

2007

Jule Kreyling v. City of St. George, a Utah municipal corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JULE KREYLING,

Plaintiff-Appellant,

vs.

CITY OF ST. GEORGE, a Utah
municipal corporation,

Defendant-Appellee.

Court of Appeals No. 20070882-CA

BRIEF OF APPELLANT

Appeal from the Orders Entering Summary Judgment for Defendant St. George City
by the District Court of the Fifth Judicial District, the
Honorable James L. Shumate, Presiding

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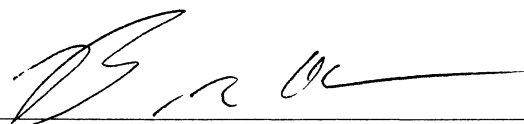
Defendant-Appellee.

CERTIFICATE OF SERVICE

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JURISDICTIONAL STATEMENT

The Fifth Judicial District Court, Judge James L. Shumate, entered its Summary Judgment in this matter on or about October 5, 2007. Plaintiff-Appellant timely filed his Notice of Appeal on or about October 19, 2007. The Utah Supreme Court transferred this matter to this Court on or about November 1, 2007. Therefore, the Utah Court of Appeals has jurisdiction over this Appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

FIRST ISSUE PRESENTED

I. UNDER UTAH LAW, MAY A CITY DELEGATE ITS DUTIES TO MAINTAIN ITS PROPERTY, BEING A PARK STRIP, ALONG ITS CITY STREETS, TO ADJOINING PROPERTY OWNERS BY CITY ORDINANCE?

Standard of Review

This issue presents a question of law. The trial court's conclusions of law should be reviewed by this Court de novo. State v. Pena, 869 P.2d 932 (Utah 1994). Further, to insure that a court acted within its discretion, the facts and reasons for the court's decisions must fully set forth in appropriate findings and conclusions. Barnes v. Barnes, 857 P.2d 257 (Utah App. 1993). Findings must be sufficiently detailed to ensure that the trial court's discretionary determination was rationally based. Id. A trial court's decision on summary judgment is reviewed for correctness. Gary Porter Construction v. Fox Construction, Inc., 101 P.3d 371, 379 (Utah App. 2004).

Preservation of this Issue

Plaintiff-Appellant preserved this issue below by filing his Memorandum in Opposition to Defendant's Motion for Summary Judgment. (R. at 381).

SECOND ISSUE PRESENTED

II. DID THE TRIAL COURT ERR IN ENTERING SUMMARY JUDGMENT CONCLUDING THAT THE DANGEROUS CONDITION UPON PROPERTY IN QUESTION WAS A "LATENT DEFECT" ENTITLING DEFENDANT CITY TO GOVERNMENTAL IMMUNITY FROM PROSECUTION?

Standard of Review

This issue presents a question of law. The court should review the trial court's conclusions of law de novo. State v. Pena, 869 P.2d 932 (Utah 1994). The trial court's decision on summary judgment is reviewed for correctness. Gary Porter Construction v. Fox Construction, Inc., 101 P.3d 371, 379 (Utah App. 2004).

Preservation of this Issue

Plaintiff-Appellant preserved this issue below by filing his Memorandum in Opposition to Defendant's Motion for Summary Judgment. (R. at 381).

THIRD ISSUE PRESENTED

III. DID THE TRIAL COURT ERR IN DETERMINING THAT THERE EXISTED NO GENUINE ISSUE OF MATERIAL FACT WITH REGARD TO A DANGEROUS CONDITION UPON PROPERTY DETERMINED TO BE A "LATENT DEFECT?"

Standard of Review

Generally, summary judgment can be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Stevenson v. First Colony Life Insurance Company, 827 P.2d 973, 974 (Utah App. 1992). The

court reviews conclusions of law pursuant to summary judgment for correctness without according deference to the trial court's legal conclusions. Id.

Preservation of this Issue

Plaintiff-Appellant preserved this issue below by filing his Memorandum in Opposition to Defendant's Motion for Summary Judgment. (R. at 381).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES**

Utah Rules of Civil Procedure, Rule 56, reads as follows:

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah Rules of Civil Procedure, Rule 7, reads as follows:

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b)(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b)(2) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for

sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the

minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.

St. George City Code § 4-7-11 reads as follows:

LANDSCAPING AND EXTERIOR MAINTENANCE:

Property owner shall maintain the landscaping and exterior features of the property in good repair, including maintaining:

A.Paint, siding, stucco, etc., in good repair free from peeling, large holes or cracks;

B.Landscaping of all areas visible from a public street, alley, sidewalk, or neighboring property, including rear and side yards;

C.Landscaping free from weeds, dead plants, litter, refuse, or debris and adequate water provided for landscape maintenance;

D.Lawns mowed and maintained;

E.Sprinkler systems maintained in good repair or, if no inground sprinkling system is installed, provide garden hoses and sprinklers sufficient for maintaining the yard;

F.Landscaping maintained as approved on a site plan submitted when the rental dwelling units were approved by the city (for those projects where a site plan was required or submitted) unless a subsequent landscaping plan was approved by the community development director in writing;

G.Curbs and gutters clean and in good repair;

H.Sidewalks, driveways and walkways in good repair free from large holes, cracks or other unsafe conditions;

I.Fences in good repair, free from graffiti, peeling paint, holes, and able to stand upright as designed without propping or additional support;

J.Carport areas (where applicable) clean and free from boxes, junk, debris, or other storage.

Property owner may contract with a third party, including tenant, to provide the maintenance required under this section, however property owner shall remain

liable for any deficiencies or violations of this section. (Ord. 2005-12-002, 12-1-2005, eff. 3-1-2006)

St. George City Code § 4-7-2 reads as follows:

DEFINITIONS:

LANDSCAPING: The combination of elements such as trees, shrubs, ground covers, vines, and other plants that are generally not considered to be weeds or noxious plants, and nonorganic matter such as decorative rock, that is planted or placed on the areas outside of the rental dwelling unit for the purpose of creating an attractive and pleasing environment. All landscaping shall meet the requirements of any applicable city code.

OWNER OCCUPIED: A. A natural person who possesses fifty percent (50%) ownership or more in the dwelling and said dwelling is the primary residence of such person; or

B. A family trust created for the primary purpose of estate planning by one or more trustors who create the trust, place the dwelling in such trust, and whose primary residence is such dwelling.

PERSON: Unless the context otherwise requires, the term "person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust or any unincorporated organization.

PROPERTY OWNER: An individual, a corporation, a partnership, an association, a joint stock company, a business trust or any unincorporated organization that is the owner of a rental dwelling unit or has a financial interest in the rental dwelling unit.

RENTAL DWELLING UNIT: A building or portion of a building that is:

A. Used or designated for use as a residence by one or more persons; and

B. 1. Available to be rented, loaned, leased, or hired out for a period of thirty (30) days or longer; or

2. Arranged, designed, or built to be rented, loaned, leased, or hired out for a period of one month or longer.

RENTAL PROPERTY: Any legally subdivided lot or parcel of property containing one or more rental dwelling units.

TENANT: Any natural person and any individual other than a commercial tenant that signs a rental agreement or is otherwise responsible for payment of rent for the unit.

UNIT: A rental dwelling unit. (Ord. 2005-12-002, 12-1-2005, eff. 3-1-2006)

St. George City Code § 7-1-7 reads as follows:

OBSTRUCTIONS:

A. Sidewalks And Streets: It shall be unlawful for any person, without a permit issued by the public works encroachment officer, to cause an encroachment or obstruction upon any street, alley or sidewalk of the city, which shall hinder the free travel of pedestrians, automobiles or other traffic along the streets or sidewalks, or which shall obstruct the view³¹ along the same. (1962 Code § 9-1-11; amd. 2003 Code)

B. Ditch Or Gutter: It shall be unlawful for any person to make or place any obstruction of any kind or nature in or over any irrigation ditch, wastewater ditch, or in any gutter situated upon any street or sidewalk within the city. Placing or allowing the accumulation of leaves, construction materials, garbage or debris of any type in gutters along city streets shall be considered an obstruction within the intent of this subsection. The adjoining property owners shall be responsible for keeping gutters free from such obstruction. No bridge, flume or conduit of any kind shall be placed or installed in or upon any ditch, canal or gutter, without permission from the streets superintendent being first obtained, and every such structure shall be installed in accordance with the instructions of and to the satisfaction of the streets superintendent. Any obstruction or installation made in violation of the provisions of this subsection, may be immediately removed by the streets superintendent, and any person who violates the provisions of this subsection shall be deemed guilty of a class B misdemeanor and upon conviction, subject to penalty as provided in section 1-4-1 of this code. (Ord. 12-6-1988, 12-15-1988; amd. 2003 Code)

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff-Appellant Jule Kreyling (“Mr. Kreyling”) respectfully requests that this Court reverse the summary judgment granted in favor of Defendant City of St. George (“City”) in his claims of personal injury. Mr. Kreyling’s claims stem from an incident

occurring in approximately September, 2003, wherein Mr. Kreyling was present upon a park strip, in between the sidewalk and curb of the street, owned by Defendant City, wherein he stepped with one leg into a cylindrical hole, falling in the entire length of his leg, causing back injury.

B. Course of Proceedings and Disposition of Court Below

Mr. Kreyling filed his Complaint on or about July 8, 2005, against Defendants St. George City, Washington County, and Watts Construction, Inc. (R. at 1) Plaintiff subsequently settled its claims against Washington County and Defendant Watts Construction. (R. at 605).

Defendant St. George City filed a Motion for Summary Judgment on or about April 13, 2007. (R. at 270). In its Motion for Summary Judgment, City of St. George maintained that (1) Plaintiff's claims were barred by governmental immunity because Plaintiff's injuries arose from a "latent defect" located upon the park strip, (2) the adjoining land owners had some obligation to maintain the park strip area pursuant to St. George City Code, (3) and that Plaintiff may not maintain his personal injury action against a governmental entity because Defendant owed Plaintiff no special duty of care. Id. Mr. Kreyling opposed Defendant's motion for summary judgment, arguing that (1) Defendant's duty to maintain its property was non-delegable despite city ordinance, (2) a determination of "latent defect" required a finding of reasonableness best left as a question by the finder of fact, (3) Defendant City had a special duty to use reasonable care to prevent Mr. Kreyling's injury, and (4) there exists genuine issues of material fact. (R. at 381).

On October 5, 2007, the trial court signed a two-page Order granting Defendant St. George City's motion for summary wherein the court simply rules that "there is no probative evidence that the City of St. George created the defect or condition in the park strip, or knew or should have known any defect or condition." (R. at 615). Mr. Kreyling timely filed his Notice of Appeal and the Utah Supreme Court transferred this case to this court, wherein he seeks relief from the judgment of the district court below. (R. at 618).

C. Statement of Facts

This personal injury case began in September, 2003, when Mr. Kreyling accompanied his wife to a luncheon offered at the St. George Senior Center. At that time, a new Senior Center was under construction and the Center was operating in an adjoining former church house. (See Deposition of Jule Kreyling, attached as Exhibit A and incorporated herein by this reference, p. 21 line 25, p. 22 lines 1-5). On that date, Mr. Kreyling pulled up in front of the parcel where the new St. George Senior Center was being constructed. (See Ex. A p. 23 lines 12-14). Mr. Kreyling parked the car alongside the curb, and went around to the passenger door to assist his wife from the car. (See Ex. A p. 23 lines 18-25, p. 24 lines 1-3). As Mr. Kreyling traversed the park strip, his foot and leg fell into a cylindrical hole deep enough that he sunk into the hole up to his groin with his other leg sticking outward along the ground. (See Ex. A p. 27 lines 19-25 p. 28 lines 1-5). As an elderly and handicapped person, (Mr. Kreyling is missing most of his left arm from just above the elbow down) (See Ex. A p. 20 lines

13-19). he was unable to extricate himself from the hole. (See Ex. A p. 28 lines 6-11). Nearby construction workers came to the scene and assisted him out. Id.

In the months that followed, Mr. Kreyling sought and obtained medical treatment for back pain that immediately ensued after the accident. Mr. Kreyling sought appropriate care from his orthopedic physician, chiropractors, physical therapists, and pain management specialists. Mr. Kreyling incurred medical expenses and pain and suffering.

SUMMARY OF ARGUMENTS

First, this court must decide whether City of St. George may delegate, and thus avoid liability, maintenance of park strip areas to adjoining land owners by virtue of municipal code. Second, this court must determine whether the trial court may properly issue summary judgment on an issue of “reasonableness” as it pertains to a “latent defect” thus removing such question from an ultimate finder of fact. Lastly and likely related to the question of “reasonableness,” the court must determine whether the trial court appropriately issued summary judgment despite a significant dispute of fact regarding the existence and size and nature of the defect itself.

City argued in summary judgment that liability of maintaining park strip areas is the responsibilities of adjoining land owners, other defendants in this case, and by virtue of city ordinances. Mr. Kreyling will assert that Utah law has long held that a city may not delegate such duties.

The trial court in this case granted summary judgment essentially upon the premise that the dangerous condition in question was a “latent defect” and that Mr.

Kreyling's claims were barred under the doctrine of governmental immunity. As is further explained below, Utah law has long held that a "latent defect" is one that would not normally be discovered upon reasonable inspection. Mr. Kreyling asserts that the court below should have reserved any question of reasonableness for the jury in this case, being the ultimate finder of fact.

Lastly, City of St. George, in its Motion for Summary Judgment, appears to question the very existence of the defect and describes the defect, if any, as an "indentation" or scooped out area, in its statement of undisputed facts. Mr. Kreyling, in his Memorandum in Opposition to Summary Judgment, clearly disputes those questions of fact, maintaining that the defect was a deep, cylindrical hole. Consequently, the very existence and description of the defect was drastically disputed in the issues of fact.

ARGUMENT

I. THE DISTRICT COURT ERRED MAKING SUMMARY JUDGMENT UPON THE GROUNDS THAT DEFENDANT CITY MAY NOT DELEGATE ITS DUTIES TO MAINTAIN CITY PROPERTY BY CITY ORDINANCE.

City asserts that St. George, Utah, Code § 4-7-11 provides generally that property owners are expressly responsible for maintaining curbs, gutters and sidewalks, and keeping walkways in good repair free from large holes, cracks or other unsafe conditions. (R. at 274, 279). Furthermore, City asserts that St. George, Utah, Code § 7-1-7 provides generally that private land owners are prohibited from obstructing any ditch or gutter upon any street or sidewalk. Id. City asserts that said

ordinances place the liability for any injuries due to dangerous conditions on a park strip to the adjoining property owner. (R. at 280).

Regardless of city ordinance, Defendant City is still responsible to keep its property in a reasonably safe condition. Specifically, under Utah law, a “city has a non-delegable duty to exercise due care in maintaining streets and sidewalks within its corporate boundaries in a reasonably safe condition for travel and may be held liable for injuries proximately resulting from its failure to do so.” Ingram v. Salt Lake City, 733 P.2d 126, 127 (Utah 1987). The area over which Defendant City has responsibility includes “the sidewalks and all area between.” Id.

Defendant City’s duty to maintain area in which Mr. Kreyling was injured exists, notwithstanding any concurrent duties by adjoining property owners, by city ordinance. Utah courts have already decided and held that negligence of a property owner, in even the application of the special use doctrine upon which Defendant City relies, will not diminish any duty owed by a city to maintain its property surrounding a public street. Specifically, a bicyclist was injured when he crossed through a business owner’s parking lot and crashed in a ditch that appeared to be a driveway exiting the parking lot. Rose v. Provo City, 2003 Utah App. 77, ¶ 5 67 P.3d at 1017. The trial court, in that case, granted directed verdicts for both the business owner and the city but the verdicts were reversed upon appeal, with respect to both the business owner and the city. Specifically, even though the court found that the business owner could be liable pursuant to the special use doctrine, upon which Defendant City relies in this case at hand, the court went on to find that the city could also be found liable for the

breach of its non-delegable duty to maintain its property adjoining the street, notwithstanding the business owner's liability. Id. at 1024. Therefore, even if an adjacent property owner is liable for negligently creating a dangerous condition on adjoining city property, such negligence will not preclude liability on the part of the city. Just as in Rose, Defendant City's negligence is not excused by the negligence of any other party. Defendant City owed Mr. Kreyling a non-delegable duty to keep its property, including the property on which Mr. Kreyling was injured, in a reasonably safe condition. By failing to do so, Defendant City breached its duty, regardless of the negligence of any other party. Therefore, justice requires that a jury determine the negligence of the party in the case at hand and to properly apportion damages to each defendant based upon their individual liability.

II. THE DISTRICT COURT ERRED IN APPLYING GOVERNMENTAL IMMUNITY TO DEFENDANT CITY BASED UPON "LATENT DEFECT."

In its motion for summary judgment, City argued that under the Governmental Immunity Act that immunity is waived unless the injury arises out of a "latent defect of any road, street, sidewalk or other structure located on them." (quoting Utah Code Ann. § 63-30-10(16) (2001). (R. at 279). A "latent defect" is a defect which would not be discovered upon a reasonable and careful inspection. Vincent v. Salt Lake County, 583 P.2d 105, 107 (Utah 1978). City goes on to assert that the hole in question qualifies as a "latent defect." Id.

The trial court's grant of summary judgment on this issue is inappropriate because it requires answering a question of reasonableness. To determine if a defect is

“latent” the finder of fact must decide that a “reasonably careful inspection” would not result in the discovery of the defect. Pigs Gun Club, Inc. v. Sanpete County, 2002 Ut. 17, ¶ 26, 42 P.3d 379 (quoting Ingram v. Salt Lake City, 733 P.2d 126, 127 (Utah 1987); Vincent v. Salt Lake County, 583 P.2d 105, 107 (Utah 1978)). However, summary judgment is inappropriate, except in the most clear-cut case, when questions of negligence, or reasonableness of a party’s conduct must be decided. The Utah Supreme Court described the rationale behind this doctrine as follows:

“Summary judgments are more frequently given in contract cases...however, when it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position to make a total determination for here enters a prerogative of the jury to make a determination of its own, and that is: did the conduct of a party measure up to that of the reasonably prudent man and, if not, was it a proximate cause of the harm done?

Bowen v. Riverton City, 656 P.2d 434, 436-37 (Utah 1982) (quoting Singleton v. Alexander, 431 P.2d 126, 128 (Utah 1967)). Therefore, a court should refrain at the summary judgment phase from determining whether a party’s conduct is “reasonable.”

The Utah Supreme Court reached a result that is directly on point with the case at hand. In Ingrahm v. Salt Lake City, 733 P.2d 126 (Utah 1987), a man sued the city after he was injured falling into a manhole, and the trial court granted summary judgment to the city on governmental immunity grounds. Id. at 126. A trial court ruled “that either the latent defect of the manhole lid or the city’s failure to inspect

constituted exceptions to the waiver of immunity under the Governmental Immunity Act.” Id. at 127. On appeal, however, the Utah Supreme Court reversed the grant of summary judgment and remanded the matter for trial. Id. at 128. The court specifically noted that “what constitutes a defective, unsafe or dangerous condition of a parkway or a latent defect of the water meter lid presents a question of fact that is properly answered by a jury.” Id. at 127(emphasis added); see also Pigs Gun Club, 2002 Ut. 17 ¶ 26, 42 P.3d at 386 (“we have stated that the existence of a latent defect is a question for the fact finder to answer.”; Alott v. University of Utah, 2000 Ut. App. 286 ¶ 18, 12 P.3d 1011 (noting in a latent defect case that “...questions of reasonable necessarily poses questions of fact which should be reserved for jury resolution” (quoting Darrington v. Wade, 812 P.2d 452, 459 (Utah Court App. 1991))). Moreover, “a conclusion in an affidavit that reasonable inspection would not discover the defect may not form the basis for summary judgment.” Id. Therefore, summary judgment is not appropriate with respect to the claims of “latent defects” because whether an inspection sufficient to discover the defect is “reasonable” is a question of fact to be determined by the jury.

Summary judgment was inappropriate in this case because Defendant City’s latent defect claim should be decided by a jury. Just as in Ingram, the plaintiff in this case fell into a hole on property that the city had a duty to maintain. Also, just as in Ingram, it is the province of the jury to determine whether the hole into which Mr. Kreyling fell was a latent defect detectable by a “reasonable” inspection of the premises. The court’s only inquiry onto this issue was as follows:

“Well, counsel, are we going to all the directors of the streets departments from Washington City, Santa Clara City, Ivins City, St. George City, Hurricane City and have them all come in and testify as to how they inspect their streets to determine whether or not St. George City was reasonable in its treatment of this location where the injury occurred?”

(R. at 637, p. 20 lines 11-17).

Plaintiff correctly responded to the trial court that it was clearly an issue required for the finder of fact. Based upon the foregoing, the issue of reasonableness was an issue required to be presented to a finder of fact and is inappropriate for summary judgment.

Despite the question of reasonableness, there existed sufficient disputed facts that the hole in question was not a latent defect. Specifically, Defendant City had constructive, if not actual, notice that the hole was created. An examination of the pictures displaying the hole into which Mr. Kreyling fell shows that a concrete driveway, when originally formed, was poured around an object that was extending above the ground, creating a semi-circle in the edge of the driveway. (R. at 637 p. 18 lines 7-25, p. 18 lines 1-2). Therefore, Defendant City knew, or should have known, when the concrete for the driveway was poured that an object was in the ground upon city’s property and next to the driveway.

Defendant City also knew that Defendants County and Watts Construction were doing construction in the area. As such, Defendant City knew that sidewalks would be damaged, whether from heavy equipment being driven across the sidewalk to adjoining property, through the destruction and removal of the sidewalk during the

construction process, or through the removal of an object which created a hole next to the sidewalk.

Based upon the foregoing, there are significant issues of fact that remain for the ultimate finder of fact in determining whether the dangerous conditions were “latent defects.”

III. DID THE DISTRICT COURT ERR WITH REGARD TO GENUINE ISSUES OF MATERIAL FACT DESCRIBING THE DANGEROUS CONDITION UPON DEFENDANT CITY’S PROPERTY?

It is difficult to determine from the court’s ruling whether it made any particular finding as to the nature of the defect. Nonetheless, there did exist genuine issues of material fact as to the existence and the nature of the dangerous condition in question. Given the court’s determination on the prior issue, as to whether the dangerous condition constituted a “latent defect” it is imperative to understand the existence of the dangerous condition and its nature. Generally, it is inappropriate to grant summary judgment when there exists genuine issues of material fact. Utah Rules of Civil Procedure, Rule 56.

