

(Back on the record at 11:37 a.m.)

Back on the record in the matter of the People of the State of Michigan versus Eden Wells, Case No. 17-1356.

Mr. Lax.

MR. LAX: Thank you, Your Honor.

As the Court indicated, what we'd like to do at this point is argue the motion regarding which you've received briefs from both parties. This is the defendant's motion requesting that the Court admit the complete audio and transcription of a telephone conference that occurred on October 21<sup>st</sup> of 2016.

The Court may have had some opportunity preliminarily to look at it, and you know that it involves a telephone conference including several representatives of the FACHEP group as well as several staff members of the Department of Health and Human Services.

And in brief, the defense believes it is appropriate and indeed necessary under the Rule of Evidence 106 that this statement be admitted to provide the appropriate context for statements made by Dr. Zervos during his testimony indicating that these conferences, telephone conference that occurred and that statements made by Dr. Wells regarding the source of funding for the FACHEP product -- project during this telephone conference and at

other times caused him to be threatened and intimidated.

And the defense believes that rule 106 is really as far as the Court has to go in determining whether it's appropriate to admit this statement. The rule says, and I'm sure the Court has looked at it, that when a writing, a recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time or any other -- of any other part or any other writing or recorded statement, and let me emphasize this, which ought in fairness to be considered contemporaneously with the statement that's already been admitted.

I think there was probably a preliminary question that concerned the Court as to whether the actual document had to be admitted, and I think the case that we cited on page seven of our brief, which is People versus Badour, B-a-d-o-u-r, deals with that issue indicating that the statement which the Court ultimately allowed to be admitted occurred after the defense counsel in that case examined a witness on a statement she had made in a preliminary examination without actually introducing the transcript or the testimony of her prior statement.

And so I don't really think it's a question of whether the actual document was offered into evidence, I think it's a question of what Dr. Zervos was questioned

about and testified about and whether in light of his testimony as to how he purportedly reacted to statements made by Dr. Wells that under rule 106, and again, ought in fairness, the remainder of the statement be introduced contemporaneously.

And so far as I understand the Prosecution's argument, and I don't mean to caricature it necessarily, them seem to be saying that if you allow in the entire telephone conversation somehow this is a devious way of Dr. Wells to introduce other statements she has made. But I think the whole point of rule 106 is fairness, and it demands that fairness be considered and there's nothing in that rule or any other place that requires that the Court treat evidence in a way that requires the Prosecution's narrative of the case to be maintained without anything said to the contrary.

It's pretty clear, we've been here for many months, that the Prosecution's narrative in part is that Dr. Wells has threatened and intimidated people and it has another many -- many, many other parts to stop looking at the connection between water and Legionella and so on and so forth, and the Prosecution is certainly allowed to have its own version of what the evidence may support.

But what rule 106 says is that if fairness

requires that the remainder of statements be introduced, they should be allowed to be introduced. Fairness is the preeminent concern not only of rule 106 but of much of the Rules of Evidence and, indeed, much of the justice system. Anyone can then argue what the implications are of considering a whole statement; but, nonetheless, in fairness the statement should be introduced.

Now another argument that the Prosecution makes is that all or much of the telephone conversation involves hearsay, and for that reason as a result of the hearsay rule the statement should be excluded. And as we've indicated in the brief, the statement is being proposed not for the truth of the matters contained therein, but to establish the context in which Dr. Zervos' statements should be evaluated and to indicate as a result of that context the impact of the statements made by anyone and everyone during that telephone conversation on the listener.

The Court has the power and the obligation ultimately when and if this event ever ends to take into account the credibility of the witnesses, and the Court is certainly therefore in a position to reach its own conclusions as to what the impact of these various statements might have been on the listeners, and whether,

therefore, it is reasonable to conclude that a witness was intimidated of what have you.

So we are simply urging that the Court proceed under the dictates of rule 106, and its attention to fairness and allow the remainder of the statement to be introduced. We've also indicated in our brief that the common law Rule of Completeness would apply in any event, but frankly I don't know that it's necessary to have that as a fallback position, because under the language of rule 106 and under the decided cases that we've cited, the rule goes far enough. But we don't think that the case cited by the Prosecution in its brief, which suggests that the Rule of Completeness has somehow been obliterated by the court rules, I think that's a suggestion that goes too far. Common law still exists, cases make that clear.

I'm simply suggesting that the issue before the Court, at least in our judgment, is not only quite clear based on rule 106, but based on the concept of fairness that rule 106 clearly embodies.

Thank you, Your Honor.

MR. STABLEIN: Thank you, Your Honor.

One of the things that occurs to me, Judge, is that in reviewing the transcript of Dr. Zervos' testimony, it was during that examination of that witness that the

defendants wanted to present -- the defendant wanted to present this recorded statement during that -- at that time. The Court denied it, and, therefore, I don't want to give up the argument, Judge, that under 2.119F that is simply a Motion for Reconsideration. We argued it at length at the time and the Court denied their motion to admit that.

The -- and a Motion for Reconsideration, Judge, if it simply presents the same -- if the motion simply presents the same issues that have been presented already and the same arguments that the Court -- unless the moving party can demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from the correction of the error, then the Motion for Reconsideration will not be granted, and that's what it says in 2.119F, the court rules.

Getting to the substance though, Judge, and that's what I addressed, I think, or we addressed in the response that was filed, Michigan Rule of Evidence 106 does not -- there are a couple of things wrong with trying to use that Rule of Evidence, Judge, and that is because Dr. Zervos testified and testified as to conversations that he had had with Dr. Wells that he interpreted as being

threatening.

Now the emails that were admitted, the writing was in full context, there was no -- nothing outside of that writing that was not presented because we put in the whole chain of emails between Dr. Zervos and Dr. Wells. And it's interesting and important to know, Judge, that what the rule of evidence says it to -- if there's a writing or recorded statement that the -- a party may request that the entirety of that writing or recorded statement is admitted into evidence in order to provide context to whatever it is that the offering party had used it for. We put in all of the emails, there's no other writing.

Now what the defense wants to do is bring in a transcription of a telephone conference between a number of individuals, Dr. Zervos and Dr. Wells but also Dr. McElmurry, Dr. Kilgore, other people, there's an unidentified voice that's also at the very beginning of that that occurs in October of 2016. The emails that we are talking about are March of 2017, so they're talking about something completely -- and completely separated by six months, a conversation that they want to use to put in Dr. Wells' statements from that day to say, you know, I was being straight, I was not trying to threaten them, I wasn't trying to hurt their funding.

Dr. Zervos has had other conversations with her and then obviously that culminates in his email which was the important part of the writing or recorded statement that we're talking about is that email in March of 2017. That's where the -- that's where Dr. Zervos then refers to the threat and things that he had felt.

And I think it is not what the rule of evidence is, therefore, Judge, is to try to bring up a conversation that may have been recorded many, many months earlier and the defendant wants to then put her defense on, she wants to show that these are the statements that she made, which are clearly hearsay.

And I've laid out, Judge, in my response, you know, obviously the reasoning that that is hearsay, as it fits the definition of hearsay because it's not offered by a party opponent, it's being offered by the defendant and it's her statement that she wants to get into evidence, that is the definition of hearsay.

They counter with that, Judge, and say, well, we're not offering it prove the truth of the matter asserted. If you aren't under the truth of the matter asserted saying that Dr. Wells says I want you guys to do an independent investigation, I'm not trying to threaten you, something, I'm paraphrasing, obviously, but you have

to take the truth of the statement in order for it to have any relevance.

So the fact is that it is -- they're trying to bootstrap that or backdoor hearsay in by calling it not hearsay when it clearly has to be because the meaning of the words, the truth of the matter that's being asserted by the defendant, has to be understood in order for it to have any relevance.

And so that is a spurious argument, Judge, to say that they're not offering it to prove the truth of the matter asserted, that's clearly what they have to do to have it -- to make it have any relevance.

The fact is, Judge, that rule against hearsay is an important rule for a reason. And I cited the Court to a federal case, which I found the verbiage there compelling, and that is the fact that putting this statement in and she doesn't take the stand, we get no opportunity to cross-examination those statements or to try to delve into the truth or falsity of that -- of those statements. And it -- the fact is that a statement that's made in October of 2016 has no relevance to statements that Dr. Wells and Dr. Zervos had between each other in writing in the spring of 2017, many months later after a number of conversations, meetings, and the fact that even in the writing, in the

email that Dr. Zervos puts -- that he sends to Dr. Wells is a statement of the ongoing attempts by her to pull their funding or to limit their investigation and, you know, for whatever motivation. We have our theory on that, Judge.

