

1995

Matthew S. Kellogg vs. Stan J. Christensen and Robert Anthony Apgood : Brief of Appellee

Utah Court of Appeals

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BRIEF,

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 950441-CA

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MATTHEW S. KELLOGG

Plaintiff and Appellant,

Case No. 950441-CA

vs.

Priority No. 15

STAN J. CHRISTENSEN and
ROBERT ANTHONY APGOOD

Defendants and Appellees.

-----oo0oo-----

**BRIEF OF APPELLEE
ROBERT ANTHONY APGOOD**

Appeal from Summary Judgment entered by the Honorable
William A. Thorne, Third Judicial District Court,
on April 25, 1995

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FILED

DEC - 6 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

Defendant Apgood agrees with plaintiff's jurisdictional statement.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court was within his broad discretion when it allowed defendant to amend his answer to add a dispositive defense, where no bad faith, undue delay or unfair prejudice was demonstrated by plaintiff.

Standard of Review: Abuse of discretion. Pasker Gould v. Mouse, 887 P.2d 872 (Utah App. 1994).

2. Whether the trial court correctly entered summary judgment on the claim of "negligent assault and battery" where the allegations failed to state a cognizable claim, and where no evidence of negligence was presented at summary judgment.

Standard of Review: De Novo. Hamilton v. Parkdale Care Center Inc., 904 P.2d 1110 (Utah App. 1995).

STATEMENT OF CASE

Defendant Apgood punched plaintiff in the face, breaking his jaw. Apgood further screamed at and threatened plaintiff until

removed from the scene. Apgood was found guilty of assault and battery. After the one year statute of limitation for assault and battery had expired, plaintiff sued alleging assault and battery, and negligent assault and battery. Defendant Apgood, a college student, did not hire a lawyer, but answered the complaint himself and did not raise the statute as an affirmative defense. In December 1994, he hired counsel who immediately moved to amend the answer.

Over plaintiff's protest the motion was granted and the statute of limitation was plead. Meanwhile, plaintiff testified at his deposition that Apgood's blow was unprovoked, [Deposition, attached as addendum, pp. 40, 48], that he saw it coming, [Id. at 22], that it struck him in the face [R. 124; Id. 18], and that Apgood meant to hit him, intending to hurt him. [R. 126; Id. 51].

Defendants moved for summary judgment. In response, plaintiff did not present any evidence. The motions were granted based on the limitations bar and that plaintiff's negligence count failed to state a claim, and that there was no evidence of negligence. This appeal followed.

SUMMARY OF ARGUMENTS

The court was well within its discretion to allow defendants to amend their answers. It resulted in no undue delay or undue prejudice. It allowed the case to be decided on the merits, and was in all respects proper.

There is no such thing as a negligent assault and battery. An intentional tort requires an intent by the defendant to scare or injure the plaintiff. The substance of the complaint is that defendant Apgood assaulted and battered plaintiff. Plaintiff's attempt to avoid the assault and battery statute of limitation by characterizing the acts as negligent was transparent, and failed to state a cognizable claim. In addition, it was undisputed that Apgood intended to scare, hit, and injure plaintiff: there was nothing accidental about the attack. Summary judgment was, therefore, also proper because there was no evidence of negligence.

ARGUMENT

1. The Trial Court Properly Allowed Defendant to Amend His Answer.

Plaintiff sued defendant Apgood in May 1993 for a fight that occurred in August 1991. Apgood filed a pro se answer in which he did not raise the one year statute of limitation that bars plaintiff's action. In December 1994 Apgood hired counsel who immediately moved to amend the answer. After full briefing the trial court granted the motion, and defendant raised the statute in his amended answer.

Plaintiff now complains that the court abused his discretion. Rule 15(a) provides that "leave [to amend] shall be freely given when justice so requires." U.R.Civ.P. 15.

Recognizing that the entire spirit of the rules is to the effect that controversies shall be decided on the merits, the courts have not been hesitant to allow amendments for the purpose of presenting the real issues of the case, where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing part will not be unduly prejudiced, and the trial of the issues will not be unduly delayed.

Moore's Federal Practice, ¶15.08[2], p. 15-48,49 (2d Ed.).

Courts regularly grant motions to amend answers where none of the above mentioned factors are present. North Georgia Elec.

Membership Corp. v. City of Calhoun, 989 F.2d 429 (11th Cir. 1989); Hylton v. John Deere Co., 802 F.2d 1011 (8th Cir. 1986); CBS, Inc. v. Ahern, 108 F.R.D. 14 (S.D.N.Y. 1985). Our Supreme Court agrees that affirmative defenses may be asserted in an amended answer. Starker v. Hunington Cleveland Irr. Co., 664 P.2d 1188, 1190 (Utah 1983). Here, plaintiff has never asserted that the amendment was intended to delay, or that defendants were guilty of bad faith, or that plaintiff would be unduly prejudiced. Rather, he complains that it would be unfair if the statute of limitation was asserted, suggesting that he is entitled to the windfall of a pro se defendant's failure to raise a dispositive defense. Without the amendment the plaintiff would have proceeded on an expired claim; the case would not have been decided on the merits. The prejudice to the defendant had he been denied a meritorious defense outweighed any possible prejudice to plaintiff. Guthrie v. J.C.Penney, Inc., 803 F.2d 202 (5th Cir. 1986). The trial court did not abuse its discretion in allowing the amendment.

2. Plaintiff Failed to Preserve His Negligence Claim for Appeal.

Plaintiff's negligence claim was not preserved for appeal. Defendant Apgood moved for summary judgment on two grounds: The assault and battery claims were barred by the one year statute; and there was no evidence of negligence. [R.120]. Plaintiff's response addressed only the statute of limitation point. [R. 137]. He failed to list disputed material facts as to the either point presented by defendant Apgood, as required by Code of Judicial Administration Rule 4-501(2). Under the rule, defendant's facts were, therefore, "deemed admitted for the purpose of summary judgment." Id. These facts established that there was no evidence of negligence, as in plaintiff's deposition he admitted that defendant Apgood intended to hit and injure him. [R. 126].

On appeal plaintiff cannot now dispute what he has already admitted. State v. Horton, 848 P.2d 708 (Utah Ct. App), cert. den. 857 P.2d 948 (Utah 1993). In Horton, plaintiff's failure to raise or brief a basis for relief at the trial court prevented the appeals court from considering the basis. The same rule and result apply here. Not only did defendant Apgood have no chance

at the trial court to address plaintiff's new theory, but the trial court had no opportunity to address the claims made for the first time here. His negligence arguments should not be considered.

3. Plaintiff's Negligence Claim Fails.

This case arises from a fight. Mr. Kellogg testified that Mr. Apgood hit him in the face with his fist fracturing his jaw and dropping him to his knees. [R. 124]. Mr. Apgood then screamed at and further threatened Mr. Kellogg making him afraid to get up. [R. 126]. It was an archetypal assault and battery, subject to a one year statute of limitation. U.C.A. § 78-12-29(4) (1953, as amended).

Plaintiff filed suit well beyond the one year period, so plead negligence, which carries a four year statute. U.C.A. § 78-12-25 (1953, as amended). His attempt to circumvent the one year statute fails because his negligence claim has no legal or factual basis. It also fails because the only claim truly at issue is for assault and battery.

In an effort to muddle the issue plaintiff asserts that the trial court's sole basis for entering summary judgment was that

the torts of assault and battery and negligence are mutually exclusive. (Appellant's Brief. p. 14) Although they are, this was not the only basis for the decision. The Summary Judgment mentions no specific basis, but is only based on the parties' "memorandum," "oral argument," and "for good cause appearing." [R. 172] . Defendant Appgood's memorandum supporting his motion, in fact, establishes that there was no factual basis for the negligence claim. [R. 120].

Nonetheless, plaintiff asserts that because there is a continuum of torts between intentional torts on the one hand, and torts based on simple negligence on the other, that by simply characterizing the acts as negligent he can avoid summary judgment based on the assault and battery one year statute. Labeling an act negligent does not make it so. Lord v. Shaw, 665 P.2d 1288 (Utah 1983). More fundamentally, plaintiff misunderstands the base distinction between negligence and assault and battery:¹ negligence requires no intent to harm, in

¹The elements of negligence are (1) a duty owed by one party to another; (2) a breach of the duty; (3) the breach was the proximate cause of the injury; and (4) one party suffers injury. Hunsaker v. State, 870 P.2d 893 (Utah 1993). Elements of assault are: (1) The defendant acted, intending to cause harmful or offensive contact with the plaintiff, or imminent apprehension of such contact; (2) As a result, the plaintiff was thereby put in imminent apprehension of [harm] [contact]; and (3) The plaintiff suffered

contrast "[t]he gravamen of an assault and battery is the actor's intention to inflict injury." D.D.Z. v. Molerway Freight Lines, Inc., 880 P.2d 1, 3 (Utah 1994) (emphasis is original).

