PERKINS, et al v. MORTON, et al

8/13/2015

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS, FOURTH DIVISION

ROSEY PERKINS and RHONDA COPPAK, PLAINTIFFS Individually and as Co-Administratrixes and Personal Representatives of the Estate of Martha Bull, deceased

JUDGE JIM MOODY

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23 24 25 JUDGE JIM MOODY

NO. 23-CV-2014-862

MICHAEL MORTON, GILBERT BAKER, DEFENDANTS and JOHN DOES 1-5

DEPOSITION OF:

JUDGE JIM MOODY

(Taken August 13th, 2015, at 10:00 a.m.)

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ELECTRONICALLY FILED

Faulkner County Circuit Court - RkacmakarkoWhartan, Circuit Clerk

JUDGE JIM MOODY 2016-Jun-29 11:49.382015

23CV-14-862 Page 2 арре**G20D**04: 32 Pages

ON BEHALF OF THE PLAINTIFFS:

THOMAS G. BUCHANAN, ESQUIRE Law Office of Thomas G. Buchanan 215 West Second Street, Suite 115 Little Rock, Arkansas 72201 Phone: (501) 296-9820

R. BRANNON SLOAN, JR., ESQUIRE JUDSON C. KIDD, ESQUIRE Dodds, Kidd & Ryan 313 West Second Street Little Rock, Arkansas 72201 Phone: (501) 375-9901

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ON BEHALF OF THE GILBERT BAKER:

STACI DUMAS CARSON, ESQUIRE Watts, Donovan & Tilley, P.A. 200 River Market Avenue, Suite 200 Little Rock, Arkansas 72201 Phone: (501) 372-1406

ON BEHALF OF MICHAEL MORTON:

20 21 22 JOHN C. EVERETT, ESQUIRE Everett, Wales & Comstock 23 1944 East Joyce Boulevard Fayetteville, Arkansas 72703 24 Phone: (479)443-0292 John@everettfirm.com 25

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ALSO PRESENT 3 Rosey Perkins and Rhonda Coppak, Plaintiffs

10 11 12 13 14 15 16 17 18 19 20 21 22

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JUDGE JIM MOODY

CAPTION

ANSWERS AND ORAL DEPOSITION OF JUDGE JIM MOODY, a witness produced at the request of the plaintiffs, taken in the above-styled and numbered cause on the 13th day August, 2015, before Mike Mirelez, Registered Professional Reporter, Certified Court Reporter, Certified Realtime Reporter, at 10:00 a.m., at 200 West Capitol Avenue, Suite 2300, Little Rock, Arkansas, pursuant to the agreement hereinafter set forth.

> * * * * * * * * * S T I P U L A T I O N S

IT IS STIPULATED AND AGREED by and between the parties through their respective counsel that the oral deposition of JUDGE JIM MOODY may be taken for any and all purposes according to the Arkansas Rules of Civil Procedure.

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DEDUTING AT ALM MODITON AS AL

	PERKINS, et al v. MORTON, et al 3/1. SUDGE JIM MOODY 8/1.	3/201
	Pa	ge 7
1	A My life, Lisa.	
2	Q All right.	
3	A And her son, Brugh, spelled B-R-U-G-H.	
4	Q How old is Brugh?	
5	A He's 40.	
6	Q What do you do for a living?	
7	A I'm of counsel here with Wright, Lindsey &	
8	Jennings, which is just part-time employment. I'	m
9	actually retired from the federal bench.	
10	Q All right. What does of counsel mean in yo	ur
11	situation?	
12	A Well, of counsel means that I have a separa	te
13	financial arrangement with the firm. I'm not a	
14	partner, I don't participate in the firm revenues	in
15	any way, and I'm compensated essentially for the	1
16	work that I do on a percentage basis. And I'm un	der
17	no obligation to produce so many hours or so much	
18	money or anything else, I'm here really just as a	n n
19	accommodation because they were kind to me.	
20	Q Because they were kind to you?	
21	A Yes, uh-huh.	
22	Q Okay. When did you go on the federal bench	إ د
23	A September of 1995.	
24	Q And when did you go off?	ļ
25	A Well, I took senior status, but I continued	to

Page 6 WHEREUPON, 2 JUDGE JIM MOODY. 3 having been first duly sworn, was examined and testified as follows: EXAMINATION BY MR. BUCHANAN: 0 Good morning. Would you tell us your name, 8 please? 9 A My name is Jim Moody. 10 And, Mr. Moody, you and I haven't met before, 11 we just met a few minutes ago, I believe. Nice to 12 meet vou. 12 Uh-huh, thank you. Nice to meet you. 14 Where do you live at? 15 Where do I live in Little Rock? 16 Yes. 17 5414 Stonewall. 18 All right. Do you have some other places that 19 vou live? 20 Well, I have a summer home in Michigan, in 21 Ludington, Michigan. 22 All right. But in terms of Arkansas, do you 23 live anywhere else?

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No. That's -- that's my only residence.

Who all lives with you there at Stonewall?

PERKINS, et al v. MORTON, et al JUDGE JIM MOODY 8/13/2015 Page 8 work for a period of time. And I actually had to retire and resign my commission when my son was 2 appointed to the bench, and I don't remember the exact date, but I think it was like March of 2014. 5 When did you take senior status? I took senior status -- and, again, I don't remember the exact date, but it was about two years before I resigned. September of 1995, who would have appointed Q 10 you to the bench? 11 A Bill Clinton. 12 Okay. Did you have any experience as a judge 13 prior to being appointed in '95? 14 Well, I -- I had served a few times over in 15 Pulaski County just, you know, filling in for 16 somebody; but other than that, no. 17 Have you ever been appointed to be a special justice on the Arkansas Supreme Court? 19 20 0 Or the court of appeals? 21 No. 22 Have you sat special on the Eighth Circuit? 23 24 Okay. Do you recall how many times you've sat 25 special on the Eighth Circuit?

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Page 9

- Ð Were those for particular cases or just a particular day or two or?
- Well, when I first went on the bench, Richard Arnold was the chief judge in the Eighth Circuit, 6 and he made a practice of bringing all the new 7 district judges to sit on one or more panels just for the experience so you would know how they worked on the appellate level,

And I was on one panel in Minneapolis and one panel in St. Louis. And that's about a three-day stint, and you're assigned about 10 to 15 cases to decide. There are three judges on the panel, so each judge divides the number of cases by three. And that was my experience.

I also was on the Ninth Circuit toward the end of my career, kind of under the same arrangement. I had taken senior status by then, but I went out there and sat on a three-day session with two other judges.

- ٥ Where was that at?
- 22 San Francisco.
- 23 Okay. The two times that you've -- you sat in 24 on -- you sat on a panel for the Eighth Circuit --
 - A IIh-hub

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HIDGE ITM MOODY Page 11 1 No. I took a few months off. I have this 2 home in Michigan, so I went to Michigan for the summer months. And then when I came back around Labor Day of 2014, I came to this firm. 5 Okay. You said that -- well, I want to make sure I understand. I think you said that you were required to resign for your son to take the bench, 8 the federal bench? 9 That's correct, I did say that. 10 What was the reason for that? 11 A federal statute that, in effect, says that two members of the same family can't sit on the same 12 13 court. 14 0 Okay. Now, your son, he practiced here at Wright, Lindsey & Jennings; is that correct? 15 16 Yes, he did, uh-huh. 17 Okay. Do you recall when he started at Wright, Lindsey? 19 A It would have been sometime around 1980. 20 Let's see. He . . . probably around the latter part 21 of the 1980s. That's just an estimate. I don't 22 remember exactly. 23 Was he in any other law firm besides Wright, 24 Lindsey & Jennings? 25 Α No.

	· · · · · · · · · · · · · · · · · · ·
	Page 10
1	Q I think you said that was during the
2	beginning of your career?
3	A Yes. It was very early, sometime probably
4	between '95 and '97.
5	Q And then towards the end, this was after you
6	had taken senior status, so I guess within the last
7	three or four years or so?
В	A Uh-huh. Probably within the last five years
9	for sure.
10	Q Okay. Where all did you practice prior to
11	sitting on the bench beginning in '95? What firms?
12	A Oh, well, I was at Wright, Lindsey & Jennings
13	one floor below here most of that time.
14	Q Okay. When did you start with Wright, Lindsey
15	& Jennings?
16	A September of 1966.
17	Q And were you
18	A At that time we were in the tower building
19	over there. We moved here in 1970.
20	Q All right. And did you remain at Wright,
21	Lindsey until 1995?
22	A I did.
23	Q After you retired or resigned in March of
24	2014, did you immediately become of counsel with

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Wright, Lindsev & Jennings?