But the fact is that this is a statement or a recording that is separated by many months from the -- from the writing -- if they're referring to the emails as being the writing, because it can't be just his testimony, they can't bring in a writing to counter his testimony, they can only bring in the writing if it's to counter or explain or give context to a writing or recorded statement that has been admitted into evidence.

So I'm assuming, Judge, because they don't really reference it in their motion, I'm assuming they're talking about the writing being the emails, and all -- the full context of those emails were admitted. The defendant can't get on the -- cannot proffer testimony and not take the stand and deprive the People of cross-examination.

THE COURT: Well the defendant references a statement made during the October 21, 2016 phone conference that was personally interpreted as a threat.

MR. STABLEIN: Okay. Right. But that's not a writing. The writing talks about -- the writing we're talking about is the emails, right, and so those -- the

entire context of those emails were admitted into evidence.

THE COURT: But the request, as I understand it, is to admit the phone conference, the rest of the phone conference to explain that statement, if that's what I'm understanding, the alleged threat.

MR. LAX: I can speak from here if it's audible.

Your Honor, let me distinguish between the phone conference which took place in the fall of 2016 and the email correspondence which occurred later in the spring of 2017. It was -- in -- we do not have the -- we did not get the official version of the transcript, I gather it's been prepared and our copy hasn't arrived yet, but we're -- during the testimony of Dr. Zervos and when he testified on February 20<sup>th</sup> he talked about phone conferences that occurred in the fall of 2016 and he talked about intimidation. So we're talking about that event which is reflected in his testimony of about 2016 and filling out the context of those conversations about which he testified.

And the reason we had an argument at -- during that hearing was that the Prosecution was making the argument that we didn't try to introduce a document, we simply elicited his testimony of what happened. But the point under the Badour case is that's adequate to

constitute the kind of writing under Rule 106 that requires the Court, if fairness demands it, to consider the context of that statement.

So the events of the fall of 2016, while they relate to perhaps and arguably events that occurred in the spring of 2017, that really isn't the point we're making. The point we're making is that as a result of Dr. Zervos' testimony about what happened in the fall of 2016 we would like the Court to have the benefit of the context of those events in order, in the interest of fairness, to consider whether it is reasonable to conclude that he was intimidated.

So to clear up the point that Mr. Stablein is making, there are 2016 events where the entire conversation is relevant and required in the interest of fairness. There are other conversations in 2017, they relate in the sense that they all deal with the purported relationship between Dr. Wells and Dr. Zervos, but we want the Court to be able to consider the context of the 2016 phone conversation that Dr. Zervos testified to.

And we think it's important, by the way, and then I'll conclude, but you have both a transcript as well as an audio tape, and the audio tape has the actual voices of the people which, again in the interest of fairness, helps to

produce a more complete understanding of what went on during that event and what would have been a reasonable reaction to those conversations.

THE COURT: So that would require -- part of placing it in context would be statements of the defendant during that telephone conference, correct, that were not introduced by the Prosecution?

MR. LAX: Sure. Well, yeah. Well, yes, because Dr. Zervos, in response to Prosecution questions, talks about statements made by the defendant and others of the Department of Health and Human Services during those fall - - that fall telephone conference.

MR. STABLEIN: Judge, the problem that I have is that they -- they're seeking to admit the actual transcript, that's the hearsay problem. They can ask -- they had ample opportunity to cross-examine Dr. Zervos, well in October didn't she say this or didn't she say that or didn't she say anything else. Those are subjects for cross-examination.

They can't actually admit the transcript itself from that conversation because that is -- that violates the rule against hearsay; they have to lay the foundation, they have to be able to establish that that is an accurate recording, they have to put the defendant on to say that or

whoever -- whatever their witness, that's what I said in regard to my -- in my response, that they can't just simply admit it without laying the proper foundation. They can cross-examine the witness, but what we're talking about is, again, when you look at what the rule says, and the rule says when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at the time of any other part of any other recorded statement which ought in fairness be considered contemporaneous with it.

It doesn't automatically come in because a person says that -- well that's now the whole statement. I mean we had the whole statement, we're talking about the entirety of the context of the email exchange between the defendant and Dr. Zervos. And now they want to bring in a transcript from something that occurred six months earlier.

THE COURT: So your position is that it basically boils down to the admissibility of the statements? Say, for example, if the statement was between two -- several people and somebody says, yes, you know, I want to rob the bank, and there's a statement later in the conversation you know I was just kidding, I was playing a video talking about robbing a bank and I have no intention of ever robbing a bank, you're saying that still would not come in

because it'd be offered by the defendant?

MR. STABLEIN: That comes in because, Judge, no, that may come in because it's the complete statement, that complete recording that we're talking about, that complete writing or recording, that's where we start, it has to be a writing or a recording. So in that situation absolutely one hundred percent in comes in because of the fact that it's the complete statement.

This is not --

THE COURT: Okay. So what if somebody testified to that statement, we don't have the recording but somebody testified that hey, they said during this conversation they're going to rob a bank, then you're saying that the recording can't come in and say whoa, they clearly weren't serious when they said they wanted to rob a bank.

MR. STABLEIN: But wait, what you're saying, Judge, is it's not recorded, it's not a recorded -- we have to start with the premise that we have a writing or a recording.

THE COURT: But it comes in through the testimony of a witness who was part of the conversation.

MR. STABLEIN: So the witness testifies that the defendant said let's rob the bank.

THE COURT: Right. But there's a recording where

the defendant clearly denies later on in the conversation that they didn't rob -- they had no intention to rob a bank.

You're saying that can't come in?

MR. STABLEIN: It -- you'd have to lay the foundation, Judge. But, of course, they can cross-examine that witness and say, wait a minute, the defendant said I was just joking, right, remember that, no or yes. Okay. But then it doesn't come in, the actual transcript of the conversation doesn't come into evidence unless they lay the proper foundation, they could put that in there in their case in chief if you have the proper foundation.

In a situation like that I would say, Your Honor, that the statement of the defendant -- the four -- so how do you lay the foundation for that, that tape recording that you're talking about? You'd have to be able to present witnesses that would say, yes, this is, in fact, what we purport it to be. I guess the defendant wouldn't have to take the stand in a situation like that if you could lay the foundation properly.

But that situation, Judge, it's not offered to prove the truth of the matter asserted, they're using it to impeach that witness, if that's the theory. If I were the defense attorney in that case I would say I'm not offering

it to prove that the defendant didn't intend to rob the bank, I'm offering it to impeach -- I asked him did she say this and he says no, so I'm offering it now to impeach that witness. It's not offered for the -- they haven't raised that, they're not saying they're trying to impeach Dr. Zervos, if some other reason.

My point is they had the chance to cross-examine him, he didn't say anything that was contrary to what was in the statement, they haven't brought up any impeachment quality of this recording. And the -- again, the statement if it's offered to prove the matter asserted, which is what they have to be, you -- in order for these statements to have any relevance, the truth of it has to be relevant unless they're using it for some other purpose.

But the other purpose -- in your situation, the bank robbery --

THE COURT: Let's just say --

MR. STABLEIN: -- it doesn't matter --

THE COURT: Let's limit it to just they are offering it to prove the truth of the matter asserted.

MR. STABLEIN: They are?

THE COURT: Yes.

MR. STABLEIN: Then if that's the case then it doesn't come in one hundred percent because it's not -- it

doesn't fit under 106, it doesn't fit under 106 because the -- first of all, what writing did we put in about this October 2016 conversation? There was no writing or recorded statement that was offered by the Prosecution that they're trying to flesh out now or trying to provide the full context to not related to that -- you know, there was no writing or recorded statement that was contemporaneous with that conversation other than the one they have. We didn't admit any writing or recorded statement that had to do with October 2016.

So, you know, to provide the full context of it, which is the rule -- the reasoning behind 106, is saying that I can't take just one part of a writing or recorded statement, put it into evidence, leave out the context and try to mislead the jury or the trier of fact.

THE COURT: Anything further?

MR. STABLEIN: No, Your Honor.

THE COURT: Mr. Lax, anything further?

MR. LAX: No, Your Honor. Other than to say that I think Mr. Stablein has simply backpedaled a mile a minute from language and the purpose of Rule 106.