City of St. George in its Motion for Summary Judgment asserts the following as “undisputed fact”:

Paragraph 11... Plaintiff parked his vehicle parallel to the side of the road alongside the culvert roughly even with a ramp going over the culvert, walked around the car to open the door for his wife, and then stepped into the alleged “hole.” (R. at 274).

Paragraph 47...The Washington County building superintendant was not aware of the hole, because the area neither looked deep nor was it an obvious hole. Although, it had been dished out, it was not a “hole.” (R. at 278).

Paragraph 49...The size of the area Plaintiff alleges was a “hole” was nine inches deep near the gutter, covered by leaves all over. (R. at 278).

Paragraph 50...There were no holes or anything out of the ordinary between the curb and gutter and the sidewalk. (R. at 278).

Plaintiff, in his opposition to summary judgment, strenuously denied each of the foregoing “statements of undisputed fact” and properly cited to the record showing a significant dispute of fact. (R. at 384, 387-389). Indeed, in argument, Plaintiff’s counsel made it clear that there existed a significant dispute of fact. (R. at 635 p. 14 lines 9-25, p. 15 lines 1-7, p. 20 lines 2-10). Clearly, the City, in its undisputed facts, seems to suggest that the dangerous condition was a mere “dished out” area or was “nine inches deep.” The City further suggests that, by the undisputed facts, the hole simply did not exist.

Mr. Kreyling disputed any allegation that the hole into which he stepped, causing his injury, was only nine inches deep or was a mere indentation. Rather, Mr. Kreyling testified that the hole into which he stepped was at least deep enough to fit his entire leg, from foot to groin. (Deposition of Jule Kreyling at 27-28, 35 (noting that the hole was “deep, too, like I said, but my foot never even touched the bottom of the hole”)). (R. at 387-389).

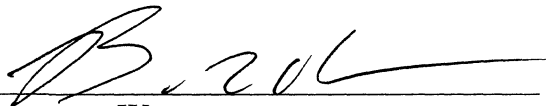
Based upon the foregoing it is clear, that there exists a significant dispute of fact as to the existence and the size and nature of the dangerous condition in question. The existence, size, and nature questions go directly to the question of “latent defect” previously presented, in that one must ask what type of condition is discoverable upon reasonable inspection. It is unclear from the entire record as to what finding of fact the court made regarding the existence, size and nature of the hole. Rather, the court seems to simply state that, regardless of the existence, size, or nature of the hole, it would not have been discovered upon reasonable inspection. In any event, it is clear that there exists a significant, genuine issue of material fact as to the existence or nature of the hole in question. Consequently, summary judgment is inappropriate.

CONCLUSION

The district court erred in its grant of summary judgment. It is somewhat unclear as to exactly which argument the court bases its decision on, but the court’s order (“There is no probative evidence that the City of St. George created the defect or condition in the park strip, or knew or should have known of defect or condition.”) suggests a finding of “latent defect.” In order to find latent defect the court must have come to the conclusion that the hole would not have been discovered upon reasonable inspection of the property. The question of “reasonable” inspection is one only a finder of fact, a jury in this case, can determine. This is especially true in light of the fact that there exists wildly different descriptions of the dangerous condition in question. Based upon the foregoing, the trial court erred in issuing summary judgment

in favor of the defendants and that decision should be reversed. Plaintiff should be entitled to present his evidence to a jury for proper determination of this matter.

DATED this 24 day of April, 2008.



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ADDENDUM

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EXHIBIT A: *Deposition of Jule Kreyling*

EXHIBIT B: *Order Granting Defendant St. George City's Motion for Summary Judgment*

EXHIBIT A

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JULE KREYLING,)
)
Plaintiff,)
)
vs.)
)
CITY OF ST. GEORGE, a Utah municipal) Civil No.
corporation, WASHINGTON COUNTY, a) 050501129
political subdivision of the State of) Judge:
Utah d/b/a St. George Senior Citizen) James L.
Center, and RICHARD WATTS CONSTRUCTION,) Shumate
INC., d/b/a WATTS CONSTRUCTION CO., INC.,)
and JOHN DOES 1-X,)
)
Defendants.)
)

DEPOSITION OF JULE KREYLING

Taken at the Law Offices of
Snow, Jensen & Reece
134 North 200 East, Third Floor
St. George, Utah

On Tuesday, October 31, 2006
At 1:00 P.M.

Reported by: J. Elizabeth Van Fleet, RPR, CSR

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 801 521 6677

1 Whereupon,
 2 JULE KREYLING,
 3 having been first duly sworn to testify to the
 4 truth, the whole truth and nothing but the truth,
 5 was examined and testified as follows:
 6 -oOo-
 7 EXAMINATION
 8 BY MR. HARDMAN.
 9 Q. Okay. Mr. Kreyling, how would you prefer
 10 that I address you? Do you want me to call you
 11 Mr. Kreyling or Jule or what would be best for you?
 12 A. Jule. It's Kreyling anyway.
 13 Q. Kreyling, okay. I apologize. I've been
 14 pronouncing it incorrectly now for going on, what,
 15 two years or a year and a half?
 16 MR. OLSON: I probably have as well, so
 17 it's --
 18 MR. HARDMAN:
 19 Q. Mr. Kreyling, Jule, have you ever had your
 20 deposition taken before?
 21 A. Nope.
 22 Q. Okay. Well, that being the case, let me
 23 just kind of cover with you some sort of
 24 housekeeping rules. I'm sure you've probably spent
 25 some time discussing depositions with your attorney

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1 and why it is that the other attorneys and I are
 2 wanting to depose you today.
 3 Maybe before I get into that, I'll just
 4 rep -- just to tell you who I am, my name is Greg
 5 Hardman, and I represent Watts Construction, which
 6 was the general contractor on the senior center.
 7 And the other two attorneys here; one represents
 8 Washington County and the other represents the City
 9 of St. George. And I'll let them make a more
 10 formal introduction should they choose to do so
 11 later when they have a chance to ask you some
 12 questions.
 13 A. Okay.
 14 Q. But a deposition is an opportunity for us
 15 as attorneys to ask questions of both parties and
 16 witnesses in the lawsuit just to find out, you
 17 know, in your case what you know about this
 18 particular accident. And since you're the
 19 plaintiff, we will also want to ask you questions
 20 about your medical history and health conditions
 21 and things before and after the accident and kind
 22 of get into the particulars of the claim that you
 23 filed against Watts Construction and the City of
 24 St. George and Washington County.
 25 In order for us to make a good transcript

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1 of the -- of this deposition, as you probably have
2 surmised, the lady to my right here is a court
3 reporter, and she's taking a verbatim transcript of
4 everything that is said here today. And as
5 attorneys, should this matter proceed beyond the
6 stage that it is now, we may refer back to your
7 deposition when you're perhaps testifying in court,
8 if it gets to that point. The deposition may be
9 useful to refresh recollection or remind you of
10 things that you would have stated on this date.

11 And so recognizing that, you've been
12 placed under oath. It's the same oath that you
13 would take if you were in court. You know, we all
14 expect that you will testify truthfully and to the
15 best of your recollection.

16 Secondly, when -- you know, as humans as
17 we speak, just like I'm doing now, I kind of
18 gesture with my hands sometimes when I talk. None
19 of that can be transcribed very well. And so when
20 answering my questions, please try and do so, you
21 know, with a yes or a no, rather than nodding or
22 gesturing, even though I'll know what you're
23 intending to be as a response as will the others in
24 the room. That's not something that can be
25 transcribed very clearly, and we want to make sure

1 Q. Did you work in New York state following
2 your graduation from --

3 A. No.

4 Q. -- Rochester?

5 A. My father had a printing business in
6 Irvington, New Jersey, and I went to work -- back
7 to work for him and so did my brothers. The three
8 of us were in together.

9 Q. What kind of printing did you do back
10 then?

11 A. Letter press and oil set. Mostly just
12 commercial printing for smaller businesses. And it
13 was during the war and we were getting some
14 government contracts which we bid on. And it was a
15 little nicer because the paper was rationed. A lot
16 of things were rationed during the war, even your
17 gas, and we could preserve our business. But the
18 government on war items, you know, survived a
19 little better.

20 Q. And did you -- was work as a printer your
21 primary vocation or occupation throughout your
22 whole life?

23 A. Yeah. I started printing when I was 10
24 years old, and I'm still in it.

25 Q. Okay. I'm going to ask you a little bit

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1 we're preserving your testimony the way that you
2 intended for it to be here today.

3 So having kind of covered those basic
4 ground rules, do you have any questions of me or
5 the process before we --

6 A. No.

7 Q. -- begin? Okay. Oftentimes, when
8 deposing the parties in a lawsuit, the plaintiff,
9 in particular, I like to just get a little
10 background information to try and understand a
11 little better, you know, who you are as a person,
12 get your life experiences and some of those kinds
13 of things. And so we'll go ahead and kind of begin
14 there.

15 I'll ask you: What sort of formal
16 education do you have beyond high school?

17 A. I went to Rochester University RAT in
18 Rochester, New York and graduated in printing and
19 publishing. At that time it was a two-year
20 course. Both summers were given, so I -- and I got
21 a associate degree.

22 Q. Okay. And did you complete any formal
23 education beyond the associate's degree from
24 Rochester University?

25 A. No.

1 about your current printing business in a few
2 minutes.

3 When did you move to the St. George area?

4 A. 1975.

5 Q. And what was it that caused you to move to
6 St. George?

7 A. I don't know.

8 Q. Just a change of scenery or did you retire
9 from your employment?

10 A. Well, we came here to get -- we came here
11 to get married in the temple and we liked it. And
12 so when we got back to New Jersey, I finally wound
13 up selling my business in New Jersey, me and my
14 brother. My dad was out of it by then. And they
15 hired me on. Part of the arrangements were that I
16 was hired on to be a -- run one of his plants. He
17 had six or seven printing plants in New Jersey, the
18 fellow that bought them and bought our plant, and
19 we worked for him for a while.

20 And then he decided to close the plant
21 down. He wanted me to go on the road selling, and
22 I'd rather be closer to the machinery and the
23 actual production of the printing. So I finished
24 out -- my contract was five years, and he bought me
25 out and I moved to St. George. In fact, I guess I

4 (Pages 10 to 13)

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1 collected money from him for about a year and a
2 half and that helped me get going here. Then I set
3 up a printing business here.

4 Q. Tell me a little bit about your printing
5 business here. Did you begin this -- is it the
6 same printing business that you're doing today that
7 it was when you first started here in St. George in
8 terms of the kind of printing that you do?

9 A. Yeah. I had bigger equipment and a bigger
10 place to do the business in. But for some
11 complications, I had -- someone counter sued me,
12 was Blaine Hudson in Salt Lake City. I got a big
13 job for a customer of mine. And I didn't handle
14 it, he handled it direct. He just wanted to know
15 who could handle a job this big. So I suggested
16 Blaine Hudson.

17 And then when he -- the job got finished,
18 he had broken his leg and was unable to travel up
19 there and get it, so he asked me if he got me a
20 U-Haul truck if I could go up and pick the order
21 up, and I did.

22 And, naturally, when you pick an order up,
23 you sign for it, and then he absconded with the
24 money. This was a big job for Del Webb in Vegas
25 for their houseboat business and stuff like that.

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1 And it came to about \$60,000. And so they sued me
2 for the 60,000, even though it was his check that
3 paid for it and later bounced.

4 And so I went to an attorney here in town,
5 and he didn't do anything. He failed to go to
6 court, so I had to file bankruptcy. I lost
7 everything. I had a place up in -- I had 10 acres
8 up in Dammeron which I traded for. I had a house
9 down here at the temple. I had a two-story
10 building where Allgood got shot, that coin
11 building, that was mine. And so I lost
12 everything. I had to start over again.

13 Q. When did that occur, roughly, what year?

14 A. I really can't remember. It was -- I'm
15 trying to think now. I can't remember when they
16 sold the building or took it over. It wasn't
17 Allgood; it was someone else that took the building
18 over. I would say that was maybe 15 years ago. I
19 had a much bigger press. It was one of the biggest
20 presses in town. I was about the only printer here
21 when I started except the boys that own the
22 Washington County News. The Malfords owned that.

23 And then I bought a big press out of
24 Denver so I could do some bigger sheets. You
25 remember the maps for the Chamber of Commerce that

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1 are put out? It was the huge big map, it was all
2 folded up. I used to get that order every year.
3 And so I had to go into a much smaller operation,
4 because I kept some of the equipment. But --

5 In fact, my home teacher, old Brother
6 Gilbert Jennings, came to the auction, and he bid
7 on some of the equipment, then just gave it to me.
8 So I got a good start there. Someone really helped
9 me out. And -- but it is tough starting over
10 again.

11 Q. So approximately 15 years or so ago you
12 started --

13 A. Yeah. I can't even remember.

14 Q. -- you started over in the printing
15 business that you currently maintain today in terms
16 of the kind of equipment and orders that you fill?

17 A. Yeah, but I was in a different place. You
18 know where Allgood is; right?

19 Q. Uh-huh.

20 A. Up on the corner there's that little gray
21 house that the Anasazi lady owned it. I think it
22 was a guy named Pierce lived there. I went into
23 the garage, put my plant in there until they sold
24 that building.

25 And then I went to Jay Ence, and he rented

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1 me a place, a building in his little mini mall up
2 there about halfway up on maybe about 3, 400 North
3 on Bluff on the left-hand side. On the other side
4 is a church. Do you know where that is?

5 Q. Uh-huh.

6 A. And I had a print shop there. And he
7 traded me printing for the rent, which got me going
8 a little better, too. And then when I -- when
9 he -- we outgrew that, or whatever, I can't even
10 remember exactly what happened, but I just -- I
11 bought a house, and I put the business in my
12 garage.

13 Q. And has the printing business been
14 continuously maintained in your garage since 2002,
15 prior to the accident 2003?

16 A. Oh, yeah. It was -- I was working there
17 at it, but since the accident, I had to eliminate
18 some of my customers. Some of them were pushing me
19 too hard, and I was working too many hours. I
20 couldn't handle it anymore. They would give me --
21 I was doing a lot of work for Josh Warburton. Do
22 you know Josh?

23 Q. I don't.

24 A. He puts out that -- he put out that
25 Sampler for a while. He put out a number of

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1 magazines and stuff. And he had a lot of big
2 accounts. And I would do his work, but he was such
3 a deadline on some of the stuff, that I couldn't
4 handle it, because they'd give me one particular
5 job for Papa Murphy's we used to do weekly. The
6 magazine was a weekly magazine.

7 And he put it -- it just got too much. I
8 used to get 12 or 15,000 sheets printed, two sides,
9 and he'd give it to me at 5:00 in the morning and I
10 had to deliver it to The Spectrum office to collate
11 it. And this paper is at 7:00 in the morning, so I
12 would be up all night doing that. And once a
13 week. And it just got too much after the
14 accident. I just couldn't stay on my feet that
15 long. So I just -- I don't know who's doing it now
16 for him.

17 MR. OLSON: Greg, can I break in just a
18 minute? Can I get him a more sturdy stair?

19 MR. HARDMAN: I was just going to mention,
20 there's a lever on the side that you can push in,
21 and then it won't rock back.

22 MR. OLSON: It's won't rock back. Is it
23 this one right here?

24 MR. HARDMAN: Yeah. It pushes in.

25 MR. OLSON: Is that better, Jule?

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1 THE WITNESS: Yeah.

2 MS. HUTTON: I was going to ask him the
3 same thing, though. It's making me uncomfortable.

4 MR. HARDMAN: Is that better for you, more
5 comfortable?

6 THE WITNESS: Yeah.

7 MR. HARDMAN: Okay.

8 THE WITNESS: And so I eliminated some of
9 the customers that were a little problem and stuff
10 like that because I was -- I'm 76 now. I was,
11 what, 72 or -- 72 or 3. I don't remember how old I
12 was. I should have been retired, but I needed the
13 money, and so I kept it going. And so I just --
14 I'm much smaller now in my garage than I was
15 before, you know.

16 And I've got a lot of extra running around
17 since then because I got a city license and they
18 know I'm doing it at home, but they put some
19 restrictions on you. You're not supposed to have
20 customers coming and do a lot of deliveries going
21 to your house and stuff.

22 So everything that I need, paper and
23 material, I go and get it myself and deliver the
24 jobs, and so no customers ever came to my home
25 since I had that business in my house.

1 MR. HARDMAN:

2 Q. Okay. Tell me about the kind of equipment
3 that you operate in your printing business.

4 A. Well, right now I've got a small press.
5 It takes 11/17 sheet. It goes about 6,000 an hour,
6 and I had -- I had put in another one, I bought
7 another one that's a little bigger. It was 14x17,
8 but I didn't use it that much, so I got rid of
9 that. And basically that's all I do. I used to
10 have a little, believe it or not, Atari computer
11 and I used to do my own type setting and stuff like
12 that.

13 Q. What -- what manual labor is required of
14 you to operate the press? For example, I mean, do
15 you have to load it with paper?

16 A. Yeah, you do.

17 Q. Okay. And what else?

18 A. Set it up and make sure it registers and
19 running fine. And you don't just sit there.
20 Presses are very temperamental sometimes, you know.
21 Sometimes you could sit there and run it and run it
22 for hours and hours and then all of a sudden it
23 starts acting up and it drives you crazy.

24 Q. Are there parts of the equipment that you
25 operate that are pretty heavy that you have to lift

1 over your head?

2 A. No, I wouldn't say that. You've got to
3 get down inside of it sometimes and repair things
4 and oil it and stuff like that.

5 Q. And so the printing work that you're
6 doing, I take it they're primarily inserts for the
7 newspaper?

8 A. No. Right now I do four or five jobs a
9 year for -- and some of them they are repeat for
10 the temple. The men's and women's clothing slips
11 that they rent down there. And then they give a
12 schedule every year of the times of endowments and
13 stuff like that. And those little things that fit
14 in your -- you know what I'm talking about?

15 Q. Uh-huh.

16 A. The schedules. I do about 50,000 of them
17 a year. I do most of them in January. And then I
18 do some work for Bryce Christensen. That's just
19 simple little work that I do, not very
20 complicated. And that's about all I do, but I
21 don't have too many customers left now.

22 Q. And is it your testimony that that's a
23 result of the injuries that you sustained that
24 have --

25 A. Yeah. I've -- I just couldn't work out

6 (Pages 18 to 21)

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1 there that many hours a day, so I got rid of the
2 troublesome customers that would either beat me
3 down on the price all the time or it was short
4 deadlines to get the jobs done. And I just
5 couldn't take the pressure, so I gave some of them
6 up.

7 Q. Okay. Who are your -- you've mentioned
8 your primary customers now.

9 A. The temple, Dixie Oral Surgery and Bryce
10 Christensen. That's about -- that's the most.

11 Q. He's an excavation contractor or --

12 A. Yeah. I just do his weigh slips when --
13 he's got a scale out there. And his invoices.

14 Q. And then prior to the -- let me ask you,
15 just so we have a point of reference: What is the
16 date on which you contend you were injured?

17 A. The date?

18 Q. Uh-huh.

19 A. I don't know. It was September
20 something. Comes to mind like the 20th or
21 something. I can't remember --

22 Q. Okay.

23 A. -- the exact date of it. But we've got it
24 all written down.

25 Q. Okay. So since September -- 2003 was the

1 defendant in a lawsuit, have you ever been a party
2 in a lawsuit, either a plaintiff or a defendant,
3 other than that instance or this particular case?

4 A. No.

5 Q. I assume when you visited with your
6 attorney about the deposition he probably told you
7 that one of the things that we would be a little
8 interested to have you kind of discuss with us is
9 the extent to which your left arm, you know, may
10 impede your balance or, you know, affect your
11 mobility or your -- just your kind of day-to-day
12 life skills.

13 Let me ask you, if I may: What was the
14 circumstance that led to your -- the injury there
15 to your left arm?

16 A. Oh, I was born that way.

17 Q. Oh, okay. Okay. And do you wear any sort
18 of a prosthetic limb with that?

19 A. No.

20 Q. Okay. I want to kind of get into the --
21 sort of the circumstances of the accident, but
22 before we talk about the accident itself, tell me a
23 little bit about kind of your habit or routine in
24 going to the senior center.

25 A. We usually go there two, three, sometimes

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1 year? Is that correct, 2003?

2 A. Yeah. Is that when I had the fall?

3 Q. So since September 2003, these three
4 customers have been pretty much the only ones for
5 whom you've been doing any work?

6 A. Right.

7 Q. What about prior to the accident during
8 the time you were operating the printing business
9 in your garage, who were your principle customers?

10 A. Of course, it was them and then there was
11 just people, you know, that would come and call me
12 because they knew me before and just other small
13 businesses. I gave Josh Warburton up with his
14 stuff, and I was doing quite a bit for him, because
15 he was so tight on the deadlines. He drove me
16 crazy. I'd do a little work -- I usually do a
17 little work for the school district once in a
18 while. I still do a couple of small jobs for them,
19 but not much.

20 Q. You mentioned that you were, I guess, a
21 defendant in a lawsuit, this lawsuit over the Del
22 Webb printing job, and that you -- and that's a
23 matter in which you -- led to you filing for
24 bankruptcy.

25 Other than that instance where you were a

1 four times a week.

2 Q. When you say "we," to whom are you --

3 A. Me and my wife.

4 Q. Okay.

5 A. For lunch. We go there for lunch.

6 Q. Is your wife still living?

7 A. Uh-huh.

8 Q. Did you participate in any other
9 activities there at the center --

10 A. No.

11 Q. -- beyond lunch?

12 A. No, just lunch.

13 Q. And about how often would you go during
14 the week, did you say?

15 A. At least twice. You know, sometimes it
16 would be three times, but that would be rare, I
17 think.

18 Q. Let me ask you: Prior to the accident,
19 which you believe occurred sometime in September
20 2003, when you were visiting the senior center a
21 couple of times a week for lunch, did you have
22 occasion to observe that the construction of the
23 new center as it was going on sort of next door to
24 the old center?

25 A. Yeah. There was some -- there was some

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1 action there, but it was in the -- I guess we were
2 going to that old -- it was a church building at
3 the time, the old stake center or something. We
4 were going to there about a year before they
5 started that, my wife and I.

6 Q. Before they started the -- the County
7 started construction of the new senior center?

8 A. Right.

9 Q. And in the days or weeks leading up to the
10 accident, do you recall, as you would go to the
11 senior center during the lunch hour or prior
12 thereto for -- to have a meal, did you encounter
13 any difficulties in finding a place to park at that
14 hour?