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JUDGE JIM MOODY
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                                                   Page 12
          Have you been in any other law firm besides
 2
    Wright, Lindsey & Jennings?
 3
          Well, not really. When I took the bar in
    1964, I had six weeks before I had to report for
 5
    active duty in the Army, and I worked for John Haley
    at the Rose Law Firm. I wasn't working for the law
    firm, I was working directly for John, filling in
    for him while he was sort of taking a leave. But
    otherwise, no, I was with the Wright firm the rest
10
    of the time.
11
          Okay. When you went active -- did you say you
12
    went active in 1964 in the military?
13
          I did, uh-huh.
14
          Okav. What branch of the military?
    Q
15
          Artillerv.
16
          What -- was it Marines, Army, Navy, Air Force?
17
18
          Army?
19
          Uh-huh.
   A
20
   Q
          And at that time, was the Vietnam War going
21
   on?
22
          Well, it was just -- yes. But it was just
23
    beginning to involve the increased influx of troops
    over there, so I never was sent to Vietnam. When
25
    they -- when they had the big buildup, I had less
```

11

25

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12 Wright, Lindsey & Jennings, has it always been 13 a defense law firm, meaning they represent

there when he was appointed to the federal bench.

14 defendants in civil lawsuits typically? 15

Well, that -- that may be a fair 16 characterization. I mean, it -- it is a 17 full-service law firm, I mean, in that we have a

1 A number of different departments. We have bankruptcy 19 lawyers, we have securities lawyers, transaction

20 lawyers, labor lawyers, everything that -- the law 21 firm got its beginning as part of the Rock Island 22

Railroad law department, and their main function was to defend the Rock Island in crossing cases and 23 other cases.

But it evolved. And -- and when I joined the

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So you were not -- were you an officer?

2

3

6 got out sometime in '66?

7 Uh-huh. Got out in September of '66 and came В straight to the Wright firm.

Your son -- and that's Jay Moody?

10

And he -- I think you said he started here 11

12 sometime -- "here," meaning the Wright, Lindsey &

13 Jennings Law Firm -- in the late 1980s?

Uh-huh. 14

15 How long was he here before he took the bench?

16 Well, he -- he went to the federal courthouse 17 first as a circuit judge and served two 6-year terms

18

19 You mean the state court?

20 Yes, uh-huh.

21 0 Okay.

22

1

2

4

5

8

9

10

19

Uh-huh. Circuit -- Pulaski Circuit Court,

23 Third Division.

24 0 Two 6-year terms, so that would put it roughly 25

2000. 20022

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Page 15 firm in 1966, it had a substantial practice in civil defense. A few plaintiffs cases, but largely cases against Mr. Kidd and his bunch.

Okav.

JUDGE JIM MOODY

MR. KIDD: Thank goodness.

6 BY MR. BUCHANAN: 7

In terms of -- of a plaintiff's practice, a plaintiff's personal injury practice. I mean, is it fair to say that typically folks in the Wright, Lindsey Law Firm, even though there are a number of departments, at least in the civil defense

11 department would be opposite of plaintiff? 12

13 I think that's a fair characterization. I'd

14 say we would occasionally have a plaintiff's case, 1.5 but it was not the usual. And most of our work was

16 defense work, either for insurance companies or for

17 self-insured companies. And -- and we did business litigation as well, so --18

Q Sure.

20 A -- it wasn't just insurance companies or 21 products cases.

22 The -- did your practice include nursing home 23 defense?

24 А Mine personally?

25 0 Yes. JUDGE JIM MOODY

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Page 14

Page 16 1 A Yes, to some extent. And for a period of time. I didn't do it exclusively. 2

3 Can you give us some of the names of the clients that you represented in nursing home defense 5 work?

I think the majority of them were for Beverly

Enterprises. And that came about through Travelers Insurance Company, who was insuring them while I was representing them. Most of the time we would be 10 chosen by the insurance company rather than the 11 nursing home.

12

And so if they changed carriers, we -- the business might go somewhere else. But for a period of time, I was doing a lot of work for Travelers

16 Insurance Company; and during that time, I had some

cases representing Beverly. 17

16 Do you recall how long it was that you represented Beverly Enterprises?

20 I really don't.

21 Do you recall how many cases you handled in 22 your defense of Beverly Enterprises?

23 Well, I can only give you an estimate, but I would say no fewer than five and no more than ten,

but that -- that is just an estimate. 25

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12

17 Okay. Who handled that case?

18 Primarily Sam Jones.

19 Do you know when that was?

20 I was still with the firm, so it would have

21 been before 1995. It was probably sometime around

22 1990, I would think.

23 Do you recall who Mr. Jones had that case

24 against in terms of the company that had the nursing

home that was the defendant?

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JUDGE JIM MOODY 8/13/2015 Page 19 son who worked here as a courier briefly. Okay. What about have you had any family members, at least by blood -- by marriage that have worked here? 6 Is Kristi Moody related to you? I know Kristi, but, no, she's not related. В ٥ Okay. Do you know if your son -- when I say 9 "your son, " Jay. 10 Uh-huh. 11 -- did any nursing home defense when he was 12 here at Wright, Lindsev? I don't remember that he did. He did casualty 13 14 defense work, but I don't remember any representa --15 could have, but I just don't remember it if he did. 16 It looks like you brought some information 17 here to the deposition. 18 А Uh-huh. 19 0 And I'm just curious what all you've got over 20 21 Okay. Well, you -- you sent a request attached to your deposition notice --23 Uh-huh. 0 24 -- and I tried to respond to that. So that --25 I've typed up a brief resumé. And then you asked

The nursing home was in Saline County and the 2 case was tried in Saline Circuit Court, but I don't 3 remember the name of the nursing home.

Okay. Can you recall any other examples of the firm representing plaintiffs in litigation against a nursing home or nursing home company other than the instance with Mr. Jones?

That's the only one that comes to mind.

Do you know anything about Wright, Lindsey's 10 practice with respect to whether they continued to

defend the firm, at least continued to defend 11

nursing home companies while you were on the bench? 1.3 No, I don't know.

14 Okay. Do you know anything about Jerry

Sallings' practice? Well, I know Jerry. He's -- he has an office 16

17 down the hall from mine, but -- and I know he does

18 some nursing home defense, but I -- I haven't been

19 involved in any of his cases, so I don't have any 20 intimate knowledge of them.

21 Have you had any other family members here at 22 Wright, Lindsey & Jennings?

23 Other than my son?

24 Yes.

25 No. Well, I take that back. I had another

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Page 20 for correspondence, which I included a couple of letters here and then one bill that I have sent that was back in February of 2015. That's what is attached to the deposition notice.

5 Okav.

JUDGE JIM MOODY

But I went ahead and included a few other things here. This is the file from which I got the correspondence, this is the file I have. And in that file, I also have some pleadings that

10 Mr. Everett sent me in this present lawsuit.

11 0 All right.

> A complaint and a couple of answers. And there were a couple of other pleadings in the case against Greenbrier Care Center, which I obtained on

15 my own.

12

13

14

In this same file, there are some cases that I 16 17 decided on the federal bench involving remittitur, 18 and I think Mr. Everett has already provided those 19

20 I think I -- he gave me some documents here 21 right before we started. I haven't had a chance to 22 go through them yet, but I will.

23 Well, I think this is the same thing.

24 All right.

25 A And then finally, I had a paralegal here --

```
Page 21
    or -- a law clerk, I should say, not a paralegal --
    do a memo which basically pulled up some of the
    Arkansas appellate decisions on remittitur cases.
         All right.
          And although that didn't seem to fit the
    request exactly, I wanted you to know I had looked
    at most of that stuff, so if you want me to ask
    about it, you --
10
          Now, this -- this binder is just pleadings,
11
    primarily posttrial pleadings in the Greenbrier
12
    case.
          All right.
13
          Which I think you have.
14
    A
15
    Q
          Okav.
16
          These are some notes, this is a legal pad with
17
    some of my handwriting on it that basically are my
18
    notes when I reviewed the pleadings, the trial
19
    transcript, and all of the trial exhibits.
20
          All right.
21
          And that -- I didn't see that that was
22
    specifically requested, but I brought it. And
23
    that --
24
    0
          Well. I appreciate that.
25
          And I have at least one extra copy.
```

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                                                    Page 23
 1
    Q
          That's your original.
 2
          Well, no. I -- you asked me to produce that,
 3
    so I did.
    0
 5
    А
          So that's yours, if you want to --
          All right. Well, I'll keep it and you can
    Q
 8
          Have this copy? All right.
 g
    ٥
          You can keep that.
10
              MR. BUCHANAN: We'll just attach all of
11
          this as Exhibit 1.
12
              (Exhibit 1 was marked for identification.)
          All right.
13
14
    BY MR. BUCHANAN:
15
          And of all this that -- this appears to be a
16
    lot, at least, of what you were talking about that
17
    John handed me before the deposition started.
18
          Is there . . .
19
              MR. EVERETT: Tom, to explain that, you
20
          had asked for communication --
              MR. BUCHANAN: Uh-huh.
21
22
              MR. EVERETT: -- and I discovered that
23
          Judge Moody sometimes deletes his E-mails or
24
          frequently deletes his E-mails -- I don't
          blame him. But I was -- managed to capture
25
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Page 22 THE WITNESS: Does anybody want a copy of 1 2 3 BY MR. BUCHANAN: 4 0 What was that of the -- your --5 That's the same thing I just handed you. Uh-huh. This is a cop -- these two are the same? I hope so. I did some of my own copying, so I can't guarantee that all the pages got in there, but 10 I did the best T could. MR. EVERETT: I know how that works 13 MR. KIDD: Not good at collating? 14 THE WITNESS: Not good at collating. 15 BY MR. BUCHANAN: 16 Looks the same, with the exception of there 17 was one document that was double-sided, and so we'll 18 attach the copies as Exhibit A; and whenever we take 19 a break or something, we'll copy the back of this 20 21 Okav. 22 Q -- to stick it in here, if that's okay with 23 vou? 24 I have no objection. Is that the -- oh, you may keep it.

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21

22

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24

25

have it.

Right.

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what I think is all the communication between
           us. I wouldn't bet my life on that either.
           But what he's produced and what I've produced
          would be, in many ways, duplicated.
 5
              MR. BUCHANAN: Okav.
    BY MR. BUCHANAN:
 6
 7
          I guess, what I'd like to do is kind of take a
    look at what you've got over there just to make sure
    that there's something that -- that -- like I know,
10
    obviously, your notes are probably not in here.
11
             MR. EVERETT: Yeah, they're not there.
12
    BY MR. BUCHANAN:
13
          I'd just kind of like to take a look at it to
    make sure that we have everything that is at
14
15
    least --
16
          Sure, you're welcome to. The -- as I sav.
17
    there are really -- let's see -- five components.
18
    This on the backer is the correspondence, which you
19
20
   O
          Right, Okay. So we could skip it, because I
```

info, meaning the documents with those black clips.

What else do we have? Like the -- the clipped

MR. BUCHANAN: John, do I have all that?

24

25 A

24

25

have.

Uh-huh.

2

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MR. EVERETT: I think you do, Tom, but you might want to look at it.

Well, one is a letter from John Everett dated January 21st, 2015, forwarding a copy of the complaint and the answer of defendants Morton and Baker.

> MR. EVERETT: I know you have the letter. You might not have the enclosures to it.

MR. BUCHANAN: Right,

MR. EVERETT: They're just pleadings.

MR. BUCHANAN: Right. Okay.

BY MR. BUCHANAN:

13 Okav.

> And I have two -- two pleadings, one an amended judgment and one order granting separate defendant Michael Morton's motion to dismiss and for summary judgment. These were obtained in that same case -- or -- I mean in the original case against Greenbrier. And I think my secretary obtained those.

> The next binder is the list -- or -- the opinions of the Eighth Circuit involving cases that I decided where remittitur might have been an issue while I was on the federal bench.

All right. And --

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1	Q And do you have another one that's over there?
2	A I do. I have one styled Mike Townsend against
3	Bayer Healthcare Pharmaceuticals.
4	Q Okay.
5	A It was tried in Pine Bluff, and it was
6	appealed to the Eighth Circuit.
7	Q All right. And so you have copies of those
8	opinions there with you?
9	A I do.
10	Q All right. So I'm trying to make a list of
11	stuff that we're going to need to copy. And you
12	said it's the Bayer case?
13	A Uh-huh, Bayer, uh-huh.
14	Q And then we have this memo that I think you
15	said there was a was it a law clerk?
16	A A law clerk, uh-huh, Kirby Miraglia, prepared
17	it.
18	Q Is this somebody who's still in school at
19	A She works she works here. She's actually
20	been employed as an associate when she completes law
21	school, but she works here while she's in school as
22	a as a law clerk.
23	Q So was she so she's still in school right
24	now?
25	A Yes. She has one more year of law school.

Page 26 I think that's duplicated by what Mr. Everett 2 gave you, but I can't be sure. 3 MR. EVERETT: I think that I gave you, Tom, three cases, and I believe Judge Moody has four, I think. One of the ones he has is not in the packet I gave you. BY MR. BUCHANAN: It looks like there are three cases that folks in Kirk Dougherty's office found and sent to 10 Mr. Everett, who, in turn, sent them to you. Do 11 you -- is that --12 A Probably true, yeah. 13 One looks like this Randy Bennett and Richard 14 Turney versus Riceland Foods, an order that you signed in 2012 that went up on appeal. One of them 16 is the Boerner versus Brown and Williamson Tobacco Company. It looks like there's an Eighth Circuit 17 18 opinion on it. 19 20 Looks like there's one called Hart and Dver 21 versus the City of Little Rock, an order that you 22 signed back in June of 2004 and looks like it went 23 up on appeal. So those are the three cases that I

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PERKINS, et al v. MORTON, et al JUDGE JIM MOODY Page 28 All right. And has the firm made her an 2 offer? Is that the --That's my understanding, yes, that it's to 4 become an associate here in the firm when she 5 completes law school. 6 Did she work here in the past? Well, she was here when I joined the firm, but 7 I don't know how long she's been here. Is she somebody who went to school later on in life, to law school? 10 11 A I don't know. 12 I guess what I'm getting at, how old is she? 13 I don't know. A 14 Would you reckon, estimate? Q 15 Α I would never attempt that. 16 O All right. Well, we won't tell her you said 17 18 I don't have to answer that. No, I'm not trying to be facetious with you. She actually 19 20 worked for Jay for a year or two over in Pulaski 21 County, and she was a case coordinator over there. 22 And so I think she's been out of school for a few 23 years before she went back to law school. But

Well, I knew I recognized the name

beyond that, I really don't know.

