

***The Mechanics of a Trial:
From Jury Selection to Verdict -
How to Improve your Litigation Skills &
Make Your Case***

**Torts, Insurance & Compensation Law and
Trial Lawyers Sections**

January 25, 2018

**New York Hilton Midtown
NYC**

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New York State Bar Association

Accessing the Online Electronic Course Materials

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online
at: www.nysba.org/TICLTRIAAM18Materials

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at <https://get.adobe.com/reader/>
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2018

Torts, Insurance & Compensation Law and Trial Lawyers Sections

The Mechanics of a Trial: From Jury Selection to Verdict -
How to Improve Your Litigation Skills & Make Your Case

January 25, 2018 | New York Hilton Midtown | NYC

6.5 Total Credits: 6.5 Skills (Transitional)

Offsite Reception and Dinner – Wednesday, January 24, 2018

6:30 pm to 10:00 pm | The Edison Ballroom, 240 West 47th Street - **NEW VENUE!**

Honoree/Speaker: **Honorable Rowan D. Wilson**, Associate Judge, New York Court of Appeals

MCLE Program – Thursday, January 25, 2018

8:45 am to 4:30 pm | Regent, 2nd Floor

TORTS, INSURANCE & COMPENSATION LAW SECTION CHAIR

Elizabeth A. Fitzpatrick, Esq., Island Companies, Calverton

TRIAL LAWYERS SECTION CHAIR

Noreen DeWire Grimmick, Esq., Hodgson Russ LLP, Albany

TORTS, INSURANCE & COMPENSATION LAW PROGRAM CO-CHAIR

Charles J. Siegel, Esq., Law Office of Charles J. Siegel, New York City

TRIAL LAWYERS SECTION PROGRAM CO-CHAIR

Violet Samuels, Esq., Samuels & Associates, PC, Rosedale

8:45 am

Business Meeting and Election of Officers and District Representatives of the Torts, Insurance and Compensation Law Section and
Business Meeting and Election of Officers and District Representatives of the Trial Lawyers Section

9:00 am – 9:50 am

Jury Selection

Speaker:

Peter S. Thomas, Esq., Peter S. Thomas, P.C., Forest Hills

9:50 am – 10:40 am

Motions in Limine

Speaker:

Hon. Michelle Weston, Supreme Court Justice, Kings County, Brooklyn

10:40 am – 11:00 am

Refreshment Break

11:00 am – 11:50 am

Opening Statements

Speaker:

William Pagan, Esq., The Pagan Law Firm, P.C., New York City

11:50 am – 1:15 pm

Lunch on Your Own

1:15 pm – 2:05 pm

Expert Witnesses

Speaker:

Hon. Michelle Weston, Supreme Court Justice, Kings County, Brooklyn

Get Social: #NYSBA18   



2:05 pm – 3:20 pm

Direct & Cross Examination

Panelists:

Hon. Carmen Victoria St. George, Supreme Court Justice, New York County, New York City

Heather Palmore, Esq., Law Office of Charles J. Siegel, New York City

Michael C. Tromello, Esq., Tromello, McDonnell & Kehoe, Melville

Hon. Shawndya Simpson, Supreme Court Justice, Kings County, Brooklyn

Thomas P. Valet, Esq., Rappaport, Glass, Levine & Zullo, LLP, Islandia

3:20 pm – 3:40 pm

Refreshment Break



3:40 pm – 4:30 pm

Closing Arguments

Speaker:

Jesus M. Zeno, Esq., Jesus M. Zeno, P.C., Brooklyn

4:30 pm

Adjourn

Register Online www.nysba.org/AM2018 | **Get Social: #NYSBA18**   

IMPORTANT INFORMATION

Under New York's MCLE rule, this program has been approved for a total of 6.5 credit hours in Skills. This program is **transitional** and is suitable for MCLE credit for both newly-admitted attorney and experienced attorneys.

Discounts and Scholarships: New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program, based on financial hardship. This discount applies to the educational portion of the program only. Under this policy, any member of our Association or non-member who has a genuine basis for their hardship, if approved, can receive a discount or scholarship, depending on the circumstances. Request for discounts or scholarships must be received prior to January 12, 2018. For more details, please contact Catheryn Teeter in writing at New York State Bar Association, One Elk Street, Albany, New York 12207 or cteeter@nysba.org.