15 A. No. We never had too much trouble
16 parking. Just have to park on the street. There
17 was no parking lot there basically. There was, I
18 think, a small one behind that church center there
19 because they used to help a handicap troop that was
20 stationed in there. It was the -- American Legion
21 was our supporter on that one. We funded the kids
22 that were handicapped and retarded, run a scout
23 troop just for them in there.

24 Q. Do you recall there being any -- there
25 being a chain link fence around the perimeter of

1 happened. I think maybe I'd just go around and
2 help her out. She either had the Jazzy or a
3 walker.

4 Q. A Jazzy, is that what you called it?

5 A. Yeah.

6 Q. What is that?

7 A. It's an electric wheelchair basically for
8 handicapped people.

9 Q. Okay. And so did she have difficulty
10 walking, then?

11 A. Yeah. She's diabetic and she had a stroke
12 and it was too hard for her to get around. She got
13 overweight and so we'd just park and go around and
14 open the door and help her out and put her in the
15 chair and wheel her in there or something.

16 Q. Do you recall, on the date of the
17 accident, was she using her Jazzy wheelchair or her
18 walker?

19 A. I think she was just using the walker
20 then.

21 Q. Okay. Let me kind of orient you, then, to
22 the date of the accident itself. You're
23 approaching the senior center. Do you recall from
24 which direction you were traveling?

25 A. Traveling south on a road that was closest

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Page 25

1 the new senior center during the time it was under
2 construction?

3 A. I never saw any.

4 Q. What about orange cones? Do you recall
5 any orange cones being placed out in the street or
6 next to the sidewalks during the time of
7 construction of the senior center?

8 A. No, not where we parked. We just parked
9 in front of it.

10 Q. And where did you typically park when you
11 went to the senior center for lunch?

12 A. Parked on the right-hand side of the road
13 going south. We were just going to make a U-turn
14 and park right in there by the main entrance to it.

15 Q. Just right out in front of the main
16 entrance to the old center was where you'd
17 typically park there along the street?

18 A. Right. And there was the walkways that
19 came out in two or three spots. I'd try to get
20 near one of them because my wife was, at that
21 point, having a lot of trouble with her legs and I
22 would have to help her out and all. And so she
23 would sit in the car and I'd come there.

24 And I forget if she had a Jazzy then, but
25 she had her a Jazzy when we were -- when that

1 to the senior center. I would always come a little
2 early so she would get a seat. I made a -- either
3 I made a U-turn or I came in on that right-hand
4 side going south.

5 Q. When you say "the right-hand side,"
6 recognizing it could be the right hand depending on
7 which -- could be right or left depending on which
8 direction you're traveling, you mean right in front
9 of the center?

10 A. Right.

11 Q. The side of the road immediately in front
12 of the main entrance to the center?

13 A. Where the road was going south, yeah.

14 Q. And so on this particular date, then, you
15 would pull up alongside the -- well, let me --

16 A. There was an individual walkway there
17 going -- there was irrigation ditches there, and
18 there was -- every place -- every once in a while
19 they would have a walkway going into the center,
20 and it came out over the thing. The water would
21 run under it. Irrigation would run under there.

22 So I'd help her across that and then we'd go in and
23 get a place to sit and eat our lunch and then come
24 out and put her in the car.

25 Q. So you would try and pull up alongside one

8 (Pages 26 to 29)

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1 of these little concrete bridges, culverts going
2 over the irrigation line, so that she could get
3 over that, whether she was in her walker or her
4 wheelchair?
5 A. (Witness nodded affirmatively)
6 Q. Let me -- as you probably know, we were
7 taking some depositions of some other folks this
8 morning, and we previously marked, as Exhibit 1 to
9 those depositions, a series of photographs. And
10 this is -- we'll now mark this other sheet as
11 Exhibit No. 6 to your deposition, or to the
12 depositions. And just for reference let me take
13 that back from you for a moment. I'm going to make
14 some numbers here on these pictures so that we can
15 all refer to them

16 (Whereupon, Deposition Exhibit 6
17 was marked for identification.)

18 MR. HARDMAN:

19 Q. Okay. I'm going to place in front of you
20 what we've marked as Exhibits No. 1 and 6 to the
21 depositions. Let me have you get those right in
22 front of you there. And then on each of these
23 pages, Exhibit 1 and 2, are depicted five
24 photographs on each sheet, is that correct?

25 A. Uh-huh. Yep.

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1 Q. Now, these are color copies of some
2 photographs that were produced to all of the
3 defense attorneys by your counsel, Mr. Olson.

4 A. Yeah. I took these pictures.

5 Q. Okay. Do you recall the date that you
6 took them?

7 A. It was about a week after the accident. I
8 didn't do anything much because I didn't feel -- I
9 felt fine. And then I started to get some pain in
10 my back, and I had trouble sitting and sleeping.
11 And so I said, "I better go down and take some
12 pictures of that." And when I was there, like here
13 on picture No. 3 --

14 Q. Okay. Let me just turn this over. We're
15 talking -- you're now pointing to Exhibit No. 6,
16 picture No. 3 on Exhibit No. 6?

17 A. Yeah.

18 Q. Okay.

19 A. This is the hole I fell into, which is a
20 different color stone there, and it's oval shaped.
21 And when I got -- this is the walkway here that was
22 coming out. I walked -- I came out of my car and
23 walked over to this -- opened the door for my wife,
24 and she -- I heard her scream, "He disappeared, my
25 husband disappeared." She started screaming. And

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1 I had fell into this hole. And it was my -- my
2 left leg fell in the hole. My toe never touched
3 the bottom, that's how deep it was. And I couldn't
4 get out with one arm and my age and stuff. And
5 they had to send somebody to get me.

6 And so this guy that come out of the
7 senior center was older than me. He couldn't do me
8 any good. So they finally went to the construction
9 site over here and got somebody to come over and
10 help me out of the hole. I didn't think too much
11 about it.

12 And like I say, after four or five days, I
13 started having some pain and things were bothering
14 me, so I said, "I better take some" -- because they
15 wanted me to call an ambulance that day and I said,
16 "No, I don't feel that bad." And So I came down
17 here. They said -- these things were even older
18 than a week, I think, that I took these.

19 When I fell in that hole and came out,
20 they said, "Is there anything we can do for you,"
21 the kid from Watts. He was a young man, you know,
22 but he was a big strapping guy, and he pulled me
23 out of it.

24 I said, "Well, yeah, just fill that hole
25 up." And it took them a couple, three weeks before

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1 that hole was filled. They put fill in there.

2 Q. Uh-huh. Let me ask you a couple of
3 questions about that. You said some big strapping
4 kid from Watts. How do you know he was an employee
5 of Watts Construction?

6 A. Because he was working there with a hard
7 hat on.

8 Q. I mean, is that just an assumption on your
9 part, that he was an employee of Watts
10 Construction?

11 A. Yeah. He might have been employed by
12 somebody else, but he was working on the -- on the
13 new building there.

14 Q. And did you happen to get his name?

15 A. No

16 Q. And then you said that it was two or three
17 weeks before the hole was filled. How do you know
18 that?

19 A. Because I was -- we'd go there -- go past
20 there, and so that's when I -- when I said, "I
21 better take some pictures," and then I went home
22 and got a camera and got some film. And then two
23 or three days later they had put that dirt in
24 there.

25 Q. So when you say you would go past there,

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1 you mean as you would, for the successive days
2 thereafter, that you would go to lunch?
3 A. Yeah. We went there and nothing was
4 done. They did put a couple of these cones around,
5 but they weren't there when I fell. None of these
6 cones were there or yellow ribbons or nothing. I
7 think they had a small piece of this fence
8 someplace, and I can't even remember where now
9 exactly it was. But they -- I think they put up
10 something like this near the front, but there was
11 no cones there or anything.

12 So I just told them, "You know, fill that
13 hole up before someone else falls in it " And they
14 said, "Okay." And it took them, I don't know, I
15 thought it was a couple of weeks, but it might not
16 have been. It might have been only five or six
17 days. I can't remember. They didn't fill it right
18 away. I know they didn't fill it right away.
19 After I fell in it, you'd think somebody would fill
20 it up. I knew it was there, so I just stayed away
21 from it.

22 Q. Let me direct your attention to the
23 picture that we've marked as No. 1 on Exhibit No.
24 6.

25 A All right

1 little bit so that I could open the door for her,
2 and that's when I stepped into the hole.

3 Q. Okay. Now, when you say you parked your
4 car parallel to the gutter, was the passenger side
5 door roughly even with this driveway ramp going
6 over the culvert?

7 A. That wasn't -- that wasn't a driveway. It
8 was just a -- it was just a walkway for people to
9 go into the building, into that old building. It
10 wasn't wide enough to -- there was never any cars
11 that went in there, it was just like for
12 passengers, for people walking.

13 Q. And you're talking about this concrete
14 area on which you're standing here on picture No.
15 1?

16 A. Right, uh-huh.

17 Q. You're saying that was just kind of a
18 sidewalk of some sort?

19 A. Yeah. It was -- I think there was even
20 yellow things going across the street or
21 something. I don't know. That's where anybody
22 that would park near here would go down to there
23 and walk into the building.

24 Q. Okay. And what I'm trying to understand,
25 then, is you pulled up in your car alongside the

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1 Q. Is that you standing there on that little
2 driveway area over the culvert?

3 A. Yeah. I'm trying to point to the hole.

4 Q. Okay. I'm trying to understand, when you
5 stepped into this hole, were you stepping
6 backwards?

7 A. No. I was going towards -- my car is
8 parked right here, and I tried to park, when I
9 could because -- because sometimes I'd have to park
10 further away from there, but if I could get there,
11 I'd go -- try to go early, and I put it right by my
12 wife's spot when she was sitting in the front
13 passenger seat.

14 Q Okay.

15 A. And when I was going over there to get
16 her, I -- my left leg went into that hole.

17 Q. Okay. Let me kind of back up a little bit
18 here You said -- when you're saying you were
19 parked right there, I'm trying to understand, was
20 your car parked parallel to the -- to the side of
21 the road alongside the culvert?

22 A Like all of them are here, see, they're
23 going this way, so I parked right here. Then I
24 walked around and opened the door for my wife to
25 get in. And I had to walk over into this area a

1 curb here and did you -- did you stop the vehicle
2 so that your wife's doors were roughly aligned with
3 the entrance to this sidewalk area --

4 A. Yes, so that she could get out.

5 Q. Let me finish, just a moment. -- this
6 sidewalk area that goes over the gutter there?

7 A. Yeah. I'd have to so she could get out.
8 She couldn't walk into the irrigation ditch.

9 Q. So did you then have to walk down into the
10 irrigation ditch to get her, either behind the car
11 or in front of the car, to get around to the
12 sidewalk to open her door?

13 A. Yeah. Sometimes I would, depends on where
14 I had to get. There was cars always there for
15 people that came to the thing. They'd park in that
16 area. At this particular time here, there was no
17 car when I took that picture, but yeah.

18 Q. Okay. So -- I know this is kind of a --
19 it seems sort of tedious and maybe a little
20 repetitive, but just -- I'm trying to just get a
21 mental picture as to the exact sort of sequence of
22 where you walked. And so let me -- let's just kind
23 of back up to the point --

24 A. I can't remember all of that because who's
25 got that kind of memory, you know?

1 Q. Uh-huh.
2 A. I just parked over here so she could
3 walk -- I could get her out of there and get on
4 that walkway to go into the building.
5 Q. Okay. And so if you pulled up the car
6 alongside this sidewalk area and then presumably to
7 open the door of the car, the car door, would it
8 have kind of opened out over the top of this
9 sidewalk area --
10 A. Yeah.
11 Q. -- as it goes over the culvert?
12 A. Right.
13 Q. And then where did you store her walker,
14 in the back seat of the car or the trunk of the car
15 or --
16 A. I did it in both. I can't remember if she
17 even had it. Sometimes she would just go with her
18 cane. I can't even remember if she had a walker or
19 not that day.
20 Q. Okay. So then you proceeded around the
21 front -- or do you recall whether you went around
22 the front of the car or the rear of the car?
23 A. I probably went around the front, and then
24 I walked over this way to get her door. And just
25 as I reached the door, I disappeared into the hole.

1 looking at photograph No. 1 here?
2 A. See, if I'm coming off and around here,
3 I'm -- and her car is here, I'm trying to get a
4 hold of her and open the car door when I was
5 standing there, but -- and my right foot is the one
6 that went into the hole.
7 So I was walking on part of this excavated
8 area here that it's -- that probably the car door
9 edge was right there, the handle, right this way
10 because I always tried to park near it so she could
11 get out and walk on that sidewalk in.
12 Q. Let me ask you: On the date of the
13 accident, was this area, if we're looking here --
14 let me direct your attention to photograph No. 1.
15 And was this area to the -- if you're holding that
16 photograph so that you're looking at it right side
17 up, in the top right-hand corner of Exhibit No. 6,
18 just to the bottom edge of this sidewalk area, you
19 see on this particular photograph taken, whenever
20 it was, that area is, you know, heavily excavated?
21 A. It wasn't. It was just plain dirt right
22 from there. It would look like this other side
23 here.
24 Q. Okay.
25 A. This is dirt.

1 Q. Okay. Now, as you were walking along the
2 front of the car and then onto this concrete area,
3 could -- you could see that you were walking on a
4 concrete surface, could you not?
5 A. Yeah.
6 Q. And then did that -- did that concrete
7 surface appear to you to kind of end abruptly into
8 this sort of excavated area into which you fell?
9 A. Yeah, but I don't remember how much of
10 this was dirt because I -- I just -- I probably
11 was -- I probably walked right over here, maybe her
12 car door was here or something, and just stepped
13 over there to get the door handle to open it for
14 her. And as soon as I grabbed on the handle, I
15 fell in the hole. It was covered with cobwebs and
16 leaves and stuff like that. It didn't look like
17 there was a hole there, but it was deep, too, like
18 I said, but my foot never even touched the bottom
19 of the hole.
20 Q. Now, as you were approaching the area of
21 the hole, you were walking on concrete, is that
22 correct here, going over the culvert?
23 A. Yeah. I don't recall if there was
24 anything over on this side.
25 Q. And when you say "this side," are you

1 Q. Okay. And that's what I wanted to try and
2 understand. So at the time of the accident --
3 A. There was no ribbons, there was no cones,
4 there was nothing there.
5 Q. And, in fact, was the curb and gutter also
6 installed alongside this area that we now see
7 excavated here to the bottom side of the sidewalk?
8 A. Well, it probably was like it was behind
9 where I was. That other side was all dirt and this
10 was filled.
11 Q. It was all filled in roughly level with
12 the edge of the sidewalk?
13 A. Right.
14 Q. As it appears to be on the other side of
15 the walkway there?
16 A. Right.
17 MS. HUTTON: Before you move on, can I
18 clarify something? You keep saying probably. Can
19 you say, was the -- was the curb and gutter there
20 when you fell?
21 THE WITNESS: What curb and gutter?
22 MS. HUTTON: Was there a curb and gutter
23 on the side of the --
24 THE WITNESS: Yeah, it was like this.
25 MS. HUTTON: Okay.

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1 MR. OLSON: And just for the record, the
2 witness is pointing to the other side of the
3 driveway where there is curb and gutter showing.
4 THE WITNESS: It looked just like that.
5 MS. HUTTON: Okay. So it wasn't -- before
6 you said probably it was. I just wanted you to be
7 sure whether there was a curb and gutter or not.
8 THE WITNESS: Yeah, it was -- they was
9 starting to do something here, I guess, but I
10 didn't -- I don't even recall. All I know is I
11 didn't see a hole. If I would have saw it, like I
12 said, when I -- as I was going down there remember
13 seeing leaves and stuff laying there, but it didn't
14 look like a hole. And I just happened to step in
15 it.
16 MR. HARDMAN:
17 Q. So when you were approaching that area
18 that was, you know, roughly similar to the area on
19 the other side of the driveway --
20 A. Right, yeah.
21 Q. -- and you could see that you were at some
22 point going to leave concrete and walk onto --
23 A. Onto dirt.
24 Q. -- onto dirt, did -- and recognizing that
25 that was in an area where construction was

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1 occurring, did it ever occur to you to kind of test
2 the area with your foot before putting your weight
3 on it?
4 A. No, because I had done that dozens of
5 times with getting my -- picking my wife up and
6 never -- never noticed that hole that was there.
7 It was like it was camouflaged. It was -- I saw --
8 I remember seeing spider webs as I walked around
9 and leaves and stuff like that. I thought it was
10 all solid dirt there, but it was just covered over
11 the hole because there was not -- there was a
12 hole. It was a big deep hole, too.
13 Q. Now, you said that you remembered seeing
14 it as you approached it. And I believe I
15 understood your testimony to be that you approached
16 your wife's door from the front side of the
17 vehicle. Is that what you said earlier?
18 A. Yeah, probably. Yeah, I think I did.
19 Q. Okay.
20 A. But, I mean, I can't remember everything.
21 It was -- I just parked there and must have got out
22 and just gone around and opened the door for her.
23 We used to do that every week when we went there.
24 Q. So -- just again, I'm trying to
25 understand. How is it that you observed this area

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1 covered with leaves and spider webs if you were
2 approaching it from the other direction rather than
3 coming around from the rear of the vehicle, you
4 were approaching it from the front of the vehicle
5 from, you know, this other side of the sidewalk?
6 A. I don't follow you. I mean, when you walk
7 someplace and it's just dirt, you -- you naturally
8 look on the ground, and all I saw was leaves and
9 spider webs in that whole area.
10 Q. So as you were coming to the --
11 A. And it wasn't -- it wasn't dug up dirt
12 like this. It looked like this.
13 Q. Okay. And so as you -- and what, again,
14 I'm trying to understand is just your recollection
15 as to the accident site.
16 As you were approaching the edge of the
17 sidewalk coming from the front of your vehicle that
18 was parked parallel to the gutter facing south as I
19 understand --
20 A. Right.
21 Q. -- your wife's -- the passenger side door
22 positioned so that it would open somewhere over the
23 top of this walkway going over the culvert?
24 A. Right.
25 Q. Okay.

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1 A. I didn't want her to walk over that dirt.
2 Q. Uh-huh. So then as you walk around the
3 front of the vehicle, and you're -- then presumably
4 cross over the culvert onto this dirt area and then
5 proceed to the dirt area just to the top of the
6 sidewalk here on picture No. 1 of Exhibit 6, then
7 you started walking across the concrete; is that
8 correct?
9 A. Walking across here, you mean?
10 Q. Uh-huh.
11 A. Yeah.
12 Q. And then as you were approaching the edge
13 of the concrete, you distinctly recall looking down
14 and seeing cobwebs and leaves and things of that
15 nature?
16 A. Yeah. It looked just like this. There
17 was a curbing going through there and an irrigation
18 ditch was all made out of concrete.
19 Q. Do you think it's possible that you
20 stepped into the irrigation ditch?
21 MR. OLSON: I'm going to object if you're
22 asking him to speculate, but go ahead and answer.
23 THE WITNESS: How could I -- how could I
24 step into the irrigation ditch when my hole -- when
25 my foot went into the ground five, six feet deep?

1 MR. HARDMAN:

2 Q. And that's your distinct recollection, is
3 I think you said you couldn't feel the bottom of
4 the hole with your foot, it was kind of dangling or
5 something?

6 A. Yeah. I couldn't -- I couldn't feel any
7 solid ground under there. That's how deep that
8 hole was. There was -- there was -- it was an
9 irrigation ditch all out of concrete all the way up
10 the street. Then right after I fell, somebody came
11 and started to do all this, and they put these
12 cones in and everything else.

13 Q. Uh-huh.

14 A. They started messing around here, but they
15 still never filled the damn hole up.

16 Q. Okay. Let me -- I'm trying -- so this
17 hole, then, if I take -- and, again, looking here
18 at this photograph that we've marked as Exhibit 1
19 to your deposition, and your testimony to
20 understand, is that on the date of the accident the
21 curb and gutter were installed the same as we see
22 on the other side of the sidewalk; is that correct?

23 A. Yeah.

24 Q. Okay. Then where the curb appears to
25 match up on this other side of the walkway here

1 walked over towards my wife. This was all level.

2 It was like over here. This is all dirt now, the
3 picture you got. This is all lawn and dirt over
4 here. It was even with the other. I walked around
5 and I stepped over this way and I fell in a hole.

6 Q. Okay. And which leg was it that stepped
7 into the hole?

8 A. My right one.

9 Q. So at the point that your right leg
10 stepped into the hole, where was your -- where was
11 your left foot at the point your right leg stepped
12 into the hole in reference to where it was --

13 A. Right over on -- probably on top of this
14 gutter here.

15 Q. So it was on concrete?

16 A. Right here. Concrete or whatever it was.
17 The irrigation ditch was all concrete.

18 Q. Uh-huh.

19 A. That was still there.

20 Q. So if your -- your right leg stepped into
21 the hole and your left foot was still standing on
22 top of the gutter, then did your seat kind of end
23 up in the gutter when you stepped into the hole?

24 A. I can't remember. All I know is it
25 surprised the devil out of me that there was even a

1 going over the culvert, it would appear to me that
2 it would match up in the seam here right adjacent
3 to this area into which you're pointing was the
4 hole. Do you see what I'm saying here?

5 If the -- see where the edge of the gutter
6 is, the top of the gutter here on picture No. 1 of
7 Exhibit 6?

8 A. Right.

9 Q. And where that -- that intersects going at
10 the -- it intersects here kind of at the -- sort of
11 the apex between the part covering the culvert and
12 the edge of the walkway here, and if you follow
13 that seam in the concrete going over the culvert,
14 running parallel to the culvert to the other side
15 through there, that seam right there --

16 A. Uh-huh.

17 Q. -- and it's your testimony that curb and
18 gutter continued through the other side of this
19 area here on Exhibit No. 1, that's the -- or
20 Exhibit No. 6, picture No. 1.?

21 A. Yeah.

22 Q. So when you stepped into this whole, were
23 you kind of straddling the corner of the culvert
24 and the gutter when you stepped into it?

25 A. No. I was standing here on this, and I

1 hole there. This seam, this seam here in the
2 concrete where my foot was when I took this
3 picture, that's right where this seam was.

4 Q. Yeah. And that's what I was kind of
5 trying to understand when I was asking you
6 questions about where your -- your right foot went
7 into the hole. Presumably, you were say -- your
8 back -- your back was to the --

9 A. I wouldn't have even -- I wouldn't have
10 even walked over there if this is the way it
11 looked. They started to do things here after I
12 fell in that, and it all got -- started to get
13 excavated, they put these cones and stuff around.