THE COURT: I've had this come up before and every time to me it just seems unfair, but the rules are the rules and I didn't make the rules. but when a statement,

admission is offered against a party in whatever fashion used against them and there's other statements that could be exculpatory or could explain the statement, but if it's offered by the defendant it's just not allowed by the Rules of Evidence, And I believe that the Rule of Completeness does not change that. I do believe that to enter -- to enter the statement, recording, anything into evidence it would have to satisfy some hearsay exception, and that doesn't appear to be the case here.

In addition, the rule does on its face say a recording or writing that's partially entered and the remainder of the recording or writing may be entered. And there was no recording or writing that was entered in this case. Indeed, there was testimony and opportunity to cross-examine.

And I think the reason for my ruling the first time I think was kind of based on that -- the fact that if somebody testifies to an event and then there's something else that covers the event, whether it's a conversation or a writing or something, based upon that testimony then every time somebody testifies then you can bring in other documents and other evidence or other recordings to explain their testimony, and then at that point we're having a trial within a trial of the witnesses and the statements. I

think cross-examination was -- there was an opportunity cross-examine at that time. And indeed, the case isn't over at this time, technically witnesses could be called to rebut or explain the statement.

But as far as introducing the recording, I'm not going to allow that, and my original ruling would stand.

MR. STABLEIN: Thank you, Your Honor.

MR. LAX: Thank you.

THE COURT: Thank you.

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A No, not at that meeting. Some of the other things that are referenced in this email had to do with other interactions or other meetings that we'd had, we'd had earlier. The subject of funding had come up in an earlier, earlier meeting.

Q How did it come up?

A It comes up -- it actually came up in a couple of different ways. There was discussions about restricting the epidemiologic part of our investigation because of concerns that the health department had with what we were looking at or not looking at. The -- and it came up in the form of -- I think most directly, which is what I'm referring to in the email, of a statement of do you know who's funding you, which I took as a -- I personally took as a threat.

Q As a threat. Who made the statement do you know who is funding you?

A Dr. Wells.

Q And you expressed your concern that you interpreted as a threat in your email, correct?

A Yes.

Q Okay. Were you aware of Dr. Wells, yes or no, whether or not she engaged in actions that would disparage your work as an attempt to suppress your findings?

MR. TRAMONTIN: Objection, Your Honor, that calls for speculation.

BY MR. STABLEIN:

Q Alright. What, if anything, did --

MR. STABLEIN: I'll withdraw the question.

BY MR. STABLEIN:

Q What, if anything, did Dr. Wells say to you in regard to disparaging your work?

A The -- at that meeting we asked, because we have a data use agreement with the state, so we asked if we could, we could talk with Dr. Pugh, we were told no, and then that ended the meeting. But later that day MDHHS came out with a disparaging press release, which is public record.

Q Okay. And you referenced that in the email to Dr. Wells, correct?

A Correct.

Q Do you need to review it to see?

A No, it's referenced in there.

Q Okay. Alright. And in regard to your email, did you get a response from Dr. Wells?

A Yes.

Q And that is -- is that contained in the exhibit that I presented you?

A Yes.

Q Okay. And then in regard to Dr. Wells' response, did you reply to that?

A Yes, I did.

Q Okay. And did you get then a response from Dr. Wells again on Sunday, March 5<sup>th</sup>?

A Yes.

MR. STABLEIN: Okay. Your Honor, I would move for the admission of People's Proposed Exhibit No. 45 as People's 45.

MR. TRAMONTIN: No objection, Your Honor.

THE COURT: Alright. People's Exhibit No. 45 is hereby admitted without objection.

(PX#45 admitted at 12:24 p.m.)

MR. STABLEIN: Thank you.

BY MR. STABLEIN:

Q Dr. Zervos, if you want to, if you could refer to the first page of this exhibit, you had sent a reply to her response, it appears to be on March 7<sup>th</sup> at 12:05 p.m., and in there you state, "This is another example of your continuing attempts to intimidate me that I am not going to stand for. It is apparent that I cannot maintain any scientific or ethical integrity by continuing to work with you. I will make arrangements with the Henry Ford Research Office to terminate our subcontract with Wayne State University."

You said that to her on that March 5<sup>th</sup> date, correct?

A Yeah. The you though it's referring to is the health department collectively, it wasn't meant, although I addressed it to Dr. Wells it wasn't meant specifically to her, it was a collective response that I couldn't work with the health department collectively.

Q Right. When you directed your first email to her you said, "Dr. Wells, your comments to us at earlier meetings such as do you know who is funding you or your more recent mandate to us to put a stop to the retrospective epidemiologic component of the project can only be interpreted as a threat and a clear attempt to influence our independent work and scientific integrity."

You said that to Dr. Wells, correct?

A Correct. And I -- it's -- that's how I felt.

Q Alright. And then in regard to when you talk about the -- when you state on March 5<sup>th</sup>, "This is another example of your continuing attempts", that implies that there were other attempts other than what you're referring to here?

A The earlier attempts are the -- were the restrictions on us doing the -- or concerns about us doing the retrospective part of the study. There were concerns about the epidemiology of what we were doing. There were concerns about us looking at water filters. So there were a combination of issues that I think pressured us into not looking at things that we wanted to or that were necessary to look at.

Q Okay. And you considered it an attempt to intimidate you, right?

A The intimidation part was the -- I interpreted it as threats to cut off our funding.

Q Okay. And to the point where you were going to withdraw from working with -- when you said that you were going to seek to arrangements, I'm sorry make arrangements with Henry Ford Research Office to terminate our subcontract with Wayne State, is that referring to this project?

A Correct.

Q And did you, in fact, after that contact Henry Ford about

terminating your subcontract?

A Yes, I did. I contacted Henry Ford's research office, I also talked with Wayne State's research office, I talked with Shawn McElmurry who's the principal investigator on the project, and through a combination of those discussions decided to stay in the project because the work was important, my role was important, so I decided to stay in. I did not -- we did not terminate the contract with Wayne State, I stayed part of it.

Q Okay. Going back to your initial email on March 3<sup>rd</sup>, you received a response from Dr. Wells at about, well exactly 9:42 a.m. on March 5<sup>th</sup>; is that correct?

A Right.

Q You had told her that her concerns about you acting un -- she had made representations to you that you were acting unethical, correct?

A Correct.

Q And obviously you took offense to that; is that right?

A Yes, I did.

Q Okay. And did she respond to you on Sunday morning, March 5<sup>th</sup> that, she said, "Regarding your thoughts that our concerns are unfounded, be aware that -- be aware I do have a copy of a text message (?Facebook) from a source that will remain confidential and anonymous."

How did you interpret that?

A I mean, that email, you know, which included, you know, sharing things with Dr. Lanier. Dr. Lanier is the head of research at Wayne State, and then talking about, you know, something out of Facebook, to me I took it that it was an attempt to intimidate me, that was the only way I could take it. Plus it seemed really way out. I don't know what she was referring to that was on Facebook.

Q Alright. And then when you said to her in response that this is another example of your continuing attempts to intimidate me, that's what you're referring to?

A That's what I'm referring to.

Q Okay. Did those, what you characterize as threats, have an impact on any aspect of your investigation in Flint?

A No, it didn't have an impact because we continued our -- we continued our work. The -- we did the retrospective part of the study. We were not restricted in the works of -- the work continued on, we were not restricted in the work. It was a discussion around it, comments, but we were not restricted in the work. There was no cuts in our funding.

Q Alright. Just the threat of cuts, right?

A That's how I interpreted it.

Q Okay. Now one of the responsibilities you said of the DHHS is to gather this data about Legionnaires' cases, right?

A Yes.

Q Okay. And they have to investigate any outbreak, correct?

A Correct.

Q And do you have an opinion as to whether the investigation could -- you came on in 2016, right?

A Right.

Q Okay. And your analysis of anything that occurred prior to that is based upon the investigation that the DHHS did, right? I think I might have said that wrong.

A Mostly, but we also spoke with others that were involved.

Q You did your own retrospective analysis, correct?

A We reviewed the information that was in the MDHHS database, so the information that was collected by the state. But we also talked with others that were working in Flint, you know, separately; not patients, we didn't -- weren't able to contact patients, but others that were doing work in Flint.

Q Okay. And did you discover in regard to your investigation as to whether or not there was information that the DHHS had kept from you?

A Yes.

Q Okay. And what was that?

A Well over the course of our working with the -- working in Flint there was information on strain typing that was

collected. So looking at bacteria again, strain typing, but this was collected from the Centers for Disease Control that would have been important in our investigation but we were not made aware of it. There were also reports of increased deaths due to pneumonia which the health department was aware of but not shared with -- also not shared with us.

