2004 WL 5467640 (E.D.N.Y.) (Expert Trial Transcript)
United States District Court, E.D. New York.

Thomas NIMELY, Plaintiff,
v.
THE CITY OF NEW YORK, and Sergeant James Muirhead, Defendant.

No. 98 CV-6925.
February 4, 2004.

Transcript of Trial

Name of Expert: Ali Guy, M.D.
Area of Expertise: Health Care-Physicians & Health Professionals >>Physiatrist/Rehabilitation Medicine
Case Type: Civil Rights & Constitutional Law >> Excessive force
Jurisdiction: E.D.N.Y.

Representing: Plaintiff

Appearances.

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Before: Hon. Charles R. Wolle, District Judge, and a jury.

Proceedings recorded by mechanical stenography, transcript produced by computer.

[Note: Pages 1-480 missing in original document]

THE CLERK; Civil case on trial, Nimely versus City of New York and Sergeant Muirhead.

THE COURT: This is the third day of the jury trial and before we have the jury come in, outside the presence of the jury, a question about the EMT witness who is going to be called.

MR. VERSCHELL: I believe that it's Ms. Rossan's motion in limine.

THE COURT: The question to the extent that you need to go into anything pertaining to damages in order to have the witness' testimony on liability. Summarize where you draw that line.

MR. VERSCHELL: Key issues on liability in this case are to put to the back versus the front and as well as the side.

Mr. Waring's testimony will develop to the point where he found the bullet wounds themselves, the gunshot wound themselves, that he arrived and Mr. Nimely was the victim of a gunshot wound.

In order to get to that point, Mr. Waring will have to testify that he performed his assessment on him, what that assessment consisted of how he found the wounds themselves.

In addition, your Honor, the defense has made indications that Mr. Nimely may or may not have been intoxicated at that time that he was found with alcohol on his breach and that was part of Mr. Waring's assessment. In order to get to the point where his testimony makes sense, he certainly has to testify as to what he saw on Mr. Nimely, why he performed certain tests and made certain assessments.

THE COURT: What is the opinion that he is expressing on liability?

MR. VERSCHELL: That there will be a gunshot wound to the back area to the scapular, medial, that he found a wound on the midaxillary line on the right side, that Mr. Nimely had alcohol on his breath but that is not an indication that he was intoxicated.

THE COURT: At this point I have no sense of why you need to do anything about what he found when he first arrived. All you need to do is give his opinion about what was the place where the bullet entered and left and he doesn't need to talk about his assessment of the condition.

As to the alcohol, that is a liability issue, I guess, although-- I'm surprised you're going into it, but let me stop now and hear from Ms. Rossan.

Tell me the basis for your motion in limine.

MS. ROSSAN: First of all, we've already stipulated there are stipulations of fact as to where the bullet left and entered the body. The plaintiff already called Dr. Zugibe yesterday who explained it in detail. He is calling Dr. Guy today.

THE COURT: I thought this it was EMT.

MS. ROSSAN: Yes, we're talking about the EMT. We have stipulated about the entrance and exit wound of the bullet and he stipulated about it. He is just being offered because we think they want to try to introduce hearsay statements that were made to him when he got to the scene.

THE COURT: Don't proffer what you think they are going to offer when they just told me that is not part of the presentation. I'm really inclined simply to sustain the motion in limine, that to the extent that if you intend to go beyond entrance/exit wound and the matter of alcohol, you'll need permission in advance.]

MR. VERSCHELL: There are only two other issues which I will let the Court know in advance. The defense has been trying to indicate that there may have been a wound to the chest area.

Mr. Waring will testify as the first person on the scene to examine him, he examined him, found no wound at all in the chest area.

THE COURT: That has to do with liability. Go ahead.

MR. VERSCHELL: In addition, there have been indications by the defense. --

THE COURT: Don't bother about the defense, tell me what you have to offer.

MR. VERSCHELL: His neurological session. Pupils equal and reactive, which will be indication that he wasn't on any elicit substances.

THE COURT: That goes to liability. I don't think this is inappropriately repetitious, so the witness will be allowed to testify. I'll rule tightly on what is gone into so that nothing beyond liability is addressed and is my ruling.

