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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2015-001964
Unpublished Opinion No. 2018-UP-281 (S.C. Ct. App. filed June 27, 2018)

Philip Ethier and Jeanne Ethier,

Petitioners,

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.

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

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

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

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

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

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

MR. PROFFITT: Okay.

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

MR. PROFFITT: Yeah.

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

MR. PROFFITT: Okay.

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

MR. PROFFITT: Yeah.

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

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

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

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

THE COURT: All right.

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

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

MR. PROFFITT: Right.

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

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

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

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

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

MR. PROFFITT: Absolutely.

THE COURT: And there is no consideration of how

negligent the person she's taking under is?

MR. PROFFITT: Absolutely.

THE COURT: Okay.

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

THE COURT: I understand your position.

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

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

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

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

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

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

MR. PROFFITT: Okay.

THE COURT: But go ahead.

MR. PROFFITT: All right.

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

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

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

What's interesting in that case was---

THE COURT: Yes, sir.

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

THE COURT: Yes, sir.

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

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

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

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

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

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

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

THE COURT: I understand.

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

If Your Honor were to grant their motion and, and

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

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

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

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

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

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

THE COURT: Okay.

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

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

Thank you, Your Honor.

THE COURT: Yes, sir.

MR. PROFFITT: Your Honor?

THE COURT: Let's make it quick.

MR. PROFFITT: I will.

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

MR. PROFFITT: All right.

THE COURT: I don't blame them.

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

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

MR. PROFFITT: Right.

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

MR. PROFFITT: Right.

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

MR. PROFFITT: Yes.

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

MR. PROFFITT: But---

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

in there.

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

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

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

MR. PROFFITT: ---and completely wrong.

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

analysis of the damages apportioned.

THE COURT: All right. Thank you, gentlemen.

MR. PROFFITT: Thank you, Your Honor.

THE COURT: Thank you, Your Honor.

MR. PROFFITT: Thank you very much.

THE COURT: Have a safe trip home.

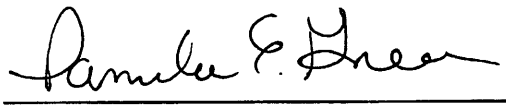
* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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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SHIRLEY BROOM
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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Jerilyn Wadford
By Mr. Smith 871
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By Mr. Holler 943
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Guy Bibeau
By Mr. Meyers 953

Proffer:
Guy Bibeau
By Mr. Meyers 961
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By Mr. Meyers 967
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Dr. Eric Weinstein
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Dr. Charles Dorn Smith
By Mr. Holler 1092

Proffer:
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By Mr. Holler 1130

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

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

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

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

(WHEREUPON, MR. AND MRS. ETHIER COMPLY)

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

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

(WHEREUPON, DR. BIBEAU COMPLIES)

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

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

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

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

(NO RESPONSE)

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

(NO RESPONSE)

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

(NO RESPONSE)

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

(NO REPSONSE)

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

(NO RESPONSE)

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

(NO RESPONSE)

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

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

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

(JUROR STANDS)

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

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

THE COURT - So you knew him from that employment?

JUROR - Yes, sir.

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

JUROR - Right.

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

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

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

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

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

(NO RESPONSE)

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

THE COURT - Yes, please do.

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

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

(NO RESPONSE)

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

(NO RESPONSE)

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

(NO RESPONSE)

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

(JURORS STAND)

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

JUROR - 130, Michael Urias.

THE COURT - Yes, sir. Your situation?

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

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

JUROR - As a nurse.

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

JUROR - No, sir, it would not.

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

JUROR - Paul Marshall, 80.

THE COURT - Your situation?

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

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

JUROR - (Indicating no)

THE COURT - Have to answer verbally.

JUROR - No.

THE COURT - Have to get you on tape. Thank you. You can be seated. Name and number, sir?

JUROR - Keith Stocker, 122.

THE COURT - Yes, sir.

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

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

JUROR - No.

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

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

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

JUROR - (Indicating yes)

THE COURT - You no longer do that?

JUROR - No, I do longer ---

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

JUROR - No.

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

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

COURT REPORTER - She needs to speak up, Judge.

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

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

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

JUROR - (Indicating no)

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

JUROR - Robert Caldwell, number 28.

THE COURT - Yes, sir.

JUROR - My wife is a retired nurse.

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

JUROR - No, sir.

THE COURT - Thank you, sir. Anyone else?

(NO RESPONSE)

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

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

(NO RESPONSE)

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

(NO RESPONSE)

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

(NO RESPONSE)

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

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

(NO RESPONSE)

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

(NO RESPONSE)

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

(JURORS STAND)

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

JUROR - Linda Albowicz, juror 2.

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

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

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

JUROR - I don't believe so.

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

JUROR - Yes.

THE COURT - All right. Thank you very much. Name and number, sir?

JUROR - Keith Stocker, 122.

THE COURT - Yes, sir.

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

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

JUROR - I don't believe so, no.

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

JUROR - I'm a certified nurse assistant.

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

JUROR - No, sir, it won't.

THE COURT - Thank you, ma'am.

COURT REPORTER - What was her number, Judge?

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

JUROR - Oh, I'm sorry. 72.

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

JUROR - Kathleen Markowitz, number 79.

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

JUROR - I'm a nurse, yes.

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

JUROR - Yes.

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

JUROR - Yes.

THE COURT - Thank you. Name and number?

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

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

JUROR - No, sir.

COURT REPORTER - What was her number again?

THE COURT - Your number again?

JUROR - 102.

THE COURT - Thank you.

CLERK - One more, Judge.

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

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

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

JUROR - No. No, sir.

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

JUROR - No, sir.

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

(JURORS STAND)

THE COURT - Name and number, sir?

JUROR - Keith Stocker, number 122.

THE COURT - Your situation?

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

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

JUROR - No.

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

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

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

JUROR - No, sir, it won't.

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

JUROR - Juror number 137, Tommy Walton.

THE COURT - Yes, sir. Yes, sir.

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

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

JUROR - No, sir.

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

JUROR - Number 82, Bobby Mason.

THE COURT - Yes, sir.

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

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

JUROR - No, sir.

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

JUROR - Kathleen Markowitz, number 79.

THE COURT - Yes, ma'am.

JUROR - I suffer from depression and anxiety.

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

JUROR - It might.

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

JUROR - Yes.

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

JUROR - Okay.

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

JUROR - Okay.

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

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

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

JUROR - No, sir.

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

(NO RESPONSE)

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

(JURORS STAND)

THE COURT - Yes, sir. Name and number?

JUROR - Number 82, Robert Mason.

THE COURT - Yes, sir.

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

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

JUROR - No, sir.

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

JUROR - No, sir.

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

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

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

JUROR - No, it wouldn't.

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

JUROR - Gerald Moody, 89.

THE COURT - Yes, sir.

JUROR - You talking about my family, too?

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

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

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

JUROR - No, it wouldn't.

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

JUROR - James Mcgrew, 84.

THE COURT - Yes, sir.

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

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

JUROR - No, sir.

THE COURT - --- your impartiality in this case? Thank you, sir. Ma'am, name and number?

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

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

JUROR - No, sir.

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

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

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

JUROR - No, sir.

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

JUROR - Is that ever?

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

JUROR - Keith Stocker, 122.

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

JUROR - It was a civil trial, drunk driving.

THE COURT - Did it go to a verdict?

JUROR - Yes, it did.

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

JUROR - No, sir.

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

JUROR - Number 137, Thomas Walton.

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

JUROR - Civil.

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

JUROR - Yes, it did.

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

JUROR - No, sir.

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

JUROR - Kathy Rabb, 106.

THE COURT - Yes, ma'am.

JUROR - I believe it was a criminal trial.

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

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

THE COURT - Has it been a long time?

JUROR - Yes, sir.

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

JUROR - No, sir.

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

JUROR - Gerald Moody, 89.

THE COURT - Yes, sir.

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

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

JUROR - No, it won't.

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

JUROR - Connie Pete, 102, criminal trial.

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

JUROR - (Indicating yes)

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

JUROR - No, sir.

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

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

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

JUROR - Yes, sir.

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

JUROR - No, sir.

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

JUROR - 28, Robert Caldwell.

THE COURT - Yes, sir.

JUROR - It was criminal.

THE COURT - Did it go to a verdict?

JUROR - It didn't, sir.

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

JUROR - No.

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

(NO RESPONSE)

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

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

(NO RESPONSE)

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

(NO RESPONSE)

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

MR. PROFFITT - No, Your Honor.

THE COURT - Any from the defense?

MR. SMITH - No, sir, Your Honor.

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

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

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

(WHEREUPON, RECESS IS TAKEN)

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

MR. PROFFITT - Yes, Your Honor.

THE COURT - Defense ready?

MR. SMITH - Yes, sir, Your Honor.

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

DEPUTY CLERK - Okay. Plaintiff strikes first.

MR. PROFFITT - Plaintiff strikes number 11.

MR. SMITH - Defendant strikes number 14.

MR. PROFFITT - Plaintiff strikes number 13.

MR. SMITH - Defendant strikes number 5.

MR. PROFFITT - Plaintiff strikes number 19.

MR. SMITH - Defendant strikes number 17.

MR. PROFFITT - Plaintiff strikes number 20.

MR. SMITH - Defendant strikes number 12.

DEPUTY CLERK - And this will be for the alternate.

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

DEPUTY CLERK - 21 to 23.

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

MR. PROFFITT - Plaintiff strikes number 21.

MR. SMITH - Defendant strikes number 22.

THE COURT - Second alternate.

MR. PROFFITT - Plaintiff strikes number 25.

MR. SMITH - Defendant strikes number 24.

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

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

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

MR. PROFFITT - Yes, ma'am.

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

MR. SMITH - Yes, ma'am.

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

MR. SMITH - Yes, ma'am.

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

MR. PROFFITT - Yes, ma'am.

MR. SMITH - Yes, ma'am.

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

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

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

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

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

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

THE COURT - And from the defense?

MR. SMITH - No, sir, Your Honor.

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

(WHEREUPON, JURY PANEL EXITS THE COURTROOM)

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

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

(WHEREUPON, REMAINING JURY PANEL EXITS THE COURTROOM)

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

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

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

(WHEREUPON, JURY ENTERS THE COURTROOM)

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

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

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

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

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

(WHEREUPON, JURY EXITS THE COURTROOM)

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

MR. PROFFITT - No, sir.

THE COURT - Any from the defense?

MR. SMITH - No, sir, Your Honor.

THE COURT - All right, we'll break til 2:30. We're in recess til that time. We'll resume at that time. Thank you very much.

(WHERUEPON, COURT IN RECESS FOR LUNCH)

(WHEREUPON, JURY ENTERS THE COURTROOM)

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

(WHEREUPON, NO RESPONSE)

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

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

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

(WHEREUPON, NO REPONSE)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT - Objection's noted.

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

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

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

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

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

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

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

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

THE COURT - You wish to be heard on that?

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

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

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

MR. HOLLER - I understand, Judge.

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

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

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

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

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

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

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

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

DR. ADAMS - Carl Ward Adams.

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

MR. PROFFITT - Thank you

DIRECT EXAMINATION

BY MR. PROFFITT -

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

A Very well; good morning.

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

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

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

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

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

A Thirty-five years.

Q Are you board certified in anything?

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

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

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

Q Where are you licensed as a doctor currently?

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

Q What's your rank in the Army Reserve?

A I'm a Brigadier General.

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

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

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

A Absolutely.

Q Have you done that in past cases?

A Yes.

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

A Yes.

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

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

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

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

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

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

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

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

Mr. Holler: Without objection.

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

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

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

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

You may proceed.

Mr. Proffitt: Thank you, Your Honor.

RESUMPTION OF DIRECT EXAMINATION BY MR. PROFFITT:

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

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

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

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

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

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

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

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

A Ten-plus hours.

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

A That's correct.

Q Travel time and all that?

A Correct. It's all inclusive.

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

A Correct.

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

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

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

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

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

A (no response)

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

A Yeah, I see it.

Q And that's?

A Roughly 4:30.

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

A Lower right leg pain.

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

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

Q Okay.

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

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

A I can.

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

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

Q Okay.

A Acute onset of pain at 1:00.

Q What does ecchymonic mean?

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

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

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

Q Okay.

A I would say that plus two is present.

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

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

Q Okay.

A If patients don't have heart failure.

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

A This was the triage nurse, Jacqueline.

Q Was it her or Samantha Anthony, the CNA?

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

Q That Samantha Anthony actually filled it out?

A Correct.

Q And Samantha Anthony is a certified nurse assistant?

A Correct.

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

A I got it.

Q Is this the page you're looking at?

A Correct.

Q Is this where Doctor Bibeau recorded his findings?

A Correct.

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

A Correct.

Q And this is Doctor Bibeau's findings?

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

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

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

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

A It's the foot and the leg.

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

A Correct.

Q And there we have cold. Correct?

A Correct.

Q And up here we have another report of what?

A Pain.

Q And what about this?

A Numb.

Q And what is this word here, again?

A Ecchymonic.

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

A No wheezing or edema.

Q What does that mean?

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

Q Does the document also indicate severe pain---

A Correct.

Q ---where I'm pointing here?

A Correct.

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

A Got it.

Q Who completed this page on April 10?

A Doctor Bibeau.

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

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

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

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

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

A Correct.

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

A Correct.

Q And what is livedo reticularis?

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

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

A No.

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

A Correct.

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

A Absolutely.

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

A Correct.

Q And those are all blank?

A Correct.

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

A They were not done.

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

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

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

Q What is paresthesia?

A Paresthesia is the numbness or tingling.

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

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

Q What about paralysis, or paresis, or weakness?

A Sure, that's one of them.

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

A He presented with pain.

Q All right.

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

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

A That's correct.

Q Okay.

A Which are signs of the P's.

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

A Absolutely.

Q And how?

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

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

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

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

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

A Correct.

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

A Correct.

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

A That's correct.

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

A The superficial skin.

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

A That's correct.

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

A Yes.

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

A Correct.

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

A Correct.

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

A No.

Q What was he in danger of?

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

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

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

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

A Yes.

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

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

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

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

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

A Absolutely.

Q Is anything noted there?

A Nothing.

Q And is this the exam that was done by Doctor Bibeau?

A Correct.

Q Now, you mentioned the pulses. Let's make sure the jury understands which pulses you're talking about. Here's a little stick figure of a man. Let's focus on the pulses in the lower extremities. You mentioned the femoral. Is that illustrated here?

A Correct.

Q And that's in the groin area?

A Correct.

Q And here we've got the popliteal, that's behind the knee?

A Correct.

Q And down here at the bottom, we have the two foot pulses. Is that right?

A Correct.

Q One's on the side of the ankle. Right?

A Correct.

Q And one's on top of the foot?

A Correct.

Q So, to do a proper exam, do you need to check those pulses on both limbs to compare them?

A Correct.

Q Was that done in this case?

A No.

Q Is there any indication from Doctor Bibeau that he ever checked the pulses at all on the left leg?

A Only according to his deposition, but not in the record.

Q Did he even claim to check the left leg?

Mr. Holler : Objection to leading.

The Court: I overrule the objection. You may proceed.

Q Did he even claim to check the left leg at all?

A No.

Q Did he claim to check the foot pulses on the right foot?

A No.

Q He did claim that, didn't he?

A He said he doesn't remember, but he claimed he did it. But it's not recorded, so it's not done.

Q Why is if it's not recorded, it's not done? What does that mean?

A That means if you're doing a physical examination and it's vascular exam that you would, as a physician, you felt the pulses, you're going to fill out the little stick guy that's in here and put down the pulses yourself.

Q Okay. Doctor Adams, is it your opinion that the failure to do a proper vascular exam was a breach of the standard of care required of Doctor Bibeau as an emergency room physician?

A Yes, based upon the presenting complaints of pain, acute pain, pallor, pulselessness, paresthesia, ---

Q All right.

A ----color, pain.

Q Let's talk for a minute about the spider bite. Now we saw in Plaintiff's Exhibit 25, which again, this is the physical exam done by Doctor Bibeau. Correct?

A Correct.

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

A Probable spider bite.

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

A Correct.

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

A No.

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

A No.

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

A None.

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

A None.

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

A I don't.

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

A Yes.

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

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

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

A Correct.

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

A Spider bite.

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

A Possible chemical exposure, unknown blunt force trauma.

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

A Right.

Q There was the trauma. Right?

A Possible chemical exposure, spider bite.

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

A None.

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

A No.

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

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

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

A No.

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

A Correct.

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

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

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

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

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

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

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

A Absolutely.

Q You believe that because why?

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

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

A Absolutely.

Q Now, what was the other test you mentioned?

A The CTA or angiogram.

Q Tell the jury what that is.

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

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

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

Q Why do you believe it was that artery?

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

Q Okay.

A Just the bottom.

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

A I do.

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

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

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

A Uh-huh.

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

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

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

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

A I do.

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

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

A Got him a vascular consult.

Q And why is that?

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

Q You're talking about heart stuff?

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

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

A Correct.

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

A Correct.

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

A Yes.

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

A No.

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

A Absolutely.

Q Is that what Doctor Bibeau should have done?

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

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

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

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

A Correct.

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

A It doesn't.

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

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

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

(Whereupon the jury exited the courtroom)

The Court: Yes sir?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Proffitt: I will not---

The Court: ---not a legal expert.

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

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

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

(laughter)

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

(laughter)

The Court: Do you understand where we are?

Mr. Proffitt: I do.

Q Do you, Doctor?

A I do.

The Court: Let's bring the jury in.

(Whereupon the jury entered the courtroom)

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

Mr. Proffitt: Thank you, Your Honor.

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

A Correct.

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

A Correct.

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

A Correct.

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

A Correct.

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

A Correct.

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

A Correct.

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

A Yes.

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

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

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

(Whereupon the jury exited the courtroom)

Yes sir, your objection?

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

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

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

Mr. Proffitt: Yes sir.

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

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

The Court: (chuckling) Very good.

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

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

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

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

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

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

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

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

(Whereupon the jury entered the courtroom)

(Car alarm blaring)

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

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

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

A I do.

Q Tell me about your opinion.

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

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

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

Q On May 25?

A Correct.

Q Doctor Adams, do you know, or is anyone able to tell when the clots would have shed off and clogged the arteries? Could that have occurred early, say, in late April, 2011? Was it in mid-May, 2011? Was it May 23 or 24, 25, 2011? Do you know?

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

Q Does it matter exactly when it occurred?

A No.

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

A It's going to occur.

Q Okay.

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

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

A Correct.

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

(Whereupon witness exits witness stand)

Q What does this medical illustration illustrate?

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

Q Stand over here where the jury can see you.

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

Q What is this diagram over here to the left?

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

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

Q All right.

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

Q Thromboses are what?

A Blood clots.

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

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

Q All right.

A It's like a blueberry.

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

A Absolutely.

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

A Right.

Q All right.

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

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

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

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

Q Okay. Thank you.

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

The Court: Is there an objection?

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

The Court: And?

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

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

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

Mr. Proffitt: All right. Thank you.

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

Mr. Proffitt: All right.

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

Mr. Proffitt: Thank you, Your Honor.

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

(Whereupon witness exited witness stand)

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

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

Q Step over here.

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

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

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

Q That's medicine?

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

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

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

A No.

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

A Correct.

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

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

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

A Correct.

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

A Yes.

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

Mr. Holler: No objection.

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

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

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

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

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

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

A Correct.

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

A Correct.

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

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

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

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

Q Okay.

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

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

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

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

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

A Correct.

Q And then shortly after surgery what happened?

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

Q What is an anastomosis?

A The joining of the two arteries together.

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

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

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

A Correct.

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

A Correct.

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

A Yes.

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

A No. But he recognized it fast and operated.

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

A Correct.

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

The Court: What number was that, number three?

Mr. Proffitt: Yes sir.

Mr. Holler: No objection.

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

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

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

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

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

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

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

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

Q What do you mean acute embolic event?

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

Q All right.

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

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

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

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

A Nope, one puncture.

Q Where would the puncture be?

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

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

A Correct.

Q Okay.

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

Q Phil had gone way beyond that?

A Correct.

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

A Yes.

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

A Yes.

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

Mr. Holler: No objection.

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

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

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

(Whereupon witness returned to witness stand)

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

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

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

A I did.

Q And you provided that to me?

A I did.

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

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

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

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

A That's it.

Q And is this another photo of it---

A That's it.

Q ---on Phil's leg?

A Correct.

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

A Yes.

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

A Correct.

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

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

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

A Correct.

Q He would not have had that event?

A Correct.

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

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

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

Q And what is done to relieve Compartment Syndrome?

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

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

A Correct. The technical word for decompression of a compartment is called a fasciaotomy.

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

A Correct.

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

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

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

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

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

A Correct.

Q And what damaged the muscles, what caused that?

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

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

A No.

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

A Yes.

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

A Correct.

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

A Correct.

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

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

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

A Correct.

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

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

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

A Right.

Q And that's a sensory kind of nerve?

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

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

A Correct.

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

A Correct.

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

A No.

Q And how long would his recovery might have been?

A A day or two.

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

A No.

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

A Overnight.

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

A No.

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

A Correct.

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

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

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

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

Q He's on his last artery. Right?

A Correct.

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

A No.

Mr. Proffitt: Just a minute, Your Honor.

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

A No.

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

A In my practice, yes.

Q A caterpillar, you always find a bite?

A I don't recall for a caterpillar bite.

Q Any type of insect bite?

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

Q And you always find---

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

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

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

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

A Sure.

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

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

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

A The spider bite, there was no spider bite.

(Pause)

The Court: Any other questions?

Mr. Holler: Yes sir.

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

RE-DIRECT EXAMINATION

BY MR. PROFFITT:

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

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

Q Thank you.

Mr. Proffitt: Nothing further.

The Court: Anything to follow up on that question?

Mr. Holler: No, sir.

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

Mr. Proffitt: We do, Your Honor.

The Court: Any objection?

Mr. Holler: None.

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

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

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

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

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

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

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

MR. PROFFITT - Thank you.

(WHEREUPON, LUNCH RECESS TAKEN.)

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

MR. PROFFITT - We are, Your Honor.

THE COURT - Defense ready?

MR. HOLLER - Yes, sir, Your Honor.

THE COURT - All right, bring the jury in.

(WHEREUPON, JURY RETURNS TO THE COURTROOM)

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

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

MR. PROFFITT - Plaintiff calls Dr. Jeremiah Holleman.

THE COURT - Come forward and be sworn.

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

DEPUTY CLERK - Please be seated.

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

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

THE COURT - Thank you. Your witness, counsel.

MR. PROFFITT - Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. PROFFITT -

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

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

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

Q All right. And where are you currently employed?

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

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

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

Q Okay, so ---

A Through the present.

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

A Sure.

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

A Thirty-six years sounds right.

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

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

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

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

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

A North Carolina.

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

MR. HOLLER - Without objection.

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

MR. PROFFITT - Thank you, Your Honor.

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

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

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

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

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

A Correct.

Q Okay, and what, just briefly, did the Chester Hospital ER records tell you? You've reviewed those. Correct?
A Right. The Chester ER records indicated, as I recall, that he had had sudden onset of pain the evening before and seven or eight-hours later -- think that would be the seven or eight-hours -- seven or eight-hours later presented to the Chester Emergency Department with excruciating pain, cold foot, clearly acutely ischemic foot.
Q All right. And what happened subsequent -- is that when you got involved, when Chester called you?
A Correct. I think they -- Chester called a general surgeon on call who correctly indicated that he didn't deal in vascular work and suggested they call a vascular surgeon in Rock Hill who, well, was not in a position to accept transfers and they contacted us and we did accept him in transfer.
Q Okay. And where is your -- what hospital was he transferred to?
A He was transferred to Carolina's Medical Center in downtown Charlotte.
Q And that's where you primarily practice?
A That's where I primarily practice.
Q All right. Now, when Phil -- when you first saw Phil on May 25th, 2011, it was the morning hours around 8:00 or so?

A That is correct.
Q And what was his condition then?
A His foot was clearly acute ischemic; it was cool. I don't recall the color, but it was cool; it was without pulses. He was having pain.
Q Okay. And what did you do for him there in those first hours? What happened?
A I think they have already given him a dose of Heparin in Chester and then we gave him another dose of Heparin. We obtained the CT angiogram, which demonstrated that he had a popliteal aneurysm and occlusion of all three of the tibial blood vessels. We subsequently carried him to the angiography suite where we tried to open -- open this acute ischemia -- this acute ischemia of the leg.
Q Okay. All right. Is that when you did the first thrombolysis, the clot-busting procedure?
A Correct. The first -- the first thrombolysis was associated with that first angiographic procedure.
Q All right, Dr. Adams -- I'm sorry -- Dr. Holleman, if you'll step down off the stand and come down here. And if you would -- this is -- I'm showing you what's been marked at Plaintiff's Exhibit 1, and if you could, maybe, come over here and stand over here where I am so all the jurors can see and just tell the jurors -- first of all, tell them what this diagram here is and what it means.

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

Q And tell us again what a CT angiogram is.

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

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

A No. This is a shot from the angiogram.

Q Oh, okay.

A This is a -- a cath lab image.

Q Okay. And what does that show?

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

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

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

A Yes. These yellow arrows here are the blockages.

Q Okay. All right.

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

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

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

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

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

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

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

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

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

A It does.

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

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

Q Okay.

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

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

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

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

Q Okay. And an ischemia or occlusion is what?

A Ischemia is inadequate blood supply and occlusion is blockage.

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

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

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

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

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

Q All right.

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

Q Okay. Run-off being circulation?

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

tree than it does if you've just got a small portion or, you know, a limb, so there's -- there's just more cross-sectional area for blood to go through. Just the tissue distally is better perfused. Grafts are -- tend to be -- have better patency because they're higher flows to the graft, because there's more blood going through the graft.

Q Okay. All right, Dr. Holleman, were you able, using this catheter procedure, to break through the blockage on any of the arteries on that first attempt?

A On the first attempt, -- well, our first -- our first objective was to get a wire across these arteries, because they -- the way that these procedures are down is that if you get a wire across this lesion, across the area you're working with, then you can safely put your catheter through, because the catheter -- the wire holds the catheter in place, so if you just -- if you -- if you just have the open catheter, which is like a tube with the, you know, opening in the end, if you don't have it protected in some way, as you pass it forward, it kind of -- they'll -- likely to snow-plow the blood vessel or scrape it or in otherwise injure the artery and create situations where it would be worse than it was to begin with. So in any of these angiographic interventions, our goal is always to get the wire across first and then whatever catheter we plan to get across second. So on the posterior tibial the wire

crossed easily; on the anterior tibial the wire did not cross easily, and, in fact, we spent a fair amount of time hammering away, pecking away, and it was just like concrete, it would not - it was not going ---

Q What about the peroneal artery, the third one that you tried?

A The peroneal artery, also tried, and the wire would not go through the peroneal.

Q So two of them were blocked in a very hard obvious manner with blood clots.

A Correct.

Q And one of them was not blocked -- was partially blocked but you got the wire through.

A Well, the other one was part -- was completely blocked but blocked with soft kind of jelly-like clot. Well, the presumption it was soft and jelly-like clot, because the wire just fell through.

Q Okay. All right, now you did that about in the afternoon of May 25th, 2011.

A Correct.

Q Was this attempted again?

A As a standard part of this, you really don't know what you've accomplished until you look again. So our usual -- our practice has been to look again, depending on what the situation is, either 12 or 24 hours later. Mr. Ethier was

-- you know, had significant ischemia and so we chose to look again in approximately 12 hours later and Dr. Roush who was my partner was doing cath lab work at that time, so he was the operating surgeon in the cath lab the second procedure.

Q Okay. And that was the morning of the 26th.

A Correct.

Q Now, did Dr. Roush have any better luck than you did in breaking through the clots on any of the artery -- the two that were clogged?

A What he discovered was that the posterior tibial had partially opened up. It had not completely opened up. There was a channel of blood going through the posterior tibial artery; there was now a distal pulse on that posterior tibial artery, but it was still not a normal artery. He tried to take a balloon and kind of clean it up and make it more -- more closely to normal, but he was not able to get the wire back through the clot at that point, and so rather than risking injuring the artery further, after persisting a while to try to get a wire through, it felt like this -- this was not going to be amenable to the thrombolitic procedure for this part of the procedure and we were going to have to do something else to get him -- to get Mr. Ethier a durable result to overcome this ischemia.

Q All right, now, as of the morning of that second day, what was the plan then? What were you going to do then?
A The morning with the next day our intention was to carry him to the operating room and to do a bypass from the superficial femoral artery to the posterior tibial artery.
Q All right, and if I'll get you to review Plaintiff's Exhibit 3 ---
A Sure.
Q --- and is this the exhibit that represents the bypass graft procedure?
A This represents the bypass graft procedure.
Q Okay, if you'll come over here again.
A Sure. So a bypass graft is like a bypass around the city. You go -- you take a -- the graft material which is like a bypass around the city, connect it to the normal artery above the problem and then connect it again to the normal artery below the problem, and so our goal at that time was to take the vein out of his same leg -- veins have one-way valves that only allow the blood to go back toward the heart, so you have to reverse the vein. So we took the lower end of the vein and put it up to the groin so the blood would be able to go down, and so the one-way valves would be oriented to allow the blood flow to go, so it's a reversed saphenous graft, and then we connected -- we dissected out the artery above the aneurysm and then we

dissected the posterior tibial artery down below the aneurysm and then -- so this graft end from above the aneurysm to below the aneurysm and tied off the aneurysm so that clots wouldn't come out of the aneurysm anymore.

Q All right. And you were working on the posterior tibial artery, the one good artery he had left ---

A Correct.

Q --- in the lower leg?

A Right.

Q Okay. Those two other arteries in the lower leg, what's their condition today?

A They're occluded today. They -- once these arteries are occluded under the circumstance they don't open up, which is why -- another reason that we would like to have gotten the anterior tibial artery open. It's -- you know, one artery will carry all the blood that you really have to have, but if something happens to that artery some time, you know, over the next years, then the leg would be in trouble again, so ideally, you'd like to have two arteries open, but he does not.

Q All right. And when you say the other two arteries are occluded, you mean blocked.

A Blocked.

Q There's no blood flow through them.

A Correct.

Q All right. All right, Dr. Holleman, one other question before you get back in the chair. I'll show you what's been marked as -- actually Dr. Holleman ---

THE COURT - One second. He has one more question.

Q One more question.

A Oh, I'm sorry.

Q One more question. This diagram is what, shows what?

A This diagram again shows the femoral artery. This is a different form of access. This is what we call antegrade access. That's going from the same side but aiming it down rather than coming from the opposite and aiming it up. So antegraded access. This is the popliteal aneurysm; this is the -- these are the run-off vessels, anterior tibial, peroneal, both tibial arteries. This is the -- another -- again, a diagram of a popliteal aneurysm. This is ---

Q Step back just a little bit so all the jurors can see you. I'm sorry.

A Sure. Sorry about that. So this shows -- actually -- ever so slight imperfection here. This doesn't really show the wire going through this graft. Normally this wire should be well below the graft; a wire should be coming through this device well below the graft and it's to insure that it doesn't harm the artery by bouncing around, but this is what we call a stint graft or a endograft. It is a

GORE-TEX graft that's wrapped very tightly, stuffed into a very small catheter, but it also has attached to it a frame of a metal called nitinol. Nitinol is a very interesting alloy that at room temperature it's very soft, but at body temperature it becomes very firm, so -- but it -- and it's also very springy. You can just take it and just -- it -- you know, you can bend it a thousand times and it doesn't break, and so it's very durable, very springy, and it maintains its regular strength. If you crunch it, it springs back. So this GORE-TEX graft is fused to this nitinol stint and it's packed into a sheath; it's, you know, probably smaller than a typical pencil, and it can be passed down through the artery, in this situation through the aneurysm, and then it can be released so it expands to its natural size. And if you've sized it properly, it will exclude the aneurysm and restore flow to the leg below.

Q All right, and is this is a less -- this grafting stint placement as shown in Plaintiff's Exhibit 4, is this a less invasive procedure than the bypass graft procedure that you actually had to do on Phil?

A It is.

Q All right. But this -- this procedure was not done on Phil. Right?

A That's correct.

Q He had the more invasive one.

A Correct.
Q Okay. And, Dr. Holleman, what is your opinion on whether it was a -- the best idea was to do this procedure for Phil or the open bypass graft procedure, at that point where he was on -- May 25th, 2011.
A Yes, I -- our point -- that, you know, he was in -- we felt like he was in otherwise reasonably good health, in spite of being a smoker -- as far as we were aware he did not have significant heart disease, he did not have significant lung disease, didn't have other debilitating factors -- we expected him to be around for a long time. So our goal was to provide him safely with the most durable procedure that we could. Our experience -- and I think the experience of most other -- in the vascular surgeons -- is that while these endografts work quite well most of the time in the short-term, there simply is not a 20 or 30-year history in -- our thinking is for somebody who's in otherwise good health, this is a better, smarter, more durable choice.
Q The bypass graft procedure.
A To do the bypass graft.
Q All right, but either one could be done and surgeons may have different ideas, but they're both appropriate medical care.

A They're both reasonable choices, and I think either would be within the standard of care for vascular surgery. Part of the decision comes down to a conversation with the patient.

Q All right. Thank you, Dr. Holleman. You can return to the stand. All right, Dr. Holleman, I understand you're not offering opinions here today about whether or not Dr. Bibeau did anything wrong or did anything right. You're not really testifying at all about the standard of care for -- that Dr. Bibeau was required to meet as an emergency room physician.

A That's correct.

Q Okay. But do you still have some opinions about the vascular condition of Phil's leg as the records have shown you and as the material you reviewed as shown you about from April 10th, 2011 coming into the future?

A I do.

Q All right. Tell us what you believe -- well, let me ask you this first. In your opinion, on April 10th, 2011, at the time he was discharged from the ER there at Fairfield Hospital, was Phil Ethier medically stable?

A Yes.

Q All right. Was his limb or his lower leg in any immediate threat or serious injury to the leg at that point?

A Probably not an immediate threat to the whole leg.
Q All right. Was it something that had to be addressed in the near future, that needed to be addressed soon?
A Well, he had a -- I mean it's like he had a ticking time-bomb, and nobody -- it would be impossible at that time to know what soon was. I mean it's possible - the -- looking back at the events, most likely event that occurred is on April the 10th he threw a clot from the aneurysm to his leg further down.
Q Okay. Yes, that's what I want you to explain for the jury.
A Right.
Q What is your opinion on what happened to Phil's leg on April 10th, 2011 going forward until you met him on May 25th, 2011?
A From reviewing the records it seemed that -- there's little question that he experienced pain with the onset of this episode. There seems to be little question that there was some form of bluish discoloration on a part of his foot or part of his leg. Little question that his pain was of sudden onset; there's little question that later he developed -- did have that popliteal aneurysm, he developed these other episodes of acute ischemia, so ---
Q Did -- did he have the popliteal aneurysm on April 10th, 2011?

A He certainly would've had a popliteal aneurysm on April 11th. (sic)
Q All right. And -- go ahead.
A And I think the most likely thing -- you know, and based on what we know and what we know about the natural history of these various events is he almost certainly threw some -- a clot of some sort, or a thrombus or embolus. Embolus is any kind of particle moving in a blood vessel that moves downstream. Clot, of course, would be involving clotted blood, but in my mind there's little question that on April 10th or 11th that he threw a clot from this popliteal aneurysm, it went distally into that right leg.
Q Distally meaning?
A Somewhere beyond the aneurysm.
Q Okay.
A I think from what has happened subsequently and I think from the records, it's not entire -- one of two things almost certainly happened. In my view, the most likely thing that happened is that this clot, like these clots typically do, is not one episode but when it happens, it's kind of like a burst of large clots and smaller clots, so I think the most likely thing that happened is that a small clot lodged in the arteries to his toes, larger clot was stuck in the anterior tibial artery.

Q Okay. All right. And then it became more acute as of May 25th, 2011.

A Actually the cloud circulation from his posterior tibial artery took over, and I think between April the 10th and May 25th his foot was not really critically ischemic. There was some -- apparently I think from Mr. Ethier's deposition he had a -- the tip of one toe became black and sloughed off I think, so the likelihood is that there was some kind of an acute vascular injury to the tip of that toe, which as that toe healed, that skin turned black and fell off. I think that -- that supports the idea that embolus went to his toe; where an embolus just strictly stopping at the anterior tibial artery would not cause that because the circulation from the other artery would take over and help provide perfusion of the foot.

Q Is that why from the period of April 10th, 2011 and a couple of weeks after that when it seemed to get better to Phil and things seemed to gradually improve, is that what was going on, is that the collateral arteries were helping carry the flow?

A Right. The collateral arteries opened up, and the fact is any one of the three arteries can carry all the blood the foot needs, and so once the collaterals open up, then the acute injury or the symptoms of the acute injury improve. We -- you know, that's something that we -- a

phenomenon that we regularly see, and then for -- you know, if there had been no further emboli, his foot would've been just fine, but that was not what happened. What happened was he did have another embolic episode and his foot and leg was not just fine.

Q Okay. Do you believe that there was a missed opportunity for Phil to get care on a non-emergency basis?

A I think that the signs and symptoms of an acute arterial problem existed on April the 10th, and had anyone chosen to do a very simple diagnostic test and an ultrasound, then the ultrasound would've demonstrated that popliteal aneurysm and he would certainly have gotten elective repair of that popliteal aneurysm which would've averted all these subsequent complications.

Q Okay. All right. Dr. Holleman, let's talk about the complications for just a couple of minutes. Would Phil, if he had been accurately and timely diagnosed back on April 10th, 2011 and referred to a vascular surgeon or sent for an ultrasound or a CT angiogram, would he have had to have the two clot-busting procedures that you described for us a few minutes ago?

A He would not have.

Q Okay. And why not? Why would he not have to have that?

A Well, he was not acute ischemic at that time.

Q Okay. And ischemic means blocked. Right? Reduced blood flow.

A Ischemic means an inadequate -- it means inadequate blood supply to the point that there's being -- that damage is being done to the tissue.

Q Okay. Would he have had to following the surgery had the compartment syndrome and the fasciotomy that went with that?

A He would not have.

Q Okay. And would -- and why not? Why wouldn't he have to have the compartment syndrome? Why would that -- that not have occurred?

A He would not have had any of the things that cause compartment syndromes. Compartment syndrome is a condition in which the pressure in the muscle is increased, and muscle -- muscles don't just sit in the body loosely. Muscles are all swashed around by something called fascio. Fascio is a -- very much the same thing as the grizzle on a steak.

Q Okay.

A And so it's a very dense firm connective tissue which really does not expand, so when something causes the muscle to swell and the surrounding fascial compartment can't enlarge, then the pressure goes up in the muscle to the point that the muscle -- and the blood supply to the muscle

then becomes compromised, and then the muscle, you know, responds to this as it would for any other circumstance without an adequate blood supply, but the pressure from the muscle -- the three thing -- the three basic causes of compartment syndrome: one is fracture, which he didn't have; one can be a blockage to a vein, and so the blood going out of the compartment is blocked and the pressure goes up and the artery continues to flow, the vein does not; the third condition, which is what Mr. Ethier had was following -- it's called reperfusion following ischemia. So what happens, when tissue has an inadequate blood supply or has ischemia as -- forgive me if I keep lapsing into, you know, jargon, but -- because it's a term that I -- that accurately reflects what's happening, but the tissue has prolonged ischemia or inadequate blood supply, then that causes damage to the tissue, may not be enough damage to kill the tissue, but it can cause damage to the tissue, and the tissue responds to most injuries by swelling. I mean if you burn your hand, then it'll swell. If you twist your ankle, it'll swell. If you have an ischemic injury to a blood vessel and then blood is restored, then that injury will cause that blood vessel to -- that muscle to swell. Well, in the compartments of the leg, there's a limit as to how much it can swell. That -- and so once it gets beyond that limit, then you've got the compartment syndrome, and

if you don't relieve the pressure, then the muscle will die.

Q Okay. And that's when you do what you call the fasciotomy?

A That is correct.

Q Okay. And is this -- Plaintiff's Exhibit 13, does this show where you opened his leg for the fasciotomy to relieve the pressure?

A That shows where we opened the leg to relieve the pressure, and, this, of course, is several weeks later and there's been some healing, but that's basically -- that's the best shot of it anyway.

Q Would the leg have been even larger than it is shown in this picture earlier on?

A Oh, it's hard to get a respective on that picture. The muscle would certainly been swollen, whether it is larger than that, it'd be hard for me to say.

Q Did his leg swell up to like what seemed like enormous size?

A His leg would be -- would've been swollen to much larger size.

Q Okay. All right. All right, and Dr. Holleman, again, if he'd been timely diagnosed and referred as needed, that wouldn't have happened to him.

A That's correct.

Q All right, and it's -- you believe that to a reasonable degree of medical certainty.
A I do.
Q And are all the opinions on the questions I'm asking you here today stated to a reasonable degree of medical certainty?
A Yes, they are.
Q Okay. And that it's more probable than not that all these complications we're talking about would not have occurred if he'd been timely diagnosed.
A Right.
Q Okay. All right, would he have the -- as long of a hospital stay -- would he have had to stay in the hospital seven days if he'd had those non-emergency surgeries?
A Possibly yes, possibly no. You know, three to seven days is not unusual hospitalization for this kind of surgery, depending on how things go.
Q Okay. All right. What about the seven-month-long recovery period? Would his recovery have been as difficult or as long if he'd had the surgery on a non-emergency basis?
A No. The likelihood is within four to six weeks he would've been essentially normal.
Q All right. And what about the permanent damage to the nerves and muscles in his leg that resulted from a

compartment syndrome? Would he have suffered from those or had that complication, those complications, if he'd been timely diagnosed back on April 10th, 2011?

A He would not have had he sought attention and, you know, somebody arranged to have this elective popliteal aneurysm repair.

Q Okay. So if he'd been -- if he'd been diagnosed in the ER on April 10th, 2011 and properly referred somewhere, that wouldn't have happened to him.

A Correct.

Q Okay. All right, would -- Dr. Holleman, would he have the permanent foot drop that he still has today if he'd been timely diagnosed on April 10th, 2011 and referred to a vascular guy or ordered for diagnostic tests?

A No.

Q No, he would not have that ---

A No, he would not have that.

Q Okay. Would he have the permanent and chronic foot pain and leg pain that he still has today if he'd been timely diagnosed and referred to a vascular surgeon or for further diagnostic testing on April 10th, 2011?

A He would not have.

Q Dr. Holleman, what is your opinion on future care that Phil may need as far as his -- the condition of his leg and foot with regard to the vascular issues?

A I think that -- that his graft should be eval -- a durable graft -- I think that he -- you know, anyone with a bypass graft it would be in his best interest to have an ultrasound once a year or every other year now to -- for that -- for that probably from now on.

Q Okay. Do you believe that the graft is likely to last his lifetime, or is there a chance that it may fail at some point?

A The likelihood is that this graft -- I'm sorry -- with a -- excuse me -- the likelihood is that this graft will last him a lifetime.

Q Okay. Do you have any estimate on the percentage chance that it might fail based on studies and your knowledge of these things?

A I would think that he would probably have a -- a -- maybe a 70 to 80 percent chance of having a patent graft without any kind of intervention. If he has an intervention maybe a 50/50 chance of preserving the graft for the rest of his life, so probably a 10 or 15 percent chance of the graft failing.

Q Okay.

A About a 10 or 15 percent chance of the graft requiring intervention to keep it working.

Q Okay. So 10 or 15 percent chance that it might fail entirely ---

A Correct.
Q --- and a 10 or 15 percent chance that it might just need some work or some revision.
A Right.
Q Okay. One other complication, as you told us earlier, the two arteries -- two of the arteries in Phil's lower leg are still completely blocked.
A Correct.
Q All right. Would he have two completely blocked arteries in his lower leg if he'd been timely diagnosed and referred to a vascular consult or referred for further diagnostic test on April 10th, 2011?
A Chances are he -- it's quite possible he would still have those two arteries blocked. I mean it's not -- you know, if he had not -- I mean the likelihood is that by the time anybody got to those arteries, that procedure, that was going to a chronic clot, and that was not going to come out easily, so ---
Q Okay.
A --- I think at that point ---
Q He might still have that.
A He might still have those two arteries occluded.
Q Okay. All right. All right, doctor, have you -- once again, are all the -- all the opinions you've expressed

here today stated to a reasonable degree of medical certainty?