Page 29 somewhere --Yeah, yeah. 2 3 -- and now I've put it together. Yeah. She worked for Judge Jay Moody when he was at Pulaski County for a num -- several years at 5 least. Okay. So the next would be your memo. And then is this my copy or yours? 0 10 You may have a copy, yes. 11 Q 12 Or at least a copy --13 All right. 0 -- to copy. And then you wanted the Townsend 14 Α 15 stuff. 16 0 Right. And then your notes. 17 All right. This is the opinion of the Eighth 18 Circuit on Townsend. 19 0 All right. 20 And this is a copy of my order. А 21 Okav. 22 And there was a request for a remittitur in 23 that case that I denied, and then it went up on 24 appeal, and the circuit granted a remittitur. 25 Okay. And then in terms of that stuff over

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                                                   Page 31
          what's in your right hand --
              MR. BUCHANAN: Right.
 3
              MR. EVERETT: -- if you want it.
          Everything else I gave you, I think, are
          copies themselves.
              Aren't they, Judge?
              THE WITNESS: I think so, yeah.
 8
              MR. BUCHANAN: Okay.
              MR. EVERETT: The Townsend case, I'm not
10
          sure of, because I didn't send you that. You
11
          don't need to copy that stuff, you can have
12
              MR. BUCHANAN: Okay.
13
14
    BY MR. BUCHANAN:
15
         And for purposes of the record so we know
16
    exactly what you-all -- what you have looked at here
17
    for your deposition, I'm going to start marking some
18
    of these as exhibits to your deposition. And so I'm
19
    going to mark as Exhibit 2 the memorandum from Kirby
20
   Miraglia to you.
21
          We'll mark the correspondence between
   Mr. Everett and you transmitting the three cases.
   the Riceland Foods case, the Brown and Williamson
23
24
    case, and the Hart and Dyer versus City of Little
25
    Rock case as Exhibit 3.
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Page 30
    there, that information, we've got your notes --
 2
          Yeah, the notes, these --
 3
    0
          -- which we can copy?
          Yeah, you -- if you want to copy them, you
    may. And then this is the -- just the pleadings, if
    you want to look at them.
          From the original case?
          Yes. These are the posttrial motions, pretty
 8
 9
    much, just that I picked out for -- to bring home
10
    from Michigan. Most of the stuff that I reviewed
17
    was in Michigan, so I couldn't bring it home, it was
12
    too voluminous
13
          Uh-hub.
14
          And then the rest of the stuff you already
    have that I produced in response to the deposition
16
    notice.
          Okay.
17
18
              MR. EVERETT: I think everything the judge
19
          has given you need not be copied except those
20
          notes, Tom. I don't want you to keep the
21
          original of those. I want to copy them if you
22
23
              MR. BUCHANAN: Okay. That's fine. So,
24
          John, I can have this but not this: right?
              MR. EVERETT: You can have copies of
25
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          We'll mark as Exhibit 4 the order -- your
    order in the Bayer Healthcare case.
          Exhibit 5 will be the court of appeals case in
    Townsend versus Bayer.
          Exhibit 6 is going to be, basically, the
    invoice, the check, and the correspondence that
    you've had with looks like Jeff Hatfield and
              (Exhibit 2 was marked for identification.)
10
              (Exhibit 3 was marked for identification.)
11
              (Exhibit 4 was marked for identification.)
12
               (Exhibit 5 was marked for identification.)
13
               (Exhibit 6 was marked for identification.)
          Yeah, I never really corresponded with
14
15
    Mr. Hatfield. He did send me some of the material
16
    that I reviewed in Michigan, and I'm sure there was
17
    a cover letter there, but I've never really had any
    direct contact with him by mail or otherwise.
19
          All right. And Exhibit 7 will be another
    packet of, looks like, primarily E-mails between you
20
21
    and Mr. Everett. So --
22
              (Exhibit 7 was marked for identification.)
23
          I haven't looked at those lately, but I don't
```

copies of the materials that I looked at in Michigan

doubt what you say. Mr. Buchanan, I think the

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are over here in the corner that were -- that consist of trial transcript, pleadings, and trial exhibits. I haven't looked at them since they were brought over, but the reason they were brought here from Little Rock was that I couldn't get all of that material back from Michigan on the airplane. Okay. So did you actually look at a hard copy of the transcript?

- I did. uh-huh.
- 10 And on your notes -- and we'll copy them
- 11 during a break. But on your notes, there are -- I
- 12 notice there are various references to -- it would 13
- say like "T345, T346, T353." I assume those
- 14 correlate to the pages in the record?
- 15 Yes, they do.
- 16 0 Have you looked at any depositions in this
- 17

2

3

- 18 A Which is this case?
- 19 Meaning the civil case. I'm not talking about
- 20 the underlying case --
- 21

JUDGE JIM MOODY

- 22 -- I'm talking about the civil case against
- 23 Mr. Morton and Mr. Baker.
- 24 No, no, no, sir. I did review the two
- 25 depositions that were part of the trial transcript,

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and I don't remember any case. What's the nature of your practice right now? 3 Well, I'd say it's eclectic. I don't -- I don't intend to handle any cases. I mean, I'm sort of here to advise when -- when the lawyers are handling cases, sometimes they'll form teams and consult with each other, and I'm sometimes involved in that. I am available for mediations, and I've 8 done a few of those. And I'm also serving as a 10 receiver in a case where the principals to the thing couldn't agree on how to handle litigation, so I'm 12 stepping in in their -- their role doing that. 13 0 Is that the case that Mr. Cearley is involved 14 in?

- 15
- 16 Are you -- have you become a certified
 - mediator?

17

24

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- 18 A No. I'm taking private mediations, but I've 19 not taken the course or been certified to handle
- 20 domestic relations or anything like that, I wouldn't 21 do that anyway, but -- so I'm just handling those
- that do not require certification. 23
 - And I'm also enrolled with an arbitration -- a federal judge arbitration panel. I haven't been assigned any cases yet, but they do have my name and

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Page 34 Ms. Treat, I believe, and Ms. Henson, that were 2 probably read to the jury, but I have not reviewed 3 any depositions that were taken in the present case. Have we covered the universe of documents and information that you've looked at in forming your opinions in this case? I believe we have, yes. I mean, I can reiterate them for you, if you want me to. No. I'm just saying have we -- is there 10 anything else out there that you've looked at that 11 you believe is somehow significant in forming your 12 opinions in this case? 13 I don't think so. I think we've covered it all. I mean, I primarily focused on the trial transcript and the pleadings, the trial exhibits, 15 16 the memorandum that I showed you from the law clerk, 17 and I reviewed some of my prior decisions in federal 18 court, but that's pretty much it. 19 Looks like you've testified once before in a 20 legal malpractice case? 21 Uh-huh, that's correct, uh-huh. 22 Is there any other case where you've given expert testimony? 24 A Not that I remember. I didn't keep any 25 records, but I think I would have remembered that,

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Page 36 they've called a few times to see if I would be

Is that -- a federal judge arbitration panel, is that when a federal court would order a case to

5 arbitration? I don't -- I don't think so. It -- I mean. this is something that the parties -- most of the

judges that are on that panel in that association

- are retired, and I think they're doing it for 10 private people, I don't think they're taking
- 11 referrals from courts.
- 12
- Okav.

BUDGE 11M MOODY

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- 13 But as I say, I have not taken one yet, so I
- 14 don't really know all the particulars.

willing to take some cases.

- 15 But in terms of cases that you're actually
- 16 working on in some capacity, whether it's as a
- 17 receiver or as an expert witness, sounds like it's
- 18 this case, meaning the one we're talking, the
- 19 present case, and then the case where you're the
- 20 receiver; is that true?
- 21 And I'm scheduled for a mediation next week.
- 22 And as I say, I -- I consult on cases. They usually
- 23 charge for my time if I do, but I don't keep a
- 24 record of them, all of them.
- 25 When you consult on cases for the firm, is

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Page 37 that -- you said you charge for your time. Do you charge the firm for your time? No. I should say that the firm charges my

time to the client.

Okay.

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TUDGE 37M MOODY

If -- if they think it's of any benefit to the 7 client, they -- they will add that as an additional 8 charge

9 I know that Mr. Everett has provided me with a 10 letter that has your opinions. What are they?

What are my opinions?

Yes. In this -- in this case. 12 0

13 All right. Well, I think there are three in 14 number, and they're probably adequately set out in that letter. But, one, just by way of background, I 15 16 could give an opinion that there are federal rule --17 I mean civil procedural rules in state court that 18 tell a judge what he's to do in case of a motion for remittitur or to just review any verdict for 19 20 excessiveness.

21 Then based on my review of the trial 22 transcript and all of the other material that we've 23 discussed here today, it was my opinion as an 24 impartial judge that if I had been sitting in 25 judgment on this case -- or any judge, any impartial

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understands that this is not something that a judge just does on a whim, there is a process by rule where the court is obligated to look at verdicts and review them for excessiveness.

And that would, of course, be a motion to either set it aside or grant a new trial or for remittitur if -- if they meet the criteria of the rule. That -- that would be the first opinion.

0 Okav.

HIDGE ITM MOODY

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10 А Yeah.

And what rule is that in Arkansas?

Well, the statute is at Arkansas Code Annotated 16-64-124, is the remittitur statute. The section that precedes that, 123, I believe, is the

14 one that defines excessiveness or what an excessive 1.5

16 verdict would be

17 Okay. 16-64-124 gives the court inherent 18 authority to remit a verdict if it's -- the -- in

the trial judge's view, excessive? 19

excessive? That's your reading?

A That's -- that's the way I read the statute, yes, sir.

0 And 123 -- 16-64-123 defines what is

24 А Yes, sir.

25 0 Okay. So when you analyze this case, are you JUDGE JIM MOODY

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judge, that a remittitur would and should have been granted given the evidence in this case and the -and the limited amount of the damages.

And then the only final thing would be to explain the rule that a party who has -- or a party that has been told that there will be a remittitur in the case has the option of either accepting the remittitur or electing to retry the case and refuse the remittitur.

Those are essentially the three opinions that I was asked to consider and the opinions that I

0 Okay. I want to make sure that I understand. This very first opinion that there are several procedural rules that a trial judge should consider when evaluating a motion for remittitur and for excessiveness of the verdict.

What -- what I really mean is that the law

Well, maybe I better clarify that.

19 Okay.

JUDGE JIM MOODY

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21 provides a mechanism that tasks a sitting trial 22 judge to review a verdict for excessiveness and usually at the request of one of the parties. And ${\tt I}$ 23 24 mean, I don't think there's any dispute about that, the law is what it is. But just so the jury

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Page 40 using the definition for excessive set forth in 16-64-1232

2 Well, that -- that's part of it, yes. I mean, there are some cases, I think, that say that the court is to decide whether a verdict shocks its conscience. And, I mean, that's not set out in the rule itself or the statute. But, I mean, when you 8 read the rule in conjunction with the other case law, I mean, the case law seems to be pretty well settled, that it's the obligation of the trial court then to determine, first of all, whether a verdict is excessive and whether it's excessive because it shocks the conscience, I guess, is sort of like what Steven said about pornography. I mean, it is if you see it that way. You know, if the judge believes that the evidence does not support the verdict, then it's excessive, or if it's obtained as a product of passion and prejudice. I think that's set out in the rule. So that defines excessiveness, I believe.

So you -- well, does it shock the conscience of the court and is it influenced by or the product of passion and prejudice, and then you go to the 124, which is the -- the remedy for that, which would be a remittitur. And that sets out that the court can grant a remittitur, and then the parties

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have -- the party against whom the remittitur has been granted has the option then of taking the remitted amount or retrying the case.

And, I mean, that really is not an opinion that the jury necessarily needs to hear, they just need to know that there is a process in place for a court to react to what might be perceived to be an excessive verdict.

- Okay. What is the difference between the federal authority for remittitur and the state authority for remittitur?
- 11 Well, it's -- it's very similar, I'd say, at 12 13 least as far as the case law is concerned. And I 14 haven't tried to make a comparison for this case; 15 but, I mean, my understanding is that the process 16 that a judge would follow would be the same. I 17 think the federal authorities talk about shocking 18 the conscience of the court, that it's influenced by passion and prejudice, all of those are catchwords 19 20 that appear in both the federal decisions as well as 21 the state decision.
- 22 Let's take a federal case. Let's say you 23 enter an order of remittitur.
- 24 70. Okay.

JUDGE JIM MOODY

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0 My understanding is that, basically, what the

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before having to retry the case?

- I don't think so, no.
- 0 You have to retry the case, then appeal?
- A Yes. Otherwise you wouldn't know whether there was any prejudicial error by the rule.
- Does that work that way in the state system?
- As far as I know, ves. А
- So if the plaintiffs in this case would have -- would have opted for the new trial, they would have had to have another trial in front of the same trial judge and -- before the case went up on appeal?
- 13 That's my understanding, yes. Now, it might be a little different in the sense that the jury reached verdicts on punitive -- I mean, not on