(Jury in at 9:10 a.m.)

THE COURT: Good morning. Please be seated when you reach your place.

The plaintiff may present another witness. We're going to interrupt the testimony of Officer McCarthy once again to accommodate a witness.

You may come forward. Stand beside the witness chair. You'll be placed under oath and then take the witness chair.

DR. A L I G U Y , having been called as a witness, first being duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Would you state and spell your name for the record.

THE WITNESS: My name is Dr. All, A-L-I, last name is G-U-Y. My office address is 7 Grammercy Park, New York, New York 10003.

THE COURT: Speak right to the jury so they can hear.

Questions, Mr. Kelton.

MR. KELTON: Yes, your Honor. May the record reflect that plaintiff is calling Dr. Guy as a witness.

MR. MONTOYA: Defendants renew their objection to this witness' testimony for the reasons set forth on the record yesterday.

THE COURT: Overruled.

Continue.

DIRECT EXAMINATION

BY MR. KELTON:

Q Good morning, Dr. Guy.

Would you please tell the jury what your profession is.

A I'm a physician licensed to practice medicine and surgery in the State of New York.

Q Would you tell our jury if you have any particular area of specialization as a physician?

A Yes, I do. My area of specialty is physical medicine and rehabilitation, also known as physiatry.

Q Are you being paid a fee for your time here today in coming to court to give testimony?

A Yes, sir, for canceling my patients and being available here. Yes, I am.

Q What is the fee that you are receiving?

A My fee is 3,000 for half a day of court testimony, 1,000 for pretrial preparation, altogether 4,000.

Q Other than this case, have you and I ever worked together on any other cases?

A I believe one other case a few years ago.

Q And you and I spoke briefly this morning, as a matter of fact?

A Yes.

Q And we have spoken in the past about this case, is that correct?

A Yes, sir, we have.

Q Would you please explain to the jury a little bit about what a doctor who specializes in physical medicine and rehabilitation, what type of treatment, what type of care does that type of doctor render?

A First of all, this is a medical specialty that has been around since after World War II. It's over 55 years old.

We deal primarily with traumatic injuries to the body covering the whole body from head to toe. We deal with spinal cord injuries, we deal with musculoskeletal problems, we deal with nonsurgical and surgical orthopedic problems. We deal with neurosurgical problems.

We deal with the rehabilitation of gunshot wounds, we deal with disability impairment. We deal with cardiac and pulmonary rehabilitation and there is a great deal of overlap between what our specialty does and orthopedic surgery as well as neurology.

The difference is orthopedic surgery concentrates on the surgical aspect of the musculoskelital and the boney system. We concentrate on the pre and postsurgical problems relating to these same areas.

How we differ from a neurologist is a nuerologist concentrates primarily primarily on central neurology which is the diseases of the central nervous system like Multiple Sclerosis, Parkinson's, so on and there is a great deal of overlap with the two and our specialty deals with disability and impairment, evaluating a patient to say what the extent of injuries are, is it permanent, total, mild, partial, moderate partial, severe partial. That's basically what it is.

Q Are you presently board certified in any specialty area?

A Yes, sir, I am.

Q What area is that?

A I'm board certified in the field of physical medicine and rehabilitation.

Q Would you please tell our jury what it takes to become board certified in that area?

A In order to become board certified in this specialty you have to have training in a field other than physical medicine and rehabilitation, preferably internal medicine and/or surgery.

You have to satisfactorily complete a three-year training program in physical medicine and rehabilitation, pass the yearly examinations given by the department, you have to score at least 70 percent or higher. You have to get good evaluations on a monthly basis by your teachers.

Once you finish your three-year training program, you sit for your boards part one, which is an all-day examination approximately eight to ten hours covering everything you learned from the beginning to end, deals with spinal problems, it deals with gunshot wounds, rehabilitation of wound care, surgical rehabilitation, cardiac, pulmonary rehabilitation neurology, orthopedics, so on and so forth.

Once you pass your boards part one, you have to be in private practice for at least 18 months, be sponsored by two other doctors already board certified that know you closely, that can vouch for your continuing education.