Plaintiff muddies this distinction by his reliance on dicta in Doe v. Doe, 878 P.2d 1161 (Utah App. 1994), that an actor's conduct can give rise to a negligence claim and a claim for an intentional tort. [Appellant's Brief p.14]. This less than precise language in Doe misstates the common law. The demarcation between the torts "is drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty." Prosser & Keaton on Torts, § 8, p.36 (5th Ed.) "There is, properly speaking, no such thing as a negligent assault." *Id.* at §10, p.46.

This rule, set forth by Prosser & Keaton, distinguishes plaintiff's authority. In Doe v. Doe 878 P.2d 1161 (Utah App. 1994), the court remanded for a factual determination as to whether a ten year old could and did form the intent to injure

injuries proximately caused by defendant's actions. D.D.Z. v. Moerway Freight Lines Inc., 880 P.2d 1,3 (Utah App. 1994). If the defendant's acts of assault result in actual touching or striking of plaintiff, they constitute battery. *Id.*

his seven year victim when he attempted to sexually molested her. Likewise, in Matheson v. Pearson, 619 P.2d 321 (Utah 1980), a remand was necessary to determine whether the defendant children acted recklessly when they threw a tootsie roll from a second story window at the plaintiff, striking him in the head. The defendants testified that they had not intended to harm plaintiff, although they were aiming at him. Thus, summary judgment on the basis that the defendants committed a battery was improper since there was no evidence of an intent to harm. Here, a remand is not required since it is undisputed that defendant Apgood intended to harm plaintiff.

Attempts to avoid the assault and battery one year limitation by pleading negligence are regularly rejected. In Maes v. Tuttoilmondo, 502 P.2d 427 (Colo. App. 1972), defendant hit plaintiff in the head with a pool cue. Plaintiff sued in negligence after the one year assault and battery statute had run. Relying on the plaintiff's own deposition, the appeals court affirmed summary judgment as it was uncontroverted that defendant assaulted and battered plaintiff. Similarly, in Maddox v. B.A. Bano, 422 A.2d 763 (D.C.App. 1980), plaintiff's arm was

broken by a policeman during an arrest. After the one year statute had passed he, too, sued in negligence. In affirming summary judgment the court wrote: "There is no dispute that the physical contact was intentional, and such intentional contact constitutes battery." Maddux, 422 A.2d at 764.

In Boyles v. City of Kennewick, 813 P.2d 178 (Wash App. 1991), plaintiff claimed to have been injured during an arrest when an officer "wrench[ed] plaintiff's arm behind her back." The trial court denied defendant's motion to dismiss based on the assault and battery statute of limitation. The appeals court reversed, holding that the assault and battery statute applied. It also refused plaintiff's attempt to amend to plead negligence: "the limitation period applying to assault and battery cannot be avoided by disguising the real cause of action in a different form." Boyles, 813 P.2d at 179. In a similar case where the plaintiff plead intentional infliction of emotional distress instead of time barred assault and battery, the North Carolina Court of Appeals wrote "[w]here the gist of a claim for relief is assault and battery, courts have applied the statute of limitation applicable to assault and battery despite allegations

in the complaint that is was some other tort." Dickens v. Puryear, 263 S.E.2d 856, 859 (N.C. App. 1980).

New York courts have "adopted the prevailing modern view that, once intentional offensive contact has been established, the actor is liable for assault and not negligence, even when the physical injuries may have been inflicted inadvertently." Jones v. Trane et. al. 591 N.Y.S.2d 927, 929 (1992); See also Schmidt v. Bishop, 779 F.Supp. 321, 325 (S.D.N.Y. 1991); Robinson v. Franklin General Hospital, 611 N.Y.S.2d 778 (1994) ("negligent assault" a contradiction in terms); Trott v. Merit Department Store, 484 N.Y.S.2d 827 (1985) (negligent assault assertion fails to state a claim as a matter of law).

Utah courts hold that the form of the complaint should not be exalted over substance. In Lord v. Shaw, 665 P.2d 1288 (Utah 1983), plaintiff sued defendant on six counts, five of which sounded in false imprisonment and assault and battery. The complaint was filed well beyond the one year limitation period applicable to these claims. The sixth count claimed a "course of conduct, [including the acts alleged in the first five causes of action], designed and calculated to cause plaintiff to suffer."

Noting that "specific averments in pleading are usually given precedence over general ones," the court reasoned that plaintiff's "descriptions and conclusions of law that respondent's conduct was ...negligent...do not change the nature of her sixth cause of action. The substance of the pleading and the nature of the issues which are raised, rather than the pleader's designation of the cause of action control the issue." Lord, 665 P.2d at 1290. The court held that the sixth cause of action was ground in assault and battery, and was time barred.

The same rule and result obtain here. As in Lord, plaintiff's "negligence" count pleads the same conduct as plead in the assault and battery count - the fight- "defendants negligently hit plaintiff." [R. 5]. Since the substance, not the form, of the pleading controls, the "negligence" count, in fact, pleads an assault and battery, and is time barred. Lord v. Shaw, 665 P.2d 1288 (Utah 1983).

Not only is dismissal proper because the complaint fails to state a negligence claim, but the undisputed evidence is that defendant Apgood assaulted and battered plaintiff. Summary judgment is then proper because there is no evidence of

negligence. Mr. Kellogg testified that during the altercation defendant "shoves me right in the chest as hard as he can."

[Addendum p. 17] ... "And the next thing I know, I get grabbed from my left side, which is where Christensen was, spun around and hit in the side of the face by Apgood with a right hook and dropped me to me knees. And I put my hand up like this, and I had blood going everywhere." [R. 124]. He said that Mr. Apgood "definitely ... meant to hit me." [R. 126]. This is plainly a battery. D.D.Z v. Molerway Freight Lines, Inc, 880 P.2d 1,3 (Utah 1994) .

Mr. Kellogg saw the punch coming: "I saw the fist coming at me." [Addendum p. 22] This is an assault. Id. Plaintiff testified that he had not first swung at defendants, and that there was no justification for the attack. After he was struck and fell to the ground Mr. Apgood stood over plaintiff and screamed at him and threatened him, leading plaintiff to believe that had he gotten up "he would have hit me again." [R. 126]. This constituted yet another assault. Id. Defendants were found guilty of assault and battery. [p. 24].

The uncontroverted evidence is that Mr. Kellogg was injured by defendant's assault and battery, and not as the result of negligence. Summary judgment was proper, as there was no evidence of negligence.

Finally, plaintiff asserts that there are fact issues as to whether the defendants should have been equitably estopped from amending their answers. This argument fails for two reasons. First, fact issues about equitable estoppel are not left to juries, so there is no need for a trial. Special Service Dist. v. Jackson Cattle, 744 P.2d 1376, 1377 (Utah 1987) (equitable estoppel is an issue of law). Second, plaintiff's estoppel arguments were raised, addressed and rejected under Rule 15, when defendants moved to amend. As such, the decision was subject to the court's sound discretion, which was not abused.

CONCLUSION

Appellee/Defendant Apgood seeks affirmance of the trial court's summary judgment.

DATED this 6th day of December, 1995.

SNOW, CHRISTENSEN & MARTINEAU


By Andrew M. Morse
Andrew M. Morse
Attorneys for Appellee Apgood

MAILING CERTIFICATE

I hereby certify that two (2) true and correct copies of the foregoing were mailed to the following, postage prepaid, this 6th day of December, 1995.

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ADDENDUM A

PLAINTIFF'S DEPOSITION

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MATTHEW S. KELLOGG,)
Plaintiff,) Civil No. 920905255 PI
vs.) Deposition of:
STAN J. CHRISTENSEN, ROBERT) MATTHEW KELLOGG
ANTHONY APGOOD, TROY A. COX)
and ERIC TODD STRAIN,)
Defendants.)

BE IT REMEMBERED that on the 15th day of
December, 1994, the deposition of MATTHEW KELLOGG was
taken before Teri L. Hansen, (License No. 335),
Registered Professional Reporter (National Certificate of
Merit) and Notary Public in and for the State of Utah
commencing at the hour of 10:00 a.m. of said day at the
law offices of Kipp and Christian, P.C., 175 East 400
South, Suite 330, Salt Lake City, Utah.

Reporter: Teri L. Hansen, CM-RPR

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For the Defendant: Andrew M. Morse
Robert Apgood: SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
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Also Present: Stan Christensen

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1 PROCEEDINGS

2 MATTHEW KELLOGG,
3 called as a witness by and on behalf of the defendant,
4 Stan Christensen, being first duly sworn, was examined
5 and testified as follows:
6 MR. KIPP: The record should show that this
7 deposition was scheduled at my office with Mr. Zoll's
8 office on a date that was agreeable to both for December
9 9, 1994 at ten o'clock. At 5:30 p.m. on the evening
10 before, my office was called by Mr. Zoll's secretary and
11 advised that they would not be here since he had a
12 conflict.
13 We've had an exchange of some communications,
14 and he doesn't like what I say and I don't like what he
15 says But in either or any case, I took the liberty of
16 rescheduling with Mr. Zoll's secretary for today with the
17 view that that might resolve the problem and I could
18 complete my deposition, which is all I really want to do.
19 So --
20 MR. ZOLL: Am I supposed to make a response?
21 MR. KIPP: I'm going to finish, Ray, and then
22 you can talk. I'm agreeable that we can proceed today as
23 though it were last Friday. I'm satisfied that I have
24 said what I have to say about last Friday. I don't have
25 any claims further to make about that, and so

MERIT REPORTERS 3

1 accordingly, I'll proceed as the rules provide to take
2 Mr. Kellogg's deposition.
3 MR. ZOLL: I have no objections, except to the
4 extent that I believe there would be some apologies in
5 order when I read the letters that were involved. Since
6 those are not forthcoming, we'll just let the chips fall
7 where they may. I've produced my client, and we're ready
8 to proceed with this deposition.