14 But even at this -- at that point when I
15 went back, they didn't even have a cone over the
16 hole. It wasn't even -- when it was still a hole
17 before they filled it up with dirt. They should
18 have done that right away, but it was at least a
19 week later or maybe two before they actually filled
20 it up. But this was -- this was all like this side
21 was. It was all like lawn and old grass growing in
22 it.

23 MR. HARDMAN: Off the record for a second.
24 (Off the record.)

25 ///

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1 MR. HARDMAN:

2 Q. Do you recall when your -- when your right
3 leg stepped into this hole, was your -- was your
4 back to the hole or were you facing the hole?

5 A. I can't remember. It looked -- I -- I
6 almost recall that when I was in it, when I was in
7 the hole, that I was kind of looking at the -- I
8 was probably facing towards this -- I don't know.
9 Just I remember seeing the senior center there.

10 Q. The old senior center?

11 A. Yeah. I wasn't facing my car.

12 Q. So if your right leg had stepped into the
13 hole and you were facing the old senior center,
14 then your back was probably to the hole; is that
15 correct?

16 A. Huh?

17 Q. If your right leg stepped into the hole
18 and you were facing the senior center once you were
19 in the hole, then your back was probably to the
20 hole, was it not?

21 MR. OLSON: Are you saying when he stepped
22 into it?

23 MS. HUTTON: Uh-huh.

24 THE WITNESS: My back would be even with
25 the hole if I stepped into it; right?

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1 MR. HARDMAN: Uh-huh.

2 Q. But at the point just prior to stepping
3 into it?

4 A. I don't even remember that. I mean, that
5 just -- I did this many, many times before, went to
6 the same place, left my wife off, and then all of a
7 sudden that day, I just fell in a hole. And it --
8 it's not a fabrication, there was a hole there.

9 Q. And I don't mean to suggest that you're
10 fabricating this. I mean, one of the things that
11 we're trying to determine, and you probably have
12 talked about this with your attorney, is that, you
13 know, in these sorts of accident cases, sometimes
14 the -- the plaintiff in the case bears some
15 responsibility for the accident; I mean, walks into
16 an area where it was an obvious hazard or -- or
17 didn't take adequate precautions under the
18 circumstances or things like that.

19 A. I didn't think it was an obvious hazard or
20 I wouldn't have went there.

21 Q. Okay. And so I'm just trying to
22 understand --

23 A. See, none of this was there. This -- this
24 construction here, this was just a street that was
25 coming up -- let me see here. Like -- like this

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1 was back there. It had a piece of curbing here,
2 the irrigation ditch was over here, and this was
3 all grass. There -- none of this was that way when
4 I fell into it.

5 Q. And I understand. I understand your
6 testimony that was -- yeah.

7 A. And I might have opened the door for my
8 wife and then just stepped into it. I can't
9 remember exactly what happened. All I know is I
10 was awfully shocked that -- because I didn't
11 envision there was a hole there.

12 Q. Okay.

13 A. Who would leave a hole there? I don't
14 know.

15 Q. Early on in the case, this came kind of
16 through your attorney, that it was suggested to all
17 of us, the defense attorneys, that this hole was
18 maybe the result of a telephone pole having been
19 removed. Was that --

20 A. That's the idea that I got because it
21 being so deep.

22 Q. Is that -- is there anything beyond just a
23 -- kind of a supposition on your part that it was a
24 telephone pole that caused the hole?

25 A. Yeah, because there was -- it was round,

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1 the hole was round. I mean, you can see.

2 Q. What was the approximate diameter of the
3 hole into which you fell?

4 A. About the size from here to there, you
5 just continue it around. It was a pretty big hole,
6 had to have been.

7 Q. Okay. Let's figure out something.

8 A. I didn't measure it or take pictures of it
9 immediately.

10 Q. Okay. I understand. Let's say --

11 A. Because I just figured, well, something
12 happened and -- but then I started having some
13 problems and I said, "Maybe I should have called an
14 ambulance," and stuff. They might have -- they
15 might have taken pictures and stuff. I don't know
16 what they would have done, but -- so I says, "I
17 better get a camera and take pictures." And then
18 when I got there, it looked like this, but there
19 was -- a lot of changes were made in that area
20 before I come to take the pictures.

21 Q. Okay. In terms of the size of the hole,
22 do you -- are you familiar with the size of a
23 standard basketball, kind of what the diameter is?

24 A. Yeah.

25 Q. Would you say the hole was bigger or

1 smaller than the diameter of a standard basketball?
2 A. Well, my whole thigh got in it. It might
3 have been a little bit bigger even, close to it. I
4 don't know. Just --
5 Q. So as your leg was down inside the hole,
6 there were -- it was -- there were a few inches on
7 either side of your leg inside the hole?
8 A. No, I was stuck in there. I couldn't get
9 -- I couldn't move. I tried to push myself out of
10 the hole. Somebody had to yank me out of there. I
11 was wedged in.
12 Q. Was it the -- was it the circumference of
13 your upper thigh that kind of stopped you from
14 falling down into the hole, it sort of became
15 lodged in the hole?
16 A. Yeah, but I went all the way in, I mean,
17 up to my groin, into the hole.
18 Q. So is it your testimony, then, that the
19 circumference of the hole was roughly the diameter
20 of your thigh? Is that --
21 A. Yeah.
22 Q. Okay.
23 A. Yep.
24 Q. Okay.
25 MR. HARDMAN: Let's mark this as Exhibit

1 No. 7 to the depositions.
2 (Whereupon, Deposition Exhibit 7
3 was marked for identification.)
4 THE WITNESS: I guess this is what they
5 made over at the senior center. They went in and
6 gave me this to fill out.
7 MR. HARDMAN:
8 Q. Okay. I'm going to ask you some questions
9 about that, give everyone a chance to get their
10 copies of this in front of them. This is a
11 document we've marked as Exhibit 7 to your
12 deposition. It consists of two pages. And I'll
13 ask you if you have seen this document before?
14 A. Yeah, I filled it out.
15 Q. Okay. All parts of it, this is all your
16 handwriting?
17 A. Yep. Let's see. I didn't write client on
18 there.
19 Q. On the top on the page 1, that's not your
20 writing?
21 A. No. I printed everything. Somebody
22 marked client here.
23 Q. There on page 2 where it says client,
24 that's not your writing either on at the top or
25 down in the bottom next to what appears to be your

1 signature?
2 A. Yeah. That's my signature, but I didn't
3 do that either.
4 Q. Where -- you didn't write the word
5 "client" next to your signature?
6 A. No. It's on here three times.
7 Q. Yeah. But apart from the word "client"
8 twice on the second page and once on the first
9 page, all the rest of the handwriting is yours?
10 A. Yep.
11 Q. Okay. And do you recall, did you fill
12 this out on October the 13th, 2003?
13 A. Yeah.
14 Q. So there on page 1 where it says October
15 10, 2003, is that -- was that the date of the
16 accident?
17 A. I guess so.
18 Q. Do you recall who it was that asked you to
19 fill this out?
20 A. The girl that worked there.
21 Q. That worked at the senior center?
22 A. Yeah.
23 Q. Do you recall her name?
24 A. I don't have it with me.
25 Q. Is it Betty McCarty?

1 A. The girl is -- that's there now was not
2 there then.
3 Q. Okay.
4 A. This is another girl.
5 Q. Okay.
6 THE WITNESS: Do we have both of those
7 names written down someplace?
8 MR. OLSON: Do you recall if you wrote it
9 down at the time of the accident?
10 THE WITNESS: I don't remember now.
11 Apparently I filled this out on the 10th; right?
12 MR. HARDMAN: Well, I don't know. It's
13 dated. There's a date on page 2, the 13th. Yeah.
14 So I'm trying to understand. That's been one of
15 the things that's a little --
16 THE WITNESS: They might have handed me
17 that right away and then on the 10th -- and then
18 I -- when I handed it into them, I put 13th on
19 there. I'm not sure. I can't recall.
20 MR. HARDMAN:
21 Q. And down there in the middle of page 1 it
22 says, date of accident, time began work, time of
23 occurrence, and then off to the right-hand side it
24 says 12:00 noon?
25 A. Yeah.

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1 Q Did you intend for that to be the
2 approximate time of the accident?
3 A Yeah, but I don't know why I didn't put
4 the date. I don't know. I guess I didn't think
5 maybe it had anything to do with me because it said
6 date of accident, time began work, time of
7 occurrence, but I don't know.
8 What does that say underneath where it
9 says report of accident? Somebody scratched out
10 that, so I don't know who -- I don't know who gave
11 me this form, but I filled it out. It says
12 employee's report, I guess, but I wasn't -- I
13 wasn't an employee of the County's. I guess the
14 County was running that program, weren't they?
15 Q Uh-huh
16 A. And this was given to me by somebody in
17 the office there. If a client got hurt working at
18 the senior center making lunch and stuff for the
19 people, that's the only form they had to fill out.
20 So I guess I didn't figure that I needed to do
21 that, but I should have -- I just put down 12 noon.
22 Q Now, let me give you a couple of other
23 documents.
24 MR. HARDMAN: Let's mark this one as No.
25 8

1 because I went down to the senior center one day
2 and they gave me his name and address. And I don't
3 think they had a phone number or not.
4 But I had trouble even trying to find his
5 house because he lived in -- he lived in a little
6 condominium area. When you walked in they just
7 numbered the mailboxes, but -- and nobody's name
8 was on it, and the apartments were all there with
9 the same number on it, but nobody's name on it, so
10 I couldn't find him.
11 Q. And you said you -- you were trying to
12 look -- locate him to talk with him about the
13 lawsuit or kind of what he recollected from the
14 incident?
15 A. Yeah, so I could just give it to --
16 Q. But you haven't ever been able to locate
17 him?
18 A. But he did.
19 Q. Your attorney did?
20 A. Yeah.
21 MR. OLSON: I've spoken with him.
22 THE WITNESS: He spoke with him on the
23 phone.
24 MR. HARDMAN: Okay.
25 Q. Directing your attention here to what

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1 (Whereupon, Deposition Exhibit 8
2 was marked for identification.)
3 MR. HARDMAN: And then this one here as
4 No 9.
5 (Whereupon, Deposition Exhibit 9
6 was marked for identification.)
7 MR. HARDMAN:
8 Q. Let me give you a chance to read through
9 Nos -- look at what we've marked as Exhibits 8 and
10 9.
11 A. I must have dictated it to somebody it
12 looks like because I can't remember. It's not my
13 handwriting, so I didn't fill it out.
14 Q Okay. Let me --
15 A. It says Bob was the guy that tried to get
16 me out of the hole, but he was too old and frail to
17 pick up a paperweight, you know, so he went to
18 the -- to get one of the guys, the guys over at the
19 other side.
20 Q. Is Bob somebody that's familiar to you at
21 the senior center there?
22 A. Yeah. He used to be there all the time
23 kind of glad handing everybody, "Welcome to senior
24 center today." I forget even his first name, but I
25 -- he's -- he's got it written on some of his stuff

1 we've marked as Exhibit 8 to your deposition, it
2 appears, and we can only surmise that this Betty
3 McCarty down here at the bottom is the person that
4 must have filled this out. Do you -- do you know
5 Betty McCarty?
6 A. Yeah. She was in the office there, you
7 know, just if I had a question about something or
8 whatever when I was going there. We used to pick
9 up little furniture once in a while, like when they
10 were redoing the place we bought some chairs and
11 stuff like that when I went to see her. We used to
12 have stuff that was donated on sale. We would go
13 in that little shop that was there and get it.
14 Q. Do you recall meeting with her sometime
15 after the accident in filling out or discussing
16 with her the accident?
17 A. I don't remember doing this, but she might
18 have -- I might have done it right that same day.
19 Because she put down -- well, time of occurrence,
20 11:30 to 12:00. And that's my exact address. That
21 was my phone number at the time. Since then I got
22 a cell number, and I don't use that number anymore.
23 Q. Well, down here at the bottom it says date
24 of report, October 9, 2003. Do you see where that
25 is on the bottom of Exhibit 8?

16 (Pages 58 to 61)

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1 A. Yeah. With her signature by it?
2 Q. Yes. Then up at the top where it says
3 date of accident, it says October -- or excuse
4 me -- September 24 -- 25, 2003?
5 A. Yeah. I can't remember because I guess I
6 went down there later, and she wanted me to fill
7 out a report or something, what happened. So I
8 explained everything to her, and I guess, I can't
9 remember exactly, but she had to interview me
10 somehow so she could fill that form out because she
11 said they had to be covered, too.
12 Q. Okay. I wanted to ask you about a couple
13 of statements, one here on Exhibit 7 and one on
14 Exhibit 8. The bottom of Exhibit 7, the very last
15 line there, appears to be your handwriting. It
16 says, "I felt a sharp pain behind my left knee and
17 tendons." To which tendons were you referring when
18 you -- when you wrote this?
19 A. Went to my right groin. I did miss -- my
20 left leg was almost up in the air. It was -- I was
21 -- my right leg was down and the other one was up.
22 And I was like being stretched, and I felt the -- I
23 just felt the pain there --
24 Q. Did your left knee --
25 A. -- in my groin.

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1 Q. Did your left knee twist or something as
2 you went into the hole or --
3 A. I don't know, but the left leg didn't go
4 in the hole. It was the right -- up to my right
5 groin and my left leg wound up in the air. It was
6 going up this way. I felt the sharp pain behind my
7 left knee, and I don't know why that was. I can't
8 even remember that now.
9 Q. You don't -- you don't recall feeling a
10 pain in your knee at the time of the accident or --
11 A. No, but I must have because this was
12 closer to it. I just -- probably just forgot it,
13 but I -- because this was closer to it. I didn't
14 even realize there was that much time between the
15 accident and the time the form was filled out. I
16 just -- I don't know.
17 Q. Let me direct your attention to Exhibit
18 No. 8, kind of in the middle. The line right above
19 the printed entry where it says Extent of Injury,
20 there's -- in cursive writing there it says,
21 "Mr. Kreyling came in and ate lunch, waited a
22 couple of hours and went," and then "that to"
23 something or other.
24 MS. HUTTON: Doctor.
25 MR. HARDMAN: Doctor.

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1 Q. Do you recall that being the case?
2 A. Yeah. We -- we went in, went in and ate
3 lunch. I mean, I was -- I was still mobile. I
4 never stopped being able to walk or move around.
5 Q. And then you went into -- and then do you
6 recall going to the doctor that same day?
7 A. And then she -- I don't remember going to
8 the doctor right then. You know, this is the date,
9 it was the 25th, but when did she fill this out?
10 On the 10th. So I might have gone to the doctor by
11 then.
12 See, I never even got copies of these from
13 them, or if I did I guess they would have given
14 them to the attorney, but I can't -- I don't even
15 remember some of this. I don't remember her
16 questioning about it, but she probably did, because
17 she said that she had to make a report out, now
18 that I, you know, look at it, but I don't even
19 remember ever reading it. It just -- she asked me
20 questions. I probably just answered her because I
21 did sign the thing.
22 Q. Okay. I want to ask you a little bit
23 about your -- about the injuries that you feel that
24 you sustained from this -- from this accident.
25 Tell me, if you can, just kind of list them for

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1 me.
2 A. Mostly my back was hurting, my lower back
3 was hurting, and that's why, I guess, I went to
4 Dr. Labrum. And then one day there later, it was
5 even about a year later, I went to see Dr. Parry,
6 and he -- see, they had taken x-rays of my lower
7 back a little while after it happened.
8 Q. After the accident or prior to the
9 accident?
10 A. No, after. And they discovered some
11 things. And then the pain started to get worse,
12 and I told them that my neck was bothering me and
13 he took x-rays of my neck. And he said to me that
14 it could have been partially caused by the accident
15 or it could have been something that just
16 happened. But it was a while later that he took
17 the x-rays, because they just took the first x-rays
18 of where my bottom hit the top of the hole. And I
19 weighed a lot more. I weighed about 300 pounds
20 then. Now I'm 205.
21 Q. So you've lost a lot of weight?
22 A. Yes. So I went, you know -- yeah, because
23 I was having trouble walking. I was almost forced
24 to do that because I couldn't sleep good at night
25 and had to slow down at work. And so I just made a

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1 lot of changes in my life, I guess, and then one of
2 them was I lost some weight.

3 Q. Okay. So you described lower back pain as
4 one of your injuries.

5 A. The main injury at the time, yeah, but as
6 time goes on, they discovered these tendons and
7 stuff up in my neck.

8 And I said, "Well, why didn't you take
9 x-rays of my neck when you did the back?"

10 He said, "I don't know. You were just
11 complaining about your back hurting."

12 But then it was about a year later that I
13 started having trouble with my neck and they
14 discovered that. But they don't know if it was
15 caused by the accident or aggravated, that part.
16 Because of the accident, he wasn't sure. They
17 couldn't -- it might have been, but they couldn't,
18 I guess, swear to it in court that that's
19 definitely what it was caused from.

20 Q. Okay. And beyond your lower back and the
21 tendons in your neck, what other -- what other
22 injuries do you feel you sustained from the
23 accident?

24 A. That was all the injuries. I just -- they
25 just started to get worse as time went on. I

1 in my whole front of my house. In fact, they even
2 paid for all of it, paid for the stone and the
3 flowers, and came in one day and just did the whole
4 job for me.

5 Q. So am I correct in understanding, then,
6 that it's your testimony that even carrying around
7 an extra hundred pounds, you were a lot more active
8 prior to the accident than you are now --

9 A. Yeah.

10 Q. -- after the accident?

11 A. Oh, yeah. Yes, I am.

12 Q. So beyond your lower back pain and the
13 tendons in your neck, those are the only -- those
14 are the only two injuries you feel you sustained
15 from the accident?

16 A. Yep. I think my neurologist examined me a
17 little bit, too, and she -- because I go to her and
18 get MRIs and stuff like that on a regular basis.
19 And I don't know if they noticed anything
20 different, but she wrote me a -- the last time we
21 went there was maybe six, nine months ago, and she
22 wrote a prescription out for me to get a Jazzy for
23 myself. And I only use that occasionally. It's
24 when I go out with my wife together and we both
25 take one along with us.

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1 couldn't do as much. Before I was a very active
2 person. Like -- like I've got a little boat, and I
3 take my grandkids fishing and stuff. I can't. I
4 have a hard time climbing in and out of the boat
5 now, you know, but that could be old age, too.
6 That could have been from that. But I was old when
7 it happened, and I'm a little older, so --

8 Q. So even at that -- and I believe it was
9 your testimony that prior to the accident you
10 weighed about 300 pounds?

11 A. Yeah.

12 Q. And even --

13 A. I weighed 299 and I said to my wife, I
14 said, "Boy, I'm going to lose some weight because I
15 don't" -- I had started to lose some weight right
16 away, you know.

17 Q. Prior to the accident or after?

18 A. No, right after. I just -- I couldn't
19 remain as active as I was in business and stuff, so
20 I wound up giving up some customers and slowing
21 down.

22 And my neighbors even come over, and they
23 was always cutting my lawn even after that -- I had
24 started to neglect it. They come over, my
25 neighbors come over, and put the desert landscaping

1 Q. Do you ever have races? Have you ever
2 done that?

3 A. No. We go around the block every once in
4 a while together. But I got a smaller Jazzy and
5 just when we -- she likes to go to Wal-Mart. And
6 she can't get up off of hers, so I -- I can stand
7 up with mine and get something higher on the shelf
8 and give it to her and just help her out shopping a
9 little bit.

10 Q. Well, that's good.

11 A. But somewhere along the line, I always
12 felt that somebody knew -- somebody took that,
13 whatever was in that hole, they took it out. And I
14 never even blamed Watts for that. I just -- I
15 didn't know who did, but somebody must have removed
16 something from there, and then they never filled it
17 up. And with all the people that were walking by
18 there -- that's why I told the guy at Watts to fill
19 the hole up, but it took them a while to get it
20 done.

21 Q. Again, when you say "the guy at Watts,"
22 that's just your assumption that he was an employee
23 of Watts Construction --

24 A. Yeah.

25 Q. -- because there was a big Watts

18 (Pages 66 to 69)

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1 Construction sign out in front of the building?
2 A. Yeah, right, and he was working there. He
3 was on the job. So I don't know what he was doing,
4 if he was a subcontractor, working for a
5 subcontractor for them or what.

6 THE WITNESS: Did you ever get his name?

7 MR. OLSON: Don't know him.

8 THE WITNESS: Watts said they were going
9 to try to find out who he was, but it might have
10 been a day laborer that just came that one day. I
11 don't know.

12 MR. HARDMAN:

13 Q. Okay. During the course of the -- are you
14 okay for a while or do you want to take a break for
15 a minute?

16 A. No, that's all right.

17 MR. HARDMAN: We've been going for an hour
18 and a half. Do you guys want a break?

19 MS. HUTTON: No, I'm fine.

20 MS. LIUZZI: No, I'm fine.

21 THE WITNESS: I'd rather get it over with
22 myself.

23 MR. HARDMAN:

24 Q. During the course of the lawsuit, your
25 attorneys, all of us, all of the parties in the

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1 back. You know, when I -- when I do numbering --
2 I've got a letter press, I don't know if you know
3 what a letter press is

4 Q. I don't know. Tell me what a letter press
5 is.

6 A. It's made from type that's put in a shell
7 and putting a press in it. And it's the kind you
8 see in the movies boom, boom, boom.

9 Q. Okay.

10 A. I use it for scoring and numbering. And
11 when I do that, I'm standing up. And I don't have
12 two hands. You -- you take the sheet out and put
13 one in with your right hand, out with your left.
14 And I don't have it, so I put it in, wait for a
15 second revolution, and then come to take it out.
16 Put it in, take it out.

17 So it takes me twice as long to number and
18 to do some dye cutting and scoring and things like
19 that that a letter press can do. And when I do
20 that, it really hurts my back. And so I had gotten
21 a brace from somebody, but I don't remember who it
22 was, and it might have been that person.

23 Q. That didn't have anything to do with your
24 accident, that was just through the repetition of
25 using the press?

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1 lawsuit, shortly after it begins, have an
2 obligation to submit to each other what we call
3 initial disclosures. And that's where, in the case
4 of the plaintiff, you identify all the people who
5 you think may have some knowledge about either the
6 accident or your injuries and provide kind of a
7 statement as to your claim for damages. It's
8 called in the legal terms, the costs, financial and
9 other costs, to you as a result of the accident.
10 And so I want to ask you questions about some of
11 the -- this information that was provided.