- 16 punitive damages, the court directed a verdict on 17 that, but on the wrongful death claim. So I don't think you would retry the wrongful death claim.
- 19 You would retry the other -- the estate 20 claims; right?
- 21 That's my understanding, yeah. The surviving 22 claims, yes.
- 23 0 And so then after another new trial, you know, 24 or another trial --
- 25 А Uh-huh.

JUDGE 31M MOODY

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trial judge is doing is ordering a new trial. However, if the plaintiffs want to forgo a new trial, they can accept the -- the amount of the verdict as it's remitted by the trial court; is that a fair understanding?

Well, I think that's the effect of it, that the order itself may just say that the werdict was excessive and that you can take a remittitur or you can take a new trial. I don't know that the wording 10 necessarily would be ordering a new trial, but the effect is that the party has a choice. 11

The court would say what the remitted amount would be and -- and say this -- this verdict is excessive and should be remitted to X dollars -- or whatever. And then the party, by rule, has -- has the option of either taking that remitted amount or the alternative would be for a grant of a new trial.

18 So I guess you're right as far as the court is ordering a new trial, with the exception that if the 19 20 party accepts the remitted amount, that would --21 that would be the result.

- 22 Okay. And so let's say that the party rejects 23 the remittitur under the federal system --
- 24 Right.
- 25 -- and opts for a new trial, can they appeal 0

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0 -- in front of the same trial judge --2 Α

3 -- at that point, if the plaintiffs disagreed with the jury's verdict, they could appeal?

А Yes.

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JUDGE JIM MOODY

- Okay. Assuming, of course, that -- well, what happened -- I mean, can this just go on to infinity in front of a -- I guess what I'm getting at is can judges keep remitting the case and the party not get to the Eighth Circuit?
- Well, I guess it's theoretically possible, although I've never heard of that happening.
- Let's just say that the plaintiffs wanted to take up the issue of the judge's directed verdict on 15 punitive damages and they opted for a new trial; they retry the case; there's an appeal. Is it at 16 17 that point, after they've had two trials, that they can finally appeal the judge's decision on the
- 18 directed verdict in the original trial on punitive 19 20 damages?
- 21 Well, the reason that I said that you couldn't 22 appeal from the grant of a remittitur or a new trial is that there hasn't been a final decision on that. 23
- 24 If there has been a directed verdict or a verdict

25 that the court accepted on the wrongful death claim

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or the punitive damage claim, then I think you have a final judgment of those claims and it may be right for appeal on those.

I mean, I'm not -- I'm not sure I'm following your question. But the -- once the judge enters a judgment on the jury verdict against the plaintiffs on the wrongful death claim and the directed verdict on the punitive damage claim, I think that's appealable.

- But in order for the judgment to be final, it would have to dispose of all claims and all parties;
- Well, no. I mean, I think the -- I think the claims are discreet. I may be wrong. I haven't looked at this in a while, but I -- I don't think you would have to wait until you resolve the survivor claims as the result of the finding of a remittitur or new trial before your time would appeal on the wrongful death claim.

I may be wrong about that, but that's my impression. But that's a final judgment. And the -- the time for appeal starts to run, you -- you can have a -- maybe -- maybe in the nature of an interlocutory appeal, but it's an issue that would be appealable.

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JUDGE JIM MOODY Page 47 -- on what the -- you think the supreme court would have done? 3 Well, I guess if you want to separate it out. But, I mean, it's that a remittitur should have been 5 granted; and had it not been granted by an impartial judge, that the supreme court would, in all probability, have reversed it. And, I mean, I'm 8 treating that as one opinion. If you want to treat 9 them separately, that's fine. 10 MR. EVERETT: Tom, when you get to a good 11 place, you're going to have to let some of us 12 old fellows go to the bathroom. 13 MR. BUCHANAN: That's fine. I think now 14 15 MR. EVERETT: Thanks. 16 (A brief recess is taken.) 17 BY MR. BUCHANAN: 18 0 Do you have any opinions about whether or not 19 Judge Maggio was bribed? 20 I really don't have any information about 21 22 0 Okay. So is your opinion in this case related to damages? 23 24 Well, I think my opinion is related to what an 25 impartial judge would have done if that impartial

Page 46 So the -- in terms of this first opinion where 2 you talk about there are civil procedure rules and 3 statutes that a trial judge can use to review a 4 verdict for excessiveness, is there anything -that's an opinion that basically kind of speaks for itself to me. I mean, is there anything about that opinion that we haven't covered? В No. As I say, it's really only by background 9 so that the jury understands why a judge would 10 consider an excessive verdict in the first place. I 11 think the -- that the -- the more important opinion 12 probably is that an impartial judge had heard this 13 case. I mean, me, as an impartial judge, having reviewed the record, would find that motion for a 15 remittitur to have merit and would have granted it. 16 And that if I had not granted it, then I think the 17 probabilities are that the case would -- would have 18 been reversed on appeal. That is if the motion for remittitur had been denied and the defendant took 20 that up on appeal, I think it's more likely than not 21 that the supreme court or the court of appeal, 22 whoever heard the case, would have reversed it and order some type of remittitur. 24 Okay. So is that another opinion --25 Well, it's --

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JUDGE 1TM MOODY

Page 48 judge had been trying this case and was presented 2 with a motion for remittitur and new trial. And I guess my question is: How is that -given the nature of what the judge has pleaded 5 guilty to, how is that relevant to an issue in this Well, that's not my job to decide whether the opinions that I have are relevant or not. That --I'll defer to Judge Laser on that. I mean --10 11 -- I've known him since law school and I have 12 every confidence that he'll do the right thing on that. So I'm -- I don't have an opinion. I haven't 13 14 been asked an opinion as to whether it has any 15 bearing on the trial of this case because I have 16 this limited assignment, and I'm not that familiar 17 with the strategy of either side or how it would factor into that strategy. 18 Okay. How many -- I know you pulled your 19 20 cases. Do you intend to do any additional research? 21 And you have this memo from Ms. Miraglia. Do you 22 intend to do any additional research, rely on any 23 additional cases? 24 Not unless I'm asked to.

25 Ω Sure.

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I mean, as far as I'm concerned, I've completed the assignment that I was given to this point in time, so I don't presently have any intention of doing any more research.

- You think that your opinions are fully supported by the research that's already been done, at least to the present date?
- Well, when you say "research," a lot of the case law that I brought here today has to do with the procedures in place for a remittitur, and I think that law is well settled. And I don't think there's any dispute about that -- if that's an opinion, that that opinion is accurate and supported by the law.

The cases that deal with a remittitur are of very limited value in determining whether any particular case or any particular verdict is excessive, and I think that depends on a review of the evidence. They're all unique, and a judge has to make an independent judgment on that just based on looking at the evidence and making a determination in his opinion as to whether it was excessive or not.

So I don't think when you say the research supports that opinion, I don't think the research

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JUDGE JIM MOODY 8/13/2015 Page 51 law she could find that dealt with remittiturs in 2 nursing home cases or in cases in general and 3 particularly to tell me what the standard that a judge sitting in judgment of a motion of remittitur would -- would be guided by. 6 Sure. And in terms of the -- was there a 7 reason that you asked her -- or -- did you ask her 8 in particular, look for large nursing home verdicts? 9 I don't recall that I did, although I told her, you know, some of the background about what I'd been asked to consider here. So nursing homes was 11 12 the -- was the topic of interest, and if -- if there 13 were nursing home cases on point, then that would be 14 helpful. But I was mainly interested in just seeing 15 what -- what law was out there on -- on remittiturs. 16 Did you believe there were nursing home cases 0 17 that were on point? 18 Yes. I mean, I had some familiarity with A 19 supreme court decisions on nursing home cases where 20 a remittitur had been granted, specifically that 21 Sauer case, I believe it is, Advocat, Sauer. I just remember that case. Why? I don't know. But I 22 23 remember that case when it went to the supreme 24 court. 25 Q And you're talking about Advocat, Inc., versus

Page 50 1 was all that helpful. There are some cases which 2 set out parameters. There are cases that have decided remittitur issues, and they're of some 3 benefit. But I don't think, unlike the cases that set out the procedure for granting a remittitur, that they're that important. Okay. And so I hope -- I'm going to try to ₿ make sure I understand what you just said. 9 10 The case law that you brought primarily deals 11 with procedure and not with whether or not, in your 12 view, the Bull case should have been remitted, 13 because that depends more on the evidence that was 14 presented at that trial? 15 I think that's right. 16 Okay. Did you make the assignment to 17 Ms. Miraglia to do this memo? 18 I did. 19 And what specifically -- I mean. I know she --20 she's got some -- in her memo, she -- which is 21 Exhibit 2, she's got a section on large nursing home 22 23 Uh-huh. 24 Did you ask her to pull that up? 0

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Yes. I ask her just to look to see what case

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JUDGE JIM MOODY

Page 52 Sauer? 1 2 3 Okay. I mean, I don't -- I don't remember the exact 4 5 style, but that's my memory of it. Well, what you remember is -- and I think what most people remember is -- a verdict for over \$78 million; correct? Well, I don't -- I don't remember the 9 10 particulars about it, but that sounds right, uh-huh. 11 I mean, it was a -- it was pretty big news in 12 Arkansas for a \$78 million verdict to come down, was 13 it not? 14 I agree, yes. 15 And the supreme court did remit it. Do you 16 know why they remitted it? 17 They remitted it because it was excessive. 18 Did they also say the reason that they remitted it by two-thirds in the opinion? 19 20 Well, they may have. I don't remember exactly 21 what they said at this point. 22 Do you recall a discussion of the Court saving 23 that the reason they're remitting it by two-thirds 24 is because there were three different defendants who 25 essentially acted as one company and the Court felt

JUDGE JIM MOODY

Page 53 like they were being punished times three for each 2 defendant? 3 I do remember something about that, yes. Okay. Is there a particular amount you would 5 have remitted this case to? 6 The Sauer case? ٥ The Bull case. Well, I think the remittitur to a million dollars was reasonable. 10 But what would you have remitted it to? 0 11 Well, a million dollars. A 12 That's what you would have done? 13 14 Why? 0 15 Well, because I think that's all that the 16 evidence would support in the -- in the way of a 17 18 0 Did it support a million dollars? 19 Well. I don't think that that was an 20 unreasonable amount. 21 Well, do you believe that the evidence 22 supported a million dollar verdict? 23 Yes. I do. А 24 O Do you believe that the evidence supported a million and a half dollar verdict?

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TUDGE ITM MOODY 8/13/2015 Page 55 1 million dollars. I frankly didn't give that as much consideration. And I probably have to go back and look at some of the information again just to be sure. I didn't focus on that, frankly. Although, I 5 don't have any dispute that that was a reasonable amount. 7 A million dollars? 8 Uh-huh. 9 Okay. My question is. As you sit here right 10 now, can you give us an opinion one way or the other as to whether a \$1,500,000 verdict for the 12 plaintiffs would have been reasonable? 13 Well, can I give you an opinion? Yes, I can 14 give you an opinion that I think a million dollars 15 is as much as this case could be supported by the 16 17 0 Okay. And anything above a million dollars 18 is, in your view, would shock your conscience? 19 Α Yes. 20 Okay. And anything above \$1 million, you 21 would believe to be influenced by passion and prejudice? 23 A 24 0 And so even a \$1.1 million verdict, in your 25 view, would have been excessive?

Page 54 1 Well, I don't know that I've given it that much thought. I did decide that it was reasonable 2 to remit it to a million dollars, but I didn't try 3 4 to evaluate precisely what the damages would be. 5 Well, my question to you is: Would the evidence have supported a million and a half dollar verdict? 8 I don't know. I don't have an opinion about A 9 that. 10 Do you have an opinion as to whether or not 11 the evidence would have supported a \$1,100,000 12 verdict? 13 Well, again, I haven't made that analysis, so 14 I don't have that opinion. 15 Well, you've looked at the -- you've looked at 16 the trial transcript; right? 17 Uh-huh, sure. 18 Is there anything that you can sit here right 19 now that you think you need to look at to answer 20 that question? 21 Well, I'd have to give it some thought 22 probably. I mean, my -- my principal analysis was was the verdict excessive, and my conclusion was 23 yes. So a remittitur should have been granted. 25 I was less concerned about the amount of the

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                                                    Page 56
          Yes.
 2
          Okay. Why is the million dollar cutoff?
    What's the significance of $1 million?
 3
          Well, you mean why -- why do I think that
    that's adequate? Because I think that in my
    judgment, in my experience -- and as I say, I have
    to make a subjective determination based on the
    trial transcript that I reviewed -- that anything in
    excess of that amount, anything more than a million
    dollars would be excessive and could not be
10
11
    justified by the evidence that the jury heard.
12
          And --
          It's sort of a cutoff point.
13
14
    0
          Okay.
15
    Α
          Yeah.
16
          And I want to make sure that I understand.
17
    And I'm not asking about adequate. You used the --
18
          Oh, I understand.
19
          -- phrase "adequate." And the standard is
20
    what would shock the trier of fact's conscience.
    and --
21
22
          Right.
23
          -- and so it's your testimony that a million
24
    dollars is the absolute cutoff and that anything
25
    above that would shock your conscience?
```