9 EXAMINATION

10 BY MR. KIPP:
11 Q State your name.
12 A Matt Kellogg.
13 Q Your address, Mr. Kellogg?
14 A 7659 South 2610 East.
15 Q Salt Lake County?
16 A Salt Lake City.
17 Q What's your age?
18 A Twenty-six.
19 Q Tell me your educational background.
20 A Graduated from Brighton High School, two years
21 at Ricks College, a year at the Salt Lake Community
22 College, a year at the University of Utah, and a year at
23 Brigham Young University.
24 Q Any degree?
25 A I did not finish my degree, no.

MERIT REPORTERS 4

1 Q What did you study?
 2 A Well, I guess my Associates, two year degree.
 3 Q Okay. What was your general course of study?
 4 A I was in business when I got my full-time job.
 5 Q Are you employed?
 6 A I am.
 7 Q Where?
 8 A I work for Kellogg, Wachter & Associates.
 9 Q For whom?
 10 A Kellogg, Wachter & Associates. It's an
 11 insurance agency, brokerage.
 12 Q Offices where?
 13 A 9231 South Redwood Road.
 14 Q Is that Kellogg some relative of yours?
 15 A It's my father, yes.
 16 Q How long have you worked there?
 17 A Four and a half years.
 18 Q What are your duties?
 19 A I'm an independent contractor with them. I'm
 20 an independent agent. I work through them, but I'm
 21 basically self-employed.
 22 Q Do you have a license with the State of Utah?
 23 A I do.
 24 MR. ZOLL: Excuse me. I think the record
 25 should reflect that Mr. Christensen, I believe, has just

MERIT REPORTERS

5

1 entered the room for the deposition.
 2 MR. KIPP: Thank you. I didn't see you come
 3 in.
 4 Q And they act as a broker for you?
 5 A Kellogg, Wachter?
 6 Q Yeah.
 7 A That's correct.
 8 Q And your pay is by way of commissions earned
 9 on the business. Am I right?
 10 A Correct.
 11 Q Do you specialize in any particular kind of
 12 business?
 13 A I do.
 14 Q What is it?
 15 A Senior citizen market, also investments of
 16 senior citizens.
 17 Q You're aware that I have recently become
 18 involved in this lawsuit as a lawyer for Stan J.
 19 Christensen, are you not?
 20 A I am.
 21 Q And as your attorney pointed out, Mr.
 22 Christensen just arrived, as I invited him to be here to
 23 assist me with this proceeding. Other than the events
 24 from which this suit arises, have you ever known him in
 25 any other fashion or had any contact with him?

MERIT REPORTERS

6

1 A None.
 2 Q Have you ever known any of the other named
 3 defendants, Robert Appgood, Troy Cox or Eric Strain, other
 4 than in that -
 5 A None.
 6 Q - on that occasion? I'd like to ask you some
 7 questions of - give you a chance to describe to me what
 8 happened. The complaint says that it was August 5th of
 9 1991 at about eight o'clock, eight p.m. Is that your
 10 best memory?
 11 A It is.
 12 Q At the Glenmoor Golf Course?
 13 A Uh-huh.
 14 Q And that's out in West Jordan?
 15 A That's correct.
 16 Q That's a public golf course?
 17 A It is.
 18 Q Nine holes or eighteen?
 19 A Eighteen.
 20 Q And I take it you were playing or had played
 21 golf?
 22 A Yes, I do.
 23 Q With whom did you play?
 24 A That day?
 25 Q Yes.

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1 A Darren Difrancesco.
 2 Q Last name again?
 3 A Difrancesco. I think it's Difrancesco.
 4 Q Can you spell that?
 5 A D-I-F-R-A-N-C-E-S-C-O.
 6 Q Thank you, and just the two of you?
 7 A That's correct.
 8 Q Is he, so far as you know - is he still a
 9 resident of Salt Lake County?
 10 A He is.
 11 Q And where - how would I find him?
 12 A He's probably in the phone book.
 13 Q Thank you. Do you know what his employment
 14 is?
 15 A I believe he's working for a home theater
 16 company.
 17 Q And was it a twosome you were in?
 18 A That's correct.
 19 Q About what time was your starting time?
 20 A I guess I'd have to check the logbook with
 21 them. Probably sometime around five, I would assume.
 22 Q Did you just play nine holes?
 23 A We did. We just played the back nine.
 24 Q Okay. Do you have a handicap?
 25 A I don't.

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1 Q What kind of scores do you usually shoot?
 2 MR. ZOLL: Objection, irrelevant. Subject to
 3 that objection, you can go ahead and answer.
 4 A I'm not a great golfer. I golf often, but I
 5 don't get much better, 42 to 48 on nine holes.
 6 Q Thank you. Do you hit it quite a long ways?
 7 A No, not for my size, I don't.
 8 Q How tall are you?
 9 A Six-two.
 10 Q And what do you weigh?
 11 A 235.
 12 Q Aside now from what happened in this incident,
 13 otherwise, was your health good then?
 14 A Yes. I have some pretty serious ankle
 15 injuries. Other than that, I'm healthy.
 16 Q What's the nature of the ankle injuries?
 17 A I've played some college football and had both
 18 of my ankles reconstructed.
 19 Q But they work well enough you can play golf?
 20 A Yeah.
 21 Q Did you walk?
 22 A No. We had a cart, and that's why we took the
 23 cart is because I can't walk nine holes.
 24 Q How was the weather?
 25 A Weather was fine.

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1 Q And I guess it was plenty of light with
 2 daylight savings?
 3 A It was getting dark when we arrived on the
 4 last hole.
 5 Q And the events that led up to this thing
 6 you're going to tell me about commenced with your – some
 7 contact with your twosome and the other foursome on the
 8 last hole. Is that true?
 9 A That's correct.
 10 Q What happened?
 11 A Well, what happened was my friend and I,
 12 Darren, when we started the back nine holes, a girl by
 13 the name of Dana was running the shop that day. She
 14 says, "I'll put you in here on the back nine. You'll
 15 follow this foursome," and she says, "We've already had
 16 two complaints that they're playing very slow so be
 17 patient. It's going to be a long nine holes."
 18 And so we went out and consistently, probably
 19 five of the nine holes at least we were on the tee box at
 20 the same time they were, and normal golf etiquette –
 21 like I say, I'm not a professional golfer. But my
 22 understanding of golf etiquette is, if you have a twosome
 23 behind a foursome and you're playing slow, you usually
 24 let them play through. It was never offered to us.
 25 Nothing was ever said. There was never anything said on

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1 the tee box, but I'm surprised it was never offered for
 2 us to play through.
 3 Q Do you have any memory how far they were
 4 behind the group that were ahead of them?
 5 A There was no group ahead of them.
 6 Q So the course was clear as far as you could
 7 see?
 8 A That's right.
 9 Q Obviously, a twosome would play more quickly
 10 than a foursome?
 11 A Sure. That's correct.
 12 Q What is the 9th hole? Is it a par what?
 13 A The 9th or the 18th?
 14 Q The last hole.
 15 A The last hole, the 18th?
 16 Q The 18th.
 17 A That's correct. It's a par five, I believe.
 18 Q Okay. Describe what happened that led up to
 19 this confrontation.
 20 A Well, like I say, you know, we were a little
 21 aggravated that they were playing so slow, and as we got
 22 later into the holes, there was another group that caught
 23 up. And so by the 17th hole, there were two groups
 24 waiting, us and another one, on that hole as they teed
 25 off.

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1 And I remember on the 17th hole – I don't
 2 remember which one it was, but one of them hit a bad shot
 3 and decided they were going to hit what they call a
 4 Mulligan, another shot, because it was out of bounds.
 5 And I thought that was pretty inconsiderate with two
 6 other groups waiting behind them. We got to the 18th
 7 hole, same situation. They played on. We were halfway
 8 down the fairway. We had hit our tee shots. Not even
 9 halfway, really, because it was a par four or par five.
 10 And I noticed there were two groups behind us
 11 on the tee box, us in the middle, and they were finishing
 12 up on the green. My friend Darren does hit the ball a
 13 little longer than I do. I do not hit the ball straight,
 14 but sometimes I can hit it a long way but not straight.
 15 And we didn't want to hit onto the green just in case
 16 because we were probably 280 out, somewhere in that
 17 vicinity.
 18 We watched them put. They were still putting.
 19 They finished putting. They put the stick back in, and
 20 then a couple of them put their balls back down and
 21 started putting again, just like they were on a miniature
 22 golf course, and I thought, "What are they doing?"
 23 And my friend was probably 50 yards ahead of
 24 me and on the opposite side of the fairway, and I noticed
 25 them take two or three puts, and I look back, and the

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1 group back there yelled at us. They go, "Just go ahead
2 and hit," and they were obviously upset. And there was a
3 foursome there. They were older gentlemen, probably in
4 their 50's.