You then fly to the Mayo Clinic in Minnesota where all the textbooks and literature is written. You get tested by the best of the best and they test you on principles of orthopedic neurological interpretation of x-rays, CAT scans, MRIs, EMG's, so and so forth. If you prove to these doctors that your knowledge is up to par, they pass you, give you a title of Diplomate of the American Board of Physical Medicine and rehabilitation that was obtained in May of 1989.

Q Where did you get your medical degree?

A From University of Northeast from the Dominican Republic in June of 1981.

Q Would you describe to your jury your postgraduate training, internships and residencies?

A Yes. I did 18 months of internal medicine at Mt. Sinai School of Medicine, Mt. Sinai Medical Center. I did one year of general surgery at Cabrini Medical Center. I completed a three-year training program at Mt. Sinai School of Medicine Mt. Sinai Medical Center.

That is my residency.

Q Do you have any Worker's Compensation rating?

A I do.

Q What rating is that?

A CPMR, stands for certified in physical medicine and rehabilitation.

Q Would you please tell our jury of any current hospital affiliations or recent hospital affiliations that you no longer have?

A Yes. I was a director of the Department of Rehab Medicine at Maimonides Medical Center in Brooklyn from 1997 until July 30th of 2002 where my duties were to be involved in all the inpatient and outpatient rehab services, provide teaching to the house staff, to the internal medicine residents, to the surgical residents, to the orthopedic residents, to prepare them for the boards under the rehab section.

I was in charge of quality assurance. I was consultant to different doctors in the hospital, did hospital consults, disability and impairment evaluations for my department.

And I've been the director of the Neuromuscular Equipment Clinic at Hospital For Joint Disease at NYU where I see patients that come with all kinds of spinal cord injuries, patients that have birth defects, patients that have severe back problems, people that have wheelchairs, other equipment, I evaluate them and write the prescriptions for them.

I also teach the residents that rotate through that hospital from NYU. I prepare them for their boards, parts one and two.

Q You mentioned that you render care and treatment to patients who have spinal cord injuries.

Could you elaborate a little on that nature of your practice and would you let our jury know if that involves spinal cord injuries that relate to gunshot wounds?

A Yes. First of all, my training in spinal cord injury stems from my training while I was rotating through Mt. Sinai. we rotate through the Bronx Veterans Administration Hospital where they have one of the largest spinal cord injury units in the northeast. There is a whole floor devoted to spinal cord injury patients, whether from gunshot wounds, accidents, falls. There is a mixture.

Also rotating through Mt. Sinai we have a rotation inpatient ward where we have patients again with mixed trauma.

And also rotating through Elmhurst Hospital we see again a lot of gunshot wounds with paralysis, so on and so forth.

Also after my postgraduate training, I continued to see an treat patients with spinal cord injuries and gunshot wounds.

Q You had been talking about your position up until July of 2002 as the director of rehabilitation medicine at Maimonides Medical Center.

Do you presently have any other hospital affiliations?

A Yes, sir. NYU, Hospital For Joint Disease. I'm still currently the director of the Neuromuscular Equipment Clinic.

Q Now, do you have any affiliations with any law enforcement agencies?

A Yes, sir.

Q Would you please tell our jury about that?

A I'm a State Police Surgeon with the State Police at the Yonkers division.

Q Are you familiar with firearms?

A Yes, sir, I have a license to carry two firearms.

Q Would you tell the jury your practice presently, what it generally consists of on a day-to-day basis?

A Yes, sir. One-half day a week I teach the residents from NYU and Hospital Of Joint Disease at the hospital and in my office I have a private practice office in Grammercy Park and another one in Long Island in Jericho.

I treat patients with all kinds of injuries from head to toe. I treat patients like stenographers with carpel tunnel syndrome, neck problems, back problems, spinal cord injuries, spinal surgeries disk herniations, shoulder problems, hip replacements, knee replacement.

After each of these surgeries, you need rehabilitation. I treat patients with strokes, with Parkinson's, with Multiple Sclerosis, just about everything that you can imagine from head to toe.

Q As part of your day-to-day practice, do you have occasion to consult with attorneys on cases involving injuries?