I mean, I would find out things were -- I would find out things from reading the papers, reading Bridge magazine then being -- then having information from the health department. But that included Genesee, it included the CDC and the state, it wasn't one entity.

Q I understand. But that, just saying though, you're saying the state, the DHHS did, right?

A Yes.

Q Was the investigation that the DHHS had done prior to your involvement, was it done in a -- how would you characterize it, whether it was -- the investigation?

MR. TRAMONTIN: Your Honor, I would object to lack of foundation. There's been no testimony as to what this witness has particularly reviewed to be in a position to characterize prior investigations.

MR. STABLEIN: I'll lay the foundation then, Judge, that's fine.

BY MR. STABLEIN:

Q Did you gather information about their investigation?

A Yes.

Q Okay. And in gathering that information you had an understanding, did you familiarize yourself with how their investigation was conducted?

A Yes.

Q Okay. And was that done in, you know, A+ standards, exemplary investigation?

A Well the way that investigations are done is that the -- initially it's done by the local health department, so it's done by Genesee Health Department. And then depending on the significance of an outbreak on whether the local health department needs help or not, then the state becomes involved, and then depending on the significance of that then sometimes the CDC becomes involved. So eventually every health group was involved, CDC, state, Genesee were all involved.

But the answer to your question specifically there were -- there were limitations in the initial investigation that patients were interviewed late, there was missing data with the initial -- some of the initial investigation.

Q Did you determine or make an opinion that this was a poorly

done investigation?

MR. TRAMONTIN: Objection, leading.

BY MR. STABLEIN:

Q What, if anything --

THE COURT: Sustained.

BY MR. STABLEIN:

Q How would you characterize the investigation that was conducted?

A There were deficiencies in the investigation.

Q Okay. And did the HHS do anything to try to prevent you from making that -- those deficiencies known to the general public?

A We had data use agreements, so the -- we were not able to talk about -- we were not able to talk about anything in relation to the -- to our investigation unless the -- unless the state approved it. It is -- including whether there was missing data or not.

Q Okay. And did Dr. Wells ever give you that permission to make that known?

A No.

Q When the -- strike that.

Doctor, I'm going to mark what's been -- I'm going to mark this as Proposed Exhibit -- People's Proposed Exhibit No. 46.

(PX#46 marked at 12:38 p.m.)

MR. STABLEIN: So the record's clear, Your Honor, also this is a document that is actually already admitted into evidence as part of a large quantity of documents, medical records from Dr. Snyder's admission -- not Dr. Snyder, Mr. Snyder's admission at McLaren Regional Medical Center, but I just want to focus on this one page and that's why I've marked it separately as People's Exhibit No. 46.

May I approach?

THE COURT: Yes, you may.

BY MR. STABLEIN:

Q Sir, I'm handing you what's been marked as People's Proposed Exhibit No. 46, and have you seen that document before?

A Yes.

Q And what is it?

A This is a Microbiology Culture Report dated 6-16-2015. It is a -- it's a culture showing a -- it's a positive culture from a patient at McLaren Hospital or done by McLaren's laboratory.

Q Okay. And it's identified as John Snyder, correct, the patient?

A Correct.

Q     Alright. And now what I want to ask you about this in regard to your expertise as a physician in Infectious Disease, I want to ask you in regard to this report what does this tell you, first of all what does the report tell us?

A     Culture is positive for mycobacterium kansasii.

Q     Mycobacterium kansasii.

A     Correct.

Q     Is that what you said?

A     Right.

Q     And could you spell that because the court reporter at some point's going to want to --

A     M-y-c-o-b-a-c-t-e-r-i-u-m, kansasii is k-a-n-s-a-a-s-i-i.

Q     One A?

A     I'm sorry, one A.

Q     Okay, thank you. K-a-s-a-s-i-i, right?

A     K-a-n-s-a-s-i-i, correct.

Q     Alright. Now in regard to -- do you know what that bacterium is?

A     Yes. It's not a very common cause of infection, but when it does cause infection it can cause skin infections, sometimes it can cause lung, lung infection, sometimes it can cause what we call disseminated infection, meaning spread throughout somebody's whole body, but usually it

causes either lung or skin infection.

Q Okay. And can you -- is this important to you or is this significant in any way, this report in regard to Mr. Snyder?

A It was very important for him because it's not something that we would normally think of. It was good that a culture was done and identified so that he could -- so that -- so that a proper treatment could be administered. It's a very rare cause of infection.

Q Where do you commonly -- where do you normally find this bacterium *kansasii*?

A It does have significance. Most of the time we don't know where bacteria are coming from, but it is -- but this organism is a -- it's an environmental organism, it can be in soil, it can be in water. So it does have some significance from the point of view of a potential acquisition from a soil or water source.

Q Okay. Meaning an environmental source outside of what?

A So it's -- it would be -- so the way people get infections is that somebody can get infection from another person, so if you're around somebody else who's sick and they cough on you or touch somebody else who's sick. But this is a type of bacteria that you don't get from being around another person, you get it from coming in contact with the bacteria

from water that has the bacteria in it or soil that has bacteria in it.

So the environmental source means that it's coming from someplace outside of another person.

Q Okay. And is that -- in Legionnaires' disease is that similar?

A Legionella is similar in some way. Legionella comes from water. Like this mycobacterium can come from water, it can also come from soil.

MR. STABLEIN: One second, Judge.

BY MR. STABLEIN:

Q I has asked you earlier, Doctor, about whether -- first of all, if you were aware of the uptick in Legionnaires' cases in 2014 or aware of the outbreak in 2014, did you say something about the fact that Legionnaires spikes in the summertime?

A Yes, it increases in summer.

Q Okay. And if -- and I think you said if nothing is done it's foreseeable that other people are going to contract the disease the following summer let's say, right?

A That's correct.

Q And what can -- what -- if something is done, what is it that you would recommend should be done or could have been done to prevent people contracting the disease?

MR. TRAMONTIN: Your Honor, I'm going to object to this question. This goes beyond the scope of this particular witness' expertise. He is not qualified as a public health expert and we anticipate that this question is designed to delve into that area; therefore, we would object to the question.

MR. STABLEIN: Judge, I disagree 100 percent. He's an Epidemiologist, number one, to analyze data and review these charts and understand the outbreak, and then he's an Infectious Disease physician who knows how to prevent the spread of disease. And I think that he can definitely comment on what could have been done to prevent people contracting the disease in 2015.

MR. TRAMONTIN: Your Honor, may I voir dire the witness?

THE COURT: Yes, you may.

VOIR DIRE EXAMINATION

BY MR. TRAMONTIN:

Q Good afternoon. Dr. Zervos, just a few questions.

Have you ever worked for a public health agency?

A No.

Q Have you ever been involved in generating or fashioning public health notifications?

A No.

Q Have you studied that process, the risk factors, all those  
--

A Yes. I'm very familiar with the process.

Q You mentioned that you're a hospital Epidemiologist,  
correct?

A Well I'm an Infectious Disease physician and also hospital  
Epidemiologist, but many of the projects that I've worked  
on have also dealt with the issues outside of the hospital.

Q But you would agree that there's a difference between a  
hospital Epidemiologist and a public health Epidemiologist?

A Yes.

Q Okay. And what are those differences?

A Yeah. I've never had a public health position, never had a  
public health role. A hospital Epidemiologist deals with  
issues around prevention of infections in the hospital. If  
somebody ended up getting pneumonia in the hospital, are  
they going to get infection after they have surgery, are  
they going to get a blood stream infection because they  
have an IV catheter. That's very different from looking at  
issues that would happen in the community, like a hepatitis  
outbreak in a community.

Q Okay.

A Some of the principles are the same, but they're different  
roles.

Q So your testimony is that your expertise is very different than that expertise that would be applied to prevention of disease in the community?

A Well I'm familiar with issues of prevention of disease in the community and prevention of infections in the community, but it's -- I do not have a public health role or expertise.

Q Have you ever testified in court regarding -- as a public health expert?

A No.

MR. TRAMONTIN: Your Honor, at this time I would renew my objection to that question.

MR. STABLEIN: Judge, I think he's fully qualified to answer this question. He's familiar with -- I don't want to belabor the point, Judge, but I believe that he's qualified to render this opinion as to what could have been done to prevent the spread of Legionnaires' disease. He's familiar with -- he's worked with many public -- I heard him say he worked with public health agencies, he obviously has in his own investigation. He is -- and he's familiar with the prevention of disease, obviously, as an Infectious Disease physician.