A They are.

MR. PROFFITT - Thank you, Dr. Holleman, I don't have anything further.

THE COURT - You may cross examine.

CROSS EXAMINATION

BY MR. HOLLER -

Q Dr. Holleman, good afternoon. I'm David Holler; I introduced myself earlier. A few questions for you. The -- the physician-patient relationship is a partnership. Would you agree with that?

A Yes.

Q That when you ask a -- when you ask a patient to do something, you expect them to do it.

A Based on -- I would like to think that they would do it. Based on what happens across the country, that frequently does not happen.

Q Okay. Well, there's an issue of patient compliance.

A Okay.

Q Okay. And there are things that get in the way of compliance. Understanding. Right?

A Sure.

Q So there's an educational component when you deal with your patients, when any physician deals with their

THE COURT - All right, the record will reflect that the jury has returned to the courtroom. Juror Shikierra Harrison, if you'll raise your hand, please.

(WHEREUPON, JUROR COMPLIES)

THE COURT - You are now a member of the regular jury. You're no longer an alternate. This morning when Mr. Usher appeared, he had been up all evening sick and having problems, so I did not allow him to come in the jury room you; I didn't want that spread among the rest of the jury, so now you have been made a part of the regular jury. You understand that?

JUROR - Yes.

THE COURT - All right, thank you, ma'am. All right, I trust everyone had a good evening. If anyone had any difficulty in complying with my instructions over night, I'd ask that you please raise your hand or stand.

(NO REPSONSE)

THE COURT - It appears that all jurors have been able to comply with my instructions thus far. Yesterday afternoon when we stopped we were receiving evidence from the plaintiff; we'll continue to do that at this time. The plaintiff may proceed.

MR. PROFFITT - Thank you, Your Honor. The plaintiff calls Phil Ethier.

THE COURT - Come forward, sir, to be sworn.

PHILIP ETHIER, AFTER BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS -

THE COURT - Have a seat, please, sir. Once seated, state your name, please.

MR. ETHIER - My name is Philip Ethier.

THE COURT - Thank you. Counsel, your witness.

MR. PROFFITT - Thank you.

THE COURT - Yes, sir.

DIRECT EXAMINATION

BY MR. PROFFITT -

Q Good morning, Phil. How are you doing?

A Good morning. Nervous.

Q That's okay. All right, Phil, if you would, I just want you to introduce yourself to the jury by telling them where you grew up and where you were raised?

A I'm 56 years old. I was born in Massachusetts. We moved to North Carolina, actually, I believe it was 1997, somewhere around there. We stayed there -- it was actually earlier than that. We were there for 13 years, and we've been in South Carolina for about four years.

Q Okay. All right, tell us a little bit about your education. Where'd you go to high school?

A Went to high school at Blackstone Regional High School; I dropped out in ---

Q Where was that?

A That's in Blackstone, Massachusetts.
Q Okay. Go ahead.
A I dropped out -- I wanted to be a pitcher. I was an athletic-type person, so I made the varsity baseball team, I believe, when I was in the eighth grade, but in the 9th grade I broke my wrist, my right wrist -- I was a pitcher -- so that pretty much ended my baseball career, so -- we come from a pretty poor family, so I dropped out of school and went to work ---
Q All right.
A --- in tenth grade.
Q Tenth grade. Okay. Did you eventually go back and get your high school diploma?
A Yes, I did. I went back and got my GED.
Q When did you do that?
A I can't say the exact date, um ---
Q When you were still in your teens or about 20 or ---
A No, it was my 20s, early 20s, mid 20s.
Q All right, what were you doing for work during that period in your late teen years, early 20s?
A I was a foreman at a plastic factory. They made like saran wrap. We actually sold to saran wrap through actually that company, but, you know, they would put whatever company's name on it that bought it from the company.

Q All right. And about how long did you work there?
A I worked there between 11 and 12 years.
Q All right. And what -- what did you do next, as far as your work career?
A I got offered a job actually with the pastor of my church to go work for a company called Catifac. We made prototype machinery and I was an electrical technician, I wire-up the machinery. Pretty much -- it was experimental machinery. The company would ask us to build a machine that would do a certain thing, ---
Q Okay.
A --- and the engineers would design the machine and we'd build it from scratch.
Q All right. And was it about 1990 when you got into nursing, when you started going to LPN school?
A Yes, it was.
Q And about how old were you then?
A Oh, I believe I was probably about 29, about -- maybe even in the early 30s.
Q Okay. All right. And where'd you go to LPN school?
A I went to LPN school at Amherst Valley Vocational Technical High School.
Q All right. And what is an LPN?
A An LPN is a licensed practical nurse.
Q How long did you go to school for that?

A I went to school for that for one year.
Q All right. And after you got out, did you get a job as an LPN somewhere?
A Yes, I did.
Q Where'd you work up there in Massachusetts at first?
A My first four to five years I worked in the nursing home.
Q In Massachusetts?
A In Massachusetts.
Q Okay. And then did you move down to North Carolina?
A Then we moved down to North Carolina.
Q Okay. Who are you married to?
A I'm married to my wife, Jeanne Ethier sitting over there.
Q Okay. How long have you guys been married?
A Twenty-eight years four days ago.
Q Okay. All right. What does Jeanne do?
A Jeanne is an RN.
Q A registered nurse?
A Yes, she is.
Q And what kind of nurse is she?
A She's a psychiatric nurse.
Q And where does she work?
A She works at Piedmont -- I believe it's Piedmont Hospital in Rock Hill.

Q Okay. All right.
A In the psychiatric unit.
Q Now, once you moved to North Carolina and were working as an LPN, what kind of LPN jobs did you have?
A I believe my first LPN job in North Carolina I worked at a nursing home for four to five years.
Q Okay. And what did you do at the nursing home? What were your general duties?
A I was a floor nurse, so I would do patient dressings, give them shots if they needed shots, write notes on them. That was probably the biggest job, because working as an LPN is writing notes.
Q Okay.
A I do rounds with the CNAs. That's when I do my assessments. I would -- it was easier for me to work right along-side the CNA and help them change the patients because then I could actually look at them, so I -- that's the way that I worked. Not all nurses do it that way, but that's the way that I worked.
Q Okay. And did you work in some other places in North Carolina, some other types of facilities?
A Yes, I did take a little break from nursing for a while, and I worked construction for a couple of years.
Q Okay. And then what?

A Then I realized it was too hot and it didn't pay enough money to be working outside in the heat, so I went back into nursing.
Q Okay. And what kind of places did you work then?
A I believe after that there I went to ---
Q Or just the types of places. You don't have to remember the names.
A Okay, it was nursing homes, doctor's offices, that type of -- and I worked in an urgent care and they pretty much were closing up, so I left there and ---
Q Okay.
A --- I went to work for a private doctor.
Q Okay, so the urgent care was like one of these doctor's care places?
A Yes. Yes, people who went there for colds, or if they couldn't -- they -- it was actually company called ECIM which was East Carolina Internal Medicine. It was a big facility. They have a lot of doctors that work there, so they have a lot of patients, so if a patient couldn't get in to see a doctor, what they would do is they would come to the urgent care.
Q Okay. All right, and you moved to South Carolina in about 2010?
A Yes, sir.
Q And where in South Carolina do you live? What city?

A I live in Chester, South Carolina.
Q Okay.
A Oh, I actually worked at Port Human Services also after the ECIM?
Q Okay, and what's Port Human Services?
A Port Human Services is a non-profit organization. They pretty much take care of the people that who are in need, people who don't have insurance, people with drug issues, ---
Q Okay, and that was ---
A -- I ran a methadone clinic couple days of week, dispensed methadone and ---
Q That was an LPN job?
A That was LPN job.
Q All right. Now, when you moved to South Carolina, did you continue to work as an LPN?
A Yes, I did.
Q Okay. And what was your first job in South Carolina, what type of job?
A My first job in South Carolina was working for a Home Health as an LPN.
Q All right. And did you eventually take a job with Fairfield Memorial Hospital?
A Yes, I did.

Q Okay. And do you remember, approximately, when you started working as an LPN there?
A I'm a little nervous and confused. I cannot -- on the exact there I'm not sure.
Q Okay. Was it about March, 2011, late March, 2011?
A That sounds right.
Q Okay. All right. And where were you going to work there in the hospital?
A In the emergency room.
Q Okay. Was that the first time you'd ever worked in any kind of ER setting?
A Yes, it was.
Q All right. So what's the date of the incident that we're -- that we've talked about all week so far?
A April 10th, 2011.
Q All right. And so how long had you been there at the hospital? Were you still doing orientation?
A I believe I was still on orientation, yes.
Q Okay. All right, and do you know what you were making per hour at the hospital?
A I believe it was $16.50 an hour.
Q Okay. All right. Now, Phil have you worked your entire life?
A I've always worked. I started working when I was probably nine years old working at a zoo. My friend's

father owned a zoo, and I worked at a zoo from nine til I was probably 15 or 14. I worked at a restaurant as a short-order cook for a period.

Q Have you ever been without a job since you were like 15, 16 years old?

A Maybe for a month or so -- with - so -- maybe even three months -- I was out on workmen's comp, I believe, when I got hit by a patient, but besides that I always worked.

Q All right. Now, Phil, tell us a little bit about your health before all these things happened to you in April, 2011. How was your health?

A I believe I was in great health. I was very, very athletic, gym four or days a week, jogger, hiker, played - loved playing softball, I played softball on a church softball team. Me and my wife used to hike all the time, fishing, boating, camping, volleyball. I mean it was just -- it's the way that we lived.

Q Okay. Did you ever have any chronic leg pain?

A No, I did not.

Q Did you ever have any chronic pain of any kind?

A Not -- well, no.

Q All right. Were you able to do pretty much anything you wanted to do as far as activities or work-related things?

A No, I was say just about anything I wanted to do.
Q Okay. All right, now did you -- I think you said you worked construction for a couple of years at some point.
A Yes, sir.
Q Do you remember falling in a ditch in about the year 2000?
A Actually we were working in the ditch putting in piping for the drainage system and the -- they're supposed to put in a steel cage around you to protect you and they were in a rush, so they didn't do that and part of the ditch collapsed in on me.
Q Okay. And were you injured by that?
A I did hurt my -- I -- my foot got sucked in -- where they actually hit my foot with a shovel -- when they were pulling me out and my boot stayed in the dirt and I did have some leg spasms and some back pain.
Q Okay. And did you receive some treatment for that?
A I went to the emergency room, and they -- they pretty much just sent me home, then they actually called me back and said don't go to work until you see another doctor, because there might be something there.
Q All right, so did you receive some medical treatment and heal up?
A Yes, I did. When I went back to the other doctor he said there was nothing and he sent me back to work.

Q All right. And so you just had some back strain that went away?
A Yes, and some sciatica they -- a nerve in the back and the leg.
Q And that was in the year 2000?
A In the year 2000, yes.
Q Okay. And after that healed up, did you have any more back pain or leg pain or anything like that ---
A No, I did not.
Q --- until all this happened?
A No, I did not.
Q All right, Phil, do you have high blood pressure?
A Yes, I do.
Q Okay. And have you had that for a number of years?
A On and off.
Q And have you monitored that yourself at times and ---
A I monitor it all the time myself.
Q Take your own blood pressure?
A Yes, I do.
Q Okay. All right, Phil, tell us a little bit -- and you mentioned some of this -- but tell us a little bit about your hobbies and recreational activities that you would do before all this happened, before you were -- before April, 2011.

A Like I said, I would jog, go to the gym, play volleyball, swim. I've got a swimming pool, which I really can't get in anymore. I've gone in it probably twice over the last ---

Q Yes.

A --- four years.

Q Okay. Did you do carpentry jobs around the house?

A Oh, yes, I've actually -- I built a -- I believe it's a 10 by 30 deck, built a deck on the back of my house; I put in a sliding glass door on my house. I put hardwood floors in my house. I built a -- I believe it's like a 40 by 10 deck on the front of the house, ---

Q Okay.

A --- and I built that alone. I don't -- I like working alone. It's the way I am.

COURT REPORTER - I'd ask that he speak into the mic.

Q Yes. Phil, speak into the mic so the court reporter can hear you well. All right, do you -- were you able to do things around the house like mowing the yard, washing the car?

A I love to work out in the yard. I was always working in the yard; I always had a garden. I built a 13 by 27 greenhouse. I was actually starting to grow palm trees. Once I found our palm trees would grow around here, I did

studying and learned how to grow them, and actually me and my wife used to live in Myrtle Beach would steal some of the seeds off the palm trees once in a while.

Q All right. Did you chop your own firewood?

A Yes. I cut my own firewood and chopped my own firewood.

Q All right.

A We have a fireplace and we -- to supplement the heating in the house.

Q Yes, okay. All right, did you raise dogs at some point?

A Yes, we used to have a -- a small dog business, a Yorkie business, actually small -- we raised them and we lived around Camp Lejeune in North Carolina, so they pretty much went as fast as we could get them.

Q What kind of dogs were they?

A Mainly Yorkies, little tiny Yorkies. We did the teacup ones, the little two, three, four-pounders. A lot of the marines would buy dogs for their wives or their girlfriends before they went overseas.

Q Yes.

A So we pretty much even had a waiting list. We had a very, very good name, so -- that we had no problem selling dogs.

Q Okay. All right, Phil, were you the kind of dog that often helped others, as far as ---

A Oh, I'd be the first one out there.

Q --- odd jobs and things your brother-in-law might need around the house or whatever?

A Oh, yes, I would -- I absolutely just loved -- that's my thing. I just -- I was the type of person who would start at 6:00 o'clock in the morning and end at 9:00 o'clock at night.

Q Always on the go?

A Always on the go.

Q Okay. Before all this happened.

A Before all this happened.

Q All right. Phil, let's talk about -- let's move to the date of this incident, this visit to the ER ---

A Yes, sir.

Q --- on April 10th, 2011. I want you to tell the jury where you had been that morning and what -- what you were doing that day?

A Me and my wife had gone -- we went to church ---

Q Where do you go church?

A We were going to Chester Second Baptist Church in Chester.

Q Okay.

A We had gotten home from church, and they were actually having a cookout next door. My sister lives next door, my older sister and my brother-in-law, and we were going to have a cookout that day and had company coming over, so I went -- I told them instead going right over there after church I was going to go take care of my dogs, and so when I got home, I changed up my church clothes and I was going out to the back to get dog food to feed my dogs, and I felt a very sharp pain in my leg.

Q All right. Okay, Phil, I'll show you on the screen here what's been marked as Plaintiff's Exhibit 36. What's that a picture of?

A That's actually a picture of me standing on my back deck taking a picture of pointing to the pathway that leads right in front of the dog pins.

Q Okay, so this is sort of where you were walking that Sunday morning?

A Yeah.

Q Okay. And you're standing on the deck taking that picture out into your yard?

A Yes, I was.

Q Okay. And is this another picture? What is this?

A It's pretty much the same picture, but I'm not standing on the deck at that time.

Q Okay. And that -- that I just showed you was Plaintiff's Exhibit 37. Let me show you Plaintiff's Exhibit 38. What's that a picture of?
A That's me standing on my back porch taking a picture of my shed and part of my back yard.
Q Okay. All right, and what's this a picture of, Plaintiff's Exhibit 39?
A Pretty much the same thing, the dog path where we -- where I went. If you see it, there was a palm tree there on the left, that right outside the palm tree there's a straight path probably about three, four feet wide, and that's where my dog pins line up.
Q Okay. All right, so you're walking out to the shed around or to the dog pin area to feed your dogs, and what happened, you felt a sharp pain? Tell me what happened.
A I just -- just out of nowhere I just -- my leg was just screaming out in pain, one of the worst pains I've ever felt in my life.
Q Did you look at your leg?
A I looked and my leg and it was a purplish color; I felt it; it was cold.
Q Okay.
A I was -- it was cramping.
Q What did you do?

A I had no idea what was going on. I -- I started rubbing it at that time and then I went back into the house.
Q Okay. What'd you do there?
A I -- first thing I did is I took a couple aspirin that were sitting right there.
Q Okay.
A Started massaging my leg. I don't know if I had filled up the tub or not at that time, but I kept massaging my leg and it was cold, very, very cold, so I was filling up the tub with hot water, you know, I wanted to soak my leg, and I found some Tylenol -- I'm not sure if it was before or after I had soaked it. I soaked it like and kept massaging it trying to make it feel better.
Q Okay.
A It did start feeling a little bit better.
Q Okay.
A And that's pretty much what went on, let the medicine kick in, see if it would help, see if it would go away.
Q And about what time was that? Right after church or so, 1:00 o'clock or so?
A It was between 1:00 and 1:30. I can't exactly what time it was. It -- that's just giving it a rough guess. It -- you know, takes 15 minutes, 20 minutes to get home from church, and by the time I changed up and got outside -

- I'm not exactly sure what time church got over so -- and all this time I've had -- they're an estimate, but, you know, they're fairly close.

Q Okay. All right. And when did you go to the ER? About what time did you go to the ER?

A I believe I went to the ER about 3:00 o'clock.

Q Okay. And what ER did you go to?

A I went to Fairfield Memorial ER.

Q Did anyone go with you?

A Yes, I had my wife drive me, wasn't able to drive.

Q All right. And what happened when you walked in the door to the ER? Who did you see?

A When I walked in the door in the ER, the first thing I did was approach the window and told them I needed to be seen. They told me to sign and have a seat.

Q Okay. What did you tell the lady there at the front area?

A At that point nothing, because she just told me to sign in and have a seat.

Q Okay. Did you tell her anything about leg pain?

A I did a few minutes later. After probably four or five minutes she pulled us into a little side room, myself and my wife, and she started asking me questions why I was there. I told her I was there because I had right leg pain.

Q Hang on. You talking about the CNA that took you back into triage?
A No, I'm talking about the admission lady.
Q Oh, okay. All right.
A She took a picture of my license, started to ask where I lived, got all my information, just -- she pretty much admitted to the emergency room.
Q What was your leg looking like at that point?
A It was still purplish; it was cold; it was still hurting.
Q It was the leg and the foot or just the leg?
A It was the leg and the foot. And that's why I told her when I checked in that my leg was killing me.
Q Which leg?
A My right lower leg.
Q All right. What happened next after you talked to the lady up front and she does all the paperwork, then what happened?
A Then she told me to go have a seat. Because I work there I know what happens, is that she pushes a little buzzer and ---
Q Well, now you're talking about what you knew later.
A Okay. All right.
Q Let's don't go there for now. Let's -- stick to what you're doing that day.

A Okay. I went and I had a seat in the waiting room until the triage person came back and got me.
Q Okay. Now, did you know the triage person at the time?
A No, I did not.
Q Did you subsequently learn who she was during the course of this lawsuit?
A Yes, I did.
Q Okay, what's her name?
A Her name is Samantha Anthony.
Q All right, so -- but you'd never met her before that?
A No, I had not.
Q Didn't know her.
A No.
Q Did you really know anyone at the hospital?
A That day that I went in I did not recognize anyone.
Q How many days had you been there for orientation so far? Do you remember?
A It was April 10th. I believe I started there on March 31st, so I probably worked there -- actually worked with people, because it was some classroom teaching, maybe four days, five days.
Q Okay. All right, so you didn't really know anybody in the ER.
A No. I did not.

Q And, of course, you'd never met Dr. Bibeau ---
A No, I did not.
Q --- at that point. All right, so you -- what happened? You're taken back to triage by Ms. Anthony. Correct?
A That's correct.
Q Tell me what happened in triage?
A She took my vital signs, asked me why I was there, asked me what my pain level was. I told her it was about -- it was extreme pain, and it was probably about seven or an eight. She asked to take a look at my leg, asked me if I had any allergies, what medications I was on, if I had any medical history, which I told her I did have -- I had a skin cancer on my nose, and I told her I had hypertension, a risky hypertension.
Q Right. Did you um -- did Ms. Anthony look at the foot and leg?
A Yes, she asked me to take off my shoe and sock and to pull up my pants leg so that she could take a look at it.
Q All right. Did she touch you? Did she do anything touching you?
A She did lift up my foot and I believe she took my pedal pulses. That's what I remember.
Q All right. So she took your foot pulses?

A I believe were only taking one pulse. The only one I remember her taking was the pedal pulses, the one on the top.
Q Okay. But you don't deny that she may have taken both of them?
A No, I don't deny that she may have taken both.
Q And did she take the two foot pulses on the right foot?
A Yes, she did.
Q Okay. Did she ever take any foot pulses on the left foot?
A No, she did not.
Q Did she ever take any pulses anywhere else, behind the knee on either leg?
A No, she did not.
Q Did she take any pulses up near your hip or groin area?
A No, she did not.
Q Okay. All right. Did you -- did you have a primary care physician at that point?
A I had been to Blue Granite a couple of weeks prior to that.
Q And what for?
A The hospital actually sent me down there for a pre-exam before I got hired, because my blood pressure was

high. They sent me down there to get some medications for blood pressure and to -- so that when they finished the exam up my blood pressure would be okay to a point where they could me.

Q Stay near the mic. Mr. Ethier, I'll show you what's -- or Phil, I'll show you what's been marked as Plaintiff's Exhibit 22, a page from that exhibit. You see where I'm pointing down here where it says family doctor?

A Yes, I do.

Q What does that say?

A That says Blue Granite.

Q All right. And is that the page that -- does this say it's a triage record?

A Yes, it is.

Q What's your understanding of what Blue Granite is?

A Blue Granite is -- from what I understand, the hospital put Blue Granite there, and I believe the hospital owns Blue Granite. Blue Granite is kind of an overflow for people who don't have money or insurance so they won't take up the time at the emergency room; they'll send them to Blue Granite, and that's run by a nurse practitioner.

Q Okay. To your knowledge, was there any doctor available at Blue Granite?

A No, a doctor did not work at Blue Granite.

Q Okay. If you needed to see a doctor you came to the hospital or Blue Granite, where'd you go?
A If you would have to see the doctor, you have to go to the emergency room.
Q Okay. Phil, did -- during triage, were you ever examined by anyone other than Samantha Anthony?
A Examined? Dr. Bibeau examined me quickly.
Q During triage, when that initial ---
A During triage, no one. Samantha Anthony was the only person with me besides my wife.
Q Okay. Did Jerilyn Wadford, a registered nurse at the hospital, ever examine you during triage?
A She did not.
Q Did Jerilyn Wadford ever take any foot pulses on you on either foot or leg?
A No, she did not.
Q Did a nurse named Rhonda Gwynne ever take any foot pulses on you?
A No, she did not.
Q Did she take a foot pulse or any kind of pulse on the right leg?
A No, she did not.
Q Did she take a -- did Rhonda Gwynne ever take a foot pulse of any kind on the left leg?
A No, she did not.

Q Did Rhonda Gwynne ever come into triage or do anything during triage while you were there to you?
A No, she did not.
Q Okay. And who were the only people that were involved in the process of triage there at the hospital on that afternoon with you?
A Samantha Anthony.
Q And who else was in the room?
A My wife.
Q All right. Okay, did you ever tell Samantha Anthony that you had been bitten by a spider?
A No, I did not.
Q Did you ever tell Dr. Bibeau that?
A No, I did not.
Q Did you ever tell nurse Rhonda Gwynne or nurse Jerilyn Wadford that you'd been bitten by a spider?
A I hadn't seen Ms. Wadford that day, but no I did not.
Q Okay. Did you ever see any kind of spider bite mark on your leg?
A No, I did not.
Q Okay. All right, so after your triage by Ms. Anthony, then what happened?
A Ms. Anthony had me walk across the hall to what they call exam room number 2. It's got a stretcher and a curtain that goes across, and she had me set on the

stretcher and told me she was going to get the doctor. She actually put me on a blood pressure monitor, because she was concerned about the blood pressure because it was high, and I do get situation when my high blood pressure -- I'm sure my blood pressure is high right now; I'm nervous.

Q Okay. All right. All right, so she takes you the exam room where Dr. Bibeau's going to see you or a doctor is going to see you.

A That's correct.

Q Okay. And who walked in?

A Dr. Bibeau walked in.

Q And did you know him at the time?

A No, I did not.

Q Okay. And what did Dr. Bibeau say or do? What happened?

A Dr. Bibeau introduced himself as being a doctor. Asked me what happened, you know, what had happened. I pretty much told the same thing I said earlier, I was in the backyard and my leg turned cold and pain was incredible, absolutely -- I've had pain worse one time and that's when I had a kidney stone, but besides that's it's -- it was ranking pretty close to that.

Q Okay. All right, did you tell the doctor what color your leg had been?

A Yes, I told him that it was ecchymotic or a purplish color from the knee down to the toes. The toes were definitely a lot darker than -- that's where -- it was pretty -- really dark purple.
Q Okay. All right. Now, and what did Dr. Bibeau do?
A Dr. Bibeau looked at it in a -- gave me the impression that he had seen that a thousand times.
Q Why do you say that?
A Well, he just looked at it -- didn't -- there was nothing -- he just looked at it and he put his hand on the front of my leg and then the side and said something, well, that it was, you know, definitely it felt cool. He said you probably got a spider bite, I'm going to give you some prednisone, explained what the prednisone was for.
Q Which is what? What is prednisone?
A It's a steroid; it's going to help relieve inflammation, swelling, discoloration, that he was going to give me some Percocet.
Q What is Percocet?
A Percocet is a narcotic pain medicine -- and said, you know, uh -- that I'll -- I'm going to give you a couple of prescriptions to take home with you, you know, take the medicine as directed and, you know, give it a little bit of time, it should be better.

Q Okay. Where do you recall Dr. Bibeau touching you on the leg or foot?
A I believe he touched me on the side of the calf and right on the front shin.
Q Okay. Do you recall Dr. Bibeau taking your foot pulses?
A He never touched my -- never took my pulses at all.
Q So is the only person that ever took your foot pulses on the right foot that day in the ER Samantha Anthony?
A That was correct.
Q Did Dr. Bibeau take the foot pulses on your left foot?
A No, he never looked at my left foot.
Q Did he take any kind of popliteal pulse behind the knee on either leg?
A No, he did not.
Q Did he do any kind of femoral pulse on either leg up in the groin or hip area?
A No, he did not. I actually still had my pants on, so they never even had put me in a gown.
Q Okay. So did you just pull your pant leg up?
A I just pulled my pants leg up.
Q Were you wearing long pants or did you have on shorts?
A I had long pants on.
Q Okay. All right. Okay. Up until that point when Dr. Bibeau walks in and says it looks like it's probably spider

bite, had anybody in that ER ever said the word spider bite?

A Not that I can recall, no.

Q Did you ever tell Dr. Bibeau that you thought you'd been bitten by a spider?

A No, I did not.

Q Did you ever tell anybody in the ER you'd ever been bitten by a spider?

A No, I did not.

Q Did you ever call the ER ahead of time and tell them you thought you'd been bitten by something and you're coming in?

A No, I did not.

Q Now, how long do you think Dr. Bibeau's exam lasted when he's in the room with you examining you or talking to you?

A It was under five minutes.

Q Okay, so was it a very brief time?

A Oh, it was a very brief time. He did more time writing than he did talking or examining.

Q Okay. Did he do anything else other than what you've told us? He sort of comes in, says hi, you give him some descriptions, he touches your leg on the side and the front; anything else that he did to examine you?

A Not pretty much besides telling me it was going to take a little bit of time, what medication he was going to give me, asked me if I had any allergies to any medication, and like I said, he looked at it and he seemed like he look -- seen the same thing a thousand times, so it actually made me feel better. I felt pretty good. It was like, okay, God -- thank God it's only a spider bite, so I was actually very happy that he gave me that diagnosis.

Q All right. Did you believe Dr. Bibeau when he said that?

A Oh, I believe and trusted him a hundred percent.

Q Okay. Phil, do you believe and trust doctors all the time?

A Up to that point I did.

Q Okay. Is that what you did as an LPN for years since your early 30s?

A I always had to trust doctors.

Q All right. At that point, Phil, had you ever heard of a thing called an aneurysm in the popliteal artery?

A No, I had not.

Q Did you know what the popliteal artery was?

A I did not.

Q Did you know that you were having some kind of vascular event or a blood vessel problem? Did you have any suspicion of that?

A No, I've never seen one. No, I never have.
Q Never known anybody that something like that happened to before?
A No, I do not.
Q Okay. And what did Bibeau tell you again, that -- as far as what to do?
A Once again, he asked me if I had any allergies to medication, to take the medication and give it a little bit of time and make sure I follow-up with my blood pressure, because it was high.
Q Okay. All right. And what happened next?
A He walked out of the room.
Q Okay. And then what happened?
A I don't know much longer -- a few minutes later one of the -- an LPN came in and gave me prednisone and Percocet.
Q Is that that the nurse you later learned to be Rhonda Gwynne?
A That's correct.
Q Did you know her at the time?
A I -- I think I may have seen her in passing once. I don't really remember her. When I walked in that day I didn't recognize anybody.
Q Okay. All right, and did Ms. Gwynne discharge you?
A Yes, she did.

Q All right. And what did she do during the discharge? What did she do or say?
A The discharge took about 30 seconds. She walked in; she said doc wants you to follow-up, make sure you get that blood pressure checked because -- I mean because it's high and sign here, please. And we did that -- she gave me a clipboard and I signed it as we were walking out of the door.
Q Okay. Did you -- what did you understand her to say as far as following up with a doctor? What were you supposed to follow-up about?
A My blood pressure.
Q All right. Did you believe that you were supposed to follow-up with regard to a spider bite?
A No.
Q Did she ever tell you that?
A No.
Q Did Dr. Bibeau ever tell you, specifically, to follow-up with your family doctor about a spider bite?
A No, they never even did a treatment for a spider bite. They did nothing, didn't even look for one.
Q So after -- after he's looked at you and decided it's a spider bite, you just sort of walk out the door 10 minutes later?
A Yes, about that.

Q Okay. After he said it was a spider bite, did any of the nurses come back in and do any further examination to try to find some kind of bite mark?
A No, they did not.
Q Did any of the nurses come back in and do any kind of further treatment or analysis or anything to do -- to try to figure out if it's a spider bite?
A No, I never got as much as a band-aid or nothing.
Q Did you ever see Dr. Bibeau again after he talked with you the five minutes or so in the exam room?
A That day? No.
Q Okay. Not that day. All right, so what happened? You're discharged and what happened then?
A Then I went home and on the way home we stopped at CVS Pharmacy; it was almost 6:00 o'clock, so it was getting close to the time the pharmacy closing, so we -- this is a drive-up window, and I handed them the prescription and they weren't very happy with me.
Q Yes.
A I actually had two prescriptions to give them, and when I went to hand them one, I kind of got an attitude, so instead of handing them both of them, I just handed them one, and I believe that one there was for the Percocet and Hydrochlorothiazide or is a water pill which helps to bring the blood pressure down. I'm not sure exactly which one I

gave them, but I know it was for the Percocet because of the pain and they did fill it, and then the following morning I had the other prescription filled at Walmart.

Q Okay. All right, now -- I forgot to ask you this earlier, but why did you go to Fairfield Hospital when you lived in Chester? What made you do that?

A I believed that Fairfield Hospital was a very good hospital; I was working there; I was proud to be working there.

Q So you just went where you were going to be working.

A I went to where I was going to be working.

Q Okay. All right.

A Or where I actually was working.

Q Right. Okay, now, so you pick up your pain medications and you head for home. What happened next?

A I pretty much stayed in the recliner and lifted my leg up because it was throbbing. It hurt. The pain was pretty excruciating.

Q Had the pain gotten any less from the time you entered the ER until you left the ER?

A Oh, absolutely no, not. They had given me the pain medication and discharged me within like seven or eight minutes after giving me the medication.

Q Okay. All right, and what happened? You're in the recliner, you rested there. What happened next?

A I did the best I could to rest and sleep. It was a very, very, unrestful night. Leg was throbbing, hurt, kept it up. Color may have gotten a little bit better, because when I massaged it, it seemed like it got a little bit better; I mean it made it feel better.
Q Okay.
A It's like anything, if you bump yourself and you rub it, it does make it feel better. You can't feel bad and good at the same time, so that's why you rub it.
Q Okay.
A So I massaged it and it made it feel a little better and --
Q All right, did you ever call back to the ER any time that night after the ---
A Well, the following ---
Q --- after you had been there?
A I was seen I believe it was on -- whatever day it was that -- 12 -- about 12 hours later I called back the ER about 3:00 o'clock in the morning.
Q Okay. So that would've been like 3:00 a.m. the morning of the 11th of April?
A That's correct.
Q And who did you speak with?
A Well, actually a nurse. I don't -- I know -- so I can't say a nurse, because nurses and CNAs work there.

Someone answered the phone -- and a receptionist -- someone answered the phone and I told them that I was ---

Q What department were they in?

A It was the nursing department.

Q Did you call the ER number or did you call the main hospital number or what?

A I called the ER number.

Q Okay. All right, go ahead.

A I told them that I had been seen there earlier during the day and I got a diagnosis of a probable spider bite, I was still having a lot of pain and discoloration and asked them if I should come back in. They said, well, the doctor was sleeping at the time, he was going to be getting up at 4:00 o'clock to check on some lab results or whatever, so to call back then.

Q Okay. And what happened next?

A So I called back at 4:00 o'clock in the morning, and I believe it was Dr. Canty. I cannot say for a hundred percent sure. Again, I was new at the hospital. I'm almost positive it was Dr. Canty that I spoke with.

Q Was it Dr. Larry Canty?

A Dr. Larry Canty.

Q What was his position in the ER that you learned later?

A I later learned that he was the medical director.

Q Okay. And what happened in the phone call with Dr. Canty?
A Dr. Canty asked me kind of like what happened; I told him that I was seen there for a probable spi -- I got a diagnosis of a probable spider bite. I told him what medications that Dr. Bibeau had put me on, and he said, well, just follow Dr. Bibeau's instructions and give it time.
Q Okay. All right.
A I asked him if I should go back into the ER to be checked, and he said no.
Q Okay, so he just told you ---
A He said follow Dr. Bibeau's instructions.
Q And just give it some time.
A And give it time.
Q All right. All right, anything else happen that -- sort of immediately there on April 10th or 11th as far as contacting the hospital or anything like that?
A Nothing I recall, no.
Q Okay. All right, now, Phil, I want to turn your attention to sort of the period after April 10th, 2011 and talk about up until May 25th, 2011 when you had another acute episode. So tell the jury sort of what happened in those first few days with your leg and what was going on with it, in your leg and your foot?

A It was doing what Dr. Bibeau said it was going to do, it was starting to getting a little better. The color came back a little bit more each day. The pain got a little bit less each day. The tip of my toe had turned black, like it -- when they said the tip of the toe, I heard it described in this courtroom as being the whole toe. It was like a blood blister at the tip of my toe.

Q Okay, so just the very end of it.

A It was the very end. It was like having a blood blister on it, like you would get one on your finger or anywhere else. That's -- and that's why I said the tip -- that's why I said the tip of my toe like turned black.

Q Okay. All right. Did you go to any other doctors outside the hospital or the ER?

A No, I did not.

Q Okay. Didn't follow-up with any other doctors.

A No, I did not.

Q Okay. And why did you not follow-up with another doctor outside the hospital?

A Because I worked at the hospital and I seen doctors almost every day.

Q Okay. What doctors do you recall seeing there in the hospital in those first couple of weeks or so after April 10th, 2011.

A Dr. Bibeau again, where I had pulled up my -- I actually -- and again when I heard it discussed earlier they say it's a hallway conversation, this is not a hallway conversation. Any conversation I had with a doctor was actually done behind the nurses' station or in the nurses' station behind glass where patients could not hear. We would have downtime where there would not be any patients in there. Usually if my foot was hurting, I would pull my shoe off and I would rub my leg and I would rub my foot, and Dr. Bibeau was sitting there one time and looked -- and I pulled down my sock and showed him my foot and my leg and said, you know, it's still hurting and, you know, my toe's a little black, and he said, well, is it getting better, and I said yes, he said, well, okay, well, good, let's give a little more time and you should be all set.

Q All right. And that was Dr. Bibeau that you had that conversation with?

A Yes. I also had a conversation very similar to that with Dr. Canty.

Q All right. All right, Phil, I'm going to hand you what's been marked as Plaintiff's Exhibit 42. What is this document?

A This is a little scrapbook that I actually just kind of kept for myself. If I was to hand it to the jury, you probably wouldn't be able to read it, because it's written

same thing, but it wasn't interesting like his, so I just like of like ---

Q Okay.

A --- was -- didn't mean a whole lot.

Q Okay, so um -- so, Phil, during that period from April 10th, 2011 to May 25th, 2011, did the leg or did the leg not continue to improve?

A Oh, it improved to just about to the point where it was actually a hundred percent better.

Q All right, and during that time, what did you believe about Dr. Bibeau's diagnosis?

A I believe Dr. Bibeau was a hundred percent right. I believed what he told me. I did what he asked me to do, as well as taking medication, steroids and the pain medications ---

Q Okay.

A --- and I believe and trusted him. I worked with doctors in the ER and I believed in my job, and I believed in people that I worked with.

Q All right. Now, you mentioned and you told us about the encounter with Dr. Bibeau after-the-fact, and your notes show it was approximately when that you showed Dr. Bibeau and Dr. Canty the black -- the tip of the black toe?

A End of April, somewhere middle Ap -- end of April.

Q All right. Okay. Did you talk with any other doctors besides Dr. Canty or Dr. Bibeau in the ER during this period?
A Yes, I did.
Q And who were those doctors?
A That was Dr. Keith and it would be a Dr. Suess.
Q All right. And tell us what happened with Dr. Keith? How did that come about?
A It was pretty much the same thing. We were behind the nurses' station; we were having some downtown. I worked the 7:00 at night til 3:00 o'clock in the morning shift, so, you know, there was times that -- certain times of the night it was -- really wasn't busy, so we would be just kind of sitting around and talking, whatever, and I would have my shoe off and rubbing my leg and I let him know what happened, told him, and I got pretty much the response, is it getting better, yes, well, good, just keep doing it, it takes time.
Q All right. Did Dr. Keith -- is that the one you're talking about now?
A That was Dr. Keith, yes.
Q Yes. Did Dr. Keith actually examine you any way formally?

A No. I think I -- I believe I lifted my pants leg up, maybe dropped by sock down a little, but he didn't see my black toe or anything really, nothing like that, no.
Q Did you have the same kind of encounter with Dr. Suess?
A Yes.
Q And did Dr. Suess examine you formally or anything like that?
A No, he did not, just kind of looked over at me and ---
Q Did you ever register as a patient again at the ER to get seen formally?
A No, I did not.
Q Did you think that was necessary?
A No, I did not.
Q All right. Now, Phil, are you -- you're not saying that Dr. Canty or Dr. Keith or Dr. Suess were your treating doctors, are you?
A No, I am not.
Q Who was your treating doctor on April 10th?
A Dr. Bibeau.
Q Okay. Did you still consider him to be your treating doctor after he had discharged you from the ER?
A Yes, because Dr. Ke -- Canty actually told me to do what Dr. Keith has -- I mean what Bibeau -- he told me to

do -- take the medications like Dr. Bibeau had told me to do and give it time like Dr. Bibeau said.

Q Yeah. But you admit you never went back in and did paperwork again and formally registered as a patient at the ER?

A No, I did not.

Q All right, and did Dr. Bibeau ever suggest that at any point when you were talking to him in that second conversation, that you go in and register as a ---

A No, he did not.

Q --- patient. All right. Did you obtain any refills of the pain medication, the Percocet medication that they gave you that first time?

A No, I did not.

Q So it's just the one prescription.

A Yes, sir.

Q All right, so ---

A I also -- I'm sorry.

Q Did -- did you work at regular schedule after April 10th, 2011?

A I may have missed a couple of days, but yes, I did work a regular schedule.

Q All right, and I'll hand you what's been marked -- well, let me just show it to you -- what's been marked

Plaintiff's Exhibit 35. What is this document? Can you see it?

A Yes, sir.

Q What is that document showing us?

A It seems to be my pay-stub history from the hospital.

Q All right. And does this show where I'm pointing where you're getting paychecks for 4/8/11? See that?

A Yes, sir.

Q And you see where it's got a paycheck for 4/22/11?

A Yes, sir.

Q And a paycheck for 5/5/11?

A Yes, sir.

Q Paycheck for 5/20/11?

A Yes, sir.

Q And then we've got a paycheck for -- what is that? Is that 6/3/11?

A 6/3/11, (indicating yes).

Q Okay. And then what's the next date you got a paycheck after that?

A 12/15.

Q Of what year?

A Of 2011.

Q All right. All right, so, Phil, let's turn to May 25th, 2011.

A Yes, sir.

A Last note -- (witness mumbling)

COURT REPORTER - He needs to speak in the mic.

A From what I see it's ---

Q Phil, try to turn a little bit ---

MR. SMITH - Judge, I can't hear a word. I'm sorry.

THE COURT - You're going to have to ---

A I -- I -- I believe ---

THE COURT - --- turn more toward the microphone.

A I believe the last date I have written in here is 7/18/11.

Q Okay. So July 18th, 2011.

A Yes, sir.

Q And all those notes in that period were when you're sort of sitting around in the recliner recovering?

A That's correct.

Q All right, Phil, let's go back to May 25th, 2011. Tell us again what was going on, what happened that day.

A Like I said, I don't remember exactly what the day was like. It was just a -- one of my regular days, and it was either very late at night or early in the morning; I really don't know what time it was. It could've been 11:30 at night; it could've been 1:00 o'clock in morning. I really don't know what time it was. It was just late. I -- again, I worked the 7:00 at 9:00 o'clock (sic) -- 7:00 at

night until 3:00 a.m. shift at the hospital. That was my regular shift, so for me to be up at 1:00, 2:00, 3:00 o'clock in the morning is average, and my wife also was sleeping when I would come in most nights, so I wouldn't go into the bedroom to wake her up, so I was watching TV with my legs up on the recliner and the exact same symptoms came back again.

Q Okay. Now, at that point before those symptoms came back again, what'd your leg look like?

A My leg was normal.

Q So it was pretty much -- the color was pretty much back to normal.

A It was pretty much back to normal.

Q But you're still having some cramps and stuff if you walked a lot.

A If I walked a lot I had some cramps.

Q Okay. All right. So you feel the pain in your leg late at night. What -- what next?

A As soon as I felt it I got scared. I mean I thought I was going to die. I think the first thing I did was pray.

Q Okay.

A Second thing I did is I got up and I took a Percocet that I had leftover, ---

Q Okay.

A --- because I did not want to -- I couldn't even think about facing that pain again.
Q Okay.
A It was -- it was just so overwhelming to even think about going through that pain again.
Q Was it the same kind of pain you had earlier?
A Yes, it was. It was identical.
Q All right. And what did your leg look like when you looked at it then?
A It was turning purplish and cold.
Q Okay. And did you believe at that point that it was a spider bite?
A At that point I knew that it was not a spider bite.
Q Okay. So you knew that was no longer the spider bite problem.
A That's correct.
Q Okay. All right, what happened next?
A I did a lot of praying, made a couple of phone calls, I believe, just to try to find out where I -- where I should go, you know, ---
Q Okay. Right.
A --- and then I waited for the Percocet to wear off to a point to where I could drive, because, you know, it did affect me, made me pretty dizzy, and so as soon as it wore

off to a point where I knew I could drive, I woke my wife up and told her I was going back to the emergency room.
Q All right. And so where'd you go that time to the emergency room?
A That time I went to Chester -- Chester Memorial Hospital.
Q And do you remember about what time it was you might've gotten to Chester Hospital?
A I don't remember exactly what time it was. I know I had to stop a few times, because I was having really bad pains in my legs and bad cramps, so I had stopped a few times a few minutes each time. When I got there, I definitely said a good long prayer before I went in ---
Q Okay.
A --- and then I went into the emergency room and signed in.
Q Okay. And what happened next?
A Again, I signed in, filled out the paperwork, they he had me wait in waiting room until I get called back by a triage nurse.
Q All right. And what happened next?
A She came in and took my vitals, took a look at my leg and left the room kind of quickly and got the doctor.
Q Okay. And what happened next?