Accommodations for Persons with Disabilities: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Catheryn Teeter at 518-487-5573 or cteeter@nysba.org.



For overnight room accommodations, please call the New York Hilton Midtown at 1-800-445-8667 and identify yourself as a member of the New York State Bar Association or on the web at www.nysba.org/am18accomm. The rate will be based on room selection (single/double occupancy) and arrival/departure dates with additional taxes and hotel fees. The discounted rate for January 21st and January 22nd is \$179 per night. The discounted rate for January 23rd through January 28th is \$229 per night. A rate of \$209 will be offered to those with overlapping dates. Reservations must be made by December 29, 2017.



For questions about this specific program, please contact Catheryn Teeter at 518-487-5573. **For registration questions only, please call the Member Resource Center at 800-582-2452. Fax registration form to 518-463-5993.**

MCLE INFORMATION

Program Title: **Torts, Insurance & Compensation Law and Trial lawyers Sections Annual Meeting 2018**

Dates: January 25, 2018

Location: New York Hilton Midtown, NYC

Evaluation: www.Nysba.org/am2018-tic0

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **6.5 New York CLE credit hours**

Credit Category:

6.5 Skills

This course is approved for credit for both experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys attending via webcast should refer to Additional Information and Policies regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

- 1) **Sign in** with registration staff
- 2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

Lawyer Assistance Program 800.255.0569



Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling 800.255.0569 or connecting to our website www.nysba.org/lap

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?
2. Is it difficult for me to maintain a routine and stay on top of responsibilities?
3. Have I experienced memory problems or an inability to concentrate?
4. Am I having difficulty managing emotions such as anger and sadness?
5. Have I missed appointments or appearances or failed to return phone calls?
Am I keeping up with correspondence?
6. Have my sleeping and eating habits changed?
7. Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?
8. Does my family have a history of alcoholism, substance abuse or depression?
9. Do I drink or take drugs to deal with my problems?
10. In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?
11. Is gambling making me careless of my financial responsibilities?
12. Do I feel so stressed, burned out and depressed that I have thoughts of suicide?

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

JOIN OUR SECTION

As a NYSBA member, **PLEASE BILL ME \$40 for Torts, Insurance and Compensation Law Section dues.** (law student rate is \$5)

I wish to become a member of the NYSBA (please see Association membership dues categories) and the Torts, Insurance and Compensation Law Section. **PLEASE BILL ME for both.**

I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

City _____ State _____ Zip _____

The above address is my Home Office Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ / _____ / _____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:

MEMBER RESOURCE CENTER,

New York State Bar Association, One Elk Street, Albany NY 12207

Phone 800.582.2452/518.463.3200 • FAX 518.463.5993

E-mail mrc@nysba.org • www.nysba.org

JOIN A TORTS, INSURANCE AND COMPENSATION LAW SECTION COMMITTEE(S)

All active Section members are welcome and encouraged to join one or more Committees at no additional cost. Please indicate the Committee(s) you would like to join in order of preference (1, 2, 3 and so on):

- ___ Alternative Dispute Resolution (TICL3100)
- ___ Automobile Liability (TICL1100)
- ___ Business Torts and Employment Litigation (TICL1300)
- ___ Class Action (TICL1400)
- ___ Continuing Legal Education (TICL1020)
- ___ Diversity (TICL4200)
- ___ Ethics and Professionalism (TICL3000)
- ___ General Awards (TICL1600)
- ___ Governmental Liability (TICL1700)
- ___ Information Technology (TICL2900)
- ___ Insurance Coverage (TICL2800)
- ___ Laws and Practices (TICL1800)
- ___ Membership (TICL1040)
- ___ Municipal Law (TICL2100)
- ___ No Fault (TICL4400)
- ___ Premises Liability/Labor Law (TICL2700)
- ___ Products Liability (TICL2200)
- ___ Professional Liability (TICL2300)
- ___ Social Media (TICL4600)
- ___ Sponsorships (TICL4500)
- ___ Task Force on TICL Committees (TICL2400)
- ___ Toxic Tort (TICL4300)

