an RN is
8 supposed to be doing that triage and if she didn't check
9 behind Samantha Anthony like she was supposed to, she'd be
10 in big trouble. So she definitely has a motive to
11 disremember things.

12 But regardless the only point and an important
13 point to take from all that is that the pulses are in
14 question. The foot pulses are in question but even if they
15 were normal, even if they were normal, you can still have a
16 blood vessel problem. All of the experts, Doctor Adams and
17 Doctor Jolin on our side; Doctor Weinstein and Doctor Smith
18 on the their side all said that you can have a blood vessel
19 problem with - and still have a normal foot pulse.

20 The paralysis and this is of course not an
21 issue. Now, what was Doctor Bibeau supposed to do that day
22 that he did not do? What did he not do that a reasonably
23 competent physician would have done? First of all, he did
24 not perform a proper vascular exam. And he testified that
25 he believes he checked the foot pulses. And he wants to

1 say that he checked the foot pulses. But you were
2 repeatedly shown on the exhibit in the ER record - and you
3 can see it when you go back to the jury room - look for the
4 little block that says pulses. It says physician exam
5 record and it has pulses and it has femoral pulse,
6 popliteal pulse, foot pulse. It has a place for the left
7 and the right; all those little blanks, none of that's
8 filled in. None of it. That's the physician record.
9 That's where Doctor Bibeau is supposed to write down where
10 he did the pulses. And there is not a shred of evidence he
11 did that other than his alleged memory and his alleged
12 belief that he actually did that on April 10th, 2011. That
13 he put his hand on Phil's foot and took those pulses as
14 opposed to just a very quick touch as Phil testified to the
15 side of the leg and to the feet to find out that one was
16 cooler than the other. And why didn't Doctor Bibeau do
17 that? Because Doctor Bibeau thought that Jerilyn Wadford,
18 his trusted and thorough and excellent nurse reader, had
19 done pulses. He relied on her so he thought the pulses
20 were normal. And he knows he should have taken it himself
21 but he didn't take it himself. And as even their own
22 expert Doctor Dorn Smith, the vascular guy for defense, as
23 he got up there he said, you know, foot pulses are
24 important. Those are important; it's important to note the
25 pertinent positives and the pertinent negatives. And there

1 is no more pertinent negative or positive when you're
2 trying to examine a lower right leg that has the kind of
3 condition that Phil's had that day than a foot pulse.
4 Everybody says that. The foot pulses are crucial to know
5 that. And yet Doctor Bibeau did not note what his own
6 expert says is the important pertinent negative or
7 pertinent positive. That is negligence. That is
8 carelessness. That is falling below the standard of care
9 so that's the first thing that Doctor Bibeau did wrong. He
10 did not do a proper vascular exam.

11 Now the second thing that Doctor Bibeau did wrong
12 was he failed to consider the possible diagnosis of a blood
13 vessel problem. He testified to that himself. He got on
14 the stand and under my questioning testified that the only
15 three things he considered that day were acute trauma,
16 acute trauma where something - you bang your leg into
17 something, something strikes your leg or some kind of
18 traumatic injury to the leg. An acute means it occurred
19 right then, immediately, just recently. Acute trauma,
20 that's the first thing he thought about.

21 No evidence of acute trauma. There is no
22 evidence at all in the record anywhere and in any of the
23 testimony that there was any acute trauma to Phil's right
24 lower leg. So he ruled that out, not acute trauma.

25 The second thing he considered was chemical

1 exposure to the skin. Maybe Phil spilled something on his
2 skin. Somehow he came in contact with some chemical and he
3 said the record shows he's unloading a truck although Phil
4 didn't have a truck. Don't know how that got in there but
5 regardless maybe he spilled something on his skin.
6 Chemical exposure to the skin, maybe that's what this
7 discoloration is. Maybe that's the reason for the pain and
8 the change in the color and the numbness. Chemical
9 exposure: No evidence of that. Doctor Bibeau said no
10 evidence of that. All the experts said no evidence of
11 that. Phil said no evidence of that. So that's ruled out,
12 cross that one off. Chemical exposure, acute trauma, not
13 there and it's not those.