A On occasions, yes.

Q Would you describe to your jury the nature of that aspect of your work, approximately what percentage of your work is involved in that area?

A It's a small percentage. I would say five to ten percent, perhaps less.

Q Does that involve testifying in court on occasion?

A That's separate in that to come to court and testify I would say about five percent of my time and my field, coming into court and testifying as an expert witness and to the care of my patients.

Q In the course of any given year do you have an estimate of about how many times you actually testify in court in a given year?

A Between my two practices, on average 12 times a year, some years less, some years more, but on average 12.

Q In addition to actually testifying, do you render examinations for injured people in legal cases?

A I could. It's call a disability and impairment evaluation.

Q And can you give a percentage of about how much of your practice is involved in doing disability and impairment evaluations involving legal cases?

A I believe that question was asked earlier when you asked me about legal cases. That is in the same category.

Q Did there come a time, Dr. Guy, when I asked you to conduct a physical examination of Mr. Nimely?

A Yes, sir, you did.

Q What was the purpose of that physical examination that I asked you to conduct?

A To evaluate his overall condition, the extent of his disability, his diagnosis prognosis and his future medical needs.

Q Did you, in fact, conduct that examination of him?

A Yes, sir, I did.

Q Did you review any material in connection with the examination of Mr. Nimely that you conducted?

A Yes, sir, I did.

Q Would you please tell our jury what material you reviewed?

A I reviewed medical records from the Staten Island University Hospital also from Kings County Hospital.

Q Do you recall reviewing material also from the Visiting Nurse Association of Staten Island?

A Yes, sir.

Q At the time you examined Mr. Nimely, was there any attorney representing him present during that examination?

A No, sir.

Q When you do a physical examination to review an injured person to determine the nature and extent of disability, do you ever read depositions taken during the legal case as part of that evaluation?

A No, sir.

Q Why don't you do that when you are doing a physical examination?

A When I do a medical physical examination, all I need is past medical records, hospital records, other physicians' records. I do not need depositions becausethey help me not in the least in my diagnosis and prognosis.

Q Did you, after you reviewed the material that was sent to you and examined Mr. Nimely, did you prepare a report and send it to my office regarding your finding about a physical examination?

A Yes, sir.

Q Did there come a time thereafter when I asked you to review certain additional material on the issue of whether Mr. Nimely would have been able to turn and face a police officer after a bullet had entered his body?

A Yes, sir, I did.

Q Do you recall what additional material I sent you at that time for you to consider that issue?

A Yes.

Q What material did I send you?

A I reviewed transcript depositions of Dr. Dawson, Dr. Zugibe and Dr. Michael Baden, forensic pathologist.

Q With respect to Dr. Dawson, did you review a transcript or just his report?

A Just a report.

Q With respect to Dr. Zugibe and Dr. Baden, did you review the entirety of the deposition or only certain portions?

A Only certain pertinent portions.

Q And in reviewing this second issue that I asked you to consider, did you also take into account what your physical findings were from your earlier examination of Mr. Timely?

A Yes, sir.

Q Would you please describe to our jury the nature of the damage, if any, chat was done to Mr. Nimely's vertebra and or spinal cord as a result of the bullet that came from the officer's gun.

MR. ROSSAN: Objection.

THE COURT: Sustained.

That will pertain to a damage issue, but it hasn't been shown it pertains to the question of liability that the jury is now considering.

Continue.

MR. KELTON: May we have a sidebar?

THE COURT: No, not right now, but before you complete the testimony you may wish to extend your examination beyond what I have just directed. Continue.

Q What does the term complete cord injury mean?

MR. MONTOYA: Objection.

THE COURT: Sustained.

Q I want to ask you a hypothetical question then ask you for an opinion based upon your knowledge of the injuries suffered by Mr. Nimely.

I want you to assume that Mr. Nimely is running and behind him a police officer is running after him and that at some point Mr. Nimely falls to the ground.

I want you to assume for the purposes of my question that he has a gun in his hand, just assume that.

I want you to assume that Mr. Nimely gets up from the ground, starts to turn left, completes the turn, faces the officer, stands erect and raises his right arm and points the gun directly at the officer face-to-face.