12 And since this is a document that has been
13 exchanged among all the attorneys, I don't know
14 that we need to mark it as an exhibit to your
15 deposition, but I want to ask you about some of the
16 medical providers here.

17 You mentioned that your only injuries were
18 to your lower back and the tendons in your neck.
19 What -- what sorts of medical care did you receive
20 from Advanced Physical Therapy?

21 A. I don't even know. Advanced Physical
22 Therapy, that name doesn't even ring a bell with
23 me.

24 Q. Okay.

25 A. I got a brace off of somebody for my

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1 A. No. I never used it before, the brace.
2 Now I can't hardly number without doing that
3 because it's really tiring on your back. But I --
4 he suggested that I use that when I run press
5 there, whoever I got it from. I can't even
6 remember his name. He was located at the corner of
7 River Road and 700 South, right there diagonal from
8 the hospital. There's a little shopping center
9 there.

10 Q. Uh-huh. So prior to the date of the
11 accident, when you were utilizing this press with
12 just one arm, the same as you were after the
13 accident, weighing a hundred pounds more, it didn't
14 cause you any discomfort or pain?

15 A. No.

16 Q. But only after the accident you had to go
17 get this brace?

18 A. Yeah, I wouldn't -- I would do -- if I had
19 a thousand things to do and a thousand numbering on
20 the machine, I would do a hundred, 250 at a time,
21 which took me maybe 30 minutes to do, and then I'd
22 take a rest or do something else around the shop
23 and then come back and do the numbering some more
24 until it was done.

25 Q. And this brace you're talking about, it's

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1 a back brace?
2 A. Yeah. It's got like elastics in it and
3 you put it on and it's Velcro and it clamps on
4 itself. You just pull yourself tight then.
5 Q. It fits around you like a belt sort of?
6 A. Yeah, like a big fat belt. It's about
7 that wide and goes around my whole middle.
8 Q. And by "that wide," just -- you were
9 gesturing about eight or 10 inches in width?
10 A. Yeah.
11 Q. And you think that may have been what you
12 received from Advanced Physical Therapy?
13 A. Could be. I don't know. It didn't say
14 what it was, what I got from them? I -- the name
15 doesn't ring a bell with me.
16 Q. Okay.
17 A. Sometimes, you know, your doctors send you
18 to somebody else and they just do something and
19 then away you go. You know, I don't know. It
20 just --
21 Q. And I'm -- I'm presuming that your
22 attorney compiled this list of medical providers
23 from information that you gave to him.
24 A. Yeah, probably.
25 Q. But maybe that's an incorrect assumption,

1 to get -- work to try to strengthen my back muscles
2 up and stuff like that, I guess. They would run me
3 at treadmills, they would exercise me and they'd
4 put a strap around me and keeping weight off my
5 bottom legs and I'd have to run on the treadmill
6 for -- 'til I almost died, you know.
7 They say, "Oh, just another 10 minutes."
8 And then when it was up I'd say, "No 10 minutes
9 more," and then I'd sit down for a while. But it
10 probably helped a little bit. I don't know.
11 Q. What about Dr. Eric Evans? He's also
12 listed at that same address, Orthopaedic
13 Specialists & Sports Medicine of Southern Utah.
14 A. He was probably working there.
15 Q. You don't recall having any particular
16 relationship with him?
17 A. No. The one doctor would send me to them,
18 and I -- they would just do what he would say and
19 do it for a week or two and then it would stop.
20 Q. How about Dr. Scott Parry also at the same
21 address?
22 A. Yeah. He's my orthopaedic man. He gives
23 me shots in my knees because I'm having arthritis
24 problems. As you get older, those things happen.
25 And I was going to him before I even had this

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1 I don't know. But let's move on to the next one
2 listed here, the St. George Surgical Center. Do
3 you recall what sort of treatment you obtained from
4 the St. George Surgical Center?
5 A. No. I've heard of them, but I didn't even
6 know where they're located.
7 THE WITNESS: Do you know where they are?
8 MR. OLSON: I'd have to look them up.
9 THE WITNESS: I guess I just got some of
10 the recent bills that came up in investigating it
11 and looking at it, and I just gave him a list, but
12 I can't remember a lot of that stuff. I just --
13 MR. HARDMAN: Okay.
14 Q. What about Orthopaedic Specialists &
15 Sports Medicine of Southern Utah?
16 A. I was -- I think I was going there just
17 for treatments. They give you like a workout,
18 treadmills and all that kind of stuff. They were
19 -- I think that's where it was. Is that it? It
20 was right there near the hospital. Is there no
21 address there or nothing?
22 Q. It lists an address of 1490 East
23 Foremaster Drive, No. 150, which is --
24 A. That's in the same building with Dr. Parry
25 is in. Yeah. That's -- I went there for a while

1 problem.
2 Q. You previously testified, though, that you
3 didn't have any injuries to your knees as a result
4 of the accident; is that right? It was just your
5 lower back and tendons in your neck?
6 A. Yeah, but my knees, he gives me cortisone
7 shots in there every three months. I get shots in
8 both my knees.
9 Q. And that's just from old age, arthritis?
10 A. Yeah. I also started to go to Dr. Stott,
11 but I take Coumadin and he wants me to have a shot,
12 stop my Coumadin for five days while he gives me
13 shots in my spine. And I can't -- I can't do that
14 anymore.
15 Q. Why does Dr. Stott want you to take shots
16 in your spine?
17 A. It's possibly because of this accident
18 because they -- he was referred to me by somebody
19 that was working at Dr. Parry's office, I think,
20 and said that I should go there and get shots in my
21 spine because Dr. Parry and those guys don't do
22 that kind of stuff. You have to go to Dr. Stott
23 for that.
24 Q. Okay. What about, have you -- let me ask
25 you: Have you had any of those shots in your

1 spine?

2 A. Yeah. I had them for a while and then he
3 changed it. I used to have to stop my Coumadin for
4 two days and now he jumped it to five. And
5 Dr. Nimer is my cardiologist, says it's too
6 dangerous.

7 In fact, a friend of mine, my son's
8 in-laws, or at least LeFevres, I don't know if you
9 saw them in the paper a while ago, but his brother,
10 LeFevre's brother, died recently because he had
11 some shots somewhere in his back that they had to
12 stop the Coumadin. And then they -- as soon as the
13 Coumadin was stopped, he was bleeding all through
14 his body and it killed him.

15 So Dr. Nimer told me that I better not
16 take a chance with that anymore, so I just have
17 to -- he just -- he just gives me pain medication
18 now.

19 Q. Okay. And let me ask you: I asked you
20 about Dr. Scott Parry, and you mentioned that you
21 saw him, but I don't recall for what purpose.

22 A. Just because my knees were starting to go
23 on me for old age.

24 Q. Okay.

25 A. And I was getting shots. I still get the

1 they sent me there for a while, but it didn't seem
2 to help me. There's -- I started to have some
3 balance problems. I fell five or six times in the
4 last year and a half to two years. And they're
5 trying to straighten the balance problems out right
6 now. And they don't know. They can't guarantee it
7 was caused anything at all from the accident, but
8 they said it could be, but they -- you can't prove
9 it one way or the other, so --

10 Q. Tell me about these balance problems.
11 What -- is there any -- when does it occur?

12 A. I just feel all dizzy. My wife thinks
13 it's from some medications, but we gave all the
14 doctors that I was complaining to about. And I got
15 a Koi pond in my front yard. You know what Koi
16 are?

17 Q. Fish.

18 A. Oh, yeah. And the whole Koi pond is
19 outlined with lava rocks. And I fell on them a
20 couple times, and then -- so my wife wants me to
21 pull the lava rocks out and put other rocks in, so
22 I don't know.

23 Q. You've fallen a couple of times since the
24 accident on these lava rocks?

25 A. Yeah, but this -- this balance problem has

1 shots from him, but it's not the same as getting a
2 shot in your spine. It's completely different, you
3 know.

4 Q. Well, what about Dr. Gary Snook?

5 A. Dr. Snook worked for Dr. Parry, worked
6 with him. And he's the one that initially told me
7 to go to Dr. Stott. He only saw me once, I think,
8 that guy. They're all orthopaedic men.

9 Q. Okay. What about Bruce McPherson? He's
10 listed as a physician's assistant.

11 A. Yeah. I don't -- well, maybe -- my
12 primary doctor is Dr. Graff and he worked for
13 Dr. Graff for a while and now he's working for
14 Dr. Parry. So I might have seen him at both of
15 those locations. I don't know if I ever saw him.
16 Yeah, maybe I did see him at -- because he is
17 working with Dr. Parry's office now.

18 Q. Again, am I correct in understanding that
19 any treatment that you received from Dr. Parry was
20 related to knees and that that didn't have anything
21 to do with the accident?

22 A. Right.

23 Q. What about Rick Johnson, physical
24 therapist?

25 A. Yeah. He's in the hospital there, and

1 only started within the last year, so I don't know
2 if it's partially related to this accident and just
3 in time develops into balance problems or not. I
4 don't know.

5 Q. You mentioned that your wife and/or you
6 thought that this, your balance problems, may be
7 attributable to medications that you're taking?

8 A. Yeah.

9 Q. Which medications are you taking?

10 A. Oh, I have no idea.

11 Q. Just like a whole --

12 A. She gives me a cup full of pills in the
13 morning and a cup full of pills and it could be
14 arsenic and I would just down -- take them down.
15 If she wants to kill me, she's got a good shot of
16 it, I would say.

17 MS. HUTTON: Do you carry a list of your
18 medications in your wallet?

19 THE WITNESS: Nope. I think I did, I did
20 at some time, but I -- no. Mostly it's just --
21 there's heart medications and the Coumadin because
22 I have had heart attacks and strokes, too, a long
23 time ago. It had nothing to do with this.

24 MR. HARDMAN:

25 Q. Let's see. Ryan D. Church?

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1 A. Ryan Church, he worked for Dr. Parry or
2 some -- or one of these other doctors I don't
3 even know.

4 Q We could probably ask Linette what the
5 acronym FNP-C means.

6 MS. HUTTON: He's a nurse practitioner.

7 MR. HARDMAN: Okay.

8 THE WITNESS: Since I -- well, I've been
9 going to Dr. Graff since the day I came here in
10 '75 In fact, I've never paid him a nickel. We've
11 always taken it out in printing. I still do
12 printing for him.

13 MR. HARDMAN:

14 Q. So Dr. Graff is your primary treating
15 physician?

16 A. Primary, yeah.

17 Q. I don't see him --

18 A. And he's --

19 Q. -- on the list here. Which Dr. Graff?

20 Oh, yeah, he is, No. 22, William Graff.

21 A. Yeah. And he's had a number of -- he's
22 had two girls and three or four men working there
23 as assistants.

24 Q. Okay. We've already talked about
25 Dr Stott

1 Q. And why did you seek treatment from
2 Southern Utah Neurology?

3 A. Because Dr. Nimer told me I ought to see a
4 neurologist, too. So up there -- and the first
5 doctor I saw was Dr. Sanchez, but he isn't there
6 anymore and this new girl is there. And she just
7 has me take MRIs and a few other tests on a yearly
8 basis and stuff.

9 Q. And do you feel that -- that some part of
10 the injuries that you sustained from the accident
11 necessitated your having to go to Southern Utah
12 Neurology?

13 A. I don't know why we started to go there.
14 Probably was still bothering me, it was painful or
15 something. I don't know if it was just pain
16 medication that he was treating me for or what. I
17 don't remember why they -- why I go to so many
18 doctors. Some of them are just, you know, you've
19 got to exercise your back, you've got to do this or
20 you've got to run around the block twice a week or
21 something. I don't know why they do the things
22 they do, but --

23 Q. What about Dr. Edward Shepherd? It looks
24 like he works at Southern Utah Neurology.

25 A. He might have been the guy that give me

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1 A. The only thing I'm going to him now for,
2 because I stopped those shots, is just pain
3 management.

4 Q And what sort of pain are you managing
5 from --

6 A. I don't know. He gives me Lortabs and a
7 couple other things.

8 Q. But, I mean, what parts of your body are
9 causing you pain for which he's treating you,
10 Dr. Stott?

11 A. Mostly my back.

12 Q And where else? You say mostly. Where
13 else? Your knees?

14 A. In my neck No, not my knees. I don't
15 get anything from Dr. Parry on those. But when I
16 -- when I'm taking them, my knees are better
17 anyway. You know, it stops, my knees start acting
18 up. The pain medicine I'm taking for my back is
19 probably helping that, too, you know. So if it's
20 pain medicine, it's going to help any kind of pain,
21 I guess.

22 Q Southern Utah Neurology in Ivins, Utah?

23 A. Yeah, that's Mrs. DeSaibro.

24 Q. How do you spell that? Do you know?

25 A. No, I don't know.

1 the MRIs or something. I don't -- I don't even get
2 to know those people really They just put you on
3 a table and put you through that tunnel and the
4 printout comes out and --

5 Q. What about Dr. Terry L. Montague?

6 A. Doesn't ring a bell. I don't know what he
7 was doing for me.

8 Q. You don't even know what kind of doctor he
9 is?

10 A. (Witness nodded negatively.)

11 Q. Is that a no?

12 A. Never heard of him. Some of these guys
13 might just be ones that examine x-rays or
14 something. I have no idea.

15 Q Dr. Tracy Orr, appears that he's a
16 radiologist. Do you recall having received any
17 treatments from him?

18 A. No

19 Q. Dr. Steven B. Davis at the Snow Canyon
20 Clinic in Ivins.

21 A. He must just take some x-rays on me or

22 MRIs or goes through the tunnel or do something. I
23 don't know. X-rays

24 Q. And we previously talked about Dr. William
25 T. Graff. He's your primary treating physician.

22 (Pages 82 to 85)

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1 A. Yeah. Just for normal colds and that kind
2 of stuff. And if he's got something that he thinks
3 I need to see somebody else on, he just calls them
4 up and I go there and see them.

5 Q. Dr. Oscar Sanchez at the Ivins Clinic.

6 A. He's gone now and DeSaibro is the one that
7 takes care of me there.

8 Q. Do you recall having ever treated with
9 Dr. Sanchez?

10 A. Yeah. I remember doing things with him.

11 Q. Like what? Was that attributable to the
12 accident as far as you recall?

13 A. No. I think it was before the accident.

14 Q. Why were you visit -- why were you
15 treating with Dr. Sanchez prior to the accident?

16 A. I don't know. I don't know why. She had
17 other things to do that -- I don't know what
18 neurologists do actually. Do you?

19 Q. I have some ideas, but --

20 A. I don't know.

21 Q. Okay. How about Dr. Keshav Chandler?

22 A. That name doesn't even ring a bell. A lot
23 of times a doctor, like Dr. Graff or something,
24 says, "Here, go and see this guy, and I'll call
25 them and tell them what to do." And then he gets a

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1 Q. Why did you go -- what -- what sort of
2 treatment did you get from him, chiropractic
3 treatment?

4 A. Well, right now I still go to him now.
5 It's all -- that part I'm going to him now is -- is
6 related to the -- to the fall. He just gives me
7 adjustments on my back and then I feel better for
8 another month or so. And then I -- I don't know
9 why, but it does feel better.

10 Q. What -- what was the reason that you saw
11 him before the accident? Was he adjusting -- was
12 he adjusting your spine, then, as well?

13 A. Yeah, but I don't know. Really wasn't the
14 same -- the same pain and stuff. It was -- I'd
15 just go to him every once in a while to -- if I
16 overdid it. He just cracked my back or whatever
17 they do, and I'd feel better, but --

18 Q. How are the -- how are the treatments that
19 you received from him prior to the accident
20 different than the treatments you're receiving from
21 him now?

22 A. The only thing is I'm seeing him more
23 often since I -- but just apparently adjust my
24 spine and I can sleep better and do things better.

25 Q. Does this press that you operate, does it

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1 report and tells me what happened. I don't --

2 Q. How about Dr. Lynn Nimer?

3 A. He's my heart specialist. He's the one
4 that gives me Coumadin and checks my -- go in for
5 the tests. They give you stress tests on your
6 heart and all that kind of stuff every year.

7 Q. And is it your contention that your heart
8 condition has worsened as a result of the accident?

9 A. I don't think so.

10 Q. How about Dr. Brad Myers, M-Y-E-R-S?

11 A. I don't recognize that name either. Like
12 I say, a lot of times you'll go in and the guy that
13 works on you isn't the fellow you went to see.

14 Q. How about Dr. Clark Labrum?

15 A. He's my chiropractor.

16 Q. Did you treat with Dr. Labrum, receive
17 chiropractic treatments from him, prior to the
18 accident?

19 A. Yeah.

20 Q. For how long?

21 A. Just when I'd feel that I needed some kind
22 of adjustment or something. I don't know. I used
23 to go to him very rarely, but we -- again, I used
24 to trade him printing for going there. But I
25 didn't -- I didn't see him on a regular basis.

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1 kind of throw your spine out of alignment working
2 in -- working with that?

3 A. For the numbering, like I was telling you
4 about the letter press?

5 Q. Whatever sort of press you use in your
6 current business.

7 A. Yeah. No. I don't think any of them
8 really bother me that much, but I've just got to
9 rest in between. I got to take longer to do. If
10 it takes me half an hour to do 250 of them, I'd do
11 that, and then I rest for -- or go do something
12 else, then run a job on another press or
13 something. And I just kind of alternate. I can't
14 do it real steady.

15 Q. Rick Pool at Fitwell Prosthetic & Orthotic
16 Center. Is he the person from whom you received
17 this back brace that you were talking about?

18 A. That probably is right. I don't even
19 recall all those names.

20 MR. OLSON: I'm starting to think I just
21 opened the yellow pages, but I don't remember that
22 many either.

23 MR. HARDMAN:

24 Q. Okay. This might be a good time for just
25 a little break. I want to spend some time talking

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1 a little bit about you're making a claim for lost
2 wages and then ask you some questions about some of
3 the statements and things in some of your medical
4 records that we've received, so do you want to take
5 a bathroom break or get a drink of water or stretch
6 your legs?

7 A Yeah, I guess so.

8 Q. Okay.

9 (Whereupon, a recess was taken
10 from 2:53 P.M. to 3:01 P.M.)

11 MR. HARDMAN:

12 Q. Let me ask: We spent some time earlier
13 trying to kind of narrow down as best as you could
14 the date that the accident occurred. And I believe
15 it was your testimony you didn't know specifically,
16 sometime toward the latter part of September, early
17 part of October. Do you --

18 A. Yeah, but when I made this one thing out
19 here then, the date of the accident was 9-25-03.

20 Q. So is that your testimony, that it
21 occurred on --

22 A. I think -- that's what I think it was. I
23 didn't report it until the 21st, I guess, because
24 they gave me -- and what have they got there, 9-25
25 on this one? I don't know if they put a date on

1 knee prior to the accident?

2 A. Yeah. Oh, yeah.

3 Q. What -- what sorts of injections are you
4 receiving in your back?

5 A. I don't -- I don't even know what they are
6 actually, but it helps the pain. But I have to
7 stop them now because they -- when I mentioned
8 Coumadin, being off the Coumadin too long, so I'd
9 rather live with the pain than die. I mean, I'm
10 not afraid of dying, but, I mean, I've still got my
11 wife. I need to take care of her, so --

12 Q. Sure. One of the things, that in
13 preparing your complaint for the lawsuit that your
14 attorney has alleged on your behalf, is that you
15 have an ongoing need and that part of the damages
16 for which you should be compensated are for future
17 medical expenses. Did you understand that?

18 A. Yeah, there's probably some of the things
19 that are a problem. I might have to see a doctor
20 'til the day I die, I would imagine.

21 Q. Okay. Now, you've just -- as I understand
22 your testimony, you've got this situation where
23 it's kind of a catch 22, you have to take the
24 Coumadin for your heart and you can't take Coumadin
25 and receive the injections in your back; is that

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1 this one or not.

2 Q. Do you recall what day of the week it was?

3 A. No.

4 Q. Let me ask another question. You -- you
5 talked a little bit about your arthritic knees. Do
6 you recall when you were diagnosed with arthritis
7 in your knees?

8 A. Maybe about five years ago.

9 Q. So --

10 A. A couple years before the accident, I
11 guess, but that -- you know, I get those shots once
12 every three months because that's what Medicare
13 will pay. Medicaid will pay for that.

14 Q. Tell me about the shots. Are they into
15 each knee?

16 A. Yeah. And they -- he does them both on
17 the -- used to be he would give me one and then I'd
18 come back in a couple weeks and get the other one.
19 And now he's -- they got some new stuff that you
20 can do both at once or just go in there for one.

21 Q. And when you say "he," are you referring
22 to Dr. Scott Parry?

23 A. Dr. Parry, yeah. Just goes in and gives
24 me a shot in each knee and I go out.

25 Q. And were you receiving those shots in your

1 correct?

2 A. Right

3 Q. And you've made a conscious decision to
4 continue with the Coumadin medication in preference
5 to maintaining your heart condition; is that
6 correct?

7 A. Yeah, but there are -- I got a meeting
8 with the doctors. There's other things that they
9 can do now. They've got these patches that you can
10 paste on your back and stuff like that so you don't
11 have to take shots. I guess it just absorbs in
12 through the skin or something. I don't know.

13 Q. Okay.

14 A. But I'm supposed to have a pain
15 management meeting, I think, in a week or two with
16 Dr. Stott's people there.

17 Q. Okay. So -- so here in these initial
18 disclosures where your attorney has suggested that
19 you should be compensated for the rest of your life
20 for the cost of these injections that you would
21 receive in your back, should we disregard that now
22 that you've decided not to obtain that procedure?

23 A. I don't know. I'd have to ask -- I don't
24 know what they're going to do.

25 Q. But you won't be receiving these

24 (Pages 90 to 93)

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1 injections into your back at a cost of \$475 each
2 for the rest of your life?
3 A. Probably not. I don't know.
4 Q. Okay. And then another --
5 A. Whatever they decide on might be more
6 expensive. I have no idea --
7 Q. Sure.
8 A. -- until I talk to them, you know.
9 Q. And then it also states here, "He,"
10 meaning you, "will require approximately six
11 injections per year for the rest of his life." I
12 believe this is referring to the injections you
13 were receiving in your knees.
14 And you've previously stated, testified,
15 that you were receiving those injections prior to
16 the accident; is that correct?
17 A. Yeah.
18 Q. And that those injections and the pain
19 that they were designed to treat, that being the
20 pain in your knees, had nothing to do with the
21 accident. Is that also correct?
22 A. I don't think they did because otherwise
23 why would it be in both, you know.
24 Q. And why would you have been receiving them
25 prior to the accident --

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1 A. Yeah.
2 Q. -- if it was a result of the accident?
3 A. It's just arthritis. That's probably
4 what's doing it.
5 Q. So should we disregard that from your
6 claim for future medical damages as well, then?
7 A. I would imagine so. I don't know how they
8 -- how you people work. I have no idea. Sometimes
9 the alternative that you've got to make the
10 decision could be worse, could be more money
11 involved. I have no idea what they're going to do
12 to me if it does get worse, but I'm mobile now.
13 I -- I have trouble getting up and down sometimes.
14 Like to sit in this chair for like two
15 hours, I had trouble getting up and even walking to
16 the bathroom. Now I feel a little better that I
17 went down and got back here again. I try to keep
18 as active as I can, but it just slows you down.
19 When you're used to being an active
20 person, it's -- you know, I think I can do
21 everything, and then I say to my son, "Come over
22 here and help me," only because I've got to bend
23 down to get on two knees and look for something
24 under my bed or whatever. So I get my son to come
25 over and do it for me.