14 The only other thing he considered by his own
15 testimony and his own admission was a spider bite. Spider
16 bite. That's what he came to was spider bite. What
17 evidence is there in the record that there was a spider
18 bite ever reported or ever noted or ever found or ever seen
19 other than Doctor Bibeau's conclusion. The only place
20 you'll see that ER record when you go back there in the
21 jury room and look at it is Doctor Bibeau's writing
22 probable spider bite under clinical impression and on his
23 diagnosis sheet probable spider bite. That's the only -
24 Nobody ever said that in the ER, nobody ever told that to
25 Doctor Bibeau although he claimed that he got some

1 mysterious phantom phone call. Now when I deposed him - he
2 admitted on the stand - When I deposed him he never
3 mentioned any mysterious phantom phone call about something
4 coming in and him getting information from one of the
5 nurses that there had been a call that an employee was
6 coming in with a possible spider bite. That didn't happen.
7 Doctor Bibeau never said a word about that in his
8 deposition. When he got here to trial today, or this week,
9 he had to come up with this mysterious phone call - phantom
10 phone call. That phone call never happened. Phil didn't
11 call any - He didn't testify that he did not call the ER.
12 Jeanne did not call the ER. They went to the ER. They did
13 not call ahead to the ER. There was no phone call, but
14 regardless, the phone call's meaningless. Just like I ask
15 Doctor Bibeau on the stand, so you took the phone call and
16 you're already jumping to the conclusion. What are you
17 doing, filling out your diagnosis sheet before the guy even
18 gets here, is it what you're already doing in your head?
19 That makes no sense whatsoever. There is no evidence of
20 spider bite.

21 And our experts testified and Doctor Bibeau
22 testified that the indications for a spider bite were not
23 even there. There was no bite mark. And remember this is
24 four hours now after this alleged bite would have occurred.
25 Happened about one o'clock and he's in the ER about five

1 o'clock. Four hours had gone by, four hours, and there's
2 still no spider bite mark anywhere. Nothing like that
3 anywhere that any of the nurses found, any of the nurses
4 noted, any of the doctor - the doctor did not find it and
5 did not note it at all. There was no spider bite, there
6 was no spider bite.

7 But Doctor Bibeau without considering the
8 diagnosis that he should be considering, the blood vessel
9 problem, and just thinking chemical exposure, or trauma to
10 the leg, he was left with a spider bite so he just says
11 spider bite and sent Phil on his way. The failure to
12 consider the diagnoses that was raised by Phil's condition,
13 the possible blood vessel problem, is negligence. That's
14 carelessness, that's not taking enough time to think it
15 through. He was with Phil maybe five minutes no more than
16 ten minutes according to his own testimony. He did not
17 think it through, he did not consider all the
18 possibilities, and he did not consider the number one
19 diagnosis that should have been on the list which is blood
20 vessel problem. And again, he didn't have to magically
21 find that popliteal aneurysm. All the doctor's say the
22 aneurysm was there. All the doctor's say that aneurysm was
23 there. On both sides everybody says that popliteal
24 aneurysm was behind his knee on April 10th, 2011.

25 But Doctor Bibeau didn't have to find that. All

1 he had to do was see some symptoms of a blood vessel
2 problem going on and refer Phil for a vascular consultation
3 or for a CT angiogram a test with the dye in your veins and
4 arteries and all that. One ultrasound is all he had to do.
5 It's all he had to do and he did not do it and that is
6 carelessness.

7 Now the final thing that Doctor Bibeau did not do
8 is he did not refer him anywhere. He did not realize the
9 diagnoses and he did not refer Phil to a vascular consult.
10 He did not refer Phil to a - for further test either ultra
11 sound or a CT angiogram. He did none of that and that is
12 carelessness.

13 Now it's important for you to remember and
14 realize that all of the doctors, all of the experts, Doctor
15 Adams and Doctor Jolin on our side and Doctor Smith and
16 Doctor Weinstein on their side all said that a blood vessel
17 problem had to be on the diagnosis list. It had to be
18 there. A reasonably competent ER physician had to consider
19 a blood vessel problem as a possible diagnosis. All the
20 experts agree about that. Now Doctor Weinstein and Doctor
21 Adams - I'm sorry, Doctor Smith, their experts, Weinstein
22 and Smith want to say well you know the foot pulses seem to
23 be normal and it was probably, you know, it really wasn't a
24 strong indication of a blood vessel problem or an arterial
25 blockage so it had to - it was on the list but it wouldn't