2018 MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	\$275
Attorneys admitted 2011-2012	185
Attorneys admitted 2013-2014	125
Attorneys admitted 2015 - 3.31.2017	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	\$180
Attorneys admitted 2011-2012	150
Attorneys admitted 2013-2014	120
Attorneys admitted 2015 - 3.31.2017	60

OTHER

Sustaining Member	\$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS

Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS

Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS

Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS

Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association

Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association

*Newly admitted = Attorneys admitted on or after April 1, 2016



NEW YORK STATE BAR ASSOCIATION

JOIN OUR SECTION

As a NYSBA member, **PLEASE BILL ME \$40 for Trial Lawyers Section dues.** (law student rate is \$15)

I wish to become a member of the NYSBA (please see Association membership dues categories) and the Trial Lawyers Section. **PLEASE BILL ME for both.**

I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

City _____ State _____ Zip _____

The above address is my Home Office Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ / _____ / _____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:

MEMBER RESOURCE CENTER,

New York State Bar Association, One Elk Street, Albany NY 12207

Phone 800.582.2452/518.463.3200 • FAX 518.463.5993

E-mail mrc@nysba.org • www.nysba.org

JOIN A TRIAL LAWYERS SECTION COMMITTEE(S)

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

- ___ Appellate Practice (TRIA1100)
- ___ Arbitration and Alternatives to Dispute Resolution (TRIA1200)
- ___ Commercial Collections (TRIA4200)
- ___ Construction Law (TRIA3000)
- ___ Continuing Legal Education (TRIA1020)
- ___ Criminal Law (TRIA3300)
- ___ Diversity (TRIA4100)
- ___ Employment Law (TRIA3700)
- ___ Family Law (TRIA4000)
- ___ Lawyers Professional Liability and Ethics (TRIA3800)
- ___ Legal Affairs (TRIA2900)
- ___ Legislation (TRIA1030)
- ___ Medical Malpractice (TRIA2200)
- ___ Membership (TRIA3200)
- ___ Motor Vehicle Law (TRIA3400)
- ___ No Fault Law (TRIA3500)
- ___ Real Property Law (TRIA3900)
- ___ Trial Advocacy Competition (TRIA2700)
- ___ Trial Practice (TRIA2800)
- ___ Website (TRIA4400)
- ___ Workers Compensation (TRIA3600)

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Jury Selection

Peter S. Thomas, Esq.
Peter S. Thomas, P.C., Forest Hills

JURY SELECTION/VOIR DIRE OUTLINE

**By PETER S. THOMAS, P.C.
Attorney at Law / Trial Counsel
108-18 Queens Blvd., 6th Floor
Forest Hills, NY 11375
718-896-7200
www.QueensTrials@gmail.com**

VOIR DIRE literally translated means, to “See and to Tell.” This will be your first and best opportunity to have a direct conversation and open discourse with your prospective jurors. Don’t let this opportunity be wasted. Be prepared and confident when addressing your panel. Have an idea of what type of juror you are looking for before you get to court. Knowing the facts of your case is not enough, you also need to know who your client is, where they come from, and the impression they will make when they take the witness stand. The general rule is to select jurors who are similarly situated to your client, if possible. Jurors can be easily convinced of your arguments if they can relate to your clients’ condition or circumstance.

SUMMONING THE JURY

It is the duty of the court to impanel a fair and impartial jury. When a jury is needed the court shall summon the panel, a group of citizens from which the jury in a specific trial will be chosen. The court will not sustain a challenge to the jury pool unless there has been a radical departure from the statutory scheme, fraud or bad faith is shown.

PRE-VOIR DIRE

The concept of a pre-voir dire stage of the proceeding, while not statutorily enunciated, is clearly a recognized part of the jury selection process. A determination that a prospective juror should be discharged during pre-voir dire screening because of physical impairments, family obligations, juror convenience, or work commitments is a matter within the sole discretion of the court. Thus, though a defendant has a right to a

particular jury chosen, according to law in whose selection he or she has had a voice, that right is subject to the broad discretion of the trial court to examine and excuse prospective jurors before voir dire and to prevent a time-consuming phase of a jury trial from becoming unduly protracted. Prospective jurors who have been sworn to answer questions truthfully, but have not been individually questioned by counsel or selected and sworn as trial jurors can be dismissed by the trial court sua sponte without the exercise of a challenge. The dismissal of jurors in the pre-voir dire phase of trial does not impinge on either party's rights and is warranted out of concern for the burden on jurors.