THE COURT: Right. It seems to me that the people who are in charge of making the public health decisions and

notifications look to somebody like him to know exactly what they're supposed to do because they're not familiar with exactly what Legionella does or doesn't do or how it spreads or doesn't spread. I mean, they have to do it in conjunction with somebody like him.

And based upon the testimony of some of the people who have testified earlier, it seems like they might have called somebody like him.

So the Court's going to allow it because I think in conjunction his opinion would have some bearing on what maybe should have been done or was done.

MR. STABLEIN: Thank you, Judge.

THE COURT: So the objection's overruled.

MR. STABLEIN: Thank you.

THE WITNESS: So it actually -- just like the Judge says, it is a partnership between the health department and physicians and people working in the community, and it is -- and there's a combination of things that could be done. And it is --

CONTINUED DIRECT EXAMINATION

BY MR. STABLEIN:

Q For example?

A Some of which is out of my expertise like the coating of the pipes or changing the pipes and, you know, dealing with

chlorine levels, those are out of my area of expertise.

Q How did you -- what public -- if the public was made aware of the fact that a Legionnaires' outbreak had occurred, what could be done medically to prevent the spread of the disease?

A It is also important to notify the public, it's important to notify the health care providers, to notify the hospitals and in that way specific prevention measures can be considered. And then from the point of view of physicians we have an idea of what somebody might be coming in with we might modify their treatment based on a knowledge that there's an epidemic of Legionnaires in the community.

So it does have an impact on patients and how we would manage them as a physician. It has an impact on what a hospital might do. It has an impact on recommendations that we're going to make in prevention of patients. But there's not one single thing that needs to be done because there's also a need to address issues of chlorine and coating the pipes and changing the pipes in Flint, which is also a critical part of it.

Q Certainly. And I was talking about just medically. If you're aware of the fact that there is a -- likely that there's going to be another spike in 2015, is the -- let me

ask you this.

Is -- first of all, antibiotics treat bacterial infections, correct?

A Right.

Q Okay, I know that's rudimentary.

But the early use of antibiotics of somebody that has Legionnaires' disease is that good or bad for them?

A You know, we would use antibiotics early anyway, but it would be important to know that there's Legionella in the community so we make sure that we're treating the patient for Legionnaires along with other bacteria that could cause infection.

Q Okay. And if the public's not made aware of that is it foreseeable that people that, especially those immunocompromised people, are going to contract the disease if nothing --

A Yeah.

MR. TRAMONTIN: Objection, leading.

THE WITNESS: From the point of view --

THE COURT: Just a second.

MR. STABLEIN: I could rephrase it, Judge. I don't know that it's actually leading, I mean it's something that's already been covered, I'm just trying to tie it in with this testimony.

That's my response, Judge. I can rephrase it.

THE COURT: Rephrase it or repeat it.

MR. STABLEIN: Okay. I don't know if I can repeat it, Judge.

THE COURT: Okay.

BY MR. STABLEIN:

Q In regard to -- you testified earlier that people who are -- there are people that are more susceptible to the severe outcomes of Legionnaires' disease like death than others, correct?

A Right.

Q Alright. And these -- if the public is aware of the potential spread of Legionnaires' disease, that would affect, would it not, in your opinion, I'll put it this way, not to ask it leading, would it affect the treatment that someone is going to get if the public is aware versus not being aware?

A Yeah. Providing a notification is important, it's important for providers because then we know how best to treat a patient. But it's also important for the public because we can then provide recommendations to the public on how they can prevent -- how they can prevent infection. Bottled water is an example if they're -- especially if they're immune suppressed.

Q Okay. Any of your investigation as to what occurred in Flint, was there any public notification prior to 2015 of the outbreak of Legionnaires' disease?

A Not that I know of.

MR. STABLEIN: I have nothing further, Judge, thank you.

THE COURT: The Court will break for lunch at this time.

Thank you, you may step down, Doctor.

(Witness excused at 12:52 p.m.)

MR. STABLEIN: Judge, if I didn't, I'm moving for the admission of People's Proposed Exhibit No. 46.

THE COURT: Any objection?

MR. TRAMONTIN: No objection, Your Honor.

THE COURT: People's No. 46 is hereby admitted.

(PX#46 admitted at 12:52 p.m.)

MR. STABLEIN: I'm sorry, Judge, what time?

THE COURT: Two o'clock.

MR. STABLEIN: Thank you.

(Off the record at 12:53 p.m.)

(Back on the record at 2:14 p.m.)

THE COURT: Back on the record in the matter of People of the State of Michigan versus Eden Wells, Case No. 17-1356.

You remain under oath, Doctor, thank you.

THE WITNESS: Thank you.

(Witness resumes the stand at 2:14 p.m.)

MR. STABLEIN: Good afternoon, Your Honor, Paul Stablein appearing on behalf of the People of the State of Michigan.

MR. TRAMONTIN: Good afternoon, again, Your Honor, Steve Tramontin and Jerry Lax on behalf of Dr. Eden Wells.

THE COURT: Cross-examination.

MR. TRAMONTIN: Thank you, Judge.

#### CROSS-EXAMINATION

BY MR. TRAMONTIN:

Q Good afternoon, Dr. Zervos.

A Good afternoon.

Q My name is Steve Tramontin, like I just said I represent Dr. Wells. I have several questions for you related to your testimony earlier.

During that testimony you were permitted to opine on the benefits of issuing a warning to the public in 2014 when it was an uptick of cases; did I get that correct?

A Correct.

Q Okay. And if you could just summarize what those benefits would have been to the public specifically?

A The benefits are to the medical community is that

physicians know that there was an uptake in Legionnaires' disease and they would make sure that if they were seeing a patient with pneumonia they were giving the patient early and appropriate treatment. The treatment that's given for Legionnaires' disease is different, the antibiotic is different than what we would do for other infections. The duration of therapy is longer, if they're sicker then we give them longer duration of therapy.

So knowing that there was an uptick in Legionnaires would be important to the medical community.

To the public the importance would be that they could take preventive measures. So, for example, bottled water, if somebody is immune suppressed. Things like re-emphasizing the need for smoking cessation, for being immunized would be other measures that we could -- that would be important for the public to know to be able to also protect themselves against getting Legionnaires' disease. But the biggest recommendation would be bottled water.

Q Thank you Doctor.

So are you aware that the medical community was informed by the local health department of the uptick in Legionnaires' cases through a HAN?

A As far as I know there was no -- there was no notification

to the public or the health community until sometime in 2015.

Q Okay. And just as there can be limited helpfulness to a public notification as to Legionnaires' specifically, wouldn't you agree, Doctor, that there are some concerns with providing that information?

A I don't agree with the first part of the sentence that there is limited -- there is limited utility in providing notification. Notifications are provided all the time. We're in an outbreak now of Hepatitis, for example, in Michigan and the health department has put out a very extensive notification, it's important for the public, it's important for us as providers.

The second part of the question was -- remind me again what the second part of the question was.

Q Well let me respond to your answer to the first part of the question. There's a difference between Legionnaires and Hepatitis, correct? They are different infectious diseases?

A They're different organisms, but the principles of notifying the -- the importance of notifying the public is the same.

Q Hepatitis, for example, is transmitted human being to human being, correct?

A Right.

Q And there are specific actions that one can warn an individual or tell an individual to abstain from such as intravenous drug use and tell them to wash their hands and to practice safer sexual practices, correct?

A That's actually a really good example because we don't know everything about Hepatitis, but what we do know about Hepatitis we're able to warn our patients about it and the public can take measures to prevent it.

Same thing with Legionnaires, we didn't know everything about Legionnaires' disease at the time, but there are measures that can be taken to prevent one from getting it, meaning using bottled water.

Q The main measure that one -- I don't know if you've studied Legionnaires' outbreaks in the past, have you, sir?

A Yes.

Q Okay. You would agree that the main point of doing an investigation is to determine the source of the outbreak, correct?

A And the main point --

Q It's an environmental source and you're trying to figure out where it's coming from?

A The main point of doing the investigation is to find out where it's coming from, what are the risk factors, how

people are getting it, and the reason for doing that is so that control measures can be implemented.

Q Correct. Because if you can isolate that it's coming from a particular fountain or from a cooling tower, then you can give people actionable information to avoid exposure to that particular location?

A No, it's critical. To have information on Epidemiology is critical for the control measures, but we need to act on the information that we have. Sometimes, and actually more than sometimes, often information isn't complete, we act on the information we have that gets modified later as more information comes in.

Q But when you give information without knowing the source you would agree that that could be problematic and cause panic within the public if they don't know what to avoid?