1 be way down on the list. That's sort of their approach,
2 way down on the list but it's on the list. It's on the
3 list; it had to be on the list. They have to admit that.
4 Our experts say no. Doctor Adams and Doctor Jolin say no
5 that's at the top of the list. You got the Ps here these
6 things you learn in Med School. You remember Doctor
7 Weinstein talked about the mnemonics, mnemonics; however
8 you say it, the things to make you remember symptoms and
9 problems and all that. Well four of them are met. Four of
10 them are met and arguably five are met and yet blood vessel
11 problem was never considered by Doctor Bibeau. That is
12 carelessness and all the doctors, all the experts say that
13 he had to consider that and yet he did not. And you
14 remember you may recall this that Doctor Adams testified
15 that this is the kind of case an ER physician lives for.
16 This is the kind of thing that they went to med school for
17 and if they want to be an ER physician. This is the kind
18 of thing where you can save somebody's life or limb cause
19 so much of the time, I know you guys know this, that so
20 much of the time in an ER it's routine mundane stuff and
21 it's colds and flu and it's chronic babies or colicky
22 babies and just routine things that are not really life
23 threatening. You're more there as a almost a family doctor
24 or not really emergencies.

25 But when someone comes in with a life or limb-

1 threatening problem and you find that and you can help
2 that, that's what you're there for. That's what you're
3 really living for. That's like - That's the goal. And
4 Doctor Bibeau missed it entirely. He missed the diagnosis
5 entirely. You will recall also that Doctor Adams said the
6 whole thing about the spider bite was just ridiculous. I
7 mean you remember on cross-examination the defense kept
8 pressing him on that point and ask him question after
9 question on that point. And finally he just really got
10 blunt with it and said it's just ridiculous, it's
11 ridiculous that somebody would say this was a spider bite
12 based on these symptoms and these conditions. And if you
13 recall Doctor Jolin, our expert, our ER expert we got from
14 Connecticut, I think it was the second witness, he
15 testified that you don't - you only have to look at the
16 first four or five lines on that ER physically - physician
17 exam record, just that little block up in the left hand
18 corner where it says pain, cold, numb, and ecchymotic and
19 you've already got like four of the pains right there just
20 with the symptoms reported that boom blood vessel problem,
21 blood vessel problem. That's like top of the list. It was
22 that obvious and yet Doctor Bibeau still missed it.

23 Now, Phil also testified that there was a second
24 encounter. The curbside consult. Curbside consultation
25 with Doctor Bibeau. And that occurred - He doesn't know

1 the exact date and his notes don't reflect the exact date
2 but sometime April 10th, 11th, 2011 to sometime April 25th,
3 2011 he had a second encounter, a curbside consultation
4 with Doctor Bibeau in the ER. It happened at the nurse's
5 station and he was sitting there, had his shoe off and he
6 showed Doctor Bibeau his leg again and the leg had improved
7 some but it was still painful. And the color had improved
8 some but it was still not normal color at that point. And
9 he had the little tip of the black toe, just the tip. His
10 toe wasn't rotting off. His toe wasn't mummifying, his toe
11 wasn't falling apart and the whole thing falling off. He
12 had a little tip of a toe like a blood blister, a little
13 black point, and he showed that to Doctor Bibeau. And
14 Doctor Bibeau just sort of glanced at his leg didn't touch
15 him didn't examine him. There was no formal visit record
16 made no - nothing was done. Just sort of glanced at it and
17 said looks like its getting better and give it some more
18 time. Same thing he told Phil earlier. The same thing he
19 told Phil earlier, just give it some time, it's gonna take
20 some time. And that's what Phil believed; that's what Phil
21 trusted.

22 Phil did the same thing with Doctor Canty and
23 showed him the black tip toe. And he mentioned his problem
24 to at least two other ER physicians in a curbside consult.
25 But those guys, those guys Canty and Doctor Suez and Doctor

1 Keith those other ER doctors were not Phil's treating
2 physicians. They had never seen Phil before for this
3 problem, they did not have the history and background that
4 Doctor Bibeau did. That was just a curb-side consult with
5 no background information and no prior relationship with
6 those other doctors and they are in no way at fault in this
7 case and we never alleged that. The only person who is at
8 fault in this case is Doctor Bibeau on the doctor's side.