Thus, it is error for a court to refuse to swear a panel of prospective jurors prior to the beginning of voir dire and the initial screening of the jurors, regarding their knowledge of the case, familiarity with the parties and attorneys, potential witnesses, and their ability to impartially serve on the jury.

QUALIFICATIONS OF PROSPECTIVE JURORS

In order to qualify as a juror, a person must:

- be a citizen of the United States and a resident of the County;
- be not less than 18 years of age;
- not have been convicted of a felony;
- be able to understand and communicate in the English language.

A deaf prospective juror who communicates in signed English is qualified for jury service. Also, a person with significant visual impairment may also serve on a jury.

WHO MAY BE A JUROR?

All litigants in the courts of the state entitled to a trial by jury must have the right to a jury selected at random from a fair cross-section of the community in the county or other governmental subdivision wherein the court convenes. All eligible citizens must have the opportunity to serve on juries in the courts of the state and will have an obligation to serve when summoned for that purpose unless excused.

The Commissioner of Jurors must cause the names of prospective jurors to be selected at random from the voter registration lists, as well as other available lists of the residents of the county as the Chief Administrator of the Courts must specify. Such lists include utility subscribers, licensed operators of motor vehicles, registered owners of motor vehicles, state and local taxpayers, persons applying for or receiving family assistance, medical assistance or safety net assistance, persons receiving state unemployment benefits, and persons who have volunteered to serve as jurors by filing with the Commissioner their names and places of residence. The Commissioner of Jurors must select the names of prospective jurors or cause them to be selected at random from the sources provided by such provision. The selection may be accomplished by mechanical means or by any other method designed to implement the purposes of the article regarding the selection of jurors.

NUMBER OF JURORS IN A CIVIL CASE

Generally, a total of eight jurors including two alternates shall be selected in a civil case. The court may permit a greater number of alternates if a lengthy trial is expected, or for any appropriate reason. Counsel may consent to the use of "non-designated" alternate jurors in which event no distinction shall be made during jury selection between jurors and alternates, but the number of peremptory challenges in such cases shall consist of the sum of the peremptory challenges that would have been available to challenge both jurors and designated alternates.

ALTERNATE JURORS

Whether or not alternate jurors are impaneled is within the trial judge's discretion. Alternate jurors shall be drawn in the same manner as regular jurors, have the same qualifications, and be subject to the same examination and challenges for cause.

Alternate jurors are chosen after the regular panel is completed. They are chosen in the same manner as the main panel and one additional peremptory challenge is

allowed for each two alternate jurors. Such peremptory challenges for alternate jurors cannot be used to strike regular jurors.

An alternate juror shall replace a regular juror who, prior to the time the jury retires to consider its verdict, becomes unable or disqualified to perform its duties. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict. It is within the trial court's discretion to dismiss a juror for cause and replace that juror with an alternate.

VOIR DIRE

Once the panel is established and the prospective jurors are summoned, the court should establish that the prospective jurors are competent. The court has discretion to question the jury pool or to allow the parties or their attorneys to question the prospective jurors regarding their qualifications. The parties have a right to question the prospective jurors with reference to challenges for cause and peremptory challenges in addition to the court's inquiry into the qualifications. The method and control of the voir dire exam is within the discretion of the court. The judge will normally question the panel regarding the general qualifications and allow the attorneys to question the panel regarding challenges for cause and peremptory challenges. The court's discretion is, however, not unlimited, and if clear prejudice is found on appeal an abuse of discretion may be grounds for reversal. Objections to voir dire not made at trial will be deemed waived for purposes of appeal.

Individual jurors may be examined regarding answers given to the general questions or for other good cause as allowed by the court. Questions on voir dire are prepared to elicit information upon which to base a decision to challenge the prospective juror for cause or to exercise a peremptory challenge.

A party may inquire into whether or not the prospective juror would be opposed to awarding punitive damages in a negligence action if the court instructed them that punitive damages might be considered.