5 Q Do you know their identities?

6 A Never did meet them, no. They yelled, "Just
7 go ahead and hit." Darren looked at me and said, "Should
8 I go ahead and hit from across the green? And I said no.
9 And he yelled, "Hurry up. Get off the green." And the
10 next thing I know, these guys are turning around flipping
11 us off, F-you, F-this. Am I supposed to say the word?

12 MR. ZOLL: I don't think you have to if you
13 don't want to. Maybe you ought to spell it for the
14 record.

15 A F-U-C-K and mother F-U-C-K and that kind of
16 language, and they were all doing it. They were giving
17 us the bird and things like that. They finally ended up
18 leaving. They got done with their expletives, and they
19 left.

20 Q And then you played on up?

21 A Yeah, and then we played on up. So my friend
22 and I finished the golfing, finished the hole, and I went
23 to get the cart that was parked off to the side. And he
24 walked off towards the clubhouse.

25 Q Can I just interrupt you a second now? Can

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1 you kind of explain the setup from where the 18th green
2 was, where the clubhouse is, where you were parked?

3 A Sure. Oh, excuse me. The 18th green is
4 straight -- the 18th hole is straight, and it's going
5 almost straight to the clubhouse. You finish up.

6 There's some grass area between that and the road that
7 you drive in on. You cross the road, and there's a
8 little pond, and then there's a clubhouse. So you're
9 going straight towards the clubhouse, but you have to
10 drive past the 18th on your way back out.

11 Q And where were you parked with respect to
12 that?

13 A With the cart?

14 Q Well, is that where this happened, when you
15 were still with the cart?

16 A Right.

17 Q Okay. Describe to me what happened.

18 A The cart was off to the west side of the
19 green, okay? I went to get the cart, and you have to go
20 north to get to the clubhouse.

21 Q Right.

22 A So my friend walked off, and he was headed in
23 that direction, towards the clubhouse. And I went to get
24 the cart probably 30, 40 yards away. I noticed these two
25 cars going by. I believe they were two cars, and again,

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1 the expletives start.

2 Q That would be on the road leading from the
3 park?

4 A Leading from the clubhouse out to leave.

5 Q Okay.

6 A And as I see this, my friend Darren's over
7 there, and I see these guys driving by. And I didn't at
8 the time recognize that it was them, but as soon as I
9 heard it, I realized what was happening. And they
10 started swearing at them again. F-you. And I heard
11 Darren yell at them. "What's your deal?" And the next
12 thing I know, the brakes stop, and they're out of the
13 car, and they're going towards Darren."

14 Q Both cars?

15 A There were four people, and all four of them
16 were coming. I do believe there were two cars.

17 Q Okay.

18 A And they were out of the car and coming, so I
19 got in the cart and started over there.

20 Q Over to where your friend was?

21 A Right, because I thought it was going to be a
22 problem.

23 Q Yeah.

24 A And I thought, you know, we better get this
25 stopped immediately. And we were probably 30 yards off

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1 of the green back behind the green.

2 Q Okay.

3 A I got over there, and Darren was in an
4 argument with -- let's see. I believe he was in an
5 argument with Mr. Christensen and either Mr. Strain or
6 Mr. Cox. I'd have to see them to know which one it was.

7 Q How were they standing?

8 A Well, there were two of them that were taller.
9 Mr. Christensen and Mr. Appgood were taller, and then Mr.
10 Cox and Mr. Strain were shorter, about the same size.
11 And he was in an argument with one of the two shorter
12 ones, and I'd have to see to know which one it was. I
13 believe Mr. Christensen, but I can't be sure of that.

14 All I know is that I came over. By the time I
15 got there, all four of them were there. I was the last
16 one to get to the group. So I walked up and I got in the
17 middle, and there was exchanges going on.

18 Q Vocal exchanges?

19 A Right.

20 Q Calling each other names and swearing?

21 A Well, it wasn't really calling each other.

22 Darren was saying, "What's your guys' deal? You were
23 playing so slow. What are you mad at us for? All we did
24 is ask you to get off the green."

25 And they're saying, "You're F-ing this. You

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1 guys are jerks." And to this day I still have no idea
 2 what they were upset about. All we did is ask them to
 3 get off the green, and so I stepped in between them. I
 4 said, "That's it. Bag this thing."
 5 And the next thing I know is, one of the
 6 shorter ones -- I was standing, and he was standing right
 7 in front of me, Cox or Strain. Next to him or a little
 8 ways off was the other shorter one, behind me on my left
 9 side. Right behind me was Mr. Christensen, and on my
 10 right side was Mr. Appgood. I mean, right over my
 11 shoulder, and in the middle of them or off to the side
 12 was my friend Darren behind me also.
 13 So they called -- the word I remember, and I
 14 won't forget it -- Mr. Cox or Strain, the one that was
 15 sitting there, calls me an F-ing yo-yo, and I go, "You
 16 know, what's your problem? You know, what did you guys
 17 do? And right then he takes both hands and shoves me
 18 right in the chest as hard as he can. Well, he was only
 19 about this high.
 20 Q You're showing me about to your shoulders?
 21 A Yes. He's probably a foot shorter than I was
 22 or close to that, and I wasn't about to get in a fight
 23 with him. I wasn't about to get in a fight. There was
 24 no excuses for what was going on, and so right about that
 25 point as he shoved me, I put my hands out like this

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1 because I thought he was going to shove me again.
 2 Q You're showing me your hands up kind of level
 3 with the ground and out in front of you?
 4 A Right, both of them. Both of my hands were
 5 where his shoulders were so that he didn't swing at me
 6 again. He shoves me, and this all happened really fast.
 7 He shoves me hard. I took a step back. I put my hands
 8 out like this, about his shoulder-length high, and I
 9 believe my hands were on his shoulders like this.
 10 And the next thing I know, I get grabbed from
 11 my left side, which is where Christensen was, spun around
 12 and hit in the side of the face by Appgood with a right
 13 hook and dropped me to my knees. And I put my hand up
 14 like this, and I had blood going everywhere.
 15 Q You're showing me your hand to your face?
 16 A Right.
 17 Q Your right hand?
 18 A I had blood going all over, and the next thing
 19 I know, the people from the golf course are there
 20 breaking it up. My friend Darren, he's probably not
 21 going to admit this, but he was scared to death. First
 22 thing he did is run to the cart, which was 10 yards back,
 23 and grab a golf club and start swinging a golf club; not
 24 at them, from a distance. Yelling, "Come on."
 25 Because I could tell -- I mean, there's four

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1 of them. There's two of us, and I've just been put on my
 2 knees. And I'm a fairly decent-sized person, and anyway,
 3 I started to get back to my feet, and that Dana person
 4 was there and another kid by the name of Jamie, the golf
 5 person who saw the whole incident and was on his way over
 6 when the incident started.
 7 Q He works at the golf course?
 8 A Yes.
 9 Q His name is Jamie?
 10 A His name is Jamie Wamlus, I believe.
 11 Q Describe him.
 12 A He was a high school kid, dark hair.
 13 Q Thanks.
 14 A He was there. They both were there to break
 15 -- what happened was -- later I found this out. He went
 16 to get Dana when he saw the argument persisting, and they
 17 were on their way over when the altercation took place.
 18 Q And Dana is the --
 19 A She was working in the golf shop, right.
 20 Q Is that a man or a women?
 21 A She's a women.
 22 Q Okay. She was the starter?
 23 A Right, correct.
 24 Q Thank you.
 25 A So I started to get back on my feet, and

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1 Christensen and Darren were arguing big time. There was
 2 a lot of arguing going on. I thought there might be more
 3 of a fight. I'm still trying to get my composure, and
 4 the next thing I know, you know, the thing broke up. And
 5 they get in their car swearing at us all the way to their
 6 car and left. We didn't know who they were. We didn't
 7 know any names. We didn't know anything.
 8 They helped me back to the clubhouse. We went
 9 in and washed all the blood off and saw that my lip was
 10 split wide open, and what ended up happening was that,
 11 and I fractured my cheekbone.
 12 Q Right?
 13 A Correct, correct.
 14 Q The right cheekbone?
 15 A Correct.
 16 Q Can I come back to that in a minute? And I
 17 just want to make sure I've got all the details.
 18 MR. ZOLL: Well, he's not finished. Are you
 19 going to let him finish?
 20 MR. KIPP: Oh, sure.
 21 A Anyway, I was in the bathroom. I remember
 22 being in the bathroom. I came out of the bathroom, and
 23 Dana said, "I've called the police to tell them what's
 24 happening. Do you want to talk to them?" I believe
 25 Darren talked to them and gave them his address, and they

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1 said they were going to meet him at his house, which was
2 in West Jordan/South Jordan area.