A Doctor came in; she looked at my leg; she felt behind my knee; she said ---

MR. SMITH - Objection to the hearsay, Judge.

THE COURT - I'm going to instruct the witness not to quote what people may have said in treatment unless the lawyer specifically thinks there's exception to the hearsay.

MR. ETHIER - Yes, sir. I'm sorry.

Q All right. Yes. Just tell us what happened next, but don't really say exactly what the doctor told you.

A The nurse, like I said, did the vital signs, a quick history, seen what my leg looked like and she had put a -- had me put a johnny on before she actually even came into the triage.

Q The dress -- the gown or whatever?

A A gown so you could actually see both legs this time.

Q All right.

A And she -- when she seen what was going on, she left and got the doctor.

Q Okay. All right, did -- what was your understanding of what was -- your problem was there at the ER?

A At that time I had no idea.

Q Okay. After the doctor comes in and talks with you, what's your understanding of what's going on with your leg?

A Well, she did an exam on me and she said that I had a popliteal ---

MR. SMITH - Objection to the hearsay ---

Q Don't say what she said, just ---

THE COURT - Again, I will caution the witness ---

A Okay. I -- she felt behind my ---

Q Wait, wait ---

THE COURT - Sir, just wait a second. Sir, just one second.

MR. ETHIER - I'm sorry.

THE COURT - Please don't quote what they said. You understand what I'm saying?

MR. ETHIER - Yes, I'm sorry. I just ---

THE COURT - All right. Thank you. You may proceed.

Q What's your understanding of what was wrong -- what your problem was?

A That I had a popliteal aneurysm.

Q All right. Some kind of blockage in your leg?

A A blockage of an artery.

Q All right. And what happened next?

A I was -- how can I say this, um ---

Q Before you -- before you go there -- let me -- strike that question. Let me ask you this. What did you tell the

doctor when you were talking to her there in the ER at Chester?

A I told her that the same thing that had happened before and they said it was a spider bite.

Q Okay. And what ---

A Or a probable spider bite.

Q Okay. And what did you tell her about the way the leg had looked in the hours before you came to the ER as far as its description?

A Cold, purple, painful, painful (sic), numbness.

Q Okay. Is that the same thing that you had reported on April 10th, 2011 to Dr. Bibeau?

A Yes, sir, it is.

Q Okay. All right. So, okay, once that they had -- you identified some kind of arterial blockage there at the ER, what happened next? What'd they do for you?

A They had called the surgeon of the hospital and asked if he would take me to be a patient ---

Q Okay.

A --- and I was denied.

Q Okay. And what next?

A So I -- they called around until they found a surgeon that would take me.

Q Okay, do you know what kind of vascular -- what kind of surgeon they were looking for?

A A vascular surgeon.
Q All right. And where were you eventually transferred?
A The Charlotte main hospital in Charlotte, North Carolina.
Q How did you go there?
A By ambulance.
Q On the road.
A On the road.
Q Did -- and who was the doctor that began treating you there at Charlotte?
A I don't -- Charlotte was Dr. Jeremiah Holleman, the doctor -- yes, Mr. Holleman, Dr. Holleman.
Q Okay. All right. Okay, now, tell us what happened when you get up to Charlotte. You're at the hospital. Did you go in the ER?
A At that point I believe I was transported to the ER. I had -- I had been given quite a few different medications.
Q Okay. What medications were you given?
A I know that they started a Heparin drip on me.
Q What is Heparin?
A Heparin is a anticoagulant. Stops ---
Q Is that the blood thinner?
A It's a blood thinner. It doesn't let the blood -- it doesn't let the blood coagulate.

Q Okay.
A I was given Demorral.
Q What is Demorral?
A Demorral is a narcotic pain medication. I was given Morphine.
Q Okay. All right. Do you know about what time you got to hospital up there in Charlotte?
A Between 9:00 and 10:00 I'm going to guess.
Q All right. All right, so what happened in Charlotte as far as getting admitted? Were you admitted into the hospital?
A I was admitted. Like I said, that was very, very blurry. I was under a lot of medication, so I -- it was pretty blurry.
Q All right. Now, Dr. Holleman was here yesterday and he walked us in detail through all the surgeries that were done on you. Tell us, Phil, what you remember about the procedures that were done.
A Well, I remember the first one was quite -- I'm sorry -- it was quite uncomfortable because they had to cut me in the groin, in the left groin, and that one did not exactly tickle.
Q Is that when they did the CT angiogram?
A Yes. They stuck needles in the groin and then they cut me open and ran a wire ---

Q All right.
A --- in me.
Q Okay. All right. And what do you remember about the other procedures?
A I remember them doing it again the following morning --
Q Okay.
A --- the same -- well, they didn't cut that time. They had a -- they left a port so that they could reuse it.
Q Okay.
A They had -- they also told me -- Dr. Holleman -- I'm sorry; I can't say that. I was told I was going to be given -- I was asked to sign a form to give them permission to do a TPA on me.
Q Okay. And what is your understanding of what a TPA is?
A TPA is a clot buster.
Q Okay. So is that when the doctors were trying to -- as they described to us yesterday -- trying to bust the clot with medication or with the wire?
A That's correct. It's a very, very dangerous medication, because it can kill you as fast as it can heal you.
Q Okay. All right. Now, do you remember anything about the open femoral bypass graft procedure that was done?

A Well, I was scheduled to have -- Dr. -- I had a discussion and I was asked which procedure I wanted to have done.

Q So you had some discussions with Dr. Holleman?

A Yes, I did.

Q Okay. And, ultimately, was the open procedure done, the femoral ---

A It was required to be done at that point.

Q All right. Did they actually move your surgery up a little bit?

A Yes, I was scheduled to have surgery at 11:00 o'clock that morning, and they came in -- a doctor came in -- I'm not sure which one it was -- it was one of the surgeons -- came in to explain to me what was going to be going on that day and what to expect, and he looked at my foot and he said you're ---

MR. SMITH - Objection, Judge, to hearsay.

A He looked at my foot.

THE COURT - I'll caution you again, sir. You can't quote what's said.

MR. ETHIER - Yes, sir.

A He looked at my foot.

THE COURT - Thank you. You can say what's done, but you can't say what was said. Thank you.

MR. ETHIER - Thank you. I'm sorry.

MR. PROFFITT - Thank you, Your Honor.

Q Okay. Okay, do you remember anything about the -- after your first surgery with the open femoral bypass graft procedure, what happened to you?

A I had woken up in the recovery room and I was screaming.

Q And what ---

A I was in pain. I was in extreme pain.

Q And you -- did you tell the personnel that?

A Oh, I was -- actually the personnel came over to me and had told me to be quiet and told me ---

MR. SMITH - Objection.

Q Yeah, don't ---

A Oh, I'm sorry. I was approached by someone in the emergency and asked not to be yelling out ---

MR. SMITH - Objection. Judge, objection ---

THE COURT - Let's move on to a different question. Thank you.

MR. PROFFITT - Yeah, let's move on. All right, very good.

A I was yelling out in the emergency room.

Q Okay. All right, Phil, what was your time like there in the hospital for those -- was it seven days you were there?

A Seven days, yes.

Q And just tell the jury a little bit about what that was like in the hospital?
A They had me on a liquid diet, constipated because of all the narcotic medication. I don't think I had a bowel movement for like six days. I had a wound vac which is -- I believe you've seen a picture of it -- but it's actually also a box that is the actual vac itself, so you have to either carry it or strap it to you, and of course, I had all the staples and stitches in the leg, so I was pretty much in agony the whole time I was in the hospital.
Q Were you taking pain medication all throughout that time?
A I was on a Morphine pump.
Q Okay. Now, Phil, let's turn to the period of -- let's talk about the months from sort of June, 2011 when you got out of the hospital until December, 2011 when you went back to work. Okay?
A Yes, sir.
Q Tell me in those first few weeks and months what was your life like at the house? What did you do?
A I lived in the recliner. I couldn't -- I had a -- I had a walker that I would use to get up and use the bathroom, and my wife would buy frozen dinners so if I was home alone, I would pop a frozen dinner in the microwave and I pretty much lived in the recliner.

Q Okay.
A The first two weeks my mother did live with me to help me out.
Q Okay. All right, was Jeanne still going to work?
A Yes, she was.
Q Okay. Did she -- did she work more or less while you were trying to recover?
A She was working anything they would offer her to help money-wise.
Q Okay. All right. Were you able to go outside and walk around much or ---
A At that -- which point are you ---
Q Well, sort of early in the process.
A Early in the process, no, I was not.
Q Later on could you go outside on the porch?
A Yes, later on I could.
Q All right. What kind of pain or discomfort did you experience during those months? Describe that for us.
A It was horrid. It was terrible. It would -- the easiest way to explain it is if I was to take a tourniquet and put it on your knee area around your leg, tighten it as tight as I could tighten it, sit there for five minutes and then you tell me what it feels like.
Q Okay.
(WHEREUPON, WITNESS CRYING)

MR. PROFFITT - You want to take a break, Phil?

THE COURT - Why don't we just take a general break. I was going to do that at 11:00 o'clock anyway. Ladies and gentlemen of the jury, we're going to take a short break, allow you to step back to the jury room. I'm going to ask you as always not to discuss anything about the case during the break. You may retire to the jury room. Thank you very much.

(WHEREUPON, JURY EXITS THE COURTROOM.)

MR. ETHIER - Sorry, Your Honor.

MR. PROFFITT - It's all right.

THE COURT - We'll be in recess for about ten minutes. Thank you very much. Let me caution you sir, -- put this on the record -- we're in the middle of your testimony; you should not discuss your testimony with anyone during the break. You understand that?

MR. ETHIER - Yes, sir,

THE COURT - Thank you.

(WHEREUPON, RECESS TAKEN)

THE COURT - Ready to go forward?

MR. PROFFITT - Yes, sir.

THE COURT - Defense ready?

MR. SMITH - (No response)

THE COURT - Mr. Smith, you ready?

MR. SMITH - Oh, yes, sir. I'm sorry.

THE COURT - Okay. That's all right. Let's bring the jury in if they're ready.

(WHEREUPON, JURY ENTERS THE COURTROOM)

THE COURT - All right, the record will reflect that the jury has returned to the courtroom. You may proceed, Mr. Proffitt.

MR. PROFFITT - Thank you, Your Honor.

Q All right, Phil, when we left off we were talking about the time period of June, 2011 to December, 2011 before you went back to work.

A Yes, sir.

Q When did you begin experiencing the foot drop after your surgery?

A As soon as I knew I could walk again.

Q And describe for the jury what the foot drop was like at that time back in 2011.

A You just can't move your foot. It's just -- it's just there. There's no -- I can't move it side to side. I can push down; I cannot lift it back up. There's just no -- I just cannot lift up, ---

Q Okay.

A --- so it's just there and ---

Q All right. Did you receive some home health care during the months of the recovery there?

A Yes, I had a home health nurse come in and change my wound vac dressing an average of three nights a week.
Q Okay. And let me just use these photos. Phil, I show you what's been marked as Plaintiff's Exhibit 6. What is that photo?
A That's a photo of the incision that they made for the graft itself.
Q Okay. Do you have any idea when that was taken, approximately?
A That one there looks like it was taken in the hospital bed while I was still in the hospital.
Q I show you what's been marked as Plaintiff's Exhibit Number 5. What is that photo?
A That is another one. Looks like it was probably taken in the hospital bed, because evidently the staples and stitches are still in.
Q Okay. What about Plaintiff's Exhibit Number 6, oh, no, I'm sorry, number 10?
A That's just me sitting in the chair watching TV.
Q Okay, is this at home?
A That's at home. I had to wear that brace, because, again, my foot just drops, so ---
Q Okay. And what's the black and tube thing on your ---
A That black thing is a foam -- it's about an inch-thick and they cut it to the size of the wound, and what they do

is they put it over the wound, and then they take a sheet of plastic -- sticky plastic and they put it over that and then they -- there's a hose there, they cut a hole in it and they put the hose to it and that hose hooks up to the vacuum system and the vacuum system starts, it squeezes the foam down til it's just about flat, and it keeps a constant pressure on the wound, so it takes up any drainage, any blood, any infection that may come in.

Q Okay. All right, and Plaintiff's Exhibit Number 9, is that another shot of the same thing?

A Yes, that's probably -- I don't know exactly -- I believe that was actually taken in the hospital bed also, --

Q Okay.

A --- because I can see how big my leg was at the time. It was quite huge.

Q All right. What about this photo, Plaintiff's Exhibit Number 13?

A That one there was ---

Q Stay close to the mic.

A That one there was -- I believe I took that one myself, and that was after the wound vac had come off. I was doing a wet and dry dressing. I think I was doing it myself daily.

Q Okay. And what about Plaintiff's Exhibit Number 5?

A That was in the middle of changing the wound vac. I used to take the -- the nurse would really, really hurt when she came in and took the wound vac off, because they would just come in and they would just rip it off to kind of debride it, so I actually got permission and a prescription from my family doctor to get lidocaine so I would shoot myself with the licodaine to numb myself up, and then I would take the dressing off, I would clean the dressing myself and clean the wound myself and get everything ready so when she would come in, she would just have to put the foam back on and the plastic on and start the wound vac up.

Q All right. All right, Plaintiff's Exhibit Number 12, who is this?

A That's me in not too good of a mood.

Q All right, are you sitting in your recliner?

A I'm sitting in my recliner.

Q Plaintiff's Exhibit Number 11, what is this?

A That was a picture of me when I was starting to heal up. I was probably -- I don't know how far into it. I was on the heal.

Q Okay. Does your leg -- it looks like the leg swelling has gone down some?

A The leg swelling has gone down some; the wound is closed up some.

Q All right. Plaintiff's Exhibit Number 15. What do we see here?
A That's the picture of the scar of -- that I have on my leg.
Q Is this several months later?
A At this point I cannot tell. I had my shoe on. It was definitely two or three weeks. It was -- actually because of the size of my leg I would have to say it was at least a month or two after.
Q Plaintiff's Exhibit Number 14.
A And that was prior -- just prior to them discontinuing the wound vac.
Q Okay, and then finally, Plaintiff's Exhibit Number 15.
A Again, that's pretty much -- I don't see the wound vac on, so they had probably just switched me over to a wet and dry dressing at that point.
Q Okay. All right, Phil, what was your -- your daily routine during that period of June to December, 2011? Just briefly describe a day in the life of Phil during that period?
A Setting -- live in that recliner, watch TV, read books, scribble notes, uh ---
Q Where would you sleep?
A I slept in the recliner. I could not sleep in the bed.

Q Why not?
A I tossed and turned all night; I would get cramps really bad, so I went in the recliner, at least I could get my leg up, and again, I was keeping my wife up all night, so that pretty much then become my bed.
Q Okay. All right, did -- this time period from June to December, 2011, did if affect your relationship with Jeanne?
A Oh, yes, it did.
Q And how so?
A To this day we have no sexual relations; we do not hike anymore; we don't play volleyball anymore; we don't go to the gym anymore; we don't ---
Q Okay. All right. Now, Phil, let's look at the time period from when you did return to work in December, 2011 up until March, 2013. Let's talk about those months, that 15-month period. When you returned to work, did you return to a normal schedule?
A I believe it was a normal schedule, yes.
Q Okay. Did you still have the foot drop?
A Yes, I did.
Q Okay. Were you having to wear a brace at that time or not?
A Yes, I still wear the brace.
Q No, back -- back then.

A Yes, I wore the brace.
Q And would you -- were you still on pain medication?
A Yes, I was. I was still taking narcotic pain medication.
Q Did your leg hurt, continue to hurt during that period when you were working at the hospital?
A Especially while I was at work, because I could not take the pain medication while I was at work.
Q Okay. So how would you do that? Tell the jury how you managed your main medication and your pain during those 15 months at the hospital.
A When I was working I didn't manage the pain. I just had the pain and I worked forward.
Q Why could you not take the pain medication while at work?
A You cannot work while under the influence of a narcotic pain medication.
Q All right. So when you would go to work, you just wouldn't take it.
A I just wouldn't take it.
Q All right. And would you take it when you came home?
A Oh, yes, I would definitely take it when I came home.
Q Okay. And did it help when you came home?
A Sometimes it did, depending on how bad of a day it was at work; sometimes I would take it and it would have little

to no effect. I'd get home and just crash, just -- I was done for the day.

Q Okay. Now, outside of work, what was your life like there at home? What were you -- were you doing anything at home?

A I tried. I tried to do as much as I possibly could. I tried exercising as much as I possibly could using rubber bands, tried the rubber bands on the leg and the foot trying to -- trying to prove the doctors wrong, that it would never go away.

Q Okay.

A I -- Dr. Holleman -- sorry -- I was doing a lot of exercising as much as I could to try to keep the leg healthy, because I was told that I only had one good artery and that I had to keep that artery healthy.

Q Okay. All right. And you continue to exercise even today?

A Oh, yes, I do.

Q All right. Phil, were you able to go out and do carpentry jobs in your yard during that period?

A No, I could not.

Q Okay. Did you work on your car or chop firewood during that period?

A No, I could not.

Q Okay. What was a typical day like? Say, the day you had to work, what was your -- how would your day go? Tell us your day.

A Depending on what shift I was working -- sometimes I did work the day shift, so if I got called in -- if I was working my regular shift I -- pretty much spend most of my time in the recliner. That's ---

Q Is that normal ---

A Take pain medication, because I would -- I was -- I pretty much would take it in the morning. That's when I had less pain was in the morning, but what -- as soon as it started getting bad and the foot drop started kicking in, I would take the pain medication and -- as long as it wasn't too close to work time -- and let it wear off and then go to work.

Q Okay. Which doctor was it that was prescribing your pain medication at that point?

A It was Dr. Johnson.

Q Okay. And he was your family physician ---

A My family physician.

Q --- at that point?

A Yes, sir.

Q Okay. Had Dr. Johnson been your family physician before all this happened?

A No, he was not.

Q All right. Did you have a family physician when all this happened in April, 2011?
A No, I did not.
Q All right, now, Phil, when you returned there to work at Fairfield Hospital, did you at some point bump into Dr. Bibeau again?
A Uh, yes, I did.
Q Okay. And tell us about your sort of first encounter when you saw Dr. Bibeau again in the ER. What happened?
A My first encounter with Dr. Bibeau in the ER, I had walked behind the nurses' station to where he was sitting and I had no idea what I was going to say or what I was going to do and how I was going to react. Dr. Bibeau turned around and looked at me and said, no wonder I couldn't figure out what was going on, or no, that's what's happened, no wonder I couldn't figure out what was -- I -- I'm sorry, I'm -- can I say that?
Q Tell us what Dr. Bibeau said.
A Dr. Bibeau said to me, so that's what happened; no wonder I couldn't figure it out.
Q And what did you say?
A I didn't say anything, my head spun; I thought I was going to pass out.
Q What did you do?
A I wanted to kill him for a second.

Q But you didn't.
A No, I walked out the back room and I called my wife and told her, you're not going to believe what Dr. Bibeau just said to me.
Q And what did you tell your wife?
A I told her he -- that what he said is, so that's what your problem was, no wonder I couldn't figure it out.
Q Okay. Were you angry at that point?
A I was angry; I was very, very upset, yes, extremely.
Q Did you ever have any further conversations with Dr. Bibeau at all about your situation?
A Not that I recall.
Q All right. Now, as time went on at Fairfield Hospital there from December, 2011 to March, 2013, were you able to continue working a full-time schedule?
A No, I had to cut back on my hours.
Q And why did you have to cut back?
A Because the pain was getting to a point where I could not handle it anymore, and it started getting to my head.
Q Okay. How much did you cut back?
A I believe I cut back to like 24 hours a week, maybe even less that, maybe 20.
Q All right. All right, and so how were you doing mentally and emotionally during that time?
A I was spiraling emotionally.

Q You'd have some good days and then some bad days?
A Some good days and some bad days, and, of course, it would all have to do with how busy it was at work. If it wasn't a really busy night at work and we get to sit down a lot more, it was a better day, it was a better night; I'd be able to go home, take the pain medication and it'd worker longer, I'd get fairly a good night sleep.
Q Okay. At some point did you decide that you just couldn't handle the job at Fairfield anymore?
A Yes.
Q And where did you go to work after Fairfield?
A I went to work for Gentiva Home Health.
Q And why did you do that?
A I knew it'd be a lot less time on my feet and probably a lot less demanding.
Q What did you do at Gentiva Home Health as an LPN?
A I went home to home. Seventy percent of home health is education when it comes to nursing, teaching diabetics about -- new diabetics about how to take their medication, what to look for, that type of thing. The other times mainly giving shots and dressing changes.
Q Okay. And when you first started there, how many visits a week were you doing?
A I signed a contract to do at least 35 visits a week.
Q Okay. Do you remember what you made per visit?

A I made twenty-five fifty per visit.
Q Twenty-five dollars and fifty cents per visit?
A Yes, sir.
Q Now, were you able to continue working that -- that 35 visit a week schedule or did you have to cut back?
A I had to cut back.
Q And why was that?
A Because again the pain. I could not handle the pain, and mentally I was declining quickly.
Q Okay. Were you able to take the pain medication when you went to work?
A No, I could not take it, because I could not drive while taking the narcotic pain medication.
Q Okay. Could you do your job while you're taking a narcotic pain medication?
A No, I cannot do my job while taking narcotic pain medication.
Q Was this a day shift job?
A This was a day shift job.
Q Now, so would you just -- how would you handle the pain medication and your pain management during this period when you're working for Gentiva for about a year?
A I just went to work in pain everyday, and when I got home, I would take my pain medication, pray that it would work.

Q Did it work sometimes?
A Sometimes it did; sometimes it didn't.
Q Sometimes it did; sometimes it didn't?
A Sometimes it was just the pain was just so out of control that the pain medication wasn't strong enough to handle the pain.
Q Okay. When -- on days like that were you able to get any sleep?
A I would try. Didn't get much but I would try. I'd do my best.
Q All right. Where were you sleeping at that point in that time period?
A I still sleep on the couch or the recliner. I don't -- I very rarely sleep in the bedroom.
Q All right. Were you using your leg brace for the foot drop?
A Sometimes I do; sometimes I don't.
Q No, I'm talking about from March, 2013 to March, 2014 when you're working for Gentiva. That's the period we're talking about.
A Oh, yes, yes.
Q Okay. All right. Now, Phil, what happened in sort of December, 2013 toward the end of that year? How were you doing mentally and emotionally by that point?

A At that point I became -- starting getting some suicidal ideations. I was wondering if it was worth living anymore.
Q Okay. And why was that? Why did you feel that way?
A Because I knew I was going to be in pain the rest of my life.
Q Okay. And were you still trying to work? You're still at Gentiva.
A I was still working, yes.
Q Okay. And -- but you cut back your schedule by then.
A Yes, I had cut back my schedule.
Q All right. And did you report your -- I mean were you depressed?
A Oh, I was very depressed; I was suicidal.
Q Okay. Were you -- did you report that depression to your doctors, to Dr. Johnson?
A I had reported depression to Dr. Johnson from day one. He had put me on Klonopin. I had been on Klonopin since the first visit with Dr. Johnson.
Q Okay. And what is Klonopin?
A Klonopin is an anti-psychotropic ---
Q Anti-depressant medication?
A Anti-depressant, tranquilizer-type medication.
Q Okay.
A And I was scheduled to take that twice a day.

Q Okay. All right. Now, do you remember a visit to Dr. Johnson in December, 2013 when it was sort of a bad visit?
A Yes, I do.
Q Tell us about that visit.
A I went to see him and I had a total breakdown in his office.
Q Okay, what do you mean by that?
A Pretty back what the jury was excused for, but I couldn't stop. I just -- I was going -- I wanted to kill myself; I didn't want to live anymore.
Q Okay. All right. And did you eventually speak with a doctor named Mark Harari?
A Yes, I -- actually realizing the position I was in and that Dr. Johnson didn't do a whole lot for me when it came to my medical issues -- my mental issues -- I'm sorry -- I did some research on the computer and I found a psychologist or a psychiatrist in Columbia.
Q Okay. And did you go see that psychologist in Columbia?
A Yes, I did.
Q All right. And what's your understanding of what that psychologist said about your mental health condition there at the end of 2013?
MR. SMITH - Object to the hearsay, Judge.

THE COURT - Don't think he can state as to what the doctor said.

MR. PROFFITT - No, I asked him what his understanding was of the diagnosis the doctor made of him, not what the ---

THE COURT - I'll allow him to state what his understanding of the diagnosis was.

A My understanding of the diagnosis is I was suffering from major depression.

Q All right. All right. All right, and did you continue to work for the next few months up until about March, 2014?

A Yes, I did.

Q Okay. And what happened in about March, 2014, as far as your mental healthcare? Who did you see?

A I was actually given a list of different doctors to call, and I had made phone calls and either I didn't get return calls or they refused to take me.

Q Are you talking about psychiatrists?

A Psychiatrists.

Q Okay. All right, and how did you come to see Dr. Tammy Chen?

A My wife actually worked with Dr. Tammy Chen before, and she was not accepting patients, but I called her up and

I let her know that my wife used to work with her, and so they let me go in to see her.

Q Okay. And what did -- what did you tell Dr. Chen about your mental health condition and how you were doing at that point and ---

A I told her I was having suicidal ideations, I was falling apart, and I needed help for -- I -- I just didn't care anymore.

Q Okay. Did you give her some background and some history about your whole situation and what had happened to you?

A I believe I did.

Q Okay. Did she ask you lots of questions about everything?

A Oh, yes.

Q Okay. And what did Dr. Chen do for you as far as medications? Did she help you with that?

A I don't remember exactly what it was she prescribed, because I actually had Dr. Nandurkar also prescribing me a medication for pain and nerves.

Q Okay. So Nandurkar, just so the jury's clear, is the doctor who was giving you your pain management and pain medication. Correct?

A That's correct.

Q And Dr. Chen is a psychiatrist who was prescribing medicine for your depression, for your anxiety. Correct?
A That's correct.
Q Okay. All right. Now, Phil, did you -- when did you stop working?
A I believe it was March 31st, somewhere around there.
Q Of what year?
A 2014.
Q All right. Phil, on your mental health issues, did Dr. Chen help you?
A Dr. Chen saved my life.
Q And why do you say that?
A Because I want to live now.
Q Okay. Did -- she helped you get on the right medications?
A Yes, because the doctors were not working with each other very well. I was -- actually at one point I had one doctor give me a medication, which is Gabapentin and another doctor giving me Zoloft, and the two of them do not mix and that can actually kill you, and I didn't even realize it and I was - started getting sick and then I was feeling well, and then I looked it up and so I had to stop it and so they had to change the medication around, because the doctors were not communicating with each other. What Dr. Chen did, is not only did she take care of me with my

medication mentally, but she also kind of coordinated all the doctors together, so they all worked together.

Q All right. Did Dr. Chen recommend that you stop working?

A Yes, she did.

Q Okay, and why did she recommend that? What's your understanding of that?

A Because the pain issue was never going to go away and the psychiatric issue was going to be a major problem. I had been -- was understanding I was going to have major depression for the rest of my life.

Q Okay. Did you want to quit working?

A Absolutely not.

Q As we sit here today, do you want to work?

A I would much rather be at work than be here right now.

Q All right. All right, before all this happened, Phil, how long did you plan to work? What age did you try to plan to work to?

A I was probably planning on working til I was about 70.

Q I'm going to hand you what's been marked as Plaintiff's Exhibit 42. What is this document? I'm sorry, Plaintiff's Exhibit 41.

A Those are a lot of the different doctor visits that I've had.

Q Okay. What's titled on this document here at the top?

A Medical Bills of Philip Ethier.
Q All right. So let's just sort of -- we're not going to go through every single item on this list, but I want you to point out for the jury -- you've go the hospital on here.
A Fairfield Memorial Hospital, right.
Q And you've got Bibeau and Chester Regional ---
THE COURT - You're going to be better if you move behind the microphone to talk so we can hear what you have to say.
MR. ETHIER - Okay, I'm sorry.
THE COURT - Thank you.
MR. ETHIER - Thank you.
Q And then you've got various care related to your hospital stay there at Charlotte Hospital?
A Yes, sir.
Q Okay, and then tell us again who Dr. Eric Johnson is?
A Dr. Eric Johnson was my primary care doctor.
Q All right. And if we look on the next page, who's Dr. Porter? What is Dr. Porter?
A Dr. Porter was my neurologist.
Q Okay. And Hanger Prosthetics. What's that about?
A That was about my brace.
Q Okay. And you've got some pharmacy bills?
A Yes, sir.

Q And Dr. Holleman, is that the doctor we heard from yesterday who did your surgery ---
A Yes, it is.
Q --- in Charlotte? Okay. And is Dr. Timothy Roush one of Dr. Holleman's associates?
A Yes, it is. He is; I'm sorry.
Q All right. Then you've got Dr. Nandurkar down here. Did you see him?
A Yes, sir.
Q And, again, who is that doctor?
A He is my pain management doctor.
Q Okay. And so this exhibit as we see here has dates and costs of the visits?
A Yes, sir.
Q All right. And if we flip over to the last page, we've got Dr. Harari? Is that the doctor you talked about a few minutes ago?
A Yes, sir.
Q Okay, and then we've got Dr. Tammy Chen?
A Yes, sir.
Q Okay. And Demetrius Blount, a counselor?
A Yes, sir.
Q Saw her a few times?
A Yes, sir.
Q Okay. And who's Dr. Taormina down at the bottom?

A That's the - that's the vascular surgeon I've been seeing for following up on my ultrasounds. I have another one scheduled for the 17th of April of this year.
Q The ultrasound of your leg?
A For me leg, yes.
Q All right. And what's the total we see here in the column there?
A That's a hundred and ninety-five thousand and one dollars and zero cents.
Q Okay. And have you had a chance to review all the bills that are attached to this exhibit?
A Yes, sir, I have.
Q Okay. Do those bills appear to be the bills that were sent to you or issued in your case by this various providers listed in this list?
A Yes. The only one that I didn't believe that we did miss was a Dr. Crawford who was my plastic surgeon.
Q Okay. All right. Well, so we're clear ---
A Yes.
Q --- did you have any plastic surgery?
A No, I did not, but he treated me for the wound.
Q Okay, so what was the purpose of possibly seeing Dr. Crawford back at that time right after the surgery?
A He believed that the wound would close up on its own - --

MR. SMITH - Objection ---

A --- without plastic surgery.

MR. SMITH - --- Objection what he believed ---

THE COURT - I will ---

A He ---

THE COURT - --- sustain the objection.

MR. PROFFITT - It's fine. We'll move on.

Q Okay. Phil, were all of these bills necessarily incurred in your case in the care you received?

A Yes.

Q All right, Phil, as we sit here today, what medications are you continuing to take now in this present time?

A Right now I take Percocet and the dose is 10 grains and 325 -- well, 10 325, the 10 would be the Oxycodone and the 325 would be the Tylenol mix.

Q Okay, how often do you take that?

A I take that three times a day.

Q All right. And what else?

A I take Valium.

Q How often do you take the Valium?

A I take the Valium -- it's as needed, but it's twice a day, 10 milligrams.

Q Okay. And what else? Anything else?

A I take Klonopin, one milligram twice a day.

Q Okay. Do you still take Prozac?
A I take Prozac 60 milligrams daily.
Q Okay. Anything else? Is that it?
A Lovastatin for the high blood pressure and hydrochlorothiazide.
Q Okay. All right. All right, Phil, I need to ask you just a couple of questions that I forgot to ask you earlier about this notebook. At the time you were deposed in July, 2013, had you found the notebook, or did you remember it?
A I didn't remember that it existed.
Q All right, and at that deposition, did you testify that you did not even believe you had any notes?
A Yes, I did.
MR. SMITH - Objection to the leading, Judge.
Q Well, tell us what you said at the deposition about whether or not you had any notes.
THE COURT - He's rephrasing the question. I'm going to ask him to do so. Thank you.
Q Tell us what you said at the deposition about whether or not you had any notes?
A I believe I said I didn't keep a calendar or notes of it, so I really can't be exact on the dates, or something to that effect.
Q And was that the truth at your deposition, as far as your memory was ---

A Yes, it was the truth.
Q As far as your memory was at that time.
MR. SMITH - Objection. Judge, objection to the bolstering. That's a jury determination to determine whether it's true.
THE COURT - I'll allow the question.
A Could you repeat the question, please?
Q At the time of your deposition, was that the truth to the best of your knowledge and memory about whether or not you had any notes?
A Yes, absolutely.
Q And did you later find these notes?
A Yes.
Q Okay. All right. Phil, I want you just to talk for just a few minutes about sort of what you are -- you know, what your life is currently. Let's start this way. What are we looking at here with Plaintiff's Exhibit 26?
A That's my leg if I was to show it to you right now.
Q So that's the current condition of your right leg?
A I believe I took that picture maybe a week ago.
Q Okay. And what about Plaintiff's Exhibit 27?
A I took the picture the same day.
Q All right, is that showing the other side of your leg?
A That's showing the other side of my leg.
Q Plaintiff's Exhibit 28.

A Same thing, the inside of my leg just another angle.
Q How about Plaintiff's Exhibit 29?
A That was just a close-up of it.
Q Okay. All right. I want to show you a few photos that you provided for us. What are we looking at here at Plaintiff's Exhibit 34?
A Just that -- the way that we -- some of the things that we used to do. That's me carrying my daughter on my shoulder. I'm not sure where it is, the bottom one anyway -- if that was Carowinds or -- that could've been Disney World, or it could've been Universal Studios. I really don't know. The top one ---
Q Is ---
A This was at Disney World, me and my wife I believe.
Q Okay. Is this several years ago?
A This is before the incident happened.
Q All right. So all of these photos we're looking at now are pre- ---
A Are prior to -- these two are anyway, yes.
Q Are all these photos we're looking at prior to April, 2011?
A I haven't seen the other ones yet, so ---
Q They are. All right, what about this photo? What about ---

A I believe it was one at Carowinds and another one at Disney World at a different time.
Q All right. What are we looking at here in this =- this page of the photos ---
A That's me catching a catfish on the top at a -- we used to like -- so we were always very big campers, so we actually owned one of those campers there, and we had a -- it was a year-round place and we went for six years, so I'd be out fishing or boating. I had a boat down there and ---
Q Where's there? Where you talking about?
A That was in North Carolina. That was a -- actually I forgot the name of the bay, but it was right next to Emerald Isle and ---
Q On the coast of North Carolina.
A Yes, and that was a catfish I had just caught, and the other one was a little baby shark that I don't know why I took a picture of it, because I'm not too proud of it.
Q Okay. Do you still like to fish?
A I love to fish.
Q Do you go fishing very much anymore?
A No.
Q Are you able to -- there's a -- I think in one of the earlier photos we saw a little lake behind your house?
A Yes, I have a lake behind my home.

Q Did you used to be able to go out on a boat in that lake?
A Yes, I used to have a 16-foot flat bottom and a 10-foot flat bottom.
Q Okay. Do you still have those boats?
A No, the 10-foot actually got stolen, and the 16-foot I sold after the incident?
Q Why'd you sell it?
A Because I couldn't -- I tried going out in it one time and I almost fell out of it, so I just sold it.
Q And so you don't go out on the lake anymore and fish on the boat?
A No, I do not.
Q All right, what is this photo we're looking at here from Plaintiff's Exhibit ---
A That's just me playing with a couple of the dogs up near the dog pins.
Q Okay. What about the bottom one?
A That's me and my wife. I'm not sure if that was at Cape Cod or -- that probably was at Cape Cod, because it looks like I had a patriots shirt on, so ---
Q Okay. All right. And what about these photos? What's this?
A That's my trucks with my kennels. It's a -- that's what was the name of my business that I had for my dogs,

and that's my daughter holding one of -- just one of the pups that we had. The top one is just one of the ones of when we were camping one time.

Q Okay. Did you used to do a lot of camping?

A Oh, yes.

Q Did you use to hike a lot?

A All the time.

Q Have you been camping since all this happened since you've recovered?

A I have been a couple of times to Lake Wateree.

Q Okay. Did you -- how long did you stay?

A One to two days.

Q Okay. Did you hike anywhere when you were there camping or ---

A No, we just had a pop-up. We'd pull in; we would just -- I'd sit from shore and fish off whatever camp it was.

Q Have you -- have you taken some -- a couple of vacations since all this happened?

A Yes, we have taken a couple of cruises.

Q Okay. Why do you take a cruise?

A Because it's no work to do, and I can take a pain pill whenever I want and lay down whenever I want. I don't have nothing to clean and I don't have any cooking to do. It's ---

Q Okay. All right, what's this photo here, Phil, the top one?
A The top one is just a picture of my house, partial picture of my house. It's decorated for Christmas.
Q Okay. Did you put all those decorations up?
A Yes, I did.
Q Do you still do that?
A No.
Q Why don't you do that anymore?
A I cannot climb on any ladders and I just don't care.
Q All right, what about the bottom photo? What's that?
A That's a picture of my wife, myself, my daughter in Florida with my mother playing miniature golf.
Q Okay. And what about that photo? What's that?
A That was just a picture when I lived in North Carolina. We had -- we had horses and goats and cows and chickens and ducks and rabbits and ---
Q All right. Do you still have any of those animals now?
A We have a few dogs and a cat.
Q Do you plan to get any cows or horses ---
A No, sir.
Q --- or chickens? Why not?
A I can't take care of them anymore.

Q All right, Phil, tell the jury whether or not you continue to have any chronic pain now.
A My pain is just as bad now as it was back then ---
Q If you don't take the pain medication?
A --- if I do not take the pain medication.
Q Does the pain medication always knock it down to where it doesn't hurt at all or does it ---
A Oh, no, doesn't always pain (sic), but it drops it down to probably around a two or three.
Q Okay, so you can live with it.
A I can live with it.
Q You're making it.
A Yes, sir.
Q Okay. What about the foot drop?
A I fall a lot.
Q Okay. Even today?
A Even today. I trip and fall all the time.
Q All right. Is it -- what is your understanding as to whether or not the foot drop is going to continue for the rest of your life?
A As far as I understand, it's going to continue the rest of my life; it's never going to get better.
Q Okay. What about the pain?
A The pain is going to be chronic. It's chronic pain; it's never going to get better.

Q All right, what about the leg brace? Do you still wear a leg brace?
A Yes, I do.
Q All right. Did you recently get a new one?
A Yes, I did.
Q Okay. Was it better or worse than the old one?
A Worse when I try to drive, because I can -- it covers the whole bottom of my foot, so I cannot bend my foot down at all, where the other one only covered half my foot, so if I was driving and my foot was to get up to step on the brake, I could pull it up and allow it to happen. Now if that happens with the one I have on now, I can't feel the top of my foot, so I can't feel that I'm stuck.
Q Yes, okay. All right. What about just walking with the new brace? Is it better or worse than the one you used to have?
A I think it's better than the one I used to have.
Q Okay. Is it -- are you -- is it your understanding you're going to need some kind of a leg brace like that the rest of your life?
A As far as I understand, I will need it for the rest of my life.
Q All right. Phil, how often do you drive?
A I try -- I try to get everything done at one time, so I probably drive about once a week.

Q All right. Now, do you still have depression?
A Yes, I do.
Q Do you still have anxiety disorder?
A Yes, I do.
Q Okay. And are you still taking pain medication that you described earlier for those conditions?
A I take ---
Q I mean, not pain medications, medications?
A Yes, I take Valium. I take Prozac and I take Klonopin.
Q Do you -- do you worry about the future?
A I'm always worried about the future. I have nightmares. I wake up wondering if my leg is still there. I have dreams, nightmares about the leg, wondering what my wife's going to do if I'm not around anymore.
Q Has this ---
A The side affects bother me a lot, because the medication makes me very nauseous; constipation is a non-stop issue. I know it's not a pretty thing to talk about, but narcotic pain medication makes the constipation terrible.
Q Do -- what is your understanding of the instructions that you've been given with the various medications you're on as far as whether or not you're supposed to drive?

A It tells me if it affects me at all I'm not supposed to drive.
Q And is that why you don't drive much?
A That is why I do not drive much.
Q When you do drive, are you on the pain medication?
A No, I am not.
Q How do you work that? I mean you just work your schedule out that way or what do you do?
A I don't work.
Q No, I mean as far as I'm not going to take my pain medication because I'm going to go be driving today?
A That's exactly what I would do. I would try to plan my day around it or plan my medication around -- if I have to be at a doctor's appointment, if it's 11:00 in the morning I just will not take any pain medication until after I get home from the doctor's appointment. If it's in the afternoon, I can take one in the morning, and by the time the afternoon comes around it's worn off enough so I can drive safely, ---
Q Okay.
A --- because I can be in trouble for driving under the influence of a narcotic just like the influence of alcohol, so ---
Q All right. So you avoid doing that?
A And I avoid it at all cost of doing that.

MR. PROFFITT - All right. One moment Your Honor.

THE COURT - Yes, sir.

Q All right, Phil, does the -- your current condition today, is there any on-going impact with your relationship with Jeanne?

A We have not had a sexual relationship since this incident has happened.

Q All right, and what about besides the physical relationship, how has it affected your relationship with Jeanne, if it has?

A We used to be like best friends; now we're more like companions.

Q Okay. All right. Now, Phil, I want to turn your attention back one more time to the deposition that you gave back in July of 2013. At that deposition did you remember talking to Dr. Bibeau in that second encounter, the follow-up that's reflected in your notebook that we talked about earlier?

A At the deposition, no, I do not believe -- I believe I said if I ran into him I talked to him, but I -- I could not say for sure if I did or not.

Q All right. And at that deposition were you doing your dead-level best to tell the truth as you knew it at that time and as you remembered it at that time?

A Absolutely, I tried my best.

MR. PROFFITT - All right. Thank you, Phil, I don't have any further questions at this point.

THE COURT - You may cross examine.

MR. SMITH - Judge, can I approach real quick.

THE COURT - Yes, sir.

(WHEREUPON, BENCH CONFERENCE IS HELD IN THE PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE JURY WHICH WAS NOT REPORTED.)

THE COURT - Ladies and gentlemen of the jury, we're going to take a short break before we begin the cross examination. As always, when I let you step back to the jury room you know I'm going to ask you not to talk about the case until I've asked you to begin deliberations. You may retire to the jury room. Thank you very much.

(WHEREUPON, JURY EXITS THE COURTROOM.)

THE COURT - All right, we'll have about a five minute break. I'll stay on the bench. You may move about, but do not discuss your testimony.

MR. ETHIER - Yes, sir.

THE COURT - Thank you. We'll be in recess briefly.

(WHEREUPON, RECESS TAKEN)

(WHEREUPON, EXHIBITS MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBITS 11 AND 12.)

THE COURT - All right, ladies and gentlemen of the jury, we're going to stop at this point in time. It's just a few minutes before 1:00 o'clock. We'll stop for our lunch break. I'm going to ask you to be back in the jury room at 2:00 o'clock. We should be in a position to start shortly thereafter. You know what I'm going to tell you as far as your duties when you leave the courthouse. Don't attempt to gather any information on your own. Don't listen to, watch or read media reports; don't discuss the case with anyone; don't allow anyone to discuss it with you and, please report any efforts by anyone to talk with you about this case. All right, we're going to start again, as I said, at 2:00 o'clock. Hope you have a good lunch break. You're free to go at this time. Thank you very much.

(WHEREUPON, JURY EXITS THE COURTROOM.)