During voir dire any reference to insurance should be made with caution. Generally, any reference made to the fact that the defendant is covered by insurance

may result in a mistrial. An attorney, however, may determine whether a prospective juror works for an insurance company doing business with the defendant, such questions should be confined to those necessary to qualify the juror on the particular facts of the case. An attorney should pose questions so as not to bring the subject of insurance before the jury. One method approved by the courts allows the attorney to inquire into a juror's business and upon responses that a juror works for an insurance company the attorney may inquire further. If an improper question is posed, and is not objected to at that time, such objection may be considered waived if the court gives proper jury instructions.

METHOD OF JURY SELECTION

All prospective jurors shall complete a background questionnaire supplied by the court in a form approved by the Chief Administrator. Prior to the commencement of jury selection, completed questionnaires shall be made available to counsel. Upon completion of jury selection, or upon removal of a prospective juror, the questionnaires shall be either returned to the respective jurors or collected and discarded by court staff in a manner that ensures juror privacy. With Court approval, which shall take into consideration concern for juror privacy, the parties may supplement the questionnaire to address concerns unique to a specific case.

Counsel must select prospective jurors in accordance with the general principles applicable to jury selection and using the method designated by the judge. The methods that may be used are:

(1) "**White's method**," as set forth by Part 202 of the Uniform Civil Rules of the Supreme Court and County Court Section 202.33. Conduct of the Voir Dire;

(1) Prior to the identification of the prospective jurors to be seated in the jury box, counsel shall ask questions generally to all of the jurors in the room to determine whether any prospective juror in the room has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(2) After general questions have been asked to the group of prospective jurors, jury selection shall continue in rounds, with each round to consist of the following: (1) seating prospective jurors in the jury box; (2) questioning of seated prospective jurors; and (3) removal of seated prospective jurors upon exercise of challenges. Jurors removed for cause shall immediately be replaced during each round. The first round shall begin initially with the seating of six prospective jurors (where undesignated alternates are used, additional prospective jurors equal to the number of alternate jurors shall be seated as well).

(3) In each round, the questioning of the seated prospective jurors shall be conducted first by counsel for the plaintiff, followed by counsel for the remaining parties in the order in which their names appear in the caption. Counsel may be permitted to ask follow-up questions. Within each round, challenges for cause shall be exercised by any party prior to the exercise of peremptory challenges and as soon as the reason therefore becomes apparent. Upon replacement of a prospective juror removed for cause, questioning shall revert to the plaintiff.

(4) Following questioning and the exercise of challenges for cause, peremptory challenges shall be exercised one at a time and alternately as follows: In the first round, in caption order, each attorney shall exercise one peremptory challenge by removing a prospective juror's name from a "board" passed back and forth between or among counsel. An attorney alternatively may waive the making of a peremptory challenge. An attorney may exercise a second, single peremptory challenge within the round only after all other attorneys have either exercised or waived their first peremptory challenges. The board shall continue to circulate among the attorneys until no other peremptory challenges are exercised. An attorney who waives a challenge may not thereafter exercise a peremptory challenge within the round, but may exercise remaining peremptory challenges in subsequent rounds. The counsel last able to exercise a peremptory challenge in a round is not confined to the exercise of a single challenge but may then exercise one or more peremptory challenges.

(5) In subsequent rounds, the first exercise of peremptory challenges shall alternate from side to side. Where a side consists of multiple parties, commencement of the exercise of peremptory challenges in subsequent rounds shall rotate among the parties within the side. In each such round, before the board is to be passed to the other side, the board must be passed to all remaining parties within the side, in caption order, starting from the first party in the rotation for that round.

(6) At the end of each round, those seated jurors who remain unchallenged shall be sworn and removed from the room. The challenged jurors shall be replaced, and a new round shall commence.

(7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Designated alternate jurors shall be selected in the same manner as described above, with the order of exercise of

peremptory challenges continuing as the next round following the last completed round of challenges to regular jurors. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

(2) "**Struck method**," as set forth by Part 202 of the Uniform Civil Rules of the Supreme Court and County Court Section 202.33. Conduct of the Voir Dire;

(1) Unless otherwise ordered by the Court, selection of jurors shall be made from an initial panel of 25 prospective jurors, who shall be seated randomly and who shall maintain the order of seating throughout the voir dire. If fewer prospective jurors are needed due to the use of designated alternate jurors or for any other reason, the size of the panel may be decreased.