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1 Q. Now, recognizing that, you know, you're
2 advancing in age, to what percentage of your
3 present condition do you attribute to old age
4 versus the effects of this accident that you
5 sustained?
6 MR. OLSON: I'm going to object to that
7 because not only are you asking him to speculate,
8 but I think you're asking him for expert opinion.
9 To the extent that you have any idea how to
10 apportion it by percentage, you can certainly
11 answer.
12 THE WITNESS: I don't know.
13 MR. HARDMAN: Well, what I -- I guess --
14 and that was a very poorly phrased question, I'll
15 admit.
16 Q. Let me ask you: What I'm trying to
17 understand, and we all are as defense attorneys
18 here trying to appreciate, is we -- examining your
19 medical records and things here, it was pretty
20 clear that you had some conditions that were part
21 of your life prior to the accident and that -- and
22 that all of those conditions and circumstances have
23 continued after the accident and that --
24 A. And some of them got worse, but --
25 Q. Okay. And that's what I want to -- and

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1 that was a poor way of asking it.
2 A. It's kind of hard to pin that down, you
3 know. I don't know, you know. I could --
4 Q. I can appreciate --
5 A. You know, I've had a couple -- a couple of
6 heart attacks and a couple of strokes. I mean, I
7 could walk out of here, out of your front door, and
8 drop dead, you know.
9 Q. Sure.
10 A. I don't know. When you get older, you
11 can't -- you wish you'd live forever.
12 Q. Well, do you -- do you attribute the way
13 you're feeling today to -- more so to just
14 advancing in age than you do to the -- to the
15 injuries you sustained in the accident?
16 A. Well --
17 MR. OLSON: Same objection as prior.
18 THE WITNESS: Yeah, but I -- yeah. I
19 think that -- I think I was very active up to that
20 point. And I can't do those same things.
21 Like I was telling you, I took my
22 grandkids out on the boat. I used to be able to
23 just pick them up and put them in the boat and go
24 out. I've got to have help getting in and out of
25 the boat now.

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1 MR. HARDMAN:
2 Q. Okay. Tell me about your activities prior
3 to the accident. How often would you go boating?
4 A. At least once a week.
5 Q. And what kind of a boat?
6 A. It's an old Chrysler. It was made in
7 1975, 105 horsepower motor on it. And I just got
8 these couple of tubes that the kids jump on. One
9 of them is long, three kids get on it, and we just
10 ride around.
11 Q. I'm not a boat person myself. How big of
12 a boat is this in length?
13 A. About 17 feet.
14 Q. Is this a boat behind which you could pull
15 water skiers or --
16 A. Yeah, but I don't do that with the kids.
17 Q. Sure. Parents probably wouldn't like
18 that.
19 A. They can do that later, you know, on their
20 own. I just got these like inner tubes. One is a
21 big inner tube and the other one is like a snake
22 that three or four kids can fit on it and just pull
23 them around in the water. And if they fall off,
24 they've got a life preserver on, and that's it, you
25 know I always bring one of their parents with me,

1 condition that prevents you from doing that?
2 A. My back and my unsteadiness. I'm afraid
3 I'm going to fall again.
4 Q. Did -- do your arthritic knees bother you
5 to hike up and down those hills like this?
6 A. No. My knees don't really bother me that
7 much, but I have this -- the un -- this balance
8 problem right now that developed over the last six,
9 eight months, you know. And nobody knows why, if
10 it's medications or if it's had something to do
11 with the accident or -- so I just kind of take it
12 as easy as I can so I don't fall. I think I made a
13 statement somewhere I think in the last -- the last
14 year or last year and a half, I fell three or four
15 times, and it depends how bad you fall, you know.
16 Q. Have you been hospitalized as a result of
17 any of these falls?
18 A. No. No.
19 Q. Have you broken any bones?
20 A. No. Never broke a bone in my body my
21 whole life, but I come from a family of people that
22 live forever, I think.
23 Q. That's good.
24 A. I had an aunt that was born, weighed a
25 pound and a half and the doctor said that she

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1 and he can help me in and out of the boat and stuff
2 like that.
3 Q. Now, this is prior to the accident you
4 would always have a parent with you?
5 A. Yeah.
6 Q. So who would take the -- is this a boat
7 that you haul around on a trailer?
8 A. Yeah.
9 Q. So who would -- who would put the boat in
10 the water when you'd take --
11 A. I would. I'd always have my son -- one of
12 my sons with me. There's three of them living here
13 in Irvington. I mean -- that's where I was born.
14 That's going a ways back.
15 Q. Okay. So beyond -- besides boating
16 roughly once a week with your sons and grandkids,
17 what other activities did you do prior to the
18 accident that you cannot do now?
19 A. I used to go -- I used to go hiking and
20 fishing at the same time. But I -- now I go
21 somewhere where there's water where I can take the
22 boat because I can't get up and down. Like Baker
23 Dam, I used to go up and walk back and down the
24 hill and fish. I can't do that anymore.
25 Q. What -- what is it about your present

1 wouldn't live 'til morning, and he walked out of
2 the house and she lived to be 85, so -- my father
3 is one of 13 kids and they had a big family and
4 they all lived to be all in their nineties. One
5 aunt got -- passed away last year in Florida. She
6 was 105, so -- but I don't know how long I'll
7 live. But I don't worry about that too much.
8 Q. Okay. Are there any other future or
9 anticipated ongoing medical expenses that you've
10 been told or understand that you need to continue
11 receiving as a result of the accident?
12 A. All my medical conditions that I have
13 right now I have to keep up, whatever. The only
14 thing is, with my back, I've got to be continually
15 taking either shots of some kind or this patch
16 might work. And I understand they're not cheap,
17 but it's cheaper than getting -- the shots aren't
18 cheap either, you know, so --
19 Q. But you're not going to receive those as I
20 understand?
21 A. The shots, I probably won't get them
22 anymore.
23 Q. Are there alternative therapies to the
24 shots --
25 A. That's what I'm saying.

26 (Pages 98 to 101)

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1 Q. -- besides this patch thing? I mean, can
2 you do back strengthening exercises?

3 A. I don't know. They tried them and nothing
4 seems to work much because I -- I'm not as muscular
5 as I used to be or can't pick up as much weight. I
6 used to pick up cartons of -- even on my stump I
7 used to pick up two cartons of paper, and they
8 weigh about 50 pounds each, and walk them from my
9 car into the shop and put them there and run a
10 job. Now I can't even pick one up. I got to get
11 my -- either I've got to open the carton up at my
12 door and bring them in there two reams at a time or
13 get one of my kids to do it for me.

14 Q. Then you don't attribute that to the
15 accident, though, do you?

16 A. I don't know. I mean, it's been getting
17 worse the last couple of years, you know, the
18 effects on my body, so I just -- I just go ahead
19 and do it anyway. But I don't pick up as many as
20 -- I can't pick up as much as I used to before I
21 got hurt, you know. But that doesn't bother me
22 that much anyway. I get it done. If I've got to
23 make 10 trips to my shop to put the paper in there
24 or one, it doesn't -- it takes a little more time
25 and that's it I don't worry about that.

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1 Q. Let me kind of segue into something you
2 just -- or from something you just said there about
3 your work. You've also made a claim for lost
4 income as a result of the accident.

5 A. Like I said, I had to give up a good
6 portion of my business to be able to keep hold of
7 any of it. I didn't give it all up. I'm still
8 working. I'm 76 and I still work every day. But I
9 don't get it done as quick as I used to. I can't
10 do as much as I used to.

11 Q. And you blame that entirely on the
12 accident?

13 A. Yeah, because I told the people they're
14 going to have to find another printer. I just kept
15 the people that are better for me, easier for me to
16 handle.

17 Q. What -- what is it about the condition of
18 your body following the accident that you have --
19 that's made it so you cannot continue to service as
20 many customers?

21 A. It's just harder for me to work, to do
22 anything. Since that accident I'm not as limber or
23 as quick as I was. I don't run anymore. And I
24 walk slow. And it just takes me longer to do
25 everything. And where you draw the line, where age

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1 comes and after that, an accident comes, I don't
2 know what makes it worse, getting old or the
3 accident. I don't know.

4 Q. So you think it could be a combination of
5 those two things?

6 A. That's the way I feel, yeah. You're not
7 getting any younger. You can't operate the same as
8 when you were 16, can you?

9 Q. No. I can't do things I could do three or
10 four years ago, so -- and I'm 37.

11 A. You're getting old quick. Be careful.

12 Q. Approximately how much income were you
13 generating in your business in the year immediately
14 prior to the accident, monthly income?

15 A. I don't know. Ranon Beasley just makes up
16 my income tax, and I give him all the information.
17 I just sign it and I get money back. But he
18 doesn't put in -- I've got a son that's
19 handicapped, he's on 100 percent disability checks,
20 and I always get a return from him, but I don't
21 declare a lot of my -- my attorney wrote the IRS a
22 letter even that he doesn't -- we don't put a claim
23 in for all our expenses because we've got a son
24 that, I don't know, winds up that I get more money
25 back than if I declared all my business expenses.

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1 Q. Sure. Are you yourself receiving Social
2 Security?

3 A. Yeah.

4 Q. And you get a payment from your son as
5 well for being his primary --

6 A. Yeah, but he doesn't get that much.

7 Q. Uh-huh.

8 A. And he -- the money comes to me, but he
9 gets it all.

10 Q. When did you make this determination with
11 your accountant that you would not report as much
12 income to -- to enable you to receive more Social
13 Security?

14 A. Well, when I -- when this accident first
15 came up because I couldn't -- I'm not getting as
16 much back anyway. I used to also get a, you know,
17 1,500 to \$2,000 back every year in my income tax.
18 And now I don't. I get maybe five or 600, that's
19 it.

20 Q. So by purposely reporting less earnings
21 from your printing business, you could increase the
22 amount of income from Social Security?

23 A. Right. What is it, child something? He's
24 a 34-year-old kid, but he's got a lot of mental
25 problems

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1 Q. Well, and that's the case for yourself and
2 the Social Security that you receive as well, is
3 that not correct, in terms of the income that you
4 report? If you report less income, your individual
5 Social Security payments increase as well, do they
6 not?

7 A. I don't think so.

8 Q. No?

9 A. I get the same amount every year, just
10 cost of living increase goes up, and then I get a
11 little more money every year, but they set that the
12 day you're going to retire.

13 Q. Okay. So help us, as defense attorneys,
14 understand something. If you've consciously made a
15 decision to report less income from your printing
16 business, then how do we -- to increase the amount
17 of Social Security income, then how do we
18 extrapolate that into a loss attributable to the
19 accident?

20 MR. OLSON: Let me object because I don't
21 think that that's what he's testified to. I don't
22 think he's testified he's not reporting his income
23 in his printing business. Rather I think he had
24 testified that he was not reporting all of his
25 expenses --

1 now you get about 750?

2 A. Right

3 Q. So in terms of calculating -- well, let me
4 ask you: Are -- do you have plans to increase the
5 amount of printing work that you're presently
6 doing?

7 A. No I would give more of it up if I
8 could, but people are so good to me that -- and
9 they're not a pain in the neck people to work for.
10 You know, they give you plenty of time to do the
11 work. And if I call them and -- and I kind of keep
12 tabs on them.

13 So like I went down to Bryce Christensen
14 the other day and she says, "Yeah, we were going to
15 call you because we think we needed some more."
16 And then they looked and they were almost out And
17 so I'm working on a job for them.

18 Q. Okay So based on your testimony, as I
19 understand it now, that you -- the appreciable
20 difference that you recognize in reduced income
21 from your printing business is 12, \$1,300 a year,
22 that's the figure that we, as attorneys, defense
23 attorneys, should rely upon when trying to assess
24 what your future loss of income would be?

25 MR. OLSON: I guess I'm going to object

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1 THE WITNESS: Yeah.

2 MR. OLSON: -- looking to increase
3 income.

4 MR. HARDMAN: And maybe I misunderstood,
5 I'm sorry.

6 THE WITNESS: I don't report all my
7 expenses in my business so that it shows up that I
8 made more money, so -- but I get more back because
9 I'm taking care of my son who's on 100 percent
10 disabled. I don't know what it's all about
11 either. My accountant takes care of that and I
12 just give him the figures at the end of the year
13 and he does it.

14 But I used to get a couple of grand back
15 every year, and these last three years since the
16 accident and I eliminated part of my business, it's
17 like 750 bucks that I get back a year instead of a
18 couple thousand, you know.

19 MR. HARDMAN:

20 Q. So is it your testimony, then, that as a
21 result of the accident your printing business
22 income is roughly 12, \$1,300 a year less than it
23 used to be?

24 A. Yes.

25 Q. If you were historically getting 2,000 and

1 again because I'm not terribly sure that that's
2 what his testimony is, 12 to \$1,300 a year.

3 THE WITNESS: No, some --

4 MR. OLSON: It seems to me that the best
5 evidence --

6 THE WITNESS: Some of it I just gave up,
7 you know.

8 MR. OLSON: Jule, just a minute. I think
9 the best evidence of that probably is tax returns.

10 MS. HUTTON: Which may not be the best
11 evidence since he testified that he has not been
12 reporting all of his expenses.

13 MR. OLSON: Sure. But he's been reporting
14 all of his income, all of his revenue.

15 THE WITNESS: You're not required to
16 report all your expenses in any business. You're
17 required to report your income.

18 MR. HARDMAN: Well, let me ask it a
19 different way.

20 Q. Again, in this document, this initial
21 disclosure, it is estimated lost monthly income of
22 approximately \$300 per month. But you just
23 testified that in recent year, and this -- so 300 a
24 month times 12 is \$3,600, but it's your testimony,
25 I believe, that your recollection of that annual

1 lost income is somewhere between 12, \$1,300; is
2 that correct?

3 MR. OLSON: I'm going to object again.
4 I'm not sure that was his testimony. Where are we
5 getting that figure from?

6 MR. HARDMAN: He's talking about what --
7 his tax returns being the basis for him to justify
8 -- or the refund, the amount he received back from
9 his taxes, as being the amount that he used to
10 justify the -- the reduction in printing business
11 after the accident. He used to get a return of
12 2,000. Now he gets a return of about 750.

13 MR. OLSON: Okay. So I guess I'm not
14 understanding where that gets us to a 1,200 bucks a
15 year figure.

16 MS. HUTTON: 2,000 minus 750.

17 MR. HARDMAN: 2,000 minus 750 would be
18 1,250, I think.

19 MR. OLSON: But that's not revenue.
20 That's just the tax refund difference.

21 MR. HARDMAN: I understand. I understood
22 that to be his testimony as to how he figured out
23 that -- how his business had been affected, his
24 income had been affected by the accident. Maybe I
25 misunderstood, but --

1 MR. OLSON: Okay.

2 THE WITNESS: I don't know. I just -- I
3 gave all the stuff to my accountant, and I gave up
4 about half of my gross business, but that isn't
5 income because part of that, a third of that at
6 least, is materials and stuff like that.

7 Your power bill goes up and this goes up
8 and so it isn't -- it isn't just a figure that you
9 say, but I gave up about half of my volume of
10 business, my gross. And I can only guess at that,
11 you know. But I --

12 MR. HARDMAN:

13 Q. Okay. Turning to the documents that have
14 been provided by your attorney as part of your
15 initial disclosures. The document that has been
16 Bates stamped No. 62 by your attorney, and I'll
17 just represent for purposes of our record here,
18 this is the -- it's a consultation from December
19 the 21st, 2004.

20 And here where it talks about in this
21 document diagnostic studies, this was a reference
22 from a Dr. Gary Snook. It says, "X-ray of the
23 lumbar spine which reveals degenerative disk
24 disease with some disk space narrowing and facet
25 arthropathy of the lower lumbar facets," and then

1 some more kind of technical stuff.

2 What I want to ask you about: Where
3 this -- the doctor diagnosed you with degenerative
4 disk disease. Do you understand what that means,
5 degenerative disk disease?

6 A. Yeah.

7 Q. What's your understanding of that term?

8 A. You're getting older.

9 Q. Okay. Do you -- did you -- do you recall
10 having that diagnosed prior to the accident, that
11 you had degenerative disk disease in your spine,
12 your back?

13 A. I don't think we ever had any kind of
14 diagnosis one way or the other on that before. He
15 saw me about halfway through. Well, three years
16 now; right? He saw me about halfway through the --
17 like a year and a half ago, or a year ago. He --
18 he just gave me a quick rundown. He took some
19 pictures and he saw me for about 10 minutes and
20 then he wrote the thing out. I don't know.

21 Q. Okay. In terms of past medical history,
22 and again, referencing December 21, 2004, at least
23 at that point in time apparently as you reported to
24 your doctor your past medical history of heart
25 problems, what sort of past problems have you had

1 with your heart? You've talked a little bit about
2 them today, but I'd like you to more specifically
3 tell me what problems are with your heart.

4 A. Well, it goes out of rhythm, and he's got
5 a -- I don't have pacemakers or anything like that
6 in, but he carefully monitors that. I go to see
7 him every month on a pro time check to see if my
8 Coumadin level is right, and he takes my blood
9 pressure and cardiograms and stuff like that and
10 determines when I've got to go in for another test
11 or stress tests or whatever he has me do.

12 Q. Now, it looks like following the accident
13 in 2004 you had an angiogram and angioplasty times
14 two. Do you know what that -- do you recall having
15 those procedures?

16 A. Yeah. I -- your heart valves going into
17 your heart, they put in what they call -- an
18 angiogram is when they take a picture of your
19 heart, and then the angioplasty is when they do the
20 procedure

21 I had to go in the second time after a few
22 years because the stint that they put in there to
23 keep your valve open, they started closing up
24 again. And they -- and it almost looks like a
25 chain link fence type of thing because they can

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1 make it bigger or smaller and the links this way or
2 that way. I think it's metal anyway. And they put
3 it inside of you, and it apparently has been
4 working.

5 Q. Okay. So you had these -- these ongoing
6 heart issues. It also lists here as part of your
7 past medical history respiratory problems. What
8 sort of the respiratory problems were you --

9 A. I've had bronchitis since I've been a
10 little kid, and it's hard for me to breathe
11 sometimes.

12 Q. And do you take medication for that?

13 A. Only when I get a cold. I -- and I --
14 they've got to put me through an inhaler for a
15 period of time that I take my inhaler and open up
16 the bronchial tubes and stuff like that.

17 Q. And the next thing listed here as part of
18 your past medical history, high blood pressure.

19 A. Yeah. I've had that.

20 Q. Hypertension?

21 A. Yeah, I've had that.

22 Q. Do you take medicine for that?

23 A. Yeah. I had that before I came here.

24 Yeah, I have taken --

25 Q. Currently?

1 that the combination of these conditions that we've
2 just discussed, heart problems, respiratory
3 problems, high blood pressure, arthritis in the
4 knees and bleeding problems for which you're taking
5 Coumadin, that they collectively cause fatigue and
6 inhibit your ability to carry on your normal daily
7 activities?

8 A. I've never noticed any difference until I
9 had the accident at the senior center. That's the
10 only thing that ever slowed me down.

11 Q. Later in this same record, talking about a
12 review of symptoms, discusses in December 2004
13 weight loss of approximately 60 pounds. It says
14 that -- and you previously talked about losing
15 quite a bit of weight following the accident.
16 Vision problems. What sort of vision problems do
17 you have?

18 A. I wear glasses.

19 Q. Beyond that, I mean, you don't have
20 glaucoma?

21 A. No.

22 Q. Or any other issues?

23 A. No.

24 Q. What sort of prescription do you have?

25 A. I don't know.

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1 A. Yeah.

2 Q. As well as at the time of the accident,
3 were you taking high blood pressure medication?

4 A. Yep.

5 Q. Do you know what medicine you were taking?

6 A. No. You'll have to ask my wife.

7 Q. Okay. The next thing listed here was
8 arthritis in the knees. We've talked about that
9 already a little bit.

10 A. Right.

11 Q. That's in both knees; is that correct?

12 A. Uh-huh.

13 Q. You were receiving injections in both
14 knees prior to the accident?

15 A. Yep.

16 Q. And it lists "and bleeding problems."
17 What sort of bleeding problems do you -- do you
18 have?

19 A. I don't know. I'm taking Coumadin, but
20 that -- you take too much and then your blood is so
21 thin it just runs right out of you. You make it
22 thicker, I guess, but then you have other problems
23 doing that. The only thing I take for my blood is
24 Coumadin.

25 Q. Have you ever been told by a physician

1 Q. Do you know if you're nearsighted or
2 farsighted?

3 A. I can see you here, but you're a little
4 fuzzy, but I don't know. They just -- I just go to
5 the doctor and get an eye exam occasionally and
6 they issue me a new pair of glasses. I go to
7 Andrus.

8 Q. Okay.

9 A. Phil Andrus. And he checks my eyes every
10 couple of years, and if he needs me -- needs more
11 glasses, then changes can happen. It's strange, my
12 dad, when he got his stroke real bad, he gave his
13 glasses up. He could see like a little kid again.
14 So he figured that out. So I don't know.

15 Q. On this same pain consultation report to
16 which we've been referring, Bates stamped No. 62,
17 there's also a second page to that, Bates stamped
18 No. 63.

19 A. And who prepared that?

20 Q. These are documents that were given to us
21 by your attorney. Presumably came from you or from
22 your doctors directly. I'm not sure, but --

23 MS. HUTTON: Prepared by what physician is
24 what he's asking?

25 MR. HARDMAN: Oh, I'm sorry. Dr. Dale G.

30 (Pages 114 to 117)

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1 Stott.