THE COURT - All right, again, I will caution you, you are in the midst of your testimony. It would be improper to discuss that testimony with anyone during the break. We'll resume at 2:00 o'clock. Thank you very much.

MR. SMITH - Thank you, Your Honor.

MR. ETHIER - Your Honor, I'm not allowed to even speak with my attorney?

THE COURT - Can't talk about this testimony.

MR. ETHIER - Okay.

MR. PROFFITT - For the record, Your Honor, we will not go to lunch with the Ethiers. They will go to lunch by themselves.

THE COURT - Oh, that's fine.

MR. ETHIER - Yes, we go to McDonalds every night so ---

THE COURT - Thank you.

(WHEREUPON, LUNCH RECESS TAKEN.)

THE COURT - All right, plaintiff ready to proceed?

MR. PROFFITT - Yes, Your Honor.

THE COURT - Defense ready?

MR. SMITH - Yes, sir, Your Honor.

THE COURT - Let's bring the jury in, Mr. Bailiff.

(WHEREUPON, JURY RETURNS TO THE COURTROOM.)

THE COURT - The record will reflect the jury has returned to the courtroom. I trust everyone had a good lunch break. If there's anyone who had any difficulty in complying with my instructions while you were away from the courthouse, please stand.

(NO RESPONSE)

THE COURT - It appears that all have been able to comply with the instructions. When we stopped before lunch, the defense was in the process of cross examining this witness. Mr. Smith, you may proceed.

A That's correct.
Q And then you -- and then you went and had surgery, bypass surgery. Is that right?
A That's correct.
Q Now, I think I heard you say this. You had surgery and then you had a complication with the surgery; you had to go back again for a second one. Is that right?
A Yes, I don't know -- I mean I was -- I knew I went back in for second one; I woke up in agonizing pain and I was yelling and the next thing I know someone came in, had put something in the needle or in my IV and I was back out.
Q Okay.
A The next thing I knew I woke up in my room.
Q All right, and so you went through the recovery; we heard about that, and you came back to work at Fairfield. Is that right?
A Yes, sir.
Q And then you say that the first time that you -- when you saw Dr. Bibeau you didn't know -- well, you don't know whether it was first time or some time later, do you?
A It was the first time I had seen him since I come back.
Q When was that? Do you recall?
A I don't recall.
Q Do you recall what year?

A Was probably the same year I went back. I -- I really -- I -- no, I can't recall. I'm sorry.
Q Okay. And so he made this supposed admission to you that he -- no wonder he couldn't figure it out.
A Yes.
Q And he did it in the nurses' station, didn't he?
A Yes, he did.
Q And the nurses' station is -- is where doctors and nurses and are all sitting waiting on patients. Is that right?
A They're doing a lot of things in the nurses' station. It's a buzz -- it's a bee's nest in there usually.
Q All right. So what nurses overheard this?
A I have no idea who I was working with at the night. (sic) My head was spinning. After he said what he said, I didn't -- I didn't even know what day it was; I didn't know who I was; I didn't know anything. I was just -- I went blank. I just -- I had so much anger in me and so much -- so much anger. I just walked out of the room.
Q Okay. And so -- and so at that point you just walked out of the room and called your wife.
A Yes.
Q You didn't go home and record it in your scratch pad then.
A No.

Q So you record in your scratch pad when you get discharged from the emergency room but not when a doctor supposedly says, no wonder I couldn't figure it out.
A Nothing happened. I didn't do anything. I went back to work. That was the end of it. It was no longer discussion until these proceedings.
Q And you worked with Dr. Bibeau for a fair amount of time after this, didn't you?
A Yes, I did.
Q And you continue -- y'all worked together as a team.
A Yes, I'm a Christian and I forgave him.
Q Okay. And so you are -- and so y'all were -- you were part of the triage process and the discharge process when you were working with Dr. Bibeau. Right?
A Yes.
Q Okay. Now, in here I'm looking at these medical bills that have been marked as Plaintiff's Exhibit Number 41. Let me hand you these, please, sir. And these are the medical bills you're asking to be awarded. Is that right?
A I don't know what my attorney is asking me to be awarded. I believe this is what he went over with me. It looks -- it looks familiar, yes.
Q Well ---
A He did go over this with me.

A No, I do not. Now I do, yes. Please call us with any further questions or problems you have and we will be happy to address them for you.

Q All right. Phil, did you continue to improve from April 10th, 2011 to May 25th, 2011?

A Yes, I did.

Q Did you ever suspect that you had a blood vessel problem until the second acute episode on May 25th, 2011?

A No, I did not.

Q Did you ---

A I believed Dr. Bibeau.

Q That was my next question. Did you believe and trust in Dr. Bibeau to have given you an accurate and proper diagnoses on April 10th, 2011?

A Absolutely. I trusted all the doctors I worked with.

Q You were asked why you did not record the comment in your scratch pad that Dr. Bibeau made to you after you returned to work. Do you recall that?

A Yes, I do.

Q Is there any chance that you're ever going to forget that comment for the rest of your life?

A No, there is not.

MR. PROFFITT - No further questions, Your Honor.

THE COURT - Re-cross?

MR. SMITH - No, sir, Your Honor.

DR. SCOTT JOLIN, AFTER BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS -

THE COURT - Once you're seated, sir, state your name, please.

DR. JOLIN - Scott Jolin.

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

MR. PROFFITT - Thank you.

DIRECT EXAMINATION

BY MR. PROFFITT -

Q Good afternoon, Dr. Jolin. How are you?

A I'm fine, thanks, Mr. Proffitt. How are you?

Q I'm good. Dr. Jolin, if you would, introduce yourself to the jury by telling them a little bit about your medical and educational background?

A Sure. Hello everyone. I graduated from the Tufts University School of Medicine.

Q You might want to get closer to the mic. Is it working?

A Sorry.

THE COURT - You can push that over toward the jury and it might help a little bit. There you go.

MR. PROFFITT - Is it on?

DR. JOLIN - It's on.

A I graduated from the Tufts University School of Medicine in 1989. I then performed a medical surgical internship at a small community hospital outside of Boston called Newton-Wellesley Hospital. I then performed a three-year residency in emergency medicine and that was at the Georgetown -- in Georgetown combined programmed in PC. After that I went on to be the associate residency program director at Yale University School of Medicine. It was in emergency medicine.

MR. PROFFITT - Hang on, Dr. Jolin. They're having trouble hearing - want to make sure the jury can hear.

(WHEREUPON, DISCUSSION HELD REGARDING THE MICROPHONE WHICH WAS NOT REPORTED.)

THE COURT - Just speak more into the mic if you would.

DR. JOLIN - Test.

MR. PROFFITT - That's better. Just try to stay close to it.

A Where would you like me to resume?

Q I believe it was the professorship at Yale.

A After residency I accepted a position at the Yale University School of Medicine, and also the Yale Hospital. I was the associate residency program

director in emergency medicine. After six years I became the residency program director, and I worked at Yale for a total of twelve and a half years. After that I entered the world of community hospital emergency medicine. And I've been working at three community hospitals since then.

Q So, how many years total do you have as a practicing emergency room physician?

A After graduation from residency, twenty-two years.

Q Is that essentially what you've spent your entire career doing?

A Yes, that is my career.

Q Are you board certified in anything?

A I'm board certified in emergency medicine, yes.

Q And the jury's heard this a couple of times, but just briefly explain what board certification is for an emergency room physician.

A Sure. It entails a residency in the specified field of emergency medicine, followed by passing a written board examination certification, followed by passing an oral board certification examination. And then that has to be renewed every ten years. So, that's another examination that I have to pass in 2003 and in 2013.

Q Where are you licensed as a medical doctor?

A I am licensed in the state of Connecticut.
Q Have you ever testified at trial or at depositions as an expert in emergency medicine?
A I have.
Q About how many times?
A Around fifteen depositions and perhaps five or six trials.
Q And at those trials you were admitted as an expert in emergency medicine?
A Yes, I was.
Q Dr. Jolin, do you review cases for attorneys in litigation about emergency medicine?
A I do.
Q About how many of those do you do in a year?
A Probably about fifteen to twenty per year.
Q And do you review them for both plaintiff and defendant?
A I do.
Q Are you charging for your time here today?
A I am.
Q What's your hourly rate?
A $375 per hour.
Q And you're taking time away from your practice and your work to be here?
A I am.

Q And you took time away from your practice and work to review records and be deposed earlier up in Connecticut?

A Yes.

Mr. Proffitt - Plaintiff would tender Dr. Jolin as an expert in emergency medicine; he's going to testify about the standard of care required of an emergency room physician, including vascular issues.

The Court - Any objection?

Mr. Holler - No sir.

The Court - Without objection, he will be qualified as such. I've explained that to the jury, so you may proceed at this time.

Mr. Proffitt - Thank you, Your Honor.

Q Dr. Jolin, if you would, just explain to the jury what I asked you to do in this case.

A Initially, you asked me to review the records to render an opinion if the standard of care was met in the evaluation of Mr. Ethier on the emergency department visit of April 10, 2011.

Q Without say -- you know, without going into detail on everything you've looked at, just give the jury of what materials you have looked at.

A Sure. The medical records from April 10.2011, from Fairfield Memorial and May 25, from Chester Hospital.

I have reviewed over the past two years deposition transcripts from various involved experts and parties in this case.

Q Have you reviewed Dr. Bibeau's deposition?

A I have.

Q Did you review Fairfield's deposition, among others?

A Yes.

Q Dr. Jolin, what generally is the role of an emergency room physician in his job or her job?

A Well, the primary role is to rule out the greatest treatable life -- life or limb threat.

Q That's the overriding goal of the ER job?

A That's exactly it.

Q Dr. Jolin, I want to talk for a few minutes about the information that you gleaned from the Fairfield Hospital ER records that was available to Dr. Bibeau on April 10, 2011. Okay? We're looking at Plaintiff's Exhibit Number 22. Look down here where it says admitting diagnosis. What does that say right there?

A Lower left leg pain.

Q Lower what?

A I think it's right. Lower right leg pain, RT.

Q Do you need a copy at your ---

A That'll be helpful. Thank you.

Q Dr. Bibeau, if you'll turn first to the triage record. What information is available to Dr. Bibeau on April 10, 2011 that you gleaned from this triage record done by the certified nurse assistant?

A The triage states from the CNA that the patient is a 52 year old male who complained of right foot pain, and it started at 1300, which is 1:00 p.m. in the afternoon. He stated he was unloading his truck after his right foot started to turn ecchymonic, which is a bluish-purplish color, and complained of pressure. The patient stated that he started -- I can't read the term -- oh, getting worse at around 3:30 in the afternoon, 1530, and his capillary refill as performed by the triage person was one second and he had two-plus right pedal and right posterior tibial pulses, which are the two major pulses in the foot.

Q All right, if I can show you Plaintiff's Exhibit 23. Is this the same document with some highlighted areas on it that point out the pain and pressure reports?

A Yes, it is.

Q Does this appear to be accurate?

A Yes.

Q Does it also show the cap refill and the pulses on the foot?

A Yes, it does.

Q Points to that. All right, Dr. Bibeau, let's look at the page that was filled out by Dr. Bibeau. One back from the one we were looking at. Do you see that one?
A Yes.
Q Tell us what you gleaned from this page.
A Dr. Bibeau noted that the history of the present illness was that that patient had right foot pain since 1300, 1:00 o'clock. It was cold, it was numb, ecchymonic, and the patient was in severe pain.
Q Okay.
A And he documented right leg as the chief area of complaint.
Q So, does this page of the ER record indicate that Dr. Bibeau was looking at both the leg and the foot?
A I believe so, yes.
Q Okay. Look up here. See where my finger's pointing?
A Yes.
Q Right. See where my other finger's pointing?
A Leg, yes.
Q Right leg?
A (No response)
Q Let me show you this exhibit. Does this help? D Can you point out where the pertinent information is ---
A It does.

Q Okay. So, do we have the right leg and foot right here?
A We do.
Q What about this report right here?
A Cold.
Q This one?
A Severe pain.
Q That's a quote?
A Apparently, yes.
Q That's what it says here, severe pain?
A Severe pain, yes.
Q What's that word?
A Ecchymotic, which is a purplish-blue color.
Q What about the wheezing?
A He documents lower on the record that there's no wheezing or parenchymal edema.
Q What does that tell you?
A I think he was -- he was trying to elucidate if this could possibly be an allergic reaction.
Q Okay.
A Which that would be two signs or symptoms of an allergic reaction.
Q What were there any signs or symptoms of an allergic reaction?
A No, he documented none.

Q And what does this tell us?
A The word, numb.
Q Okay. What is this up here?
A Pain.
Q Okay. All right, Dr. Jolin, let's take a look at Dr. Bibeau's physical exam page. Do you see the page?
A I do.
Q Is the page I'm now laying down the same page with some highlights?
A Yes, it is.
Q What do we see here as far as what Dr. Bibeau is telling us of his physical exam of Mr. Ethier, Phil?
A What he observed was the patient had, his right foot had a pattern of livedo reticularis. And he also noted that the right foot was cooler than the left foot.
Q Okay. So, again, we have a report of coolness?
A Yes.
Q And what is livedo reticularis? What do you take that to mean?
A It is a very, non-specific pattern, a lacy pattern that is a purplish-pink color, and it's directly underneath the skin. It is, as I said, non-specific and it can be associated with over a hundred different types of medical conditions.

Q And up here where we see the highlighted area for vascular, is there anything filled in on any of those blanks where you can fill out vascular information or pulses?
A No, there's no documentation whatsoever under the vascular examination section.
Q Is there a place in that area to put the foot pulses?
A Oh, yes.
Q Is it the where -- is it where I'm pointing, the dorsi-pedi and the post tib?
A Right. There's a place for femoral, popliteal, dorsi, dorsi-pedi, which is dorsalis pedis, and post tib, which is posterior tibial.
Q And when we're talking about those pulses, we'll take a look at Plaintiff's Exhibit 31, where are the two foot pulses?
A There's one -- one on the inside of the ankle.
Q This one?
A Posterior tibial, right. And then there's one on the top of the foot. This diagram has it further down than it should be. It should be closer to the ankle joint, but on the top of the foot.
Q Okay.
A The dorsal aspect.
Q All right. And what about this?

A That's a popliteal pulse, which is behind the knee.
Q And what about this one up here?
A The femoral pulse, which is in the groin.
Q And are those pulses on both limbs, both legs?
A Yes.
Q So you've got two sets of them, right, that you can take?
A That's correct.
Q Is there any indication in the ER record that Dr. Bibeau took any of those pulses that you just listed?
A No.
Q And this is where he would record it, correct, if he took those?
A Exactly, that's the section.
Q And then down here at the bottom of this page, what do we see as the clinical impression or diagnosis?
A Probable spider bite.
Q And over here -- and that's the diagnosis Dr. Bibeau came to. Correct?
A Exactly.
Q Now, down below that, what does it say as far as Phil's condition there at the ER and upon discharge?
A Well, two boxes are checked, both improved and stable.
Q So was Phil Ethier medically stable when he was discharged from the ER on April 10, 2011?

A Not really. He was not in any threat of dying.
Q Okay. So, there's no immediate threat to life or limb at that -- no immediate threat.
A To life.
Q Right.
A But there is immediate threat to limb.
Q Well, now, is it immediate in the sense that it's going to occur in the next five minutes, or is it imminent in that he needs to see someone in the very near future?
A He needs to see someone in the -- he could see someone immediately or he could see someone probably within a day or maybe two at the most.
Q But when he was discharged from the ER he was medically stable; he was not about to have a heart attack or drop dead in the next five minutes.
A That's correct.
Q And that's what Dr. Bibeau reported.
A That's correct.
Q All right, Dr. Jolin, let me use our little P chart here. I'm trying to squeeze it all in, but can you see that?
A I can.
Q What is that?

A You're showing a piece of paper that has the six signs and symptoms and physical findings collectively placed together known as the six P's of arterial vascular insufficiency.

Q And those are what? What's the list?

A Number one is pain, which is a symptom. Number two is polar, which stands for cool or coldness. It's also known as poikilothermia. That's a fancy, scientific name of saying cold, which is also a symptom, which is what a patient can complain about or it's a sign which the physician can document on a physical examination and then there's pallor, or color change, which is a sign, something that the physician can note on examination. And number four is paresthesia, which stands for numbness or tingling, which is mostly a symptom that the patient would complain about, but the physician can test for sensation in the affected area. Number five is pulselessness, which I think we've discussed already. And along with that goes capillary refill, which is -- I think we discussed that -- it's when you can assess the profusion or the blood supply of each toe by gently pinching the nail end of the toe, the nail bed, and measuring approximately how long it pinks back up again, because when you pinch it, it blanches and then

you release it, and the toe nail becomes pink again. Normal is less than two seconds. So, that's a sign; that's a physical finding that the physician would note, or the health care provider, I should say. And then number six is paralysis or paresis, which essentially means weakness. In other words, the patient has some sort of weakness of the affected area compared to, perhaps, his other side which is unaffected.

Q Of this list and based on the ER record that we just looked at, just the written record itself, which of these P's are reflected in that record?

A Four out of the six.

Q And those four are what?

A The pain; the polar, the coolness; the pallor or change in color; and number four, the paresthesia, the numbness and tingling.

Q What's your understanding of who took the foot pulses that's shown in the triage record?

A It was the CNA.

Q Was her name Samantha Anthony?

A I believe it was, yes.

Q Was she very experienced at taking foot pulses?

A No, she was, I believe, if I remember correctly, she was a student, or some sort of -- a nurse in learning and education.

Q Is there evidence in the record, in the written ER record that Dr. Bibeau ever took foot pulses?

A No.

Q Now, Dr. Bibeau, I'm going to ask you some questions about several different issues. And I'm going to ask you, first of all, are all the opinions that you're going to state in your testimony coming up stated to a reasonable degree of medical certainty?

A Yes, they are.

Q The first issue I want to discuss with you, doctor, whether or not there was a proper exam done of Phil Ethier for a vascular issue? Talk to me about that.

A Sure. We went over the record briefly a few minutes ago. Essentially, the vascular section of the documentation of the physical exam is left blank. There are some aspects of the vascular exam as performed by the CNA which she documented.

Q All right. Now, what -- how would you do a proper vascular exam if Phil is reporting to you as an ER physician?

A The first part is -- the first aspect is observation, so in other words to look at the affected area.

That's where you would note either pallor or color change, that's number one. Secondly, palpation, in other words a physical, hands-on examination of the affected area. In that aspect you can gauge coolness, the degree of coolness. You can test for paresthesia, which is the numbness and tingling. You can obtain pulses. And you can also ask the patient to move their foot around so you can -- and assess for muscle weakness.

Q Okay. And do you need to take the pulses on both limbs and compare them?

A Well, you should. If it's abnormal, then yes. We have another side that is normal, so it's very helpful to -- for a comparison.

Q Even if the foot pulses were normal on April 10, 2011, does that mean that Phil Ethier was not having a blood vessel problem?

A No, it does not. In fact, when I heard him speak today about his presentation, and when I actually just read the -- Dr. Bibeau's first several lines, and also in conjunction with the CNA's triage assessment, and essentially a physical exam, although, yes, it's proper to do one, but based upon just those two collections of statements, an arterial vascular problem needs to be diagnosed until proven otherwise.

Q Okay. Now, which statements are you talking about, Dr. Jolin?

A I think I can go to Dr. Bibeau's statement, and that is right foot pain, including coldness, numbness and ecchymosis, and then the word -- the phrase again, severe pain.

Q Okay. Wait a minute. Let's let the jury catch up with us. So, you're looking at the….

A The four lines, essentially.

Q Okay.

A So, right foot pain, and then it has the timing, since 1:00 o'clock, the limb, the right - the right extremity is cold, numb, ecchymonic, with severe pain. So, essentially right there is four out of the six P's. And of course, a physician should perform an adequate physical examination, but with that evidence in front of me as it is right there, the number one entity on my list, the differential diagnosis is an arterial vascular problem which needs to be ruled out.

Q Okay. So, just looking at that alone, those few lines right there, an ER physician should have been able to conclude, a reasonably competent ER physician should have been able to conclude that there was a blood vessel problem of some sort going on?

A Exactly. As the physician obtains the history from the patient, from the first moment that the patient begins speaking, the physician, in his mind, or in her mind, is developing a differential diagnosis. And that changes by the second based upon any further information that the patient is able to tell them. And so, the emergency physician thinks about the greatest treatable threat to life or limb first. It's a different way of thinking than being in a family medicine clinic where physicians sometimes will approach it as most probable diagnosis and not the most serious diagnosis, which is fine; it's a different way of thinking, but in the emergency department we approach it as the greatest treatable threat to life or limb. And so, therefore, in this case, as I was listening to Mr. Ethier explain his account of what happened, I was trying to develop a differential diagnosis as he was speaking in real time and I developed one, but at the top, the greatest treatable threat to limb is an arterial vascular problem, which definitely needs to be investigated based on what he said today and his memory of what happened and the medical record which was documented in real time back in 2011.

Q Okay. Now, -- so, at the top of your list would be some kind of vascular problem?
A Right.
Q Now, what is your understanding of whether Dr. Bibeau ever considered a vascular problem or a blood vessel problem in the ER when treating Phil that day on April 10, 2011?
A Well, since he didn't pursue that diagnosis I would have to say he didn't consider it.
Q What did he testify about that?
A I believe he said, if remember correctly that he did consider it, but there's no evidence that he investigated it.
Q Okay, let's take a look at that. I want to refresh your memory of Dr. Bibeau's deposition. We'll start with this part right here.
A Would you like me to read it or just paraphrase it?
Q Well, let's just look at. I'll read it. I'll save you the effort. Tell me what differential diagnosis you considered other than spider bite if any? And Doctor Bibeau answered: Possibly contact with some, you know, some chemical. That's what it says?
A Yes.
Q Okay. You mean like spilling something on the skin? He answered, yes.

A Yes.

Q All right. What else? I considered acute injury, although I didn't see any signs of trauma.

Mr. Holler - Judge, excuse me. Can I note an objection. We're publishing a portion of a party's deposition here without notice as required by the rule, so that we could also ask for the corresponding parts that would respond to this; they should be contemporaneously published. I'm not sure why we're publishing Dr. Bibeau's deposition here with an expert. There was certainly the notice requirement --

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Mr. Proffitt - This is material that Dr. Jolin has reviewed and considered. I'm merely refreshing his memory. We can just let him look at it and I can go from there. I don't have to read it.

Mr. Holler - He's publishing it to the jury.

Mr. Proffitt - I'll let him read it.

The Court - Okay. Hand it up, let him read it.

Mr. Proffitt - Sure. I'll be glad to.

Q Just read that part right there.

A So, the question is: Tell me what differential diagnosis ---

Q No, no, no. I'm sorry. Read it to yourself.

A Oh, I'm sorry.

Mr. Holler - Judge, I need to be clear on my objection. There's points -- there's other places in this deposition that respond and further elaborate ---

The Court - Oh, I sustained your objection and I've asked him to let him read whatever he wants him to read; then I'll let him question him. I've heard him testify that he has reviewed this deposition in preparation for trial.

Mr. Holler - Which is appropriate.

The Court - So, I'll allow him to look over it again before he asks questions. You may do so; you may read the deposition.

A (Witness complies) I have read it.

Q Okay. Now, has that refreshed your memory?

A It has, yes.

Q Now, what did Dr. Bibeau testify at his deposition or the differential or possible diagnoses that he considered on April 10, 2011 in Phil's case?

A He considered three diagnoses. He considered spider bite. He considered a chemical toxin of some type. And he also considered an acute injury.

Q Okay. And was there any evidence in the record, in the ER record about any acute injury or trauma to the foot or leg?

A No.

Q Did Dr. Bibeau agree with that?
A He apparently did, yes. I agree with that, yes.
Q Was there any evidence in the ER record of any chemical exposure to the skin?
A No.
Q And did Dr. Bibeau agree with that?
A Apparently, yes.
Q That's what he concluded. Right?
A Yes, and I agree also.
Q And so, the conclusion he reached was what?
A The third potential diagnosis, which he listed, which was spider bite.
Q And according to that, did he ever think about vascular events, vascular occlusion, blood vessel problem, anything like that?

Mr. Holler - Objection, Judge. At some point in time we're interpreting what's inside the mind of Dr. Bibeau. He's being asked what Doctor Bibeau was thinking. That's going a bit beyond.

The Court - Rephrase the question, please.

Q According to the testimony of Dr. Bibeau that you just reviewed, is there any indication that he ever considered the possible diagnosis of any kind of vascular event or blood vessel problem on April 10, 2011?

A On this page that I just read there was no indication that he considered a vascular problem.

Q All right. Dr. Jolin, does the -- do you understand that Dr. Bibeau claims that he took Phil's foot pulses but did not document it on the record anywhere?

A Correct.

Q Do you recall that testimony?

A Yes.

Q Does the fact -- let's assume for a moment that Dr. Bibeau did take Phil's foot pulses, even though there's no evidence of that and Phil says it didn't happen. Let's assume for a moment that he did. Does the fact ---

Mr. Holler - Objection, leading.

The Court - I guess to finish the question, and a leading question is one that suggests an answer. I haven't heard him suggest an answer, so I'm not going to rule on that until I hear the whole question.

Q Does the fact that Dr. Bibeau, assuming he did take the foot pulses, mean that he considered any kind of a vascular diagnosis or a blood vessel problem? Does that standing alone mean anything?

A No, it's part of a good physical examination.

Q But it doesn't tell you what kind of diagnosis he considered, does it?

A No, it doesn't.
Q Now, Dr. Jolin, let's talk for just a couple of minutes about the infamous spider bite. Is there any record, is there any indication in this record that we've looked at with your testimony here today, and repeatedly over the last few days where Phil Ethier reported any kind of a spider bite to anybody at the hospital?
A No, there isn't.
Q Is there any indication that Jeanne Ethier reported any kind of a spider bite to anybody at the hospital?
A No.
Q Is there any indication that the CNA Samantha Anthony, the RN, Jerilyn Watford, or the LPN, Rhonda Gwynne, ever saw any kind of spider bite, spider bite mark evidence on April 10, 2011?
A No.
Q Is that anywhere in the record?
A No.
Q Where is the only place in the ER record where the words, spider bite, are mentioned?
A The diagnosis.
Q Who made that diagnosis?
A Dr. Bibeau did.

Q What is your opinion on whether or not the ER record that we looked at would lead to a conclusion of spider bite? Tell me what your opinion is on that.
A I can't arrive at that diagnosis based upon the record.
Q And why not? Why is it not a spider bite in your opinion?
A The rule in emergency medicine is to make the diagnosis of a spider bite there has to be some -- more evidence than just a physical examination. There has to be some, either a specimen where the patient will sometimes bring in the spider with them; that happens. Or now with cell phones and cameras, they take a picture of it. I would expand it to, if I could find two fang marks on the affected area I would say that that's good evidence that there's a spider bite.
Q Anything like that found here?
A No, no. And also another point is is that many insects can cause bites and stings. If there's no direct evidence of any such insect or critter or whatever, then really it's just a possible diagnosis. You can't arrive at that conclusion based upon that. You have to also consider other things.

Q Dr. Jolin, was it a breach of the standard of care for Dr. Bibeau to conclude that it was a probable spider bite?
A Yes. There's no evidence to make that conclusion.
Q Was it a breach of the standard of care required of a reasonably competent emergency room physician for him to not consider the possible diagnosis of a blood vessel problem?
A Yes. It was a deviation from the standard of care. It shouldn't have been considered as the top, possible diagnosis.
Q Okay. And was it a deviation from the standard of care or a breach of the standard of care of a reasonably competent emergency room physician for Dr. Bibeau not to do a proper vascular exam?
A It was. Although, as I said, it was not crucial in this case. The entity of the possible arterial vascular problem should have been investigated just based upon the history.
Q The history given by Phil?
A The history given by Mr. Ethier as recorded by Dr. Bibeau and Samantha Anthony.
Q Okay. All right, now, what in your opinion should Dr. Bibeau have done if he had realized there was a

vascular problem or a blood vessel problem? What needed to be done?

A Two options, and I'm not sure if they were available that evening at Fairfield Memorial Hospital. But one -- the definitive diagnosis could have been made by a CAT scan called a CAT scan angiogram of the arteries of the leg, and that involves injecting dye into the patient's vascular system, and then obtaining a CT scan, CAT scan, that basically, the x-ray slices up the patient's leg as the dye flows through the leg. That would have shown that -- that would have shown the popliteal aneurysm at the time, but that wasn't absolutely necessary. The other option would have been to contact a vascular surgeon and explain to the vascular surgeon the presentation of the patient and what's going on, and the fact that the patient needed to be seen urgently by a vascular surgeon and evaluated.

Q All right. And was there another possible diagnostic test that might have been able to have been done at Fairfield Hospital, the ultrasound?

A Well, yeah. I'm not sure if the -- the ultrasound probably would've been helpful in this case, but the definitive study would have been an angiogram. Essentially what happened at the May 25th, visit, in

other words, the emergency physician performed the physical examination and actually was able to palpate the popliteal aneurysm on a physical exam.

Q Now, you're talking about at Chester Hospital on May 25.

A Chester -- I'm talking about May 25. But essentially the same thing could have happened in that presentation and that would have been another -- I shouldn't say -- an angiogram at that point or a referral to a vascular surgeon, and at that point that physician obtained the appropriate referral to a vascular surgeon and sent Mr. Ethier by ambulance to Carolinas Medical Center.

Q So, what happened on May 25, 2011, could have been the same thing that happened on April 10, 2011, if Dr. Bibeau had accurately and timely diagnosed the possible blood vessel problem?

A That's correct. Yes, they were just -- they were almost -- I mean, in terms of medicine, they were identical visits. Same problem, maybe slightly different in terms of presentation or findings, but that's what -- what happened on May 25th should have happened on April 10.

Q Okay. Now, is it your opinion that it was a breach of the standard of care of a reasonably competent

emergency room physician for Dr. Bibeau not to refer him to a vascular consult or for further diagnostic testing?

A It was definitely a breach of the standard of care.

Q Okay. And you hold all those opinions you've been talking about to a reasonable degree of medical certainty?

A Yes, I do.

Q Dr. Bibeau -- sorry. Dr. Jolin, do you believe that the popliteal aneurysm actually existed on April 10, 2011?

A It did to some extent, yes.

Q And did Dr. Bibeau on April 10, 2011, have to reach the definitive conclusion of popliteal aneurysm, or did he simply have to recognize there was a blood vessel problem that needed further study and treatment?

A No, he just needed to recognize that there was a possible arterial vascular problem and then either investigate it with a study or discuss it with a vascular surgeon. He did not have to make the diagnosis of a popliteal artery aneurysm. There was -- obviously, given the presentation, there was some sort of limitations in arterial flow to the patient's right leg, subsequently proven to be from the

popliteal aneurysm and a blood clot forming in the aneurysm and then flowing into the patient's right third toe, but he didn't have to make that diagnosis. That blood clot came from somewhere in the closed system between the patient's heart and his foot, but as long as he referred him to a vascular surgeon for the appropriate valuation and study, he didn't have to do that that night.

Q All right. Dr. Jolin, let's move on and let me ask you a couple of questions about the visit that Phil had with Dr. Bibeau from about April 10th, sometime between April 10th and about April 25th, 2011. You were here for Phil's testimony. Correct?

A Yes.

Q And you've heard the back and forth about whether or not that visit ever occurred. Correct?

A Yes.

Q I want you to assume for a moment that the visit did occur, or the encounter at the nurses' station did occur. What should Dr. Bibeau have done at that point as a reasonably competent ER physician who had previously seen Phil for what he thought was a spider bite issue?

A If he perceived that there was an emergent or urgent type of situation, then he should have urged Mr.

Ethier to re-register as an official patient and be seen officially, because these are what we call curbside consultations. In other words, there was no official visit. However, he had been -- there had been one documented patient-physician relationship in the medical record, and therefore, that should have encouraged to officially occur again. The other possibility is to say, well, it is appearing to look a little better, but did you see a primary care physician; did you follow up as we talked about, or as we told you. So, there had to be -- even though there wasn't a specific patient-physician encounter beyond -- with Mr. Ethier and Dr. Bibeau beyond the first visit in the emergency department on April 10th, the physician has some moral responsibility -- they've taken an oath to be -- to help patients, essentially. There should have been some sort of encouragement to follow up.

Q All right. Do you believe that it was a breach of the standard of care required of a reasonably competent ER physician to not do anything, assuming that what Phil has said is true, and that the encounter at the nurses' station did occur?

A I do, with the caveat that I explained, and that is, since there's no -- there is no specific patient-

physician relationship the second time, but it should have been -- it should have been encouraged to -- some visit should have been encouraged, whether it be re-registering in the emergency department or seeing a primary care physician.

Q Okay. And why is that? Why do you say that?

A Well, the, it sort of goes back to the original presentation and that is -- and it's difficult to answer that in isolation, but essentially, the first time around, the first visit an arterial vascular problem should have been considered. And this would have been over time observation of the toe specifically. You would expect that if the patient threw a blood clot from some area in his circulation to the toe, that eventually that tip of the toe, that artery, the end artery would, the skin that it supplied would die and it would slough off. In other words, it would just sort of fade away and then regenerate, so this was -- even though it was getting better, which was great, there was some evidence that there was an evolution here and follow up should have been encouraged ---

Q Okay.

A --- more than just suggested.

Q All right. Let me ask you this, Dr. Jolin. If Phil had seen a family care physician outside the hospital, not the emergency room doctors that he has testified that he spoke with in curbside consult, but if he had gone to a family physician, a primary care physician outside the hospital in the few days after the April 10th, 2011, visit or within a week or so, and given with the presentation he had on April 10th, do you believe that the family care physician should have recognized a blood vessel problem?

A I would hope so, yes.

Q Okay. All right, so, that family care physician, if he'd seen him, should have recognized it and would it have been required under the standard of care to do that, do you think?

A Well, since I'm not a family physician, I can't specifically comment on that, but I would hope that any primary care physician should have recognized that.

Q Okay.

A And then the appropriate referral could have been -- or the appropriate study could have been performed. Either one would have met the standard of care.

Q All right. And is it you understanding that Dr. Bibeau himself is a board certified family physician?

A I believe he is.
Q And has been so for years?
A I believe so, yes.
Q So, just as that family care physician outside the hospital should have recognized it a few days later -- Right? ---
A Right.
Q --- should Dr. Bibeau have done that on April 10th, 2011?

Mr. Holler - Objection. I think he's now testifying as a family care physician which he just said he wasn't.

The Court - I'll ask you to rephrase the question.

Q Do you believe that the family care physician, a reasonably trained family care physician should have been able to recognize a blood vessel problem if Phil had gone to see him within the next several days or so after April 10th, 2011 ---

Mr. Holler - Same objection.

Q --- given the presentation that you ---

Mr. Holler - He just said he could not testify about the standard of care for a family care physician when he was asked the question and we objected.

Mr. Proffitt - I don't think he -- I'm asking him what a reasonable physician -- let me try it another way. Let me ask it this way.

The Court - All right.

Q Dr. Jolin, would a physician with an MD be able, in your opinion, to recognize a blood vessel problem given the presentation - and if the presentation is the same as shown in the ER record that we've been talking about for the last few minutes?

A I would expect most specialties to be able to do that. There are certain specialties that I would not expect that.

Q Okay. Would a regular MD, a plain old family doctor that might be down the street anywhere here in Winnsboro or any other small town in South Carolina?

A I would hope so, yes.

Q Okay. Dr. Jolin, you testified that there were a number of deviations from the standard of care, the required standard of care for a reasonably competent emergency room physician in this case. Correct?

A Yes.

Q How much of a deviation from that standard of care would you -- how would you characterize it, as far as it a small deviation, is it a large deviation? Talk to me about that.

A Yeah. I would categorize it as a substantial deviation. I think the problem of leaping to the diagnosis of a probable spider bite without any evidence whatsoever and without any apparent consideration beyond two other different -- two other diagnoses within the differential diagnosis, which could have been easily ruled out by history, which they were, and I agreed that there was no indication of any chemical spill or of any trauma, so, that's essentially ruling them out, but then just considering the third diagnosis of a probable spider bite, I believe that that's egregious.

Mr. Proffitt - One moment, Your Honor. (Pause) Thank you, Dr. Jolin, that's all the questions I have.

The Court - Mr. Holler, you may cross-examine.

Mr. Holler - Thank you, Your Honor.

CROSS EXAMINATION BY MR. HOLLER:

Q Dr. Jolin, David Holler. How are you?

A Fine, thank you, Mr. Holler, how are you?

Q I spoke with you briefly this morning. Good, good. Now, you testified about something that I want to make clear, just one point before we get started. And that was the tip of the toe died, sloughed off and re-grew?

A Apparently, yes.

Q And that's your medical opinion?

A It does.
Q And a patient has a responsibility to follow the instructions they're given.
A They do.
Q And that's the patient's responsibility solely.
A Correct.
Q And the ER physician has no way to force the patient to be compliant with they leave.
A They cannot force compliancy, no. That's the patient's decision.

MR. HOLLER - Thank you, Dr. Jolin.

DR. JOLIN - You're welcome, sir.

The Court: Re-direct.

Mr. Proffitt: Just briefly.

The Court: Yes sir.

RE-DIRECT EXAMINATON BY MR. PROFFITT:

Q Dr. Jolin, did that same discharge form that he was referring to also say call or return to the ER if you need to or if you're worse?
A I believe it did, yes.
Q Now, you were asked on cross examination, if a patient comes into the ER and says I am Jesus, you're supposed to write it down in the chief complaint section?
A Uh, ---
Q You write down what they say?

A Yes. Yes. I've seen it written there, yes.
Q And if a patient had come into the ER, if Phil had come into the ER, and said I had a spider bite, it would have been written down, wouldn't it?
A It should have been, yes.
Q Okay. Is there any evidence that you're aware of that he had any kind of a spider bite in that sneaker that he put on inside his house before he walked out to his dog pin?
A No.
Q Any evidence of any spider bite mark on the toe?
A No.
Q Is there any evidence that you've heard, that you're aware of in the ER record that there was any kind of call by Phil or anyone on Phil's behalf to the ER before he got there, talking about a spider bite?
A No.
Q Dr. Jolin, is it still your opinion that the four P's, four of the six P's were met as shown in the first few lines of the physical exam record that Dr. Bibeau did on April 10th, 2011?
A Yes.
Q Is it still your opinion that there were the various and numerous breaches of the standard of care by Dr. Bibeau who did not act as a reasonably competent ER

physician on April 10th, 2011, in all the ways we talked about earlier?

A Yes, my opinion is the same.

Q In the failure to do a proper vascular exam?

A Yes.

Q In the failure to consider a vascular problem or a blood vessel problem as a possible diagnosis?

A Yes.

Q That's a breach?

A Yes, it is.

Q And in the failure to order additional diagnostic tests or refer for a vascular consult?

A Correct.

Q And all that occurred on April 10th. 2011?

A Correct.

Q And was April 10th, 2011, the key date?

A It was. It was the sentinel event. I mean, that type of visit is what emergency physicians look for. In other words, there could have been a diagnosis made or at least a referral to a specialist who could have made the definitive diagnosis. The vascular surgeon could have made the diagnosis, repaired the aneurysm, and then we wouldn't be here discussing any more events today. It would have been cured, essentially.

Q And what do you mean by saying that's the kind of event that an emergency physician lives for?
A It would have made a difference in the patient's life.
Q Because so many times, all you get in the ER are colds and flus, and just really minor things, just routine stuff. Right?
A Well, we help those patients, too. But I think the point is, is that when a patient has a life threatening or a limb threatening situation and we can actually do something about it and reverse it, that's the, that's why emergency physicians exist.
Q That's why you went to medical school, isn't it?
A Well, yes, that was -- I learned that I wanted to go into emergency medicine while I was in the tail end of medical school, but in general, you go to medical school to help -- to become a physician so you can help people.

MR. PROFFITT - All right, thank you, Dr. Jolin. I don't have anything further.

A You're welcome.

The Court - Re-cross.

Mr. Holler - Very briefly.

RE-CROSS EXAMINATION BY MR. HOLLER:

Q When Mr. Ethier walked out, he wasn't in a life or limb threatening situation on April the 10th 2011?

THE COURT - I'll let you ask that.

MR. DUQUETTE - Sorry.

MR. COX - All right, thank you, Your Honor.

THE COURT - All right, you wish to ask another question?

MR. SMITH - No, sir, I quit.

(WHEREUPON, LAUGHING)

THE COURT - All right, thank you. All right, you may step down. Thank you, sir.

MR. DUQUETTE - You're welcome.

THE COURT - All right, plaintiff may call its next witness.

MR. PROFFITT - Play a video, Your Honor.

THE COURT - All right, ladies and gentlemen, we have another deposition by video. We'll set it up. Should take just a moment. We're probably getting pretty good at this I hope. (Pause) You ready?

MR. PROFFITT - (Indicating yes)

THE COURT - All right, come to order please. You may proceed.

MR. PROFFITT - Plaintiff would call Samantha Anthony by video.

THE COURT - Samantha Anthony?

MR. PROFFITT - (Indicating yes)

TO AWR ✓

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

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COURT'S 5D
EXHIBIT NO. 5
IDENTIFICATION/EVIDENCE
DKT.#
DATE: 3/31/15

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ALSO PRESENT.

Alan Metts, videographer

(INDEX AT REAR OF TRANSCRIPT)

Redacted transcript of video as presented to jury Highlighted / underlined portions were redacted from video

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.

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?

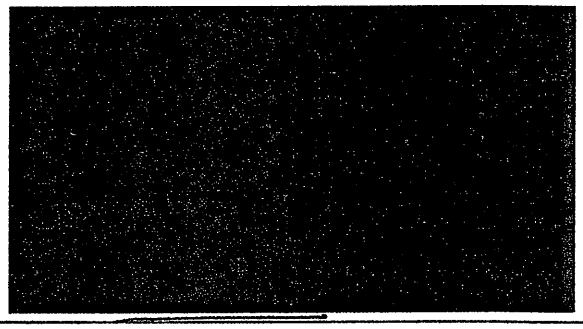
A. Yes, sir.

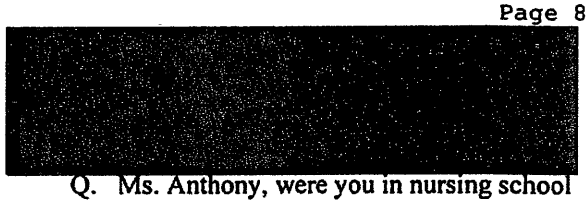
Q. Okay. If you would just introduce yourself to the jury by telling them your name and

where you live now.
A. Samantha Anthony. I live in Elgin, South Carolina.
Q. Okay. And where did you grow up more or less?
A. I grew up in the Carolinas the -- most of my life.
Q. Okay. Where did you go to high school?
A. I was at Ridgeview in Columbia.
Q. All right. What were you doing as of April 10th, 2011, as far as education?
A. I was at USC as a student.
Q. In what?
A. In nursing.
Q. Okay. And had you worked in any kind of medical position before that, before April 10th, 2011?
A. As a certified nursing assistant.
Q. Okay. Where had you worked as a certified nursing assistant?
A. I had worked at UniHealth Post Acute Care.
Q. Is that a nursing home?
A. That is a -- considered a long-term skilled facility, I want to say. So they have

rehab facilities there.
Q. Okay. And what did you do there, basically?
A. I assisted with activities of daily living or --
Q. All right.
A. -- ADLs, if you will.
Q. Okay. When did you begin working at Fairfield Memorial Hospital?
A. About nine months after I started working at --
Q. Does March 2010 sound right?
A. Probably.
Q. Okay.
A. I was going to say April, but I didn't think so.
Q. Okay. All right. And what were you hired at Fairfield Hospital as, what kind of employee?
A. A certified nursing assistant --
Q. Okay.
A. -- as I think part time.
Q. Okay. And what -- when did you work, what days of the week?
A. In the beginning -- I cannot tell you

what I worked in the beginning. But I worked every weekend, Saturday and Sunday, 11:00 AM to 7:00 PM.
Q. Okay. And what departments did you work in?
A. I worked on the floor, the medical surgical floor, as well as the emergency room.
Q. Okay. And how much of the time did you work in the emergency room, approximately?
A. I'd say about 95 percent of the time.
Q. Okay. And do you remember how long you worked at Fairfield Hospital?
A. I believe it was shy of a year and a half.
Q. So about October 2011?
A. Yes, sir.