And I want to you assume that the officer has testified that he shot Mr. Nimely in this position into the chest.

Based upon those facts, I want you to also assume the following:

I want you to assume that there will be a doctor who will be presented by the defendant, Dr. Dawson who will testify that the bullet wound actually entered Mr. Nimely in the back as he was turning and that Mr. Nimely continued to turn standing erect, raising his right arm, extending it with gun in hand and faced the officer and then Mr. Nimely collapsed.

Do you have an opinion to a reasonable degree of professional medical certainty whether that proposed testimony by Dr. Dawson is consistent with good medical fact?

MR. MONTOYA: Objection.

THE COURT: And you may extend your objection if you wish. What is inappropriate about the question?

MR. MONTOYA: He is not qualified to give testimony. He is not a forensic pathologist. He is not qualified.

THE COURT: The objection is overruled.

You may answer.

And members of the jury, just so you understand, a hypothetical question is that you may consider if indeed what has just been outlined as a hypothetical set of facts is proved in this case. If that is proved in the case then this witness is allowed to express an opinion concerning that matter.

To the extent that a hypothetical contains facts that are not established in the case, then that may weigh on how much strength or weight you give to the opinion of the witness expert, but expert witness are allowed, as I told you before, to testify to matters in their expertise and you may consider all of their credentials and expertise to the extent that I give weight to the expert testimony.

Now you may answer the question.

A First of all, when a patient is laying facing downwards and you are hit at the level of P-ll, that is right mid-back about four finger breaths below the scapula to shoulder blade, and the bullet hit the bone and doesn't go through the bone, the force of a .9 millimeter impact is so powerful that it throws you, knocks you to the ground.

It's a medical impossibility to be hit at that angle and to be able to turn around and direct your gun at anybody let alone to be able to pull a gun, so that makes no sense in the medical context.

Second of all, once this patient was hit he was paralyzed immediately and as a result once you are paralyzed again either you are in neurogenic shock or hypovolemic shock and in that state you do not have all your faculties to be able to pull a gun out, face it and point it to, at anybody, so it makes no sense in the medical context.

Q You mentioned neurogenic shock and hypovolemic shock.

Did you see any evidence in the medical records in this case that Mr. Nimely may have suffered from those conditions?

MR. MONTOYA: Objection.

THE COURT: Overruled.

You may answer.

A Yes, sir, I did.

Q What was that?

A The initial --

MR. MONTOYA: Objection.

THE COURT: You may answer.

A The initial vital signs that were taken of him showed his blood pressure to be 90 over 40. Normal blood pressure is 120 over 80 plus or minus ten and 90 over 40 is very, very low.

The cardiac output at that type of a blood pressure is very much decreased and patients are not fully coherent with that type of a blood pressure. They are light-headed, they are in shock.

It is again medically impossible to have the coordination to pull a gun out and to point it at anybody.

Q And does that condition, the hypovolemic shock and neurogenic shock, can that impact a person's memory of the event causing that shock?

MR. MONTOYA: Objection.

THE COURT: Overruled.

You may answer.

A The answer is yes, absolutely.

Q Would you explain that to the jury?

A When a person is again in any type of a shock, a patient's coordination and higher faculties are impaired and the cardiac output at a blood pressure of 90 over 40 is very rich decreased and the amount of blood flow from the heart to the brain is again diminished. So full cognitive function is impaired and memory is a part of cognitive function, so patients at this type of a blood pressure don't have memory of what happened to them.

MR. KELTON: Thank you. I have no further questions at this time, your Honor.

THE COURT Cross-examination, Ms. Rossan.

CROSS-EXAMINATION

BY MS. ROSSAN:

Q Good morning, Dr. Guy.

A Good morning.

Q To date, how much have you been paid by plaintiff to work on this case?

A For my initial evaluation, initial office visit is 250, narrative report was 300, review of records was 700. I believe that is about 1200 and I did one deposition before, I don't know at whose request. I received a fee of 3,000 for that.

I did a review of the transcripts, report of Dr. Dawson and Dr. Zugibe, I got 500 for that.