3 We still didn't know who they were, and then
4 Dana said she thought they paid with a credit card, so
5 she looked it up and they had. One of them had paid with
6 a credit card. That's how we got somebody's name, and
7 also, we had a license plate number. So we went to
8 Darren's house. The police came and filed the report. I
9 went to the hospital, had the stitches and everything put
10 in my lip and the X-rays taken.

11 And I was out of work for a week to 10 days.
12 I had my sister's wedding 10 days later where I was in
13 the line with every single person that I know coming
14 through having to explain that I just got jumped.

15 Q Would it be convenient for me to ask you a few
16 more questions about the facts of it, and then we'll get
17 back to what your injuries were and what your losses
18 were? Is that all right with you?

19 A Fine.

20 Q All right. I'd like to make sure I understand
21 the various things that happened in this -- you say it
22 was a short -- all happened fast. I understand that.

23 A Uh-huh.

24 Q But you were in the confrontation you've
25 described.

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1 A Right.

2 Q And you're saying what's going on? What's the
3 problem? And one of the small guys gives you a shove.
4 You're trying to hold him off, and then you think Stan
5 grabbed you by your left shoulder?

6 A Yeah. He grabbed me and turned me into the
7 punch.

8 Q Turned you to your right?

9 A Correct.

10 Q And then who hit you? Apgood?

11 A Mr. Apgood.

12 Q Did you see him swing at you?

13 A I saw the fist coming at me, yeah.

14 Q Right hand?

15 A Yes, it was his right.

16 Q And he hit you in the right cheek?

17 A That's incorrect. He hit me in the left cheek
18 across my face.

19 Q In the left cheek?

20 A Well, I believe the scar is right here, and
21 this is the cheekbone, so as he turned me this way, the
22 punch came this way.

23 Q Okay. And that knocked you down?

24 A Oh, yeah, dropped me.

25 Q Does that describe all the actual physical

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1 contact that took place?

2 A With pushing and shoving or just what you said
3 there?

4 Q Well, what you've just described to me about
5 the shoving.

6 A What I said, yes. That was most of the -- the
7 three physical contacts were the person in front of me,
8 Mr. Christensen on my side, and Mr. Apgood on my other
9 side.

10 Q Do you know the identity of any other
11 witnesses besides the high school kid you've described
12 and the starter -- and the people that were involved?

13 A Any other witnesses?

14 Q Yeah.

15 A There were the people on the golf course, but
16 I don't think anybody ever got their name, and no reports
17 were ever taken.

18 Q Did the police come to the golf course?

19 A I don't know. I believe they went up
20 afterwards, but you'd have to ask Dana. I don't know.
21 Not while I was there. I went to the hospital

22 Q Thank you. Do you know what, if any, action
23 the police took or whether they filed any charges?

24 A They did. There was a case in south Jordan.

25 Q And who was charged?

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1 A Three of the four of them were found guilty of
2 assault and battery or assault or something.

3 Q And were those the three people you've
4 described?

5 A That's correct.

6 Q That had contact with you?

7 A That's correct. That's right.

8 Q Do you know how they plead or if there was a
9 trial?

10 A There was a trial. I don't know how they
11 plead. I'm assuming they plead not guilty.

12 Q And what court was that in?

13 A South Jordan.

14 Q What hospital did you go to?

15 A Alta View.

16 Q That's the one that's up on 13th East?

17 A That's correct.

18 Q Take you to the emergency room?

19 A That's right.

20 Q Did they take any x-rays?

21 A They did.

22 Q Tell me how they treated you. I don't mean
23 nice. I mean, what did they do for you?

24 A Well, they went in and they -- once I was in
25 the emergency room, they took the x-rays. They cleaned

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1 up my face, put the stitches in my lip, came back. I was
 2 there for an hour, hour and a half. The stitches -- or
 3 they put the stitches in. Then they came back with the
 4 X-rays and said I had a fractured cheekbone, but there
 5 wasn't really anything they could do for it. It wasn't
 6 crushed. It was just fractured, and by that time I was
 7 pretty black and blue. It was starting to take effect.
 8 My eyes were swollen shut.
 9 Q Did they give you pain medication?
 10 A They gave me some pain killers.
 11 Q Then did you go home?
 12 A No. I went back to Darren's house. He was
 13 driving. I went back to Darren's house because we had to
 14 meet with the police officer. I was on the way to the
 15 hospital first.
 16 Q I forgot to ask you if you were married. Are
 17 you?
 18 A I am now. I was not at the time.
 19 Q You weren't then?
 20 A No. I was engaged.
 21 Q Where did you live then?
 22 A 2488 East 8200 South in Sandy.
 23 Q Your own place?
 24 A With my mom.
 25 Q After your emergency care, did you receive any

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1 further medical attention?
 2 A I had to go back to -- I had to go back, I
 3 believe, twice. Once they wanted -- either they
 4 rechecked the x-rays or they took more x-rays. I'd have
 5 to check the doctor's report, and then the other time to
 6 have the stitches taken out.
 7 Q Do you remember the name of the doctor that
 8 was principally in charge of your care?
 9 A I don't. I'd have to find the medical
 10 records.
 11 Q Just somebody that was on duty there at the
 12 time?
 13 A I would assume so. Well, my stepmom works at
 14 Alta View Hospital, and so she asked for someone that was
 15 on that she knew was good, so --
 16 MR. ZOLL: Is that it?
 17 THE WITNESS: That's right.
 18 MR. ZOLL: Dr. Scott Lindley.
 19 MR. KIPP: Say it again.
 20 MR. ZOLL: Dr. Scott Lindley, L-I-N-D-L-E-Y.
 21 MR. KIPP: Thank you.
 22 Q After your two revisits, have you had any
 23 subsequent medical care from anybody?
 24 A None for that. I have a scar that Dr. Lindley
 25 told me I'd always have. There's nothing they can do

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1 about it.
 2 Q A scar where?
 3 A Here on my lip.
 4 Q And who told you that?
 5 A Dr. Lindley when he sewed me up said I would
 6 always have a scar there.
 7 Q Does it bother you?
 8 A It bothers me when I look in the mirror, yeah.
 9 Q Is your sensation okay?
 10 A No. I don't have complete feeling. I don't
 11 -- I mean, it's like dead skin right there, but as far as
 12 speaking or anything, no, it does not bother me, just the
 13 way it looks.
 14 Q How did your treatment work out?
 15 A Everything ended up fine. It healed okay.
 16 Q Except for the scar, then, I take it you got
 17 well?
 18 A Health-wise, yes.
 19 Q How long did it take you to get well?
 20 A Before you were unable to notice anything?
 21 Q Yeah. When were you back to feeling like you
 22 did before this happened, except for the scar?
 23 A Three weeks to a month.
 24 Q Do you think you missed a week to 10 days at
 25 work?

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1 A I did.
 2 Q Did you lose some income as a result of that?
 3 A Sure.
 4 Q How would you calculate that?
 5 A I work on a commission basis, and so the only
 6 way I would be able to calculate it is by basically what
 7 I make through the year and dividing it. At the time I
 8 was probably making somewhere between a thousand to
 9 fifteen hundred dollars a week, and summer is the best
 10 time of year. But that's probably fair, a thousand to
 11 fifteen hundred a week is about what my average would
 12 have been.
 13 Q Do you have in mind what charges you incurred
 14 for the medical care you've described?
 15 A I believe a bill is here. It's \$535.
 16 MR. ZOLL: \$585.92.
 17 MR. KIPP: Five --
 18 MR. ZOLL: \$585.92.
 19 MR. KIPP: May I get a copy of that?
 20 MR. ZOLL: I have no objection.
 21 MR. KIPP: Thank you.
 22 MR. ZOLL: You might want likewise this docket
 23 statement.
 24 MR. KIPP: That would be helpful.
 25 MR. ZOLL: On the criminal docket showing the

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1 guilty verdict.

2 MR. KIPP: Thank you.

3 Q Now, besides the bill that we're copying and
4 the loss of pay you've described, did you have any other
5 out-of-pocket losses?

6 A No. It's hard to tell exactly with the
7 business, you know, because what happened is, all my
8 appointments that week had to be given to another agent,
9 which I make override off of and I make sales off of.
10 Like I say, you can't tell, you know, what -- obviously,
11 I feel like I'm a better salesman than him because I was
12 in a training position. Whatever he got or didn't get
13 and what that would have cost me on what I would have
14 sold and what he didn't sell, so that's why I feel -- I
15 was just trying to give you an average.

16 Q And if he did sell, though he might not sell
17 as well as you -- if he did sell, did you get some share
18 of the commission?

19 A No.

20 Q Did they reschedule any of those appointments
21 so you could do them?

22 A No.

23 Q They just kept them and had somebody fill in
24 for you?

25 A That's correct.

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1 Q Tell me again what kind of product he was
2 going to -- you were trying to market to those people.

3 A Medicare supplements. Nursing home policies
4 and annuities mainly.

5 MR. KIPP: Ray, I'm not sure about this.
6 Maybe you can just straighten out my head about what
7 happened. Originally there were four named defendants.
8 I see in the recent pleadings that two named defendants
9 are Christensen and Appgood. Can you explain that to me?