2 THE WITNESS: Yeah. He's the one that's
3 treating me for my back injury and -- by way of
4 shots. And I switched. I was first going to a
5 doctor that just -- I'd lay down and he'd turn me
6 over and he'd give me a shot in the back. And
7 Dr Stott, he puts a fluoroscope on there so they
8 watch the machine and you don't go in the wrong
9 place in the spine. That's the only reason I went
10 to him, because he uses that machine, to make sure
11 he doesn't hit the wrong thing in your spine,
12 because that could paralyze you for the rest of
13 your life if they do it wrong. So I went to him,
14 but he's changed his attitude on eliminating the
15 Coumadin to making it more, so I didn't want to get
16 involved in that one either.

17 MR. HARDMAN:

18 Q. The document that's been Bates stamped No.
19 70 in the documents that were provided by your
20 attorney is from the Department of Radiology, Dixie
21 Regional Medical Center, and it appears to me to be
22 for some sort of an injury to the -- your hand and
23 wrist from May 30, 2003.

24 A. I don't know.

25 Q "Three views of the right hand reveal no

1 Again, it's your testimony that you didn't
2 have any injury to your hand?

3 MS. HUTTON: It also predates.

4 MR. HARDMAN And it also predates the
5 accident.

6 THE WITNESS: Yeah. I don't -- I don't
7 remember ever having anything like that done.
8 Maybe I was having trouble with my wrist or
9 something and --

10 MR. OLSON: If I can figure out a way to
11 recover medical expenses that predated the
12 accident, that would be a neat trick.

13 MR. HARDMAN: Yeah. Well, I guess we're
14 just trying to figure out why they were included
15 with the medical bills.

16 THE WITNESS: I don't know.

17 MR. HARDMAN: Okay.

18 THE WITNESS: I never even heard of that
19 doctor.

20 MR. OLSON: Probably in a stack that I got
21 from Dixie Regional.

22 MR. HARDMAN: Okay. And that may
23 similarly be the case for Bates stamp No. 71. It
24 says, again, one of the physicians that we
25 discussed previously, Lynn R. Nimer.

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1 fracture or dislocation. Mild interphalangeal
2 space narrowing is noted. Small subchondral cysts
3 are seen with the scaphoid and the triquetrum."

4 Do you contend that there was any kind of
5 injury to your right hand as a result of this
6 accident?

7 A. No. I didn't -- I didn't even know that
8 -- who wrote that?

9 Q. This is Steven Davis.

10 A. I don't even know who he is.

11 Q. He's one of the doctors that was on the
12 list that we discussed previously, I believe.

13 A. I don't know who he is. I don't remember
14 reporting anything wrong with my hand. Maybe I got
15 nervous about something, because I only got one.
16 Maybe I had some kind of fall or did something and
17 I hurt my wrist and I went to a doctor and --

18 Q. Yeah. I guess it appears --

19 A. I don't understand some of the things they
20 say anyway.

21 Q. Sure. It appears to me that this record
22 may have been included by mistake, I don't know,
23 but apparently it was for some sort of an injury or
24 incident on May the 27th, 2003, and this report was
25 prepared on May 30, 2003.

1 THE WITNESS: He's my cardiologist.

2 MR. HARDMAN:

3 Q. The date on that is March the 3rd, 2003,
4 which also predates the accident.

5 A. Yeah. I'd go in there every once in a
6 while and he'd check to see if I had a -- slow my
7 heart down or speed it up and they -- if I need
8 some kind of jolt to keep it steadiness and stuff
9 like that. Because my heart would sometimes pump
10 faster than it should. And I don't know what they
11 do for it, but --

12 Q. Referencing now the documents that have
13 been marked as Bates stamp 74 and 75, this is a
14 two-page report from Dr. Gary Snook. On page 2,
15 where he's talking about surgeries that you have
16 received, one of them kind of caught my attention
17 in reference to your talking about problems with
18 your back. It says he had a cyst removed from your
19 spine. What was that all about?

20 A. I don't know.

21 Q. Again, this is a report that was created
22 on December the 8th, 2004.

23 A. How would he know that -- Dr Snook saw me
24 for about 10 minutes That's all I ever saw him

25 Q Okay

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1 A. Then he wouldn't -- couldn't do anything
2 for me, and so he chased me out --
3 Q. Okay.
4 A. -- basically.
5 Q. Well, let me ask you --
6 A. He was connected with Dr. Parry's office,
7 but I don't remember having a cyst on my spine. I
8 don't know where he got that from, but I had a
9 cystocele when I was a little kid back in New
10 Jersey.
11 Q. Uh-huh. And maybe that's what he's
12 talking about. I don't know. I'm just asking.
13 A. They put a drain in it and every -- every
14 now and again up to now, that thing starts draining
15 again. Just a little blood and mucous comes out of
16 it, and I just -- I just press my hand against it
17 and run that juice out. I don't know. They had
18 a -- they put a drain in by cutting me open a
19 little bit and put a little tube in there with a
20 little piece of rubber.
21 Q. And this is in your back somewhere?
22 A. Yeah.
23 Q. Okay.
24 A. It was in my spine. It was called a
25 cystocele.

1 pool, swimming three times a week at least 30
2 minutes. Did you ever do that?
3 A. I don't remember him telling me that. I
4 remember after the accident I thought it was the
5 chiropractor that told me to get in the pool with
6 an inner tube and let my body hang loose and just
7 paddle my feet, that it would be helpful to my
8 spine, but I never did it.
9 Q. Why not?
10 A. I don't know. I just -- I really didn't
11 have access to a pool. And if you've got to go to
12 a pool and pay money just to swim for 10 minutes,
13 you know. I mean, I used to -- I used to swim at
14 the pool over at Desert Palms because I had a
15 membership there because I did their printing. My
16 whole family was raised in that pool. Used to go
17 there all the time, but I don't even trade there
18 anymore now. I do work for them occasionally, too,
19 maybe once a year.
20 THE WITNESS: Did you just go to the
21 hospital and ask for all my records, is that --
22 MR. OLSON: Yeah. We just made a request
23 for a bunch of records.
24 THE WITNESS: That could go back to 1975.
25 MR. OLSON: It could.

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1 Q. Okay. And maybe that's what he's
2 referring to here.
3 A. I also had a hydrocele when my testicles
4 swell up like a balloon. You know, those things
5 happen
6 Q. Sure. I know. I'm just --
7 A. It really had nothing to do with that
8 accident.
9 Q. Okay. And that's -- that's what I'm
10 trying to clarify, so --
11 A. But that problem with my cyst happened
12 when I was back east yet.
13 Q. Okay.
14 A. I was quite young at that time. Well, it
15 was when I was just a teenager.
16 Q. Here in Dr. -- in this report here, again,
17 page 2 on Bates No. 75, last -- second to the last
18 full sentence on page 2 of the report, "We have
19 also started him in exercising in the pool and he
20 will swim three times a week at least 30 minutes."
21 Presumably that was done to help with some
22 of the -- the conditions that you were experiencing
23 here. His diagnostic impression was that you had
24 mechanical back pain, degenerative disease of the
25 lumbar spine and he prescribed exercising in the

1 THE WITNESS: Right?
2 MR. OLSON: It could.
3 THE WITNESS: That's where they found the
4 angiogram on me. And they put me on this little
5 SkyWest bugger, that was the biggest plane they
6 had, and brought me out on the board and they had
7 to turn me sideways to get me in the plane. And
8 then they flew me up to Salt Lake.
9 And then when they were done putting the
10 stunt in me, then my son came up and drove me back
11 home. And then five or six years later I went and
12 had to do that -- had to change that stunt. My
13 artery cleared out.
14 MR. HARDMAN:
15 Q. Let me ask you another question about one
16 of these records. It's from Eric Evans. It's No.
17 97, Bates stamp No. 97. I was looking for a -- it
18 looks like it was dictated on July the 16th, 2004.
19 And in the first -- middle of the first paragraph
20 it reads, "He," referring to you, "notes that
21 taking a break from his printing business, less
22 heavy lifting and slowing down and resting often
23 tends to be the best thing for his back.
24 Unfortunately, he is staying fairly busy. He is
25 concerned that he has just overdid it since his

32 (Pages 122 to 125)

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1 last shot."

2 A. I don't even -- I don't even know who
3 Dr. Evans is or why I saw him.

4 Q. And it was -- in July 2004 from which
5 physician were you receiving shots?

6 A. I don't know. On a regular basis?

7 Q. Well, it looks like -- it says the pain
8 clinic. I'm assuming this is referring to perhaps
9 Dr. Stott, St. George Surgical Center.

10 A. Could be. I can't remember. He was the
11 only one I was ever getting any shots regularly
12 from. I did on that one guy that was on Bluff
13 Street, but I found out he wasn't using the
14 fluoroscope to find the right spot, so I gave up on
15 him and went to Dr. Stott. But some of those guys,
16 like Evans, like you mentioned here, I don't even
17 know who he is.

18 Q. Let me ask you to kind of shift gears for
19 a minute.

20 Do you think there's anything that you
21 could have done to avoid the accident?

22 MR. OLSON: Object to the extent that it
23 calls for speculation, but go ahead and answer.

24 THE WITNESS: No, I don't think so.

25 ///

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1 Q. I asked you a question about whether you
2 had done any of these sort of pool exercises and
3 you said no.

4 Were there any other sorts of exercises
5 that any of your doctors recommended that you
6 perform to improve your back condition?

7 A. No. When I was over at that one place,
8 the same building that Dr. Parry was in for some
9 rehab, I think that was right after the accident.
10 They were just putting me on weights and stuff like
11 that and I was hanging there kind of loose and
12 going on the treadmill and stuff, but they never
13 had anything that I should personally do. Then
14 they finally said that they -- that they were
15 finished with me and --

16 Q. So as we sit here today, what -- what is
17 your treatment plan going into the future for
18 your -- you -- as I understand your testimony,
19 there are two injuries that you feel you sustained
20 as a result of the accident, injury to your back
21 and the tendons in your neck; is that correct?

22 A. Yeah.

23 Q. Okay. What is --

24 A. And for some reason, they never did my
25 neck x-rays or anything until after. You know,

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1 MR. HARDMAN:

2 Q. Why is that?

3 A. Because I was normally going by that all
4 the time to pick her up. I happened to step in a
5 spot maybe I never stepped in before and the hole
6 was there. But it didn't look like a hole in the
7 ground. It looked like just ground there. That's
8 why I say I was careful when I got -- walked
9 through there, but I don't know how I could have
10 prevented it. Who steps in a hole anyway on
11 purpose?

12 Q. I don't know. Yeah. I would -- I would
13 not assume most anyone would on purpose, but,
14 again, there wasn't anything about that -- the
15 vicinity of the area that gave you concern that
16 there was any sort of a hazard there?

17 A. No.

18 Q. You don't recall seeing any caution tape
19 or orange cones or things around the accident?

20 A. There was nothing there.

21 Q. Okay.

22 A. Absolutely nothing. I told you that. The
23 only time they put it up was after I fell. That's
24 when they put the tapes up and put -- put more wire
25 fence there and stuff

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1 they always -- because all I did was complain about
2 my back and all they did was do the lower back.
3 They never checked the upper back or the neck or in
4 that area.

5 Q. Now, I believe it was your test -- your
6 prior testimony that the pain in your neck came
7 about within the last year; is that correct?

8 A. Oh, this last year, a year from now, from
9 going back a year?

10 Q. Is that your testimony?

11 A. Yeah.

12 Q. That prior to --

13 A. It didn't seem to bother me -- even though
14 it could have been related to the injury, it didn't
15 bother me until two years after the accident
16 roughly.

17 Q. Okay. And you've testified that following
18 the accident you've fallen several times; is that
19 correct?

20 A. Yeah.

21 Q. And you --

22 A. Mostly in the last year and a half to two
23 years, I think, somebody marked that down I've
24 fallen a few times.

25 Q. What about in May, May 2004? According to

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1 records from one of your physicians, it's the
2 document that's Bates stamped 106, it says, "I fell
3 and hurt my knees when I was working on my deck."
4 And that -- that injury was reported somewhere
5 around May the 26th, 2004. Do you recall falling
6 and hurting yourself working on your deck?

7 A. No, I don't. And who did that? Who did I
8 go to?

9 Q. Looks like a physical therapy evaluation.
10 So getting back to your -- as you sit here today,
11 sort of your plan for treating your back condition
12 going into the future. What is that?

13 A. I don't know. It depends on what
14 Dr. Stott says. If nothing else, I'm just going to
15 have to take pain pills the rest of my life, but
16 there may be physically there's nothing else they
17 can do.

18 If these patches work, that would help,
19 but that's still a medication. It isn't -- even
20 the shots are -- don't cure it. All that does is
21 take the pain away. I mean, it's like a root
22 canal. You pull a nerve out and you don't feel the
23 tooth but it's still a messy tooth. I don't know
24 what people do to stop pain, maybe get rid of the
25 nerve that's giving you the pain. I don't know.

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1 Q. Have you had any of those discussions with
2 your doctors?

3 A. No.

4 Q. And as far as anticipated treatments for
5 your neck, that that condition that was diagnosed a
6 year or so ago?

7 A. They haven't -- we haven't really done
8 much about that at all right now. Who was -- oh,
9 Dr. Parry was the first one that took those, and
10 then he told me to talk to Dr. Stott about it, but
11 he might be out of the picture soon, I don't know,
12 unless he's -- he's the one to prescribe the
13 patches to me if they work.

14 I'm almost afraid of pain medication
15 because you can get hooked on that stuff. I don't
16 want to become a drug addict from pain pills, but
17 pain is no fun either, you know. So it's hard to
18 make a decision.

19 MR. HARDMAN: I think I have run out of
20 questions. You're probably happy to hear that,
21 huh?

22 THE WITNESS: Yeah.

23 MS. HUTTON: My turn.

24 THE WITNESS: Go ahead.

25 ///

-oOo-

EXAMINATION

3 BY MS. HUTTON:

4 Q. Mr. Kreyling, you've testified that you've
5 been treated for high blood pressure for a number
6 of years; is that correct?

7 A. Yeah.

8 Q. Do you recall when you were first
9 diagnosed with high blood pressure? How old were
10 you?

11 A. It was probably in the late seventies
12 or -- well, early seventies maybe because I had it
13 when I was in New Jersey, but I don't know how bad
14 it was. But I started to take some blood pressure
15 medication then. I came here in '75, so it's
16 probably between '70 and -- 1970 and '75.

17 Q. So is it fair to say that you have taken a
18 number of different medications for your high blood
19 pressure?

20 A. Probably. I don't know. It just -- the
21 doctor starts giving me something else that works
22 better. Sometimes they don't tell you it's -- you
23 know.

24 Q. Do you know what you're currently taking
25 for high blood pressure?

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1 A. I think Carzaar. I don't know. I should
2 have brought the whole list with me. Is Hyzaar a
3 blood pressure?

4 Q. Corzaar is.

5 A. Huh?

6 Q. Corzaar is. Do you take a diuretic,
7 something that makes you pee a lot?

8 A. You could call my wife right now, and she
9 could read them all off to you. And I don't --

10 Q. Well, do you take any medication that
11 makes you have to go to the bathroom a lot right
12 after you take it?

13 A. No, I don't think so. I do go to the
14 bathroom a lot, but I thought I had prostate
15 troubles. And I went to Dr. Reed and they checked
16 me all out and my prostate is fine, but I've got to
17 get up and go to the bathroom 10 times every night.

18 Q. Your -- you've said you've had two
19 previous heart attacks; is that correct?

20 A. Yeah, but it's just the angiogram and an
21 angioplasty. It actually wasn't a heart attack. I
22 wouldn't assume. You might call it that, but I
23 never --

24 Q. Well, didn't you previously tell us that
25 as a result of -- that you have a defect in your

34 (Pages 130 to 133)

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1 heart and blood collects there and if you don't
2 stay on Coumadin then that defect will throw out
3 those clots to the rest of your body?
4 A. I don't know. Did I say that?
5 Q. Yeah. Explain to us why you're taking
6 Coumadin.
7 A. To thin my blood so I don't have -- don't
8 have clots, I guess, but, I don't -- but I don't
9 know that -- when that valve closes down in your
10 heart, it restricts the actions so they thin your
11 blood out so it can get through.
12 Q. What valve?
13 A. That stint they call it. It gets put
14 inside your -- and then when that doesn't work no
15 more, they've got to go in and take that stint out
16 and then put another one in.
17 Q. Okay. So the Coumadin is because of the
18 placement of the stint? Is that when you first
19 started taking Coumadin?
20 A. I think so. I --
21 Q. But you don't recall?
22 A. I don't recall.
23 Q. The medications that you're taking for
24 your heart and for your high blood pressure, do --
25 has your doctor ever cautioned you about sudden

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1 dizzy spells when you first get up?
2 A. Yeah, but I never had any like that.
3 Q. Did you not earlier testify that you got
4 dizzy spells and fell down in the rocks by your Koi
5 pond?
6 A. Balance.
7 Q. Okay. So those aren't dizzy spells?
8 A. I just -- maybe it is, I don't know, but
9 that's not what I would call them.
10 Q. Did you have a dizzy spell outside the
11 senior center?
12 A. No.
13 Q. Did you have a balance problem?
14 A. No. I didn't have them then.
15 Q. Take a look at those pictures, the two
16 pages of pictures that have five photographs on
17 each page.
18 A. Yeah.
19 Q. There's one of them, it's marked on the
20 back as Exhibit 6, but on the front of it, you're
21 in the picture in the top right. Can you see that
22 right there?
23 A. Yeah. Yeah.
24 Q. Okay. Is it your testimony that in that
25 photograph you weighed 300 pounds?

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1 A. Probably close to it, yeah.
2 Q. Okay. So since that picture was taken
3 right there, you've lost 90 pounds?
4 A. Right.
5 Q. Okay. Who monitored your weight loss?
6 A. Me.
7 Q. What physician monitored your weight loss?
8 A. Nobody.
9 Q. Okay.
10 A. I did. I just stopped eating all my junk
11 food.
12 Q. Okay. In that same photograph, can you
13 see right behind you that chain link fence?
14 A. Yeah.
15 Q. Is it your testimony that that fence was
16 not there the day that you fell?
17 A. That's what I think. I can't remember
18 exactly, but I don't remember seeing a chain link
19 fence there when I fell.
20 Q. Okay.
21 A. This is after I fell I came back and took
22 pictures.
23 Q. Now, I believe that what you previously
24 testified was that you came back about a week,
25 maybe two weeks after you fell to take those

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1 pictures; is that correct?
2 A. Yeah.
3 Q. Is the hole that you fell into in those
4 pictures?
5 A. Yeah. It's right here, but they covered
6 it up with gray dirt. And all the dirt around it
7 is red.
8 Q. So in this picture, it's your testimony
9 that someone had filled the hole in or covered it
10 up?
11 A. Finally, yeah.
12 Q. Okay.
13 A. But they didn't do it right away because I
14 told them to do it right away. And it appeared to
15 me -- I can't remember exactly -- that it was a
16 couple of weeks later, when I came to take the
17 pictures, I saw that red dirt there.
18 Q. Okay. So --
19 A. It's an entirely different color.
20 Q. So regardless of when they filled it in,
21 whether it was two weeks after you talked to them,
22 you took the photographs sometime after that?
23 A. Yeah.
24 Q. Is that correct? Okay.
25 So if they took two or three weeks to fill

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1 that hole in, then you didn't take those pictures
2 until at least two or three weeks after the
3 accident; right?
4 A. Right.
5 Q. Okay. Now, you've said several times that
6 you had to drop customers and get rid of at least
7 half of your business. You've said that many, many
8 times.
9 A. Yeah.
10 Q. But so far you've only told us Josh
11 Warburton and some work from the school district
12 that you dropped. Who are the other customers that
13 you dropped?
14 A. I can't even remember at this time. I'd
15 have to go back and look at my records, but I --
16 Q. So do you have a record of every customer
17 that you dropped as a result of this accident?
18 A. No. I just cut back. People would try to
19 give me work, even my regular customers. I would
20 just -- I had a long list of customers that -- I
21 used to do a lot of work for Ram and I get one job
22 a year from them now, just one little job.
23 Q. Did you deliberately cut back or did they
24 elect to only give you one job a year?
25 A. On -- on most of the customers that -- I

1 business, but he hasn't been able to remember
2 anyone but Josh Warburton. And I'm asking him to
3 remember.
4 THE WITNESS: Because he was --
5 MR. OLSON: So actually your question is:
6 When did you drop Josh Warburton, and he said I
7 don't know. You asked October? He said, I don't
8 know. You asked November? He said, I don't know.
9 Are you asking him to guess when he dropped Josh
10 Warburton?
11 MS. HUTTON: No. I'm asking him to try
12 and remember when he dropped Josh Warburton.
13 THE WITNESS: It was soon after there. It
14 was -- maybe it was mutual. I don't know. I just
15 remember telling him that -- because he was putting
16 too much pressure on me anyway, and I had to make a
17 decision because I couldn't work those same amount
18 of hours the way he was giving me the work.
19 MS. HUTTON: Okay.
20 Q. Can you -- can you think of any other
21 customer that you spoke with or wrote to or
22 communicated in any way that you needed to
23 eliminate their business, sort of cut down on your
24 -- on your workload?
25 A. No. I don't think so, because Josh was

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1 eliminated. They just stopped. I told them to get
2 another printer.
3 Q. Did you send them out a letter or
4 something that said that you --
5 A. Just talked to them.
6 Q. Did you send them out a letter or
7 anything --
8 A. No.
9 Q. -- in writing?
10 A. No.
11 Q. Okay. So who did you talk to at Josh
12 Warburton about discontinuing their business?
13 A. Josh.
14 Q. Okay. And when would that have been?
15 A. I can't remember. It was probably right
16 after -- soon after the accident. I can't
17 remember.
18 Q. October 2003?
19 A. I don't know.
20 Q. Before Thanksgiving?
21 A. I can't remember.
22 MR. OLSON: Let me enter an objection.
23 Are you asking him to guess?
24 MS. HUTTON: No. He said that after
25 the -- after the accident he lost 50 percent of his

1 almost half of my business.
2 Q. And so you think it was Josh that reduced
3 that -- that business 50 percent?
4 A. It could have been. I don't know.
5 Q. But you have that in your records? You
6 have that power to go back and look and see what
7 that was?
8 A. From each customer? You know, it's hard
9 to tell with a customer in the printing business.
10 Some people give you a certain amount of business
11 every year and some would give you a job every
12 couple of years and then they'd give you a bunch of
13 printing and then they stop again and it's --
14 Q. What customers you dropped -- you
15 testified you dropped customers as a result of the
16 accident.
17 What I'm asking you is: Can you go back
18 from -- through your records and tell us what
19 customers you dropped?
20 A. Probably -- probably not, because I would
21 get calls, You were referred to me by so and so,
22 and I would tell them I'm not doing that anymore.
23 Q. Okay. But you specifically said that you
24 dropped existing customers.
25 A. That was only based on my income tax

36 (Pages 138 to 141)

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1 returns for that period right after I had the
 2 accident.
 3 Q. Okay. So you can't go through your
 4 business records and tell us a customer other than
 5 Josh Warburton that you told them you could no
 6 longer do work for them?
 7 A. Right.
 8 Q. Okay. What kind of vehicle were you
 9 driving the day of the accident?
 10 A. It had to be the one I'm in now, '95
 11 Mercury Marquis.
 12 Q. Four-door?
 13 A. Yeah.
 14 Q. Was your wife in the front passenger seat?
 15 A. Yes.
 16 Q. And you testified earlier that you
 17 actually got there early, you got to the senior
 18 center early.
 19 A. I always went early I said.
 20 Q. So that your wife would be able to get a
 21 seat; is that correct?
 22 A. Right.
 23 Q. Okay. Did you check the parking lot when
 24 you got there?
 25 A. There was no parking lot.