A It can be problematic if the -- if information is given without also giving recommendations around what to do or not having some information on what the cause might be. But we do have information on what the cause might be with Legionella, we know that it's coming from water.

Q Well you mentioned bottled water as an example. Are you suggesting that citizens could have avoided contracting Legionnaires' disease by drinking bottled water versus tap water?

A I think that was one of the measures that should have been recommended. It was recommended by the Genesee Health Department, it was recommended by the Genesee Medical Society, and I think particular for immunocompromised patients it was, I think it was a prudent measure. I think it still is a prudent measure.

Q Are you aware of any particular case studies, documented case studies where individuals have contracted Legionnaires' disease from drinking water?

A Yes. Legionnaires is contracted in two ways; one is through inhalation of aerosols, so it gets into the air and you breath it in, then the other is that it can be acquired through aspiration of water. So and a perfect example of that is well what happens in a hospital. Somebody gets Legionnaires' disease in a hospital, it's not because they were taking a shower in a hospital, it's because they aspirated on water that had the bacteria in it.

Q You would agree though that the second example of contracting Legionnaires is less common than the first?

A It depends on the situation. Every situation's different. If it's -- if there's a cooling tower that's an issue, then that's the problem. Flint was, is a unique situation. I'm not aware of any situation in my career that's been like this.

Q You say it was a unique situation, are you familiar with any protocols or literature, publications prior to the Flint water situation that guided public health departments or guided Epidemiologists in terms of investigating an outbreak?

A Yes. No, I'm very familiar with how it operates --

Q How about public notification?

A I'm also familiar with having received many public notifications of illnesses. I'm familiar with the -- at least on the end of the --

Q My question was is there some type of manual or some sort of published document or study which would instruct public health individuals on when --

A Not that I know of.

Q Okay. Now you mentioned the hospital, now you are aware that more than half of the cases had an exposure to a certain hospital, correct?

A I think that's a difficult question because there were limitations in the investigation that do not let me conclude how many cases were hospital acquired --

Q There were a number of cases associated, a large number of cases.

A I can't -- I wasn't -- I think based on the definition that was used I don't know if they were hospital -- how many

hospital cases --

Q So the hospital -- okay, let's put aside what you know.

So if a hospital knows that they have several cases identified within their hospital, should they give their patients bottled water?

A If a hospital has even one case of Legionnaires' disease that is health care associated, they should be all over it. The hospital should be all over it, the health department should be all over it, and every mitigation strategy should be done that is possible. It should be -- the water should be chlorinated, the pipes should be flushed out, patients be given bottled water. Everything should be done in an abundance of caution --

Q The patient --

A -- to prevent further cases.

Q Should the patients be told that there's a Legionnaires' issue within the hospital?

A Yeah, I think they should be told.

Q So it's your testimony that McLaren Hospital should have told their patients before coming into their hospital that they had an issue with an increased number of cases?

A I don't know how the -- that every patient should be notified, but I think the patients that are at risk should be told.

Q To your knowledge were they told?

A Not that I know of. I don't have any information on what happened in the hospital.

Q Why is that?

A We were restricted from getting any information from the hospital. We weren't -- as part of our agreement with the state we were not allowed to connect with patients, and the hospitals were -- although we talked in general terms they were not willing to give us specific information on what happened in the hospital.

Q And what was the nature of your request to the hospital that were denied? How did you make those requests?

A We met with the -- we met with the Chief of Staff of each of the hospitals in Flint and with the Infection Control Quality Departments.

Q And you specifically asked for what?

A We weren't allowed to connect with patients, so we were not allowed to ask anything related to a specific patient. What we asked about were what were the -- what was being done in terms of mitigation strategies in the hospitals.

Q Were you given that information?

A No.

Q Were you told why you couldn't have that information?

A No.

Q And what was your personal reaction to being denied that information?

A It's speculation. The personal reaction is that it's unfortunate that everybody can't work together in solving a problem that they -- that the universities, the hospitals, the academic institutions, the health departments, the EPA and others can't work together, I guess was my reaction.

Q So you were disappointed?

A Yeah, I was disappointed.

Q Did it affect your ability to do your research project?

A Absolutely.

Q Did it interfere with your research project?

A It didn't allow us to fully understand the epidemiology.

Q What about -- are you familiar at all with the protective order that went into place during the inception of your project?

A Yes.

Q Okay. And what effect did -- could you explain your understanding of the protective order?

A So our understanding of the protective order was that the state, the MDHHS, was not able to interact with the -- with McLaren Hospital. And although when we checked with our legal general counsel at the University of Michigan and Wayne State interacted with the Prosecutor's office here in

Flint, we learned that that didn't apply to us. However, because we were perceived and connected and funded with the state, it did affect our, I think our ability to connect with the hospitals here also.

Q And could you approximate how long the protective order would have affected your ability to conduct your research?

A It went for a while. I don't remember how long, but it was several months.

Q Going back to the initial stages of your project, you said you were contacted sometime in March or February/March 2016 about getting involved with this?

A Correct.

Q Okay. And you stated generally that there was a process by which your organization and the Department of Health and Human Services were working out IRB's and DUA's; is that correct?

A Correct, working on IRB's, data use agreements, and importantly the protocol itself, what we were going to look at and not look at and budget.

Q And isn't it true -- and do you have some familiarity with that back and forth and that exchange that occurred?

A Yes.

Q And this protocol required several amendments; is that accurate?

A Yes.

Q Okay. And it was quite complicated?

A It was very complicated.

Q And that's not uncommon in trying to coordinate a research project with this type of data and this type of situation or is it?

A No, correct, it is -- it isn't uncommon to go back and forth and to have some disagreement and then eventually come to an agreement on what's going to be looked at, and sometimes we have to make compromises on what we're going to look at or not. So, no, it's not unusual especially in a complicated protocol like this to go back and forth, have amendments, have budget modification.

Q And compromises were made?

A I don't know if I'd call it compromises, but it was -- we did not completely -- we were not able to study what we wanted to or what we thought was necessary.

Q When you began your study did you attempt to work with the local health department?

A Yes.

Q Was there -- were there any issues in working with them initially?

A There was -- in terms of Legionnaires' disease it was off limits for us.

Q Okay. Could you expand on that a little bit, how was that communicated to you?

A The -- through working with both Jim Henry and Suzanne Cupal at the health department that information related to Legionnaires' disease for us was to come through the state, it was not to come through the Genesee Health Department.

Q Did you detect a general desire by the local health department not to work with your agency?

MR. STABLEIN: Objection, Judge, I mean that's a broad statement, it's also hearsay, and it would be speculation on his part.

MR. TRAMONTIN: It's his impressions from dealing with and interacting with the local health department, does he believe -- were there -- okay, I can ask him about specific instances that may have led him --

THE COURT: Right. I think the same question was asked the other way --

MR. TRAMONTIN: Yeah, it sure was.

THE COURT: -- in regards to the state, so overruled.

MR. TRAMONTIN: Thank you, Judge.

THE WITNESS: No, they showed willingness to work with us. In fact, I just talked to Suzanne Cupal three days ago about guidance for clinicians. So the -- I think they,

although they were -- we were restricted on getting information on cases, which was actually us -- went along with our protocol and we were referred to the state for connection on anything related to Legionnaires. I think there was a willingness to work with us, and that's continued to now.

BY MR. TRAMONTIN:

Q Wasn't there an instance where you had asked for data from the local health department and were denied --

A Yes.

Q -- access to that?

A Yes.

Q Okay. So is that cooperative, in your view?

A Cooperative's a relative term. There were -- we work with the health department, we worked with Genesee Health Department on guidance for clinicians, we work with them at their, what they call Bug Fuzz meeting where we connected with the hospitals on infection control. What we were restricted on was information on patients, so that was -- so there was cooperation but it was -- we were restricted from some information. We asked about what was happening in the hospitals and were told that was information that we were not going to get.

Q You mentioned guidelines for clinicians, isn't it true that

you worked with Dr. Wells on that at the initial part of your project?

A She was involved in that process, yes.

Q So it was your testimony that -- so this protocol, IRB, DUA process you didn't see anything out of the ordinary in that negotiation, correct?

A No. Actually I didn't see anything out of the ordinary that we would go back and forth and have dis -- you know, that's typical in a research protocol that the -- there can be disagreements about what we're going to study and not study. We didn't -- we wanted to look at some other things that we didn't end up doing, but I think the -- other than the delay in getting the protocol started, which went longer than what we would have liked to, I didn't -- I didn't see anything unusual in the -- otherwise in the startup.