Page 57 Yes, that's correct. 1 Α 2 0 And is it your view that it would shock any reasonable trial judge's conscience? 3 A 5 And so, in your view, there is no reasonable 0 6 trial judge who could have looked at this transcript 7 and determined that -- let me back up because I'm about to ask a terrible question, which isn't unusual. but --That's all right. Go ahead. 10 A 11 In your view -- or -- help me with this. 12 Is it your opinion that any reasonable --13 there is no reasonable trial judge who could look at 14 this transcript and say that \$1.5 million is 15 reasonable? 16 No, I -- I'm not sure I can go that far. 17 Because I think reasonable minds can differ on any 18 opinion like this. I mean, this is not -- this is not science, this is not math where you just add up 19 20 figures and -- and get one result, this is a matter 21 of judgment. A reasonable judge might conclude that 22 a million one five or a million five would be the 23 cutoff point. 24 But I think that a -- a reasonable judge, a 25 reasonable, impartial judge -- and -- and I put

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JUDGE JIM MOODY 8/13/2015 Page 59 Right. And I think you phrased the question better than I did. And that is, you would agree that similarly qualified people to you could reach 3 4 different opinions on this issue? I don't -- I don't doubt that, no. 5 And you would agree that similarly qualified folks to you could reach an opinion that the motion 8 for remittitur should not have been granted? 9 Oh, yes. I don't -- I mean, there could be 10 people out there that disagree with my opinion. I 11 concede that, ves. 12 And you could see that some of those people --13 I mean, would you at least con -- make room for the 14 notion that it would not be unreasonable for someone 15 to have the opinion that the amount of the 16 remittitur was too much? 17 Well, they may have that opinion. Would I A 18 agree with it, no. I mean, I can see that somebody 19 qualified to make that judgment could come to a 20 different conclusion than I just did, but I 21 wouldn't -- I wouldn't just agree with it because somebody else made that statement. Well, sure, sure. I mean, that's reason that 23 24 we have dissents even at the United States Supreme 25 Court; true?

Page 58 myself in that role, trying to be reasonable and impartial here -- would conclude that anything more than a million dollars would be excessive and influenced or the product of passion and prejudice and would shock the conscience of the court. Now, I can't speak for every other reasonable judge, they may -- they may come to a different conclusion. Sure. And so if -- if we get an expert 10 witness --11 12 -- that has been a judge, are you going to 13 be -- if he comes to the opinion that -- he or she 14 comes to the opinion that, you know, let's say 2 million would not have been excessive, you're not going to say that that's an unreasonable opinion, 16 17 are vou? 18 Well, I haven't heard that opinion or who that 19 opinion came from, but -- so I can't just 20 automatically say no. But, I mean, I -- I recognize 21 that other people similarly qualified to me could reach a different conclusion. I'm not -- I'm not 22 23 saying that I'm the ultimate arbiter here. 24 25 I'm just saying this is my opinion.

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                                                    Page 60
 1
    A
          I guess, yeah. I don't know why we haven't,
    but we do.
 2
 3
    Q
          Well, because people disagree?
          Yeah, that's true.
    A
 5
    Q
          Do you know anything about the jurors in this
 6
    case?
 7
          I don't know any of the jurors.
    A
 8
          Have you thought about the fact that you could
    be wrong in your opinion?
10
          Well, yes, I have. I mean, I -- I'm
11
    frequently reminded that I can be wrong about a lot
    of things. As I said, I'm not a king. I mean,
12
13
    I'm -- I'm just giving you an opinion based on my
14
    experience.
15
          Do you have any opinion as to whether or
16
    not -- if the plaintiffs' allegations are true.
17
    whether or not the plaintiffs have suffered any
18
19
          I'm not sure I understand your question.
20
          Sure.
    Ó
21
    A
          You're talking about the plaintiffs in this
22
    case or --
23
24
          -- the plaintiffs in the case below?
25
    ٥
          Well, they're the same people.
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JUDGE 1TM MOODY

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Page 61
          The same. All right.
 2
    ٥
          Do you have an opinion as to --
 3
          The claims are different, that's what I mean.
          Sure. And -- and that's -- that's a good
 4
 5
    question. And that is, do you have an opinion as to
 6
    whether or not the plaintiffs, if their allegations
 7
    are true, have experienced any damages?
 8
          Are you talking about --
          In this case.
10
          "In this case" being the one against Morton
11
    and Baker?
12
          Right.
13
          If their allegations are true, have they been
14
    damaged --
15
    Q
          Ríght.
16
    A
          -- is that what you're saving?
17
          Right.
    0
18
          Well, be a little more specific about what
19
    allegations you mean and damaged in what way.
20
         Well, damaged in any way in the sense that --
21
    in the sense that -- I think -- let me step back.
22
          One of your opinions deals with the right to
23
    appeal; correct?
24
          Yes.
25
    Ω
          All right.
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Page 63 verdict. And to that extent, if an appellate court had reversed -- I mean, if there had been a new trial and an adverse verdict against the plaintiffs in that lower case, in Judge Maggio's case, then they could have appealed to the appellate court. And if -- if they had an adverse verdict in the lower court then and the court of appeals agreed that the remittitur should not have been granted, they could reinstate the original verdict. So to that extent, yes, there could have been

damages to the plaintiffs, if I'm understanding your question.

- And that's my -- that's my question, is that 0 could there have been damage to the plaintiffs if they accepted the remitted amount not knowing that there was bribery that was taking place.
- Well, that makes some assumptions. They ${\mathord{\hspace{1pt}\text{--}}}$ they could -- they could have refused the remitted amount for any reason and taken their chances on a new trial. And they may have gotten more, they may have gotten less, but then they would have had a right to an appeal, I suppose.
- And one of the assumptions that they're going to make is that the judge isn't going to be bribed; true?

Page 62 1 Well -- well, the fact that if there had been 2 an appeal -- is that what you mean when you say "right to appeal"? 4 Well -You asked me some questions about the right to appeal from the -- the verdict in favor of the defendants on wrongful death. I mean, I don't want to get confused about that.

0 Sure. Well, I guess my question is: I 10 thought you had an opinion about how when a trial judge makes a ruling on a motion for remittitur, 11 12 that the plaintiffs can either take the remitted 13 amount or take a new trial and at some point there 14 can be an appeal? 15 Well, yes. I mean, I do have -- I mean, I'm not sure it's an opinion, but that is a fact, that 17 if there's a grant of a remittitur but the party 18 elects to take a new trial. If they take the

19 remittitur, there won't be an appeal because that ends the case. If they take a new trial and they

lose, then they would have a right to appeal. 21 22 Right.

23 And the appeal would say, I suppose, if the

remittitur shouldn't have been granted, then the 24 appellate court could then restate the original

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Well, yeah, I'm assuming that they would -wouldn't believe that, no. I mean, I don't know 2 3 what influenced the plaintiffs to accept the remitted amount. I don't know whether they -- I don't -- I don't have any information about that. 6 But I do know they accepted it. Sure

But I don't know what influenced them to do so or -- or what different information would have persuaded them not to. I want to make it plain. 10 11 I'm not trying to justify what Judge Maggio did. If 12 he accepted a bribe, that's not good. I acknowledge 13 that. I'm not trying to defend Judge Maggio. 14 Sure. And you do know that he's pleaded 15 quilty to that charge? 16 Well, I know to the extent that I read it in 17

the newspaper. That's all I know.

18 Have you looked at his plea agreement?

19 No. sir.

25

20 Do you believe that there were -- that you 21 ever entered plea agreements with criminal 22 defendants who were not guilty?

23 MR. EVERETT: State your question over. 24 BY MR. BUCHANAN:

Well, do you believe that you typically

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Page 65 authorized or allowed plea agreements to be entered 2 in cases where you think that the defendant isn't 3 quilty? 4 No, no. I -- as a matter of procedure, when 5 we accepted a plea of quilty from a defendant, we had to have his assurance that he committed every essential element of that offense, his admission, and I had to be satisfied that he was being sincere about it, yes. I mean, I -- there were times when I 10 would reject a plea when either the defendant 11 wouldn't admit to all of the elements, even though 12 he said, I'm guilty, he wouldn't admit to intent, 13 for example, or something like that, then I would 14 refuse the plea, yes, and obligated to do so. 15 And so the judge in Judge Maggio's case, Judge 16 Miller --17 24 Hb-bub. -- Judge Miller would have been obligated to 18 19 not accept the plea if he was not satisfied that the 20 defendant in this ca -- the defendant in that 21 criminal case, Judge Maggio, committed every element 22 of the offense that was charged? 23 I don't know that for a fact, but I'm -- I 24 think it's a reasonable assumption because I know Judge Miller knows his stuff. I mean, he's a very

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Page 67 In terms of the -- you mentioned a couple 1 depositions. 2 3 A IIh-hub And you said, Well, I think they probably would have been read to the jury. Which depositions 6 were you talking about? 7 Ms. Treat -- I may get these names wrong, but Ŕ I think it's Ms. Henson and Ms. Treat. They were referred to in the trial transcript, but the actual 10 deposition testimony was not included in the 11 material prepared by the court reporter, which is typical, but -- so I asked for the depositions, and 12 13 I read the depositions. But it appeared to me from the trial 15 transcript that they had been presented to the jury 16 in deposition form, so I treated it as just like any 17 other testimony. 18 Could you tell what part was admissible and 19 what part was actually played to the -- or read to the jury, in your words, and what part wasn't? Well, I recall there was an exercise there where there may have been some objections to some of 22 23 the deposition testimony, and the Court ruled on those. But, frankly, I just took what the jury 24

Page 66 1 capable judge. And that certainly is the procedure, 2 that he would not ordinarily accept a plea unless he was satisfied that he was in fact guilty of what he 3 was charged with. I don't have any question about that. I mean, I'm not questioning it, I'm just saying that I wasn't personally involved, and I am under oath, so I can't say that for certain. Is there a value to actually seeing the testimony in terms -- or seeing the witnesses and 10 their demeanor? 11 You mean is it preferable to have heard the 12 testimony as opposed to looking at the transcript? 1.3 Right. 14 Oh, I agree with that, yes. 15 Is there value in actually listening to the testimony and how the witness's voice inflects and 16 things of that nature? 17 18 I agree with that. 19 And you would agree that Judge Maggio had an 20 opportunity to see the witnesses and hear the 21 testimony as it came out of their mouths? 22 I don't have any reason to doubt that, no. 23 And you've not had an opportunity to do that; 24 correct? 25 That's correct, ves. Α

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JUDGE JIM MOODY Page 68 some of the evidence that was excluded was 2 admissible or not Well, I guess what I'm trying to get at is did the transcript somehow indicate that the jury heard 5 this part but not this part? б Well, I think you could have figured that out, I mean, by -- as I say, there was a dialogue, I think, between you or -- or -- and the other attorneys about certain objections to the deposition testimony, and the Court ruled on those. 10 11 As I say, I didn't analyze that as to whether 12 the judge made the correct decision or not. I did see what I thought was -- what was actually read to 13 the jury. 14 15 0 Okav. 16 And I just factored that in. Because all I 17 was interested in was what the jury heard and whether their -- what the evidence they heard 19 supported a verdict in the amount of \$5.2 million. Okay. Is it significant to you in your 20 21 opinions that the -- those witnesses, the videos of 22 their depositions and actually -- were actually 23 played to the jury instead of read by someone else? 24 Well, I think that's preferable to just 25 reading a cold transcript to them, ves.

heard. I mean, I wasn't concerned about whether

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21

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23

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JUDGE JIM MOODY

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1 0 Do you recall if both of those ladies talked 2 about the amount of suffering that Martha Bull --3 I do, yeah. 4 0 -- endured? 5 I do. And I was impressed with their testimony. And I found it to be credible, even in a Is it fair to say that Martha Bull went through a great deal of pain and suffering prior to 10 11 Well, you know, those are your terms. I mean, 12 I don't question that she had a significant amount 13 of pain. It's hard for me to delineate the pain 14 that she may have been experiencing before it became 15 intense in those last hours. Because I do think from the record that I saw, the medical records and 17 the other testimony, that when she entered the facility, she still had some abdominal pair and 18 19 maybe pain from other sources.