Q. Ms. Anthony, were you in nursing school in April 2011?
A. Yes, sir.
Q. Okay. And what year were you in nursing school?
A. I was -- 2011, I was in my third year.
Q. All right. And how many clinical courses had you had in nursing, hands-on kind of courses I'm talking about, in nursing as of April 2011?
A. I was on my second.
Q. Okay. Where was your first one?
A. It was at Lexington Medical Center.
Q. Okay. And what did you do in that hands-on clinical course at Lexington Medical Center?
A. Primarily reviewed charts.
Q. Okay. Did you have any hands-on patient work at all?
A. To my knowledge or to my memory, I don't recall.

Q. Okay. All right. And that would have been in fall of 2010?
A. Yes, sir.
Q. Okay. Now, what were you doing in spring of 2011 as far as hands-on clinical courses in your nursing program?
A. I was learning the core foundation of nursing on the surgical trauma ICU --
Q. Where --
A. -- at Richland.
Q. At Palmetto Richland?
A. Yes, sir.
Q. In Columbia?
A. Yes, sir.
Q. Okay. And what were you doing as far as hands-on patient care at that time at Palmetto Richland?
A. Everything that you need to build a strong foundation in nursing. The assessments, the calling other people that you need to call to get things taken care of, what you need to report to other people --
Q. Okay.
A. -- the normal findings, the expected things, the --

Q. Okay. What unit were you working in?
A. The surgical trauma intensive care unit.
Q. Okay. And were the patients in there sedated or not sedated?
A. Sedated.
Q. Okay. So when you took the vitals and those kinds of things, you were doing those on sedated patients?
A. Yes, sir.
Q. Okay. And how many times would you take the vitals or do an assessment of the sedated patient?
A. Sometimes hourly, sometimes every 15 minutes depending on how quickly they were out of surgery.
Q. Okay. And what about on a daily basis though, how many times a day were you doing the basic vital signs when you did the full assessment on those Saturdays when you worked?
A. It was every hour --
Q. Okay.
A. -- as per the standard.
Q. I thought you testified earlier it was about once or twice a day you would do that in an

eight-hour shift?
A. The full -- no, you didn't ask me how many times I had done the vital signs.
Q. Oh, okay, I'm sorry. Well, let's do it that way.
A. Yeah.
Q. How many times had you done the vital signs per day during those Saturdays?
A. Vital signs were every hour.
Q. All right. All right. Now, let's move to talking about your duties at Fairfield Hospital, Fairfield Memorial Hospital. What were you doing in the ER on -- at Fairfield as of April 10th, 2011, what were your duties there generally?
A. I would triage patients. I would assist in the flow of getting them in, getting them to a room. Getting them transferred, if need be. Cleaning the room, prepping for the next one.
Q. Okay. All right. And tell the jury about the triage area there at the hospital, what size it is and what it's like.
A. It's about a four by five or six room that has two chairs, a Dinamap to use to take vital signs on, a scale. A small table that had a small scale for when you weighed babies and stuff.

Q. Okay. You're describing the triage room?
A. Correct.
Q. Okay. It's basically a small room?
A. Correct.
Q. All right. All right. Ms. Anthony, let me hand you what's been marked for identification as Plaintiff's Exhibit for trial 22. Do you recognize that document?
A. Yes, sir.
Q. What is that document?
A. It is the admission paperwork.
Q. Okay. And there's several pages to it. What does it appear to be when you look through the entire document?
A. An ER visit --
Q. Okay. And who is --
A. -- documentation.
Q. -- and who is the patient in that ER visit?
A. Philip Ethier.
Q. All right. And if you look there on the first page of the Exhibit 22, down where it says: Admitting diagnosis. What does it say there on that first page?

[redacted]

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?

[redacted]

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?

[redacted]

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?

[redacted]

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

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

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

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.

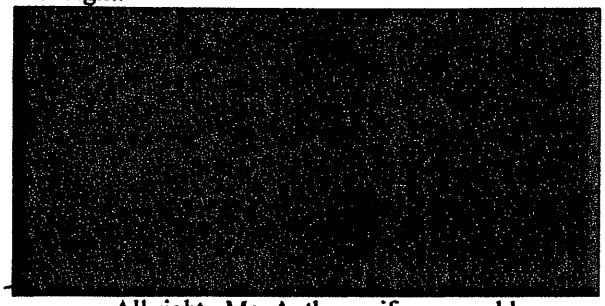
Q. Okay. And what was that pulse?

A. Plus two.

Q. All right. So that was normal

according to your assessment that day?
A. Yes, sir.
Q. All right. How many times at that point in your position as a certified nurse assistant had you taken foot pulses?
A. At Fairfield?
Q. At Fairfield.
A. I don't recall.
Q. Was it a few times, many times, do you --
A. I don't recall if I did it at all at Fairfield.
Q. Okay. So it --
A. Other than this instance, of course.
Q. Okay. How experienced do you think you were at taking foot pulses at that point in your career?
A. My career was pretty inexperienced/nonexistent at that time, but I feel confident in my pulse-taking abilities. Though, like I said, it was an inexperienced beginning.
Q. Okay, fair enough. All right. Did Mr. Ethier report pain to you during the triage?
A. Yes, sir.
Q. Okay. And what did you record his pain

level as?
A. Moderate.
Q. And what is that on a scale of 1 to 10 that you had circled?
A. For him it was a 5.
Q. Okay. All right. Ms. Anthony, I'll hand you what has been marked for identification as Plaintiff's Exhibit 23. And what I want you to do is just hold that up, sort of put it to one side so the videographer can tape it and then I want you to help me look at it.
A. Okay.
Q. Hold it up so he can -- hold it up straight.



All right. Ms. Anthony, if you would look at -- and I just want you to help the jury

understand what we've been talking about for the last few minutes.
A. Okay.
MR. PROFFITT: Can you see that?
THE VIDEOGRAPHER: Yeah.
BY MR. PROFFITT:
Q. Okay. All right. If you look at it and see that top part where the box that says: Capillary refill and pulses on right foot; do you see that?
A. Yes, sir.
Q. With the arrow?
A. Yep.
Q. Is --
A. Oh, yep.
Q. Okay. Is that pointing to the area of the report where we just talked about the capillary refill and foot pulses?
A. Yes, sir.
Q. All right. And if you look over there where it has the box -- there are a couple of boxes marked pressure. Is that pointing to areas of the form where you're reporting that there was pressure?
A. Yes, sir.



BY MR. PROFFITT:
Q. Well, you tell what the pressure reports -- what are you reporting about pressure?
A. That there was a complaint of it.
Q. Okay. All right. And then what about the boxes with the arrows that show reports of pain, are those accurately pointing toward the reports -- the sections of the report that show the reports of pain?



THE WITNESS: Yes, sir.
BY MR. PROFFITT:
Q. Okay. You can put it down now, thank you.
A. Uh-huh.
Q. All right. Ms. Anthony, down at the bottom of the form it mentions family doctor Blue Granite; do you see that?
A. Yes, sir.
Q. What is Blue Granite?
A. Blue Granite is a -- I don't know what you call it now. It was a community, not quite clinic, sort of a half point between clinic and family doctor.

Q. Is it an operation that was run by Fairfield Memorial Hospital?
A. Yes, sir.
Q. Okay. Do you know if there was even a physician available at that clinic?
A. I know very little information about that clinic, sir.
Q. Okay. All right. Ms. Anthony, did you take the popliteal pulse of Phil Ethier on April 10th, 2011, the popliteal pulse behind the knee?
A. No, sir.
Q. All right. Is there any indication in this record anywhere that anyone took the popliteal pulse behind Mr. --
MR. SMITH: Objected to -- she doesn't have the ability to answer it.
THE WITNESS: Of the full record?
BY MR. PROFFITT:
Q. Yes, ma'am.
A. I don't know, I haven't looked through it.
Q. All right. Look through it for me and see if you see any indication in there where any mention of a popliteal pulse being taken.
A. I will go ahead and agree that I would

not know where on this doctor's form to even look for something like that.
Q. Okay. All right. Well, let's just stick to your triage record then, that's fine. Is there any indication on your triage record that anyone took the popliteal pulse?
A. I did not take the popliteal pulse.
Q. Okay. Did Nurse Wadford take the popliteal pulse?
A. Possibly, I don't know. It wasn't during this triage.
Q. It wasn't on the triage, right?
A. It wasn't during the triage, no, sir.
Q. Is there any other record or page in this record that shows Nurse Wadford took the popliteal pulse?
A. I do not know.
Q. Look through the record and tell me if you see any.
A. I would not be knowledgeable in reading charts at this time. Are you asking for my opinion currently as a nurse?
Q. I'm asking your as a -- your opinion as a nurse, if you want to -- yeah, is there any indication in this record that Nurse Wadford ever

took the popliteal pulse of Phil Ethier on April 10th, 2011?
MR. SMITH: I object to her providing opinion testimony.
BY MR. PROFFITT:
Q. Oh, no, I'm not asking you for your opinion. I'm asking you as a fact: Is there anywhere in this record that Nurse Wadford or Nurse Gwynn, while you're looking, ever took the popliteal pulse of Phil Ethier on April 10th, 2011?
MR. SMITH: I object, she's not qualified to answer this question. She's talking about the testimony and examination in records that she filled out, not what someone else did. You need to ask them that question, so I object to this.
THE WITNESS: Among other things I can't read Rhonda's handwriting, so...
BY MR. PROFFITT:
Q. Okay. All right. Fair enough, we'll move on. Is there any indication, Ms. Anthony, in the triage record that you completed that either Nurse Wadford or Nurse Gwynn ever took the foot pulses of Phil Ethier on April 10th, 2011?
A. Between 16:40 and 16:51, no.

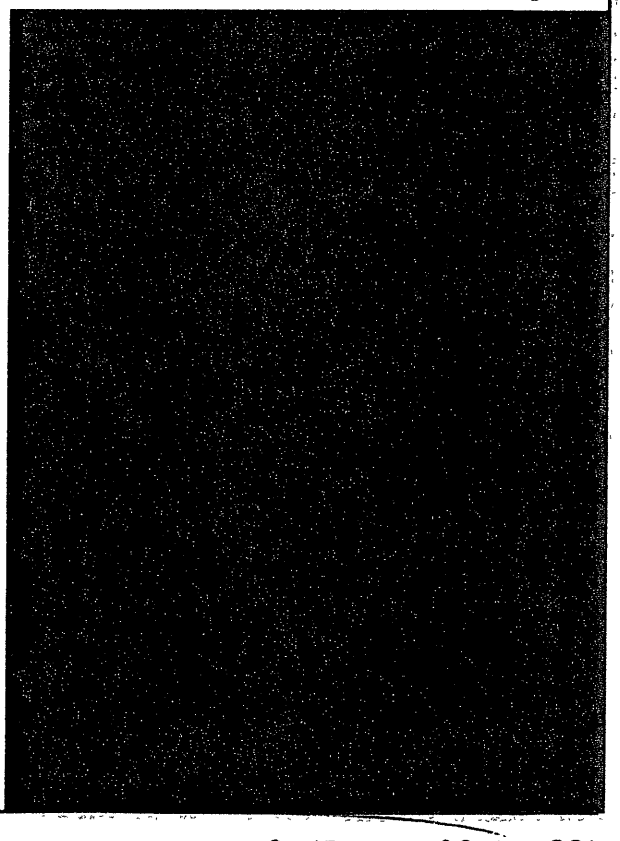
Q. Okay. All right. Ms. Anthony, did you ever see any spider bite mark on Phil Ethier's leg or foot -- right leg or foot on April 10th, 2011?
A. I don't recall.
Q. Is there any indication in the record that you ever saw a spider bite mark on his leg or foot?
A. I would not be even qualified to think to look for that, so I --
Q. That's not what I asked you --
A. -- I didn't look for it.
Q. -- no, that's not what I asked you. Is there any indication in the triage record on April 10th, 2011 that you ever saw any spider bite mark on Phil Ethier's right leg or foot on that date?
A. No, sir, but --
Q. Okay.
A. -- there's also nothing in here that says that I assessed his skin for integrity.
Q. All right. If you had seen a spider mark on Phil Ethier's right leg or foot on that date, would you have noted it?
[redacted]
THE WITNESS: I wouldn't do a full skin assessment on him. I would not have felt the need

to look everywhere for a small spider bite, sir.
BY MR. PROFFITT:
Q. No, I'm not talking about everywhere, I'm talking about on his right leg or foot. You looked at his right leg or foot, right, correct?
A. I checked his cap refill and how strong his pulses were.
Q. And you were looking at his right leg and foot, correct?
A. Yes, sir, but that's a very small amount of skin that even needs to be visualized to do those assessments.
Q. Did you see, according to this record, any indication of a spider bite mark on Phil Ethier's leg on that date?
A. I did not write anything about a spider bite --
Q. Okay.
A. -- no, sir.
Q. If you'd seen a spider bite mark on that date would you have written it down?
A. I doubt I would have because I am not qualified to say whether it's a spider bite or not. I would say that something might have the appearance of a bite.

Q. All right.
A. Or that it would have two small puncture wounds. I would not be able to actually say that someone would have a bite or not.
Q. All right. Ms. Anthony, I'm going to hand you your deposition. And I'll direct your attention to page 56. Do you remember being deposed in the past?
A. Yes, sir.
Q. Do you remember that deposition being held on April 11th, 2014?
A. Sure.
Q. Okay.
A. Okey doke.
Q. Okay. If you'll look at page 55 there at the bottom.
A. Yes, sir.
Q. I'll ask you -- I'll read the question, you read the answer.
A. Okay.
Q. Okay. It says my question is: All right. When you're doing the triage of Mr. Ethier on April 10th, 2011, that afternoon, did he tell you or did his wife tell you that he had suffered a spider bite? And what's your answer?

A. If he did then I would probably -- I would more than likely have written it down. Like I said, I was really good into direct quotes and writing specifically what the patient would say.
Q. All right. So Mr. Ethier and Mrs. Ethier never told you anything about a spider bite, did they?
A. No, sir.
Q. Okay. And again is there any indication in this record where you have marked down that he had any kind of spider bite in the triage record?
A. In the triage record there's nothing even insinuating a bite.





THE COURT - Can I ask that the representative for the attorney approach for just a moment.

JEANNE ETHIER, AFTER BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS -

(WHEREUPON, BENCH CONFERENCE WAS HELD IN THE PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE JURY WHICH WAS NOT REPORTED.)

CLERK - We need you to state your name for the record and speak into the mic.

MRS. ETHIER - Jeanne Ethier.

THE COURT - Mr. Proffitt, you may proceed. I believe she's under oath now.

MR. PROFFITT - All right, thank you, Your Honor.

THE COURT - Yes, sir.

DIRECT EXAMINATION

BY MR. PROFFITT -

Q Good morning, Jeanne. How are you?

A I'm here; thank you.

Q Are you nervous?

A Yes.

Q Don't be nervous. Introduce yourself to the jury and tell them how long you've been married to Phil.

A I've been married to Phil for 28 years.

Q All right, and where are you from originally?

A Massachusetts.

Q All right, your voice is really soft, and I don't hear these speakers working.
A Hello.
THE COURT - You need to get a little closer.
Q Get a little bit closer.
A (Witness complies)
Q All right, where are you from now.
A Massachusetts originally.
Q And so you and Phil both grew up in Massachusetts?
A Yes.
Q Okay. And when did you move to North Carolina approximately?
A In 1997.
Q Okay. And when did you move into South Carolina, approximately?
A 2010, April, 2010.
Q Okay, and what's your job? What do you do for a living?
A I'm a registered nurse on a psychiatric unit.
Q Okay. And what hospital do you work at?
A Piedmont Medical Center, Rock Hill.
Q How long have you worked there?
A Since I moved here, April, 2010.
Q Okay. And how long have you been an RN?
A 1995.

Q Okay. And how long did you go to school to be an RN?
A I did the LPN course for one year and then I -- they started a fast-track where you can just -- if you were an LPN, they will fast-track you for one more year so you can complete your RN, so I did two years and became an RN with a few extra courses to go from an LPN to an RN.
Q Okay. And how did Phil go to school to be an LPN?
A The regular one-year course.
Q All right. And that was up in Massachusetts.
A Yes.
Q Okay. Now, have you ever been any kind of an emergency room nurse or anything like that?
A No.
Q What have you done your entire career?
A I've been a psychiatric nurse and before that the developmentally delayed patients.
Q And what do you do all day as a psychiatric nurse at Rock Hill hospital.
A We do medication administration, suicide assessments and group therapy.
COURT REPORTER - She needs to speak up a little bit.
MRS. ETHIER - Okay.
Q If you could speak up a little bit more. All right, Jeanne let me ask you a few questions about Phil before all

these events happened to him after April of 2011. Tell us what Phil was like as far as his work and activities and lifestyle, just general.

A Before the activity? (sic)

Q Before all this happened.

A We were outdoors people; Phil would always be outside, very active, over-active, you know, like a jack of all trades, working outside, fixing things, fixing cars, fixing the house.

Q All right. Did he build you a back porch at one point?

A The front and the back, yes.

Q Okay. Did he build some dog rungs and dog pins?

A Yes.

Q Okay. Did he have a garden?

A Yes, he had a large garden.

Q Okay. Did he like to mow the yard, work in the yard and do that kind of thing?

A Yes. Anything outside Phil was -- everything outside. That's what he loved to do.

Q All right. Did he help friends and neighbors who needed some help from him?

A Yes, he was always helping my brother-in-law or whatever; they were two peas in a pod; anything that they needed, they would work and help other people as well.

Q Okay. Did you -- did you guys go camping and hiking very much?
A Oh, yeah, we -- our life was outside. So we would go camping, hiking, walking, jogging, everything that you can think of that you do outside, that's where we were.
Q And you've got one daughter. Right?
A Yes.
Q Okay, what's here name?
A Kianna (phonetic).
Q Okay. How old is she now?
A She's 22.
Q Okay. Still lives at home I think?
A Yes.
Q All right, so you're always on the go. Right?
A That's right, yes.
Q Okay. All right, Jeanne, I want you to think back to April 10th, 2011 and just tell us what you recall happening that day, as far as Phil going to the ER.
A Okay. Um, Phil told me that something was wrong with his leg, his leg was killing him, I needed to take him to the hospital. So we went to Fairfield Memorial Hospital emergency room. And so we went in there and he was seen by, you know, the staff that took the vital signs and then um ---
Q Did you know who that person was at the time ---

A No.
Q --- that did the triage?
A No.
Q Did you later learn it was a lady named -- a CNA or a certified nurse assistant named Samantha Anthony?
A Yes.
Q Okay, go ahead.
A And then when we went there, they took the vitals, she took the vitals and looked at the leg; she left the room, then Dr. Bibeau came in, looked at his leg, felt his leg and then he left the room. And then shortly after that a nurse came in and gave my husband some pain medicine and said we'd be leaving soon.
Q Okay. Did you see the leg that day?
A (No response)
Q Did you see the leg that day, Jeanne?
A Yes, when we were in the emergency room.
Q And what did it look like?
A It was -- from the knee down his leg was discolored and dark, and his right third toe had a um -- it was an odd color and it had a black tip on it like a blood blister.
Q Okay. You remember seeing that at the ER?
A Yes. I didn't see it before then.
Q All right. So you're putting in -- or Dr. Bibeau comes in and what did Dr. Bibeau do again?

A Oh, he looked at the leg; he touched the leg, and then he left the room.
Q Okay. Do you recall what he said at any time?
A I don't.
Q Do you recall what Phil might've said to him?
A I don't.
Q Okay. All right. Did you at any point see a nurse by the name of Jerilyn Wadford or any other nurse, nursing person besides Samantha Anthony, that first lady in triage?
A I don't.
Q Never saw anybody else?
A There was a nurse who came to give Phil the medication when we were -- after Dr. Bibeau saw -- saw us.
Q Okay. All right, that would be Rhonda Gwynne as you now know?
A Okay, yes.
Q Okay, but Jerilyn Wadford, did you ever see Jerilyn Wadford?
A No, I did not.
Q Did Jerilyn Wadford ever touch Phil?
A No, she did not.
Q Did she ever examine Phil?
A No, she did not.
Q Okay. All right. All right, did you, Jeanne, ever tell anybody at the ER that Phil had had a spider bite?

A No, sir.
Q Did you ever hear Phil say anything like that?
A No, sir.
Q Did you ever hear or know of Phil making any kind of call to the ER before he went in to say that he had had a spider bite?
A No, sir.
Q Did that ever happen at all?
A No, sir.
Q Okay. Did you -- to your knowledge did any nursing person who examined Phil at all find any kind of spider bite?
A No, sir.
MR. SMITH - Objection to what the nurse -- they can testify what they found, Judge. She doesn't know that.
MR. PROFFITT - I asked ---
THE COURT - You'll have to lay a better foundation for knowledge of what the other nurses might've known or found.
MR. PROFFITT - Okay.
THE COURT - I haven't heard a foundation like that, so I'll sustain the objection.
MR. PROFFITT - Thank you, Your Honor.
Q Jeanne, you were in the room when Samantha Anthony was -- the CNA was examining Phil?

A Yes.
Q Okay. Did you -- did you hear what she said to Phil?
A I did not.
Q Okay. So you don't recall what she said?
A I do not.
Q All right. Was any kind of a spider bite ever found on Phil later?
MR. SMITH - Judge, same objection with the foundation.
THE COURT - I'm not sure exactly how you're -- who you're asking may have found it. And so ---
MR. PROFFITT - I'm asking ---
THE COURT - --- I'm going to sustain the objection at this point.
MR. PROFFITT - Okay.
Q Jeanne, did you ever see or find any spider bite on Phil's leg at any time on April 10th, 2011 or later?
A No, sir.
Q All right, Jeanne, did -- you're there in the exam room with Dr. Bibeau. Right?
A Yes.
Q Okay. Did you know Dr. Bibeau?
A No.
Q Had you ever seen him before?
A No.

Q To your knowledge, had Phil ever seen him before?
A I'm not sure if at that time, because I know he was working in the hospital so I don't know.
Q All right. Did you -- did you trust Dr. Bibeau at that point?
A Well, yes, he was a doctor, and that's all we -- we trusted -- yes, we trusted Dr. Bibeau.
Q All right. As an RN for years, have you trusted doctors for years?
A Yes.
Q Have you believed doctors for years?
A Yes.
MR. SMITH - Judge, objection to the leading.
THE COURT - Overruled.
A Yes.
Q You have believed doctors for years?
A Yes.
Q And, in fact, is that what nurses do all day long?
A Yes, sir.
Q Now, Jeanne, tell us what you remember about the days after April 10th, 2011, up until he had his second episode on May 25th 2011. What -- what happened in that period?
A Well, um during the first couple of weeks the black tip of the toe had sloughed off and Phil still had a little bit of pain, but he eventually, gradually improved, and he

said he was talking to the doctors at work and they said give it time.

MR. SMITH - Judge, objection to what the doctors said.

THE COURT - I'll sustain that objection.

Q Go ahead. Tell us what else you remember from that time period.

A So then -- and he gradually improved and we -- it was my understanding that Phil was to give it time so that, you know, his leg could heal. So he went out and bought a foot massager for his foot, and we were giving it time.

Q All right.

A And that's what we did.

Q All right. Did Phil tell you that he was checking in and following up with doctors there at the ER?

A Yeah, he was -- yeah, he was talking to the doctors when ---

MR. SMITH - Judge, objection. That's bolstering and corroborative, cumulative.

THE COURT - I'm going to ask you to ask her more specifically when this may have occurred, so I'm going to ask you to rephrase the question.

MR. PROFFITT - All right.

Q Jeanne, there in the days um -- in that first couple of weeks or so after all this happened and still it started to improve more like you just testified about, ---

A (Indicating yes)

Q --- what did Phil tell you, if anything, about what he was asking or doing in the ER with regard to his leg?

A It was my understanding that when they had downtime behind the nurses' station, you know, with doctors, that Phil would ask questions on, you know, look it (sic) I'm -- I need some information, what do you think about this, just like an opinion, and it was always my understanding to give it more time.

MR. SMITH - Judge, objection to what she -- that's double hearsay to what she understands and what was told to her.

MR. PROFFITT - Your Honor, she can ---

THE COURT - I'll let her testify as to what her understanding was, and your question was what he told her, so I'm going to allow it to go forward.

MR. PROFFITT - All right.

Q Jeanne, I'll hand you what's been marked as Plaintiff's Exhibit 45. Do you recognize that document?

A Yes.

Q And just to move things along, are those some of the discovery responses that plaintiff provided to defendant over the course of this case?
A Yes.
Q All right, and if you would, look in the list of documents that's provided there on the second page I think.
A (No response)
Q You see where I'm talking about?
A (No response)
Q It says the following documents are enclosed in hard copy ---
A Yes.
Q --- with these responses?
A Yes, first page, yeah.
Q All right. Sorry, the first page. What does it -- read to us the tab 45 and tab 46. What do those say?
A Tab 45, handwritten notes by Phil Ethier.
Q Okay. What about tab 46?
A Tab 46, typed version of Phil Ethier's notes.
Q All right. And is it your understanding that that is the pages -- what's the date of that document? On the next page.
A January 6th, 2014.

Q Okay. And is it your understanding that's the copies of pages that were taken from the notebook admitted earlier as Plaintiff's Exhibit 42?
A Yes, sir.
Q Okay. So that was produced to defendant more than year -- or 15 months ago.
A Yes, sir.
Q Okay. All right, Jeanne, let's turn to May 25th, 2011 and the Chester hospital events and all that. Let me ask you about that. What do you recall about that day? What happened?
A Phil told me he was going -- this is -- I think it was in the middle of the night or so -- I don't know. He told me he was going to the hospital, his leg was killing him and he knew something was wrong. He said he'd call me later and let me know what's happening.
Q Okay, and what happened next?
A Then I got a call saying that he was going to be transferred to CMC, so I drove to Chester Hospital and I asked if I could drive him to Charlotte, and they told me that it was a medical emergency and that he had to go by ambulance.
Q Okay. And what happened next?
A So then he had surgery at CMC.
Q What was that like? You get to CMC ---

A Okay, and then ---
Q --- on May 25th, 2011?
A Yes, and then I believe after he had the surgery he was in his room. Is that what you -- when I was in the ---
Q Well, what I want you to tell the jury about is what it was like for you to go to Charlotte Hospital knowing that your husband was about to have emergency surgery. How were you feeling?
A Oh, well, yeah, it was -- in shock. I mean I didn't even know who I was for a while. You know, it's just a shock, just total shock, disbelief, scared, overwhelmed.
Q Okay.
A It was just horrible.
Q Okay. And did he have some procedures there at the Charlotte Hospital that we've heard about earlier?
A Yes.
Q Okay. And did he eventually have the femoral bypass graft surgery ---
A Yes.
Q --- a couple of days later?
A Yes, sir.
Q Okay. And were you there for -
A Yes.
Q --- at the hospital all this time?
A Most of the time.

Q Okay. All right. What was Phil like there in the hospital during those days, during the week he was there?
A Okay. He had -- he just looked horrible. I could barely really even look at him. He had -- both hands had IVs in them; his leg was huge. He had all staples and stitches down one side of -- the wound vac on the other side, and he just didn't ---
Q Okay.
A He just looked horrible. I couldn't believe that my husband looked like that.
Q All right.
A And we didn't know if he was going to lose his leg or we didn't know what was going to happen.
Q All right. All right, now, Jeanne, let's talk some about the months after he's out of the hospital, sort of from June to December, 2011. Tell us what was going on during that period. What do you recall about that period?
A (WITNESS CRYING)
Q It's okay.
A When Phil came home, he went into -- he had to stay in a chair for over four months. And so it was really hard to see him, (sic) because he was always so overactive ---
Q Okay.
A --- and so I would have, you know, both coffee tables on each side of the chair so he could have things like, you

know, his notebooks and his food, snacks and stuff so that he couldn't get up, so I just had to make sure everything was around him.

Q Okay. All right.

A And he just looked horrible and was just shocking.

Q Okay. And what was his demeanor or how was he was doing himself?

A He was doing horrible. He just had trouble sitting in a chair and it was -- really all in shock, and it was just horrible, so depressing, hopeless. Hopeless.

Q Did you still have to go to work?

A Yes. Actually I had to -- when there was more hours I had to fill-in, because I -- we had to stay afloat. I mean I had to do what I had to do.

Q All right. Now, did Phil gradually improve over those months and the wound started closing up and all that?

A Yes.

Q Okay. And as things went on, I mean how did he do later on when he sort of was able to get out of the chair more and was recovering more there toward the fall of 2011? Tell us about that.

A Phil worked really hard to get himself back together. He -- he -- with everything he had -- I mean he tried and he would practice, you know, walking and do some bends. It was my understanding that the doctor told him if he could

walk longer periods, that he would be able to return to work, so I had no idea he was walking four point five miles, but that's how much he wanted to go back to work. And the doctor gave him -- Dr. Johnson gave him a lifetime disability plate as well to help him.

Q Okay. All right. Was Phil still having any pain during this period?

A Phil was having excruciating pain, and he was just on pain medication every time he needed it.

Q Okay. All right, now at some point Phil returned to work. Right?

A Yes.

Q There sort of middle of December, 2011?

A Yes, sir.

Q All right. And where did he return to work? Where'd he go?

A Fairfield Memorial Hospital.

Q Okay. And how'd that go there at the beginning? How was he doing?

A Well, when he was there he would try to do his job. I mean he was getting through. He couldn't take his pain medicine, so when he would come home he would be -- he would be -- he'd have to take his pain medicine and go to bed. I mean he could barely even talk. Our relationship over time was wearing thin.

Q Okay. Where did Phil usually sleep?
A Well, Phil -- he sleeps on the couch or the chair because of his leg. He doesn't sleep in the room up to this day.
Q Okay. And why did he sleep in the couch or a chair? Why does he do that?
A Because his foot, it just tingles and pain and he can't -- he has to like keep it elevated sometimes and it just bothers him. Like he has like spasms and stuff during the night.
Q Okay.
A And it's easy -- it just helps him. He's got like a little incline from the recliner or the side of the couch.
Q Okay. All right. Now, Jeanne, do you remember receiving a phone call from Phil some time after he started back at -- started back at Fairfield Hospital in the ER?
A Yes.
Q Okay. And when Phil called you, was he happy, was he upset? How was he?
A Phil was irate. Phil said -- well, ---
MR. SMITH - Objection, Judge, this ---
A --- wait a minute. Okay.
MR. SMITH - --- is corroborative and it's bolstering, and I object to it. May I approach?
THE COURT - Yes.

(WHEREUPON, BENCH CONFERENCE WAS HELD IN THE PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE JURY WHICH WAS NOT REPORTED.)

THE COURT - Ladies and gentlemen of the jury, this is one of the occasions I need to discuss something with the attorneys outside of your hearing, so I'm going to ask you to step back the jury room. As always, I'll ask you not to discuss the case while you're in the jury room until I ask you to do so. You may retire to the jury room.

(WHEREUPON, JURY EXITS THE COURTROOM)

THE COURT - All right, I think you've already stated your objection on the record.

MR. SMITH - Yes, sir, Your Honor. Oh, you want me to restate it?

THE COURT - Well, no, that's okay. I think you put it on the record. I just want to find -- what answer are you expecting to elicit by the question?

MR. PROFFITT - I am expecting Jeanne Ethier to testify that Phil Ethier called her just immediately after he had the phone conver == had the conversation with Dr. Bibeau in the ER where Dr. Bibeau told him, so that's why I couldn't figure it out, no wonder -- that's what was wrong with you, no wonder I couldn't figure it out, that he immediately picked up the phone ---

THE COURT - This was the conversation after his after the surgery, when he first saw him ---

MR. PROFFITT - This is after the surgery. He's gone back to work at Fairfield Memorial; it's the first time he's seen Dr. Bibeau, and they have this conversation very brief at the nurses' station that Phil testified about.

THE COURT - This is not the curbside consult.

MR. PROFFITT - No, no, this is not the curbside consult. This is where -- and ---

THE COURT - And you expect her to testify that he called her and said he had seen the doctor and?

MR. PROFFITT - That he had seen Dr. Bibeau -- had just seen him. He did this right after he talked to Dr. Bibeau -- Phil, as he testified sort of freaked out and was very angry about it. He immediately picked up the phone and called his wife and said you won't believe what Dr. Bibeau just told me. He was upset and was excited and angry and he told her -- he repeated what Dr. Bibeau said to him, and that's what she's going to testify to. That's admissible under hearsay exception.

THE COURT - All right. Yes, sir?

MR. SMITH - Judge, that's hearsay; it's corroborative; it's bolstering, and the admissibility he's trying to say is either a present sense impression or

excited utterance, and that is not what it is, and foundation is not there. I object to it.

THE COURT - Anything further?

MR. PROFFITT - No, sir.

THE COURT - I'll sustain the objection.

MR. SMITH - Thank you.

MR. PROFFITT - All right.

THE COURT - All right. Let's bring the jury back.

(WHEREUPON, JURY ENTERS THE COUTROOM)

THE COURT - All right, the record will reflect the jury's returned to the courtroom. I sustained an objection. You may proceed.

MR. PROFFITT - Thank you, Your Honor.

Q Jeanne, let's turn to the time period when Phil eventually resigned from Fairfield Hospital. Do you recall that he resigned in about March, 2013 or so?

A Yes, sir.

Q Okay. And why did he have to resign from the hospital?

A Working on his feet for that amount of time constantly was too much. It just was too much for him, and he couldn't take his pain medication while he was at work.

Q Okay. And what did Phil do next as far as a job? Where did he go?

A So he -- he found a job that he thought if he wasn't on his feet so much it would, you know, really help him and so he got a job at Gentiva Home Health.
Q Okay. And what's your understanding of what Phil did with the home health job?
A He would drive to different houses and do different treatments on patients, patient teaching and different things like that.
Q Okay. And did he eventually -- did he at first carry a full-time patient load there with Gentiva?
A Yes, he did and then he had to cut his hours down because he had no life when he was working. He thought Gentiva Home Health would be helpful and he wouldn't be in so much pain, but he still -- when he came how he'd have to take pain medication, and he was basically living in pain, and so he cut his hours down so that he wouldn't be working so much so he could take his pain medication and decrease his pain.
Q All right. Now, what was Phil's mental attitude or mental outlook during this period as you go into sort of late 2013 and up into early 2014? How was he doing mentally?
A Phil -- everything was taking its toll. Phil had tried everything. He really wanted to work, and he was just feeling like a loser. I mean he wasn't able to keep a

full-time job because of the pain, and so his self-esteem was really dropping, and I believe that he was suicidal.

Q Okay. All right. Now, at some point, Jeanne, did you try to get him some help and help him find a psychiatrist?

A I did not. He looked himself, and when he asked me who the best psychiatrist was, I told him I personally feel Dr. Chen from Rock Hill is, you know, one of the best, but there are no openings and there are no openings for months in Rock Hill. So Phil started with Columbia looking for help, and there was no -- nothing available for months in Columbia either.

Q Okay.

A So he told me he called -- can I ---

Q Go ahead.

A He told me he called Dr. Chen's office and he got an appointment.

Q All right. Now, you have worked with Dr. Chen previously?

A I did. I've worked with Dr. Chen when I started there until she left for her own practice.

Q There at the Rock Hill hospital.

A At the Rock Hill -- Piedmont Medical Center. I had no outside contact with Dr. Chen. I strictly have a -- had a professional relationship with her. We were not friends. We weren't social buddies. It was strictly a professional

relationship. She was the most concerning, caring psychiatrist that you'll ever find.

Q Okay. All right, do you believe that Dr. Chen helped Phil?

A I believe Dr. Chen saved my husband's life, yes, because no one else was listening to him when he was crying for help.

Q Okay.

A And Dr. Chen is the only one who took the time to review everybody's records to find out just what was going on. Nobody else had time for that, and that's the kind of person Dr. Chen is, not because I had any other kind of relationship with her besides a professional relationship from Piedmont Medical Center.

Q Okay. All right. Jeanne, let's sort of move into the present and talk about how things are now with Phil and with you. Does Phil still continue to suffer from the chronic pain?

A Yes, Phil -- our whole life is based on pain. Whatever we do it's depending on the pain. I spend a lot of time by myself, because he's in a lot of pain. We can't do the things we used to do. We were both outside people, and now I'm the one doing things alone.

Q Okay. Does he still take the pain medication every day?

A Yes, he takes it as he needs it, you know. He tries to take it the way it's prescribed to him.
Q Okay. Does he still suffer from the foot drop?
A Yes, he does. He wears the brace when he needs it and his foot is always in pain. It just depends what level. Is it low, high, medium?
Q Okay. All right. Have you seen Phil stumble because of the foot drop?
A Yes. When Phil's foot gets tired and -- you know, after walking for a little bit it'll get tired, yes.
Q Okay. Do you worry about the future?
A All the time.
Q Why? What are you worried about?
A The uncertainty of the future, the way my husband tries and he just doesn't feel, you know, like he can supply our needs. That's all.
Q Jeanne, how is -- how has Phil's condition and situation affected your marriage?
A For a while I mean really it was non-existent. When he'd come home from work he would just go take his pain medication. There was little communication. He was just suffering in himself, and so we really barely, you know, had a communication.
Q All right. Is it better than it used to be?

A It is better than it used to be, yes, thanks to Dr. Chen for helping and stepping in.
Q Okay. All right. Has there been any effect on the physical relationship between you and Phil?
A Well, because of the pain medication we do not have a sexual relationship.
Q Okay. Has there been any impact on sort of the emotional relationship that you had with Phil? Is it like it was before all this happened?
A No. Every day is different. I mean we live day-to-day. We used to be really close and be partners. I mean he was my companion. I mean since then I do things alone; he does things alone. He has to take his pain medication and go to sleep often. I mean I love my husband.
Q All right. Have you tried to do any more camping in the recent past?
A You know, -- we did. Well, not this, but, you know, we went camping a few times for one or two nights.
Q Okay. And how'd that go? Was it like it was in the past?
A Well, no, not in the past because I do things alone; Phil will fish off the thing at Lake -- Lake Wateree, but no we don't -- I don't have a companion. We used to walk, jog, hike, anything outside. I mean we were just outside people.

Q Okay. Jeanne, do you still love Phil?

A Yes, I love Phil very much.

MR. PROFFITT - Thank you. I don't think I have anything further, Your Honor.

THE COURT - All right, ladies and gentlemen of the jury, at this point in time we're going to break for your lunch. As you leave the courthouse, I'm going to give you the same instructions I've given you every time you've left the courthouse, that's not to discuss the case with anyone, not allow anyone to discuss the case with you, don't attempt to gather information on your own; should anyone try to contact you about the case in your absence, please report that; don't listen to, watch or read media reports about the case. I'll ask you to be back in the jury room at 1:30. We should be in a position to resume thereafter. Thank you very much. You're free to go to lunch at this time.

(WHEREUPON, JURY EXITS THE COURTROOM.)

THE COURT - Ma'am, you're in the middle of your testimony and it would be improper for you to discuss your testimony with anyone during the break. Do you understand that?

MRS. ETHIER - Yes, sir.

THE COURT - All right, we're in recess until 1:30. Thank you very much.

MR. PROFFITT - For the record, Your Honor, we're not going to lunch with them.

THE COURT - Okay, very good. Thank you.

MRS. ETHIER - I didn't want to anyway.

(WHEREUPON, LUNCH RECESS TAKEN)

THE COURT - All right, plaintiff ready to proceed?

MR. PROFFITT - Yes, Your Honor.

THE COURT - Defense ready to proceed?

MR. SMITH - Judge, one second. I'm sorry.

THE COURT - All right, that's quite all right.

(WHEREUPON, BRIEF PAUSE)

MR. SMITH - Yes, sir, Your Honor. We're ready.

THE COURT - All right. I want to go over with the parties the question concerning the admissibility of the diary book. I told you I'd take that under advisement. I've had the chance to look at that. I will put on the record that this morning I was approached by counsel -- both counsel in chambers and at that time the plaintiff urged the additional grounds of Rule 801(D)(1)(B) to sustain the Court's original ruling allowing the diary into the record. In addition, the plaintiff suggested to the Court the possibility of removing the diary from the record and simply having portions of it -- having them read into the record, that that diary did not be presented to the

jury as an exhibit once the case goes to the jury. Of course, the defense opposed that motion and the Court reconsideration of the matter altogether. Have I correctly stated what occurred this morning, Mr. Proffitt?

MR. PROFFITT - Yes, Your Honor.

THE COURT - Is that correct, Mr. Smith?

MR. SMITH - Yes, sir, Your Honor.

THE COURT - All right, I have reviewed my ruling based on the additional grounds urged by the plaintiff as well as the opposition by the defense to the admission of the diary in question. The Court originally allowed the diary to come in primarily under Rule 803 and I would -- my -- the basis of my ruling was number one, that it was a present sense impression at the time it was made, number three under 803 that it was a statement of the declarant's then-existing state of mind and/or mental feelings, pain and bodily health would be included, then also number five under that rule as a memorandum or record concerning a matter about which the witness once had knowledge but now was == had insufficient recollection to allow them to testify fully and accurate. I have reviewed that, as well as the additional grounds urged by the plaintiff. At this time it would be my ruling that the diary is -- the statements made in the diary are admissible, however, the Court is aware of the admonition in 803(5) that states if

admitted the memorandum or record may be read into evidence, but may not itself be received as exhibit unless offered by an adverse party. Now, that limitation doesn't exist on the other exceptions to Rule 803 or other grounds for admitting statements under Rule 803, and however I am sensitive to that concern by the plaintiff. At this point in time it appears that the diary has been used for testimony from the plaintiff primarily in which portions of it were presented to the jury. There were portions placed on the overhead projector, but it was portions that were being read by the plaintiff during his testimony that were being presented to the jury at that time, and of course the rule allows for that record to be read into the evidence itself. So the Court's not changing its ruling in the matter concerning the admissibility of the statement and I will also -- and I do agree that the additional grounds offered by the plaintiff are correct, however, that would apply as far as I can tell simply to the portion of the diary which deals with a statement made by the plaintiff to the defendant doctor what would been known as the curbside consult, and there is some question as to that particular statement whether it, in fact, was made. There also has been some question as to when this statement was made, as whether it was a recent fabrication or made by improper influence. So I would accept that as additional grounds

for it being admissible, however, at this time I am going to make the ruling that the document itself will now be marked as a Court's Exhibit. It will not be presented to the jury, unless the -- at the close of all testimony the plaintiff would like to make additional motions concerning certain portions of it. I'll reconsider once all the evidence has been presented, if necessary. So that's my ruling at this point in time. I've not changed the ruling, however, I will place the diary on the Court's Exhibit list and at this time the document itself will not be presented to the jury.

MR. PROFFITT - Thank you, Your Honor.

THE COURT - Anything further concerning that matter?

(WHEREUPON, NO RESPONSE)

(WHEREUPON, DIARY/NOTEBOOK IS MARKED AS COURT'S EXHIBIT NUMBER 11.)

THE COURT - All right, ma'am, you need to resume the stand.

(WHEREUPON, MRS. ETHIER RETAKES THE STAND.)

THE COURT - All right, are you ready to proceed?

MR. SMITH - Yes, sir, Your Honor.

THE COURT - You may call the jury.

(WHEREUPON, JURY ENTERS THE COURTROOM)

THE COURT - All right, the jury has returned to the courtroom. I trust everyone had a good lunch. If anyone had any difficulty in complying with my instructions during your break, please stand.

(WHEREUPON, NO RESPONSE)

THE COURT - It appears that all have been able to comply with my instructions thus far. At this time the defense will be given the opportunity to examine the witness. Mr. Smith?