We had some -- we had some -- we had some meetings that went more negatively than what I would have wanted to see.

Q Through your course of your research, did you become aware that there were these "Bug Fuzz" meetings in 2014 at the inception of the uptick in Legionella where all ID docs in infection prevention, medical personnel in Genesee County were working and meeting and discussing Legionella?

MR. STABLEIN: Judge, I'm objecting. That question's compound, it assumes facts that are not in evidence, and there's no basis for him to make this -- to answer that, it'd be pure speculation on his part.

MR. TRAMONTIN: We've already touched on his opinion about the epidemiological investigation and who should have been told what when, and I believe he testified he wasn't familiar with a HAN notification that went out. I'm asking him if he's familiar with it, if he says no then it's not assuming facts in evidence, it's are you aware. It directly relates to his testimony as to what would be important to notify medical providers in the event of a Legionnaires' uptick.

MR. STABLEIN: Judge, the question was are you aware of and then it was X, and Y, and Z. I mean, the answer to that question is -- (inaudible) because there's too many facts that are in there.

THE COURT: If you could separate it.

MR. TRAMONTIN: Sure.

THE COURT: Thank you.

BY MR. TRAMONTIN:

Q What's Bug Fuzz, Dr. Zervos?

A So I am aware of Bug Fuzz, I have attended their meetings beginning in 2016, and it is a combination of the infection

control practitioners, quality people, Infectious Disease physicians from each of the hospitals in Flint. So I am familiar with their meeting. I've attended their meetings after 2016. I don't know what happened before then.

Q Okay. Now you mentioned on direct that, I believe you said that DHHS did not want you to inform patients that Legionella had been found in their water?

A Correct.

Q And you had stated that Dr. Wells spoke with you about that issue?

A Well she spoke with us collectively in a phone conversation I believe in October sometime 2016 and then again after a - - and then again beginning of the next year.

Q So you also stated that her concern was that the information was going to be presented without proper recommendations for the individuals whose homes were implicated, correct?

A Correct. And I understand -- I understand that concern. It is possible to give out a recommendation that is -- can alarm the public and be -- and if you don't give recommendations with it then it can be -- I can understand her -- I didn't agree with it, but I can understand the concern.

Q And isn't it true that Legionella in some form or another,

it's not uncommon for that to be found within a residential water system?

A Legionella can be found in water, but not having the kind of cases that we're seeing in Flint. So it's --

Q Just informing a resident that there's Legionella detected in their water is not necessarily telling them or it does not necessarily indicate that they're at risk to acquire Legionnaires' disease?

A Well if there wasn't an outbreak of Legionnaires' disease in Flint, then the -- then the water -- it being in their water wouldn't be as important.

Q Because it's found in other communities in their water. correct?

A It's been found in other communities in their water, and it is in the absence of disease.

Q So what were the recommendations that you wanted to be included in this notification?

A I think it should be just like what happened with Hepatitis, it is --

Q I'm asking what Dr. Wells -- what types of recommendations she suggested?

MR. STABLEIN: Objection, Judge, it's hearsay.

MR. TRAMONTIN: It's -- Your Honor, the statement from Dr. Wells has been introduced into evidence, I'm

allowed to explore the context of that statement and specify exactly what recommendations were requested or offered.

MR. STABLEIN: Judge --

MR. TRAMONTIN: And he can't just be allowed to say she didn't want it without recommendations and then we can't explore what recommendations were suggested and whether they were appropriate.

MR. STABLEIN: Judge, he -- if he's talking about putting in the statement of his own client, that's hearsay. The only reason I can introduce statements of the defendant that they're not hearsay because the rule says it's an adverse party. So you put the -- but he can't -- it doesn't go the other way.

THE COURT: Right, but he said the statement's already in evidence.

MR. STABLEIN: Statements that she had made, yes, we have the emails, we have statements that she made to Dr. Zervos, those are statements offered by the Prosecution against the defendant.

THE COURT: Right.

MR. STABLEIN: But the defendant can't put her own statements in.

MR. TRAMONTIN: I'm allowed to inquire --

MR. STABLEIN: It's not -- they're not an adverse party.

MR. TRAMONTIN: -- into the context of the statement.

THE COURT: Pardon?

MR. TRAMONTIN: I'm allowed to inquire into the context of the statement. If the witness makes a statement vaguely she wanted recommendations, is it their argument that I can't offer what types of recommendations when it's being offered in the context that this was some sort of unnecessary or attempt to obstruct or interfere with their project. I can't ask him what exactly those recommendations were and whether or not they were a viable or appropriate suggestion?

MR. STABLEIN: No, you can't because it's hearsay. The defendant can present whatever evidence they want for - - if they choose to present evidence in their case in chief, they cannot present statements of the defendant --

MR. TRAMONTIN: The Rule of Completeness allows for the entire context, any relevant statements that were made within the context of the statement that was already introduced.

MR. STABLEIN: No, Judge, the Rule of Completeness, which is found at MRE 106 says that when a

writing or recorded statement or any part of it is introduced by a party, an adverse party may require the introduction of that -- at that time of any other part or any other writing or recorded statement which ought, in fairness, be considered contemporaneously with it.

That is not the situation here. He's trying -- he's trying to now admit statements of the defendant in his cross-examination that does not fit the Rule of Completeness. First of all, we don't have any -- I haven't attempted to admit a portion of a writing or recorded statement that needs to be -- the full context needs to be admitted. That's not what you're attempting --

MR. TRAMONTIN: It's not --

MR. STABLEIN: It's a conversation between this witness and the defendant. This is --

MR. TRAMONTIN: It's not an assertion, Judge, it's suggested recommendations that were to be added to the notification, it's not to be used for the truth. It's the fact that a statement was made, it's the context of the statement that's already been introduced. It's not being offered for the truth. The recommendations themselves are not being offered for the truth of anything, they're just being offered to show what the context of the statement was.

They opened the door to this discussion, and if all they can do is offer limited statements without my ability to cross-examine the witness on the precise nature of the statement, then the Court's only getting part of the story.

MR. STABLEIN: If they're not offered to prove the truth of the matter asserted, then they're not relevant to the Court getting the entire story.

MR. TRAMONTIN: The witness criticized or at least suggested that this was an inappropriate blocking of information to the public. I'm merely trying to ask the witness what additional recommendations the defendant asked to be included in such notification.

MR. STABLEIN: That's hearsay.

THE COURT: I don't think so, I agree with the defendant.

The objection is overruled.

MR. TRAMONTIN: Thank you, Your Honor.

BY MR. TRAMONTIN:

Q What types of recommendations were -- was Dr. Wells interested in adding to the notification of the residents?

A She didn't want us to notify the residents so there weren't any recommendations.

Q Okay. She didn't --

A The recommendations came from us.

Q She didn't want you to notify the residents without recommendations, that was your testimony.

A Right.

Q Okay.

A She did not give us any recommendations, we gave recommendations to the patients that were in our project.

Q So initially you were just going to notify them without recommendations?

A No. We were -- her objection was -- her objection was for us to notify -- she objected to us notifying our research subjects of the results of the tests. We -- she had no recommendations for what we should tell the, at least that I'm aware of, she had no recommendations for what we should tell the patient with -- that had positive cultures in their home. We made suggestions, but we didn't get those recommendations from Dr. Wells.

Q So you're saying she expressed an objection to telling the residents about the Legionella without recommendations, correct? She wanted there to be recommendations --

A She wanted us to notify -- no, I didn't say that. She didn't want us -- I know how to put it differently, she didn't want us to notify the residents of -- that were in our research study of the results of Legionella in the

water in their home. The -- now when you ask me what was the, you know, potential reason for that, it probably was -  
-

MR. STABLEIN: Objection, Judge, that sounds like speculation to me.

MR. TRAMONTIN: He already testified that the issue was that they didn't include recommendation, that was in the direct testimony.

THE COURT: So --

THE WITNESS: We gave recommendations.

THE COURT: -- you're objecting to whatever comes after probably?

MR. STABLEIN: Right. I mean, he's guessing.

THE COURT: Sustained.

BY MR. TRAMONTIN:

Q Was there a Legionella -- was there an outbreak going on in 2016 during this timeframe, were there cases -- was there an above baseline number of cases going on?

A The --

Q Since October 2016; is that correct?

A It actually returned -- around 2016 it returned close to baseline. There were a few -- there were a few cases that were above baseline, but it wasn't -- it wouldn't be anything that would be expected to be out of the ordinary.

