

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM PART IA-4

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LAZARO JOEL MONTAS,

Plaintiff,

Index No.

-against-

305620/10

SALLY H. ABOUEL-ELA,

Defendant.

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TRIAL EXCERPT - DR. MICHAEL FREEMAN

851 Grand Concourse
Bronx, New York 10451
February 2nd, 2016

B E F O R E:

HON. HOWARD SHERMAN, JSC, and a jury of six plus
two alternates.

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

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Attorneys for Plaintiff
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BY: TIMOTHY F.X. JONES, ESQ.

JANET CAMPOLO, RPR
Senior Court Reporter

1 MR. OGEN: Your Honor, I call Dr. Michael Freeman
2 to the stand.

3 THE COURT OFFICER: Stand right here, raise your
4 right hand.

5 M I C H A E L F R E E M A N a witness called on behalf of
6 the Plaintiff, having been first duly sworn, took the witness
7 stand and testified as follows:

8 THE WITNESS: I do.

9 THE COURT OFFICER: Please have a seat. In a
10 loud and clear voice, please state your name, title and
11 business address.

12 THE WITNESS: My name is Michael Freeman, my
13 business address is Portland, Oregon. My title is doctor
14 and professor, I guess.

15 MR. JONES: Can we have an address, please?

16 THE WITNESS: Oh, I thought I said it. Business
17 address is 425 Northwest 10th Avenue, Suite 306.

18 THE COURT: Good morning, Doctor. And as the
19 officer said, you heard when he swore you in, in a loud and
20 clear voice, I'm going to ask you to be loud because the
21 acoustics are terrible.

22 THE WITNESS: Okay, I will do my best.

23 DIRECT EXAMINATION

24 BY MR. OGEN:

25 Q. Good morning, Dr. Freeman.

1 A. Good morning.

2 Q. Have you and I ever met before today?

3 A. No.

4 Q. Now, what do you do?

5 A. I'm a consultant in forensic medicine and specifically
6 consultant in the field of forensic epidemiology, the use of
7 statistics in forensic medicine.

8 Q. And can you please tell us a little bit about your
9 background and experience?

10 A. Sure. Well, let's see. I have a bunch of degrees, as
11 you would expect.

12 I went to school in Oregon, which is where I grew up,
13 University of Oregon. And then my first degree, professional
14 degree was a chiropractic degree. I went to chiropractor school
15 as my dad is a chiropractor, and I grew up around that.

16 After about five years, I went back to school and did
17 a masters in public health in epidemiology, and then I did a PhD
18 in epidemiology and I focused on traffic crash related injuries.
19 Then I did a doctor of medicine degree, which was done at a
20 Swedish medical school. I studied over there for a number of
21 years, and really trained me more as a medical scientist not as
22 a clinician.

23 Then I did a two-year fellowship in forensic pathology
24 involved with autopsy practice, and that was done in the United
25 States in Pittsburgh, Pennsylvania.

1 Q. Okay. And what is epidemiology?

2 A. Well, it's the study of populations of people to
3 understand how they get sick and how they get hurt. So pretty
4 much anything we hear about that's afflicting a group of people,
5 like the news reports on the Zika virus down in South America,
6 those are epidemiologic studies. When you hear about the flu
7 and whether it's a bad year and not as bad a year or Ebola, and
8 that's all Center for Disease Control.

9 But also we understand what happens to people in car
10 crashes. For example, the fact that in 1980, we had about
11 60,000 people who died that year in a car crash and last year it
12 was 32,000, not because there are fewer cars out there, but cars
13 are safer.

14 See, we're finding out actually what goes on in the
15 real world by using epidemiology to study and look at
16 population.

17 Q. And have you ever served as an expert witness in court
18 before?

19 A. I have.

20 Q. How many times?

21 A. Over 300.

22 Q. And have you ever served as an expert witness in car
23 crash injury cases?

24 A. I have.

25 Q. And how many times?

1 A. That's probably over 200. That's the majority of the
2 work I've done in the past has been on car crash cases.

3 Q. And what other types of cases have you served as an
4 expert in?

5 A. Anything that can afflict somebody where it's
6 important to understand probabilities is a case that I might get
7 involved with. For example, if there's a cluster of brain
8 cancer cases like there is in a community in Florida, and
9 there's also been dumping in that area, environmental dumping of
10 radioactive substances, which also went on in this particular
11 place in Florida, I can study that, and then actually say, well,
12 we only expected one case and we got ten cases, so those are
13 important type of cases epidemiology would be used for.

14 But I also testify in murder cases. About 20 percent
15 of my work is in the criminal arena, and I also testify in like
16 medical malpractice cases, because even though I don't practice
17 clinical medicine, sometimes one of the things you want to know
18 is --

19 MR. JONES: Objection.

20 THE COURT: Sustained.

21 Q. Okay. Do you have a special interest in injuries
22 resulting from crashes?

23 A. I do.

24 Q. Why?

25 A. Well, I started out studying that based on my interest

1 from what I did as a chiropractor 25 years ago. And then did my
2 PhD thesis on that topic, and I published about 80 to 90 papers
3 on crashes, crash related injuries and crash related deaths.

4 Q. Okay. How about any books on that topic?

5 A. Yes, I have a number of books on the topic; about half
6 a dozen books.

7 Q. And how many publications do you have overall?

8 A. Almost 200.

9 Q. On what types of topics?

10 A. Well, the first ten years I published it was mostly
11 car crashes and crash related injuries, but since that time,
12 it's been on a wide variety of things. Most recently, some of
13 my most recent publications have to do with five year study in
14 Rwanda looking at the effect of the 1994 genocide and current
15 homicide and suicide rates, so I was involved with a WHO study
16 there for five years and published on that.

17 So it's -- I'm like the painter who paints what he
18 sees. If I see something that interests me, I might do research
19 on it.

20 MR. JONES: Objection, Judge. Can we get to his
21 credentials, please?

22 THE COURT: Sustained.

23 Q. What background and training do you have in crash
24 reconstruction?

25 A. Well, that started back in the '90's when I was doing

1 my PhD at Oregon State University, I was required to study crash
2 reconstruction in order to understand crashes, and so I took I
3 think about 150 hours of training, basic and advanced crash
4 reconstruction at Northwestern University, and then I finished
5 the PhD in '97. And '99, I began working with the medical
6 examiner in Oregon and started going out on call on fatal
7 crashes, and did that for about seven or eight years and trained
8 with law enforcement during that time.

9 And then I took what's called my ACTAR accreditation,
10 which is sort of like board certification in crash
11 reconstruction, and I've had that since 2004 or 2005. So I've
12 reconstructed over 2,000 crashes over the years.

13 Q. How many papers have you published on crash
14 reconstruction?

15 A. About a dozen or so.

16 Q. And have you taught any courses or given any lectures
17 on crash reconstruction?

18 A. Yeah. I normally give at least one or two lectures
19 per year to law enforcement on crash reconstruction methods and
20 how they're used to investigate typically fatal crashes.

21 Q. And what background and training do you have in
22 biomechanics?

23 A. That was also part of my training in my PhD. That was
24 half of what's called a PhD minor, and so I had I think four
25 formal courses in biomechanics and then did mostly conference

1 related training. And then I started doing research and
2 teaching biomechanics, and so I've taught injury biomechanics,
3 how people get hurt as a result of blunt force trauma since '99
4 at the medical school where I'm a professor.

5 Q. Have you done research or work in relation to lower
6 speed crashes?

7 MR. JONES: Objection, leading.

8 THE COURT: Overruled.

9 A. I have.

10 Q. What type?

11 A. Mostly looking at injury mechanisms and essentially
12 epidemiology, I mean trying to define, if you can say a crash is
13 five miles an hour, for example, trying to define, well, how
14 many people would you expect to get hurt, how many people do get
15 hurt, what can you say about a five miles an hour crash, or a
16 six or seven miles an hour crash. And when can you say a crash
17 is five or six or seven miles an hour. That's also important.

18 Q. Published any peer review scientific articles about
19 the biomechanics of low speed crashes?

20 A. Yes.

21 Q. How many have you have you published?

22 A. Probably about 25.

23 Q. Have you served as a consultant to any government or
24 law enforcement agency on biomechanics of crashes?

25 A. No, not of crashes. Biomechanics of spinal injury,

1 yes.

2 Q. And do you currently hold any academic positions?

3 A. I do.

4 Q. Where?

5 A. Just recently accepted a position at University of
6 Maastricht, which is the Netherlands, as an associate professor
7 of forensic epidemiology; how epidemiology is used in a forensic
8 setting like we've been talking about, to essentially supervise
9 PhD students there.

10 I've been since 1997 a professor, part-time professor
11 at Oregon Health and Science University Medical School, as well,
12 and currently hold a position in the Department of Psychiatry
13 where I teach forensic psychiatry fellows about forensic
14 medicine.

15 My earlier appointment, which was in Department of
16 Public Health and preventative medicine, that department
17 actually got dissolved last year, so after 15 years that went
18 away.

19 Q. And have you taught in an academic setting about crash
20 related injuries?

21 A. I have.

22 Q. And tell us about that?

23 A. Since 1999, I've taught courses in injury epidemiology
24 and injury biomechanics at the medical school in Oregon and
25 other environments, as well, but that's the standard course that

1 I've taught.

2 Q. And have you yourself participated in the
3 reconstruction of low speed accidents?

4 MR. JONES: Judge, continuous leading, Judge.

5 THE COURT: I'll allow this one and then let's
6 get to more broad questions.

7 A. Yes.

8 Q. Tell us a little bit about that.

9 A. About 25 or 30 percent of my work involved such
10 crashes in the civil arena, just because they're -- such crashes
11 are disputed very often. And so I am routinely called to talk
12 about injury risk and injury mechanism in low speed crashes.
13 It's not uncommon at all.

14 Q. Okay. How do you define a low speed crash?

15 A. Typically a low speed crash is defined where there's
16 relatively minimal damage that you can see, and the vehicles are
17 not traveling more than ten miles per hour at any time during
18 the collision.

19 Q. And are you familiar with how such low speed
20 collisions are reconstructed?

21 A. Yes.

22 Q. Now, Doctor, how do you evaluate if someone is injured
23 in a car crash?

24 MR. JONES: Objection. Calls for medical
25 conclusion, Judge.

1 THE COURT: How do you evaluate someone?

2 MR. OGEN: If someone is injured in a car crash.

3 THE COURT: I'll sustain as to form.

4 Q. How do you evaluate whether someone has been injured
5 in a rear end collision?

6 MR. JONES: Same objection, Judge. And I'm not
7 clear, Judge, this witness has no particular field of
8 expertise, so he can't be asked his opinions yet.

9 THE COURT: Two different objections.

10 MR. JONES: Two objections. One, the medical
11 conclusion and, two, I do not agree, Judge, that he's
12 qualified as an expert in any field based upon these
13 questions.

14 MR. OGEN: Disagree.

15 THE COURT: Let's go back there.

16 (Whereupon, the following discussion takes place
17 on the record, in the robing room, in the presence of
18 the Court, the defense counsel, plaintiff's counsel and
19 out of the hearing of the jury:)

20 THE COURT: Let's go back, let's go to the
21 original objection, not his qualifications. Assuming he is
22 qualified, your objection is that it's going to lead to
23 medical testimony?

24 MR. JONES: Correct.

25 THE COURT: I don't think it should lead to

1 medical. I know you want to do it from a biomechanical
2 perspective. This is the issue of how you evaluate if
3 there's enough force.

4 MR. OGEN: I can add in from a biomechanical
5 perspective.

6 THE COURT: We've got to get it down, not to the
7 injury, but how do you know, how do you evaluate whether a
8 crash or something caused a particular injury from an
9 engineering perspective.

10 MR. OGEN: From a biomechanical perspective.

11 THE COURT: So I'll allow it that way over your
12 objection, but let's go back to whether he's qualified to
13 even give this.

14 MR. JONES: If I just heard him correctly, he's
15 taken four courses in biomechanics and made a snicker at
16 the jury when he said he kind of minored in biomechanics.
17 The man doesn't have a degree in anything but chiropractor
18 college degree, and he's an epidemiologist, which is
19 basically a statistician, somebody who can compile
20 statistics with respect to, for instance, say how many 24
21 year olds involved in automobile collisions bring claims
22 for injuries based upon two impacts. That's what an
23 epidemiologist does.

24 He's not a biomechanical engineer, so to even
25 pose questions to this witness which may call for an area

1 of expertise which obviously Dr. Toosi testified to is out
2 of bounds for this witness. His qualifications aren't even
3 established to this jury yet. They're not even close. He
4 took four courses.

5 MR. OGEN: He said he reconstructed 2,000 crashes
6 and studied the biomechanics of it, so how is he not
7 qualified to do that? And he's a professor of
8 biomechanics.

9 MR. JONES: No, he's not, he's not.

10 THE COURT: We got into an area where I was
11 listening also and I actually got a little confused,
12 because he clearly didn't say. He doesn't have an
13 engineering degree in biomechanics. He did say something
14 about minoring and taking a few courses and he did say he
15 teaches at the university level, which I sort of found
16 interesting to take a few courses and then you're a
17 professor on it, and I guess that goes towards your
18 objection, but to the extent that he did say, and if you
19 want to do this by voir dire now or on cross in terms of he
20 did say he's reconstructed and analyzed biomechanically
21 hundreds if not thousands of accidents, and he clearly
22 doesn't have any degree in it. And that he teaches and
23 he's a university professor in biomechanics, at this point
24 subject to you doing a voir dire.

25 MR. JONES: I'd like to.

1 THE COURT: I'm going to let him testify.
2 Clearly it's fair game for a voir dire or cross, but I
3 would actually listen to the voir dire, because there is a
4 question of how much of biomechanics is in his background,
5 apart from the fact that he's teaching, and he did say
6 couple of thousand accidents, which would appear to make
7 him some type of expert if people keep hiring him to
8 evaluate.

9 MR. JONES: He's forensics.

10 THE COURT: That's what I'm saying. I'm not sure
11 exactly what he does vis-a-vis biomechanics, so if you want
12 to do a voir dire, let's do it.

13 MR. OGEN: Let me just finish that question.

14 THE COURT: Do the question in the context of
15 biomechanical speaking, not injury speaking, and you make
16 your objection to the question and again to the
17 qualification. I'm going to overrule it on the question
18 subject to the qualification, and we'll start the voir
19 dire.

20 MR. JONES: Okay.

21 MR. OGEN: I'll tell the jury I'm withdrawing the
22 question and I'll phrase it in a different way.

23 THE COURT: And you have my ruling in advance and
24 it's going to lead to a voir dire, and you can ask him
25 whatever you want, because I do agree with you his

1 background in biomechanics is a little fuzzy. Okay.

2 (Whereupon, the following takes place on the
3 record in open court in the hearing and presence of the
4 jury.)

5 MR. OGEN: Judge, I'm going to reword the
6 question.

7 THE COURT: Go ahead.

8 Q. Doctor, from a biomechanical perspective, how do you
9 evaluate if someone has been injured in a rear end collision?

10 MR. JONES: Objection.

11 THE COURT: Overruled. Your objection is to the
12 question or to his qualification?

13 MR. JONES: Both.

14 THE COURT: So I will overrule it for now as to
15 the question or the form of the question, but as to his
16 ability to answer it, you can have a voir dire on his
17 qualifications.

18 MR. JONES: Thank you, Judge.

19 MR. OGEN: Before or after he responds?

20 THE COURT: Before. Okay. This is not cross
21 examination. The attorney is only going to question the
22 witness about his qualifications, similar to what
23 plaintiff's counsel was doing a couple of minutes ago.

24 VOIR DIRE EXAMINATION

25 BY MR. JONES:

1 Q. My name is Timothy Jones.

2 A. Good morning.

3 Q. I'm the attorney for the defendant.

4 And you call yourself doctor based upon having
5 achieved a PhD in epidemiology, correct?

6 A. I call myself doctor, because I'm originally trained
7 as a doctor of chiropractic. I call myself doctor, because I
8 have a PhD or a doctor in philosophy in epidemiology. And I
9 call myself doctor, because I have a doctor of medicine from
10 Umea University in Sweden. I have three doctorates.

11 Q. You had no clinical practice as a physician ever,
12 correct?

13 A. No, that's incorrect. I actually practiced as a
14 clinical physician.

15 Q. Medical doctor?

16 A. You didn't ask me that. I practiced as a chiropractor
17 physician for 12 years.

18 Q. A physician? You're telling the jury you're a medical
19 doctor with clinical experience, yes or no?

20 A. No, that's not the question you asked me. I am a
21 chiropractor. Excuse me.

22 THE COURT: Doctor, just answer his question.
23 Don't argue.

24 Q. You've been in court several times before, correct?

25 A. I have.

1 Q. I'm going to ask the questions doctor, you're going to
2 provide the responses. I'm going to frame my question such that
3 you can answer it yes or no, and if you can't, you will let me
4 know and I'll rephrase, and we'll get out of here on time, fair
5 enough?