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1 Q. I believe --
 2 A. Right now there's a huge parking lot.
 3 Q. No. The parking lot at the stake center
 4 that was used as a senior center, did you check the
 5 parking lot?
 6 A. I never went to the parking lot. I always
 7 parked on the street because it was easier to get
 8 in and out. They had steps in there going up and
 9 down, and I wanted to always go in that main
 10 entrance --
 11 Q. Okay.
 12 A. -- because it was easier for my wife.
 13 Q. Did you ever drop your wife off at the
 14 front and then go park your car?
 15 A. I can't remember. Possibly. It would be
 16 a reasonable thing to do.
 17 Q. Do you buy your own pants, slacks, jeans?
 18 MR. OLSON: Objection, relevance. Go
 19 ahead and answer.
 20 THE WITNESS: Do I buy them or who?
 21 MR. OLSON: Yeah.
 22 THE WITNESS: My wife buys my clothes. If
 23 she thinks I need some, she just goes out and buys
 24 them.
 25 ///

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1 MS. HUTTON:
 2 Q. The reason I ask is: Do you know what
 3 your inseam is?
 4 A. No, might be 28, something like that.
 5 Q. Does it say -- does your -- do your jeans
 6 say on them what your inseam is?
 7 A. Mostly jeans on mens are a 28 or 29, and I
 8 always have her do them up for me.
 9 Q. Take up, okay.
 10 A. Take this one up that much. This is the
 11 first day I'm wearing these pants. And she always
 12 wants to make them longer.
 13 Q. Now, again, in those photos -- in fact, on
 14 both pages, you appear in a couple of those photos
 15 so clear.
 16 A. I took my son with me.
 17 Q. Okay. What's your son's name?
 18 A. Benjamin.
 19 Q. Benjamin?
 20 A. Franklin Kreyling. Guess who he was named
 21 after?
 22 Q. And where does Benjamin Franklin Kreyling
 23 live?
 24 A. With me. He's on 100 percent disability.
 25 Q. Okay. How old is Benjamin?

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1 A. Thirty-four, 35 years old. I don't know
 2 exactly.
 3 Q. Does he ever go with you to the senior
 4 center?
 5 A. No. I don't think he ever went with us to
 6 the senior center.
 7 Q. But he's the individual that's taking some
 8 of those photographs?
 9 A. Yeah, because I took him to take the
 10 pictures with me. My wife doesn't leave and go
 11 anyplace driving alone because she thinks I'm going
 12 to have a heart attack and kill myself.
 13 Q. When you fell --
 14 A. I've got to take a babysitter with me.
 15 Q. When you fell this -- on this day that is
 16 in question, even the days in question, did you
 17 break your skin? Did you get any cuts?
 18 A. No.
 19 Q. Bruises, scrapes?
 20 A. You already asked me that. No.
 21 Q. No bruises?
 22 A. No.
 23 MR. OLSON: Objection, asked and answered.
 24 MS. HUTTON: Okay.
 25 Q. You said that someone took exercise -- or

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1 x-rays right after the accident. Where were the
2 x-rays taken? What facility, not where on the
3 body?

4 A. I don't think I had them, x-rays, taken
5 immediately after that.

6 Q. I believe your testimony was that someone
7 took x-rays right after the accident.

8 MR. OLSON: I'm going to object. I don't
9 think that's his testimony.

10 THE WITNESS: I don't recall ever saying
11 that

12 MS HUTTON:

13 Q. So you -- you don't believe that there
14 were ever any x-rays taken after this accident?

15 MR. OLSON: Again, I'm going to object. I
16 don't think that's his testimony either. Were you
17 asking if they were done immediately after or
18 sometime after?

19 MS. HUTTON: After.

20 THE WITNESS: They were done sometime
21 after, I guess.

22 MS. HUTTON:

23 Q. When after?

24 A. But I don't know.

25 Q. You don't know if they were taken or you

1 treating me at that time for my knees.

2 Q. Okay.

3 A. And he -- he was -- had an x-ray machine
4 there.

5 Q. And did you --

6 A. The only place I've ever had x-rays,
7 except if they took some in the hospital, was
8 either there or at Snow Canyon --

9 Q. Okay.

10 A. -- Clinic.

11 Q. When were you diagnosed with arthritis? I
12 believe you said that that was several years ago.

13 A. I don't know. Just in my knees, you
14 mean?

15 Q. Any. You tell me. When were you first
16 diagnosed with arthritis?

17 A. I guess it was in my knees when I started
18 to go to Dr. Parry. I don't know how long I've
19 been going to see him, but I never had problems
20 with my back.

21 Q. So no doctor ever told you that you had
22 arthritis anyplace other than in your knees?

23 A. As far as I can remember, yeah.

24 Q. Okay. Do you recall being told that you
25 have degenerative disk disease?

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1 don't know when they were taken?

2 A. Both I don't know when or where or what
3 or who.

4 Q. Okay. When you went to see Dr. Labrum
5 after you fell, did Dr. Labrum take x-rays?

6 A. No.

7 Q. Do you know anyone who did take x-rays as
8 a result of this accident?

9 A. Maybe it was Dr. Parry. I don't know.

10 Q. When were you first diagnosed with low
11 back pain?

12 A. I never had any low back pain except for
13 that cyst I had in my back when I was a kid.

14 Q. Okay. Where in your back specifically is
15 the pain that is -- that you have associated with
16 this accident? Is it your low back?

17 A. Yeah.

18 Q. Okay. When were you first diagnosed with
19 that back pain, low back pain?

20 A. I didn't feel any kind of pain for a week
21 to 10 days, I think, after the accident. Then I
22 started to have some pain in my back and it kept
23 getting worse. And then at one point in time, I
24 can't remember when or where, I went to -- but it
25 was probably to Dr. Parry because I think he was

1 A. Yeah. That happened over at the --

2 Dr. Parry's office, but Dr. Snook was the one that
3 did that. And he only -- he only examined me for
4 like five minutes. I don't know how he could have
5 wrote up all that stuff.

6 Q. Okay. And that's been since the accident?

7 A. Yeah, I think so.

8 Q. But you don't recall?

9 A. No.

10 Q. The neurologist that you've been going to,
11 do you know what specifically you're seeing that
12 doctor for?

13 MR. OLSON: Objection, asked and
14 answered. Go ahead and answer, if you know.

15 THE WITNESS: Yeah. I've been going to
16 her for years. I think Dr. Nimer, who handled my
17 heart problems, the stints and everything, wanted
18 me to go to see the neurologist. I don't even know
19 what a neurologist does. They check your reflexes
20 in your knees with their little hammers and walk a
21 straight line and --

22 MS HUTTON:

23 Q. So you don't know really why you're seeing
24 a neurologist?

25 MR. OLSON: Objection, asked and

38 (Pages 146 to 149)

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1 answered.
2 THE WITNESS: I don't know. I can't
3 remember why he started me to go to her at all.
4 MS. HUTTON:
5 Q. But you say --
6 A. Because we went to Dr. Sanchez first, and
7 he was over at the same clinic, then he left.
8 Q. And you say it was your cardiologist that
9 sent you to the neurologist?
10 A. I think so.
11 Q. When you fell, when you had these balance
12 problems and you fell on the rocks by your Koi
13 pond, did you hurt yourself?
14 A. Not bad, no. I was just dizzy. I just --
15 I'm just more careful now.
16 Q. Okay. Did you hurt your --
17 A. I take a -- I walk with a cane sometimes
18 and --
19 Q. Has it gotten progressively worse over the
20 last two years?
21 A. It only started like six months ago, eight
22 months ago, maybe a year ago, but the dizziness
23 you're talking about; right?
24 Q. Uh-huh. Uh-huh.
25 A. The balance problem?

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1 Q. Uh-huh. Yes. Has it -- has it gotten
2 progressively worse?
3 A. No. It's stayed about the same.
4 Q. Okay. But it -- it came on suddenly, is
5 that what you're saying? You didn't have it, and
6 then all of a sudden you did have balance problems?
7 A. Yeah. Basically that's the way I feel
8 what happened. And I went to -- I don't remember
9 who I went to about that. It might have been
10 the -- might have been Sanchez. I don't -- I mean,
11 Dr. DeSaibro to check that out. I don't -- I can't
12 recall. But I'm trying to think now why I started
13 to go to them, but I don't even know why at this
14 point.
15 Q. But you believe that the cause of this --
16 or do you have a understanding of what the cause of
17 this dizziness or balance problems is?
18 A. No. They just tell me that it could be
19 related yet to the fall at the senior center.
20 Q. When you say "they," who are they?
21 A. Any doctors that I talk to about it, the
22 dizziness, and they sent me for some balance tests
23 and I'm definitely out of balance. I don't walk
24 like I should and anything else, but they don't
25 know what caused it. It could have happened they

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1 say at the senior center. It could have just been
2 something else, but they don't tell me why.
3 Q. Did you hit your head when you fell?
4 A. No.
5 Q. Okay. What is the present, the current
6 name of your business? Is it still Magic --
7 A. It's Kreyling Brothers.
8 Q. Okay. When did it stop? When did it
9 change to Kreyling Brothers?
10 MR. HARDMAN: Magic is Bob Coulter.
11 MS. HUTTON: Yeah.
12 THE WITNESS: I don't know, and I don't
13 even know why we did that. I don't even know why
14 we did that. When I first came here, it was Art
15 Press, because that's what my business in New
16 Jersey was called. And I did some pretty big jobs
17 for, what's her name now, Janice DeMille? Do you
18 know Janice DeMille?
19 MS. HUTTON:
20 Q. Uh-huh. Janice DeMille?
21 A. DeMille.
22 Q. Okay. Huh-uh.
23 A. She wrote a book on the first hundred
24 years of the St. George Temple, which was in 1975,
25 about the same year I came here, and delivered the

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1 job the day that all the apostles came down here.
2 But I -- that job, I had done part of it myself and
3 the rest of it I got -- was sent out for printing.
4 And I don't know. I might have changed that name
5 when I went into bankruptcy to Kreyling Brothers.
6 I can't recall. I don't know.
7 Q. And do you recall when that was, late
8 seventies or --
9 A. What?
10 Q. When you took out bankruptcy. I think you
11 said maybe it was 15 years ago, something like
12 that. Does that sound about right?
13 A. Yeah. Could be. Yeah. About half the
14 time I -- I moved my shop there where the old --
15 that used to be the old Jenny Hall store and then
16 the college took the building over and then I had
17 it. Now Allgood is there.
18 Q. And did -- is that when the name of your
19 company changed?
20 A. It could be. I can't recall exactly.
21 Q. Well, what is the name of your company
22 now?
23 A. Kreyling Brothers Printing.
24 Q. Kreyling Brothers what?
25 A. Kreyling Brothers Printing.

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1 Q. Okay.
2 A But I think we just -- under the name
3 Kreyling Brothers.
4 Q Do your brothers still participate?
5 A No. It's just my sons were involved in
6 the business with me for a while.
7 Q Okay. How is -- how is the business set
8 up? Are you incorporated?
9 A No.
10 Q LL -- Limited Liability Company,
11 partnership? Do you have any organizational papers
12 for your company?
13 A No, I don't think so.
14 Q Okay. How does the company --
15 A I know we're not incorporated. I know
16 that, but I don't know who -- whose name is on top
17 or whatever. I don't understand. We did something
18 where it suggested that when we went into that
19 bankruptcy thing.
20 Q How does the company distribute the income
21 to the brothers whom I'm -- are the brothers -- am
22 I correct in assuming that Kreyling Brothers are
23 now your sons?
24 A No.
25 Q Those brothers?

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1 A. No. Kreyling Brothers are me.
2 Q You're Kreyling Brothers?
3 A Yeah.
4 Q Okay. But I thought you just said that
5 Kreyling Brothers was your sons?
6 A Yeah.
7 Q So how many --
8 A But they're all married and got their own
9 kids and don't have nothing to do with the printing
10 business anymore. So I just continued that name,
11 Kreyling Brothers, and I'm the only one that's in
12 it.
13 Q Okay. So no one besides yourself
14 participates in the income of the business?
15 A No.
16 Q Okay. Okay. Do the customers that you
17 work with now, do they pay by invoice?
18 A Yeah.
19 Q Okay.
20 A How else would they pay? I don't know.
21 Q That's my question to you.
22 A I just give them an invoice and they send
23 me a check or sometimes some of them I deliver it
24 to them and pick up a check.
25 Q But when -- if you deliver it to them do

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1 you still have it -- a bill of lading or something
2 to show what you're delivering and invoice what
3 you're charging?
4 A Yeah. I give them an invoice for all the
5 stuff, yeah.
6 Q So presumably you would be able to
7 determine who the customers were that you lost from
8 before the accident by going through the invoices?
9 Would that be accurate?
10 A Yeah, but you lose and get new customers
11 all the time. You know, I just -- like I said, the
12 one that I mostly got rid of was Josh because he
13 was half my business anyway.
14 Q Okay.
15 MS. HUTTON: That's all I have.
16 MS. LIUZZI: I don't have any questions.
17 You guys covered it all.
18 THE WITNESS: Okay.
19 MR. OLSON Mr. Kreyling, one quick
20 follow-up question just to clarify.
21 -oOo-
22 EXAMINATION
23 BY MR. OLSON:
24 Q Did you seek treatment from Scott Parry
25 due to your back pain? Is it possible that you

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1 did?
2 A Could have been. I can't remember. I
3 went to him at first, and he might have been the
4 one to suggest some kind of shots. But the first
5 shots I had in my back were over at that -- I can't
6 even remember that doctor's name there, that clinic
7 on the corner of Bluff and 700 South.
8 Q Okay. Is it possible that Orthopaedic
9 Specialists & Sports Medicine is Dr. Parry's
10 office?
11 A I think they're in the same building with
12 him, but I don't think he's got any connection to
13 that operation
14 Q Okay
15 A But I may -- I don't know.
16 Q Was it your testimony that you recall
17 doing some form of therapy with a Rick Johnson?
18 A Yeah. He might have been in that center.
19 Q Is it possible that he was involved with
20 Advanced Physical Therapy?
21 A Could be. I don't know.
22 Q Is it possible that Eric Evans works for
23 St. George Surgical Center with their pain clinic?
24 A It's possible, too. You know, you go to
25 them you just give them your card and -- because

40 (Pages 154 to 157)

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<p>1 I'm on Medicare and Medicaid. 2 Q. Okay. 3 A. And so I just give them both numbers and 4 that's who they bill. And usually -- usually they 5 don't come after me for anything that's left. It 6 probably wouldn't do them much good anyway because 7 I don't -- couldn't have the extra money to pay 8 them anyway. 9 MR. OLSON: Okay. That's all the 10 questions I have. 11 THE WITNESS: And the -- and the Medicaid, 12 I'm on what they call Spend Down. 13 MR. OLSON: Okay. 14 THE WITNESS: I've got to give them \$152 a 15 month, and this was before I started it, before 16 they did this change with medications, and that 17 would take care of all my medications and all my 18 doctor bills and the hospital and everything -- 19 MR. OLSON: Okay. 20 THE WITNESS: -- when I was on Spend Down. 21 MR. OLSON: That's all the questions. I 22 think we're done. 23 MS. HUTTON: I have a question. 24 /// 25 ///</p>	<p>1 Medicaid insurance, whatever you want to call it, 2 is a Spend Down. I've got to give them \$152 every 3 month of every year. 4 Q. So the reasoning that you went to state 5 social services was because of the cost of your 6 prescriptions? 7 A. Right. 8 Q. Okay. And they didn't ask that you 9 present to them a -- documentation of your -- your 10 other income besides Social Security? 11 A. No, because I always got a refund back on 12 that. 13 Q. No. Did they ask for any documentation of 14 income other than Social Security? 15 A. No. 16 Q. Okay. 17 A. But I did show it to them, I think, at one 18 time. And I -- when I got a refund for year after 19 year, I got some kind of refund, so they didn't 20 count that as any income at all. They just took my 21 income as the Social Security that I got. 22 Q. And when did this occur? When did you 23 first go on Medicaid because of the cost of your 24 prescriptions? 25 A. Maybe nine, 10 years ago. I don't know.</p>
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<p>1 -oOo- 2 EXAMINATION 3 BY MS. HUTTON: 4 Q. How did you qualify for Medicaid? 5 A. I just said that. I'm on Spend Down. I 6 have to pay 17 -- \$152 a month. 7 Q. How did you -- how did you qualify to be 8 on the Medicaid program? What was the basis for 9 qualifying for Medicaid? 10 A. I don't know. We just went to them and we 11 did it. They didn't even take my -- I don't know. 12 For some reason they never even took my income into 13 consideration. They just figured out what I was 14 getting for my Social Security money, me and my 15 wife. 16 Q. What was the reasoning for going? Why did 17 you go to the Medicaid office and apply for state 18 services? 19 A. Because I had -- my prescription bills 20 were killing me, so I went to them to see if they 21 could help me, and they said they could. They put 22 me on Spend Down, but I had to pay so much a 23 month. But it was costing me more for the -- to 24 buy the prescriptions, so I went through that, went 25 that route. It cost me a hundred and -- for that</p>	<p>1 I'm not sure 2 Q. And this is a question that you may not 3 know, that your attorney may have to find out. Has 4 Medicaid filed a lien against this case? 5 MR. OLSON: Do you have any idea? 6 THE WITNESS: No, but they tell me that 7 they've got to get reimbursed. 8 MS. HUTTON: The State takes a statutory 9 lien against any case. No more questions. 10 MS. LIUZZI: I'm done. 11 MR. OLSON: Okay. 12 THE REPORTER: Do you want him to read and 13 sign? 14 MR. OLSON: Yes. 15 (Thereupon, the deposition 16 concluded at 4.31 P.M.) 17 18 19 20 21 22 23 24 25</p>

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CERTIFICATE OF DEPONENT

PAGE LINE CHANGE REASON

I, JULE KREYLING, deponent herein, do hereby
certify and declare under penalty of perjury the
within and foregoing transcription to be my
deposition in said action; that I have read,
corrected and do hereby affix my signature to said
deposition.

Deponent

Subscribed and sworn to before me this _____
day of _____, 2006.

Notary Public

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REPORTER'S CERTIFICATE

STATE OF UTAH)

) ss

COUNTY OF WASHINGTON)

I, J. ELIZABETH VAN FLEET, a duly
commissioned Notary Public, Washington County,
State of Utah, do hereby certify:

That I reported the taking of the
deposition of the witness, JULE KREYLING,
commencing on Tuesday, October 31, 2006, at the
hour of 1:00 P.M.

That prior to being examined, the witness
was by me duly sworn to testify to the truth, the
whole truth, and nothing but the truth

That I thereafter transcribed my said
shorthand notes into typewriting and that the
typewritten transcript of said deposition is a
complete, true and accurate transcription of my
said shorthand notes taken at said time.

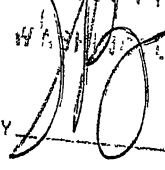
I further certify that I am not a relative
or employee of an attorney or counsel of any of the
parties, nor a relative or employee of any attorney
or counsel involved in said action, nor a person
financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my official seal in my office in
the County of Washington, State of Utah, this _____
day of _____, 2006.

J. Elizabeth Van Fleet, RPR, CSR

EXHIBIT B

Linette B. Hutton (#6408)
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FILED
FIFTH DISTRICT COURT
2007 OCT 11 AM 11:29
WASHINGTON COUNTY
BY 

**IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR THE STATE OF UTAH, WASHINGTON COUNTY**

JULE W. KREYLING,

Plaintiff,

vs.

CITY OF ST. GEORGE, *et al.*,

Defendants.

**ORDER GRANTING DEFENDANT ST.
GEORGE CITY'S MOTION FOR
SUMMARY JUDGMENT**

Case No. 050501129

Judge James L. Shumate

RICHARD WATTS CONSTRUCTION,
INC., d/b/a WATTS CONSTRUCTION
CO., INC., a Utah Corporation

Third-Party Plaintiff,

vs.

CURTIS DEMILLE CONSTRUCTION,
INC., a Utah Corporation

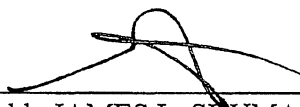
Third-Party Defendant.

The above entitled matter came before the Court on September 4, 2007 on Defendant City of St. George's Motion for Summary Judgment. The Plaintiff was represented by Brian L. Olson of Gallian,

Wilcox, Welker & Olson and Defendant City of St. George by Linette B. Hutton, of Winder & Haslam. Following oral argument from counsel, the Court's examination of the pleadings and being fully advised in the premises, the Court finds there is no probative evidence that the City of St. George created the defect or condition in the park strip, or knew or should have known of any defect or condition. Therefore, the Court hereby GRANTS Defendant City of St. George's Motion for Summary Judgment.

DATED this 5 day of Oct ~~September~~ 2007.

BY THE COURT



Honorable JAMES L. SHUMATE
Judge, Fifth Judicial District Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of September 2007, I caused to be served a true and correct copy of the foregoing ORDER GRANTING DEFENDANT ST. GEORGE CITY'S MOTION FOR SUMMARY JUDGMENT, to the following, by the method indicated below:

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Gallian, Wilcox, Welker & Olson, PC
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St. George, UT 84770

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☐ Overnight Mail
☐ Facsimile

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