(2) Counsel first shall ask questions generally to the prospective jurors as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires further elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(3) After the general questioning has been completed, in an action with one plaintiff and one defendant, counsel for the plaintiff initially shall question the prospective jurors, followed by questioning by defendant's counsel. Counsel may be permitted to ask follow-up questions. In cases with multiple parties, questioning shall be undertaken by counsel in the order in which the parties' names appear in the caption. A challenge for cause may be made by counsel to any party as soon as the reason therefore becomes apparent. At the end of the period, all challenges for cause to any prospective juror on the panel must have been exercised by respective counsel.

(4) After challenges for cause are exercised, the number of prospective jurors remaining shall be counted. If that number is less than the total number of jurors to be selected (including alternates, where non-designated alternates are being used) plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties (such sum shall be referred to as the "jury panel number"), additional prospective jurors shall be added until the number of prospective jurors not subject to challenge for cause equals or exceeds the jury panel number. Counsel for each party then shall question each replacement juror pursuant to the procedure set forth in paragraph (3).

(5) After all prospective jurors in the panel have been questioned, and all challenges for cause have been made, counsel for each party, one at a time beginning with counsel for the plaintiff, shall then exercise allowable peremptory challenges by alternately striking a single juror's name from a list or ballot passed back and forth between or among counsel until all challenges are exhausted or waived. In cases with

multiple plaintiffs and/or defendants, peremptory challenges shall be exercised by counsel in the order in which the parties' names appear in the caption, unless following that order would, in the opinion of the court, unduly favor a side. In that event, the court, after consulting with the parties, shall specify the order in which the peremptory challenges shall be exercised in a manner that shall balance the interests of the parties. An attorney who waives a challenge may not thereafter exercise a peremptory challenge. Any Batson or other objections shall be resolved by the court before any of the struck jurors are dismissed.

(6) After all peremptory challenges have been made, the trial jurors (including alternates when non-designated alternates are used) then shall be selected in the order in which they have been seated from those prospective jurors remaining on the panel.

(7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Counsel shall select designated alternates in the same manner set forth in these rules, but with an initial panel of not more than 10 prospective alternates unless otherwise directed by the court. The jury panel number for designated alternate jurors shall be equal to the number of alternates plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

(3) "Strike and Replace method," in districts where the specifics of that method have been submitted to the Chief Administrator by the Administrative Judge and approved by the Chief Administrator for that district. The strike-and-replace method must be approved only in those districts where the Chief Administrator, in his or her discretion, has determined that experience with the method in the district has resulted in an efficient and orderly selection process; or

(4) other methods that may be submitted to the Chief Administrator for use on an experimental basis by the appropriate Administrative Judge and approved by the Chief Administrator.

The trial judge must direct the method of jury selection that will be used for the voir dire from among such methods.

CHALLENGES FOR CAUSE

A judge has an absolute duty to see that the jury selected is fair and impartial. A juror may be removed for cause if a challenge against him exists which would likely

affect his competency at trial. A juror's ability to be fair and impartial is impaired if, because of his or her relationship to one of the parties, occupation, past experiences, or any other reason, the juror would normally lean in favor of one party. To strike for cause there must be a clear showing that a juror would not be able to follow the court's instruction. When there are circumstances raising some question regarding a prospective juror's qualifications, and such prospective juror assures the court that the circumstances in question will not affect his or her judgment, the prospective juror's promise is entitled to considerable deference.

PEREMPTORY CHALLENGES

After both parties have had an opportunity to challenge for cause, the court must permit them to peremptorily challenge any remaining prospective juror, and such juror must be excluded from service. Counsel shall exercise peremptory challenges outside of the presence of the panel of prospective jurors. The plaintiff must exercise his peremptory challenges first and may not, after the defendant has exercised his or her peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box.

A peremptory challenge is an objection to a prospective juror for which no reason need be given. Upon any peremptory challenge, the court must exclude the person challenged from service. Peremptory challenges are not required by the United States Constitution. Thus, without more, the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury.