6 A. They're your questions, counsel.

7 Q. Now, Doctor, medical doctor, are you telling the jury
8 that you practiced as a medical doctor, as a clinician, is that
9 why you call yourself doctor, yes or no?

10 A. No, that is not the reason I call myself doctor.

11 Q. Getting back to biomechanics, you do not have a degree
12 in biomechanics, do you?

13 A. That's correct.

14 Q. You're not an engineer, are you?

15 A. That's correct, too.

16 Q. You just told the jury you minored, you had a minor as
17 a PhD in biomechanics, was that false testimony?

18 A. No. Why would I give false testimony?

19 Q. You have a minor in a PhD in biomechanics?

20 A. Yes. There's a major and minor in a PhD program.

21 Q. Where is the minor from, what institution? Where did
22 you get that from?

23 A. Oregon State University.

24 Q. Take a look at your CV, please. You have it with you?

25 A. Do you want me to look at my laptop?

1 Q. You have it on your laptop, Doctor? I'll read it to
2 you.

3 A. Okay.

4 Q. Your education, Doctor of Philosophy, Oregon State
5 University, Corvallis, Oregon, correct?

6 A. Yes.

7 Q. Is that the same institution in which you're claiming
8 to have a minor in biomechanics?

9 A. Yes.

10 Q. You don't list it on your CV?

11 A. No, I list a degree.

12 Q. Is it correct it's not listed on your CV?

13 A. I didn't list my minor for my PhD on the CV, that's
14 correct.

15 Q. Do you think this is funny?

16 A. I think that's argumentative.

17 MR. OGEN: Objection.

18 THE COURT: Sustained.

19 Q. Are you here to testify, Doctor, and give an opinion
20 as a biomechanical expert, am I correct?

21 A. Without question.

22 Q. You just told the jury that you had educational
23 credentials that qualify you to have a minor in biomechanics
24 from Oregon State University, did I hear that correctly?

25 A. Yeah.

1 Q. Isn't it true, Doctor, that your certificate does not
2 bear the name of a minor in biomechanics, wouldn't that be true?
3 It's a yes or no.

4 A. I have to think about it. You ask me if my
5 certificate has.

6 Q. You have a diploma from an institution?

7 A. I do.

8 Q. Does it say a minor in biomechanics?

9 A. No.

10 Q. But you just told the jury you had a minor in
11 biomechanics. Were you lying to them?

12 MR. OGEN: Objection.

13 Q. I'd like an answer. Were you lying to them, yes or
14 no?

15 THE COURT: Overruled.

16 Q. It's a yes or no.

17 A. I have a minor in biomechanics in my transcript from
18 that school. It doesn't get on the diploma.

19 Q. Doctor, can you answer my question, yes or no, were
20 you lying to the jury about your credentials in the field of
21 biomechanics, yes or no?

22 A. Wow, you know, I've never lied to a jury ever at any
23 time and I don't lie about my credentials. I don't need to.

24 Q. Have you taken any engineering courses?

25 A. Yeah, tons.

1 Q. What year, doc, did you obtain this minor in
2 biomechanics?

3 A. I can't answer the question the way you asked it.

4 Q. Well, isn't it true, Doctor, that you suspended your
5 credits and you were six credits short and had to go back and
6 get the degree in 2003?

7 A. That does not pertain to my PhD. I'm not sure what
8 you're talking about.

9 Q. Does it pertain to your alleged minor in biomechanics?

10 A. No.

11 Q. What year did you obtain your alleged minor in
12 biomechanics?

13 MR. OGEN: Objection to the form of the question.

14 THE COURT: Sustained.

15 Q. What year did you obtain your minor in biomechanics?

16 A. Well, I think I already testified that my PhD was
17 finished in 1997.

18 Q. So would it be 1997 that you have a minor in
19 biomechanics, is that what you're telling the jury?

20 A. No --

21 Q. It's a yes or no. So the answer is no?

22 A. No, I can't answer the question. I mean you're asking
23 me trappy questions.

24 THE COURT: Doctor, your opinion on his questions
25 is totally not relevant to this trial, and either answer

1 yes or no, and if you can't, just say that can't be
2 answered yes or no.

3 THE WITNESS: My apologies, your Honor.

4 THE COURT: Okay.

5 A. I cannot answer that yes or no.

6 Q. Doctor, you agree if you're going to give a jury an
7 opinion under oath in the field of biomechanics, you would have
8 to have credentials in that field, correct, yes or no?

9 A. Can't answer the question the way you asked it.

10 Q. Doctor, you'd agree if you're going to give the jury
11 an opinion in the field of biomechanics that you should have
12 some educational background in that field, correct?

13 A. Oh, that, I definitely agree with.

14 Q. And the four courses that you said you took in the
15 field of biomechanics qualified you for a minor in the field of
16 biomechanics from Oregon State University, is that what you're
17 telling us? That's a yes or no, Doctor.

18 A. Can't answer it the way you asked it.

19 Q. And do they give minors, they actually qualify, give
20 you a minor degree for biomechanics in this institution?

21 A. Don't think I can answer that the way you asked it
22 either.

23 Q. Doctor, you stated you minored in biomechanics. So
24 did you get a certificate or diploma which states that you,
25 Michael Freeman, now have a biomechanical degree in

1 biomechanics, do you have that somewhere?

2 MR. OGEN: Objection.

3 THE COURT: His answer is, it's not part of the
4 diploma or on it, but it's on the transcript courses.

5 Q. On transcript courses?

6 A. I don't know what you're asking me.

7 MR. OGEN: Objection to form.

8 Q. I'm not sure I heard that correctly. It's on a
9 transcript?

10 THE COURT: Sustained.

11 Q. From that --

12 A. Yes.

13 Q. From that facility?

14 A. Yes.

15 Q. Do you have that with you? Can you get it on your
16 laptop?

17 A. No, I don't keep my transcript from 20 years ago on my
18 laptop.

19 Q. But you can get your CV?

20 A. Yes, that's correct.

21 Q. So, Doctor, can you produce anything on your laptop to
22 substantiate your testimony to this jury that you, in fact, have
23 a minor in biomechanics?

24 MR. OGEN: Objection.

25 THE COURT: Sustained.

1 Q. Other than your word, Doctor, do you have any
2 documents to substantiate your testimony that you have a minor
3 in biomechanics?

4 MR. OGEN: Objection.

5 THE COURT: You mean does he have anything with
6 him or any documentation?

7 MR. JONES: Can he produce anything?

8 MR. OGEN: Objection.

9 THE COURT: Overruled.

10 Do you have any paperwork with you or on your
11 computer that would demonstrate the minor in biomechanics?

12 THE WITNESS: No. It would be on my transcripts
13 from my school. However, I can't really answer the
14 question the way you've been asking it because --

15 THE COURT: Okay.

16 MR. JONES: I'll do a little better.

17 (Document was marked Defendant's Exhibit K for
18 identification.)

19 Q. Doctor, this is a document that's been marked as
20 Defendant's exhibit K. It's, in fact, your curriculum vitae
21 provided by you. Has some of my handwriting on it, but I want
22 you to take a look at your curriculum vitae.

23 Is it prepared by you?

24 A. I can't see what you're holding up. I don't have that
25 good of vision.

1 Q. Was this prepared by you?

2 A. Yes.

3 Q. It's updated?

4 A. No.

5 Q. When was it updated?

6 A. This month.

7 Q. Do you have that on your laptop?

8 A. I do.

9 Q. When you update it, your curriculum vitae, did you
10 reflect you had a minor in biomechanics?

11 A. I've already testified it's not on my CV.

12 Q. Oh, so even your updated CV, you didn't put in the
13 area of expertise you tell this jury you have, correct?

14 MR. OGEN: Objection.

15 THE COURT: Sustained. That's his testimony.

16 Q. Doctor, why is it if you're going to testify in court
17 as a biomechanical expert, would you leave out the one thing on
18 your CV that would actually substantiate the fact that you may
19 be a biomechanical expert?

20 MR. OGEN: Objection.

21 THE COURT: Sustained.

22 Q. Did you base your opinions, Doctor, on anything you
23 may propose to give to this jury based upon the fact that you're
24 a chiropractor?

25 A. No.

1 Q. Did you base any of your opinions that you may give to
2 this jury based upon your education as an epidemiologist?

3 A. Some of it, yes.

4 Q. Did you do a statistical analysis in your review of
5 the materials provided to you by plaintiff's counsel?

6 A. I guess you could say of a sort, sure.

7 Q. There's no statistical analysis in your report,
8 Doctor, is there?

9 MR. OGEN: Objection.

10 THE COURT: Sustained as to the form.

11 Q. Do you have your report with you?

12 A. I do.

13 Q. Take a look at it.

14 MR. OGEN: Your Honor, can we approach?

15 THE COURT: So the objection is sustained just
16 for purposes of voir dire.

17 MR. JONES: Judge, based upon the doctor's
18 testimony or the witness' testimony in the field of
19 biomechanics, defense's position is that his credentials
20 are insufficient to offer an opinion on this case and I
21 move to preclude the witness' testimony.

22 THE COURT: Based on the testimony, without
23 making any finding or rendering any opinions beyond what
24 I'm going to say, I will allow the doctor to answer the
25 last question, and understanding that it's all subject to

1 cross examination, et cetera.

2 MR. OGEN: All right.

3 CONTINUED DIRECT EXAMINATION

4 BY MR. OGEN:

5 Q. Doctor, let me go back to the question I was asking
6 you.

7 From a biomechanical perspective, how do you evaluate
8 if someone was injured in a rear end collision?

9 A. Well, you can't -- you can't actually evaluate
10 somebody's injuries from a biomechanical perspective other than
11 to explain how they occurred. That's the purpose of
12 biomechanical in that setting is you have a medical finding
13 someone has been injured and then the biomechanics says here's
14 the mechanism of how that person was injured. That's the entire
15 purpose of biomechanics in that setting.

16 Q. Okay. By the way, Doctor, have you testified on the
17 issue of biomechanics in court before?

18 A. Yes.

19 MR. JONES: Objection.

20 THE COURT: Overruled.

21 Q. How many times?

22 A. Over 200.

23 Q. Have you ever been deemed an expert in the field of
24 biomechanics in court?

25 MR. JONES: Objection.

1 THE COURT: Overruled.

2 A. Every single time.

3 Q. Every single one of those couple of hundred times?

4 A. Yes, of course.

5 Q. Are you qualified to render an opinion about --

6 MR. JONES: Objection.

7 THE COURT: Let him finish.

8 Q. Are you qualified to render an opinion involving the
9 biomechanics involved in the accident that Mr. Montas was
10 involved in?

11 THE COURT: Sustained.

12 Q. Now, Doctor, you're aware that a Kevin Toosi testified
13 in this case?

14 A. I am.

15 Q. Okay. I'm going to give you some hypotheticals based
16 on the testimony that Mr. Toosi gave and then ask your opinion
17 about it.

18 A. I believe it's Dr. Toosi.

19 Q. Dr. Toosi.

20 Now, so supposing I were to tell you that Dr. Toosi
21 performed what's called a crush energy analysis in the case.

22 Are you familiar with that type of analysis?

23 A. I am.

24 Q. Have you performed such analyses before?

25 A. I have.

1 Q. How many times?

2 A. Over a thousand probably.

3 Q. Now, supposing I were to tell you that Dr. Toosi
4 testified that he performed such a crush energy analysis in this
5 case and he made a determination that the Mr. Montas' vehicle
6 could not have been impacted at more than six miles per hour by
7 the defendant's vehicle in the rear.

8 Supposing I were to tell you that, do you have an
9 opinion whether you would agree or disagree with that?

10 A. Well --

11 MR. JONES: Objection to form. No foundation at
12 all, Judge.

13 THE COURT: Overruled.

14 A. I think you actually misstated the testimony. It's
15 not the impact at six miles an hour, it's the speed change at
16 six miles an hour.

17 MR. JONES: Objection to form, Judge.

18 MR. OGEN: Let me rephrase the question.

19 Q. Supposing I were to tell you that Dr. Toosi testified
20 that there was a delta-v change in velocity of no more than
21 six miles per hour to Mr. Montas' vehicle as a result of the
22 rear end collision from defendant's vehicle.

23 Do you have an opinion whether you would agree or
24 disagree with that?

25 A. I do.

1 Q. Okay. What is that opinion?

2 A. I disagree strongly.

3 Q. And why do you disagree with that?

4 A. Well, one of the things that we don't have in this
5 case is an examination of the vehicles, so I can't tell if
6 there's been unibody damage to Mr. Montas' vehicle. I can't
7 tell if there has been like underneath damage that you can't
8 see. I don't know what the damage has been done to the front of
9 the defendant's vehicle, to her Mercedes Benz.

10 And one of the things we know about these kind of
11 vehicles is they can be crashed at relatively high speeds like
12 10, 15 miles an hour and not look very damaged, but have damage
13 underneath.

14 MR. JONES: Objection. Speculative.

15 THE COURT: Sustained.

16 Q. Now, Doctor, do you have an opinion whether Dr. Toosi
17 can say whether the delta-v was, in fact, six miles per hour?

18 MR. JONES: Objection.

19 THE COURT: I'll sustain it as to form of the
20 question. He already said it. You said does he have an
21 opinion whether he could say it.

22 MR. OGEN: Okay.

23 Q. Do you have an opinion as to whether Dr. Toosi has a
24 basis to opine that the delta-v could not be more than six miles
25 per hour?

1 A. Well, there's not a valid basis in crash
2 reconstruction to make that kind of determination. We know that
3 from what we know about how reliable crush is for doing the kind
4 of analysis you're talking about.

5 Q. And that is my next question, Doctor.

6 The reliability and the accuracy of that number of the
7 delta-v. Do you have an opinion whether a crush energy analysis
8 is accurate for this type of low speed rear end collision?

9 A. I do.

10 Q. And what is that opinion?

11 A. It's not very accurate.

12 Q. Why not?

13 A. So it comes from how we get crush information on a
14 vehicle which is by crashing them into a barrier at a high speed
15 like 30 or 35 miles an hour. So if you produce, for example, a
16 foot and a half of crush to the front of the vehicle after
17 crashing into a wall like the government does, you can say if
18 you have a foot of crush to the front of the vehicle, okay,
19 well, it was a 35 mile an hour impact into a barrier, and,
20 therefore, for a foot and a half, so for a foot, we can say it's
21 a 25 miles an hour impact or something just as an example.

22 We can use the amount of crush from those bigger
23 crashes when there's less crush or more crush to say this gives
24 us some idea of how much energy it took to produce all that
25 crush.

1 The problem is if you have a crash where you can't
2 really see the crush, I don't know if these vehicles have been
3 shortened by an inch or two-inches or not at all, because they
4 just bounce off of each other. I don't have that information,
5 because I didn't examine them.

6 So without knowing that, first of all, we don't know
7 exactly how much crush there is and secondly, you can't take
8 what happens at 35 miles an hour and apply that to what happens
9 at five miles an hour, because the vehicles react differently.

10 At 35 miles an hour, they crush when they hit
11 something hard. At five or ten miles an hour, they bounce off
12 of something hard, because the bumper systems are very elastic
13 and they're made to not show crush. They're made so that you
14 don't have to repair your vehicle from a relatively lower speed
15 impact.

16 Q. Now, Doctor, do you have any data or graph that
17 compares the accuracy of these type of delta-v crush
18 calculations, crush energy calculations versus real life data?

19 A. Yes.

20 Q. Okay. And where do you get that from?

21 A. So that information comes from the US Government. I
22 mean, their crash injury and crash essentially reconstruction
23 and essentially biomechanics database called the National
24 Automotive Sampling System Crash Worthiness Data System.

25 Q. And do you have with you such a graph that shows that

1 comparison?

2 A. Yes. That is the statistical analysis that's in my
3 report, in fact.

4 Q. Doctor, are you familiar with this graph here?

5 A. I am.

6 Q. What does this graph show?

7 A. May I get down and point at it?

8 THE COURT: Go ahead.

9 MR. OGEN: If it's okay with the Judge.

10 THE WITNESS: Thank you.

11 A. So this shows rear impacts that were analyzed in this
12 NASSCDS database, where there were two things done to the
13 crashes and the vehicles that were involved.

14 First of all, they were all from the rear.

15 MR. JONES: Judge, can we approach?

16 THE COURT: Yes.

17 (Whereupon, there is a discussion held off the
18 record at the bench among the Court, defense counsel and
19 plaintiff's counsel.)

20 Q. Where is this data from?

21 A. This data is from a Federal program that's paid for by
22 tax dollars where every year about five or 6,000 crashes are
23 investigated thoroughly by NASS investigators who are from the
24 National Highway Traffic Safety Administration Department of
25 Transportation, Federal cabinet essentially.

1 Q. And who prepared the graph, and I'm not talking about
2 the red portion there, but besides that red portion, who
3 prepared this graph?