MR. SMITH - Thank you, Your Honor. May it please the Court.

THE COURT - Yes, sir. You may proceed.

CROSS EXAMINATION

BY MR. SMITH -

Q Good afternoon, Mrs. Ethier.

A Good afternoon.

Q Let me just ask you a few questions if you would. You've been married to your husband for how long?

A Twenty-eight years.

Q Twenty-eight years. And when y'all moved to South Carolina, you were aware that he had high blood pressure, weren't you?

A Yes.

Q And you were aware that he was not seeing a during that doctor, weren't you?

A When he went for a job he would be assessed.
Q Okay. So but when y'all moved here to South Carolina I think you were here -- he didn't -- he hadn't seen a doctor in three years or so he said -- is that right? -- before this event.
A He went to Blue Granite when he got his physical at Granite for Fairfield Memorial.
Q Yes, ma'am. Okay. So you were familiar about him going to Blue Granite.
A This is what I -- yes.
Q Okay. And you were aware that they'd place him on blood pressure medication.
A Yes, sir.
Q And that he only did that for a week and then stopped taking it again. Is that right?
A Yes, sir, he was trying to monitor it with diet and exercise.
Q Okay. And he continued to smoke at that time. Is that right?
A No, he has stopped smoking as soon as he had the surgery. He has not picked up one cigarette since then.
Q Yes, ma'am, but I'm talking about before that he was smoking, ---
A Yes, sir.

Q --- and he was smoking over a pack a day he said. Is that right?
A I didn't sit with him for every cigarette. I don't now.
Q All right, fair enough. Now, you've been a nurse for how long?
A A long time, 1989.
Q 1989?
A As an LPN.
Q And you've worked in the medical field all that time?
A Psychiatry.
Q Psychiatry. Okay. And so you -- the entire -- your entire career, you've been involved with psychiatry. Is that right?
A Entire career, psychiatry, never medical.
Q Yes, ma'am. And so during that time you're familiar with all types of psychiatric conditions in patients with all types of conditions.
A Yes, sir.
Q And you were working at this time when y'all moved to South Carolina to the psychiatric unit or floor at Piedmont Medical. Is that correct?
A Yes, sir.

Q All right. And when you were there you dealt with patients with all types of psychiatric problems, didn't you?
A Yes, sir.
Q And some patients were able to deal with their psychiatric problems and continued living life. Is that right?
A Yes, sir.
Q Okay. And some of them -- some patients were -- some of your patients were able to overcome their psychiatric problems, are they? (sic)
A That's an individual statement. I don't know how to answer that.
Q Okay. But you've had some patients who've been able -- have had success in their treatment ---
A Success in treatment ---
Q --- and y'all have discharged them from the hospital.
A Yes, ---
Q Okay.
A --- with psychotherapy and medications, yes.
Q Yes, ma'am. And part of what you do is this is a field where you work as a team with the doctors and everybody over there in the hospital. Is that right?
A When you're hospitalized, yes.

Q Okay. When they're hospitalized and y'all work -- you're part of a healthcare team which involves you, the nurse, the physician and psychologist and the patient. Is that right?
A Yes.
Q Okay. And it's -- the patients to -- when doctors or healthcare professionals give them instructions, it's up to the patients to follow those instructions in your field, isn't it?
A Yes.
Q That's a very critical part of the treatment of patients that you care for. Is that right?
A Yes.
Q And when we -- when we looked at this -- I think I heard you say earlier that -- that Dr. Chen was the best doctor that you knew. Is that right?
A That was my opinion.
Q And you worked with Dr. Chen for two or three years up on the psychiatric floor at Piedmont.
A Yes, sir.
Q Okay. And I think you -- I heard you earlier say that Dr. Chen -- that your husband -- you recommended Dr. Chen; your husband got the appointment. Is that right?
A Yes. I did not recommend Dr. Chen, no. I told my husband, Dr. Chen had no openings. No psychiatrist in Rock

Hill had openings. That's why he started in Columbia calling psychiatrists.

Q All right, ma'am, let me mark this as Defendant's Exhibits Number 14.

(WHEREUPON, DOCUMENT MARKED FOR IDENTIFICATION AS DEFENDANT'S EXHIBIT NUMBER 14.)

Q All right, just from what we heard earlier through testimony, your husband went to see Dr. Chen some time in March of 2014. Is that right?

A Yes, sir.

Q All right. Let me show you what's been marked as Defendant's Exhibit Number 14. And let me ask you this. Now, is this a fax -- you were working at Piedmont at the time. Is that right?

A Yes, sir.

Q And this is a facsimile to Dr. Chen's office from Jeanne Ethier. Is that right?

A Yes, sir.

Q And this is your hand-writing on here. Is that right?

A Yes, sir, that was me.

Q All right, and you sent this fax to Dr. Chen's office.

A Yes, sir.

Q Okay. And that was dated on January 15th, 2014. Is that right?

A Yes, sir.

MR. SMITH - Judge, I move to enter that in as Plaintiff's (sic) ---

THE COURT - Any objection?

MR. PROFFITT - No objection.

MR. SMITH - --- Defendant's Exhibit Number 14.

THE COURT - It'll be admitted as marked. You may proceed.

(WHEREUPON, DOCUMENT MARKED INTO EVIDENCE AS DEFENDANT'S EXHIBIT NUMBER 14.)

Q All right, so some two months before your husband went to go see Dr. Chen, you were faxing a letter. Is that correct?

A I faxed this letter when my husband asked me to, because he wasn't feeling well enough to drive to fax it himself, so I said, let me fax it for you, I'm going right to work now, so I faxed whatever information that he needed. I did not talk to Dr. Chen; I faxed it.

Q Okay. All right, but let's -- let's continue reading this, Mrs. Ethier. It says, Dr. Chen, here's my husband's psychological eval, thank you, Jeanne Ethier. Right?

A Right.

Q And then at the bottom you wrote lawyer, David Proffitt, didn't you? You were telling Dr. Chen ---

A No, that's not -- that's not my -- down the bottom here, this not my writing.

Q That's not your hand-writing.
A That's not my hand-writing down at the bottom.
Q Okay.
A I -- office, Gentiva, that's not my -- that's not my -- whatever is down the bottom is not my hand-writing.
Q I see. So -- so on here this -- I see the numbers, but when you look at lawyer, that's not your hand-writing? That does not look like your hand-writing right above?
A No, that -- that is not my hand-writing.
Q Okay. And so office -- and so in January of 2014, before -- two months before Dr. Chen saw your husband, she was able to know where your husband worked and who the lawyer was. Is that right?
A I have no idea.

MR. SMITH - Okay. Thank you, Mrs. Ethier.

MRS. ETHIER - Here, here's your paper.

MR. PROFFITT - Nothing further.

THE COURT - You may step down, ma'am.

MRS. ETHIER - Thank you.

THE COURT - Plaintiff may call its next witness.

MR. PROFFITT - Your Honor, our final witness will be Mr. Ethier. We just need to recall him briefly. I want him to show the leg brace to the injury.

THE COURT - All right.

MR. HOLLER - Judge, I would make my Rule 611 objection.

THE COURT - Yes, sir.

MR. HOLLER - And I'll be happy to discuss it.

THE COURT - All right, I'll ask the jury to step back to the jury room while we do that. Ladies and gentlemen, don't discuss anything about the case until I ask you to begin deliberations.

(WHEREUPON, JURY EXITS THE COURTROOM.)

THE COURT - Yes, sir.

MR. HOLLER - Judge, I'm sorry, Rule 611(D) deals with the recall of witnesses. Judge, I would be interested in what the basis on the recall of a witness that's already fully testified and we have cross examined.

THE COURT - Mr. Proffitt?

MR. PROFFITT - The only basis is I forgot to ask him to show his leg brace to the jury when he was on direct and cross the first time. I'm not going to ask him any questions except, would you please show the jury your leg brace, have him remove his shoe and show them the leg brace on his foot and leg.

THE COURT - That's the purpose?

MR. HOLLER - May I confer with counsel just very briefly, Your Honor.

THE COURT - Yes, sir.

(WHEREUPON, DISCUSSION IS HELD BETWEEN COUNSEL WHICH WAS NOT REPORTED.)

MR. HOLLER - Judge, it may be re-appropriate -- may be appropriate to re-call the plaintiff during reply, but I think it would be inappropriate to re-call him during the plaintiff's case in chief. Obviously, its in your discretion under Rule 611(D). Again, there may be a number of issues, but if we're just going to recall witnesses every time Mr. Proffitt thinks of something he didn't think of before, I just don't think that's a proper way to do it. He's limited generally in scope to things that were brought out in cross examination.

MR. PROFFITT - I hesitate to wait until reply because I don't know that we're going to have any reply testimony, and I -- I simply forgot to do it during the first time he was on the stand. It will say 30 seconds.

THE COURT - All right, I'll allow you to call him simply for that purpose, no other questions other than to demonstrate the leg brace.

MR. PROFFITT - Thank you, Your Honor.

THE COURT - Let's bring the jury in.

(WHEREUPON, JURY RETURNS TO THE COURTROOM.)

THE COURT - All right, the jury has returned to the courtroom. You wish to call ---

MR. PROFFITT - I wish to recall Philip Ethier simp -- for the simple purpose of showing the leg brace to the jury.

THE COURT - All right, Mr. Ethier, you may step to the stand. Mr. Ethier, I'll remind you that you've been placed under oath in this case. Do you acknowledge that you're still under oath?

MR. ETHIER - Yes, sir.

THE COURT - Thank you, sir. Have a seat in the witness stand.

PHILIP ETHIER, AFTER BEING QUESTIONED BY THE COURT REGARDING ACKNOWLEDGING HIS OATH FURTHER TESTIFIES AS FOLLOWS -

MR. PROFFITT - If I could, Your Honor, I believe -- I'm not sure they can see it from up there. It may better if he just sits here and the jury can ---

THE COURT - All right, since you're going to ask him about the leg brace -- and that's all I'm allowing -- you may proceed.

DIRECT EXAMINATION

BY MR. PROFFITT -

Q Sit down here ---

MR. PROFFITT - If the jury would be allowed to stand if they need to to see this. I don't ---

THE COURT - Whatever it takes for them to be able to see. It's a demonstrative question I believe. All right, you may proceed.

Q All right, Phil, if you would just roll your pant leg up and pull your shoe off so they can see the brace.

A (WITNESS COMPLIES) I can't pull my shoe off unless I take the brace off.

Q Okay. Do that.

A (WITNESS COMPLIES)

Q Okay, and then just strap it onto your leg so they see what it looks like on your leg. No, no, no.

A Oh. I'm sorry. (WITNESS COMPLIES)

Q All right, stand up. Walk over there and walk back.

A (WITNESS COMPLIES)

Q Of course, you don't have your shoe on, so -- you don't normally limp that much because you don't have your shoe on. Right?

A Yes, it's just a different level, so ---

Q Right. Okay.

MR. PROFFITT = That's all, Your Honor.

THE COURT - All right. Defense wish to ask any questions at this time?

MR. HOLLER - No, sir.

THE COURT - All right.

MR. PROFFITT - Your Honor, the plaintiff rest.

THE COURT - All right. Ladies and gentlemen of the jury, there's some matters that I need to discuss with the attorneys at this point in time. Again, I'm going to ask you to step back to the jury room but not to begin any discussions until I ask you to do so. You may retire to the jury room.

(WHEREUPON, JURY EXITS THE COURTROOM.)

THE COURT - All right, before we begin any motions I will announce that I am not granting the defense motion for a mistrial in the matter. I am taking the position that the Court has the right to withdraw evidence as I did. I'm using as authority Collins & Son Fine Jewelry Incorporated vs. Carolina Safety Systems Incorporated in part and the inherent right of the Court to rule on evidentiary questions that are presented during the trial. I will, however, if the defense wishes to request any type of limiting instruction to the jury I will certainly listen to your suggestions in that regard and will do everything I can to try to explain to the jury how they should consider that evidence without commenting on it. So if you wish any type of limiting instruction, let me know before I instruct the jury and I'll be glad to consider that. Now, motions?

MR. HOLLER - Yes, sir, Your Honor.

THE COURT - Yes, sir.

MR. HOLLER - Judge, I'll try to be as concise as possible, and certainly I can share whatever notes I have. There are 14 issues in which we would like to make a motion for directed first. First, Judge, we'd move for a directed verdict on any claim of malpractice for encounters or conversations after April the 10th, 2011. The testimony to this jury is that there was no physician-patient relationship. In fact, while there was some discussion from the plaintiff's experts, there was never anything that was, quote, clear, end quote, that would give actionable duty for a hallway encounter or curbside encounter or however you might term that. So we would move to strike allegations of malpractice for anything beyond the April 10th, 2011 encounter. And, Judge, again, I can do them all 14 at a time an entertain responses to them or we can do one at a time.

THE COURT - Let's do them one at a time. Hear from the plaintiff as to the -- any claims of malpractice -- what I'll call curbside consult. I think that's what it's been referred to.

MR. PROFFITT - Right. Your Honor, I believe it's a question for the jury. I believe our experts did testify that a reasonable doctor in that same position would've taken some action at that point if it is, in fact, true that that encountered occurred, and that in failing to do

THE COURT - Come forward, please.

Ma'am, if you'll come to my left and be sworn over here where this lady's standing, please. Thank you.

JERILYN WADFORD, AFTER BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS -

THE COURT - Ma'am, once you're seated I'd ask that you state your name and get as close to that microphone as you can so we can hear you.

MS. WADFORD - Okay.

CLERK - The chair won't move; you'll just have to slide up ---

THE COURT - The chair won't move, so you'll have to slide up in the chair.

MS. WADFORD - Okay.

THE COURT - Thank you, ma'am.

MS. WADFORD - Yes, my name is Jerilyn Ann Wadford.

THE COURT - Thank you, very much. Mr. Smith, it's your witness.

DIRECT EXAMINATION

BY MR. SMITH -

Q Good afternoon, Ms. Wadford, how are you?

A Okay.

Q And you go by the name Jeri?

A Yes, I do.

A I don't -- I don't look at that when I'm looking at the patient and asking them for their -- any problems.
Q Where is this filled out?
A At the time -- this is filled out up at the front desk, like business office fills this out.
Q Yes, ma'am. Okay. And so that's not part -- that's not something that becomes a part of the patient's file during the emergency room triage process or treatment or examination of the patient.
A No, not that I recall.
Q Okay. All right, now let's turn to page 1592 if you would for me, please, ma'am.
A (WITNESS COMPLIES)
Q And tell the jury what 1592 is.
A 1592 is a triage record as it states.
Q Okay. And is -- tell -- did you fill out this triage record?
A No, I did not.
Q Do you know who filled out this triage record?
A It was -- I believe it was Samantha Anthony.
Q All right. And sometimes when people come into the emergency room, do -- who -- does other people besides you do the triage of patients?
A Yes, they do.

Q Okay. And do you ever follow-up on the triage of the patients?
A No, I -- since I have my signature on it, I would follow-up on the -- what's stated on here.
Q Okay. So when you -- if you sign something, what does that mean to you, sign this sheet?
A That's means I've reviewed the information that's on the sheet.
Q And reviewed it -- reviewed it in which way?
A Verified the information as correct.
Q From the patient?
A From the patient.
Q Okay. And so when you look through this sheet what's been marked 1592, does this show that you signed the sheet?
A Yes, it does.
Q And it's down at the bottom of the sheet?
A That is my signature.
Q Okay. So does that -- does that mean that you had a -- took a history and then an assessment of Mr. Ethier?
A Yes.
MR. COX - Your Honor, objection to the leading.
THE COURT - I'll overrule the objection. You may proceed.

Q And so on April 10th, 2011 -- let's go through this sheet a little bit -- did you independently verify all this information?

A Yes.

Q And tell the jury how you would've verified this information.

A I would go to the patient and -- and ask what, you know, is -- you read this and see if it -- you know, did you -- what was your issue, what was your problem, what happened or tell me what happened, and I would go ahead and -- according to this, cap refill was checked, so I would check for the refill, the cap refill and also the right pedal and right post tibial pulses.

Q Okay. So if -- if this chart -- if you access something or the patient told you something different than what was written on this chart, tell the jury what you normally would do.

A If there's anything different on this chart I will just line it out, initial it and put what the correct information is that I found.

Q Okay. So on April 10th, 2011, did you go through this information with Philip Ethier?

A According to this, yes.

Q Okay. All right, well, let's talk about this a little bit; let's talk about what you went through with him. If

you'll look up at the top of this, it talks about how he arrived into the emergency room. Is that right?
A Correct.
Q Would you have verified that with him?
A I would've seen him walk.
Q Okay. And then you go through the vital signs with him?
A Not necessarily. I would look at the vital signs.
Q And see if they were still similar to what ---
A I would -- I would look at the vital signs to see what they were, to see if there's any issues.
Q And how about when we look through this, the chief complaint. Tell the jury what you would do to verify this chief complaint.
A I would ask, I'd said, so you have some right foot pain and it started about 1300 or 1:00 o'clock, you were unloading a truck and when you felt your right foot started (sic) to turn ecchymotic and you had -- you were complaining of some pressure and the pain started getting worse around 3:30 or 1530 and then ---
Q All right, and ---
A --- I would check the cap refill as it states here.
Q All right, now, let me talk to you about the chief complaint. You would ask him if that was his complaints.
A Yes.

Q Okay. Now, the term ecchymotic and the term pressure, is that something that you observed or is that something the patient told you?
A Well, according to this, it says the patient stated.
Q Okay. So that means that's what came from Mr. Ethier and not what your observations were.
A Correct.
Q All right. And then throughout this, with the pain assessment, did you perform a pain assessment of Mr. Ethier?
A That would be asking him on a pain scale, yes.
Q And what was his response to you on that?
A His response was that it's his right foot, it's moderate pain, it started about 1300 and the type of -- the way he describes the pain was the pressure, and the pain scale was about a five out of a zero to ten.
Q And all that would've been independently verified by you?
A Yes. Excuse me, yes.
Q I'm sorry. Do you need some water?
A Yes.
THE COURT - We've got some right here.
MS. WADFORD - Thank you.
Q Better?
A Yes.

Q All right, and so when you go through this, also these boxes up here at the top where it says mental status and respiration and skin, did you independently verify all that too?
A Just by looking at the patient you could tell all that information.
Q And when you go through his mental status, was how at that time? (sic) What was the mental ---
A Alert and oriented.
Q Yes, ma'am.
A He could answer my questions.
Q Yes, ma'am. And then when you went through, did you check his skin?
A It says it's warm and dry.
Q Okay. And would you -- where would you have checked the skin where it was warm and dry?
A Well, if he's complaining of right foot pain, I would look at it to see if it's warm and dry and feel it.
Q And so you would've felt Mr. Ethier's right foot on April 10th, 2011 in the triage room?
A Well, when I felt for the pulses, the pedal pulse, I'm feeling the foot.
Q Yes, ma'am. And the notation that is on there and what you found on April 10th, 2011 as to the condition of his foot was what?

A His foot was warm and dry and he had pedal pulses. They were present and they were normal.
Q Okay. And when you go through here and you observe a patient's foot or -- would you look if it was discolored or if it was a different color would you notate that on the record?
A Yes.
Q And -- when -- you had an opportunity to observe Mr. Ethier's foot on April 10th, 2011.
A Correct.
Q Had an opportunity to observe his toes on April 10th, 2011?
A Yes.
Q And when you had an opportunity to observe his leg on April 10th, 2011, his right leg?
A Well, that I can't say for sure, but it's the right foot, because the documentation says the right foot.
Q And, well, did he complain ---
A But if I'm looking at the right foot, the leg's there, so ---
Q Yes, ma'am.
A Sorry.
Q You would assume that you -- when you look at a foot, you look at the leg.
A Yeah, the leg's there, yes.

Q Yes, ma'am. And to -- was he making any complaint of right leg pain on April 10th, 2011 during the triage process?
A According to the documentation it's only his right foot.
Q Okay. And was the -- and so if he was complaining of right leg pain would that be recorded by you on here?
A Yes.
Q All right. And the fact that there's no documentation right leg pain means what to you?
A That he complained about his right foot pain.
Q Okay. And when you went through -- when you look at the leg or foot and you look at a color, if there was a different color, blue, purple, red, black, would you notate that?
A Yes.
Q And when you go through and looking at these boxes up here which is on skin, you've got a number of different choices. Is that right?
A Correct.
Q And ---
A Correct.
Q --- tell the jury what those choices are that you could've documented that day?

A That it was pale, meaning it's white-looking, diaphoretic, sweaty, or it was cyanotic meaning blue or purple.
Q And did you check any of those on that day?
A No, it's -- no, it's not checked.
Q Okay. Let me ask you this. When you're going through this -- through this triage, are you carefully observing all the conditions that Mr. -- that the patients complain of at that time?
A Yes.
Q All right. And at any time during your observation or examination of Mr. Ethier, did you notice any black toes?
A Well, according to this there was no black toe, otherwise I would've -- it would've been noted as such.
Q Okay. And a black toe, does that -- is that something of importance to you?
A Well, a black toe is really contradictory to what this says, because the pulses in his foot were normal; they were good. The nail beds -- well, cap refill which is less than one second, it was very good. And when you check for the nail beds, you're checking the toes -- oh, sorry -- you're checking the toes to see if there's good blood flow, good circulation, and if you've got good pedal pulse and the cap refill is good, there should be -- I mean there shouldn't

be a black toe. If I had seen one, it would've been charted as such.

Q Okay. Well, let's go through this. Now, you independently checked the pulses. Is that right?

A Yes.

Q And would you have signed this if you did not check the foot pulses or capillary refill?

A No. No.

Q And through this -- now, I know this jury's heard a lot of them -- but tell them how you check a foot pulse. Let's talk about the pedal pulses and the post tibial pulses.

A Okay, to check the pedal pulse, you would just -- this is the top of my foot, you would just put your two fingers on top of the foot and press lightly and see if you feel a pulsation. To check the posterior tibial, it would be putting your -- putting your fingers by the ankle and -- of the same foot -- and feel for pulses also.

Q All right, and when you did that on April 10th, 2011 to Mr. Ethier, what did you determine the foot pulses were?

A Plus -- plus two.

Q And what does plus two mean to you?

A It was normal.

Q Okay. And do you -- tell the jury -- did you check the capillary refill?

A Yes.
Q And tell the jury how you checked capillary refill?
A By pressing down on the nail bed, pressing down on the nail bed and letting it go very quickly and see how fast the nail bed returns back to the nice pink color ---
Q All right, ---
A --- so when you're pressing down it's white and when you let it go, it'll come back to normal.
Q And at that time did you verify Mr. Ethier's capillary refills on April 10th?
A Yes. Yes, it's within one second.
Q And what does that mean to you?
A That it was good.
Q And when you have pulses, the post tibial and pedal pulses and capillary refill, what does that tell you as a nurse?
A That tells me that I have good blood circulation, good blood flow. Blood comes from the heart; the heart pumps blood and it's in your most distal portion as your foot, so it takes a little bit longer to get there, but if I've got good blood circulation, you know, and a good capillary refill, then the circulation and the blood flow is good to that particular extremity.
Q All right. And have you checked foot pulses before April 10th, 2011?

BY MR. COX -

Q Good afternoon, Ms. Wadford. My name's Ron Cox. Let me ask you first of all, I think you were asked this briefly when you first started testifying, but I want to make sure I understood and the jury understood your answer. Is it correct to say that you don't have any independent recollection in your memory of this ER visit by Mr. Ethier, and that you're relying through your testimony only on what's documented in the record?

A That is correct.

Q And when -- let me ask you this. You've had a chance to look over the record. Is it correct to say that no member of the nursing staff at Fairfield Memorial Hospital on April 10th took a popliteal pulse of Mr. Ethier. Is that correct?

A I can't say that for sure. All I can say is what's documented here on this triage page; it shows that it was not -- popliteal pulses weren't checked.

Q And there's no indication anywhere in the record that any member of the nursing staff at Fairfield Memorial took a femoral pulse, is there?

A Correct.

Q And when Mr. Ethier was seen by Dr. Bibeau, you did not go in the exam room.

A I don't recall being in the exam room.

Q And so you don't know if Dr. Bibeau took a popliteal pulse of Mr. Ethier's right leg.
A No, I don't.
Q You don't know if Dr. Bibeau took a femoral pulse of Mr. Ethier's right leg.
A That's correct.
Q You don't know if Dr. Bibeau took a pedal pulse of his right foot.
A I was not there, so I can't say yes or no.
Q You don't know if he took the posterior tibial pulse either. Is that correct?
A I can't -- if he's documented, then he's taken it.
Q Okay. Well, you don't know what ---
A I mean I did not physically see him do that.
Q Okay. And if he didn't document it, then that means he didn't do it. Right?
A I would assume.
Q Now, -- I just want to make sure we're clear. You were asked a lot of questions about this document which is the nursing triage record for Mr. Ethier. Right?
A Correct.
Q This is a page of the bates number 1592 ---
A Yes.

Q --- and there is a lot of information that Mr. Smith was just asking you about that's recorded on this form. Correct?
A Correct.
Q And all the writing that's on this form, the only thing on here that's your handwriting is your signature at the bottom. Correct?
A Yes.
Q Now, on this form there's no indication that Mr. Ethier gave a history of a spider bite, is there?
A I don't see anything written on this triage record.
Q And you don't have any independent recollection. Correct?
A It was a long time ago.
Q And there's nothing anywhere on the triage record that shows that there was -- any member of the nursing staff identified a spider bite. Is that correct?
A Could you repeat that question?
Q There's nothing anywhere in the triage record to show that any member of the nursing staff identified a spider bite.
A All this talks about is right foot pain.
Q Okay. And there's no identification of a spider bite. Correct?
A I don't see anything on here.

(WHEREUPON, JURY RETURNS TO THE COURTROOM)

THE COURT - All right, I've overruled an objection. You may proceed.

MR. COX - Thank you, Your Honor. May I approach the witness and enter exhibit that's been marked as Plaintiff's Exhibit 46.

Q Ms. Wadford, I'd like to draw your attention to -- well, first of all, is this a -- one of the nursing policies and procedures from Fairfield Memorial Hospital where you work?

A It appears to be.

Q Let me draw your attention to the paragraph 3 under general guidelines, and doesn't the policy say that initial assessment must be documented for each patient arriving to the emergency department and a triage note shall be written and signed by a registered nurse only? Is that what it says?

A According to this policy, yes.

Q Thank you.

MR. COX - Your Honor, plaintiffs would offer Plaintiff's Exhibit 46 into evidence.

MR. SMITH - Objection, Your Honor.

THE COURT - Over your objection.

MR. SMITH - Sir?

THE COURT - Your objections are noted.

MR. SMITH - Yes, sir, but I object to it being introduced into evidence, Your Honor. It's cumulative; she's testified and that's -- I think we're going to have to take up -- there's other issues contained in that.

THE COURT - She's acknowledged the existent of that and has published the appropriate portion. Sustain the objection; it'll be made an exhibit.

MR. COX - Thank you, Your Honor.

(WHEREUPON, DOCUMENT MARKED INTO EVIDENCE AS PLAINTIFF'S EXHIBIT NUMBER 46.)

Q Now, Ms. Wadford, we went over the fact that on that triage note from Mr. Ethier the only writing anywhere on that page that is yours is the signature. Correct?

A Yes.

Q And even though the hospital policy requires that a triage note shall be written and signed by a registered nurse only. (sic) Right?

A According to that policy.

Q And isn't true that you don't have any idea what Mr. Ethier's foot or leg looked like on April the 10th, 2011, because you weren't even in the room.

A That is incorrect.

Q Isn't it true that you signed off on this triage and if you now admit that you signed off on it, that could cost

you your job because you violated the hospital policy, didn't you?

MR. SMITH - Judge, objection to that for same reasons we discussed earlier.

THE COURT - It's noted. She may answer the question.

A I'm not sure.

MR. COX - Thank you, Your Honor. No further questions.

THE COURT - Re-direct.

RE-DIRECT EXAMINATION

BY MR. SMITH -

Q Ms. Wadford, ---

A Yes.

Q --- nursing policies -- these are policies and procedures. Right?

A That is correct.

Q And these are used as guides for nursing at the hospital. Is that right?

A That is correct.

Q And is every policy and procedure at the hospital able to be followed by you when you see an emergency room patient?

A By the letter?

Q Yes, sir. Yes, ma'am.

A No.

MR. SMITH - Thank you.

MR. COX - Nothing further, Your Honor.

THE COURT - All right, you may step down, ma'am. Thank you.

MR. SMITH - Judge, may she be excused, so she can go enjoy her vacation?

THE COURT - Any objections?

MR. COX - No, objection, Your Honor.

THE COURT - Ma'am, you're free to go. Thank you very much for coming today.

MS. WADFORD - Okay, thank you.

THE COURT - The defense may call its next witness.

MR. SMITH - Defense calls Rhonda Gwynne?

THE COURT - Come forward, please, ma'am, to my left and be sworn.

RHONDA GWYNNE, AFTER BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS -

CLERK - State your name for the record.

MS. GWYNNE - My name is Rhonda Gwynne.

THE COURT - Thank you. Mr. Smith, your witness.

MR. SMITH - Thank you, Your Honor. May it please the Court.

THE COURT - Yes, sir.

overlap by 30 minutes, and by that when he would come on, he would get a report from the current shift, which may have been me, may have been Ms. Wadford, we would count the narcotics and then we would go. I never worked with him as a nurse. It was just passing off the duties of the shift.

Q All right, on April 10th, 2011, what involvement -- what was your role in his emergency room visit during that time?

A Well, I know I gave him some medication that Dr. Bibeau ordered and I -- when it was time for him to be discharged, I gave him his discharge instructions.

Q Okay. Did you see him during the triage process?

A No.

Q Did you see -- were you in the room when Dr. Bibeau examined him?

A No.

Q And you're -- and the first interaction you had with him was ---

A When I gave him the medication that Dr. Bibeau ordered.

Q Okay. And what is on page 1593 -- do you see that page?

A I do.

Q All right. And at that point, do you have any handwriting on 1593?

A I would say 23 years.
Q Okay. And so let's walk through the discharge patients (sic) and specifically discharge instructions with Mr. Ethier here. Did you -- were you -- what kind of nurse was he at the hospital?
A He's the same thing I am, an LPN. He was; I don't know what he is now.
Q Okay. And to your knowledge, at that time was he -- when he was orienting and being taught, was he giving discharge instructions to patients?
A He held the same position that I now do, and that was part of my duties, so I never worked with him, so I can't say what he did but it would be an RN and an LPN and I'm sure that RN didn't do everything.
Q Okay. All right. Well, let's go through the discharge instructions and turn to 1595 for me, please, ma'am.
A 1595 (WITNESS COMPLIES)
Q Yes, ma'am. Now, tell me, is that -- 1595 -- is that something that you would have given to Mr. Ethier?
A It is.
Q And tell me on April 11th, 2011, do you have an independent recollection of having a discussion with Mr. Ethier about what's been marked as 1595, this sheet?
A On April the 11th?

Q April 10th. I'm sorry.
A April 10th. I would given him that sheet of paper, which I did, and I would've said, Philip, these are your discharge instructions, Dr. Bibeau has diagnosed you as probable spider bite. He's given you two prescriptions. One's for Voltaren; one is for Percocet; you're to take them as directed; a work excuse was given for one day; he was told to follow-up with his doctor this week; he signed the form saying he received this form.
Q All right. Did you tell him personally to follow-up with his doctor on here?
A I did. I did.
Q Okay. And you would've done that when you went through this?
A Yes.
Q Do you have an independent recollection of having that discussion with Mr. Ethier?
A I do.
Q And tell the jury exactly what you told him during that time.
A I told him that not only do you need to be seen for your foot, but I notice your blood pressure was elevated when you came in, and it was also elevated upon departure. It was not as high the second time, but it was still

elevated. I told him you need to follow-up not only for your foot but for your blood pressure.

Q Did you tell him where to follow-up?

A I noted that his doctor was the Blue Granite Clinic but I remember sharing with him that I work through the week at a doctor's office and we have four doctors on staff and at that time one nurse practitioner, and I remember telling him we take new patients.

Q Okay. And at that point did he act as if he understood the instructions?

A He gave me the impression that he was going to follow-up.

Q Okay. And in here you had him sign that?

A I did. I gave him another piece of paper, too, that was the hospital fact sheet describing events about your visit that day, and this would be a sheet of paper that he should be familiar with, too.

Q Yes, ma'am. But let's go back to 1595 for me at the end. Is that his signature at the bottom?

A It is.

Q Did he sign that in your presence?

A He did.

Q And did you note his vital signs? Is that your handwriting?

A That is my handwriting.

MR. MEYERS - Good morning, Your Honor. Thank you. We'd call Dr. Guy Bibeau.

THE COURT - Thank you, Mr. Meyer. Yes, sir, come forward to my left, please sir and be sworn.

DR. GUY BIBEAU, AFTER BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS -

THE COURT - All right, sir, once you're seated, state your name, please.

DR. BIBEAU - My name is Guy Bibeau.

THE COURT - Thank you. Mr. Meyers, your witness.

MR. MEYERS - Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. MEYERS -

Q Dr. Bibeau, please forgive me if I go back and forth between Mr., Guy and Doctor. Okay?

A Okay.

Q How about introduce yourself to this jury.

A Yeah, I'm Guy Bibeau. I am a physician. I've been practicing medicine since 1983, about 28 years.

Q This is a bad question for seniors, but how old are you, Dr. Bibeau?

A 55.

Q Where do you live?

A I currently live in Colleyville, Texas which is a northern suburb of Fort Worth, Texas.

A He reported that the pain was a little better when he got there. I don't know how much the aspirin helped, how much the Tylenol helped, how much any other measures he took might've helped.
Q Did you tell him that you were treating him for a spider bite?
A Yes.
Q Did he object to you treating it as a spider bite?
A No, he did not.
Q Did he seem to agree with you that it needed to be treated as a spider bite?
A He certainly didn't express any disagreement.
Q Did you have any reason to believe that this man had suffered any sort of vascular problem?
A No, I did not, because he had good pulses, good capillary refill. He also didn't have the kind of discoloration you would expect for arterial disease, for decreased flow through an artery. You normally expect the extremity to be pale, cold, absent pulses, poor capillary refill, and I didn't see anything of that nature.
Q Now, with regards to the spider bite, do you recall whether Mr. Ethier himself told you that he thought he had been bitten by a spider?
A It's now been four years since this took place. I believed so and I said that in my deposition.

Q Okay. Now, doctor, I'm going to hand to you what's been marked and entered as Plaintiff's Exhibit 23. Do you recognize that document?
A Yes, sir, I do. It's the triage record.
Q Now, are any of your notes on that document there?
A No, that's the note made up entirely by the -- you know, by the triage person and the signature of the RN is at the bottom.
Q Okay. I'm going to hand to you what's been entered as Plaintiff's Exhibit 25. Do you recognize that document?
A Exhibit 25, yes, I do.
Q What is that document?
A That is the area where the physician documents the physical exam.
Q Now, doctor, there's been some -- there's been some testimony about whether or not you properly documented that form. Is it your testimony that you checked for the pulses?
A I did, but I'm not -- it's very difficult to document every normal finding you have. I'm very good about documenting any abnormalities I find.
Q Now, after -- or after the triage nurse saw him, about how long as far as time-line, did you walk in to see him?
A It was within a few minutes I believe.

Q Did you think that his pulse or anything would've changed, or did it, in fact, change from when the triage nurse took it?
A I would not think so.
Q So is it your testimony that you normally document only if it's something abnormal?
A Yes.
Q So is it safe to say that the reason you didn't document on that form is because ---

MR. PROFFITT - Object to the leading, Your Honor.

THE COURT - Ask you not to lead. Rephrase, please.

MR. MEYERS - I'll rephrase.

Q Why didn't you document on Plaintiff's Exhibit 25 there, Dr. Bibeau?
A I emphasize documenting abnormals. I try to think of all the pertinent positives. I believe I checked the pulses, but I did not -- I just did not look to see those boxes in that particular location.
Q All right. So from the time that Mr. Ethier presented until the time that he left, how much time had passed?
A I'm estimating roughly between five and ten minutes.
Q When you finished your observation, what happened next?

A Next, the LPN, Rhonda Gwynne, went to the -- into the room and gave him some medications.
Q Now, at any -- did you -- during your observations in that period that you were there, did you observe Mr. Ethier walk?
A I did. He walked in and walked out.
Q All right. At any time did you suspect that he had suffered or may have suffered any sort of aneurysm?
A No, sir, I did not.
Q How about his skin tone? How did that appear to you? We talked about there not being any -- any black on the toes but overall his right leg. How did that seem?
A It -- it looked good. The leg looked fine.
Q Now, all right, there's been testimony about the five Ps that you look at during the ER. Are you familiar with those five Ps?
A I am.
Q Did any of those five Ps cause you any concern during your observation of Mr. Ethier?
A There was definitely pain.
Q Did he appear to suffer any sort of life-threatening problems in your observation?
A No, he did not.
Q If you had noticed any sort of discoloration or any other problems, what, if anything, would you have done?

A If I had noticed any discoloration of the skin, then that would've pointed toward a possible problem with poor blood flow to the foot. In that case you have to know where it originates from, so you would feel behind the knee, not just for aneurysms but just to make sure you can feel a pulse there, and then go up to the femoral artery, which is in the groin, and feel for a pulse there.

Q Okay. Now, after you left or before you left, did you instruct Mr. Ethier at all about any follow-up care?

A Yes. It is important to follow-up and I did advise follow-up with the primary care physician within one week, you know, for that pain, because things can change. You're thinking more of an acute problem such as a bite or injury or some kind of chemical or toxin exposure. If you're talking about pain that has been going on for four hours, you're still thinking of that if you treat with medications appropriate for that diagnosis and the patient steadily gets better and it resolves over a few days. If it doesn't get better, then the diagnostic possibilities definitely change.

Q Okay. Now, as an ER doctor, is it important for you to instruct a patient to follow-up with his or her primary care doctor?

A Yes, it is.

Q Why is it important, Dr. Bibeau?

A Because, you know, a disease process can evolve. You know, as an ER physician you're typically seeing a patient at the onset of the problem, but disease processes in general are very non-specific at the onset and they tend to clear themselves over time.

Q When you instructed Mr. Ethier to follow-up with his primary doctor, did you have any reason to believe that he didn't have access to one?

A No, I -- I felt that he would have access and he -- I felt that he had a level of knowledge that was higher than you see in your average patient; he was a nurse.

Q Well, you said he was able to communicate. When you gave him those instructions, did he say, doctor, I can't -- I can't follow-up with a doctor?

A Rhonda Gwynne, the LPN, handed the instructions, but I don't recall him saying that.

Q Has anyone told you that he said, well, doctor, he can't follow-up with his primary doctor, so he can't follow your instructions?

A No.

Q Now, there's been some testimony about Mr. Ethier calling back in after his visit on April 10th, 2011. Did you ever receive a phone call from Mr. Ethier after April 10th, 2011?

A No, I did not.

Q Did you ever do anything to treat Mr. Ethier after April 10th, 2011?
A No, I did not.
Q Now, are you aware of any doctor speaking to Mr. Ethier after April 10th, 2011?
A I'm not aware of that or any documentation to that effect.
Q Now, Mr. Ethier testified that he eventually came back to work. Do you recall that testimony?
A I do.
Q Do you recall his testimony about seeing you in the nurses' station?
A Yes, I do.
Q Did he ever make the comment to you so -- about his foot and you then making a comment, so that's why I couldn't figure it out?
A No, I did not make that comment. I do remember him showing me the photo.
Q Was it a photo or was it his actual leg?
A I remember him showing me a photo of what happened. I do not remember what I said, if I said anything, but I know I did not make that statement.
Q Had Mr. Ethier presented himself to you after April 10th, 2011 with any sort of change in his circumstances, what would you have done?

Q Doctor, one final question. As far as the protocol at the hospital, had a patient who had previously been seen at the ER called back to the ER about a complaint, would it have been documented?

A If they -- are you talking about speaking with a physician ---

Q Yes, sir.

A It would be proper if a physician did that for them to put a notation in the medical record and to time it and sign it.

Q In sitting here today, have you seen any sort of documentation that would reflect that Mr. Ethier called back after April 10th, 2011?

A No, there's none in the record.

MR. MEYERS - Thank you. No further questions. Please answer any questions Mr. Proffitt might have.

THE COURT - Mr. Proffitt, your witness.

MR. PROFFITT - Thank you, Your Honor.

THE COURT - Yes, sir.

CROSS EXAMINATION

BY MR. PROFFITT -

Q Good morning, Dr. Bibeau. How are you doing?

A Good morning.

Q All right, Dr. Bibeau, you're a board certified family physician. Correct?

A Yes, sir.
Q And you've got something like four years of undergraduate degree at Clemson. Microbiology?
A Yes.
Q And you've got four years of medical school down at USC?
A Yes.
Q And you've got almost three years or four years in residency?
A Three years.
Q Three years. So you've got a total of 11 years in medical education?
A Correct.
Q And how many years does an LPN have in medical education?
A About a year.
Q About a year. All right. So you're the more educated guy in this entire relationship, aren't you?
A Yes, sir.
Q Okay. And, Dr. Bibeau, would you agree with me that first and foremost duty of an ER physician is to diagnose the most treatable and most threatening life or limb problem that a patient has when they come in?
A That's true.

Q That's true. That's what you do when you're in the ER. Right?
A Yes.
Q And you've been in the ER a number of years. Right?
A Correct.
Q And you've moonlighted there for a number of years.
A Yes.
Q Right? You didn't work full-time there, but you moonlighted at a couple of hospitals. Right?
A Yes.
Q And if you failed to do that, if you failed to rule-out the most treatable and the most threatening life or limb problem, that's a violation of the standard of care, is it not? You agree with that.
A Yes, sir.
Q Okay. And in order to find out whether something is threatening to the life or limb, you've got to do a proper exam, don't you?
A Yes, sir.
Q And if you don't do a proper exam, that's a violation of the standard of the care, isn't it?
A Yes, sir.
Q And you also have to take an adequate history on the patient. If you don't do that it's a violation of the standard of care, is it not?

A Yes, sir.
Q All right. And if you -- you have to spend enough time with the patient. Right?
A Enough time to -- for the particular problem.
Q Right. And if you don't spend enough time with the patient, that's a violation of the standard of care for an ER physician.
A Yes, sir.
Q Okay. And when you're in the ER as their physician in the ER, you have to consider all the appropriate possible diagnoses that are raised by that patient's condition, don't you?
A Yes, sir, and those -- the differential diagnosis comes to you by way of your history and exam. Your exam rules out certain diagnostic possibilities.
Q Exactly. And if you fail to consider all of the appropriate possible diagnoses of the patient who's sitting in front of you, that would be a violation of the standard of care, would it not?
A Yes, sir.
Q All right. Now, Dr. Bibeau, I show you what we've looked at before. On this Plaintiff's Exhibit 44 -- can you see that?
A Yes.

Q All right. You've got five or six symptoms there. You've got pain, polar, pallor, paresthesia, which is the numbness or the tingling. Right?
A Right.
Q And you've got pulselessness or paralysis or paresis which is the weakness of the paralysis. Right?
A Exactly.
Q Okay. No dispute from you, is there, that when Phil came into ER he was reporting pain?
A Yes, that's true.
Q All right. And when you -- when you're -- Mr. Meyers showed you the exhibit a second ago, we looked at all the pain reports in the triage record.
A Correct.
Q You saw those, didn't you?
A I saw those.
Q So we have the triage, got pain. Several reports of pain all over it. Correct?
A Correct.
Q Absolutely no dispute we had pain.
A Right.
Q All right. And did we also have polar?
A No, we did not have coldness. We had a very slight difference in temperature.