10 MR. ZOLL: You mean why there's only two
11 instead of four?

12 MR. KIPP: Yes.

13 MR. ZOLL: We haven't been able to effectuate
14 service on the other two. We've had attempts, and
15 they've not been able to locate them.

16 Q Thank you. Now, have we pretty much covered
17 what happened that led up to this lawsuit?

18 A I believe so.

19 Q We've talked, and you've told me all you know
20 about it?

21 A I believe.

22 Q You've told me all the people that you know
23 about that may have some information about it?

24 A Besides like my wife and people around me that
25 were with me afterwards, but as far as right there at the

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1 scene, mainly?

2 MR. ZOLL: Yeah, and let me just interject.

3 Of course, there's been a designation of witnesses and
4 exhibits that has been propounded in the case. That
5 would list all the witnesses that we anticipate calling,
6 and we would supplement the exhibit list that there have
7 been photographs taken in the case that are not reflected
8 on the designation of witness and exhibit list I didn't
9 know were taken until recently.

10 MR. KIPP: Say that again about the
11 photographs.

12 MR. ZOLL: Photographs have been taken.

13 THE WITNESS: I know that the -- I believe
14 there were photographs taken at the hospital and the
15 police.

16 (Off the record.)

17 MR. KIPP: Could we agree that we can look at
18 those pictures or maybe pay for prints of them?

19 MR. ZOLL: Oh, yes. I'll produce them as soon
20 as I have them. I don't have them yet.

21 THE WITNESS: I don't know if the hospital has
22 them or the police or who.

23 MR. ZOLL: I just sent a request to the
24 department for copies of all the documents, including the
25 photographs, which I just found out had been taken. As

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1 soon as I get those, I have no problem of delivering you
2 a copy of everything I get.

3 MR. KIPP: And we'll pay, of course.

4 MR. ZOLL: Of course.

5 MR. KIPP: That's all I have.

6 MR. MORSE: Could I get copies of those
7 photographs as well?

8 MR. ZOLL: Be glad to provide those, yes.

9 EXAMINATION

10 BY MR. MORSEL:

11 Q This criminal and traffic docket that you've
12 provided for us, Mr. Kellogg, it says that a notice of
13 appeal was filed on January 23rd, 1992. Was there
14 actually an appeal taken?

15 MR. ZOLL: If you know, and I don't know the
16 outcome of that, Counsel.

17 Q Was there more than one hearing or trial
18 having to do with this incident?

19 A I believe there was just the one trial.

20 Q And that was in South Jordan?

21 A That's correct.

22 Q Who testified at that?

23 A I believe all four of the defendants, and I
24 did, Darren did, and I believe Jamie Wamius.

25 Q Wamius.

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1 MR. ZOLL: By the way, that is spelled –
 2 THE WITNESS: W-A-M-L-U-S.
 3 Q And before that trial occurred, did you talk
 4 to Mr. Wamlus?
 5 A Just the night of the – or the day that that
 6 happened at the –
 7 MR. ZOLL: At the golf course?
 8 A Golf course. I don't know. I had never met
 9 him before. I don't know who he is.
 10 Q But he told you that – or what did he tell
 11 you?
 12 A What was that?
 13 Q What did Mr. Wamlus tell you when you talked
 14 to him at the golf course?
 15 A He was just a witness, as far as I know. I
 16 was in no position to be sitting around talking to
 17 anybody. They got me cleaned up and took me to the
 18 hospital.
 19 Q Did he tell you what he saw?
 20 A He said he saw it. He said, "I said I saw what
 21 happened" and Dana said, "You saw it?" And he says,
 22 "Yeah." And she says, "Well, let's see if we can find
 23 them." That's when she looked for the credit card. I
 24 was leaving by then. All I know is, my understanding was
 25 they called the police.

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1 Dana called the police, I believe, and while I
 2 was at the hospital someone set up for us for the police
 3 to come to Darren's house after they finished with me at
 4 the hospital.
 5 Q Did you talk to Mr. Wamlus at any time after
 6 that?
 7 A I don't believe I talked to him until the day
 8 of the trial in West or in South Jordan, and none of us
 9 – they had us in separate rooms. We didn't get to hear
 10 each other's testimony or anything like to.
 11 Q Now, this trial wasn't to a jury, was it?
 12 A No, it wasn't.
 13 Q It was just to a judge?
 14 A Uh-huh.
 15 Q And do you remember the judge's name?
 16 A I don't.
 17 Q And did you ever appear in a hearing in Third
 18 District Court on the same issue or the same incident,
 19 Third District Court being the one behind you?
 20 A No, I haven't.
 21 Q What's your social security number?
 22 MR. ZOLL: Wait a minute. Objection. I'm not
 23 sure the relevance of that, Counsel. If you can help me
 24 with that, maybe I'd withdraw the objection and ask him
 25 to answer.

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1 MR. MORSE: Well, relevancy doesn't matter.
 2 He can answer the question.
 3 MR. ZOLL: Rule 26 says the question has to be
 4 relevant to the proceedings or lead to some probative
 5 information that may become relevant, and social security
 6 numbers are something I think are guarded. And we don't
 7 like to just give those out for any reason. Unless
 8 there's something substantive that can lead to an issue
 9 relating the case, I'd instruct him not to answer.
 10 MR. MORSE: I don't want to get into an
 11 argument with you, Ray. You know, I just want to know
 12 his social security number to find out whether he has any
 13 prior criminal record.
 14 THE WITNESS: I have none.
 15 MR. ZOLL: Why don't you ask him?
 16 THE WITNESS: I have had a speeding ticket.
 17 Q Would you please give me your social security
 18 number?
 19 MR. ZOLL: I object. I instruct you not to
 20 answer.
 21 MR. MORSE: Ray, you can't do that.
 22 MR. ZOLL: I think the rules allow me to do
 23 that.
 24 MR. MORSE: You can't instruct him not to
 25 answer, except if I ask him a privileged piece of

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1 information, and that's not privileged.
 2 MR. ZOLL: It has to be relevant.
 3 MR. MORSE: You know, you're not the guardian
 4 of what's relevant.
 5 MR. ZOLL: Then you can bring your motion,
 6 Counsel. If I'm wrong, we'll let the judge decide I'm
 7 wrong. All right. Simple as that.
 8 Q What is your date of birth?
 9 MR. MORSE: Is that secret, too, Ray?
 10 A 9-29-68.
 11 MR. ZOLL: No, but I don't like the demeanor
 12 when you say it's secret. I think I have a full right to
 13 make determinations under 26 if I think it's irrelevant.
 14 You haven't persuaded me that it isn't. I'm entitled to
 15 instruct him not to answer if I think it's being intended
 16 to harass or annoy this witness.
 17 Q Do you feel harassed or annoyed?
 18 MR. ZOLL: As to whether or not he has to give
 19 private information about his social security number,
 20 yes. And I'll take that position now. If you don't like
 21 it, we'll go see Judge Medley. If I'm wrong, we'll give
 22 it to you.
 23 MR. MORSE: The other reason it's relevant,
 24 obviously, Ray, and the other reason I'm going to get his
 25 social security number, Ray, is through request for

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1 production of all of his tax returns from 1985 to
2 present.
3 MR. ZOLL: I haven't seen the production yet,
4 Counsel.
5 MR. MORSE: Well, I just entered an appearance
6 today.
7 MR. KIPP: Can I just suggest we're not going
8 to get a ruling here? The question is not whether or not
9 he can do it. The question is whether you're going to
10 get away with it. There's no sense arguing about it.
11 MR. MORSE: No, I'm not, just to let Ray know
12 I'm going to request his tax returns, and I'm going to
13 get it one way or another.
14 MR. ZOLL: Well, we'll block out the social
15 security number.
16 MR. MORSE: That would be really clever.
17 MR. ZOLL: Not clever. It's private.
18 Q Mr. Kellogg, have you given a statement about
19 this incident to anyone ever? And by a statement, I mean
20 describing what happened.
21 A Have I talked to people about it?
22 Q Yeah.
23 A Yeah. I've probably talked to 300 people the
24 day of my sister's wedding when everyone wanted to know
25 why I was beat up.

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1 Q Have you talked to anybody representing any
2 insurance companies about this?
3 A I have not.
4 Q Did you give the police any statement about
5 what happened?
6 A I did.
7 Q And do you remember the policeman's name that
8 you talked to?
9 A I believe it's Walters or something. It's a
10 female officer.
11 MR. ZOLL: I believe it's on the witness list,
12 Counsel, No. Q.
13 Q Barbara Walton?
14 A Yeah, that would be it.
15 Q Did you talk to any other officers about that?
16 A The only other person I talked to was whoever
17 the prosecutor or whoever he was that was the attorney at
18 the South Jordan case.
19 Q And do you remember that person's name?
20 A I don't. I'd know him if I saw him.
21 Q Did you have a lawyer at that hearing?
22 A I did not, unless he was it. I guess he was
23 working on behalf of the city. I didn't.
24 Q When you approached the 18th tee, was there
25 another group on the 18th tee, other than the group

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1 consisting of the defendants?
2 A Are you meaning ahead of them?
3 Q That's correct.
4 A No. There was no one on the hole all the way
5 down until it was finished.
6 Q You're telling me that it was an empty hole?
7 A Correct.
8 Q No one was on the hole?
9 A Correct.
10 Q And how many other times did that happen
11 during that nine holes?
12 A I would say the last three or four holes there
13 was no one ahead of them.
14 Q And they have marshals at Glenmoor, don't
15 they?
16 A I guess if you can call them that. Once in a
17 while I've seen somebody driving around, but not at eight
18 o'clock at night.
19 Q How often did you play at Glenmoor?
20 A Quite often.
21 Q And you don't have a handicap?
22 A I don't.
23 Q You don't record your scores?
24 A On my card, yeah, but I don't really want to
25 go show them to everybody.