4 A. That graph is prepared by me based on those data.

5 MR. JONES: Can I approach, Judge?

6 THE COURT: Let him finish.

7 Q. And what data did you use to prepare this graph?

8 A. This is data from the Federal database on crash
9 injuries. So what I plotted on this database --

10 MR. JONES: Can we approach now, please?

11 THE COURT: Just in terms of how the graph was
12 prepared. Don't give any information about findings, just
13 how you prepared this graph.

14 THE WITNESS: I understand, your Honor.

15 THE COURT: Okay.

16 A. This is called a regression, where two different
17 values are plotted on for a single point. So we have on the
18 left, we have the delta-v determined by crush for an analysis
19 and we have that compared to the actual delta-v that came from
20 the crash data recorder, which is the air bag module on the
21 vehicle. So that's the actual delta-v as measured on the
22 vehicle and that's the crush based delta-v, and the two are
23 plotted on this graph using a statistical program called JMP.

24 MR. JONES: Can we approach, Judge?

25 THE COURT: I just have one question about

1 something you just said. That actually is taken from some
2 data provided by the air bag?

3 THE WITNESS: Air bag module. That has an
4 accelerometer, it's an onboard data recorder.

5 THE COURT: And does that only record or give any
6 information when the air bag is deployed?

7 THE WITNESS: No. It gives -- it starts
8 recording for all near deployment or non-deployment events
9 that are over about 3G of acceleration.

10 MR. JONES: Can we approach, Judge?

11 THE COURT: Yes.

12 (Whereupon, there is a discussion held off the
13 record at the bench among the Court, defense counsel and
14 plaintiff's counsel.)

15 THE COURT: Okay. This is probably a good time
16 to take a morning break. So we're going to -- it's going
17 to be a little bit of a longer break, because I have one
18 other quick matter, and I promise you this is quick. We're
19 going to take about a 20 minute or so break, enjoy it and
20 we'll come back and finish up the doctor's direct testimony
21 and then eventually this morning his cross examination.

22 Don't discuss the case.

23 THE COURT OFFICER: All rise, jury exiting.

24 (Jurors exited the courtroom.)

25 THE COURT: Okay. So let me just for the record

1 we'll put this objection on the record to continue the
2 discussion. And the reason we took the break is we were
3 going to break at 11 for counsel to put a quarter in his
4 meter and more importantly to talk about a video that
5 plaintiff wants to show. So I thought it would be easier
6 to talk about this graph and any questions anybody has for
7 the doctor outside the presence of the jury for a couple of
8 minutes and then talk about the video also, just move the
9 break up a little bit.

10 So do you want to ask, before argument, do you
11 want to ask him any voir dire questions about the graph,
12 how it was prepared or anything else?

13 MR. JONES: No, my questions have been answered,
14 Judge.

15 THE COURT: Do you want to ask him anything else?

16 MR. OGEN: Well, well, I was getting to it. But
17 the offer of proof on this is that Dr. Toosi said that
18 measuring delta-v is an exact science that you can plug
19 into a formula. If the bumper is deformed one inch, you
20 plug it into this formula and you get an exact number.
21 This graph shows real life collisions and it shows that
22 it's not an exact formula, that there is a lot of
23 variability in real life, and that it's misleading, it's
24 misleading to the tell the jury that this is an exact
25 science, and that if he puts in one inch into his

1 calculation, that he knows the delta-v is six miles per
2 hour.

3 That's a misleading statement. And we have a
4 right to rebut that with government data, real life data
5 that shows that that's not the case. There is a great
6 range in variability and this graph shows it.

7 MR. JONES: Judge, if that was counsel's
8 position, well, he could have crossed the doctor on that
9 yesterday, Dr. Toosi.

10 MR. OGEN: I did.

11 MR. JONES: No such cross examination took place.
12 My objection with this alleged graph is, number one, it was
13 just stated it was prepared by the witness. Number two,
14 based upon supposedly government data. That data has not
15 been provided in any report, exchanged by plaintiff's
16 counsel. Number three, these dots on this graph I suppose
17 represent rear end collisions, 162 of them, maybe, I don't
18 know.

19 This is all hearsay foundation, Judge, for which
20 it's just a self-serving document without any exchange at
21 all to us. It's got no relevance in the field of
22 biomechanics. We don't know what kind of vehicles these
23 crashes represent, how many people were in the cars, what
24 were the size of the people, did they make claims of
25 injuries, were there lawsuits, was this secondary gain, we

1 don't know any of these things by looking at this
2 particular graph. The foundation is completely flawed and
3 it's misleading to this jury and prejudicial to our defense
4 if he's allowed to talk about this.

5 THE COURT: Couple of things, one at a time.
6 Number one, I'm not sure lawsuits and secondary gain, those
7 are all issues in this trial, but I don't know it's an
8 issue for an expert to give. I don't know any engineer or
9 doctor is going to analyze secondary gain talking about
10 crashes. But I'm more interested in was this graph, if not
11 the graph itself or the information contained and the fact
12 that he's going to render an opinion on this graph and what
13 went into it, was this exchanged?

14 MR. OGEN: Of course.

15 MR. JONES: A picture with a graph was. The data
16 upon which it's based was not. I have a picture with all
17 these.

18 MR. OGEN: He didn't ask for more information.

19 THE COURT: So the graph was exchanged and the
20 fact he doesn't give an opinion on the variables and these
21 six miles per hour variables.

22 MR. OGEN: The 3101D says he's going to talk
23 about what's in the report. And in the report there's a
24 crash. That's undisputed that this graph was exchanged.
25 He discusses what he's going to say about that graph.

1 THE COURT: Right.

2 MR. OGEN: He discusses about the variability of
3 the graph and why that precision that Dr. Toosi talks about
4 of six miles per hour --

5 THE COURT: Right, right.

6 MR. OGEN: -- is not the case.

7 THE COURT: So the only thing that's not
8 discussed from defense's point of view and it wasn't
9 exchanged or discussed in the report is where he got the
10 information, highway safety or whatever.

11 MR. OGEN: If you want to go that way, Dr.
12 Toosi's whole testimony is hearsay because he produced
13 nothing. He's taking everything Dr. Toosi said was hearsay
14 yesterday if you're going to go that way.

15 THE COURT: To the extent the graph was
16 exchanged, albeit the information was inputted by the
17 doctor, you'll get a chance to cross examine him. I'm not
18 going to preclude the graph.

19 But let's talk about the video.

20 MR. OGEN: Would your Honor like to see the
21 video?

22 THE COURT: Let's just talk about it for a
23 minute. I don't want you to get a ticket, so I'll let you
24 if you have to move.

25 MR. OGEN: I have time still. I'd rather go

1 another ten minutes.

2 THE COURT: So this is a video of what, National
3 Highway Institute or something else?

4 MR. OGEN: His own reconstruction that he himself
5 participated in.

6 THE COURT: So why don't you ask him a couple of
7 questions about it now by way of voir dire and then we'll
8 talk about it.

9 I'll ask you what's it a video of, it's a
10 reconstruction of an accident. What are the
11 circumstances -- or not an accident, but a demonstration of
12 a crash impact.

13 THE WITNESS: Correct. So the video which I have
14 stills of in my report is of an experimental crash test
15 with a female volunteer exposed to a six miles per hour
16 crash that I then published about the biomechanics of the
17 injury mechanisms that are potentially present as well as
18 describe them in a textbook for the Society of Automotive
19 Engineers based on in part the video that you're going to
20 see that we did to show what the magnitude of movement is
21 in a six miles an hour crash potentially in this particular
22 test.

23 And the entire purpose is to say, because people
24 don't know what six miles an hour delta-v looks like, is to
25 say, well, here's what six miles an hour delta-v can look

1 like and it doesn't look like every day activities.

2 THE COURT: So let me ask you a couple of other
3 questions and then I'll let the attorneys.

4 I'm going to assume and I shouldn't, I wasn't
5 even sure, it's not a crash test dummy, it's a human
6 female?

7 THE WITNESS: Yes.

8 THE COURT: And it probably would be fair to
9 assume, I don't mean anything sexist by this, but she's not
10 the same height or weight as the plaintiff in this case and
11 you're going to say for purposes of this it doesn't matter.

12 THE WITNESS: Exactly. It's only demonstrative
13 of the opinion that there's significant occupant movement
14 in a rear impact collision at six miles an hour, not this
15 is what happened to this person in a six miles per hour
16 crash.

17 THE COURT: It's just to show the degree or
18 amount of movement of the head, shoulders, arm, whatever it
19 is, body movement.

20 THE WITNESS: That's correct. It's specific only
21 to demonstrate the movement does not look like activities
22 of daily living, which I understand to be the testimony in
23 this case.

24 THE COURT: Now, this crash and this person were
25 in the car that gets hit from behind or that hits something

1 in front of it?

2 THE WITNESS: This is only a rear impact
3 collision. So their vehicle was struck from behind and
4 accelerated up to six miles per hour.

5 THE COURT: Okay. You want to ask any voir dire?
6 I'm going to let you argue about it and then he can go out
7 and then we'll talk. Any questions either way?

8 MR. JONES: Yes, I do, I do, Judge.
9 What type of vehicle was this volunteer sitting
10 in?

11 THE COURT: Oh, I did want to ask that.

12 THE WITNESS: It was a Chrysler LeBaron.

13 MR. JONES: How much did it weigh?

14 THE WITNESS: About 3,100 pounds.

15 MR. JONES: A LeBaron is a small sports car
16 convertible, correct?

17 THE WITNESS: Correct.

18 MR. JONES: And we're talking about the vehicle
19 the plaintiff was sitting in was a large minivan, correct?

20 THE WITNESS: Yes.

21 MR. JONES: So obviously there's no identical
22 circumstances with respect to the vehicle that your
23 volunteer and the plaintiff was sitting in, correct?

24 THE WITNESS: No, the identical circumstances are
25 it's a rear impact.

1 MR. JONES: Just with respect to the vehicle
2 itself?

3 THE COURT: I'll take note that car weighed
4 3,100. There's testimony in this case I think by someone
5 that his car weighed about 4,000.

6 MR. OGEN: I think I said 3,800.

7 MR. JONES: You're aware that the plaintiff is
8 claiming there were two impacts involved in this particular
9 accident?

10 THE WITNESS: I am, I mentioned in my report.

11 MR. JONES: And this video allegedly only shows
12 one impact correct?

13 THE WITNESS: That's correct.

14 MR. JONES: Judge, I have other questions but --

15 THE COURT: You want to ask him anything?

16 MR. OGEN: Does this show -- what does this show
17 with respect to the rear impact?

18 THE WITNESS: So it shows that for a six mile an
19 hour rear impact collision, all occupant movement is
20 dictated by the physics of the crash. Doesn't matter what
21 the vehicle is, all occupants are going to move backwards
22 from the seat and rebound forward. It will change by
23 occupant, vehicle, a lot of things there will be subtle
24 differences, however, if someone is going to make a blanket
25 statement that a rear impact collision of six miles an

1 hour, regardless of the vehicle, regardless of the person,
2 regardless of any other circumstance, is like the
3 activities of daily living, this video demonstrates that's
4 inaccurate.

5 MR. JONES: Judge --

6 MR. OGEN: I didn't finish.

7 Does this show the entire collision that happened
8 in this case?

9 THE WITNESS: It does not.

10 MR. OGEN: It shows part of it, correct?

11 THE WITNESS: Correct. It only shows the rear
12 impact part of the sequence.

13 MR. OGEN: And is it something you think would
14 help the jury understand what would happen in the rear end
15 portion of the collision at a delta-v of six miles per
16 hour?

17 THE WITNESS: Yes, in that it demonstrates that
18 the occupant movement is actually rather violent, and that
19 the occupant movement is not comparable to any kind of
20 daily activity, that's an improper comparison.

21 MR. OGEN: And is this a rebuttal to what Dr.
22 Toosi was saying that the kind of force that the occupant
23 was subjected to here was similar to climbing up the
24 stairs, for example?

25 THE WITNESS: Without a doubt, that's the only

1 purpose of showing the video is to rebut that claim that in
2 a six mile an hour rear impact collision, that the occupant
3 movement and the forces are going to be comparable to
4 walking up or downstairs.

5 THE COURT: Okay.

6 MR. JONES: Judge, I need to say some thing
7 outside the presence of the witness.

8 THE COURT: Yes, okay.

9 Doctor, you can step outside, and I leave it up
10 to plaintiff's counsel whether you want to go to the meter
11 and then argue or argue and then go to the meter. We're
12 taking the same break either way.

13 MR. OGEN: We can keep arguing.

14 THE COURT: Okay.

15 (Witness exited the courtroom.)

16 THE COURT: Okay.

17 MR. JONES: Judge, we're all listening to Dr.
18 Toosi with respect to his crush analysis and what he
19 thought the delta-v was. He also said that there was no
20 damage on that car to support a crush of one inch, but
21 being charitable and giving the benefit of the doubt to the
22 plaintiff, he attributed a one inch crush onto the rear of
23 that car even though there was no such one inch crush even
24 apparent on the rear of that bumper and the plaintiff
25 described it as scratches, but being charitable to the

1 plaintiff's case, he's saying here's what would happen if
2 it was that much.

3 So plaintiff's counsel adopted the charitable
4 position which Dr. Toosi presented to the jury and now
5 wants to present it to them as a fact as what's going on
6 inside that vehicle, which is not even the same vehicle as
7 we're talking about here.

8 Number two, Judge, we have two different
9 scenarios here. One scenario has just a rear end collision
10 according to the plaintiff in some of the medical records,
11 and then according to his deposition testimony, we have two
12 impacts, one to the front. The front impact is the one
13 which allegedly caused the injury. By his own deposition
14 testimony, he stated once his car hit the vehicle in front
15 of him, that's when his knee struck the dash.

16 For those reasons and many others, Judge, to show
17 the jury a video which would allegedly be able to
18 demonstrate what was going on inside a minivan, which is
19 several thousand pounds more than this Chrysler LeBaron --

20 THE COURT: Several hundred.

21 MR. JONES: Several hundred, sorry, is so
22 prejudicial, we don't know who was present, whether the
23 accident reconstruction was sanctioned by the National
24 Highway Safety Administration, we don't know if there were
25 scientists on board. We don't know any of that, and, in

1 fact, this video was never exchanged. I could have shown
2 it to Dr. Toosi. I have still photographs, but I never
3 received a video.

4 For a lot of reasons, Judge, in that it's
5 inconsistent with any testimony or position taken by
6 defense in this case, there is no identity of circumstances
7 with regard to the vehicles or occupants, the extreme
8 prejudice to our defense in this case, and just a complete
9 miscalculation of what Dr. Toosi stated about the crush in
10 the case, the video would just be too prejudicial to be
11 shown to this jury.

12 MR. OGEN: He does not adopt nor do I adopt Dr.
13 Toosi's six mile per hour delta-v calculation. In fact,
14 that's the whole point of the graph that your Honor already
15 spoke about that he can testify to. It shows there's a
16 range between five and 20 miles per hour of delta-v.

17 Now, what this shows is even if you were to
18 adopt, he thinks we're adopting it on the high end, we're
19 actually showing that even on the low end of what Dr. Toosi
20 is saying of a delta-v of five or six miles per hour, it
21 still does not represent what Dr. Toosi was saying, that it
22 was such a minor little collision that you put more stress
23 on your body by going up and down stairs and doing
24 activities of daily living.

25 And that, as Dr. Freeman testified, is the sole

1 reason for this. This is a demonstrative aid just like
2 that shoulder model that I showed the jury that was not
3 exchanged with us, okay? This is a demonstrative aid in
4 the rebuttal. It was in Dr. Freeman's report. I showed
5 three still photographs of it. I mentioned that they are
6 still shots of a rear impact collision crash test conducted
7 at six miles per hour and how much force was sustained in
8 that accident. He quoted or he cited where this was
9 published, which is in the two publications. It's part
10 of -- he stated that the video stills are part of a peer
11 reviewed research publication that he coauthored and that
12 he will make available for demonstrative purposes. It's in
13 there.

14 And at no time since this was exchanged, which
15 was a month ago, has defense counsel ever asked for a copy
16 of the video that he states he will show. It's in his
17 report, it's in our exchange that he plans to use it for
18 demonstrative purposes. At no time did they object to it
19 before right now. At no time did they ask for the video,
20 did they ask for the publications that these appear in.
21 This is purely demonstrative purpose. Case law he
22 provided, your Honor, says exactly the opposite of what
23 Mr. Jones says. You don't need identity of circumstances,
24 what it needs to be is enlightening to the jury about
25 something material to the case. And here it's enlightening

1 as to whether Dr. Toosi's characterization of this very
2 minor impact, that is no more stress on the body than going
3 up and down the stairs, if that's a fair representation or
4 should the jury see what can happen in a six miles per hour
5 rear end impact.