The number of cases went down in 2016.

MR. TRAMONTIN: Just one moment, Your Honor.

BY MR. TRAMONTIN:

Q Dr. Zervos, I want to call your attention back to this email that was entered into evidence, People's Exhibit No. 45, do you have that in front of you?

A No.

MR. STABLEIN: The Judge has it.

MR. TRAMONTIN: I'm sorry?

MR. STABLEIN: The Judge has it.

MR. TRAMONTIN: May I approach, Your Honor?

THE COURT: Yes.

MR. TRAMONTIN: Is that your only copy, Judge?

THE COURT: Yes.

BY MR. TRAMONTIN:

Q So you reviewed and refreshed your memory of that email. What was not mentioned on direct is all the other individuals who are copied on this email.

Now do you see that up at the top?

A Yes.

Q There's Sarah Lyon-Callo, Richard Baird, Shawn McElmurry, Nick Lyon, Nancy Hay.

Do you know who that is?

A She's Administrative Director of Research at Henry Ford

Health System.

Q Okay. Margot LaPointe?

A He's Medical Director of Research at Henry Ford Health System.

Q William Conway?

A He's the Chief Medical Officer at Henry Ford Hospital.

Q Eric Scher?

A Department of Medicine chairman who I report to.

Q Linda Galante?

A Chief Counsel at Wayne State.

Q John Mucha?

A He's in the legal office at Henry Ford.

Q And then Stephen Lanier?

A He's Director of Research at Wayne State.

Q So did you put all of these individuals on the original email?

A I think I might have forgotten Lyon and then added him on later because I didn't have his email at the time.

Q So you wanted everybody on this email string to know what you -- your statements to Dr. Wells, correct?

A Yes.

Q Okay. And when she responded did she copy everybody else that you had copied on the email?

A Yes. I don't think -- maybe she added Lyon on, but

everybody else was the same.

Q Okay. So the group of people receiving this correspondence between you two stayed consistent the entire time?

A Yes.

Q Now what also wasn't explored during direct was Dr. Wells' statement to you about why she mentioned the funding source, that DHHS was your funding source, correct?

A Correct.

Q Okay. And what she said was "My statement about reminding all of FACHEP members about the funding source is that academic grantees of any other funding source (NIH, HRSA, CDC, etc.) would be more prompt in responding to requests for promised revised protocols or as an agency funded for doing research during current and state public health emergency response exhibit more alacrity in responding to concerns by participating agencies."

She's telling you why she's mentioning the funding source?

MR. STABLEIN: Objection, Judge, the words, they are what they are, they speak for themselves.

BY MR. TRAMONTIN:

Q So you read this email at the time, correct?

A Yes.

Q And you read what I just quoted as an explanation from Dr.

Wells as to why she mentioned that -- reminded you that DHHS was funding you?

A Correct.

Q Okay. So her explanation was not that she was trying to intimidate you, correct?

A That's not how I took it at the time.

Q You took it as intimidating?

A I took it as intimidation.

Q But she spells out in this email exactly why she is telling you that information?

A She does spell it out, I didn't agree with it but she spelled it out.

Q And you didn't agree with it, but you don't -- you don't know what her experience has been with other research projects, correct?

A I don't know what her experience has been with other research projects. I know what my experience has been with research.

Q And you don't know personally the delays and otherwise lack of responses that she may have gotten from other members of your team, correct?

A I am aware of -- I'm aware of some of the delays. I'm not aware of all it because --

Q So you acknowledge that --

A -- Dr. McElmurry was our principal investigator --

Q Right.

A -- and a lot of the interactions were between him and the health department. And there were definitely delays, there's not -- there were delays on our end, there were delays on both ends. I would agree with that.

Q So you're testifying that the stated reason why Dr. Wells was reminding your organization that they were being funded by DHHS is accurate, that there were delays in communication from FACHEP to DHHS?

A I didn't take it like that.

Q But you testified factually that you were aware that there were delays in responses when DHHS was asking FACHEP for response to a certain issue?

A I'm aware of delays, but I don't -- I think the -- I didn't -- the statement of you know who's funding you, I took it as a threat to pull our funding.

Q You would agree that DHHS had a vested interest in the product of your research study, correct?

A Correct.

Q As the funding agency, they would have wanted your project to produce useful results?

MR. STABLEIN: Objection, Judge, it calls for speculation.

BY MR. TRAMONTIN:

Q Okay, I'll say in general, does a funding agency want their money to be spent wisely?

A Yes, and spent wisely means that it provides scientific information, publications, useful information, information that'll help the -- it'll inform the public. What it doesn't include is to try to influence the research that's being done.

Q Well it was their data, DHHS' data that you were utilizing, at least in one part of your study, correct?

A We were using their data but it's not -- but that's not an implication that the -- that they have control over what we do or don't do.

Q No. No, it isn't.

And isn't it true --

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Q So addressing that response from Dr. Wells, which was copied to all of these individuals, both of you in this -- are basically sharing your personal back and forth with several other individuals, correct?

A Right.

Q You're sharing it with people within your hospital and your partners on FACHEP, correct?

A Correct.

Q Were you the person that put Sarah Lyon-Callo and Richard Baird at the Governor's Office and Nick Lyon on the email as well?

A I put Rich Baird and Sarah Lyon-Callo on the -- my original email, and I didn't have Mr. Lyons' email at the time but I added it on later.

Q Okay. So you wanted other people to know about this conversation, correct?

A Yes, I did.

Q And certainly Dr. Wells copying all these other individuals on the email, she wasn't trying to hide her statements to you either, correct?

A Correct.

Q So you're having this conversation via email that's out in the open, correct?

A Right.

Q And you're saying that you felt intimidated by Dr. Wells' statement that -- reminding you that DHHS was funding you?

A It was part of it, yeah, that was part of it.

Q Okay. So does she respond to your statement that you felt intimidated?

A Yes.

Q And what does she say to you?

A It's not to intimidate me but to document concerns that we,

meaning MDHHS, has with FACHEP.

Q Okay. And what else does she say?

A "I feel quite confident with the scientific and ethical integrity with which we have attempted to work with FACHEP."

Q So she's denying that she's trying to intimidate you, correct?

A Right.

MR. STABLEIN: Objection. Judge, the words speak for themselves. I object to that question.

MR. TRAMONTIN: The witness can testify to their impressions from the statements that were being made. If that were not the case, then many of their witnesses would be unable to testify because they have repeatedly testified to their impressions from certain statements.

I merely asking the witness how he perceived this statement.

MR. STABLEIN: That's not what he -- that's not what the question was, not how do you perceive it, it was what she meant.

THE COURT: Alright.

BY MR. TRAMONTIN:

Q Okay. Did you perceive as Dr. Wells responding to your statement that you felt intimidated?

A Yes. I perceived it that she felt that she was not attempting to influence our scientific or -- I'm sorry, the statement speaks for itself, that she's confident with their scientific and ethical integrity. That's how I interpreted it.

Q And that was the last communication you had with her, correct?

A Yes.

Q And you did not end up terminating your contract?

A Right.

Q You continued on?

A Correct.

Q You've mentioned that there were issues initially about filter studies, you mentioned that in passing on direct?

A Right.

Q You did the filter study, correct?

A We did the filter study.

Q There was issues with the household study testing the water, et cetera, correct?

A We did household water, we weren't able to do the households of patients that had illness up until just very recently. But we were able to do what was in the -- we were able to do what was agreed on in the protocol.

Q You were about to do everything that was agreed on in the

protocol; is that correct?

A That's correct.

Q And, in fact, Dr. Wells was helpful in this contract, wouldn't you agree, in some instances?

A We had areas of disagreement, but the -- but I think -- I have -- I've known Dr. Wells for years, I have a lot of respect for her, she is and she was very helpful. I mean we had many helpful discussions where she gave us, you know, very useful information. She's a very knowledgeable Epidemiologist with a lot of experience. And, yes, she helped us interpret the results along the way.

So I would say yes to that, she was -- although we had areas of disagreement, she was helpful.

Q She was fully engaged with the project?

A She was absolutely fully engaged. I have never had a project manager in my 35 years of -- in my 35 years of academic life with all the articles that I've published I've never had a project manager who was more engaged than Dr. Wells.

Q And by engaged you mean that when there was a problem or there was an issue she would address it?

A Absolutely. She was very responsive, was knowledgeable, gave input, and was -- and we met very regularly.

Q At her request?

A Both of our requests, so mutually agreed on that we would meet regularly.