Q Okay. So there's a difference in temperature. We had coolness, and, in fact, your physical exam record, that's a finding you made. Right?
A Correct.
Q You said right foot cooler than left foot. Right? Correct?
A Correct.
Q Here -- it's right here where I'm pointing. Correct?
A Correct.
Q So you found a cooler foot. That's polar, is it not? It's not freezing, but it's cooler, isn't it?
A It's a matter of degrees. It's slightly cooler.
Q So we've got cooler. All right. Then we've got paresthesia, and we have -- we have that in this case, don't we? We have Phil reporting that he was numb in the right leg and foot.
A Yes, that's a complaint he made.
Q That was a -- there we have it again. You've seen it before. There it is, numb. You see that?
A Yes.
Q That's what he's telling you. He's telling you -- and, in fact, Phil himself was telling you, cold, numb and ecchymotic. Right?
A Is that on there?

Q Sure. Here we go. This is your -- this is a page you filled out. Right? Plaintiff's Exhibit 24?
A Cold, numb and ecchymotic, yes.
Q Cold, numb and ecchymotic. That's what he's telling you about his right leg. Correct?
A Correct.
Q And up here you circled, right leg, did you not?
A I'm not sure why I circled leg.
Q Well, did you not circle leg because he was complaining about the leg?
A No, sir. He was complaining about the foot.
Q Well, but you circled leg, and you note foot as well. Right?
A I know.
Q And you circled leg.
A That's right.
Q And that's because on that day standing in the emergency room or seated on that exam table Phil Ethier told you it was right leg, did he not?
A No, sir, he didn't.
Q So you're -- did you circle that R?
A I did.
Q And did you circle the leg?
A I did.
Q Those are your pen marks.

A But it doesn't -- we're talking about -- it says right foot pain since 1300 hours.
Q Are those your pen marks on Plaintiff's Exhibit 24 which is part of the ER record for Phil where you circle the R and you circled the leg?
A Yes, sir.
Q And Phil didn't take your pen and do that. He didn't take your hand or your pen and circle that on that form, did he? You did that.
A That's correct.
Q And -- so this is four years ago, and you're going to sit here today and tell us later that it wasn't a leg issue, you just thought it was a foot thing, even though you circled right leg on the form itself that day as he sat it front of you telling you it was the leg?
A I documented right above it that it is right foot pain and I wrote all that out myself.
Q And you documented right below it that it was right leg pain as well, did you not?
A I may have made a mistake as far as what I circled, but he came in for right foot pain.
Q Well, the document says what it says, doesn't it?
A (No response)
Q All right, Dr. Bibeau, now, let's go back to our P chart, our symptom chart here. We've talked about the

pain; we've talked about the polar. You said it was cool. You also report Phil saying it's cold; we've talked about he paresthesia, the numbness. He said it was numb. Right?

A Correct.

Q You had a history that he had numbness in his right leg and foot within the last couple of hours.

A Yes.

Q Okay. Now, let's talk about the pulselessness. Did you find any pulselessness?

A No.

Q Did you check the foot pulses?

A Yes.

Q And how do you know you checked the foot pulses?

A Um ---

Q You don't know that you checked the foot pulses, did you?

A I know -- I know that I observed capillary refill when I pushed in on the feet. I know that I reviewed the pulses checked by the RN student.

Q All right. And at the time you didn't even know that Samantha Anthony had done the triage, did you? You thought Jerilyn Wadford had done it. Did you not?

A I thought so.

Q That's what you said at your deposition, didn't you?

A (No response)

Q And you talked about ---

COURT REPORTER - He needs to answer verbally.

Q Answer affirmatively.

A Yes.

Q Did you say at your deposition that Jerilyn Wadford checked the pulses?

A Yes.

Q And you trusted her.

A Yes.

Q She's thorough; she's excellent.

A Yes.

Q But actually, the one that did it was Samantha Anthony.

A That's true.

Q And you know now that Samantha Anthony was just a nursing student, just a CNA, very inexperienced at doing foot pulses at all. Correct?

A Not correct. She's a -- you know, an RN student and she's -- you're looking at someone -- you're not looking at someone with the intelligence of a career nursing assistant; you're looking at someone who's on her way to be a registered nurse.

Q Nevertheless, you know that Samantha Anthony has testified that she was very inexperienced at doing foot pulses. You're aware of that.

A I'm aware of that.
Q And you were not aware of that on April 10th, 2011, were you? Because you didn't know Samantha Anthony did this ---
A No, sir, I didn't ---
Q --- but now we know that what's in this ER record on the triage record is unreliable, isn't it?
A No, we don't know that, because Jerilyn Wadford testified under oath that she checked the pulses and the capillary refill.
Q She sure did; she sure did. But she never -- there's also testimony that she never touched Phil in a single instance, isn't there? You sat here and heard it.
A I heard Mr. Ethier say that.
Q All right. Dr. Bibeau, you say you checked the foot pulses; you believe you did, but you're not sure. Correct?
A Correct.
Q And on your form, on the part of the physical exam form, the Plaintiff's Exhibit 25 shown here, there's a place to put the pulses, is there not? All these little yellow boxes.
A Yes, there is.
Q There's a place to put a foot pulse on the right and the left. Right?
A Correct.

Q And there's a place to put a femoral pulse.
A Correct.
Q And there's a place to put a popliteal pulse.
A Correct.
Q And there's not a single thing filled out there, is there?
A No, there's not. He did -- he had good capillary refill, and you can access that rapidly just by pushing on the foot and seeing -- you know, like I did when I touched his feet -- and seeing that it rapidly corrects. Blood flow to the foot was not a problem for him on that day.
Q Is there a place on here to put poor or to note the capillary refill?
A Yes, sir.
Q Is there anything in that blank?
A No. I observed it; I don't document all my normals.
Q You don't document all your normals. I heard that. Well, Dr. Bibeau, you're looking at the right leg and foot. Correct? That's sort of a --- that's the focal point of your entire examination. Right?
A The right foot. Correct.
Q So is it not important that you note your findings at least for that -- for what you're looking, even if you don't do the popliteal pulse, even if you don't do the

femoral pulse? Isn't it important to note that you actually took the foot pulses on that patient?
A I try to note all my pertinent normals, also, but I emphasize the abnormals.
Q And there's -- but there's nothing in the record that shows that you checked the foot pulses other than your testimony that you did so four years later sitting here today?
A Yes, sir.
Q And you've had thousands of patient encounters since then. Correct?
A Correct.
Q At the hospitals where you've worked you've seen tons and tons of patients, haven't you?
A I have.
Q Now, Dr. Bibeau, you testified about a phone call that you supposedly received or information about the phone call which was supposedly received from Rhonda Gwynne. Correct?
A Correct.
Q You never received that phone call.
A No, I didn't.
Q And you don't know who Rhonda Gwynne got that information from.
A That's correct.

Q And there's nothing in the record to show that Rhonda Gwynne got it from Phil or anybody else. Right?
A That's correct.
Q And you have no idea where that came from, whether it came out of the blue or what happened, where that came from.
A That's correct.
Q All right. And so -- Dr. Bibeau, let me understand this. Is it that you hear some rumor and some statement that you don't even know where it's coming from, no source for it at all and somehow you're already forming in your mind that that's going to be your diagnosis? Is that how you operate?
A No. No, it um -- it gives you some information that you can put in the back of your mind when you talk with him.
Q Well, it seems like, based on what the record that we have, that you immediately jumped to the spider bite conclusion, and you jumped to that apparently because you got some rumor of a call that somebody's coming ---
MR. MEYERS - Objection, Your Honor, he's ---
Q --- in with a spider bite.
A That's -- that's not ---
THE COURT - Just one second. We have an objection.

A That's not true at all.

THE COURT - Just one second, sir.

MR. MEYERS - Your Honor, he's mischaracterizing the testimony. No one said anything about jump. I mean I understand it's cross examination, but, you know, to characterize it as jumping to conclusion, that's a mischaracterization.

THE COURT - He's on cross examination. I'll allow the question, and I'll allow the defendant to fully answer. Yes, sir, you may proceed.

MR. PROFFITT - Thank you, Your Honor.

A It's not true at all. When he came in, he came in with the acute onset of pain. He could very -- he could pinpoint it to 1:00 pm when he was outdoors. Now we're hearing walking in the yard. That's the type of scenario in which -- under which a person could be bitten or step on something or, you know, twist an ankle, have that type of thing happen, so I was thinking about those kind of acute events that could've happened because of the acuity of the pain and where he was.

Q All right. Again, and you've jumped to that conclusion -- it's what -- did you not?

A No.

Q All right. Now, Dr. Bibeau, you would agree with me that it's not necessary to have a -- you can still have a

blood vessel problem if you have a pulse in the foot. You agree with that?

A You could still have a blood vessel -- yes, it's possible to have a blood vessel problem.

Q You can have some kind of a blockage, something going on with an aneurysm in your blood vessels and still have a normal foot pulse. Like the doctors told us earlier, there's three arteries that flow down the leg. Right?

A You can't have any significant degree of blockage with a normal pulse. It's possible to have an aneurysm that is A-symptomatic and have the normal pulse.

Q But you can have some kind of a blockage in one of the arteries and still you'll have a normal foot pulse because there's flow through the other arteries. There's no dispute about that. That's basic vascular system medicine, isn't it?

A I'd defer to vascular surgery on that.

Q Well, you wouldn't disagree with me that your own expert, Dr. Smith, says that, would you?

A That would be fine.

Q Okay, and you wouldn't ---

A I would agree with him.

Q Well, and -- good. And you wouldn't agree -- you wouldn't disagree with Dr. Adams who was here, the vascular expert from our side that said that, that you could have a

normal foot pulse and still have a blockage going on. You don't disagree with that, do you?

A No, sir.

Q And you don't disagree with Dr. Jolin who said the same thing, do you?

A No, sir.

Q And you don't disagree with Dr. Holleman, the treating surgeon who said the same thing.

MR. MEYERS - Objection, Your Honor. He's -- he's improperly pitting the witnesses against each other.

THE COURT - I'll ask you to move on.

MR. PROFFITT - All right. Thank you, Your Honor.

THE COURT - Let's not compare testimony between the witnesses.

MR. PROFFITT - All right.

Q Now, Dr. Bibeau, you did not ever consider a blood vessel problem as a possible diagnosis in Phil Ethier's case.

A I did not consider it after the history and exam that I felt were good enough to rule out the problem, because he, in fact, had good circulation to the foot, ---

Q Right.

A --- good blood flow.

Q Right. Even though we've talked about our P chart here, even though we've got pain, polar or coolness, pallor or change in color ---

A No, you don't. Pallor is pale. Pale is white.

Q So you think -- you think it's only pale.

A That is not correct.

Q All right, and if other doctors say differently, you disagree with those doctors?

MR. MEYERS - Same objection, Your Honor.

MR. PROFFITT - I think I'm allowed to explore his knowledge of what ---

THE COURT - I'm going to sustain the objection.

MR. PROFFITT - Very good. Thank you.

Q So, Dr. Bibeau, in your mind the only possible -- you can't have just a change in color. Is that what you're telling me?

A It's not change in color. Pallor describes -- pallor means pale; it means white. It doesn't mean any change in color.

Q But in terms of diagnosing a potential blood vessel problem, a change in color, other than just pallor, can also indicate a blood vessel problem. That's true, isn't it?

A It's true that red color can mean hyperemia, vasodilation. It's true that cyanosis, bluish

discoloration is usually more of a venis problem, like a clot in the veins.

Q So it's true that a change in color can indicate a blood vessel problem. Correct?

A Not an arterial problem. When you're talking about pallor, you're talking about pale, light, from decreased blood-flow.

Q All right. Now, Dr. Bibeau, you never considered a blood vessel problem as a possible diagnosis. Right? You've testified to that.

A I did a history and exam, and after he had good circulation to the foot I then removed it from the differential.

Q You never considered a blood vessel problem as a possible diagnosis. You never even thought about that. That didn't enter your mind, did it?

A Not after the exam.

Q Okay. The only things you considered were chemical exposure to the skin. You thought about that, didn't you?

A Yes, sir.

Q And you thought about trauma, some kind of acute trauma, that he bumped the leg or something like that.

A Yes, sir.

Q And you thought about spider bite.

A Yes, sir.

Q But you never thought about a blood vessel problem; there on April 10th, 2011, that never crossed your mind.
A Not after the exam showed that he had good blood flow to the foot.
Q Answer yes or no. You never thought about a blood vessel problem on April 10th, 2011.
A I answered the question.
Q Answer yes or no. You never thought about a blood ---
MR. MEYERS - Objection.
Q --- vessel problem on April 10th, 2011 ---
MR. MEYERS - Objection, Your Honor.
Q --- as a possible diagnosis.
THE COURT - I've got an objection. Just one second. Yes, sir.
MR. MEYERS - Your Honor, he is allowed to respond either way, so if counsel's trying to tie him down yes or no, I accept that, but he is allowed to give a response.
THE COURT - I'll instruct the witness that if the question calls for a yes or no answer, that may be appropriate, however, you have the right to explain your answers fully. If you have any difficulty in doing that, let me know; I'll be sure you have an opportunity to fully explain any answer you give.
DR. BIBEAU - Okay. Yes, sir.
THE COURT - You may proceed.

A Then the answer would be no, not after my exam documented no impaired blood flow to the foot.
Q Very good. And, Dr. Bibeau, you never checked -- we've gone over the foot pulses, which we've talked about those -- you never checked them. You say you checked them, but it's not in the record. Correct?
A It's not in the record.
Q And you never checked the popliteal pulse.
A No.
Q And you never checked any pulses on the right leg. I'm sorry, on the left leg, the other leg.
A That's correct.
Q You never checked the popliteal, the femoral or the foot pulses on the left leg.
A Right.
Q You did no comparison of the pulses on the leg. You only say, even though it's not in the record, that you checked the foot pulses on the right foot.
A Correct.
Q All right. Now, Dr. Bibeau, is there anything in the record -- and we've been over and over and over this all week long with so many witnesses, but is there anything in this ER record other than your statements that says Phil ever reported a spider bite to you?
A Nothing else in the record.

Q Is there any indication in the nurses' triage record that any nurse or nursing staff ever saw a spider bite mark or mentioned a spider bite in any form or fashion in this ER record?
A No.
Q So you're the only person, it's only your handwriting that says probable spider bite. Is that not true?
A That's correct.
Q So this is you where it says clinical impression. Right?
A That's correct.
Q And where it says probable spider bite. You wrote that.
A Right.
Q That's nowhere else in the record.
A Right.
Q Now, Dr. Bibeau, is it not true that the normal indications of a spider bite would be some burning pain at the site where the mark was, where the fang marks were? You would expect to see that?
A Yes, you're -- well, you may not always see that. With a brown recluse spider bite you see a good bit of inflammation. With a black widow spider bite a person can have violent cramping, can get pancreatitis, get very ill from it. I've seen a lot of people who felt they were

bitten by spiders, were outdoors where they probably are exposed to spiders but did not have a visible bite.

Q All right. But there was no spider bite mark you ever found on Phil's leg or foot or anywhere else on his body on April 10th, 2011.

A No.

Q None whatsoever.

A No.

Q There was no itching. Itching is another symptom of a spider bite, isn't it?

A That's correct.

Q And where was no report of itching by Phil on that day.

A No. What there was was livedo reticularis, which is a non-specific finding associated with inflammation.

Q Right. And it's also a discoloration to that right foot. Correct?

A Not an indicator of primary vascular disease.

Q That -- I understand your testimony about that, but that's -- discoloration to the right foot that has to do with the arteries in the vascular system.

A It has to do with capillaries, small vessel disease. It indicates inflammation. There's a very broad differential and generally it doesn't indicate arterial disease.

Q And Phil as a matter of fact though told you that his leg had been purple earlier, that his leg was darker.
A I don't remember him saying that it was darker earlier and had changed color. I don't remember any of that.
Q All right. And, doctor, as far as normal signs of a spider bite, you might expect to see some wheezing or something like that. Correct?
A If you had an anaphylactic reaction, ---
Q Some kind of allergic reaction.
A --- allergic reaction you could get wheezing; you could get angioedemas, swelling in the throat, tongue. You could also get hives, not just at the site but elsewhere.
Q And Phil had no wheezing, did he?
A No, sir, there was no sign of allergic reaction.
Q And he had no throat swelling or anything like that, did he?
A No, sir.
Q No sign of that.
A (No response)
Q All right. He had no muscle contractions or stomach cramps or anything like that that might indicate a spider bite, nothing like that.
A No, no indication of black widow bite.

Q Okay. So the only indication he had that you thought indicated a spider bite was pain but not pain at a site -- at a site of a bite mark.
A Yes, sir.
Q All right. Now, and you never -- you never directed your nursing staff there at the hospital to do any kind of a spider bite protocol, institute any kind of spider bite treatment.
A They don't really share the nursing protocols with us, and I don't know what protocols they have.
Q You never went to the nurses and said, this fellow needs to be treated for a spider bite, do what you need to do. You never did that, did you?
A No, sir.
Q In fact, what you did was you discharged him. You said, slam, bam, thank you, ma'am, you're out of here, you're good to go. That's what you did, didn't you?
A No, sir, I treated him what I thought was appropriately for a non-venomous spider bite.
Q All right. But you never told the nurses do any kind of spider bite treatment or protocol. You never told them that.
A No.

Q Now, -- and you never ordered any kind of vascular tests or any vascular consult or any kind of ultrasound or CT angiogram, none of that.
A No, not with good blood flow to the foot.
Q Never ordered it. All right. Now, Dr. Bibeau -- and it's -- it's undisputed - right? -- that at the time he left the ER on April 10th, 2011 at about 5:20 or so, that Phil was medically stable, wasn't he?
A That's true.
Q In fact, you documented that here on your physical exam record, didn't you?
A Correct.
Q Says stable.
A Yes.
Q So he's not in any immediate threat at that point. Right?
A That's correct.
Q Okay. And you were aware, were you not, Dr. Bibeau, by the time of your deposition in August, 2013 that Phil testified he actually did call back to the ER and talk with a person he believed to be Dr. Canty at about 3:00 in the morning?
A I heard that he said that.
Q Yes. You knew that in August ---
A Yes.

Q --- 2013.
A I knew that, but it's difficult for me to believe that, because I know Dr. Canty and I know that he would document that phone call in the medical. (sic)
Q But you don't control what Dr. Canty does or does not do.
A I don't control what he does, but I -- it's impossible for me to believe that that happened.
Q All right. Now, Dr. Bibeau, I'll show you what's been marked as Plaintiff's Exhibit 32. And is this a calendar of your work schedule at the hospital?
A Yes, it is.
Q All right. And is it the calendar for April, 2011?
A It is.
Q All right. And does it show you working on April 10th, as you've discussed and as we know?
A Yes.
Q Right?
A (Indicating yes) Right.
Q And does it also show you working for 24 hours on April 19th?
A It does.
Q And does it show you working for 24 hours on April 22nd?
A Yes.

Q All right. Now, Dr. Bibeau, is it not true that Phil came back to you at some point after he'd seen you, while you're sitting there at the nurses' station, and had that curbside consult with you, show his black toe to you, the tip of the black toe, pulled up his pant leg and showed the leg to you again?

A No, he didn't. I wish he had, because when -- you know, it's like we explained before, if pain continues, then it's not a spider bite. I mean if it's more than three days out, you're thinking of more things. Just the fact that it persists beyond three days makes you think of more things. I wish he had followed up with me or someone else.

Q And if Phil -- if it's true that Phil came back to you and had that informal consultation and sat there at the nurses' station and pulled up his pant leg and showed you the tip of the black toe, that's a violation of the standard of care for you not to do something at that point, is it not?

A No, it is not a violation. If he had done that, I would've told him, sign in and see me or see someone else.

Q You would've told him to do something.

A Exactly.

Q And if you -- if that occurred as Phil testified and you failed to tell him to see someone and you failed to

tell him to take further action, that would be a violation of the standard of care. Correct?

A Yes, if it had occurred.

Q And -- because you were -- you had treated him for that problem.

A Yes.

Q Now, Dr. Bibeau, as I understand one of your defenses is that Phil should've followed up with somebody else; he should've gone to a family doctor like you told him to do. That's what you say.

A Yes.

Q All right. And if he'd gone to see that family doctor -- let's say he went to a family doctor on April 13th or 14th or a few days after that, if he'd gone to see a family physician and had those same symptoms, even though somewhat diminished, it's your belief that that doctor should've recognized it was a blood vessel problem.

A That doctor would be thinking of other things. At that point if he had seen me, I would've ordered basic lab work, and because there is pain in that extremity that we don't know where it's coming from, I would -- I would've ordered an imaging study, so I have to think that another family practitioner would've done the same.

Q You would've expected that doctor to do that.

A Exactly.

Q And he would've been going to that doctor with the same symptoms he had on April 10th, 2011. He'd have the pain. Right?
A Exactly, but the differential diagnosis -- your diagnostic possibilities change when you go from acute pain to persistent chronic pain. They're different diagnoses you ---
Q But he would've been going to that same doctor -- to another doctor with the pain and the coolness in the foot and the pallor or the change in color and the numbness and the tingling, and that doctor you believe should've diagnosed him. If he'd done that, you believe that doctor would've diagnosed him with a blood vessel problem.
A Yes, sir.
Q And you had the same symptoms on April 10th, 2011 and you failed to diagnose him with a blood vessel problem.
A The differential diagnosis is very different when a person has an acute presentation when he is seeing you four hours after his first symptoms. If it's vascular it's going to declare itself. There was good circulation to the foot, but if this is a blood vessel problem, it's not just going to disappear. When it persists you start thinking, could it be that, could it be rheumatologic, could there be some mass there somewhere we're not seeing, and that's when you start imaging and doing further testing.

Q I understand that, but at the same time, he -- if he's at the doctor three or four days later or shortly thereafter it's the same basic presentation and you missed it, did you not? On April 10th, 2011, you missed that diagnosis.

A On April 10th, 2011 in my opinion I don't see any evidence that there was symptoms, no clear-cut evidence that were symptoms from that aneurysm.

Q All right. Isn't it a fact, Dr. Bibeau, that you missed the diagnosis on April 10th, 2011 and that's what created this cascade of horrible events that Phil has (sic) now suffering from, all the pain and the problems and the compartment syndrome and the surgery, all that flowed from your failure to diagnosis on April 10th, 2011, did it not?

A No, it's not true.

MR. PROFFIT - All right. Thank you, Dr. Bibeau. I don't have anything further.

THE COURT - Re-direct, Mr. Meyers.

MR. MEYERS - Thank you, Your Honor.

RE-DIRECT EXAMINATION

BY MR. MEYERS -

Q Dr. Bibeau, just a couple follow-up. Do you recognize this as being Mr. Ethier's journal?

A Yes. Yes.

Q Now, on cross examination -- if I could get you to read it -- now, on cross examination you looked at Plaintiff's Exhibit 32. Do you remember that?
A Yes.
Q Now, is this an accurate depiction of the days that you were working and not working at the Fairfield Memorial?
A You know, in general it's going to be true; there are occasions when there are last minute changes, but ---
Q Now, ---
A --- I probably worked those shifts.
Q Now, take a look for me the week of April 24th here where my index finger is.
A Yes. Right.
Q Is it showing you working on April 25th?
A No. April 25th -- I worked one week on, one week off at Toumey. April 25th I started my week of working at Toumey.
Q Okay, so it is fair to say that you didn't work at all at Fairfield Memorial Hospital the week of April 24th?
A Right. The week starting the 25th, starting on Monday.
Q So, do you recall Mr. Ethier's testimony that he talked to you and Dr. Canty on April 25th, 2011? Do you recall that?
A That was in his notebook.

Q So according to -- is it true or is it not true that you would have talked to Mr. Ethier the week of April 25th, 2011?
A It would've been impossible, because I was in Sumter at the time.
Q Okay. Now, going back you testified -- or on cross examination you were asked whether or not you spent enough time. On April 10th, 2011 ---
A Yes.
Q -- did you properly evaluate Mr. Ethier?
A Yes, I felt I did. The evaluation starts when you see the patient come through the door. You -- you know, you observe how they look, do they look to be in any kind of distress, do they appear to be comfortable walking? You review the triage note and see what the nurse found, see what the vitals signs are, are there any red flags going up there, and you do that before you examine the patient.
Q Is it your testimony that you spent sufficient time to diagnose Mr. Ethier?
A It is.
Q Now, did Mr. Ethier -- do you have any evidence that when his pain occurred that he was anywhere else other than Fairfield County?
A I'm sorry ---

Q Based on your information that you had at the time of when Mr. Ethier complained of his problems ---
A Right.
Q --- do you have any evidence that he was anywhere other than Fairfield County when the onset of his problem occurred -- or I'm sorry -- in South Carolina when the problem occurred?
A Yes, that's true, yes.
Q Okay. Didn't say that he was back in Massachusetts when the onset occurred.
A True.
Q How common are spiders in Fairfield County?
A Very common.
Q How common are spiders in just overall in South Carolina?
A Very common.
Q So when he came in and you diagnosed him with a spider bite, was that common or uncommon for you to do that?
A I've seen a lot of them.
Q Now, you stated that he came to you with a foot pulse issue. You remember that testimony?
A Um, I'm not sure ---
Q Or with a foot problem, came in because you diagnosed him with a foot problem.
A Yes. Right.

Q Now, what is your routine when an individual comes in complaining of foot pain?
A There is pretty much history and exam, ---
Q All right, ---
A --- I checked him -- vascular status, checking the blood flow.
Q Is checking the pulse part of that routine?
A Generally, yes.
Q Is palpating the foot part of that routine?
A Right.
Q Did you examine Mr. Ethier for problems with his foot?
A Yes.
Q Did you deviate at all from your diagnostic routine when you evaluate any foot pulse problem?
A No.
Q Now, -- and also when you check for a foot problem, you also -- but when you say the pulse -- I want to make sure the jury understands -- where exactly is the pulse in the foot that you're looking for?
A If you're looking at the dorsum -- the dorsum of the foot is the top of the foot, so if you're palpating right here, that's the dorsalis pedis. When you get to the lower leg, if you look at the angle, the mid-line side of the ankle and you feel just below that boney prominence, that's the posterior tibial pulse.

MR. MEYERS - And I'm looking now for Plaintiff's Exhibit 23, I think.

MR. SMITH - 22.

MR. MEYERS - 22?

MR. PROFFITT - Here's 22.

Q I'm sorry, Dr. Bibeau. It was sticking to a sheet. Now, I want to point to you the box. Does that say clinical impression?

A Yes.

Q Now, underneath that, your final diagnosis was probable spider bite.

A Probable spider bite and hypertension.

Q Now, before you got there, you had to actually go through several other checks, did you not?

A Right.

Q So did -- did you look at the pedal again?

A Right.

Q Was there any problem there?

A No, no swelling.

Q How about the bursitis or arthritis? Was there any problem there?

A No, I didn't see any evidence of that.

Q Did you observe any tendonitis?

A No.

Q Did you note any vascular occlusion?

A No.
Q Did you notice any deep venis -- deep thrombosis? I'm sorry.
A No.
Q Any lumbar radiculopathy?
A No.
Q How about any sort of strain?
A No, no history of any of those things.
Q So it's your testimony that you went through all of these clinical impressions before you diagnosed him with a probable spider bite.
A Yes.
Q So it's your testimony that you spent sufficient time before you reached that conclusion?
A Yes.
MR. MEYERS - One moment, Your Honor.
THE COURT - Yes, sir.
Q Doctor, finally, in your clinical impression did you note that Mr. Ethier was stable?
A Yes.
Q What does stable mean?
A Stable means vital signs are stable. It's generally airway breathing, circulation. Airway's fine, breathing's fine, vitals are fine and he's able to walk out.

Q When you decided to release him from the ER, is it your testimony that you had performed a proper standard of care?

A Yes, it is.

MR. MEYERS - Thank you. No further questions.

THE COURT - Re-cross.

MR. PROFFITT - Just briefly, Your Honor.

THE COURT - Yes, sir.

RE-CROSS EXAMINATION

BY MR. PROFFITT -

Q Dr. Bibeau, the only three things you thought about on that day were chemical exposure to the skin. Correct?

A Yes.

Q Trauma, some kind of acute trauma to the lower leg. Correct?

A Yes.

Q And spider bite.

A Yes.

Q That's it.

A After documenting normal vascular exam.

MR. PROFFITT - Thank you. Nothing further.

THE COURT - You may step down. Thank you very much. Ladies and gentlemen of the jury, we're going to take a short break, about a ten minute break or so. As always, you know when you leave the courtroom I ask you not

to discuss anything about the case until I ask you begin deliberations. You may retire to the jury room. Thank you very much.

(WHEREUPON, JURY EXITS THE COURTROOM)

THE COURT - Court will be in recess briefly. Thank you.

(WHEREUPON, RECESS TAKEN)

THE COURT - Defense ready to proceed?

MR. HOLLER - Yes, sir.

THE COURT - Plaintiff ready?

MR. PROFFITT - Yes, sir.

THE COURT - All right, let's bring in the jury.

(WHEREUPON, JURY RETURNS TO THE COURTROOM)

THE COURT - All right, the record will reflect the jury has returned to the courtroom. At this time the defense may call its next witness.

MR. HOLLER - Your Honor, we call Dr. Eric Weinstein.

THE COURT - Come forward, sir, to my left and be sworn, please.

DR. ERIC WEINSTEIN, AFTER BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS -

THE COURT - Sir, once you're seated please state your name.

CLERK - Speak into the mic.

DR. WEINSTEIN - My name is Eric Weinstein.

THE COURT - Thank you. Mr. Holler, your witness.

DIRECT EXAMINATION

BY MR. HOLLER -

Q Dr. Weinstein, I went to school right down the road at Blythewood Elementary and Hanberry Bethel Middle School. The accent I'm hearing from you doesn't sound like it's from this area.

A No, it's really hard for me to get rid of it. Some words like water I still say and chocolate -- I just can't get in rid of that, though I've been in South Carolina for a while.

Q Okay. Where are you from?

A Born in Brooklyn, grew up in New Jersey.

Q And you're here as an expert. Tell us how -- how you came to be qualified as an expert?

A Well, after graduating high school in Parsipanny, New Jersey I went to college in New Orleans at Tulane. I got a degree in physics. I went back to New Jersey in Rutgers, two years in Newark and two years in Camden, New Jersey for medical school, did a year of general surgery internship in New Rochelle, New York, and then I did an emergency medicine residency in Harlem, Spanish Harlem, Air Force sponsor residency, then after that I did two years active duty at Malcolm Grove Medical Center in Andrews Air Force

where the Air Force One is based, and then I came to South Carolina in '93.

Q And you -- since you've been in private practice, if you will, you've spent your career where?

A In Florence for seven years, and then I was in Walterboro at Colleton Medical Center for seven years and then been in Florence since 2007.

Q What qualifications are available to you in terms of -- amongst your peers?

A I'm a residency trained board certified emergency physician.

Q What does that mean, to be board certified?

A Yes, sir. We -- you do a residency in emergency medicine and then you sit for written boards, and then you have to take the oral boards, and then every ten years you have to be recertified to maintain it. And now we have to take classes every year to continue medical education, have to go to conferences and take tests and stuff.

Q And we've been through this process a little bit before, but have you ever been qualified as an expert in the state or federal courts of South Carolina before?

A Not federal courts but county courts.

Q And your specialty is?

A Emergency medicine.

Q And you do that full-time.

A Yes, sir.
Q Okay.
MR. HOLLER - Your Honor, we would offer Dr. Weinstein as an expert in emergency medicine.
THE COURT - Any objection?
MR. PROFFITT - No objection.
THE COURT - Without objection he'll be qualified as such and I've explained that to the jury so you may proceed, Mr. Holler.
Q Dr. Weinstein, there's been a number of medical records -- well, let me ask it a different way. What has been made available to you in order for you to render your opinion to this -- in this matter, in this case?
A The initial complaint, the responses to the complaint, the medical records from Fairfield, Chester, Carolina Medical Center in Charlotte and all the depositions of all the people you've seen.
Q So lay people including medical testimony?
A Yes, sir.
Q Experts?
A Yes.
Q When I say lay people, people who aren't medical but are family members and such?
A Yes, the family of Mr. Ethier.

Q Okay. And I don't want you to give me the opinion, but do you have an opinion as to whether or not Guy Bibeau on April the 10th, 2011 acted within the standard of care for emergency room physicians?

A I do.

Q Okay. If you would, tell us how you arrived at that opinion based upon the information that was available to Dr. Bibeau.

A The duty of the emergency physician is to take a history, and that includes any information that you can gather. It can include the -- what the nurses tell you on the way to the room, if you have a computer access to records, all records, what EMS will tell you, what the nurses will tell you. I work in Florence, but I don't live in Florence, so it's small like Winnsboro, and everybody knows everybody, so like I know this person from church, I know the family, went to school with them, they bring their kids in, and that's -- all that information comes in. I don't have to substantiate it; I don't have to verify it, but it's all part of my thought process in the history. Then you go in the room and you ask questions pertinent to the chief complaint. Now, what we do in the emergency department is a little bit different than your doctor's office. We do a problem focused exam, problem focused history, so you get that information, and then you look

for past medical history, past surgical history, allergies, medications, and then within the social history, like do they smoke, do they drink. Then you do your physical exam, start with the vital signs. And the physical exam to me starts as soon as I come in contact with the patient, could be when I see them walk in through the emergency department, it could be when I first enter the room. If I'm in the room first, let's say EMS comes in, then it begins with I first encounter the patient my physical exam starts. And I can learn a lot just by -- just in conversation with somebody, shrug their shoulders, they move their head, they move their eyes, my cranial nerve exam is started. I watch their respiratory pattern; I watch the way they move their arms and their hands. That's how it all starts. A lot of times it's as simple as I can watch somebody adjust the sheets on the bed with one hand but not the other, so then you know that they have some problem with that arm, and then my physical then goes to that side. And then you -- you use ancillary aids like any lab tests, urine tests, x-rays, ultrasound, CAT scans, MRIs and then there's also the medical decision-making part where I institute therapy and they either get better or it get worse. If they get better it's both diagnostic and therapeutic. There's a reason why I gave the medicine; there's a reason why I gave the IV fluid. Like if

Q When we started about your opinion, Dr. Weinstein, you talked about did you have an opinion as to whether -- I didn't ask you what it was -- but whether you had opinion as to whether Dr. Bibeau's emergency care on April 10th, 2011 was within the standard of care, and you told me you had an opinion. Can you please tell this jury what your opinion is and why?

A I think Dr. Bibeau followed the standard of care. He took an adequate history; he took a -- he performed an adequate physician exam; the documentation was adequate; he arrived at a reasonable diagnosis within four hours of presentation, and he realized that this could be very different as times goes on, and he -- he encouraged -- he encouraged Mr. Ethier to follow-up; Mr. Ethier signed discharge instructions that he understood it; Mr. Ethier gave these instructions in his previous positions in doctor's offices and urgent cares. He gave that -- he gave those instructions when he was in orientation. They explain to you what the discharge process is in orientation. I've been -- I've watched -- I've watched it; I've been there for the orientation process. So he understood that, and if -- if he had come back within those -- if he came back within the first 43 days, maybe something different would've happen, and it did, and I'm sorry -- sorry that he didn't come back. Dr. Bibeau, Dr.

Canty -- I work with Dr. Suess; he sends me patients from Williamsburg, and I think there was a Dr. Keith also that were in the depositions that he talked to, and we're all kind of -- we're all kind of -- I don't know if the word's geeky or nerdy -- but if somebody comes to me and says I got a blue toe or I got a black toe, I'm stopping what I'm doing and I want to see that. And everybody that works in the emergency department is going to want to see it also, because it's unique, it's different. If that happened, something would've been done.

Q That's significant.

A That's significant.

Q Take me if you will -- I believe this is part of 22 -- it's in the records, of course. This is the emergency department discharge sheet. You see that?

A Yes, sir.

Q Okay. And this would be something that is filled out by Dr. Bibeau?

A Yes, his handwriting is just a little bit better than mine.

Q Okay.

A For the record.

Q And again, straightforward, what is his diagnosis?

A He says probable spider -- probable spider bite. It's not -- it's not an absolutely that's what it is, because

Q When you write down things in the medical encounter, when a doctor documents certain things, what's the most critical things that doctors should write in the chart?
A Real pertinent positives, pertinent negatives. I think that that's the most important thing, what -- what would you want to know if the patient came back, what do I want to know when the patient comes back.
Q What is your assessment of Dr. Bibeau's documentation in the chart?
A It tells me everything I need to know as a doctor. It may not tell everything that attorneys need to know, but it tells me everything I need to know, what was going on then. So I think it's adequate. Now, could he have like checked off every box and done all that? Yeah, but it's still -- in the end it wouldn't have made -- be any different to me.
Q Dr. Weinstein, I want your opinions to be based upon what your understanding and training is in the medical community for an emergency physician. When you see, evaluate and treat a patient and they walk out the door, how long, if at all, is that your patient after they leave you?
A Maybe 48 hours, 72 hours, because I have my initial impression and my role is it life or limb-threatening, and if they go past three days and it wasn't life or limb-threatening, then I did my job. Right? I made sure it

wasn't life or limb-threatening. Did I figure out exactly what was wrong? No, but I made sure that there wasn't any life or limb-threatening problem. The next part of that is they've got to follow-up, and if they don't follow-up as I asked, then it's on them, and I'm sorry that that didn't happen here, but it's all on them. And if they assume that it's curbside consult thing -- if they assume that that curbside consult is their medical care, then I'm done, then my responsibility's done. If you assume that that's your care, then that's your care, and you kind of follow what I wanted you to do even though it wasn't what I wanted you to do, but in your mind you did, then I'm done. If that's the care -- it's like going to the internet and you're googling and you're making your own diagnosis, if that's what you're going to do for your care, then that's on you, I'm sorry.

Q And I think that was my next question. Let me make sure that we're -- that I'm hearing the information that I wanted to make sure you said. If you treat a patient, evaluate based on the conditions that are then present, you've given diagnosis and treatment and that patient leaves you and then has new on-set symptoms, in this case increased pain with use of narcotics, and consults with another physician, what does that do with your -- to your relationship with that patient?

If there was anyone who was unable to comply with my instructions during your absence from the courthouse, please stand.

(NO RESPONSE)

THE COURT - It appears that all jurors have been able to comply with my instructions. When we broke the direct examination of this witness had been completed, and at this time, Mr. Proffitt, are you going to do the cross examination?

MR. PROFFITT - Yes, sir.

THE COURT - You may proceed.

MR. PROFFITT - Thank you, Your Honor.

THE COURT - Yes, sir.

CROSS EXAMINATION

BY MR. PROFFITT -

Q Good afternoon, Dr. Weinstein.

A Good afternoon, Mr. Proffitt.

Q Dr. Weinstein, you have testified as an expert witness in a -- a number of times before, haven't you?

A Yes, sir.

Q But you've never testified on behalf of an injured patient against a doctor, have you?

A No, sir.

Q Never.

A No, sir.

Q Never done that in your entire life.
A I've never testified, no.
Q You've reviewed one case for a plaintiff, didn't you, for an injured patient?
A I've been offered -- two times I was offered by the plaintiff and I recused myself because I either knew the case or I knew the doctor, and that's happened before with a defense as well. I get cases and I can't because I -- I either know the case or I know the doctor.
Q Right. But you've never testified for a patient.
A No, sir.
Q All right. Now -- and you're charging to be here, like all the expert witnesses with seen.
A Yes.
Q You're charging two hundred and fifty dollars an hour.
A Yes, sir.
Q Okay. Now, Dr. Bibeau (sic) it's true, is it not, that an emergency room physician must identify the most treatable and the most life-threatening -- threat to life or limb. Right? That's your job.
A I think there's two parts to that question. Certainly the second part is true. The most treatable, you know, that -- I'm not sure I understand that part.
Q Well, let's simplify it. You have to identify a threat to life or limb in the ER if there is one.

Q Not necessarily. And there's no indication and Dr. Bibeau himself said there's no -- he didn't take a popliteal pulse, there's no popliteal pulse taken.
A He did not check the popliteal pulse.
Q And there's no indication anywhere, either from his testimony or from the ER record that he ever checked anything to do with the left leg, that he did not check the pulses in the left leg at all.
A He did not check the pulse in the left leg. He checked profusion in both legs, but he did not check pulses ---
Q Did not check the pulses.
A --- in either leg.
Q All right. And you would agree with me, Dr. Weinstein, that there's nothing in the record that says anything about spider bite, other than Dr. Bibeau's handwriting that that's his diagnosis.
A That's accumulation of the entire visit.
Q There's nothing in the written ER record that says spider bite other than where Dr. Bibeau wrote it on his clinical impression.
A Correct.
Q And, of course, it's undisputed that Dr. Bibeau did not refer Phil for any kind of vascular consultation. Correct?

A Correct.

Q He did not refer Phil for any kind of follow-up with -- I mean -- I'm sorry -- any kind of an ultrasound or CT angiogram, nothing like that.

A Correct.

Q Okay. Now, it's also your belief, Dr. Weinstein, that Phil was medically stable when he walked out of the ER there on April 10th, 2011.

A Yes.

Q He was not in any immediate threat of losing that limb at that moment.

A Correct.

Q It could happen later but not then.

A Yes.

Q All right. And you do believe that the popliteal aneurysm actually existed on April 10th, 2011.

A Yes.

Q And yet Dr. Bibeau never checked the popliteal pulse, never felt the popliteal aneurysm. Correct?

A Correct.

MR. PROFFITT - Dr. Weinstein, I think that's all I have. Thank you very much.

DR. WEINSTEIN - Thank you.

THE COURT - Re-direct?

RE-DIRECT EXAMINATION

MR. PROFFITT - Nothing further, Your Honor.

THE COURT - All right, you may step down, sir. Thank you very much.

DR. WEINSTEIN - Thank you.

THE COURT - You can give that back to the attorney.

DR. WEINSTEIN - Thank you.

THE COURT - Thank you. The defense may call its next witness.

MR. HOLLER - Dr. Charles Dorn Smith.

THE COURT - Sir, if you'll come forward to my left and be sworn, please. Thank you.

DR. CHARLES DORN SMITH, AFTER BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS -

THE COURT - Once you're seated, sir, please state your name.

DR. SMITH - Yes, sir. Charlie Dorn Smith, III.

THE COURT - Thank you. Mr. Holler, your witness.

DIRECT EXAMINATION

BY MR. HOLLER -

Q Dr. Smith, you're being offered as an expert, and I do hear a twang in your voice that I'm accustomed to. Where are you from?

A Turbeville, South Carolina.

Q What significance, if any, is there to the fact that a actual puncture wound, fang mark or other foreign body was not found on Mr. Ethier's foot?
A None. You know, it's ideal and nice if you find it, but again if you go to the beach and you're walking down the beach and you get bite -- those things we call them noseeums -- the reason they call them noseeums is because you don't see them, and it's not -- unfortunately, it's not unusual -- they'd been outside particularly this time of the year and have an insect bite or something and you come in later and you realize you've got a whelp or something that's itching or hurting or - and realize that you'd been bit but you couldn't tell exactly - there was no fang mark, if you will.
Q As a vascular surgeon who interacts with emergency room physicians, based upon the history that was provided on April the 10th, 2011, what would your expectations be for an emergency room physician conducting a vascular exam?
A I think he conducted a vascular exam. I mean from the standpoint that it's well-documented in the chart, you know, what - that that the fact that there were palpable pulses and normal capillary refill, and that being said, that's as good of a screening vascular exam as you can do. That's all you need to do quite frankly.

Q Based upon the history and presentation of Mr. Ethier on April the 10th, 2011, what is your opinion as to whether or not Guy Bibeau acted in the standard of care as an emergency room physician?
A I think he did act within the standard of care of an emergency room physician. He saw Mr. Ethier; he saw that he had a problem; he made a diagnosis, and he asked - he treated it and he asked him to follow-up.
Q Okay. Let me stop there, and I want to ask you about a few conditions as they relate to vascular problems, ---
A Yes, sir.
Q --- blood supply ---
A Yes, sir.
Q --- and I should not use the word vascular. Okay.
A Right.
Q What happens when a part of the body no longer gets blood flow?
A Well, it doesn't do very well. Long story short, the very first thing you see usually as a general rule is loss of blood flow and it gets painful. And if it progresses over a period of time it - I guess the way I always think about it is like looking at a grape on a grapevine. You may have this nice big plump, juicy, scuppernong grape, but if you don't go eat or someone doesn't come by and pick it

MR. HOLLER - Judge, we're ready to go forward.