6 The fact that it only shows a portion of the
7 crash doesn't mean it's not relevant to the case. It's
8 relevant to the rear end portion of the crash. The fact
9 that it doesn't show both doesn't mean it's not relevant,
10 it just means it shows a portion. We don't prove cases by
11 proving everything in every item of evidence whether
12 demonstrative or actual evidence. A case is built in
13 pieces. This is one piece of the puzzle, one piece of the
14 puzzle rebutting Dr. Toosi's testimony that this was a
15 nothing crash, that it posed basically no stress on the
16 body.

17 MR. JONES: Judge, if I may.

18 THE COURT: Yes.

19 MR. JONES: For counsel to suggest that a comment
20 in Dr. -- well, Mr. Free man's report, he would make it
21 available in exchange with the defense is an absurd
22 argument. We have no privy with this particular witness.
23 Counsel has never given us a video or even hinted he's
24 bringing a video. I have still photographs. I certainly
25 could have presented that to my own expert.

1 So for counsel to suggest that by having that
2 little comment in his report that it circumvents well
3 established rules of evidence is ridiculous. It's an
4 exchange required under all the rules that we all operated
5 on for decades, and to tell the court that it's analogous
6 to us not exchanging a model of an anatomically correct
7 shoulder is absurd.

8 THE COURT: Okay. I'll let you respond just to
9 that exchange if you want to respond. I know you already
10 said what's in there.

11 MR. OGEN: I already said it. It's in there, we
12 gave him notice.

13 THE COURT: Okay. So regarding again the graph
14 over objection, I'm going to let the witness testify to the
15 methodology purpose, so on, of what he's demonstrating by
16 his graph with where he got the info from and you can
17 cross-examine.

18 As to the video, I had a chance off and on to
19 read the I think three cases you gave me, one of which was
20 a criminal case, went toward reconstructing a murder
21 homicide. I don't think it's all that relevant, other than
22 the general principles of demonstrative evidence, but it's
23 not particularly relevant or similar to anything going on
24 here.

25 As to the two civil cases, couple of interesting

1 things. Number one, they're Fourth Department cases. I
2 don't see anything from the First or Second Department, but
3 one in particular stands out, Blanchard against Bitlark,
4 286 AD2d 925, Fourth Department 2001. And the somewhat
5 lengthy paragraph that goes to this issue of using in this
6 case, there were two demonstrations, I don't know if they
7 were video live or what they were, and the language counsel
8 is using is what's contained in there, such evidence may be
9 admitted when it tends to enlighten rather than mislead the
10 jury. There's no requirement of instruction or absolute
11 identity between the circumstances of the case and those of
12 the demonstration. The conditions need only be
13 substantially the same as existed at the time of the
14 occurrence and event. A variation in circumstances affects
15 the weight, but not the basis for exclusion, and I'm
16 paraphrasing.

17 And then the last sentence, we will not -- the
18 last, almost the last is the testimony concerning the
19 demonstration in that case, the testimony concerning the
20 demonstration was subject to cross examination and
21 subsequent expert rebuttal testimony, both of which
22 criticized the demonstration and minimized their
23 significance.

24 So with that, and that's the only appellate law I
25 have to go by at this point, and in terms of fairness,

1 prejudice and so on, a couple of things stand out. Number
2 one, the idea that there's no requirement that it be
3 identical. It's interesting that the language is absolute
4 identity or strict identity and substantially the same.
5 I'm not convinced in this case that this demonstration even
6 meets that requirement, apart from the cars being different
7 by almost, not quite, but almost a thousand pound weight
8 difference, and apart from male, female size and everything
9 else, I understand it's only being shown to demonstrate the
10 force, not necessarily the injury, but those differences
11 coupled with the second impact, which I think is a relevant
12 fact. And there is testimony that one of -- at least one
13 of the injuries, if not both, may have, in fact, to the
14 extent that they were at all caused by this accident, be
15 caused by the second impact or the first, I'm not even sure
16 which is first, but by the other impact, but I think what
17 stands out most to me is that last sentence, and this is
18 going to go back to something that's been discussed already
19 whether plaintiff should have called his biomechanical
20 expert on his case or on rebuttal, and he had a choice of
21 either one, to either use it to rebut or to put it in his
22 case in chief, but to the extent he's bringing in this
23 witness to rebut Dr. Toosi, and while the 3101 does mention
24 it, the fact is all that was provided was still photos.
25 And the last line of that decision that talked about the

1 two ways for defendant to deal with this are by cross
2 examination, which obviously was present here and/or by
3 expert rebuttal testimony, they can't do that now, they
4 can't bring back Dr. Toosi and they can't do anything to
5 challenge it.

6 So for all those reasons, I'm going to grant the
7 application to preclude the video. He can obviously
8 testify to, you know, his understanding in terms of walking
9 up steps is the same thing, and blah, blah, blah, but I'm
10 not going to use the video.

11 MR. OGEN: Judge, I just want to mention one
12 thing.

13 THE COURT: Yes.

14 MR. OGEN: The fact that it doesn't show the
15 front collision if anything would be more harmful to
16 plaintiff's case, because it only shows part of the
17 accident.

18 THE COURT: I understand that.

19 MR. OGEN: That's not something --

20 THE COURT: Of course he can turn that into a
21 beat him up moment about, but to the extent his decision is
22 he'd rather object to the video for whatever reason, I
23 understand. This video can go either way with a good cross
24 examination, but based on my reading this case in terms of
25 the similar circumstances, albeit not strict, I think there

1 are enough differences here coupled with the inability to
2 rebut this that I am not at this point going to allow it,
3 so we'll use the graph and then go to whatever else.

4 MR. OGEN: I'm not sure how we can mark this as a
5 court, plaintiff's exhibit or court exhibit.

6 THE COURT: We'll deem it. I'll mark it for ID
7 just for the record, I'll mark it for ID. I don't know
8 what we're up to. We'll deem it marked. You have a hard
9 drive or something, a disk or something with it on it?

10 MR. OGEN: No, it's in the computer.

11 THE COURT: Well, we'll deem it whatever we're up
12 to, and I trust that between both counsel, if it's a matter
13 of appellate record, you'll work out what video it is and
14 I'll sustain his objection.

15 MR. JONES: We'll deem his video and --

16 THE COURT: We can mark the photos, the hard
17 photos of whatever. What are we up to?

18 THE COURT CLERK: 13.

19 THE COURT: So it will be 13 deemed, and 13A, B,
20 C, D, whatever they are will be the still photos.

21 MR. OGEN: Okay.

22 (Plaintiff's exhibit 13 was deemed marked for
23 identification and 13A through 13D were marked for
24 identification.)

25 (Recess taken.)

1 THE COURT OFFICER: All rise, jury entering.

2 (Jurors entered the courtroom.)

3 THE COURT: Have a seat.

4 MR. OGEN: Thank you, your Honor.

5 THE COURT: Go ahead.

6 Q. Dr. Freeman, before the break, we were talking about
7 this graph.

8 Can you give us a one sentence summary again of what
9 this graph is again to remind us?

10 A. Sure. These are data from National Crash Injury
11 Database, and on this access is the actual delta-v or speed
12 change of the vehicle as measured by an onboard crash recorder,
13 which all cars have now because of the airbag module. And then
14 on this graph is what happened when they did a crush analysis
15 and what came out of that and how these two things correlated
16 with each other.

17 Q. And crush analysis, is that the type of analysis that
18 Dr. Toosi did?

19 A. Exactly the same.

20 Q. And what does that graph show?

21 A. Well, what you see is all these different dots are the
22 actual vehicles. So the vehicle on the database has two values,
23 one value is actual delta-v, the other one is crush basis
24 delta-v. This is pretty accepted, lot of people written about
25 this concept that there's a lot of scatter here, so if, for

1 example, I reconstructed a crash using ten miles an hour crush,
2 if they all lined up over this line down the middle, then it
3 would say, hey, that's pretty good. But if they're scattered
4 around here, it's like okay, there's some error, there's no
5 variability it's not always right.

6 And I just put a bracket here about eight miles an
7 hour, and what you can see is when you get an actual delta-v of
8 let's say eight miles an hour, if you come up here, it can
9 actually go from like, I don't know, down as low as three and up
10 to nearly 20 miles an hour. So there's a huge range of what
11 crush says versus what the actual delta-v is.

12 THE COURT: If the crush formula was 100 percent
13 accurate, would all the dots be scattered up in one area,
14 would they all be congregating in one area?

15 THE WITNESS: They would all lie on this line in
16 the middle. Because every time your crush said 15, your
17 actual would be 15. Same thing for 20. So they would all
18 just line up perfectly. And if the data were better, you
19 would see them go within this kind of narrow file here,
20 but, in fact, this is actually the spread of the data
21 around, that's what these dash lines actually are.

22 Q. So, Doctor, assume for a moment that Dr. Toosi was
23 using a one inch deformation in the bumper -- yes, you can have
24 a seat. A one inch deformation in the bumper in order to --

25 THE COURT: Are you done with that?

1 MR. OGEN: I believe so.

2 THE COURT: Move it back.

3 MR. OGEN: Is that okay?

4 THE COURT: Yes.

5 Q. Doctor, if I were to tell you that Dr. Toosi did an
6 analysis assuming one inch deformation in the bumper and came up
7 with a maximum number delta-v of six miles per hour, do you have
8 an opinion whether the actual live data can be different than
9 that?

10 A. I do.

11 Q. And what is that opinion?

12 A. So the answer is based on what we just looked at. I
13 mean, clearly when crush says six, actual can be less than six
14 or substantially more than six, it's just not that reliable.

15 Q. Okay. Is Dr. Toosi's method of evaluating whether
16 there was enough force to have plaintiff injured in this
17 accident, injuring his right shoulder and left knee based on a
18 crush analysis, is that a valid method to make that kind of
19 determination?

20 A. No, it's not.

21 Q. Why not?

22 A. Well, there's a couple of reasons. One is
23 biomechanics has never been used to say people aren't hurt when
24 they've been observed to be hurt, it doesn't work that way. It
25 can only be used to say here's how this particular injury

1 occurred, it's because the airbag didn't go off or seat belt
2 didn't hold them or some other explanation. You don't deny an
3 injury, that's not how science works.

4 So that's one problem. But the second is, you can't
5 say a crash didn't have enough force exerted on the person in
6 the crash to cause the injury you're interested in unless you
7 have thousands, hundreds of thousands of crashes like this and
8 say, well, nobody ever gets this injury.

9 I mean, if we were talking about a rear impact at
10 three or four miles an hour, I can say no one ever breaks their
11 femur in that crash, it doesn't happen. I mean, I've never seen
12 it. It may be impossible for anybody to actually have that
13 happen, but if you're talking about things like tearing a
14 shoulder or injuring a knee after you slam into a dashboard,
15 there's no threshold for that. So --

16 MR. JONES: Objection.

17 A. -- biomechanics has --

18 MR. JONES: Objection.

19 THE COURT: To any opinion on causation?

20 MR. OGEN: He's rebutting Toosi's opinion.

21 MR. JONES: We've gone over this, Judge.

22 MR. OGEN: Yes, we have.

23 THE COURT: Overruled. Go ahead.

24 Q. Could you finish your answer, please?

25 A. I kind of -- I kind of forgot where I was going, but

1 when I looked at what Dr. Toosi said, he didn't say anything
2 about the forces on any part of Mr. Montas' body, so how are you
3 going to say there wasn't enough force exerted on his body if
4 you don't know what the force was on his body. You can't say
5 the delta-v is X and nobody ever gets this injury unless you've
6 got a lot of data to show that and that's not what we're looking
7 at.

8 We're looking at a statement of I don't think it's an
9 enough force. Well, that doesn't work. I mean, people are
10 injured differently in the same crash based on their personal
11 condition. That's why if you've got five people in a car --

12 MR. JONES: Objection. Hearsay.

13 MR. OGEN: He was saying people are injured
14 differently in a car crash.

15 THE COURT: Sustained.

16 MR. JONES: Not this car crash he said.

17 Q. Doctor, if I were to tell you that Dr. Toosi did not
18 say what the force was on the plaintiff's knee in this crash, do
19 you have an opinion whether he can make the determination as to
20 whether plaintiff's left knee was injured in this crash?

21 MR. JONES: Objection. Wrong foundation, Judge.

22 THE COURT: Overruled.

23 A. You can't say anything about it. And I actually did
24 quantify the potential for forces on his knee even if we just
25 assume a five miles an hour frontal impact and they're pretty

1 substantial. You can develop several hundred pounds of force
2 whacking your knee on the dashboard in a frontal collision of
3 just five miles an hour just based on the body moving forward.

4 Q. How many hundred?

5 A. Over 300 pounds of force right at the kneecap.

6 Q. That's just in a five miles per hour front collision?

7 A. That's correct.

8 Q. And if I were to tell you that Dr. Toosi did not
9 quantify what the specific force was on the plaintiff's right
10 shoulder as a result of this accident, do you have an opinion
11 whether he has enough information to then make a determination
12 as to whether plaintiff injured his right shoulder in this
13 accident?

14 A. I do have an opinion about that.

15 Q. And what is that opinion?

16 MR. JONES: Objection.

17 THE COURT: Overruled.

18 A. My opinion is that it's just a statement, there's no
19 basis for it. You know, the forces that are exerted on your
20 shoulder have a lot to do with the position of your arm, how
21 much you're pulling or holding onto the steering wheel, how
22 springy elastic your seat back is, how you move back, because in
23 a rear impact, you go backwards, and at six miles an hour, it's
24 violent. I mean, people plan crash tests, they're all over the
25 place and then a secondary crash, which we've never even done in

1 a volunteer then throws the person forward. You're going to
2 have a lot of forces on the shoulder that can cause injury in an
3 individual. Of course it did. There's not even a basis for
4 saying it might not. But if you're then just going to say I
5 don't think it's enough without quantifying, that's not an
6 analysis, it's just a conclusion.

7 Q. And that is my question, do you consider that type of
8 analysis to be a valid scientific analysis?

9 MR. JONES: Objection.

10 THE COURT: Overruled.

11 A. I do not.

12 Q. Why not?

13 A. Because there's no science to it. It's just a
14 conclusion.

15 Q. Now, do you have an opinion --

16 MR. OGEN: Withdrawn.

17 Q. If I were to tell you that Dr. Toosi testified that
18 there was as much force on plaintiff's right shoulder and left
19 knee in this accident as there is if he were climbing up and
20 down stairs, do you have an opinion whether you agree or
21 disagree with that?

22 MR. JONES: Objection.

23 THE COURT: Overruled.

24 A. I do.

25 Q. What is that opinion?

1 A. I disagree strongly with it.

2 Q. And based on what?

3 A. Well, first of all, based on the epidemiology of these
4 kind of crashes. I mean, we know that even volunteers are
5 injured in five or six mile an hour rear impact collisions. We
6 don't put anybody into a rear and then frontal impact. So we
7 know they're hurt. Anywhere from 30 to 40 percent of people
8 have some degree of injury. We always know looking in the real
9 world people have a wide range of injuries going from things
10 that only last for a few days to problems that require surgery,
11 that's well established.

12 So to simply state that it's the same as some normal
13 activity, you're essentially saying, oh, well, normal activity
14 hurts you 30 or 40 percent of the time, that doesn't even make
15 any sense. The comparison is totally wrong and you can't
16 compare normal activity that you prepare your body for that
17 takes a very long time, half a second, a second to move and
18 everything is prepared and muscular, we generate the force to an
19 external load that occurs just like that, tenth of a second,
20 that's a crash, even a low speed crash and that's the violence
21 of the event that you see and that's what accounts for the
22 injury.

23 It's the repetity of the injury and repetity of the
24 mechanism, not just how far the person moved, it's how fast they
25 moved. And car crashes are not like anything that we experience

1 in our daily activities. Not even falling generates the same
2 kind of force as car crashes. They're just rather unique.

3 Q. Okay. Now, you mentioned that you performed many
4 crash tests, correct?

5 A. I have.

6 Q. And many of them you said have been low speed crash
7 test?

8 A. All crash tests have to be low speed if you're going
9 to be studying occupant movement. I mean, you're always doing
10 it to reduce injury risk.

11 Q. And do you still do crash tests with live human
12 beings?

13 A. No, not since 2005.

14 Q. Why not?

15 A. It's too risky. And another factor is institutional
16 review boards, which are like review boards at medical schools
17 that oversee research, they won't approve it anymore. I sit on
18 one and I won't approve it, just because now what we know is
19 these crash test people get hurt. And some day someone is going
20 to get hurt badly in a crash test. It's just not worth the risk
21 anymore.

22 Q. Now, if we were to tell you that Dr. Toosi testified
23 that there was not enough force on plaintiff's left knee to
24 cause the injuries of a chondral injury and other injuries in
25 his knee, do you have an opinion whether you agree or disagree

1 with that?

2 A. I do.

3 Q. What is that opinion?

4 A. I disagree strongly.

5 Q. Based on what?

6 A. Well, Dr. Toosi didn't do anything to evaluate what
7 the forces were on this man's knee and didn't compare it to any
8 kind of threshold. I mean, if you whack your knee and you whack
9 your patella, you can injure the tissue behind it. That's not
10 really a particularly complicated concept.