But I do acknowledge, based on what I saw, that it became more intense either during the evening hours of April the 6th or at least by breakfast on April the 7th, it was -- it was getting intense. I also know that she received pain medication that may not have been as strong as -- as

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JUDGE JIM MOODY 8/13/2015 Page 71 Well, there was a fax that came over, yes. 1 2 But it was the afternoon of April the 7th. 3 was it not? Right. Now, we can -- I think there was also 4 5 some debate, because I believe the theory of our 6 case was that the negligence didn't start then but 7 it started much earlier for the lack of assessment 8 9 Oh, oh, I don't agree -- I don't disagree with 10 that. Yeah, I -- I'm -- I'm -- I'm just saying that 11 at a minimum, there was negligence when the nurses 12 failed to respond to the fax. And -- and 13 conceivably, you're right about the assessment. I 14 mean, I know that there was a claim -- and a credible claim -- that if they had assessed her 15 16 earlier, that she might have been transferred 17 earlier. That's a little more speculative. But 18 there's no question -- I mean, the speculative is 19 about whether she would have been transferred or 20 that there would have been something that responded to that. But -- because I know that it was not that she was totally ignored, I mean, they were making 22 23 some assessments. But no question in my mind that the failure to respond to the fax amounted to 24 negligence on her part. And if she'd been

Page 70 some that could have been available, but she did 2 receive pain medication at intervals during that 3 time. But I don't -- I don't doubt that she was in pain. The severity of the pain is hard for me to evaluate based on just the transcript I read. Although, giving her the benefit of the doubt, that is resolving any doubts in her favor, I acknowledge that she was in intense pain, ves. 10 Do you acknowledge that she was in intense 11 pain at least prior to her death due to the 12 negligence of the facility? 13 Well, to some extent, yes. I mean, I think 14 that at a minimum, the failure of the nurses to respond to -- or to adequately communicate among 16 themselves and to convey the doctor's orders to take 17 her to the hospital would amount to negligence, in 18 my opinion. And that occurred sometime around 19 2:00 o'clock, I think, 2:00 to 4:00 o'clock sometime 20 on the 7th. Am I right about that? Well, I -- yes and no. Yes and no. Yes, 21 22 there was a --23 Or I should say --24 -- fax --25 -- am I wrong about that.

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transferred at that point, she might have had less 2 pain. I mean, I don't know that there was evidence in the record that said how much or -- or if that was necessarily the case, but I think you could

infer that from the evidence. And I'm not disputing your point about the assessment, I saw that in the

Can we agree that pain and suffering are types

of damage that can be difficult to quantify?

I agree with that. 10 A

11 Q And --

JUDGE 31M MOODY

12 There is no objective standard, is what I'm

13 saying.

14 0 Sure. There's no market price for pain and

15 suffering, is there?

16 Not that I know of, no. And I think it's 17

probably improper to try to quantify it in those

18

19 But in the end, the jury is asked to quantify,

20 to some extent, pain and suffering in terms of

21 dollars and cents: true?

22 That's exactly right, yes.

23 And they did that; right?

24 A They did.

25 0 And the amount was unanimous: correct?

21

22

23

25

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Page 73
          As far as I know, yes. They have to exercise
 1
2
    their judgment as reasonable people and make a
3
    decision. But as you say, we can all be wrong. And
4
    in my opinion, they were wrong.
          But you don't know anything about them:
5
 6
    correct?
7
          No, I don't know anything about them or what
    their discussions were in the jury room or what
    motivated them at all. I can only look at the -- at
    the record. I mean, I saw -- I saw the evidence
10
11
    that was presented to them, the jury instructions
12
    they had that guided them, and your arguments.
13
    0
          Did you see the defense argument?
14
   А
          I saw the defense aroument.
15
          In terms of the testimony that you -- or --
16
    the evidence of pain and suffering, have we talked
17
    about the -- primarily what you've looked at to
18
    determine whether or not the 5.2 was excessive in
19
    terms of the amount of the verdict for pain and
20
    suffering?
21
          Well, I looked at the testimony of all of the
22
    nurses that attended her and I looked at the records
23
    of the facility, I looked at some of her previous
24
    medical records that were offered by the defendants,
    so I -- if that's -- I think that's all that we've
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	Page 75]
1	A I didn't focus on that, I'll admit.	
2	Q Did you see the testimony of Sherry Morgan?	
3	A Was she the administrator?	Towns of
4	Q She would have been the director of nursing.	
5	A Director of nursing? Is she the one that	
6	talked about the staffing requirements or something?	
7	I don't remember. I mean, I'm sure I did if it was	
8	included in the trial. I read it, but I	
9	Q It was a she would have been she would	ľ
10	have testified by deposition on video; it was very	
11	lengthy; she was the very first witness. Does that	- may
12	ring a bell?	ŀ
13	A Can I see my notes there a minute? What was	
14	her name, Williams?	:
15	Q Sherry Morgan.	1
16	A Sherry Morgan. Well, I don't see any notes on	,
17	her, so I may not have. I don't know. I don't know	ļ
18	why. I read the transcript from beginning to end,	
19	but I don't was her was her deposition given?	
20	Is that right?	40.00
21	Q Yes.	ŀ
22	A Well, I didn't I didn't receive the	ŀ
23	depositions, so I may not have seen her deposition.	Ē
24	I saw the reference to the depositions of the two	l
25	nurses who, you know, were in attendance on April	

Page 74 talked about. I mean, I don't know if that answers 2 your question. 3 Were there particular nurses or CNAs or other 4 caregivers that you felt were significant in terms 5 of justifying at least a million dollars in a damage award for pain and suffering? Well, as I say, the people whose deposition I read were credible witnesses, but I tried to look at 9 the totality of all of the evidence there. 10 Do you have an opinion on whether or not it 11 was appropriate to direct the claim for punitive 12 damages? 13 Well, that was not an opinion I was asked to 14 give, but I considered that, yes. I didn't -- I 15 didn't see any evidence from which I could conclude 16 there was a punitive damage claim. 17 What would you have needed to see? 18 Well, whatever, you know, met the standard of 19 the law there. I mean, there had to be more than 20 just ordinary negligence. And I found -- I agreed

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with the -- the ordinary negligence there, but I

any kind of gross conduct that would rise to the

level of a claim for punitive damages.

Did you read the deposi ---

didn't see any -- any kind of malicious conduct or

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                                                   Page 76
    the 7th, and that was what I was focusing on at
    the time, not punitive damage claim. So if this
    other lady was testifying about the need for
    punitive damages, I may not have read her
    deposition.
 5
          Well, she didn't testify about the need for
    punitive damages, but --
          Or -- I mean the basis for punitive damages, I
    should say.
          Sure. Is it fair that before you give an
10
11
    opinion in a case like this that you have all the
12
    pertinent information?
13
          Well, yes, I agree that the more information
14
    you have, the more likely your opinion would be well
15
    substantiated. As I said, I was not asked to render
16
    an opinion about whether the Court was correct in
17
    granting a motion for directed -- I mean a directed
    verdict motion for punitive damages. So my focus
    was mainly on what evidence was there to support the
19
   award of $5.2 million under the negligence claims.
20
21
          I mean, the Court -- the Court took away from
22
   the jury any consideration of punitive damages.
23
    Whether that was right or wrong is just a different
24
    matter, in my opinion. The jury could not have made
25
    an award for punitive damages the way the case was
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presented to them.

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Right. Well, at least once the judge directed that claim out, that claim for punitive damages?

Yes, that's what I mean, yes, yeah. Once the claim was taken away from the jury, the jury was not legally entitled to factor in any conduct that would be punitive or award any damages by way of punishment against the defendant. They could only compensate for pain and suffering and mental anguish.

Do you have any opinions on whether or not the facility or whether or not -- let me say it this

Do you have an opinion one way or the other on whether or not the wrongful death claim was decided appropriately by the jury?

Only to the extent that there was evidence both ways. I mean, I think the evidence was support either verdict by the jury, and so I don't -- I don't question the jury's verdict on that. I mean -- I mean, it appeared to me from reviewing the transcript, that the vast majority of the trial was about the wrongful death claim.

24 So you don't question the jury's verdict, you think it could have gone one way or the other with

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1 verdict in excess of a million dollars, and I 2 concluded it would not. 3

Do you know of any witnesses, any other transcripts or testimony that you might not have reviewed? For example -- and I know that's hard to say, but did you see any reference to folks and then not find a deposition? Meaning -- I'm trying to figure out the best way I can --

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JUDGE JIM MOODY

-- what else might be out there that have you 10 haven't looked at. 11

Yeah. No, that's a fair question. No. I A mean, I noticed that the depositions of these two nurses was not included in the tr -- and I don't think that was intentional. I mean, since it wasn't part of the court reporter's transcript, I mean, I was just sent what the court reporter typed up first. And it omitted all the depositions, I think.

So when I got to that part of the testimony, I saw that these were nurses that were in attendance during the critical time where she was in pain, and so they were important to me. And I ask for them, and I was immediately provided with them and read them.

Now, I'm not even sure that I picked up on the

BIDGE ITM MOODY

respect to wrongful death?

2 Well, I'm saying that -- that just from --3 and, again, I wasn't asked to review that, but I did review the whole transcript, except for maybe that deposition that I wasn't sent. But I thought there was sufficient evidence to support a verdict for wrongful death or -- or the other way. I mean, there was sufficient evidence. That's all I'm saying. I wasn't asked to say did I agree with the

10 jury's verdict one way or another, because 11 that's . . .

12 And I quess the follow up to that would be 13 you're of the opinion that there was not sufficient evidence for the jury to award anything over or in 15 excess of \$1 million for the pain and suffering

16 claim? 17 Well, did you say any evidence?

18 Right. Well, was there any evidence to 19 support an award of pain and suffering in excess of \$1 million? 20

21 Well, I think what you have to do is to 22 evaluate the quality of the evidence, not just a

scintilla or any evidence, that type of thing. I 24 mean, you have to decide from the totality there

would -- would the evidence that you saw justify a 25

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JUDGE ITM MOODY

fact that the first witness deposition wasn't 2 included, but I'm not sure based on what you've told me that it would have changed my opinion in any way because I didn't think that that was directly involved with what I was being asked about. But, I mean, I don't think I answered your question. I'm not aware of anything that I have

asked for that I haven't been provided or that's out there that I haven't reviewed.

10 Q I want to look at the order that Judge Maggio 11 wrote.

12 All right. A

13 0 Is there any -- I mean, do you agree with the 14 way he worded this order?

15 Well, let me find it.

16 Sure. I've got a copy.

17 You got a copy of it? Yeah. I mean, I think it's in the material that I have here, but I don't 18

know that it is. 19

20 MR. EVERETT: Tom, it's about 10 after

12:00. What's your view of how much time this will take? And, I mean, I hate to wear folks out without taking a break, if anybody needs lunch.