I reviewed the prior deposition I had done. I reviewed numerous records. There was a fee of 500.

Q What is the total?

A Whatever the addition is.

Q So it's your testimony?

A I can add it up for you in my head very quickly, 3,000, 4,200, about 5,000.

Q When you do testify, you testified earlier that you testified in court, you generally testify on behalf of plaintiffs?

A My patients. They are plaintiffs, yes.

Q When you were first retained by Mr. Kelton he didn't ask you to render an opinion about the exit and entrance wounds in Mr. Nimely's body?

A That's correct.

Q And he didn't ask you to render an opinion about how the bullet entered Mr. Nimely's body?

A That is correct.

Q And he didn't ask you to render an opinion about what movement Mr. Nimely may have been making at the time that he was shot?

A That's correct.

Q When you were retained by Mr. Kelton he didn't ask you for your opinion about whether or not Mr. Nimely was turning when he was shot?

A That's correct.

Q And he didn't ask you to render an opinion about any of those things?

A That is correct.

Q And that's because you weren't qualified to give an opinion on any of those things?

A No, that is not correct.

Q You are not a forensic pathologist?

A You don't have to be a forensic pathologist to understand basics of medical pathology and what a neurogenic and hypovolemic shock is and what happens when you get shot with that type of force and magnitude as to what would happen to you.

THE COURT: Your question was fast. The answer was fast and technical. And the reporter is going to have to work all day. Start with a new question and speak a little slower.

MS. ROSSAN: First move to strike that answer as nonresponsive. My question was --

THE COURT: I remember the question. Overruled. Continue.

Q You've never been qualified as an expert in any court in the area of forensic pathology, have you?

A That is correct.

Q And you said earlier that when you first wrote your report, your very first report you reviewed medical records, correct?

A That is correct.

Q But you didn't review the actual CAT scans taken of Mr. Nimely, did you?

A The actual films, I did not.

Q And you testified that you never reviewed the deposition testimony of Sergeant Muirhead, correct?

A That is correct.

Q You never reviewed the deposition testimony of Detective McCarthy, correct?

A That is correct.

Q You didn't review the deposition testimony of Mr. Nimely either, is that correct?

A That's correct.

Q And in fact, the only deposition testimony that you reviewed was the deposition testimony of two other experts hired by plaintiff, correct?

A I don't know if they were hired by plaintiff, but I reviewed those depositions, yes.

Q You testified earlier that you reviewed certain portions of the deposition testimony of Dr. Zugibe, correct?

A Yes.

Q And you also testified that you reviewed certain portions of the deposition testimony of Dr. Baden, correct?

A That's correct.

Q And that's because Mr. Kelton provided you with those deposition transcripts, right?

A That is correct.

Q And both Dr. Zugibe and Dr. Baden were experts that were hired by plaintiff, correct?

A I imagine so. I never thought about that, but that's possible.

Q Is it your testimony that Mr. Kelton just sent you those deposition transcripts of Dr. Zugibe and Dr. Baden with no explanation about what you were supposed to do?

A He gave me an explanation. He wanted me to review them and render an opinion as to what I think about their theory.

Q And you did review them?

A Yes.

Q And when you reviewed them it became apparent to you that both doctors were being questioned by a lawyer for the defendant in this case?

A That's correct.

Q In fact, the lawyer who deposed both Dr. Baden and Dr. Zugibe was the same lawyer who deposed you, isn't that correct?

A I didn't know that until now, but I'm not surprised.

Q And Mr. Kelton also provided you with the report from defendants' expert Dr. Dawson, correct?

A Yes, partial.

Q Other than the deposition transcripts of Doctors Baden and Zugibe, the portions that you reviewed and the report of Dr. Dawson, you didn't review any other materials before you rendered your supplemental opinion in this case, is that correct?

A That's correct.

Q And the opinion that you rendered in your supplemental report that you were talking about earlier here is basically the same thing that Dr. Baden and Dr. Zugibe, plaintiff's other experts said, isn't that correct?

A More or less, yes.

Q And you concede in your supplemental report, don't you, that none of you doctors saw the shooting, correct?

THE COURT: I didn't hear.

Q None of you doctors

THE COURT: Speak a little more slowly.