11 Q. Now, Doctor, can you make a determination based upon a
12 photograph of a vehicle as to whether somebody was injured in a
13 particular accident?

14 A. No.

15 Q. Why not?

16 A. Well, you can look at the worst crashes and say that's
17 a terrible crash, but somebody may walk away from it without an
18 injury, or you can look at a photograph where it looks like
19 there's no damage or little damage and say most people are going
20 to walk away from that.

21 MR. JONES: Objection.

22 THE COURT: I'm sorry, look at a photograph? Are
23 you objecting to his answer?

24 MR. JONES: His answer, and it's irrelevant.

25 There's no photographs in front of him.

1 THE COURT: Overruled, overruled. You can finish
2 your answer.

3 A. So we can take a photograph with minimal damage and
4 you can say most people won't be hurt, but that doesn't tell you
5 this person wasn't hurt. It can never be used that way unless
6 you can say no one is ever hurt and you cannot say that about
7 these crashes when there's minimal damage. Some people are
8 hurt.

9 MR. JONES: Objection, hearsay.

10 A. And the way you find that is by looking at the person,
11 not the vehicle or photographs of the vehicle.

12 THE COURT: Overruled, I said.

13 Q. You've studied low speed crashes, we talked about
14 that, yes?

15 A. For many years.

16 Q. And do you have any information as to a percentage of
17 people that are injured in low speed crashes?

18 MR. JONES: Objection.

19 THE COURT: Sustained.

20 Q. Do you agree with Dr. Toosi here that the plaintiff's
21 vehicle could not have sustained a greater than six miles per
22 hour delta-v in this crash?

23 A. Absolutely not.

24 Q. Why not?

25 A. I haven't examined the vehicle, I don't know what the

1 damage is to it and even if I did know exactly what the damage
2 was to it, it would be very difficult to correlate that with a
3 delta-v.

4 Lower speed crashes are hard to reconstruct. This
5 crash could have been substantial, more than six miles an hour,
6 it could have been six miles an hour, but if it is six miles an
7 hour, it's only by chance, it's not because there's any way we
8 can specifically say that.

9 The Campbell equation, which are used for crush, are
10 similar, not accurate enough to make that kind of conclusion.

11 Q. What would you look for when you personally examine
12 the vehicles?

13 MR. JONES: Objection. Irrelevant, Judge, no
14 examination of the vehicles.

15 THE COURT: Overruled.

16 A. I would take the bumper cover off, I'd look at whether
17 there was deformation of the core of the bumper. The core of
18 the bumper is typically like a polystyrene, like a foam core
19 that's very, very elastic, so it's very, very springy. And I
20 would see if it had been damaged. And of course you'd have to
21 get it up on a special rack, a laser alignment to see if you've
22 got crush in areas of alteration of the unibody. That's not
23 that uncommon when you start to get into the upper range of not
24 showing a lot of damage but higher impact.

25 Q. Would you do a crush analysis in this case?

1 A. No. For all the reasons we talked about, it doesn't
2 help anything.

3 MR. OGEN: I have nothing further, your Honor.

4 CROSS-EXAMINATION

5 BY MR. JONES:

6 Q. Your curriculum vitae, you have it on your laptop,
7 Doctor?

8 A. I do.

9 Q. So you claim to have a doctor of medicine from Sweden,
10 correct?

11 A. I have a doctor of medicine from Sweden.

12 Q. And to get that doctorate of medicine in Sweden, you
13 took some courses and did a dissertation, correct?

14 A. No, there was substantially more to it than that.

15 Q. There were no sciences, were there? Did you take two
16 years of sciences as part of your curriculum?

17 A. I'm not sure I understand the question.

18 Q. Well, let's talk about your course curriculum, Doctor,
19 to get your doctorate of medicine in Sweden.

20 MR. OGEN: Can we approach?

21 (Whereupon, there is a discussion held off the
22 record at the bench among the Court, defense counsel and
23 plaintiff's counsel.)

24 Q. So to get your DM in the Country of Sweden, did you
25 take course curriculum of sciences of two years, yes or no?

1 A. I don't understand the question the way you asked it.

2 Q. Well, you know about the requirements in the United
3 States to become a doctor, correct, you have to take two years
4 of sciences followed by at least two years of clinical practice.
5 Are you aware of that, yes or no? Are you aware of that, the
6 requirements to become a doctor in the United States?

7 A. Can't answer the question you asked me yes or no.

8 Q. Just don't know?

9 A. Oh, no, I know. That's inaccurate.

10 MR. OGEN: Objection to the commentary.

11 THE COURT: Sustained as to the commentary.

12 Q. Do you know what the requirements are to become a
13 doctor in the United States of America, yes or no?

14 MR. OGEN: Objection.

15 THE COURT: Overruled.

16 So you're only asking him does he know the
17 qualifications to become, you're not asking about a
18 licensed physician, just to become an MD?

19 MR. OGEN: Correct.

20 THE COURT: In the United States, yes, no or you
21 don't know or can't answer it yes or no.

22 MR. OGEN: Your Honor, I object to that. First
23 of all, it varies by state; second of all, he's here to
24 testify as a biomechanical expert, not as a doctor, he's
25 not giving a medical diagnosis.

1 THE COURT: Overruled. Yes, no or I don't know
2 or I can't answer it yes or no.

3 THE WITNESS: I cannot answer the question the
4 way it was asked because doctor is too vague, your Honor.

5 THE COURT: Okay.

6 Q. Doctor of medicine -- you speak Swedish, by the way?

7 A. A little bit.

8 Q. But you attended a medical school in Sweden?

9 A. Where everybody speaks English.

10 Q. You're taking a post-doctorate course in Sweden, the
11 one you referred to before in your direct examination, correct?

12 A. No. My post-doctorate was here in were United States
13 in Allegheny County where I did autopsy training.

14 Q. Did you do a post-doctorate secondly in Sweden?

15 A. That's who administered it. It was done in the United
16 States.

17 Q. And that course is not taught in English, is it?

18 A. Yes. It's in Allegheny County. I do autopsies with
19 five other pathologist theres.

20 Q. A course in Sweden is taught in Allegheny,
21 Pennsylvania, is that what you're telling us?

22 A. No. I'm telling you part of my post-doctoral
23 requirement for the fellowship in forensic pathology is I
24 complete or participate in a certain number of autopsies. The
25 autopsies were completed or performed in Allegheny County at the

1 medical examiner's offices.

2 Q. Doctor, you're a chiropractor, correct?

3 A. I used to be a chiropractor, that's correct. I
4 haven't practiced as one in many years.

5 Q. And you went to Western States Chiropractic College,
6 correct?

7 A. 30 plus years ago.

8 Q. Did you hear any question -- I asked you where you
9 went, did you hear that question, Doctor?

10 MR. OGEN: Your Honor, can we have a side bar,
11 please?

12 THE COURT: Okay.

13 MR. JONES: I'd like to continue, Judge.

14 THE COURT: Well, I'm assuming that's an
15 objection, so...

16 MR. OGEN: To the coming line of questions.

17 THE COURT: Okay, let's have a side bar.

18 (Whereupon, the following discussion takes place
19 on the record, in the robing room, in the presence of
20 the Court, the defense counsel, plaintiff's counsel and
21 out of the hearing of the jury:)

22 MR. OGEN: I'd like an offer of proof as to why
23 he's going into his chiropractic background that's from 25,
24 30 years ago.

25 THE COURT: Okay, and I probably should note for

1 the record just a side bar two minutes ago concerned a
2 question and objection about going into his MD background,
3 Sweden or otherwise, and whether he's a doctor of medicine,
4 et cetera. And my ruling off the record was that to the
5 extent testifying in the capacity of a biomechanical
6 engineer involves medical knowledge and medicine to qualify
7 coupled with credibility and so on as being an issue, I was
8 going to allow that.

9 So now what is his chiropractic background?

10 MR. JONES: Credibility, 110 percent and --

11 THE COURT: He's not a chiropractor?

12 MR. JONES: Oh, he is, but there's some serious
13 issues about his credibility.

14 MR. OGEN: I'd like an offer of proof on that.

15 MR. JONES: I'm giving the Court my reassurance
16 it has to do with his credibility and he knows what it is.

17 MR. OGEN: I'd like to know what the offer of
18 proof is and we can discuss that.

19 THE COURT: We're going to go right back in if I
20 allow it, he's not going to have --

21 MR. JONES: He falsified data to graduate and get
22 clinical requirements. I have letters about it and
23 testimony about it from depositions he's admitted.

24 THE COURT: Depositions?

25 MR. OGEN: I'd like to see it, because that's

1 something that could be highly prejudicial, and I'd like to
2 see what it is that he's going to ask him about, because if
3 the question is out there, even if it's incorrect and it's
4 denied.

5 THE COURT: If he has some documentation or his
6 own prior testimony that he falsified a record, I'm going
7 to allow it. And I think you asked Berman essentially the
8 same question about falsifying paperwork.

9 MR. OGEN: Because I had a determination. I'd
10 like to see what it is before he shows it out there.

11 MR. JONES: Since when is -- because counsel
12 doesn't like the cross examination he thinks he's entitled
13 to an offer of proof?

14 THE COURT: To the extent it's an offer of proof,
15 I'm going to allow it, and if he confronts him with his
16 testimony, if it turns out it's not the testimony, and I'll
17 let you show it to him first before you show it to the
18 witness, and then we'll come back in here. If there's a
19 problem, I'll deal with it, but I'm not going to take a
20 break now to read through all the transcripts if he's
21 telling me there's a good-faith basis about sworn testimony
22 by this witness about falsifying a document to get a
23 license.

24 MR. JONES: I have letters first.

25 THE COURT: Ask him about it. If he says yes, it

1 did happen, you'll get a chance to clear it up. If he says
2 no, and then we get into his paperwork and transcript, I'll
3 show it to you first. I know your concern is well, it's
4 out there.

5 MR. OGEN: My question is --

6 THE COURT: I'm taking him at his word he has
7 paperwork.

8 MR. OGEN: Before he asks the question didn't you
9 say in this transcript A, B, C, D, I'd like to see that
10 before he asks that question.

11 THE COURT: Before you --

12 MR. JONES: I really object. This is -- I'm not
13 going to read from his transcript unless he denies what
14 I'm --

15 THE COURT: We're going to go back now. He's
16 going to ask him his background and license, chiropractic
17 graduation and whatever, and if he admits it, the issue is
18 over. If he denies it, he's going to say do you remember
19 giving them in a deposition or a trial in California or
20 whatever it is.

21 MR. JONES: By the way, I wasn't entitled to have
22 that kind of courtesy when he cross-examined my doctors, I
23 didn't ask for it.

24 THE COURT: The objection is overruled.

25 (Whereupon, the following takes place on the

1 record in open court in the hearing and presence of the
2 jury.)

3 Q. Doctor, my question was, did you go to Western States
4 Chiropractic College?

5 A. Yeah, about 30 years ago.

6 Q. And, Doctor, were you found to have committed actions
7 of cheating and dishonest behavior prior to graduation while at
8 that school?

9 A. Well, when I was valedictorian of my graduating
10 class --

11 Q. It's a yes or no, Doctor.

12 A. Can't answer it.

13 Q. Doctor, were you found to have willfully and knowingly
14 provided false information to your clinical director in an
15 effort to get your clinical graduation requirements, was that
16 true?

17 A. Cannot answer your question yes or no.

18 Q. Were you suspended from Western States Chiropractic
19 College for lying about the clinical data?

20 A. Cannot answer that question yes or no.

21 Q. Do you know who Robert Tolar is?

22 A. Don't have any recollection of that name.

23 MR. JONES: Can we mark this, please?

24 THE COURT: Defendant's L, M for ID.

25 MR. OGEN: Can I see it first, please?

1 THE COURT: Yes.

2 (Documents were marked Defendant's Exhibits L and
3 M for identification.)

4 Q. Take a look, Doctor, at what's been marked as
5 Defendant's L for ID and M for ID. Read both those pages,
6 please, and look up when you're finished.

7 THE COURT: Just read them to yourself.

8 A. What did you ask me to do when I was finished?

9 Q. Just look up when you're finished.

10 THE COURT: Look up so he knows you're finished
11 and then he'll follow-up with a question.

12 A. Okay.

13 Q. Have you seen those before?

14 A. I can't say that those are documents I've seen before.

15 Q. Is it addressed to you?

16 A. It's got my name on it.

17 Q. Did you ever live in Salem, Oregon?

18 A. I have and do.

19 Q. Are you denying that these two marked pages don't
20 refer to you and your conduct at the chiropractor school,
21 Doctor?

22 A. What I'm saying is I don't recall that particular
23 letter.

24 Q. Well, now that you've looked at it, does it refresh
25 your recollection as to whether or not you were found guilty of

1 cheating with regard to your clinical requirements in
2 chiropractor school?

3 You think that's funny?

4 A. It's an absurd question, and so, yeah, I do think it's
5 funny. It's a 30 year old suspension for breaking rules at a
6 school that everybody broke. Everybody broke those rules.

7 Q. Oh, so, when you commit bad behavior, Doctor, you just
8 say everybody else does it, too, so I can do it too, right?

9 MR. OGEN: Objection.

10 THE COURT: Overruled.

11 A. No. When you commit bad behavior or behavior that's
12 against the rules, it's different than committing bad behavior.
13 If the rules cannot be actually followed, then there is -- you
14 know, it's like saying speeding is bad behavior. A lot of
15 people speed because the speed limit might be considered too low
16 by most people who travel in a particular area. It's not
17 necessarily reinforced by what other people do.

18 But in that particular case, I was considered the
19 single most outstanding student in my class and I was unable to
20 actually finish my course work.

21 MR. JONES: Objection.

22 THE COURT: Sustained.

23 Q. We'll talk about how outstanding in a moment, Doctor.

24 MR. OGEN: Objection to the commentary.

25 THE COURT: Sustained.

1 Q. But I'd like you to just answer my question.

2 Were you suspended and enforced to reenroll in
3 chiropractor school and then complete all your clinical
4 requirements?

5 A. Yes.

6 Q. And --

7 A. 30 years ago.

8 Q. And specifically, Doctor, with respect to your
9 clinical requirements, you lied about people that you allegedly
10 treated clinically and submitted them so you could graduate on
11 time, would that be accurate?

12 A. False, that's completely false. I refused to lie.

13 Q. You refused to lie?

14 A. And that was why I got in trouble.

15 Q. Doctor, you testified how many times?

16 A. Many.

17 THE COURT: I'm sorry, testified on?

18 MR. JONES: Times.

19 Q. Many times, about 300?

20 A. Yes.

21 Q. So you're familiar with the rules of cross
22 examination. I'm really not interested in an explanation unless
23 I ask you for one. So if you could answer yes or no, I'd like
24 you to do that, okay, is that fair? Do you understand what I
25 just said?

1 A. If you're asking me if I can answer yes or no to your
2 question and I can answer yes or no to your question I will
3 answer yes or no, and that is a fair request.

4 Q. Did you appeal the decision which found you guilty of
5 cheating and falsifying data with regard to your clinical
6 requirements?

7 A. Oh, I absolutely took credit for patients seen by
8 other interns as did most other people, but I did not appeal it
9 because I absolutely did what they said I had done.

10 MR. JONES: Can you read back my last question?

11 THE COURT: The question was, did you appeal the
12 decision that said you were lying, so I'll strike the
13 answer.

14 The only question is, did you appeal that
15 decision?

16 THE WITNESS: I don't recall actually.

17 Q. Well, if you had appealed it and been successful,
18 that's probably something you would carry with you, especially
19 if you're going to be testifying under oath, correct?

20 A. No, no, that is not something I would carry with me
21 and neither is this the kind of question that I really have to
22 talk about when I'm in court.

23 Q. Do you recall testifying, Doctor, in 2006 in a case
24 known as Waqueem against Davis?

25 A. No.

1 Q. Do you recall --

2 MR. OGEN: Can I see it before you read it,
3 please?

4 MR. JONES: Page 154.

5 MR. OGEN: Your Honor, this is not inconsistent
6 with what he has testified to on the stand, so to that
7 extent, I object.

8 THE COURT: Let me take a quick look at it.

9 (Whereupon, there is a discussion held off the
10 record at the bench among the Court, defense counsel and
11 plaintiff's counsel.)

12 Q. This is testimony taken of Dr. Michael D. Freeman,
13 PhD, December 12, 2006, in a case of Samuel Waqueen and Phyllis
14 Waqueen against Jeanette Swikard, S-W-I-K-A-R-D, and Joy R.
15 Davis, Harris County, Texas.

16 Do you recall giving the following answer to the
17 follow questions in this case, from Page 154, Line 4:

18 "Question: When you were in chiropractor school,
19 you were suspended at one point in time?

20 "Answer: Correct.