9 Now, you know they - And despite their effort to
10 show that curb-side consultation shouldn't happen and don't
11 happen and don't happen, I mean all the doctor's admitted
12 that those do happen. And Doctor Holleman, you recall
13 Doctor Holleman the guy with the bow tie, the treating
14 surgeon that talked to you, he said that, you know, of
15 course there's hallway concerts and - consults and there's
16 church lobby consults; it happens all the time. And if you
17 have a consultation in that kind of a setting, Doctor Adams
18 and Doctor Jolin testified in this follow up curb-side
19 consult you need to - and you see this tip of the black toe
20 and you see the discolored leg, you need to make something
21 happen. You have a duty as a doctor, you have the
22 Hippocratic oath you can't just let that go by. You've got
23 to tell the fellow that's urgent and go see somebody else
24 or say come in here and let me examine you. Go get
25 registered and let's make this happen, okay. Alert the

1 person, the ignorant patient that they need to take some
2 action and that did not happen. And that again is
3 carelessness by Doctor Bibeau. Carelessness by Doctor
4 Bibeau. He says that encounter never happened. Phil says
5 it did. You will have to decide who's telling the truth on
6 that. But regardless we assert that it did happen and it
7 was carelessness by Doctor Bibeau.

8 Now, I'll show you these because you didn't see
9 these very often during the trial. But here we have
10 Plaintiff's Exhibit Thirty-five and this is Phil's. You
11 can look at this back in the jury room, but this is Phil's
12 payroll schedule that shows he was originally working
13 during those weeks and at work. And here we have
14 Plaintiff's Exhibit Thirty-two which is Doctor Bibeau's
15 schedule for April 2011 that shows him at the hospital for
16 twenty-four hours on April 19th and April 22nd. So he's
17 working during the period that Phil says that he saw him
18 there in the second encounter at the curb-side consult
19 during that period of April 10th, 2011 to April 25th, 2011.

20 All right now, one of the key defenses in this
21 case is called comparative negligence so let me talk with
22 you briefly about that. Comparative negligence is what we
23 have in South Carolina; it's where a negligence occurs
24 and causes damages then the jury is sometimes asked in
25 appropriate cases to apportion the damage - to apportion

1 the percentage of negligence between the at fault parties
2 or between the parties. So in this case you're going to be
3 ask to apportion the percentage of negligence between
4 Doctor Bibeau and Phil because their defense is you should
5 have gone to see a doctor. You should have gone to see
6 another doctor and because you did not follow up with
7 another physician you're partly to blame for this and so
8 you're partly at fault.

9 So we'll go over the verdict form in a little
10 while but I just want to introduce you to the concept of
11 comparative negligence. And if Phil is more than fifty
12 percent at fault, if he's more - if you find him to be more
13 that fifty percent at fault, then we lose, Phil loses and
14 gets nothing. It's a defense verdict. We lose and get
15 nothing if you find Phil was more than fifty percent at
16 fault. Now I submit to you that if Phil is at fault at all
17 it would be a very very small percentage. It's up to you to
18 determine that issue but it would be a very very small
19 percentage; nothing approaching fifty percent whatsoever,
20 nothing approaching that number.

21 Now, let's talk about why Phil is not at fault;
22 why we believe Phil is not at fault at all, or, if he is at
23 fault at all it's a very small percentage. Phil had been
24 an LPN forever, for twenty-one years I think by that point
25 by 2011. He'd been a licensed practical nurse. And what

1 do LPN's do all day every day? What do they do all day
2 long? They follow the doctor's orders more than most
3 people more than me. I don't go around all day following
4 doctor's orders and I don't imagine most of you do. We're
5 not in that setting. But for his working life for the last
6 twenty-one years that's all Phil had known. That's what he
7 had done at the nursing homes where he worked and at the
8 doctor's offices where he worked and at the home health
9 jobs that he had. He follows doctor's orders and what the
10 doctor says goes. Phil was accustomed to trusting and
11 believing doctors and he trusted and he believed Doctor
12 Bibeau. He trusted and he believed Doctor Bibeau that's
13 why he didn't follow-up. He believed Bibeau was right.
14 Bibeau did a very quick exam. Phil's testimony was it
15 looked like he'd seen this a thousand times; that he just
16 looked at it oh yeah that's a spider bite, no problem,
17 probably a spider bite. Give it some time here's some
18 steroids, here's some pain medication, probably a spider
19 bite. Okay. He's the doctor he makes diagnoses all day
20 long. Nurses don't make diagnoses. No nurse makes
21 diagnoses. Doctors diagnose. And that's drilled into you
22 and engrained into you as an LPN from day one. So Phil did
23 exactly what he had done for years which is trust and
24 believe Doctor Bibeau.