MR. BUCHANAN: You know, I can't imagine

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that this will last more than another hour.
1
2
          Now, if we want to go ahead and take a break,
3
          that's fine. I think we're doing fine.
              MR. EVERETT: I don't care. It's kind of
5
          up to Judge Moody, I mean, and anybody else
          sitting in here.
              MR. BUCHANAN: That's fine. Whatever
          you-all want to do. Because I think we're
          ahead of schedule, frankly, and we don't have
10
          a witness, another witness until 2:30.
              MR. EVERETT: Yeah, I was hoping we might
11
12
          move the one up at 3:30 to sometime before.
13
          Is that possible?
14
              MR. BUCHANAN: Maybe.
15
              MR. EVERETT: I'm told her office is only
16
          a block or two from here.
              MR. BUCHANAN: Move it to what? Move it
17
          earlier?
18
19
              MR. EVERETT: Well, it depends on the time
20
          you'll be through here. How are you doing,
21
          Judge? I mean, are you ---
22
              THE WITNESS: Well, I'm fine. Let me
23
          answer the pending question. But if you want
24
          to take a recess, anybody, I'm comfortable
          either way. I mean, I don't want to --
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Page 83 that the -- whether it's excessive is whether it's 1 2 so great as to shock the conscience of the court or 3 demonstrate passion or prejudice on the part of the jury, I think that's a correct statement of the law. And he -- so he recognized that that was the 5 6 standard. 7 He found that there was no conduct that R warranted the granting of a new trial, that is he -you know, he -- the claims that you enflamed the 10 jury some way wouldn't justify the grant of a new trial at least, but he did think that that may have 11 12 been an influence on the jury so that they imposed 13 punitive damages or damages that were punitive in nature against the jury, and I -- I think that that 15 was the correct language to include in here. So I guess, in principle, I agree with what he said here. 16 17 0 Okay. I mean, he controlled the evidence and 18 the testimony; right? The judge did? 19 Well, he -- to the extent there were objections. I think the attorneys picked out the 21 evidence they wanted to present. Unless there was 22 an objection, I assume the judge didn't intervene. 23 Sure. But, I mean, in the end, if there's an 24 objection, the Court can disallow the evidence? 25 Sure, yeah. It's the judge's --A

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Page B2
              MR. EVERETT: I'm fine. I mean, I'm
 2
          not -- don't care.
 3
              MR. BUCHANAN: Well, then, if we don't
          need a break or anything -- are you-all okay
          over there? Okay. Staci?
              THE WITNESS: I may need to take a break
          to go back to the restroom, but I'm not sure I
          need anything to eat.
              MR. BUCHANAN: And at any point when you
10
           want to do that, just let me know.
11
              THE WITNESS: Okav. Sure. I appreciate
12
          it.
13
          Now, your question was do I find anything
14
    about Judge Maggio's order that I would disagree
15
    with? Or is that --
    BY MR. BUCHANAN:
16
17
          Right.
18
          Let me take a minute and read it again.
19
          (Views document.)
20
          I'm ready to answer your questions.
21
    0
          Okav.
22
              THE WITNESS: Can you read it back to me?
23
              (The requested question is read back.)
24
          Yes, I agree in principle with the way he
25
    ordered it. I think he correctly cited the standard
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JUDGE JIM MOODY
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                                                    Page 84
          And I quess what I'm --
 1
    Q
 2
           -- that's the judge's role in the case in
 3
    part.
 4
    Q
          Right.
 5
          Uh-huh.
 6
          And the sentence I'm focusing on is, "The
    Court also finds that the evidence, testimony, and
    argument by plaintiffs' counsel enflamed the jury's
    passion and prejudice resulting in award that is
10
    punitive in nature, despite the Court's previous
11
    rulings that punitive damages would not be allowed
12
    in this case.
13
    А
          Uh-huh.
14
    0
          That's the sentence I want to focus on.
15
          Okay.
16
          Now, can we at least agree that, to the extent
17
    there was an objection with regard to the evidence,
    that would have been something that Judge Maggio
18
19
    controlled?
20
          If there -- if one of the parties objected to
21
    the introduction of evidence, he would decide the
22
    objection?
23
    O
24
          Yeah. I agree with that.
25
    a
          And the same thing with regard to the
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concerned about any effect of a verdict on their

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testimony; correct?

- A Well, that's evidence, yes.
- Q And then argument, was there -- was there an objection -- I mean, I recall one objection in the -- which argument? Do you know what argument he's referring to?
- A Well, I know there was a specific objection to include a motion for a mistrial when you mentioned insurance. And -- but he didn't grant a new trial on that basis, so I'm assuming that that's not -- maybe not what he's talking about.

But I recall that there was an objection and a motion for mistrial, and he declined or denied the motion for a mistrial.

15 Q Right.

JUDGE JIM MOODY

- 16 A And you continued to argue the case. That was 17 one objection that I remember.
 - Q I continued to argue -- I moved on or I did not move on?
- 20 A Oh, you moved on, yeah. You didn't talk about
 21 insurance anymore. I just meant you continued to
 22 complete your argument to the jury.
- 23 Q Do you recall what I said about insurance?
 - A Well, in a general way, I think you said
 - that -- you told the jury that they shouldn't be

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or -- to the verdict and how they needed to

basically impose a substantial award, you know, in

this case?

- A Well, that's true. There was no -- the defendants did not raise a specific objection during your closing argument about those comments, but that wouldn't preclude the judge from deciding that those comments would invoke some kind of passion or prejudice on the part of the jury, because this verdict did appear to be punitive in nature. And --
- 11 Q Based on what?
- 12 A Based on what? The argument you made?
- 13 Q No, no, no. Why do you believe that the
- verdict was punitive in nature?

 15 A Because I think it's clea:
 - A Because I think it's clearly excessive, and I don't -- I think -- I don't think it can be
- 17 justified by the evidence of the pain, I think it
- 18 had to include some component of either
- 19 sentimentality or desire to inflate the verdict to 20 allow for things that the jury shouldn't have
- 21 considered under the instructions.
- 22 Q Do you believe that the jury did not consi -23 or -- do you believe there -- do you believe that
 24 the jury instructions were adequate to tell the jury
- 25 what their job was?

JUDGE JIM MOODY

2 insurance rates or something to that effect. Right. 4 I can't remember exact. 5 I mean, was that, in your view, some sort of misconduct that would warrant a remittitur? Well, no, I'm not saying that necessarily. I'm not being critical of you or the argument you made. In fact, I was impressed generally with the 9 10 way you handled the case. But I think there was 11 some tenor in your argument later about that, you 12 know, what the reaction of the defendant would be if 13 they didn't award substantial damages, that the --

that some kind of verdict needed to teil the
defendant to avoid this con -- I mean, all of those
things would have been more appropriate for a

punitive damage award then they were for this type

18 of ordinary negligence, and I -- I think that's what

19 the judge is talking about here. Because if he had

20 found that you committed misconduct in talking about 21 the insurance, then he might have been moved to

22 grant the motion for a mistrial or a new trial.

Q And with regard to the -- there was no objection that was made to any argument about --

about sending -- about the defendant's reaction

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Page 98 Well, again, I wasn't asked to review the jury instructions. I do recall one issue, and that 3 was -- there was a claim for violation of her rights, patient rights. Okay. There was no definition of what damages the jury could award under that cause of action. And your only argument was that -- that they should award damages for the pain and suffering and mental anguish because the violation of the rights was that they didn't give 10 her adequate care. But the jury -- the jury instructions were 11 12 deficient to some extent in that -- in that if

the jury should have been told what elements of damage they might consider under that claim, and they weren't.

Q And so do you -- so you believe that they were

there's a claim that her rights were violated, then

deficient in that regard?

A Maybe, yeah. I mean, you know, I was not

20 focusing on the jury instruction conference or even
21 the jury instructions, that was just one thing that
22 I noticed. I mean, there were basically AMI,

23 Arkansas Model Instructions, by and large. So
24 having participated in that kind of thing as a

25 lawyer and as a judge, I mean, I know the

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Page 89 limitations on there, you can't -- you can't be perfect. But you-all -- there were good lawyers on both sides here. But that was the only point that I saw. I wasn't -- I'm not generally critical of the instructions. Do you have any kind of any information that the jury disregarded the instructions? No specific information that they did, no. Do you at least assume that they read the instructions and followed them as they were given? You know, I can't make that assumption either A I mean, I've had juries that I felt did and had that didn't. So I -- you know, I -- I presented the instructions to a lot of juries, and some of them acted like they followed them and some of them obviously didn't. So I can't -- I can't make an

0 Okav.

assumption either wav.

JUDGE JIM MOODY

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Let me return this to you before I steal it. 19

20 We'll attach as Exhibit 8, by the way, to your Ω 21 deposition.

(Exhibit 8 was marked for identification.)

Is that the judge's order? А

24 Ω Yeah

> А Okay.

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JUDGE JIM MOODY 8/13/2015 Page 91 So my question is: Was I acting -- well, was I acting improperly, in your view? No. I said that I didn't think you did 3 4 anything unethical. Did I do anything improper? 5 6 Well, as I say, no, except to the extent that the things that you said might have influenced the 8 jury to inflate the verdict beyond what I thought was reasonable and consistent with the evidence. If 10 that's improper in your definition, then I quess the answer is yes. Otherwise no. 12 I mean, I wouldn't have turned you over to the 13 Ethics Committee or anything like that. I didn't 14 think your argument was all that offensive, I'm just 15 saying it may have had unintended consequences that 16 had to be corrected by the Court. 17 I think we're going to take a break right now. Q 18 I want to get copies of the notes --19 А Okay, sure. 20 -- and attach them as an exhibit. And I want to kind of go through some of my notes and visit 22 with these people who are smarted than I am to figure out. 23 24 (Exhibit 9 was marked for identification.) 25 All right. Let me find somebody that's better

Page 90 O I'm going to make sure that I understand. 2 Are you going to be critical of the arguments that I made when we get to the trial of this case? I'm not going to be critical of you at all. I do think that there's a potential that the arguments that you made about the effect on the defendant as opposed to awarding adequate compensation to the plaintiff could have influenced the jury to passion and prejudice. I mean, I think the judge in his 10 order referred to that specifically. And, I mean, I find that some of the arguments that you made could 11 12 have had that effect. I'm not being critical of you 13 for making them. I'm not saying that you were 14 unethical or out of bounds on doing them, but they 15 could have had that effect. 16 Do you have an opinion as to whether or not 17 the defendants should have objected to those arguments? 18 19 Whether a defendant's lawyer makes an 20 objection is largely a matter of strategy. 21 Sometimes an objection just calls attention to 22 what's just been said. So, I mean, could they have 23 made an objection in good faith? Yes. Why they didn't? I don't know. But I can't say that they were acting improperly in not making an objection.

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PERKINS, et al v. MORTON, et al JUDGE JIM MOODY

qualified than I am to make that copy. I already failed in my one attempt. You just want a copy of this; right?

2

3

5 Okay. Anything else?

I think we kind of -- I think everything else 6 we have, so I think that's it.

Do you have a copy of the Townsend stuff? That was the only thing that you were shorted, I 10 believe.

11 MR. KIDD: I think we made that an 12 exhibit.

13 BY MR. BUCHANAN

14 Q We ended up making it an exhibit, so we'll be

15 okay.

17

21

24

16 A Okay. All right. Because that was not in

John's materials.

18

19 But I gave you the Eighth Circuit opinion now.

20 Well, if you're satisfied, I am too.

0 Well, because here's your order, and that's

22 Exhibit 4.

23

And the Eighth Circuit is Exhibit 5.

25 A You have everything, then, that I do. Okay. Page 93

(A brief recess is taken.)

BY MR. BUCHANAN:

JUDGE JIM MOODY

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JUDGE JIM MOODY

- Okay. I think we've talked about -- a little bit about this particular issue, but I'm trying to -- what I want to try to do is to ask you about all of the evidence, argument -- or argument that you believe could have resulted in the jury being enflamed by passion or prejudice. And so we've talked about the closing argument.
- Uh-huh.
- 11 What else?
 - Well, in this -- that's the only thing that I can point to directly. Although, my sense from just experience is that juries sort of have a predisposed notion about nursing homes and the treatment and some of the bad publicity that they've had. So I think that in some instances, they don't need any argument or -- so I think it's more a lack of evidence to support this award than it was evidence that would compel them to reach this verdict.
 - But I do think that the only way you can explain this verdict is that they injected something in there other than a reasonable evaluation of the pain and suffering and mental anguish. I'm not diminishing the severity of it, but just to award

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juror attitude towards nursing homes and --Well, there was some evidence in there about lack of staffing, there was some other evidence. But, you know, when I focused on the hours at hand, there didn't seem to be any evidence of pure negligent. I mean, the nurses may not have done enough; they were negligent, in my opinion, for not getting her to the hospital; but they were attentive at least in giving her pain medication, all of which would normally mitigate damages.