21 "Question: And you have testified in depositions
22 in the past, I was suspended because my clinic records
23 had names of patients who I admitted I hadn't seen.

24 "Answer: Correct. That was 20 years ago of
25 course.

1 "Question: Who wrote the names of the patients
2 that you had not seen in the clinic records?

3 "Answer: I'm sure it was me."

4 Do you recall giving those answers to those questions,
5 yes or no?

6 A. No, I already said I don't remember the case.

7 Q. Do you recall giving those answers to those questions
8 when questioned about your having been found to have cheated
9 about your clinical requirements in chiropractor school?

10 A. I've already think I've answered that. I mean, I got
11 suspended for taking credits for seeing patients.

12 MR. JONES: Could you read my last question back,
13 it's a yes or no question.

14 (Whereupon, the last question was read back by
15 the Reporter.)

16 Q. It's a yes or no.

17 A. I've already answered that, I said I do not recall.

18 Q. That's enough. That's enough.

19 MR. OGEN: Objection.

20 THE COURT: Sustained.

21 Q. Now, let's talk about your credentials.

22 An epidemiologist doctor is basically a statistician,
23 right?

24 A. No, that's incorrect.

25 Q. And with regard to chiropractic or the field of

1 chiropractic treatment, you did that for profit, correct?

2 A. I did it to help people and I also made money to do
3 it.

4 Q. So you did it to help people and make money, right?

5 A. Kind of like lawyering.

6 Q. Is that funny?

7 A. This whole line of questioning is funny.

8 MR. OGEN: Objection.

9 THE COURT: Sustained.

10 Q. Doctor, you'll get out of here a lot faster if you
11 focus on the question and answer.

12 A. Stop asking me if I think it's funny then.

13 THE COURT: Okay, I'll sustain --

14 MR. OGEN: Objection.

15 THE COURT: -- Everybody's objections. Just ask
16 the next question and, Doctor, just answer the question.

17 Q. So, Doctor, people that go to chiropractors presumably
18 are in pain right, is that an assumption? They go to you for
19 treatment because they're in pain?

20 A. Typically.

21 Q. And you're willing to forego the education of clinical
22 requirements and falsify the data saying you had seen certain
23 patients when you hadn't just for profit, right?

24 A. No. God, no, that's silly. They don't pay you to go
25 to chiropractor school. They didn't make enough patients

1 available for the chiropractors to see or the interns, that's
2 why everybody had to take credit for everybody else's patients.

3 MR. JONES: Can we move to strike that was which
4 was not responsive?

5 THE COURT: Stricken.

6 Q. You're going to have a chance, Doctor, to say whatever
7 you want if your attorney wants to ask you questions.

8 MR. OGEN: Objection to characterizing myself as
9 his attorney.

10 THE COURT: I'll sustain that, but I'll also
11 remember that counsel just said he'll have a chance to say
12 whatever he wants so -- that's a joke.

13 Q. So, Doctor, knowing that you went into the field of
14 chiropractic treatment for profit, would it be fair to say you
15 were willing to falsify data just for money?

16 MR. OGEN: Objection.

17 THE COURT: Overruled.

18 Q. Yes or no?

19 A. That's an absurd claim.

20 Q. Well, you just told the jury earlier today you had a
21 minor in biomechanics.

22 Now, let's take a look at your CV, okay? You're a
23 doctor of medicine from Umea, Sweden. Did you study
24 biomechanics there?

25 A. Biomechanics actually was involved in three of my

1 publications that actually came out of that. In fact, one of
2 the papers that came out of my work in Sweden actually had the
3 word biomechanics in the title.

4 Q. Well, where is that article, Doctor?

5 A. You want me to pull it up on my CV?

6 Q. Certainly. Do you have your own CV, Doctor?

7 A. Sure.

8 Q. Let me continue before you pull it up.

9 MR. OGEN: If he has a question pending, I think
10 he should be able to respond to it.

11 MR. JONES: There's no question pending.

12 MR. OGEN: He asked if he had it in his CV.

13 THE COURT: Actually, the doctor asked the
14 question. It was after he answered with my CV, I had a
15 report and study that included biomechanics, he asked the
16 lawyer if he wants me to pull it up. So...

17 MR. OGEN: He said yes.

18 THE COURT: Right, but for now to the extent that
19 counsel wants to ask him another question, go ahead.

20 MR. JONES: Thank you, Judge.

21 Q. The doctor of philosophy in epidemiology, did you
22 obtain any degree in biomechanics with that?

23 A. No, the only degree is the doctor of philosophy.

24 Q. Just yes or no. The masters of public health in
25 epidemiology by statistician, did you obtain any degrees in

1 biomechanics consistent with that curriculum, yes or no?

2 A. Don't understand the question but --

3 Q. Did you obtain a degree of biomechanics with your
4 masters of public health?

5 A. It's a master of public health degree, it's not a
6 degree in biomechanics.

7 Q. So the answer is no, right?

8 And obviously doctor of chiropractic, you didn't study
9 biomechanical, did you, Doctor?

10 A. Biomechanical actually was four years in chiropractor
11 school. It's a very important part actually of chiropractor,
12 because chiropractors deal with biomechanical all the time, so
13 very first term in chiropractor school and the entire first year
14 includes extensive training in biomechanical.

15 Q. When I asked you before if your opinions in this case
16 in any way were based upon your education as a chiropractor, you
17 stated no. Now you're changing your answer, Doctor?

18 MR. OGEN: Objection. Mischaracterizing.

19 THE COURT: Overruled.

20 A. No, I'm not changing my testimony, counsel.

21 Q. Let's compare Dr. Toosi's curriculum to yours, okay?

22 A. Excellent.

23 MR. OGEN: Objection.

24 THE COURT: Sustained to the form of the
25 question.

1 Q. Do you have a medical degree from the Umea Forensic
2 Medicine Department of Community Medicine and Rehabilitation?

3 A. Yes, I have a doctor of medicine degree.

4 Q. Did you ever do any clinical practice, Doctor, as a
5 physician?

6 A. No.

7 Q. Did you see patients and write prescriptions as a
8 physician?

9 A. No, I've never been licensed as a medical doctor.

10 Q. Do you have a masters of science in bioengineering?

11 A. No.

12 Q. Do you have a doctor of philosophy in bioengineering?

13 A. I do not.

14 Q. So as between yourself and Dr. Toosi, you'd agree that
15 the academic achievements of Dr. Toosi are far superior to yours
16 in the field of biomechanics, would that be true?

17 A. I disagree with that.

18 Q. The answer is no? I'll accept the answer is no.

19 THE COURT: Sustained.

20 Doctor, he's just asking you yes or no.

21 Q. The field of biomechanics, Doctor, determines which
22 vehicles are safe and allowed to go on the road, correct?

23 A. Incorrect.

24 Q. The field of biomechanics, Doctor, is supervised by
25 the National Highway Transportation and Safety Board to

1 determine whether vehicles are safe, and if they're not, they
2 can't go on the road, correct?

3 A. It was incorrect in several ways. You call the
4 agency --

5 Q. Is it correct?

6 A. -- by the wrong name and you also use the incorrect
7 term for how biomechanics is used within either of the NISSP or
8 the NHTSA.

9 Q. Now, you say, Doctor, you're a forensic
10 epidemiologist.

11 Do you have a degree in forensic epidemiology?

12 A. I'm an associate professor of forensic epidemiology.

13 Q. You invented that term yourself, it's a job title?

14 A. No. The Center for Disease invented the term.

15 Q. In 1999?

16 A. The CDD in 1999.

17 Q. Yes?

18 A. It was the first time it was described.

19 Q. So you have a degree in forensic epidemiology, yes or
20 no?

21 A. No.

22 Q. So no such degree exists?

23 A. That's correct.

24 Q. And so forensic just means pertaining to court, it
25 means you come to court to testify, right?

1 A. Typically.

2 Q. And you're self-employed. And how much of your income
3 is derived from testifying in court?

4 A. Well, I'm partially self-employed, but 30 percent of
5 my time is academia, so I'm employed in academia, as well.

6 Q. How much of your income is coming to court to testify
7 on behalf of plaintiffs?

8 MR. OGEN: Just plaintiffs?

9 MR. JONES: You heard the question.

10 A. Maybe 25 percent, 20 percent.

11 Q. You give lectures to plaintiff's attorneys on
12 occasion?

13 A. I give lectures to a variety of folks, sometimes
14 they're plaintiff lawyers.

15 Q. Did you coordinate for the Oregon Trial Lawyers
16 Association a seminar known as Handling Minor Impact Cases for
17 Lawyers back in March of 2015?

18 A. No, I don't coordinate anything. I'm asked to give a
19 talk and I'll give a talk here and there.

20 MR. OGEN: Your Honor, I'd like to approach on
21 this, also.

22 THE COURT: We're going to. If you guys want a
23 quick break, bathroom stretch, take it now. If you want to
24 just sit here, we'll be three or four minutes. Okay?

25 (Whereupon, the following discussion takes place

1 on the record, in the robing room, in the presence of
2 the Court, the defense counsel, plaintiff's counsel and
3 out of the hearing of the jury:)

4 MR. OGEN: I believe he's going to ask him about
5 a statement that he will try to attribute to him at that
6 lecture that has absolutely nothing to do with this case or
7 credibility here.

8 THE COURT: Okay. What's the statement?

9 MR. OGEN: I don't want to say it before him,
10 because I don't know if he has it.

11 THE COURT: You don't know if he knows it?

12 MR. OGEN: I can say it to your Honor in private.

13 THE COURT: Let me ask him, what are you going to
14 ask?

15 MR. JONES: I'm going to ask him what the subject
16 matter of the lecture was, and there's a statement out
17 there he allegedly made about jurors, and I'll ask him if
18 he said it, a bunch of people too stupid to get out of jury
19 duty.

20 MR. OGEN: I don't think that has anything to do
21 with the case or his credibility.

22 MR. JONES: Sure it does. Shows his contempt for
23 the system, contempt for the jurors. If he denies it, I
24 can't impeach him.

25 MR. OGEN: That's the whole point is there is no

1 basis for that.

2 MR. JONES: Then how do you know about it?

3 MR. OGEN: There's no basis. I know that there's
4 no basis for it.

5 THE COURT: Let me ask, how does anybody know
6 about it? Is it published somewhere?

7 MR. JONES: Yes. I had a consultant talking to
8 me about this particular witness, and he did tell me about
9 it, that he made such a comment at a seminar and there was
10 some raucous laughter.

11 MR. OGEN: That's complete hearsay, there's no
12 transcript.

13 MR. JONES: So he can deny it.

14 MR. OGEN: But that's the whole point. When did
15 you stop beating your wife, you know.

16 THE COURT: I'll tell you what, I have mixed
17 feelings, but also concern in terms of if he denies it and
18 if there's -- I don't doubt there's a good-faith basis, but
19 if there's nothing to confront him with in terms of a
20 transcript, his own writing or something, then we're just
21 out there, rumors, whatever, so that's my concern.

22 So if he says, and if there's proof he said it,
23 I'm going to let you ask it, but I don't want it asked
24 unless I know he said it. So I think the only way to deal
25 with that is to ask him that outside the presence of the

1 jury. You know, ask him exactly what you ask him, because
2 if he denies it, what do you do, then you don't have a
3 transcript.

4 MR. JONES: No, I don't, I don't.

5 THE COURT: And the fact that a consultant told
6 you and the fact plaintiff's lawyer heard it, too, it's
7 obviously, quote, "out there," but...

8 MR. OGEN: A lot of things are out there.

9 THE COURT: So if he acknowledges saying it, I
10 think it goes --

11 MR. OGEN: I asked him about it and I know he's
12 going to deny it, because I heard it out there and I asked
13 him, so I know he'll deny it.

14 THE COURT: Do I let him ask it in front of the
15 jury and I don't want to do that, but I will let you ask
16 him that. They're going to get pissed. Let me ask you
17 practically, he's --

18 MR. OGEN: He's got to leave before 1.

19 THE COURT: What time is his flight?

20 MR. OGEN: No, 2:20, 2:30. He's checked in. If
21 he catches an Uber at 1:00, he's fine.

22 THE COURT: I'm going to ask, I'm trying to
23 think, have him come back here, which looks bizarre, so I'm
24 going to tell the jury to go out for two minutes into the
25 hallway. If he does acknowledge in any way, I'm going to

1 let it come up in front of the jury. If he denies it and
2 you have nothing to challenge or impeach him with, I'm not
3 going to do it in front of the jury.

4 (Whereupon, the following takes place on the
5 record in open court in the hearing and presence of the
6 jury.)

7 THE COURT: I should have done what I wanted to
8 do. If you want to go upstairs, go. If not, go out in the
9 hallway, stretch, get a drink, we'll bring you right back
10 in two minutes and then finish up before we break for
11 lunch.

12 THE COURT OFFICER: All rise, jury exiting.
13 (Jurors exited the courtroom.)

14 THE COURT: Okay, go ahead.

15 Q. Doctor, at a seminar for attorneys in the field of
16 biomechanics in which you were speaking, did you say to a group
17 of lawyers that jurors are a bunch of people that are too stupid
18 to get out of jury duty?

19 A. No.

20 Q. You told us before that you don't like to lie.

21 MR. OGEN: Objection.

22 THE COURT: Sustained. Okay.

23 Assuming they're done stretching, we'll bring
24 them back in. The objection to asking the question in
25 front of the jury is sustained.

1 (Recess taken.)

2 THE COURT OFFICER: All rise, jury entering.

3 (Jurors entered the courtroom.)

4 THE COURT: Thanks for your patience. You just
5 took part in the quickest break of New York State Supreme
6 trials.

7 MR. JONES: Can we mark this, please?

8 (Document was marked Defendant's Exhibit N for
9 identification.)

10 Q. Doctor, do you recall being one of the featured
11 speakers for the Oregon Trial Lawyers called Handling Minor
12 Impact Cases for lawyers, and you co-chaired it with Dr. Arthur
13 Croft and Paul Evanchick.

14 Do you remember that event?

15 A. No, I didn't co-chair anything. I was asked to give a
16 lecture.

17 Q. Did you give a lecture at it?

18 MR. OGEN: Could I see what he's showing, Judge?
19 Could we just ask he provide me the document before he
20 shows it?

21 Thank you.

22 Is he planning to introduce this into evidence?

23 THE COURT: Right now he's just showing it to the
24 witness.

25 MR. OGEN: Okay.

1 THE COURT: So your last question was, do you
2 recall co-chairing it and his answer was I just gave a
3 lecture.

4 Q. You just spoke at it, right?

5 A. Correct.

6 Q. And do you recall some of the topics that were
7 discussed at that lecture?

8 A. At my lecture?

9 Q. Yes.

10 A. Or are you talking about the conference?

11 Q. This lecture. Do you recall?

12 A. I don't know what you mean.

13 THE COURT: His particular speaking?

14 MR. OGEN: Objection.

15 MR. JONES: Yes.

16 THE COURT: Or the whole conference?

17 MR. OGEN: I still don't know what the question
18 is he's asking about his lecture.

19 A. It wasn't written by me.

20 Q. I thought the question was pretty clear.

21 I'm not asking if you wrote this document, I'm asking
22 if you recall what the subject matter was?

23 THE COURT: Of the conference or in general?

24 MR. JONES: Of the conference.

25 A. Minimal damage crash cases, to the best of my

1 recollection.

2 Q. And were some of the other subjects Junk Science of
3 the Mist Defense, have you heard of that?

4 MR. OGEN: Objection.

5 THE COURT: Overruled.

6 Q. What does mist mean, M-I-S-T?

7 A. It's a term used by insurance companies to designate
8 how they adjust claims where there's minimal damage. It stands
9 for minor impact soft tissue.

10 Q. So its not done by insurance companies, it's done by
11 professional witnesses such as yourself, isn't it?

12 MR. OGEN: Objection.

13 THE COURT: Sustained.

14 Q. And one of the subjects covered here was how to handle
15 the fraud investigator, do you remember that as part of that
16 seminar?

17 A. Nothing to do with me.

18 MR. OGEN: Objection.

19 THE COURT: Overruled.

20 Q. But you attended, you attended a seminar for lawyers
21 being given speeches about how to handle fraud investigation.
22 Was that your particular lecture?

23 MR. OGEN: Objection.

24 Q. Yes or no?

25 THE COURT: Overruled. Was that your lecture?

1 A. No.

2 Q. So you attended a lecture where it's well known, at
3 least in the State of Oregon, that minor impact cases is subject
4 to fraud, right, Doctor?

5 MR. OGEN: Objection.

6 THE COURT: Sustained.

7 Q. Do you remember the subject of how to strike the
8 defense's biomechanist or crash reconstructionist, was that your
9 subject?

10 A. I'm not a lawyer, I don't talk about that kind of
11 stuff.

12 Q. Was your subject how to cross examine a defense
13 accident reconstructionist or biomechanist when a judge allows
14 that testimony, was that your lecture?