25 Now, you also need to understand that you - that

1 Doctor Bibeau, or any doctor that takes any patient, takes
2 the patient as he finds them. It doesn't matter.
3 Throughout this trial you've heard defense questions
4 intended to make you think that because Phil had high blood
5 pressure and because he didn't take his blood pressure
6 medication properly and because he has that situation that
7 it's his fault he's got the popliteal aneurysm. You know
8 it's his fault he's to blame for that. That is not the
9 case. A doctor takes the patient as the doctor finds them.
10 It doesn't matter if you come in and you have high blood
11 pressure or you've had to the unfortunate problem of
12 getting some kind of cancer, I mean you got to the doctor
13 to treat what you have. It doesn't matter why you got
14 there or how you got there you expect the doctor to
15 diagnose it and to help you with your problem so Doctor has
16 to take - and you'll be instructed by the judge - that he
17 must take Phil as he finds him. And the fact that he had
18 high blood pressure and the popliteal aneurysm that was not
19 his fault at all none of that's relevant to anything. That
20 has nothing to do with anything. You take the patient as
21 you find 'em.

22 Now let me talk briefly about just one other
23 point. This idea that because Phil - Phil failed to follow
24 up with another doctor that he's some how at fault. I want
25 you to think hard enough there and think about whether or

1 not that is logical. It's the defense's position that Phil
2 should have gone to one, two, three, four, five days,
3 whatever days later and seen another doctor; that that's
4 what he was told go see another physician, another MD this
5 week, and that because Phil didn't do that Phil's partly at
6 fault. Again, Phil's trusting and believing Doctor Bibeau
7 as he always does doctors. But regardless, let's imagine
8 Phil did that. It's also the defense's position and the
9 experts' testimony that if he'd gone to see the second
10 doctor, the non-emergency room doctor, that that doctor
11 should have found the problem; that that doctor, that
12 family doctor, would have to find the problem to meet the
13 standard of care they would have to see the same symptoms
14 that he presented with at the ER on April 10th 2011 the pain
15 the coolness, the numbness, the pulselessness, the
16 paresthesia. All those symptoms that he would have - still
17 have a few days later and that family doctor where you go
18 and knock on the door and say ---

19 (ATTORNEY PROFFITT KNOCKS ON JURY BOX BENCH.)

20 MR. PROFFITT: --- Doctor Family Doctor, see me.
21 That guys got to find it; that guys got to realize that
22 there's a blood vessel problem. That's what they're
23 telling you. At the same time you've got a board
24 certified family physician sitting in the ER on April 10th,
25 2011, a board certified family doctor who moon lights in

1 the ER and is the doctor on duty that day with Phil, who
2 they say didn't have to find it. Same symptoms, same
3 symptoms he's gonna report with later to the other doctor.
4 Same stuff, everything, same stuff. And yet second non-
5 emergency room doctor had to find it, was required to find
6 it by the standard of care. You got to do it you got to
7 find it. If you don't it's a violation. Yet, Doctor
8 Bibeau, no violation." Board certified family physician.
9 That makes absolutely no sense. That is utterly illogical,
10 utterly illogical; makes no sense whatsoever.

11 All right. Now, ladies and gentlemen, I just
12 want to - You haven't seen these for a few days so I want
13 to just briefly review what happened to Phil after he - in
14 that period from April 10th to May 25th, 2011. And he
15 thought it was improving, seemed to be improving. Jeanne
16 says it was improving, seemed to be getting better, color
17 back to normal, pain going away, just working his regular
18 schedule; thought everything was going good. Well, May
19 25th, 2011 is when he had the second episode; the same
20 thing happened again. A blood clot broke loose off of the
21 popliteal aneurysm went down one of the arteries and in
22 fact by that point whether it happened gradually over that
23 period or whether it happened on May 24th and 25th, 2011
24 very quickly and suddenly the doctor's can't really say.
25 You've heard all of them talk about that. It doesn't