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1 Q Did you hit your second shots when the
2 defendants were on the green?
3 A I did not.
4 Q Did your friend?
5 A He did not.
6 Q Are you sure about that?
7 A I am sure.
8 Q Did you ever swing at Mr. Cox?
9 A I took no swings at anybody. I believe the
10 witnesses there will say the same thing.
11 Q Were you ever -- did the punch knock you out?
12 A As far as cold, no. I only went down to a
13 knee. I was not blacked out.
14 Q You didn't lose consciousness?
15 A I don't believe so. I know I didn't get right
16 back up.
17 Q Had you been drinking that day?
18 A I don't drink, never have.
19 Q How about your friend? Was he drinking that
20 day?
21 A He doesn't drink, and no, he had not drunk
22 that day.
23 Q Have you ever written down what happened to
24 you that day?
25 A I haven't.

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1 MR. ZOLL: Was that have not?
 2 THE WITNESS: I have not.
 3 Q Okay. Of the people that you've told about
 4 this incident, did any of them write down what you told
 5 them?
 6 A They have not that I know of. I don't know
 7 why they would.
 8 Q Did you ever ask this group of four whether
 9 you could play through?
 10 A I don't know if we did or not. I don't
 11 remember any exchanges on any of the tees. I felt it was
 12 very inconsiderate that it was not offered, especially
 13 when we finally got to the 17th and there were two groups
 14 behind them. But I don't know if we ever asked. I don't
 15 know it was ever denied, don't remember.
 16 Q You say on the 17th hole one of them hit a
 17 ball out of bounds?
 18 A That's correct. It's a dogleg left. One of
 19 them tried to go over the out of bounds, and it didn't
 20 get over to the other fairway. So they just put another
 21 ball down and hit another one.
 22 Q Okay. Is there something wrong with that?
 23 A It is when there's -- first of all, you're not
 24 supposed to -- when there's two groups behind you and
 25 you're playing a Mulligan shot and you're holding

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1 everybody up, I think it's fairly inconsiderate.
 2 Q Are you aware that rules of golf require
 3 somebody to hit another golf from the tee if he thinks
 4 that the first shot has gone out of bounds?
 5 A I am.
 6 Q And they were then following the rules when
 7 they hit the second shot?
 8 A Except the fact that they were laughing and
 9 joking and having fun and holding the whole group up.
 10 Yeah. That's the part that was inconsiderate, not that
 11 they hit the other shot. It was the manner in which I
 12 felt they were playing.
 13 MR. ZOLL: I take it counsel is a golfer.
 14 Q How many puts were taken on the 18th green by
 15 this group after they put the flag back in?
 16 A At least three.
 17 Q Do you know who was doing those?
 18 A Like I say, we were 280 yards away. I don't
 19 recall. Everybody lining up their puts, no.
 20 Q 280 yards away?
 21 A We were only halfway down the fairway, if
 22 that; 250, 280 yards back.
 23 Q Could you have reached the green?
 24 A No way.
 25 Q Why didn't you hit your second shot?

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1 A Because I'm not going to hit into a group of
 2 people ever.
 3 Q They were on the green, were they not?
 4 A They were.
 5 Q And you just said you couldn't have reached
 6 the green, correct?
 7 A I have hit shots that are 300 yards before,
 8 and I don't know. You play golf. Would you hit if
 9 someone was 280 yards down?
 10 Q Have you ever hit a 280 yard shot from a
 11 fairway?
 12 A I believe I probably have.
 13 Q Okay. You just told me that you couldn't have
 14 hit --
 15 A Usually.
 16 Q You just told me, Mr. Kellogg, that you
 17 couldn't have hit the green.
 18 A May I rephrase? I don't believe I would have
 19 hit them because it's unlikely for me to hit at 280
 20 yards, but yes, I have been able to hit it that far
 21 before.
 22 Q How far had your tee shot gone?
 23 A I don't remember how far the hole is. I'd
 24 have to know the yardage. I could walk out to the course
 25 and show you where I was and how far it was. It seemed

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1 to me that it would have been a long shot, but I may have
 2 gotten there. And I would prefer not to hit into a
 3 group.
 4 Q Where was your friend's --
 5 A But --
 6 Q Where was your friend's tee shot?
 7 A My friend was 50 yards ahead of me, and he
 8 hits the ball further than me. If anyone were to hit, it
 9 would have been him. I mean, if someone could have
 10 reached it, he would have been the one to hit.
 11 Q Did he reach it when he hit his second shot?
 12 A No, he didn't.
 13 Q Did you reach it when you hit your second
 14 shot?
 15 A I ended up in the lake in front of it, the
 16 pond in front of the green.
 17 Q And how far in front of the green is the pond?
 18 A Probably starts 10 to 15 feet and runs 30 to
 19 40 feet out.
 20 Q Feet or yards?
 21 A I would say feet.
 22 Q Okay. Then what did you do?
 23 A Well, I just took a drop right there and
 24 played my next shot.
 25 Q In front of the pond?

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1 A I walked around to the opposite side because I
 2 didn't want to hit another one into the pond, which is
 3 probably the improper rules.
 4 Q When did your -- where did your friend's
 5 second shot wind up?
 6 A He was on the left side short of the green,
 7 tipped on, and we both finished out of the hole. We had
 8 the group behind us once we were on the green. When I
 9 hit mine into the pond before I took my drop, we had the
 10 group behind us. We waved them to hit, let them hit
 11 their next shot, and then we finished our hole.
 12 Q Did you wave for them to tee off while you
 13 were in the fairway waiting for the defendant's group to
 14 finish on the green?
 15 A No, we didn't.
 16 Q Why not?
 17 A I didn't think about it. I don't know. They
 18 didn't tee off until after we hit our next shot.
 19 Q Yet they were yelling at you?
 20 A No, they weren't yelling at us. Yeah, they
 21 were yelling at us to go ahead and hit, but that wasn't
 22 intel after they had seen them put the stick back in and
 23 put.
 24 Q They were impatient?
 25 A I'm sure they were. There were two groups on

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1 the tee box.
 2 Q And you were impatient as well?
 3 A I don't know if I was impatient. I was in no
 4 big hurry. I just thought it was inconsiderate.
 5 Q And Darren was the first one to yell?
 6 A He was.
 7 MR. ZOLL: Objection, mischaracterizes. I
 8 think he was the only one to yell, I think you said,
 9 wasn't he?
 10 THE WITNESS: That's correct.
 11 Q Darren being your friend who you were playing
 12 with?
 13 A That is correct.
 14 Q Is it safe to say that had he not yelled, then
 15 none of this would have happened?
 16 MR. ZOLL: Objection. That calls for absolute
 17 speculation.
 18 MR. MORSE: Are you going to instruct him not
 19 to answer that, too, Ray?
 20 MR. ZOLL: I think I have the right to do
 21 that, don't I?
 22 MR. MORSE: Are you going to stamp and throw
 23 stuff around now?
 24 MR. ZOLL: I have the right to say if it's
 25 speculation that he shouldn't have to answer that, but I

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1 don't do that. I'll say, if you can speculate as to what
 2 you think may have happened, subject to my objection, go
 3 ahead and speculate as you will.
 4 A How can I say? I don't know. All I know is,
 5 he didn't call anybody on. He didn't say, "Hey, do you
 6 want to fight? Do you want this?" All he said was,
 7 "Please hurry up. Get off the green."
 8 Q When you were at this trial in South Jordan,
 9 did you listen to the other witnesses?
 10 A No. Didn't get to hear anybody's testimony.
 11 Q You were outside the room?
 12 A That's correct.
 13 Q Now, you've claimed that you've suffered
 14 emotionally from this?
 15 A Yes.
 16 Q How have you suffered emotionally from this?
 17 A Well, I have a scar now on my face that I
 18 never had before. I've never been jumped and beaten up
 19 and fractured a cheekbone in my life before. I've never
 20 had to go to a wedding with a black and blue face and
 21 explain to 300 people why I looked the way I do, and I
 22 was pretty embarrassed about it.
 23 Q Have you received any treatment for your
 24 emotional damage?
 25 A I have not.