15 A. It was not. I'm not a lawyer, I didn't talk about
16 that stuff.

17 Q. What did you do at this conference?

18 A. The only thing I would normally talk about, which is
19 some of my research has been on crash related injuries, some of
20 the things we talked about here, I would have shown probably
21 some video of crash testing to show how violent crashes like
22 this one actually are --

23 Q. You didn't discuss --

24 MR. OGEN: He's not letting him answer.

25 THE COURT: Let him finish his answer.

1 A. I would have talked about the use of probability and
2 misuse of probability when assessing cause or causation.

3 Q. How to win a minor impact trial, was that discussed at
4 this event?

5 MR. OGEN: Objection.

6 A. I have no idea.

7 THE COURT: Overruled.

8 Q. Working with crimes and overcoming juror and judicial
9 bias against them, was that your subject?

10 A. No.

11 Q. So you attend these events where these subjects are
12 discussed with attorneys and how to win minor impact cases,
13 correct?

14 A. Incorrect. I do not attend. I show up, I give my
15 talk, I leave.

16 Q. You don't attend?

17 A. No.

18 Q. You just show up, talk and leave?

19 A. That's what I just testified to.

20 Q. Now, Doctor, this is part of your business as a
21 professional witness.

22 Do you provide business cards when you go there?

23 A. Well, I think you're characterizing --

24 Q. That's a yes or no.

25 A. I cannot answer the question the way you asked it.

1 Q. Okay. Well, Doctor, do you set up a little display at
2 these events with the name of your company and forensic
3 epidemiology, hire me, I'll testify for you, is that what you do
4 at these events?

5 A. No, that's silly.

6 Q. How much are you paid for this lecture?

7 A. I'm pretty sure I probably didn't get paid.

8 Q. And you also spoke at a New York State Trial Lawyers
9 event last year on the same subject, didn't you?

10 A. I don't recall the total subject I talked about when I
11 was in New York, but very well may have been similar.

12 Q. So this type of seminar is something that you
13 regularly promote and speak at to plaintiff's attorneys, would
14 that be fair?

15 A. That's unfair. That's an unfair characterization. I
16 give lectures when I'm asked, I don't promote it.

17 Q. Doctor, why --

18 MR. JONES: Withdrawn.

19 Q. Did you discuss how to handle fraud investigations and
20 low impact collisions at the seminar, was that your subject?

21 MR. OGEN: Objection.

22 THE COURT: Sustained.

23 Q. Little more about your credentials.

24 Doctor, you didn't list it on your CV, but you took
25 medical courses in Antigua, correct?

1 A. I attended medical school, MD program three years that
2 was administered through Antigua.

3 Q. Administered through Antigua means you did it online?

4 A. No. It means I did all of my clinical rotations in
5 the United States in Oregon, in fact.

6 Q. And you dropped out of that program, didn't you?

7 A. I voluntarily withdrew from the program.

8 Q. You didn't finish it, right?

9 A. I did not take my MD degree.

10 Q. Because you did not want to do the MD requirements,
11 right?

12 A. No, because I didn't want to practice medicine at that
13 time.

14 Q. Because you could make more money testifying, right?

15 MR. OGEN: Objection.

16 THE COURT: Sustained.

17 Q. How much money are you being paid to testify?

18 A. I've been paid \$5,000 per day for the two days it took
19 me to get here and sit here and chat with you and get home.

20 Q. 5,000 for two days? Where did you come from?

21 A. Oregon.

22 Q. Took you two days to get here? Did I hear you
23 correctly, you said two days to travel?

24 A. Well, I have to fly here, and by the time I get here,
25 it's night, and then I have to testify and then I've got to fly

1 home. It takes two days.

2 Q. So \$10,000 plus preparation time. How much is that?

3 A. I haven't charged any preparation time.

4 Q. What did you charge to prepare the report?

5 A. I think I charged either 12 or 15 hours and that's at
6 \$600 per hour, so that would be either some 7,000 to 9,000.

7 Q. And are you testifying tomorrow?

8 A. In court, no.

9 Q. Are you on any kind of tight schedule, Doctor? You're
10 testifying the next two days somewhere else?

11 A. I have depositions I have to do and then I have to fly
12 to Sweden to testify in Stockholm on a case.

13 Q. Let's talk a little bit, Doctor, about --

14 MR. JONES: Withdraw the last question.

15 Q. Isn't it a fact, Doctor, that you don't have a minor
16 in biomechanics? It's a yes or no.

17 A. Can't answer the question the way you asked me.

18 Q. Well, you were familiar, you're familiar, Doctor, with
19 the fact that sometimes your testimony is recorded in court in
20 forms of transcript, right?

21 Have you been presented with transcripts on occasions
22 of the questions you've answered in court or at depositions?

23 A. You mean like what you've done here?

24 Q. Yes.

25 A. Yes, I'm familiar with that process.

1 Q. Okay. So you realize it's recorded.

2 Do you want to go on record as saying that you have a
3 minor in biomechanics from Oregon University, yes or no, Doctor?
4 Do you want to? Do you have one or don't you?

5 A. Can't answer the question the way you asked me.
6 Everything was wrong about it.

7 Q. You'd agree that lying about your clinical
8 accomplishments in chiropractor school was fraud, you'd agree
9 with that, right?

10 MR. OGEN: Objection.

11 THE COURT: Overruled. Would you agree with it?

12 A. No, that is not how I would characterize what happened
13 in chiropractor school 30 years ago.

14 Q. Let's talk a little bit about this case, Doctor, and
15 your examination of this case.

16 Did you interview Mr. Montas?

17 A. I did not.

18 Q. Did you ask him, ask anybody to find out what's known
19 as which direction he may have moved if there was one impact?

20 A. I'm sorry, did you say if there was one impact?

21 Q. Yes.

22 A. You lost me there. My understanding is there's two
23 impacts.

24 Q. Okay. So you're working on the assumption in this
25 case that the entire accident involved two impacts, correct?

1 A. Yes.

2 Q. Did you see any documents from the plaintiff which
3 suggested that there may have been only one impact to the rear
4 of his car, yes or no?

5 A. The term suggested makes me not be able to answer that
6 yes or no.

7 Q. You're operating on the assumption there's two
8 impacts, not one, correct?

9 A. I've determined that there was two impacts.

10 Q. Well, if there were records, direct statements from
11 the plaintiff that there was only one rear end impact, would
12 that have changed your analysis?

13 MR. OGEN: Objection.

14 THE COURT: Overruled.

15 A. No. I'm aware of medical records where that was the
16 history taken, but that doesn't dictate what happened in the
17 crash.

18 Q. Show us in your report where you evaluate two
19 scenarios, one involving two impacts and one involving just one
20 impact. Show us.

21 A. I haven't suggested that I performed such an analysis,
22 although I actually have talked about -- quite a bit about just
23 the rear impact in my report.

24 Q. Doctor, in order to fully evaluate this case, would
25 you have to know how many impacts were involved?

1 MR. OGEN: Your Honor, objection to the extent
2 that he's talking about evaluating the case. He was
3 evaluating Dr. Toosi's testimony, he's a rebuttal witness,
4 not on the case in chief, and it's mischaracterizing the
5 way he's asking the question.

6 THE COURT: Why don't we say in order to do your
7 evaluation.

8 Q. Okay. Doctor, in order to do your evaluation, you
9 have to know how many impacts are involved in the accident?

10 A. I did make that determination, that's correct.

11 Q. Do you have to know it?

12 A. I made --

13 Q. Answer my question, please.

14 A. I have to make that determination.

15 Q. And you determined there were two, correct?

16 A. Yes.

17 Q. If you were wrong, Doctor, would you have to do a
18 separate analysis if there was only one impact? That's a yes or
19 no question.

20 A. I think the answer to that is no.

21 Q. So if there was two impacts, one involving the rear
22 followed by the front, that's a separate evaluation then if
23 there was just one impact to the rear, would that be correct?

24 A. It would not be correct. It would not be a separate
25 evaluation. It would be an additional evaluation on top of the

1 rear impact evaluation.

2 Q. So if the plaintiff has stated in his medical records
3 there was only one impact to the rear, that wouldn't change your
4 opinions with respect to what Dr. Toosi's conclusions were,
5 correct?

6 MR. OGEN: Your Honor, objection. Dr. Toosi
7 spoke and made his analysis based on two impacts.

8 MR. JONES: Incorrect. He was shown
9 alternatives.

10 THE COURT: Overruled, go ahead.

11 Q. I want you to assume that Dr. Toosi has testified here
12 and was presented with two alternatives, one involving two
13 impacts and one involving just one impact.

14 Have you done such an analysis --

15 A. Yes.

16 Q. -- involving --

17 Could you show us where it is in your report?

18 A. Sure. You want me to put the report up on a
19 projector?

20 Q. Take your report out, show me page and line in your
21 report where it states that you did two separate evaluations,
22 one involving two impacts and one involving just one.

23 MR. OGEN: Here's a copy of his report.

24 THE COURT: Why don't you let him look at a hard
25 copy.

1 The question is, what page would there be
2 either/or both evaluations.

3 MR. OGEN: There were a few pages taken out of
4 the photos, but I don't know if he needs that. Here's the
5 additional pages with the photos.

6 A. It would be Page 15 of my report.

7 Q. So you're telling us this page here has two separate
8 analyses by you, an accident involving two impacts and a
9 separate accident involving just one impact; is that correct?

10 A. No, I think the page speaks for itself.

11 Q. Can you answer my question? Is that what this page
12 states, yes or no?

13 A. I think the page speaks for itself. I mean, you've
14 phrased it in a very constrained way. And my report doesn't say
15 I assume there were two different scenarios, but neither does
16 Dr. Toosi's.

17 Q. I want you to assume the truth of the following facts,
18 Doctor: I want you to assume that at the plaintiff's
19 deposition, he testified that there were two impacts, the
20 initial impact to the rear followed by an impact to the front.

21 I want you to further assume that in the medical
22 records, there is indications that the plaintiff testified or
23 stated there was only one impact to the rear.

24 MR. OGEN: Objection.

25 Q. You would agree, Doctor, that those are two separate

1 events, correct?

2 THE COURT: Overruled.

3 A. I would not agree those are two separate events. I
4 would agree there you have a difference between what the
5 evidence shows and everything we know about this crash and what
6 some medical records give. That's not two different events,
7 that's just two different histories.

8 Q. So we have two different histories, Doctor.

9 Are you aware that in the plaintiff's deposition, he
10 states that the frontal impact caused his knee to strike the
11 dashboard? Are you aware of that?

12 A. I am.

13 Q. If there was only a rear-end collision, though, the
14 plaintiff's testimony at his deposition that the rear-end
15 collision -- excuse me, that the front-end collision caused his
16 knee to strike the dashboard can't be true?

17 MR. OGEN: I'll object to the form.

18 THE COURT: Overruled.

19 A. If you're giving me a hypothetical, and I think you
20 are, which is if the hypothetical is that we know there wasn't a
21 second collision, not that it's an error in a medical record and
22 we don't have any of the physical evidence that we clearly do
23 that the vehicle had a front collision, but if now we know there
24 wasn't a front collision, then I guess I would agree with you.

25 Q. Is that accounted for anywhere in your report?

1 A. What accounted for?

2 Q. The fact that the plaintiff has stated in his medical
3 records there was only a rear-end collision solely, is that
4 stated anywhere in your report?

5 MR. OGEN: Objection. Lack of foundation.

6 THE COURT: Overruled. Is that in your report?

7 A. Is it accounted for in my report?

8 Q. Is it stated in your report that the accident involves
9 only one rear-end collision?

10 A. No. The collision clearly involved two impacts.

11 Q. According to what you read in the deposition, right?

12 A. According to everything I looked at including Dr.
13 Toosi's analysis.

14 Q. If the Plaintiff stated that it's the frontal impact
15 that caused his knee to strike the dashboard and his shoulder
16 pain, then if there was only a rear-end impact, then this
17 accident didn't cause his injuries, correct, Doctor?

18 A. No, that's not true. However, I mean he could still
19 strike his knee in a rear-end collision.

20 Q. But he states he didn't. He says the frontal he did.
21 If you take him at his word, Doctor, and if you take him further
22 at his word in the medical records that the rear-end collision
23 was the only collision that took place, then we have
24 inconsistent histories, correct?

25 A. Right. Which word are you going to take? The sworn

1 testimony is that he had two collisions. The evidence of the
2 vehicle damage is there's two collisions. Dr. Toosi analyzed
3 two collisions. I analyzed what Dr. Toosi did, so everything I
4 see here is two collisions, but is there an inconsistency in the
5 record or some of the medical records that only talk about one
6 collision, yeah, I'm aware of that.

7 Q. You're aware of that?

8 Show us where you made yourself aware or reviewed any
9 medical records stating that there was only one rear end
10 collision.

11 A. I just told you I was aware of it.

12 Q. From what record are you aware of it?

13 A. I've seen it in one or two of the medical records.

14 Q. Which ones?

15 A. Couldn't tell you.

16 Q. And you consider yourself someone who pays attention
17 to detail?

18 A. I published almost 200 papers.

19 Q. I didn't ask you that.

20 A. That indicates that I consider myself a person who
21 pays attention to detail, and had them all peer reviewed, so
22 other people think I pay attention to detail, so I do consider
23 myself paying attention to detail, but I don't pay attention to
24 inconsistencies and call them detail.

25 Q. So you would agree, Doctor, if there was only one rear

1 end impact, that would be something you want to consider, right?

2 MR. OGEN: Objection. Asked and answered
3 multiple times already.

4 THE COURT: Sustained.

5 Q. So if you have inconsistent histories, Doctor, two
6 different scenarios, as someone who performs biomechanics such
7 as yourself, wouldn't you want to consider both scenarios in
8 your report?

9 A. I do. I actually say it on the page that I referred
10 to.

11 Q. Where does it state in your report that the rear-end
12 collision caused his knee to strike the dashboard?

13 MR. OGEN: Objection. I think we've gone over
14 this quite a bit.

15 MR. JONES: No, we haven't.

16 THE COURT: Overruled.

17 Q. Where does it say that in your report?

18 A. I don't think it suggested anywhere that that is what
19 happened or that I suggested that's what happened in this case.

20 Q. If a medical report penned in the plaintiff's own
21 handwriting states that the rear-end collision caused his knee
22 to strike the dashboard, is that something you'd want to know?

23 A. Not that -- I already know there's been two crashes
24 and it's just the kind of error that can take place in medical
25 records. Most medical records contain some error.

1 Q. Show you us in your report where you wrote down a
2 scenario as provided by the plaintiff in the medical records.

3 MR. OGEN: Objection. Asked and answered.

4 THE COURT: It has been asked but --

5 Doctor, is there any way that it directly states
6 what he's saying in your report?

7 THE WITNESS: No, I did not specifically say
8 that.

9 Q. How many photographs of the defendant's vehicle did
10 you review?

11 A. I'd have to look back in my file to tell you.

12 Q. Did you, in your report, account for the specific
13 place in the rear bumper of the Villager which was impacted by
14 the Mercedes, could you show us?

15 A. Show you what now?

16 Q. In your report where you describe the exact location
17 of the impact to the Mercury Villager.

18 A. I said it was to the rear of the vehicle.

19 Q. The whole rear, anywhere?

20 A. I said it was to the rear of the vehicle.

21 Q. Well, rear right, rear center, rear left, where?

22 A. I think I just said that it was to the rear of the
23 vehicle.

24 Q. You won't be any more specific than that?

25 A. You asked me what I put in my report.

1 THE COURT: You asked about the report. Are you
2 asking him now apart from his report his knowledge as to
3 anything more specific?

4 MR. JONES: No, no, Judge. I'll accept that
5 answer.

6 Q. Take a look at Defendant's A5.

7 You see a big scuff mark in the right part of the
8 bumper in the rear? You see that?

9 A. Yeah.

10 Q. Is that the damage you're referring to?

11 A. No. I'm referring to where --

12 Q. In your report, that was sustained by the Mercury
13 Villager accident?

14 A. No, I specified where the damage was.

15 Q. Specify where on the bumper you're referring to?

16 A. I'm referring to the scratches that correlate with the
17 license plate holder or license plate.

18 Q. So you agree that scratches and only scratches were
19 sustained by the Mercury Villager as a result of this accident?

20 A. Oh, no. We may have all sorts of crush going on here.
21 I see gaps that may be caused by the collision. I see what is
22 potentially deformation of the bumper collapsing. There may be
23 a whole bunch of damage here.

24 Q. Did you account for that with an interview of the
25 plaintiff himself?

1 A. I believe you already asked me if I interviewed the
2 plaintiff, I believe I already answered the question.

3 Q. Would it be important for you to know, Doctor, whether
4 there has been preexisting damage to the Mercury Villager before
5 you did any kind of analysis? It's a yes or no.