And your answer.

A Yes, that is correct.

Q And you also concede that all of the doctors are just coming up with theories, correct?

A Theories with reasonable medical certainty or probability.

Q But you yourself have no idea what Mr. Nimely's doing at the time he was shot, do you?

A The exact nature other than what has been reported to me, no.

MR. MONTOYA: Your Honor, may I have a moment?

THE COURT: Yes.

(Pause.)

Q You testified earlier that decreased blood pressure can lead to some memory loss, correct?

A I believe I said it was hypovolemic shock and neurogenic shock with a blood pressure of 90 over 40, the cardiac output is markedly diminishing, the cerebral blood flow is markedly impaired and cognitive function is also impaired that leads to memory loss.

Q It could lead to?

A It generally does.

Q But it might not, isn't that true?

A That is possible on rare occasions.

Q And the memory loss isn't permanent, isn't that correct?

A That's correct. The transient memory loss.

Q You would agree that there are no notations in the medical records saying that Mr. Nimely had any memory loss, isn't that true? There is no explicit note in any medical records that Mr. Nimely complained of or that they interpreted that he had any memory loss?

A That's because a patient that is in shock is not really coherent. You can't ask a patient in shock do you have any memory loss. That's not the way it's done.

Q And medical records don't indicate that Mr. Nimely suffered any head injury, isn't that correct?

A That's correct.

Q And as a doctor who treat people with spinal injuries, you would agree that an injury to the spine would not necessarily impair cerebral function, isn't that true?

A That in itself no, but an injury to the spine with a severe complete paraplegic can cause neurogenic shock and neurogenic shock can temporarily impair memory.

Q I'll ask my question again.

As a doctor who treats spinal injuries you would agree that an injury to the spine will not necessarily impair cerebral functions, isn't that true?

MR. KELTON: Objection.

THE COURT: Overruled.

You may answer.

A Yes, I believe I answered it. The way you phrased the question requires an explanation which I believe I gave you.

Q In fact, Mr. Nimely is functional above the waist including his cerebral functions?

A Yes, he is.

Q And has full use of his arms and upper body, isn't that true?

A Yes, that is true.

MR. MONTOYA: One moment, your Honor.

No further questions.

THE COURT: Any redirect examination of the witness?

MR. KELTON: May I have one moment, your Honor?

THE COURT: Yes.

(Pause.)

MR. KELTON: Just a few, your Honor.

REDIRECT EXAMINATION

BY MR. KELTON:

Q One of the things that you mentioned was that you had and that you have reviewed to formulate the opinion that you have given this morning, that was you had Dr. Dawson's report and I Just want to make it clear you had his complete report, is that correct? Would you just check and see?

A Sure.

Q Not just the deposition but the complete report.

(Pause.)

A Yes, I have his complete report.

Q With respect to the memory loss that occurred with hypovolemic and neurogenic shock, are there occasions when there is a permanent memory loss of event immediately surrounding the event causing the hypovolemic or neurogenic shock?

A That is generally the way it happens.

Q Sometimes it's temporary?

A Yes.

Q And your memory comes back?

A Yes.

Q Sometimes the memory immediately surrounding the event that led to the shock does not come back?

A That is correct.

MR. KELTON: That's all I have.

THE COURT: Anything else?

MR. MONTOYA: No, your Honor.

THE COURT: You may step down. You are excused and we'll move to the next evidence to be presented by the plaintiff.

(Witness excused.)

MR. KELTON: Just checking to see if the subpoenaed witnesses are here.

THE COURT: You may come forward. Stand beside the witness chair to the left and you will be placed under oath.

KEVIN WARING, having been called as a witness, first being duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Would you state and spell your name for the record.

THE WITNESS: My name is Kevin Waring, K-E-V-I-N W-A-R-I-N-G.

THE COURT: You may be seated and speak right to the jury loudly enough so that you are sure that they can all hear and we'll have questions.

DIRECT EXAMINATION

BY MR. VERSCHELL:

Q Good morning, Mr. Waring.

A Good corning.

Q Mr. Waring, are you presently employed?

A Yes.

Q Where are you employed, sir?

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