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1 Q You haven't been to a therapist?
 2 A I have not.
 3 Q Are you over this emotional damage?
 4 A As far as my life going on okay, yeah. I
 5 think that it's -- to me, you know, just because a couple
 6 of kids dress nice and are wearing proper golf clothing
 7 and they look good and everything else, what they did was
 8 no different than a bunch of gang members jumping
 9 somebody down on the street. It's the same thing to me.
 10 I mean, there was no instigation. There was no reason
 11 for it, and there was no reason. I mean, what are you
 12 throwing punches for? What are you shoving people for?
 13 That's the stupidest thing I've ever heard.
 14 Q Okay. Now, that didn't answer my question. I
 15 asked you whether your emotional damage has resolved.
 16 MR. ZOLL: I object to the form of that
 17 question. It does answer the question as to his
 18 emotional being and what he thinks as a result of that
 19 kind of conduct. I just voice that objection. Go ahead.
 20 You may answer.
 21 A I'm always going to -- I always remember that
 22 I got jumped. Every day I look in the mirror I see a
 23 scar in my face because I got hit and I got dropped for
 24 something that had no reason being. It bothers me. It
 25 bothers me the way I look. It bothers me mentally that I

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1 look that way in a sales presentation when I'm with
 2 people. I do not want to look like I'm scared, so I
 3 believe I've gone on with my life. It's not affecting
 4 me. I don't lose sleep over it, but it bothers me when I
 5 see myself and I see that and I remember what happened.
 6 Q Would you point out your scar again for me?
 7 A It's right here on my lip.
 8 Q Excuse me. I got to get a little closer here.
 9 I can't see it.
 10 A Oh, okay.
 11 Q Not that I'm a witness, but I don't see any
 12 scar there.
 13 A Oh, really?
 14 Q I'm sorry. I don't, sir.
 15 MR. ZOLL: Objection. Don't argue with my
 16 witness, Counsel.
 17 MR. MORSE: I'm not arguing with him.
 18 MR. ZOLL: Yes, you are.
 19 MR. MORSE: I'm just telling him what I can't
 20 see.
 21 MR. ZOLL: It might help if you had shaved
 22 before.
 23 Q You didn't shave this morning?
 24 A I didn't, no.
 25 Q Has anyone that you're selling these products

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1 to ever commented on your scar?
 2 A As a matter of fact, yeah, they have.
 3 Q Who's asked you about it?
 4 A What do you want me to do, go back and get a
 5 list? I can't remember everybody that's asked me how my
 6 scar happened.
 7 Q I asked you who.
 8 A I cannot tell you who. I can tell you it's
 9 been asked.
 10 Q In the business community in your line of
 11 work?
 12 A Correct.
 13 Q Who has commented on your scar?
 14 A Clients have. People's homes I've been in.
 15 Q How many?
 16 A Well, it's not near as much now. It's not
 17 something noticeable. It's not something someone asks
 18 about now and says, "Hey, how did you get that scar?" I
 19 probably notice it more than anyone, but for the first,
 20 oh, six months it was asked all the time.
 21 Q How long were your stitches in?
 22 A Two weeks, I believe.
 23 Q Did you have a bandage over the stitches?
 24 A I did not.
 25 Q But these days no one asks you about it?

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1 A Asks me about what?
 2 Q Your scar.
 3 A No.
 4 Q Would you say that Mr. Atwood meant to hit
 5 you?
 6 A Atwood or Apgood?
 7 Q I'm sorry, Apgood.
 8 A I believe his name is Apgood. Yeah, I would
 9 definitely say he meant to hit me. As a matter of fact,
 10 after he hit me, he was standing over top of me doing his
 11 Hulk Hogan imitation screaming at me like he was King
 12 Kong. I remember looking up and seeing that.
 13 Q What did he say?
 14 A He was just -- he was pumped up, adrenaline.
 15 I don't know what he said. He was pumped up standing
 16 over top of me like he just took me out, and he had.
 17 Q But you don't remember what he said?
 18 A I can't remember exactly what he said, no.
 19 Q Do you remember generally what he said, or
 20 have you told me everything you remember about it?
 21 A Generally, I believe he was just kind of
 22 yelling at me, whatever. I do not know what he said
 23 exactly
 24 Q Did he threaten to hit you again?
 25 A I don't think he needed to. I wasn't going

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1 anywhere.
 2 Q Did he threaten to hit you again?
 3 A I believe if I had gotten up, he would have
 4 hit me again, but I was not getting up.
 5 Q Did he threaten to hit you again?
 6 MR. ZOLL: Objection.
 7 A I would say --
 8 MR. ZOLL: Wait a minute. Let me make an
 9 objection. Threaten can be in more than words. If
 10 you're confused about the way he's asked the questions,
 11 if he means in words or in other methods, then ask him to
 12 rephrase the question.
 13 A Okay. I would say that in the sense that he
 14 was standing over me, the way he was right on top of me,
 15 yes, he was threatening me that if I did anything, I was
 16 going to get hit again.
 17 Q Did he say anything to you that would lead you
 18 to believe that he would hit you again?
 19 A The whole -- like I said, the way he was
 20 acting made me believe, yes, I was going to get hit
 21 again, but I must say I don't just believe he was going
 22 to hit me again. I believe all three of them would have
 23 hit me again. It wasn't like he was the only one
 24 involved.
 25 Q But you don't remember anything that he said,

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1 right?
 2 A I cannot tell you exactly what he said, no, at
 3 that time, once I had been hit.
 4 MR. MORSE: That's all I have.
 5 MR. ZOLL: No questions.
 6 MR. KIPP: I have just a couple of things to
 7 clear up. I'll be brief with you. Ray, maybe you can
 8 help me. This court record you've been good enough to
 9 give us shows Apgood. Do you know if there is a similar
 10 record about my client?
 11 MR. ZOLL: I don't. This is the only one I've
 12 received so far. I do have an outstanding request for
 13 those. Whatever I obtain through that request, I'll
 14 gladly deliver to you.
 15 MR. KIPP: Thank you. Could we have the same
 16 understanding about the bill? This bill, all the items
 17 show an injury date of August 5th, '91. He indicates he
 18 thought he went back twice. If there are other bills,
 19 will you get copies?
 20 MR. ZOLL: I will.
 21 FURTHER EXAMINATION
 22 BY MR. KIPP:
 23 Q You were asked about drinking and said that
 24 you weren't and never did.
 25 A Uh-huh.

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1 MR. ZOLL: I'm sorry. I didn't hear that.
 2 You have to answer audibly.
 3 MR. KIPP: I think he said yes.
 4 A Yes, I never have.
 5 Q Were the folks ahead of you drinking?
 6 A I don't know.
 7 Q You didn't see them drinking?
 8 A No.
 9 Q Other than the demeanor you've described, you
 10 know, the shouting and the activities and the physical
 11 contact with you, did they do anything that suggested to
 12 you they were drunk?
 13 A Well, I -- their attitude. The way they were
 14 being, I guess you could say, if you wanted to speculate,
 15 that maybe someone like -- that's the way a person acts
 16 when they've been drinking.
 17 Q Or maybe they just have bad attitudes?
 18 A Sure.
 19 A I, personally, did not see them drinking.
 20 Q Thank you. That's all I have.
 21 (The taking of this deposition was concluded.)
 22 * * *
 23 (Original transcript sent to Mr. Zoll.)
 24
 25

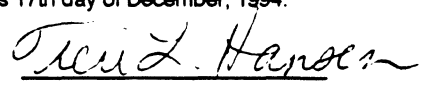
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1 C E R t i f i c a t e
 2 STATE OF UTAH)
 3 COUNTY OF _____)
 4 I HEREBY CERTIFY that I have read the
 5 foregoing testimony consisting of 54 pages, numbered from
 6 3 through 56 inclusive, and the same is a true and
 7 correct transcription of said testimony except as I have
 8 corrected Original transcript in ink, initialed same, and
 9 indicated said changes on enclosed errata sheet.
 10
 11
 12
 13 MATTHEW KELLOGG _____
 14
 15
 16 Subscribed and sworn to at _____
 17 _____ this _____ day of _____ 1994.
 18
 19
 20
 21 Notary Public _____
 22
 23 My commission expires:
 24 * * *
 25

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1 C E R t i f i c a t e
 2 STATE OF UTAH)
 3 COUNTY OF SALT LAKE)
 4 THIS IS TO CERTIFY that the deposition of
 5 MATTHEW KELLOGG was taken before me, Teri L. Hansen,
 6 Registered Professional Reporter and Notary Public in and
 7 for the State of Utah.
 8 That the said witness was before examination
 9 duly sworn to testify the truth, the whole truth, and
 10 nothing but the truth in said cause.
 11 That the testimony of said witness was
 12 reported by me in Stenotype and thereafter transcribed
 13 into typewriting by computer by me, and that a full,
 14 true, and correct transcription of said testimony is set
 15 forth in the foregoing pages, numbered 3 through 56
 16 inclusive.
 17 I further certify that I am not of kin or
 18 otherwise associated with any of the parties to said
 19 cause of action, and that I am not interested in the even
 20 thereof.
 21 WITNESS MY HAND and official seal at Salt Lake
 22 City, Utah, this 17th day of December, 1994.
 23
 24 
 25 Teri L. Hansen, CSR/RPR/CM

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