6 Do you want to know if there's preexisting damage in a
7 car, yes or no?

8 A. Can't answer it yes or no. It depends.

9 Q. I want you to assume that the plaintiff stated that
10 the only damage sustained by the Mercury Villager was that
11 little area with the red circle on it.

12 Are you aware of that?

13 A. Am I aware that's what he said?

14 Q. Yes.

15 A. I'd have to look at his deposition again and see
16 exactly what question was asked of him.

17 Q. I want you to assume, Doctor, he made that circle last
18 week for the first time.

19 So that's the first time you're hearing of it,
20 correct?

21 A. Okay.

22 Q. So today, in court, you know now for the first time
23 the location of the impact as stated by the Plaintiff to the
24 rear of the Mercury Villager, the alleged damage caused, if you
25 can even see it, but you did an entire analysis before you even

1 knew about the damage to the car, correct?

2 MR. OGEN: Objection. Plaintiff said that's
3 where the crack was, not where the entire damage was. It's
4 mischaracterizing it.

5 MR. JONES: Speaking objection, Judge.

6 THE COURT: There may be a slight problem with
7 the wording of the question, but to move this along, were
8 you aware before just now or before today that that area
9 where the circle is is what plaintiff identified at trial
10 as the area of damage he was referring to?

11 THE WITNESS: No. I don't know what the question
12 line was, your Honor.

13 THE COURT: So now that you've been made aware of
14 it, your question is?

15 Go ahead.

16 Q. Would that affect any of your opinions about what Dr.
17 Toosi stated?

18 A. No, not at all.

19 Q. Well, you said you saw some crush over here on the
20 right side of the vehicle before I asked you the question about
21 the red circle. So now we can assume that's all preexisting
22 damage to the car, correct?

23 A. That is not what I testified to.

24 MR. OGEN: Objection.

25 THE COURT: Overruled.

1 Q. You pointed to the right side of the vehicle and said
2 you saw some scuff marks and a crush, am I correct?

3 A. You are incorrect.

4 Q. What did you point to the right side of the vehicle
5 for?

6 A. Because I was talking about the potential gap,
7 increased gap or change in gap between the bumper collapsing and
8 the body that may be representative of crush to the rear of the
9 vehicle.

10 Q. Something that the plaintiff did not testify to?

11 MR. OGEN: Objection.

12 Q. Are you aware of that?

13 THE COURT: Overruled.

14 Q. At trial?

15 Take a look at the front of the Mercedes. Do you see
16 any damage to that car?

17 A. Yes.

18 Q. You do?

19 A. Yes.

20 Q. Show us where.

21 A. I see a bumper, a license plate that's been --
22 essentially been wrapped around the front bumper.

23 Q. Do you know if that happened in this accident?

24 A. I have not been told otherwise that it did not.

25 Q. Do you know if maybe that happened in a parking lot?

1 MR. OGEN: Objection. Calls for speculation.

2 THE COURT: Sustained. He already answered he
3 doesn't know, he hasn't been told otherwise whether it
4 happened in this accident.

5 Q. So you, as a detailed statistician, didn't inquire or
6 find out whether or not the damage you say you see on a license
7 plate was caused by this accident, correct?

8 A. No. That was wrong in every way it could possibly be
9 wrong, so I cannot answer that question yes or no.

10 Q. What caused, if you know fully, that alleged damage to
11 the Mercury Villager?

12 A. It appears a frontal collision.

13 Q. With what?

14 A. A vehicle in front of this particular vehicle,
15 possibly one with a tow hitch. I don't have that information.

16 Q. Tow hitch? Look in your report, look for the word tow
17 hitch, look for it.

18 A. Why?

19 Q. Where did you come up with that?

20 A. You asked me what caused this here. First time I've
21 been asked this and I gave you what I thought may have caused
22 it.

23 Q. Did you read the Plaintiff's deposition?

24 A. Yes.

25 Q. Does the word tow hitch appear there?

1 A. Don't recall.

2 Q. Look under the index, try to find the word tow hitch
3 in the Plaintiff's deposition.

4 A. I'm sure you're competent to let me know it's not
5 there.

6 MR. OGEN: I'll stipulate the words tow hitch are
7 not in that transcript.

8 Q. Does the word tow hitch appear in your report anywhere
9 as being responsible to the front end damage to the Mercury
10 Villager, yes or no?

11 A. Tow hitch I don't believe is anywhere in my report.

12 Q. So it's not, it's not in the plaintiff's deposition,
13 the sole source of his version of the accident, it's not
14 anywhere in your report.

15 Tow hitch version was concocted by you and plaintiff's
16 counsel before you came to testify, right?

17 MR. OGEN: Objection.

18 THE COURT: Sustained.

19 Q. You heard the word tow hitch for the first time,
20 Doctor, before you testified today, correct?

21 A. No. That's an absurd assertion.

22 Q. Where did you hear it first? Where did the word tow
23 hitch come from in your analysis?

24 A. You asked a question, you said what might have caused
25 this and I said might have been a tow hitch, that's it.

1 Q. Were you shown any transcripts of the Plaintiff's
2 deposition testimony from this trial?

3 A. No.

4 Q. You just pulled the word tow hitch out of thin air?

5 MR. OGEN: Objection.

6 A. No. I already told you how I come up with tow hitch.
7 I haven't been asked to see what might cause that damage, but
8 that kind of damage is consistent with striking a vehicle with a
9 tow hitch. I have no idea anybody testified to it.

10 Q. And you know that based upon your experience in
11 evaluating accidents, right?

12 A. Thousands of crashes.

13 Q. And you were so certain of it, but you left it out of
14 your 20 page report?

15 A. Wasn't certain about it and don't have an opinion
16 about it other than what you asked me what would be consistent
17 with making that damage would be a tow hitch. Could it be
18 something else? Sure.

19 Q. Page 8 of your report.

20 THE COURT: Counsel, how long? It's after 1:00
21 if we can finish.

22 MR. JONES: I'll be finished by then.

23 THE COURT: Within a few minutes?

24 MR. JONES: Yes.

25 THE COURT: If it's okay with all the court

1 personnel and the jury, we'll keep going now for a few more
2 minutes, then you'll be out of here.

3 Q. One of the considerations in your report you made in
4 evaluating the causation of an injury, Doctor, is whether or not
5 there's a more likely alternative, a more likely alternative
6 explanation for the occurrence of the symptoms, correct?

7 A. At the same point in time.

8 Q. Right.

9 Now, what, if anything, do you know about the
10 plaintiff's activities prior to the automobile accident?

11 A. I know he played baseball.

12 Q. How do you know that?

13 A. I think it was mentioned in his deposition.

14 Q. And do you know what position he played?

15 A. I don't recall.

16 Q. Do you know his activity level, how often he played?

17 A. I don't recall off the top of my head.

18 Q. Do you know how much he worked out consistent with
19 baseball to prepare for the sport?

20 A. Not that I could tell you off the top of my head.

21 Q. Do you know how many times in a year he may have
22 thrown a baseball?

23 A. I did not count, no.

24 Q. Do you know if he played in organized men's leagues or
25 was it pick-up games?

1 A. I know there was also a men's league he was involved
2 with.

3 Q. Well, as someone who pays attention to detail, did you
4 consider that as a possible source of injury to his shoulder?

5 A. Oh, sure.

6 Q. Where did you account for that in your report?

7 A. When I said if you look at this crash as being a
8 potential cause of this man's injuries versus him just starting
9 up for no reason, he needs surgery in his knee and shoulder at
10 the same time, but if the crash hadn't happened at the age of
11 23, I rejected that out of hand as being kind of silly.
12 Actually there's no reason to believe just because he played
13 baseball he was suddenly going to convert to a surgical problem
14 if the crash hadn't happened. If the crash hadn't happened, he
15 would have gone on happy as a clam.

16 Q. I know your \$20,000 you're being paid --

17 MR. OGEN: Objection.

18 THE COURT: Sustained.

19 Q. -- but did you interview the plaintiff at all with
20 respect to his activity level?

21 MR. OGEN: Objection. Asked and answered. He
22 said he didn't interview the plaintiff.

23 THE COURT: Sustained. He said he didn't speak
24 to him in terms of the accident.

25 Q. Do you have any educational background in repetitive

1 stress injury, Doctor?

2 A. Yes, I published on the topic.

3 Q. And you're aware, Doctor, repetitive stress can cause
4 wear and tear on joints, ligaments, cartilage?

5 A. Sure. Usually manifested by the time we're in our
6 forties and fifties.

7 Q. 40 and 50 only?

8 A. No. I said usually manifested.

9 Q. Would people that play sports consistently from young
10 ages, they're going to get those pathologies a lot sooner, won't
11 they?

12 MR. OGEN: Objection. Beyond the scope of his
13 testimony.

14 THE COURT: Sustained.

15 Q. The fact is, Doctor, you didn't interview the
16 Plaintiff with respect to his activity level, fair?

17 MR. OGEN: Objection. Asked and answered.

18 Q. As an alternate cause?

19 MR. OGEN: He never interviewed the plaintiff.

20 THE COURT: Are you asking if he interviewed or
21 considered the baseball history as an alternative?

22 MR. JONES: As an alternate.

23 THE COURT: Overruled.

24 A. Yeah, I did. I actually talked about the fracture,
25 that there's absolutely no reason to believe that there's

1 anything else in this man's history that accounts for his
2 developing a surgical knee and surgical shoulder after this
3 crash with the exception of the crash.

4 Q. Doctor, and that's without ever interviewing the
5 Plaintiff, right?

6 THE COURT: Sustained. He said he never
7 interviewed the Plaintiff.

8 Q. The four courses that you took in biomechanics, would
9 they be on your course curriculum at this university if someone
10 were to search it?

11 A. Yes. Well, you can't search my transcript, it's a
12 private record, but it is on that record, and those are not the
13 only courses I've taken in biomechanics. I've taken many
14 course.

15 Q. I'm talking about undergraduate and graduate. You say
16 you took four courses, correct?

17 A. I'm saying four courses considered as credit for half
18 of my PhD minor.

19 Q. How much money did you make last year testifying in
20 court?

21 A. I don't know if I can tell you exactly what that
22 number is.

23 Q. Well, 70 percent of your income comes from your
24 forensic testimony, correct?

25 A. You asked me how much I made testifying. I don't know

1 that I really divide it.

2 Q. You don't know how much money you made?

3 A. I just answered the question as best as I could. I
4 don't know how to divide it up for testimony.

5 Q. How much money did you make in total last year?

6 MR. OGEN: Objection.

7 Q. We can figure it out.

8 MR. JONES: Goes to bias, Judge.

9 THE COURT: I'll sustain the objection in terms
10 of his total income, but to the extent you want to use the
11 70/30 ratio, and the way if you want to ask him to figure
12 it out approximately rather than start spending a half hour
13 here.

14 Q. 70 percent of your income testifying, how much annual
15 income does that account for?

16 A. I can give you the kind of answer that I would give
17 when I'm normally asked this, which is the moving average or
18 five year average of my income from work in the forensic field
19 in toto, not just testimony, but in toto, criminal, civil,
20 everything is around 900,000 to a million dollars a year.

21 Q. And a small percentage of your testimony in court is
22 for criminal, correct?

23 A. Yes. By the time I get to court, most of my testimony
24 is civil.

25 Q. When you say forensics, you mean preparing the kind of

1 reports that you prepared for Mr. Ogen, that's part of your
2 preparation, isn't it?

3 A. Forensic is everything, forensic investigation,
4 forensics investigation of death, injury, disease, it's
5 everything. There's nine people work with me in my offices and
6 we handle a whole bunch of different kinds of cases.

7 Q. The civil cases you testify on, the vast majority are
8 on minor impact cases for plaintiff's attorneys, correct?

9 A. No, that's absolutely false.

10 MR. JONES: Nothing further, Judge.

11 MR. OGEN: Two to three questions on redirect.

12 REDIRECT EXAMINATION

13 BY MR. OGEN:

14 Q. Can you explain --

15 THE COURT: Not that I'm counting, but go ahead.

16 Q. Can you explain the circumstances of your suspension
17 in the chiropractic school?

18 A. Sure.

19 Q. And by the way, that was in the mid '80's, correct?

20 MR. JONES: Objection.

21 A. It was 30 years ago.

22 MR. JONES: Objection. Prior bad act cannot be
23 explained away.

24 THE COURT: Overruled.

25 A. When I was in chiropractor school, there weren't

1 enough patients for all the interns, it was a common problem.
2 And they were trying to run the clinic, as we were paying to be
3 in school. And so what was allowed by the clinic was to observe
4 some things done by other clinicians and other things you
5 couldn't observe.

6 Well, I truly -- just about everybody I knew in school
7 took credit for patients seen by other interns. There just
8 wasn't enough to get out in time, and when they asked me about
9 it, I said I did it, I know I broke the rules. And they
10 suspended me for a term and made me come back for 20 patients,
11 like whatever it was. It was a graduation thing, didn't have
12 enough to get there, but upshot of it, my father-in-law is a
13 retired thoracic surgeon --

14 MR. JONES: Objection.

15 THE COURT: Sustained. Question was just
16 explain.

17 Q. Did you re-enroll afterwards?

18 A. After I went back, they gave me my diploma, but
19 there's a coda to this.

20 Q. What is that?

21 MR. JONES: Objection.

22 THE COURT: Sustained.

23 Q. You were asked earlier about your credentials as
24 opposed to Dr. Toosi's credentials.

25 How would you compare your credentials to his?

1 A. Well, Dr. Toosi is a bioengineer, I'm not an engineer.
2 My specialty is biomechanics of injury. It's a bit different
3 and it's not as much engineering based, it's more physics based.
4 That's what I do as a medical examiner, and that's what I'm
5 interested in when I assist in an autopsy and actually do a
6 focused autopsy for a particular injury.

7 I have over 40 publications in the field of injury
8 biomechanics, Dr. Toosi doesn't have any. My work has been peer
9 reviewed, and I have been a consultant to NASA and the US
10 Congress on biomechanics of injury.

11 MR. JONES: Objection.

12 THE COURT: Sustained.

13 Q. And by the way, Dr. Toosi, do you know if he's even a
14 licensed engineer?

15 A. I have no idea.

16 Q. And --

17 MR. OGEN: I did it in two.

18 THE COURT: Okay.

19 MR. JONES: Hold on a second, Doctor.

20 THE COURT: I think we have one or two followups.

21 **RE CROSS EXAMINATION**

22 **BY MR. JONES:**

23 Q. And then that's it, you have a degree in physics,
24 Doctor?

25 MR. OGEN: Objection, your Honor.

1 Q. Do you have a degree in physics?

2 THE COURT: Overruled.

3 A. My general science degree is accumulation of
4 chemistry, physics and biology.

5 Q. Oh, undergraduate?

6 A. Yes.

7 Q. Oh, so that's the basis upon which you're telling the
8 jury you have a physics background, your undergraduate work?

9 MR. OGEN: Objection. Beyond the scope.

10 THE COURT: Overruled.

11 Is that the basis, your undergraduate work?

12 THE WITNESS: I have extensive background,
13 postgraduate background of physics with crashes, but basic
14 physics, titanium physics, I learned about that in high
15 school, the Newton titanium physics.

16 Q. High school physics?

17 A. That's where basic physics are, N plus FA, yes.

18 MR. OGEN: Judge --

19 THE COURT: You have one more question?

20 MR. JONES: I do. I have to find Dr. Freeman's
21 CV.

22 THE COURT: Counsel, do you have his CV handy?

23 A. You want to see it on my laptop?

24 THE COURT: That will take longer.

25 Q. You see the articles referenced in Dr. Toosi's CV,

1 could you take a look at them?

2 A. Have I seen them did you say?

3 Q. Yes.

4 A. Yes.

5 Q. Did you review the articles he authored?

6 A. I did. That was the basis for my testimony.

7 Q. Did you review the articles he authored with respect
8 to the possibility of shoulder injuries and his biomechanical
9 analysis, did you review that article, too?

10 MR. OGEN: Objection.

11 A. That's not what that article is about.

12 THE COURT: Overruled.

13 Doctor, you can step down and you probably should
14 before someone thinks of another question.

15 (Whereupon, the witness was excused.)

16 THE COURT: Is that the end of your rebuttal
17 case?

18 MR. OGEN: Yes, your Honor.

19 THE COURT: That, ladies and gentlemen, concludes
20 all the testimony and evidence in this trial.

21 We're going to break for the day now and bring
22 you back tomorrow morning 10:00 a.m.

23 Please be back. You will then hear the
24 attorney's summations. I'll tell you the law and you will
25 start deliberating. If not tomorrow morning, tomorrow

1 afternoon.

2 So have a good night, and for almost the last
3 time, don't discuss the case. At some point tomorrow I'm
4 going to tell you to discuss the case.

5 **THE COURT OFFICER:** All rise, jury exiting.

6 (Jurors exited the courtroom.)

7 * * * * *

8 Certified to be a true and accurate record of the
9 within proceedings.

10

JANET CAMPOLO, RPR
Senior Court Reporter

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