THE COURT - All right, very good. Bring the jury in.

(WHEREUPON, JURY ENTERS THE COURTROOM)

THE COURT - You may proceed, Mr. Holler.

DIRECT EXAMINATION

BY MR. HOLLER (CONTD.) -

Q Dr. Smith, do you have an opinion as to whether or not an embolic event happened in Mr. Ethier on April the 10th, 2011?

A Yes, sir, I do have an opinion.

Q And what is that opinion and why do you hold that opinion?

A I do not think that Mr. Ethier had an embolic event on that day in April. The reason I think that that is true is simply because of the fact that he had no evidence of arterial insufficiency and that evidence be he had palpable pulses and he had normal capillary refill, that that being the case if this event had occurred prior to him coming to the hospital it wouldn't have dissolved on its own during that four-hour period of time or six-hour window from the time the acute event occurred til the time he got to the hospital. That just doesn't happen.

Q Based upon the presentation on April the 10th, 2011, do you have an opinion whether Dr. Bibeau performed an adequate vascular examination?
A I do have an opinion. And again I think he did do an adequate vascular evaluation by virtue of the fact that when we talk about all the Ps of arterial occlusion, probably if you rank them, the most important one is pulseless and if you've got normal capillary refill with normal dorsalis pedis and normal posterior pulses, you don't have acute arterial occlusion.
Q As a expert in vascular surgeon and expert in emergency medicine relating to vascular surgical issues, do you have an opinion as to whether the diagnosis of probable spider bite was appropriate on April the 10th, 2011?
A It was not an unreasonable diagnosis.
Q Was it within the standard of care?
A It was within the standard of care.
Q Do you have an opinion as to whether or not Mr. Ethier had a portion of his == one or more of his toes that mummified and fell off?
A There's been no evidence of that that I've seen. I've read the depositions, and I've read where people have said that, but when you look at the picture -- this the first time I'd seen the picture sitting in Court here, but that's normal. That -- I don't see any evidence that he's even

that there's blue or modeled or dark toe, and in addition to this, if you look, the -- they talk about the pulses on the right, they're -- they call them reduced at the dorsalis pedis, the posterior tibial, which is markedly different than the exam six weeks earlier at Fairfield.

Q This is a classical presentation of someone who has a blood supply problem with their lower leg?

A Yes, sir.

Q Okay. Is there any indication at all there was a blood supply issue to Mr. Ethier's lower leg on April the 10th, 2011?

A No, sir.

MR. HOLLER - Please answer any questions, Mr. Proffitt may have.

DR. SMITH - Thank you.

THE COURT - Your witness, Mr. Proffitt.

MR. PROFFITT - Thank you, Your Honor.

THE COURT - Yes, sir.

CROSS EXAMINATION

BY MR. PROFFITT -

Q Good afternoon, Dr. Smith; how are you doing?

A I'm well, Mr. Proffitt; how you doing?

Q Good. Dr. Smith, you've testified as an expert in several cases over the past several years.

A Yes, sir.

Q And it's my understanding 90 percent of your work has always been for the doctor.
A That's correct.
Q Always testify for the doctor.
A That's because that's what I've been asked to do. I have been asked by you to testify for you.
Q Okay. All right, and you charge five hundred dollars an hour ---
A Yes, sir.
Q --- for your time? Okay. Dr. Smith, would you agree with me that in the ER setting the ER physician has to accurately examine and properly examine the patient in the ER to determine what the conditions are that that patient may have based on what is being presented to him?
A Yes, sir.
Q And if you fail to do that it's a violation of the standard of care.
A Yes, sir.
Q And the ER physician has to go through an adequate history. Right?
A Yes, sir.
Q And he has to go -- take enough time with the patient.
A Yes, sir.

Q And the ER physician must identify all the possible diagnoses that are raised by a particular patient's physician. Right?
A Yes, sir.
Q And if you fail to do any of those things, it's a violation of the standard of care. Right?
A Yes, sir.
Q Now in this particular case on our famous P chart ---
A Yes, sir. (Witness laughing)
Q This thing on? Had the pain. Right?
A Yes, sir.
Q Had the polar?
A Well, it was cool, but it wasn't cold.
Q It was cool. Right?
A Yes, sir, but just because you -- don't y'all know the old saying, cold hands, warm heart? That doesn't mean your wife has an acute arterial occlusion of her hand, does it?
Q Had the cool on April 10th, 2011.
A Cool, but not cold.
Q It was a cooler right foot than the left. Right?
A Yes, sir.
Q On the pallor or the change in color, you had a change in color.
A There was a change in color, but it wasn't pallor. It was not -- it was not light.

Q But change in color can also indicate a vascular event or a blood vessel problem.
A It can, but pallor itself means a lighter skin almost anemic-looking, if you will.
Q But change in color also can indicate a blood vessel problem.
A Depends on what the change in color is, but, yes.
Q And you understand that Samantha Anthony, the one that wrote the note on the triage record, ---
A (Indicating yes)
Q --- at her deposition, which the jury's heard, testified that really what she was trying to say in a more accurate term was modeling.

MR. HOLLER - Objection, pitting. Objection. I think he's pitting at this point, Judge.

THE COURT - No, he's said if he agreed that that's what she said in the deposition. I'll overrule the objections. I'm assuming -- lay a foundation if he reviewed the deposition again.

Q Have you reviewed the deposition of Samantha Anthony?
A I think I have, but I'd have to look at it. There have been so many. I don't remember her name; I'll be honest with you.
Q Okay. Well, the CNA, the CNA who did the triage.
A Okay, all right, sir.

Q All right, and do you recall that at her deposition she testified that actually what she meant was modeling was the more appropriate term of what she was trying say Phil Ethier's leg looked like on April 10th, 2011?

A Yes, sir.

MR. HOLLER - Judge, -- excuse me -- objection.

THE COURT - Just one second.

MR. HOLLER - At this point there's two depositions, a discovery deposition, and then Mr. Proffitt took the for-use-at-trial deposition. I think it would be fair to have a query as to whether he's seen the for-use-at-trial deposition. It was just taken a few days before we started this trial.

MR. PROFFITT - Your Honor, she said this at both depositions.

THE COURT - Did she say the same thing at both depositions?

MR. HOLLER - Mr. Smith attended those, and he's telling me no.

MR. PROFFITT - She said that at her first deposition and her second deposition.

MR. HOLLER - And I would object to it as ---

MR. PROFFITT - But I can move on.

THE COURT - Let's move on.

Q All right, now, Dr. Smith, the paresthesia, the numbness, that was present on ---
A Yes, sir.
Q --- on April 10th, 2011. And then the pulselessness, the CNA found pulses normal.
A Oh, yes, sir.
Q And Dr. Bibeau did not document that he took the pulses.
A But he also testified that he doesn't have to document his normals.
Q And he -- but he -- you just testified earlier that pulses in this case are most important.
A Absolutely.
Q Most important.
A I did.
Q And yet Dr. Bibeau did not document this most important pulse.
A Yes, sir.
Q He didn't do that, did he?
A No, sir.
Q And there's a blank on the form him to do that.
A Yes, sir.
Q And so if it's not written on that form, it never happened, did it?
A No, sir.

Q All right. Is it your understanding, and isn't it true, Dr. Smith, that Dr. Bibeau testified the only diagnoses he considered on April 10th, 2011 were chemical exposure to the skin, acute trauma to the lower leg or spider bite? That was it.
A He did, but he also stated that that was after he'd done his evaluation and found a normal vascular exam, a normal capillary refill, and even Mr. Either in his deposition states that Dr. Bibeau examined him and checked and touched his leg.
Q Mr. Ethier says he touched his leg; Mr. Ethier denies that any pulses were taken by Dr. Bibeau, did he not?
A I don't remember that, but I -- I do remember he said that he -- his leg was touched by Dr. Bibeau.
Q But that's all he said, he touched; he didn't say ---
A Okay.
Q --- he denied that the pulses were taken.
A I won't dispute that.
Q All right. Now, -- and is it not true, Dr. Smith, that it's your opinion that Dr. Bibeau had to consider a vascular event or a blood vessel problem as one of the possible diagnoses on April 10th, 2011?
A I think he did.

Q I'm asking you did he have to consider that? Not whether he did or not. He's already testified he did not considerate it.
A I think again, when you walk in the room to look at any patient, again, you start sizing them up from the time you walk in the door, and so, yes, the short answer to that is, when you walk in the door, again, if you're having chest pain, are you having gas or are you having a heart attack? So that -- so you do need to look through your whole repertoire of what your diagnoses are.
Q You're not answering my question.
A I apologize.
Q Did Dr. Bibeau have to consider as one of the possible diagnoses on April 10th, 2011 a blood vessel problem?
A Yes, sir.
Q And he -- he has testified that he did not do that.
A What I heard him testify early today was, he testified that he did not think of a vascular event after he did his exam and looked at what was charted and everything else.
Q Okay. All right. Now, at Chester on May 25th, 2011, you were asked some questions about that. Right?
A Yes, sir.
Q And at Chester on that date they took the pulses in the left leg. Correct?
A They did.

Q And they took a popliteal pulse.
A Yes, sir, they did.
Q And none of that was done on April 10th, 2011 by Dr. Bibeau, was it?
A No, sir.
Q Now, about the spider bite. No dispute from you that the only place in this entire ER record that the spider bite is mentioned is by Dr. Bibeau under the clinical impression.
A Yes, sir.
Q It's never mentioned anywhere else in the record?
A No, sir.
Q No mention at all of any spider bite mark or anything like that?
A No, sir.
Q And you talked about -- we've heard about noseeums, and we've heard about ticks and we've heard about chiggers and we've heard about mosquitos, but what Dr. Bibeau talked about on April 10th, 2011 wasn't a noseeums, was it?
A No, sir.
Q And it wasn't a chigger.
A No, sir.
Q And it wasn't a tick.
A No, sir.
Q It was a spider.

A He said possible or probable spider bite.
Q Probable spider bite.
A That's correct.
Q So all this ---
A It was not definitive.
Q All right. So all this stuff about noseeums and ticks and chiggers, that's just meaningless, isn't it?
A I wouldn't say it's meaningless, but it's -- it's an opinion.
Q Yes, sir. Now, Dr. Smith, it's undisputed that Dr. Bibeau did not order any vascular consultation on April 10th, 2011. Right?
A Yes, sir, that's correct.
Q And he did not order any CT angiogram on April 10th, 2011?
A It wasn't indicated.
Q He didn't order any ultrasound on April 10th, 2011?
A Wasn't indicated.
Q I didn't ask you if it was indicated; I asked you if he did.
A He did not, and it was not indicated.
Q All right. Now, it's also your opinion, is it not, Dr. Smith, that Phil when he left on April 10th, 2011 was medically stable.
A Yes, sir.

Q He was not going to walk out the door and drop dead 30 seconds later.
A No, sir.
Q But he needed to be seen.
A Yes, sir.
Q Okay. And he wasn't seen until May 25th, 2011 when the second episode happened.
A That's right.
Q He wasn't seen officially.
A No, and that's kind of, you know, mind-boggling that a medical professional wouldn't seek better medical help and care for themselves if they're concerned about it.
Q All right, Dr. Smith, is it your opinion or is it not your opinion that -- strike that --
A (Witness laughing) I'm sorry.
Q It's my understanding that it's your opinion, Dr. Smith, that Phil would not have suffered all the horrible complications that followed April 10th, 2011 if he had had timely, non-emergency surgery to repair the popliteal aneurysm behind the knee.
A The short answer to that is, is that the odds of him having those complications and problems would've been dramatically less. It's just like any time you operate on anybody, anything can happen, and that's why -- I mean it's like getting struck by lightening. I don't know anybody

that's personally been struck by lightening, but I read about it in the emergency room.

Q I understand that. Dr. Smith, you believe that he had the popliteal aneurysm on April 10th, 2011.

A Oh, yes, sir, I do.

Q It absolutely existed.

A Yes, sir.

Q And a popliteal aneurysm throws off clots.

A Yes, sir, that's one of the ways they present.

Q Right. And if that had been timely identified on April 10th, 2011 and diagnosed or that they were referred to a vascular consult or for further testing or -- further tests and had had the non-emergency surgery, he would not have had the compartment syndrome, would he?

A The odds of him having the compartment syndrome would've been markedly less. There is no way to say for certain that he would not have had, but his odds of having it would've been dramatically less.

Q What -- and isn't it true that it's your opinion that his odds of having the compartment syndrome and all the other complications ---

A Sure.

Q --- is about ten percent.

A That's correct.

Q It's a 90 percent chance that he would not have had the compartment syndrome.
A I think that's a fair statement.
Q 90 percent chance that he would ---
A That's right.
Q --- not have had the permanent nerve damage and permanent muscle damage in his leg.
A I also think if they'd operated on him in Charlotte that the odds of him having those complications would've been a lot less also.
Q Okay. A 90 percent chance that he would not have the foot drop.
A I think that's a fair statement.
Q And 90 percent chance that he would not have the chronic permanent pain that requires him today to take pain medications, a narcotic pain medication called Percocet three times a day.
A If you say so.
Q No, I'm asking you.
A Yes, sir. Well, I mean ---
Q Ten per ---
A --- yeah. I mean if you extrapolate it down the line, that's right, but there's no way to say that, because everybody's pain's different. I mean I may cut off your

leg and you don't even need Tylenol. Other people they stump their toe and they want a Morphine drip.

Q I'm not talking about the subjective nature of pain. This jury has heard ---

A I understand that. Well, you are; you're asking me to extrapolate down the line, and I can't do that.

Q Assume for me, Dr. Smith, that Phil Ethier has been in constant pain since April 10th, 2011, since May 25th, 2011; it's not ending today. And let's don't debate how bad the pain is or anything.

A Sure.

Q It's your opinion that there's a 90 percent chance that if he'd had the non-emergency surgery on a timely basis and if he'd been properly diagnosed on April 10th, 2011, that he would not have that pain whatever level it is.

A Well, it certain -- that's certainly a possibility of that, yes, sir.

Q It's a 90 percent chance he would not have it.

A I don't know the answer to 90 percent. I think the risk of him having the complication would've been probably, you know, 10 percent of him having the complication from that standpoint. Whether or not he would've had the pain or the other things that go along with it, that's -- no one knows that. Only God knows that.

(WHEREUPON, COURT'S EXHIBIT THIRTEEN AND FOURTEEN IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

THE COURT: All right, a couple of matters that I need to put on the record concerning issues that were raised yesterday afternoon. First of all, there was a question or concern about the caps of Three Hundred and Fifty Thousand Dollars imposed by Code Section 15-32-220 on non-economic damages, and I have reviewed that statute and also some cases involving some claims of loss of consortium, and I do find that both the plaintiff Phillip Ethier and his wife who have separate Three Hundred and Fifty Thousand caps on non-economic damages as to each of their claims under the statute that is based on the fact that the cap is awarded to a person suffering personal injury.

Personal injury is defined as bodily injuries and also defined as loss of consortium claims under the statute and there are numerous cases which indicate loss of consortium claims are separate and distinct causes of action so I'm going to allow that to be a separate cap on that.

The other question that I took under advisement had to do with the Code Section 15-32-320 that has to do with the level of proof required in order for the defendant to be held liable in this matter.

sure I had that right. You all talked about it yesterday and I'm not sure now that came out.

MR. COX: Well what we talked about is letting them if they're gonna flip their argument ---

THE COURT: They're gonna flip their argument.

MR. COX: --- we agreed to that as long as they don't duplicate and two arguments.

THE COURT: All right. Bring the jury in.

(WHEREUPON, JURY REENTERS COURTROOM.)

THE COURT: All right, the record will reflect the jury has entered the courtroom. Anybody had any difficult in complying with my instructions over the weekend please stand?

It appears that all have been able to comply with my instructions thus far. At this time we will begin the closing arguments by counsel. Plaintiff will be going first.

Mr. Proffitt.

MR. PROFFITT: Thank you, your Honor.

THE COURT: Yes, sir.

CLOSING ARGUMENT BY MR. PROFFITT:

MR. PROFFITT: Good morning, ladies and gentlemen. Ladies and gentlemen, Phil and Jeanne Ethier's lives changed forever on April 10th, 2011. They got up that day and they didn't know what was going to happen that

day. They went to church like always on that Sunday and they came home and they were gonna have a cookout like always on that Sunday. And they didn't know that their lives were about to change forever and they didn't know that on May 25th that it was going to change forever. But after May 25th as those days turned into weeks and those weeks turned into months, they knew that their lives would never be the same again.

They came to realize that Phil would never walk again; that he'd never walk normally again. They knew that Phil would never be pain free again. Imagine having to go to sleep every night knowing that you were gonna wake up in pain praying constantly that the narcotic pain medication would work and continue to work and that you won't become addicted to it. But slowly and inevitably the giant wheel of pain and disability and depression crushed Phil. He struggled mightily. He put his shoulder to that will - to that wheel and he tried it and he tried it and he tried it just like Job did in the Bible.

He prayed and he worked and he worked and he prayed for two and a half years, first at Fairfield Memorial Hospital and then later at Gentiva Home Health. But it was a cycle and a battle that he's destined to lose. Eventually the weight of it all crushed him and nearly killed him. The cycle of working in pain and then getting

off and having no relief or rest because the pain medication wouldn't control the pain every night drove him to the edge mentally.

Doctor Johnson noted that pain and depression but just said you're trying to escape from reality. You just want to escape from reality, that's all you're looking for. The only reality that Phil was trying to escape from was the fact that he was in such pain and the escape he was trying to make is that he was almost about to commit suicide. That's how far he went. He was about to kill himself because he was so despondent.

But then he saw Doctor Harari there in 2013, late 2013 down in Columbia, a psychologist, and Doctor Harari diagnosed him with major depression. Then he saw Doctor Chen and with his wife's help he managed to see Doctor Tammy Chen a psychiatrist that you heard from by video testimony. And Doctor Chen gave him a glimmer of hope. She looked at everything and she listened to him and gathered records and paid attention and she reached out a helping hand just like a doctor's supposed to do and she gave him hope and she saved his life.

Phil saw saved but he was not healed. He was not made whole and he cannot be made whole. As Jeanne told you and as Phil told you their lives still revolved around his pain and his disability as they had for years now. And

whether they have a good day or a bad day depends on Phil's condition. Some days are okay, other days are not so okay. Some days Phil can skip the medication briefly and take himself to the store, drive around, and do some chores and groceries. He can walk around the yard and feed the dog. He can rock on the porch. A lot of days it's bad. It's awful. The pain dominates him despite the fact that he's on the pain medication. And the depression kicks in and the old refrain about what might have been and what could have been. And when Jeanne comes home sometimes their tempers are short. They don't have a relationship like they used to. Tempers flare up sometimes and nerves just like the damaged nerves in Phil's leg become raw at times. But they still love one another and they still struggle to return to the way things were but they'll never be able to do that. This is how they are and this is how they know they're always going to be. And it didn't have to be that way. It did not have to be that way. And it's that way because of the negligence of Doctor Guy Bibeau on April 10th, 2011.

Like all of us do Phil and Jeanne but especially Phil relied on Doctor Bibeau. He'd spent twenty-four years, Phil had, spent twenty-four years as a LPN, a licensed practical nurse, taking doctor's orders, following doctor's orders, believing the doctor and trusting in the

doctor and that's exactly what he did this time. All Doctor Bibeau had to do was do a proper exam and to make sure that he considered all the possible diagnoses and he did not do that.

But Doctor Bibeau did not have to heal Phil. I want you to fully understand that. We are not saying that Doctor Bibeau had to diagnose that popliteal aneurysm on April 10th, 2011. All Doctor Bibeau had to do was recognize that it was a blood vessel problem and get him on to the proper specialist or refer him for the appropriate test. He just had to recognize the basic issue and he didn't do that. By his own admission and his own testimony he never even considered the number one diagnosis of a blood vessel problem. And because of that Phil and Jeanne are sitting here in the courtroom today and Phil and Jeanne are in the shape that they're in today and the shape that they will be in for the rest of their lives.

Now, ladies and gentlemen, I want to talk with you briefly about some points of law that you're going to hear about. His Honor will instruct you on the law but I want to briefly mention just a couple of things. The first is our burden of proof in this case. This is a civil case; it is not a criminal case. As you know in a civil case the plaintiff has the burden of proving its case by a preponderance of the evidence. And that's just a big

word that means slightly more than fifty percent.

So if you imagine these scales, the lady justice that holds the scales, and sometimes she's got a blind fold on, and when the case starts out those scales are equal. They're just like - they're perfectly equal. If the plaintiff's evidence and testimony tips the scales ever so slightly, just barely in our favor, then we win, we prevail. We don't have to prove our case by ninety percent or ninety-five percent or eighty percent. It's fifty-one percent. If you use a football analogy barely over the fifty yard line, the plaintiff wins. That's what we have to do to win in the case and to prevail and for you to award damages that you believe flowed from Doctor Bibeau's negligence.

Now the standard - The plaintiff also has the burden of establishing the standard of care by expert testimony. And you've heard about that for six days now. The standard of care of a reasonably confident emergency room physician. So number one, we gotta establish the standard. Number two, we have to show that Doctor Bibeau in his actions failed below that standard; that he was careless or negligent and did not meet the required standard of a reasonably competent ER physician in this setting and on these facts. The third thing we have to do is prove that the damages that Phil has flowed from Doctor

Bibeau's negligence; that his negligence approximately caused Phil's damages and his injuries and Jeanne's damages and her injuries.

Now let's talk for a moment. Let's start with the standard of care. You've heard this all week about how the standard of care and all the doctor's agree about this. All the plaintiff's experts Doctor Adams and Doctor Jolin. And the defense experts Doctor Smith and Doctor Weinstein. They all agree about the standard of care that should have been met in this case. And that is that Doctor Bibeau had to identify a life or limb threatening serious injury. He had to identify and injury that was a threat to life or limb. And in treating that life or limb threatening injury he had to do a proper exam, a proper vascular exam. And he had to consider the possible diagnoses that were raised by that - by Phil's condition. And if necessary he had to refer Phil to the - to a further specialist. He had to refer him to a vascular guy or do the proper diagnostic test. That's the standard of care that had to be met in this case that must be made. All the doctor's agree on that so that part's easy. We know that the standard is.

Now, Doctor Bibeau breached that standard in the ways that we've talked about here for the last six days and all the witnesses have discussed. And as you've seen many many times - here's our famous "P" chart. These are the

symptoms and signs of a vascular event of a blood vessel problem. And I'm not gonna put those exhibits on the presenter again where it shows the ER record with the pain and the numbness and the discoloration and all the symptoms that Phil was reporting. You've seen that numerous times and you'll have the ER record, the unadorned ER record back in the jury room with you and you can look at it for yourself. You can pass it around among yourselves back there. And you will see all the notations that you've seen on the screen for several days now.

Pain undisputed. All the doctor's agree that Phil had pain. Phil reported that he had severe pain. Phil reported that it was the worst pain that he ever had in his life and he came to the ER and told them that. That's not what ended up on the ER record by that point when he had some medication that kicked in but he reported that. He testified that he reported that to the ER, severe pain in his right lower leg and foot.

Polar: That's the coolness or the coldness. And you'll see in the ER records and the witnesses' have all talked about that the right foot was cooler than the left foot. It's another sign of a blood vessel problem. All the doctor's agree about that. All the doctor's, all the defense experts and plaintiff's experts. Pallor or change in color: That's the one where it's either turning

a little bit white or it's a change in color. And you will recall that I ask all the witnesses, you know, pallor also means a change in color, it doesn't just mean white. It means a discoloration, something different about the leg. Its purplish like Doctor Bibeau said it was. Or it's discolored somehow. That's an indication of a blood vessel problem going on.

Our experts testified to that that there was a change in color. So did Doctor Chen their vascular expert on the defense side he testified to the same. Doctor Weinstein, that's one that he didn't want to admit. He admitted it in his deposition cause you remember we read into some of the - some of his deposition when I cross-examined him he said it was met back then but when it came to trial he was trying to say oh no only two of them are met. But in his deposition he said four of these Ps were met. Regardless there was a change in color. You will see it in the records and you heard it from the witness stand and you heard it from Phil.

Paresthesia: That's the numbness. You will see in there where it says cold, numb, ecchymotic. Ecchymotic or modeling being the discoloration. Numbness: There is no dispute that there was numbness of the symptom. Now, all the doctors agree to that. Now the pulselessness you heard I believe every doctor testified that you can have a

blood vessel problem and still have a normal foot pulse. And why is that? As Doctor Adams explained to you it's because you got - and God gave us - three arteries in your leg. You got three arteries in your leg and if one of 'em gets blocked up the other two are still working.

Doctor Adams you will recall testified that he thinks the clot that Phil was experiencing on that day was most likely an anterior tibial artery. But the posterior tibial artery with a posterior tibial pulse on the side of the foot, posterior tibial artery, posterior tibial pulse; that artery was still working that day. So that's why allegedly there was a normal foot pulse in the ER that day on April 10th, 2011. But it did not mean that there was no blood vessel problem. And it did not definitively rule out the possibility of a blood vessel problem.

Furthermore the information we have on the foot pulses taken that day was done by Samantha Anthony. You saw her testimony by video and she's the certified nurse assistant who was in nursing school who testified, and admitted honestly, that she was inexperienced at taking foot pulses and never remembered taking a foot pulse at Fairfield Hospital before. She's the one who took that foot pulse. It's her writing on that triage page and only her writing except for the RN's signature. And you did hear from Nurse Wadford, Jerilyn Wadford, who came in and

said well I checked behind her on everything. I ask all the questions again and I checked all the issues again. But, that's in dispute. Phil and Jeanne say that Jerilyn Wadford never saw Phil that day, never touched Phil that day; never did any kind of examination, never checked any foot pulses. Nurse Wadford said she did. And as you saw from the hospital policy that was admitted an RN is supposed to be doing that triage and if she didn't check behind Samantha Anthony like she was supposed to, she'd be in big trouble. So she definitely has a motive to disremember things.

But regardless the only point and an important point to take from all that is that the pulses are in question. The foot pulses are in question but even if they were normal, even if they were normal, you can still have a blood vessel problem. All of the experts, Doctor Adams and Doctor Jolin on our side; Doctor Weinstein and Doctor Smith on the their side all said that you can have a blood vessel problem with - and still have a normal foot pulse.

The paralysis and this is of course not an issue. Now, what was Doctor Bibeau supposed to do that day that he did not do? What did he not do that a reasonably competent physician would have done? First of all, he did not perform a proper vascular exam. And he testified that he believes he checked the foot pulses. And he wants to

say that he checked the foot pulses. But you were repeatedly shown on the exhibit in the ER record - and you can see it when you go back to the jury room - look for the little block that says pulses. It says physician exam record and it has pulses and it has femoral pulse, popliteal pulse, foot pulse. It has a place for the left and the right; all those little blanks, none of that's filled in. None of it. That's the physician record. That's where Doctor Bibeau is supposed to write down where he did the pulses. And there is not a shred of evidence he did that other than his alleged memory and his alleged belief that he actually did that on April 10th, 2011. That he put his hand on Phil's foot and took those pulses as opposed to just a very quick touch as Phil testified to the side of the leg and to the feet to find out that one was cooler than the other. And why didn't Doctor Bibeau do that? Because Doctor Bibeau thought that Jerilyn Wadford, his trusted and thorough and excellent nurse reader, had done pulses. He relied on her so he thought the pulses were normal. And he knows he should have taken it himself but he didn't take it himself. And as even their own expert Doctor Dorn Smith, the vascular guy for defense, as he got up there he said, you know, foot pulses are important. Those are important; it's important to note the pertinent positives and the pertinent negatives. And there

is no more pertinent negative or positive when you're trying to examine a lower right leg that has the kind of condition that Phil's had that day than a foot pulse. Everybody says that. The foot pulses are crucial to know that. And yet Doctor Bibeau did not note what his own expert says is the important pertinent negative or pertinent positive. That is negligence. That is carelessness. That is falling below the standard of care so that's the first thing that Doctor Bibeau did wrong. He did not do a proper vascular exam.

Now the second thing that Doctor Bibeau did wrong was he failed to consider the possible diagnosis of a blood vessel problem. He testified to that himself. He got on the stand and under my questioning testified that the only three things he considered that day were acute trauma, acute trauma where something - you bang your leg into something, something strikes your leg or some kind of traumatic injury to the leg. An acute means it occurred right then, immediately, just recently. Acute trauma, that's the first thing he thought about.

No evidence of acute trauma. There is no evidence at all in the record anywhere and in any of the testimony that there was any acute trauma to Phil's right lower leg. So he ruled that out, not acute trauma.

The second thing he considered was chemical

exposure to the skin. Maybe Phil spilled something on his skin. Somehow he came in contact with some chemical and he said the record shows he's unloading a truck although Phil didn't have a truck. Don't know how that got in there but regardless maybe he spilled something on his skin. Chemical exposure to the skin, maybe that's what this discoloration is. Maybe that's the reason for the pain and the change in the color and the numbness. Chemical exposure: No evidence of that. Doctor Bibeau said no evidence of that. All the experts said no evidence of that. Phil said no evidence of that. So that's ruled out, cross that one off. Chemical exposure, acute trauma, not there and it's not those.

The only other thing he considered by his own testimony and his own admission was a spider bite. Spider bite. That's what he came to was spider bite. What evidence is there in the record that there was a spider bite ever reported or ever noted or ever found or ever seen other than Doctor Bibeau's conclusion. The only place you'll see that ER record when you go back there in the jury room and look at it is Doctor Bibeau's writing probable spider bite under clinical impression and on his diagnosis sheet probable spider bite. That's the only - Nobody ever said that in the ER, nobody ever told that to Doctor Bibeau although he claimed that he got some

mysterious phantom phone call. Now when I deposed him - he admitted on the stand - When I deposed him he never mentioned any mysterious phantom phone call about something coming in and him getting information from one of the nurses that there had been a call that an employee was coming in with a possible spider bite. That didn't happen. Doctor Bibeau never said a word about that in his deposition. When he got here to trial today, or this week, he had to come up with this mysterious phone call - phantom phone call. That phone call never happened. Phil didn't call any - He didn't testify that he did not call the ER. Jeanne did not call the ER. They went to the ER. They did not call ahead to the ER. There was no phone call, but regardless, the phone call's meaningless. Just like I ask Doctor Bibeau on the stand, so you took the phone call and you're already jumping to the conclusion. What are you doing, filling out your diagnosis sheet before the guy even gets here, is it what you're already doing in your head? That makes no sense whatsoever. There is no evidence of spider bite.

And our experts testified and Doctor Bibeau testified that the indications for a spider bite were not even there. There was no bite mark. And remember this is four hours now after this alleged bite would have occurred. Happened about one o'clock and he's in the ER about five

o'clock. Four hours had gone by, four hours, and there's still no spider bite mark anywhere. Nothing like that anywhere that any of the nurses found, any of the nurses noted, any of the doctor - the doctor did not find it and did not note it at all. There was no spider bite, there was no spider bite.

But Doctor Bibeau without considering the diagnosis that he should be considering, the blood vessel problem, and just thinking chemical exposure, or trauma to the leg, he was left with a spider bite so he just says spider bite and sent Phil on his way. The failure to consider the diagnoses that was raised by Phil's condition, the possible blood vessel problem, is negligence. That's carelessness, that's not taking enough time to think it through. He was with Phil maybe five minutes no more than ten minutes according to his own testimony. He did not think it through, he did not consider all the possibilities, and he did not consider the number one diagnosis that should have been on the list which is blood vessel problem. And again, he didn't have to magically find that popliteal aneurysm. All the doctor's say the aneurysm was there. All the doctor's say that aneurysm was there. On both sides everybody says that popliteal aneurysm was behind his knee on April 10th, 2011.

But Doctor Bibeau didn't have to find that. All

he had to do was see some symptoms of a blood vessel problem going on and refer Phil for a vascular consultation or for a CT angiogram a test with the dye in your veins and arteries and all that. One ultrasound is all he had to do. It's all he had to do and he did not do it and that is carelessness.

Now the final thing that Doctor Bibeau did not do is he did not refer him anywhere. He did not realize the diagnoses and he did not refer Phil to a vascular consult. He did not refer Phil to a - for further test either ultra sound or a CT angiogram. He did none of that and that is carelessness.

Now it's important for you to remember and realize that all of the doctors, all of the experts, Doctor Adams and Doctor Jolin on our side and Doctor Smith and Doctor Weinstein on their side all said that a blood vessel problem had to be on the diagnosis list. It had to be there. A reasonably competent ER physician had to consider a blood vessel problem as a possible diagnosis. All the experts agree about that. Now Doctor Weinstein and Doctor Adams - I'm sorry, Doctor Smith, their experts, Weinstein and Smith want to say well you know the foot pulses seem to be normal and it was probably, you know, it really wasn't a strong indication of a blood vessel problem or an arterial blockage so it had to - it was on the list but it wouldn't

be way down on the list. That's sort of their approach, way down on the list but it's on the list. It's on the list; it had to be on the list. They have to admit that. Our experts say no. Doctor Adams and Doctor Jolin say no that's at the top of the list. You got the Ps here these things you learn in Med School. You remember Doctor Weinstein talked about the mnemonics, mnemonics; however you say it, the things to make you remember symptoms and problems and all that. Well four of them are met. Four of them are met and arguably five are met and yet blood vessel problem was never considered by Doctor Bibeau. That is carelessness and all the doctors, all the experts say that he had to consider that and yet he did not. And you remember you may recall this that Doctor Adams testified that this is the kind of case an ER physician lives for. This is the kind of thing that they went to med school for and if they want to be an ER physician. This is the kind of thing where you can save somebody's life or limb cause so much of the time, I know you guys know this, that so much of the time in an ER it's routine mundane stuff and it's colds and flu and it's chronic babies or colicky babies and just routine things that are not really life threatening. You're more there as a almost a family doctor or not really emergencies.

But when someone comes in with a life or limb-

threatening problem and you find that and you can help that, that's what you're there for. That's what you're really living for. That's like - That's the goal. And Doctor Bibeau missed it entirely. He missed the diagnosis entirely. You will recall also that Doctor Adams said the whole thing about the spider bite was just ridiculous. I mean you remember on cross-examination the defense kept pressing him on that point and ask him question after question on that point. And finally he just really got blunt with it and said it's just ridiculous, it's ridiculous that somebody would say this was a spider bite based on these symptoms and these conditions. And if you recall Doctor Jolin, our expert, our ER expert we got from Connecticut, I think it was the second witness, he testified that you don't - you only have to look at the first four or five lines on that ER physically - physician exam record, just that little block up in the left hand corner where it says pain, cold, numb, and ecchymotic and you've already got like four of the pains right there just with the symptoms reported that boom blood vessel problem, blood vessel problem. That's like top of the list. It was that obvious and yet Doctor Bibeau still missed it.

Now, Phil also testified that there was a second encounter. The curbside consult. Curbside consultation with Doctor Bibeau. And that occurred - He doesn't know

the exact date and his notes don't reflect the exact date but sometime April 10th, 11th, 2011 to sometime April 25th, 2011 he had a second encounter, a curb-side consultation with Doctor Bibeau in the ER. It happened at the nurse's station and he was sitting there, had his shoe off and he showed Doctor Bibeau his leg again and the leg had improved some but it was still painful. And the color had improved some but it was still not normal color at that point. And he had the little tip of the black toe, just the tip. His toe wasn't rotting off. His toe wasn't mummifying, his toe wasn't falling apart and the whole thing falling off. He had a little tip of a toe like a blood blister, a little black point, and he showed that to Doctor Bibeau. And Doctor Bibeau just sort of glanced at his leg didn't touch him didn't examine him. There was no formal visit record made no - nothing was done. Just sort of glanced at it and said looks like its getting better and give it some more time. Same thing he told Phil earlier. The same thing he told Phil earlier, just give it some time, it's gonna take some time. And that's what Phil believed; that's what Phil trusted.

Phil did the same thing with Doctor Canty and showed him the black tip toe. And he mentioned his problem to at least two other ER physicians in a curb-side consult. But those guys, those guys Canty and Doctor Suez and Doctor

Keith those other ER doctors were not Phil's treating physicians. They had never seen Phil before for this problem, they did not have the history and background that Doctor Bibeau did. That was just a curb-side consult with no background information and no prior relationship with those other doctors and they are in no way at fault in this case and we never alleged that. The only person who is at fault in this case is Doctor Bibeau on the doctor's side.

Now, you know they - And despite their effort to show that curb-side consultation shouldn't happen and don't happen and don't happen, I mean all the doctor's admitted that those do happen. And Doctor Holleman, you recall Doctor Holleman the guy with the bow tie, the treating surgeon that talked to you, he said that, you know, of course there's hallway concerts and - consults and there's church lobby consults; it happens all the time. And if you have a consultation in that kind of a setting, Doctor Adams and Doctor Jolin testified in this follow up curb-side consult you need to - and you see this tip of the black toe and you see the discolored leg, you need to make something happen. You have a duty as a doctor, you have the Hippocratic oath you can't just let that go by. You've got to tell the fellow that's urgent and go see somebody else or say come in here and let me examine you. Go get registered and let's make this happen, okay. Alert the

person, the ignorant patient that they need to take some action and that did not happen. And that again is carelessness by Doctor Bibeau. Carelessness by Doctor Bibeau. He says that encounter never happened. Phil says it did. You will have to decide who's telling the truth on that. But regardless we assert that it did happen and it was carelessness by Doctor Bibeau.

Now, I'll show you these because you didn't see these very often during the trial. But here we have Plaintiff's Exhibit Thirty-five and this is Phil's. You can look at this back in the jury room, but this is Phil's payroll schedule that shows he was originally working during those weeks and at work. And here we have Plaintiff's Exhibit Thirty-two which is Doctor Bibeau's schedule for April 2011 that shows him at the hospital for twenty-four hours on April 19th and April 22nd. So he's working during the period that Phil says that he saw him there in the second encounter at the curb-side consult during that period of April 10th, 2011 to April 25th, 2011.

All right now, one of the key defenses in this case is called comparative negligence so let me talk with you briefly about that. Comparative negligence is what we have in South Carolina; it's where is a negligence occurs and causes damages then the jury is sometimes ask in appropriate cases to apportion the damage - to apportion

the percentage of negligence between the at fault parties or between the parties. So in this case you're going to be ask to apportion the percentage of negligence between Doctor Bibeau and Phil because their defense is you should have gone to see a doctor. You should have gone to see another doctor and because you did not follow up with another physician you're partly to blame for this and so you're partly at fault.

So we'll go over the verdict form in a little while but I just want to introduce you to the concept of comparative negligence. And if Phil is more than fifty percent at fault, if he's more - if you find him to be more that fifty percent at fault, then we lose, Phil looses and gets nothing. It's a defense verdict. We loose and get nothing if you find Phil was more than fifty percent at fault. Now I submit to you that if Phil is at fault at all it would be a very very small percentage. It's up to you to determine that issue but it would be a very very small percentage; nothing approaching fifty percent whatsoever, nothing approaching that number.

Now, let's talk about why Phil is not at fault; why we believe Phil is not at fault at all, or, if he is at fault at all it's a very small percentage. Phil had been an LPN forever, for twenty-one years I think by that point by 2011. He'd been a licensed practical nurse. And what

do LPN's do all day every day? What do they do all day long? They follow the doctor's orders more than most people more than me. I don't go around all day following doctor's orders and I don't imagine most of you do. We're not in that setting. But for his working life for the last twenty-one years that's all Phil had known. That's what he had done at the nursing homes where he worked and at the doctor's offices where he worked and at the home health jobs that he had. He follows doctor's orders and what the doctor says goes. Phil was accustomed to trusting and believing doctors and he trusted and he believed Doctor Bibeau. He trusted and he believed Doctor Bibeau that's why he didn't follow-up. He believed Bibeau was right. Bibeau did a very quick exam. Phil's testimony was it looked like he'd seen this a thousand times; that he just looked at it oh yeah that's a spider bite, no problem, probably a spider bite. Give it some time here's some steroids, here's some pain medication, probably a spider bite. Okay. He's the doctor he makes diagnoses all day long. Nurses don't make diagnoses. No nurse makes diagnoses. Doctors diagnose. And that's drilled into you and engrained into you as an LPN from day one. So Phil did exactly what he had done for years which is trust and believe Doctor Bibeau.

Now, you also need to understand that you - that

Doctor Bibeau, or any doctor that takes any patient, takes the patient as he finds them. It doesn't matter. Throughout this trial you've heard defense questions intended to make you think that because Phil had high blood pressure and because he didn't take his blood pressure medication properly and because he has that situation that it's his fault he's got the popliteal aneurysm. You know it's his fault he's to blame for that. That is not the case. A doctor takes the patient as the doctor finds them. It doesn't matter if you come in and you have high blood pressure or you've had to the unfortunate problem of getting some kind of cancer, I mean you got to the doctor to treat what you have. It doesn't matter why you got there or how you got there you expect the doctor to diagnose it and to help you with your problem so Doctor has to take - and you'll be instructed by the judge - that he must take Phil as he finds him. And the fact that he had high blood pressure and the popliteal aneurysm that was not his fault at all none of that's relevant to anything. That has nothing to do with anything. You take the patient as you find 'em.

Now let me talk briefly about just one other point. This idea that because Phil - Phil failed to follow up with another doctor that he's some how at fault. I want you to think hard enough there and think about whether or

not that is logical. It's the defense's position that Phil should have gone to one, two, three, four, five days, whatever days later and seen another doctor; that that's what he was told go see another physician, another MD this week, and that because Phil didn't do that Phil's partly at fault. Again, Phil's trusting and believing Doctor Bibeau as he always does doctors. But regardless, let's imagine Phil did that. It's also the defense's position and the experts' testimony that if he'd gone to see the second doctor, the non-emergency room doctor, that that doctor should have found the problem; that that doctor, that family doctor, would have to find the problem to meet the standard of care they would have to see the same symptoms that he presented with at the ER on April 10th 2011 the pain the coolness, the numbness, the pulselessness, the paresthesia. All those symptoms that he would have - still have a few days later and that family doctor where you go and knock on the door and say ---

(ATTORNEY PROFFITT KNOCKS ON JURY BOX BENCH.)

MR. PROFFITT: --- Doctor Family Doctor, see me. That guys got to find it; that guys got to realize that there's a blood vessel problem. That's what they're telling you. At the same time you've got a board certified family physician sitting in the ER on April 10th, 2011, a board certified family doctor who moon lights in

the ER and is the doctor on duty that day with Phil, who they say didn't have to find it. Same symptoms, same symptoms he's gonna report with later to the other doctor. Same stuff, everything, same stuff. And yet second non-emergency room doctor had to find it, was required to find it by the standard of care. You got to do it you got to find it. If you don't it's a violation. Yet, Doctor Bibeau, no violation. Board certified family physician. That makes absolutely no sense. That is utterly illogical, utterly illogical; makes no sense whatsoever.

All right. Now, ladies and gentlemen, I just want to - You haven't seen these for a few days so I want to just briefly review what happened to Phil after he - in that period from April 10th to May 25th, 2011. And he thought it was improving, seemed to be improving. Jeanne says it was improving, seemed to be getting better, color back to normal, pain going away, just working his regular schedule; thought everything was going good. Well, May 25th, 2011 is when he had the second episode; the same thing happened again. A blood clot broke loose off of the popliteal aneurysm went down one of the arteries and in fact by that point whether it happened gradually over that period or whether it happened on May 24th and 25th, 2011 very quickly and suddenly the doctor's can't really say. You've heard all of them talk about that. It doesn't