And for the jury then to turn around -- J mean, if she'd been left there soaked in urine or whatever for long hours and nobody paying any attention to her or some kind of cruel conduct like that, I can understand the jury's attitude. But just from what I saw in the transcript, it appeared that the nurses cared for her -- I mean cared about her and tried to care for her. And that just to me was -- showed a lack of any evidence from which the jury -- jury could award these kind of damages. Okay. So there was no evidence of pure neglect, that's one of your opinions; right? Well, yeah. I mean, I'm not sure what you

Well --

mean by "pure neglect."

JUDGE JIM MOODY

Page 94 5.2 million for something that may have been 20 to 2 30 hours is excessive. 3 Now, there was a punitive damage claim, and 4 I'm sure there was evidence in there of bad conduct on the part of the nursing home that have riled the jury up. I don't know. You know, I wasn't on the jury, so I don't know, and I'm not criticizing the jury for doing what they did. I mean, I'm sure they were conscientious. 10 But a lot of these things -- a lot of these 11 verdicts that you see that are runaway verdicts or 12 excessive verdicts, a lot of them involve nursing 1.3 homes just because of the attitude people have 14 toward nursing homes when one of their own loved ones has either been mistreated or died or whatever it might be. And I don't mean any criticism of 16 17 anybody, it's just a fact of life. 1.8 And I appreciate your answer. I'm just 19 looking to make sure that I've asked you about all 20 of the evidence or argument --

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verdict influenced by passion and prejudice. And

we've talked about the closing argument. Is there

anything else? And I know you said -- you mentioned

-- that you believe could have resulted in a

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But there -- you know, there was -- there was 1 2 positive evidence, I thought, that the nursing staff were at least trying to address her concerns, that they were giving her medication, they were in her 5 room trying to help her. It may be ineffective, but at least they were making an effort. Did you read the deposition of Lorine McClain?

- The name's familiar. I know her name came up in the course of the thing. But as I sav. the only 10 two depositions that T --
- 11 Well -- I'm sorry. And I don't mean to cut 12 you off. I don't think her deposition was played to 13 the jury --
- 14 Α Yeah.

JUDGE JIM MOODY

- Ó -- and I don't think her testimony was --
- 16

15

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25

Uh-huh.

- 17 Well, no. If it was a discovery deposition 18 that wasn't part of the trial transcript, I didn't 19 see it, no.
- 20 What's your understanding of what happened 21 from 2:00 o'clock on?
- 22 From 2:00 o'clock when?
- 23 2:00 o'clock that afternoon of Martha Bull's
- 24 death until the end of her life.
- 25 A From 2:00 to 7:00 -- I mean, from 2:00 to

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10:20 on April the 7th; is that right?

Right. 0

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JUDGE JIM MOODY

All right. Well, I don't know how much detail I can give you. I do know that sometime around 2:00 p.m. they discovered that she had blood in her stool, and I think that may have been one of the reasons that they called the doctor.

Then shortly after that, the doctor sent back a fax to another part of the facility saving that she needed to be transferred to the emergency room for evaluation. That fax got sent to another fax on a different wing in the facility and wasn't picked up by the nurses. And that, to me, was clearly negligence for not responding to Dr. Bowman, I believe is who it was. And that was about 2:00 to 3:00 p.m., something if that time frame.

From that point forward, I think Mrs. Bull was continually complaining about pain and that -- and then I won't remember the name probably, but one of the nurses was in pretty close contact with her during the last hours of her life when she came on her shift. I think there was a -- like a 3:00 to 11:00 shift -- or something like that -- which would have encompassed these hours I quess you're talking

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JUDGE JIM MOODY 8/13/2015 Page 99 remember reading anything about disciplinary action being taken against the nurses that went to the 2 3 jury, the evidence that went to the jury. Have you been involved in verdicts, either as a lawyer or a judge, where more than \$1 million has been awarded in pain and suffering? 7 А As a lawver? 8 0 Or a judge. 9 By a jury you mean? 10 Yeah. 11 As opposed --Well -- sure. Well --12 0 13 -- as opposed to a settlement? I mean, you know, I had some cases where big -- you know, big 14 15 awards were made by settlement. You know, I can't 16 imagine that I haven't, but I can't recall one 17 offhand. I mean, as a judge, I'm trying to think. I don't know. You know, in federal court, you don't 18 19 get quite as many of these kinds of cases where 20 there's a lot of pain and suffering, some, but not -- I mean, they're more employment related or 21 other -- I can't answer your question. I'm sorry. 22 23 Okay. Because these -- these cases primar --24 they don't have a federal component to them, a 25 federal statute or anything like that; right?

SUDGE STM MOODY

But in that period of time, my sense was that 2 Ms. Bull was in quite a bit of pain, that she may have been receiving Ultram or some kind of medication that I'm not familiar with, but at least 4 something that was intended to address her complaints of pain. And that she was being assessed, but they weren't relieving her pain. And then they discovered that she was dead as of 10:21 p.m. 9 10 Are you aware that those nurses lost their license -- well, that the nurse on duty on the 11 3:00 to 11:00 shift lost her license? 12 13 No. I knew that she was no longer with the 14 nursing home. I mean, at the time of the trial, my 15 impression was that she had been terminated, but I 16 didn't know any of the other details. 17 Do you know who --It didn't appear in the trial transcript that 18 19 I reviewed that there was any disciplinary action 20 taken against her. 21 Okav. 22 I mean. I didn't know that. I don't know 23 whether the jury knew it or not. I mean, if I'm --24 if I'm wrong about that being in the trial transcript, I apologize. But I don't -- I don't

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                                                  Page 100
          Not unless there's diversity.
          Sure. Yeah, what about settlements that you
 3
    can think of? And I'm not after names, but --
          Well, I know there were cases where I paid
    more than a million dollars in settlement; but, you
    know, to break it down as to how much of that was
    attributable to pain and suffering, I just don't
          I mean, are we talking -- I know you can't
10
    give a specific number, but in terms of an estimate,
11
    can you at least estimate the number of times -- or
    the amount -- number of cases you've been involved
12
13
    in as a lawyer or as a judge, because I assume there
14
    are times when you will know about the amount, where
15
    pain and suffering exceeds $1 million?
16
          Oh, I'm sorry. I just can't help you here.
17
    I'd be guessing. I just don't have a very good
18
    memory of -- like that to answer that guestion.
19
          Okay. Is it unusual for a personal injury
20
    case to result in a settlement in excess of a
21
   million dollars?
22
          Is it unusual?
23
          Right.
24
          Well, I'd say that's not the run-of-the-mill
25
    settlement, but I'd say it's not unheard of or
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JUDGE JIM MOODY

1 unique in any way. I mean, everything is settling for more dollars in today's environment than it was 2 3 when I was a lawyer for sure. 4 0 When did you first meet John Everett? 5 Д When did I first meet John Everett? Uh-huh. Oh, probably 30 years ago, maybe longer than that. В 9 0 Was that while you were practicing as a 10 lawver? 11 Α 12 Have you -- do you have any kind of ٥ 13 relationship with him now other than just --14 Well, you mean professional or social? A 15 Yes, social, professional? 16 We don't socialize together except that we're 17 in some of the same legal organizations. And I've 18 had cases with John as a lawyer, and he was in my 19 court as a -- as a lawyer, but we don't -- don't 20 have any present connections at all that I know of. 21 I mean, I consider him a friend, but that's about 22 the extent of it. 23 In terms of in some of the same legal 24 organizations, what would those be? Well, two that I can think of, the American

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JUDGE JIM MOODY 6/13/2015 Page 103 1 conceivably, they could have retried the case and gotten more than \$5 million. And if Judge Maggio 2 didn't set it aside for some reason, they wouldn't 3 have been damaged, there wouldn't have been anything to appeal. But if they got less, then I think they 5 could show that they were adversely effected by the 6 7 ruling and they might get the verdict reinstated. 8 The last thing that I want to ask you about is I've been supplied with -- or -- ask John about. 10 MR. BUCHANAN: We've gotten a lot of stuff over here. I'd like to get -- to go through 11 12 it. If at some point, would you agree to do a 13 fairly minimal follow-up on these cases? 14 MR. EVERETT: Sure, sure. One of the 15 problems with that is that Judge Moody is in 16 Arkansas only for a very short period of time. 17 MR. BUCHANAN: Okay. 18 MR. EVERETT: And he probably would not 19 want to come back from Michigan to give a 20 30-minute deposition, but surely we can 21 arrange it on the phone. I have no objection 22 to supplementing this, if that's what you want 23 24 MR. BUCHANAN: And it might be that I don't need to. I'd just like to --

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    College and ABOTA. Mr. Kidd's in those same
2
    organizations. He won't socialize with me either.
 3
          Do you know Mr. Morton?
          No, never met him.
          Do you know Gilbert Baker?
          No.
    0
          I assume you're charging 350 an hour? That's
    the hourly rate?
          Yes, that's the firm rate for me --
10
    0
          Okav.
11
          -- for these kinds of things.
    Α
12
          And we couldn't decide whether or not -- how
13
    this question was answered, so I'm going to try to
    get at it a different way.
15
          Sure.
16
          Do you have an opinion on whether the
17
    plaintiffs in the Bull case could just have appealed
18
    from that Judge Maggio's order of remittitur or
19
    would they have had to have faced a new trial and
20
    then appealed from that?
21
          I think the latter.
22
          Okav.
          I think they would have had to retry the case.
24
    If they elected not to take the remittitur, they
25
    would have had to retry the case. I mean,
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                                                   Page 104
 1
              MR. EVERETT: I understand. I'll
 2
          cooperate with you. And keep in mind that
          he's not here all the time.
 3
              MR. KIDD: I'll be glad to go to Michigan
 4
          if he'll put me up.
              THE WITNESS: Yeah, we'll put you up. No,
          I'll have to leave here a week from Friday to
          get my wife back home, and then I'll be back
          here sometime after Labor Day permanent, so.
10
              MR. EVERETT: Now, Tom, in connection with
11
          his billing too, it's -- I would -- I have
          asked him to send me a bill for his entire
12
13
          time, including this time, but I'll let you
14
          know how much of that is your fair share, and
15
          I trust you'll sketch me a check. Fair?
16
              MR. BUCHANAN: I will.
17
              MR. EVERETT: Thanks. All right.
18
              MR. BUCHANAN: Okav.
19
    (Whereupon, the taking of the deponent's testimony
20
    was concluded at 1:05 p.m. and does not waive
21
    reading and signing.)
22
23
24
25
```

JUDGE JIM MOODY 8/13/2015 Page 105 CERTIFICATE 2 3 STATE OF ARKANSAS)) 55 COUNTY OF PULASKI) I, Mike Mirelez, Certified Court Reporter, 7 Registered Professional Reporter, Certified Realtime Reporter, and Notary Public, do hereby certify that the facts stated by me in the caption on the 10 foregoing proceedings are true, and that the 11 foregoing proceedings were reported verbatim through 12 the use of the stenographic method and thereafter transcribed by me or under my direct supervision to 13 the best of my ability, taken at the time and place 14 set out on the caption hereto. 15 16 I further certify that in 17 accordance with Rule 30(e) of the Rules of Civil 18 Procedure, review of the transcript was requested. 19 I further certify that I am not a relative 20 or employee of any attorney or employed by the 21 parties hereto, nor financially interested in the 22 outcome of this action, and that I have no contract 23 with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect impartiality, that

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1	SIGNATURE OF DEPONENT CERTIFICATE
2	I, JUDGE JIM MOODY, do hereby certify that
3	I have read the foregoing deposition and that, to
4	the best of my knowledge and belief, said deposition
5	is true and accurate with the exception of the
6	following corrections listed below:
7	PAGE LINE CORRECTION
8	
9	
10	
11	
12	
13	
14	
15	
16	Date:
17	Signature of Witness:
18	STATE OF
) 55
19	COUNTY OF)
20	SUBSCRIBED AND SWORN TO before me this
21	day of, 2015.
22	My commission expires:
23	
24	NOTARY PUBLIC
25	

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Page 106 requires me to relinguish control of an original 2 deposition transcript or copies of the transcript 3 before it is certified and delivered to the custodial attorney, or that requires me to provide any service not made available to all parties to the 5 WITNESS MY HAND AND SEAL this 19th day of August 2015. 9 10 11 MIKE MIRELEZ 12 Certified Court Reporter 13 Registered Professional Reporter Certified Realtime Reporter 14 15 16 17 18 19 20 21 22 23 24 25

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