The sole purpose of peremptory challenges is to permit litigants to assist the government in the selection of an impartial jury. Thus, it is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise.

Caution: A sworn juror may be challenged only for cause and not peremptorily. If a district court's ruling on a peremptory challenge results in the seating of a juror who should have been dismissed for cause, reversal is required. However, a defendant's exercise of peremptory challenges is not denied or impaired when the defendant

chooses to use a peremptory challenge to remove a juror who should have been excused for cause. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.

CPLR § 4109, dealing with peremptory challenges, indicates, “the plaintiff or plaintiffs shall have a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. The defendant or defendants (other than any third-party defendant or defendants) shall have a combined total of three peremptory challenges, plus one peremptory challenge for every two alternate jurors. The court, in its discretion before the examination of jurors begins, may grant an equal number of additional challenges to both sides as may be appropriate. In any case where a side has two or more parties, the court, in its discretion, may allocate that side's combined total of peremptory challenges among those parties in such manner as may be appropriate.”

The peremptory challenge also bolsters confidence in the system for the parties, those to whom such confidence matters most. The mere appearance of impartiality created by the peremptory challenge process can reassure parties of a trial's integrity. Additionally, the process of weeding out bias in the jury may impress on the remaining jurors their duty to remain impartial.

PREPARATION

The key to any voir dire is preparation. The lawyer should be intimately familiar with the facts and issues in the case. Prior to the trial, a lawyer should develop themes to proceed along and present during the case. Themes for the case should be based on the facts and personalities of that specific case and present an easily understood and believable view of the facts to the jury. Once the themes of the case are identified, this will aid the lawyer in determining which type of jurors would be best suited for his or her case. Several different themes should be explored and developed, however. Many times the jury that is empaneled will be quite different from the jury the lawyer was

trying to seat, and it may be necessary to change the emphasis of the lawyer's presentation to appeal to the jurors selected.

MAKING JURORS FEEL AT EASE

One should remember that all people are prejudiced, and it is the lawyer's job to discover the prejudices of the prospective jurors. Determining such prejudices in a courtroom setting is a difficult task. The courtroom is an intimidating place for most people. The trial will be many people's first exposure to the court system, and most prospective jurors will be apprehensive about what is going to happen. An anxious juror will not open up to an attorney. In order to perform a productive voir dire, the lawyer's first job should be to put the jury at ease.

A lawyer should take the time in the beginning of jury selection to explain the procedures and functions of the court, the lawyers, and the jury itself. A lawyer should also explain the reason for the questions which must be asked in voir dire. It should be clear to the jury that the lawyer is not asking questions for personal curiosity or trying to pry into a prospective juror's private life unnecessarily. The function of voir dire is to determine if there is anything in a person's background which could affect that person's fairness in the case. The lawyer is trying to confirm that each person selected could consider the evidence presented, and set aside any prejudices to render a verdict based only on the evidence. The purpose and necessity of objections should also be explained to the jurors. Once the prospective jurors understand what will happen and why, they will be less anxious and more willing to listen.

CREATE A RELATIONSHIP WITH THE JURY

When conducting the voir dire, the lawyer should take every opportunity to personalize the client and himself or herself. Use the client's first name when referring to him or her. If the client is a corporation, personalize the representative, allow the jury to form a relationship with him or her. The atmosphere should be somewhat informal allowing the lawyer to create a relationship between the client and the jury and also between the lawyer and the jury. One must be careful, however, not to over-dramatize

the informality. The manner of the lawyer should be matter-of-fact so that the jury does not consciously realize that the lawyer is working to create a relationship with the jury.

The lawyer may reveal something about himself or herself when first addressing the jury. Such a disclosure may facilitate the relationship with the jury and let them know that disclosures of a personal nature are expected and acceptable during the voir dire. The lawyer provides a model for the potential jurors. If the lawyer does not appear interested or open, the jurors will respond in the same manner. Also, if a potential juror reveals an interest or a circumstance, which the lawyer shares, the lawyer should not hesitate to mention this. Any identification between the lawyer and potential jurors serves to build the rapport between the two.

Empathy with the jurors' situation is also necessary to develop a relationship. The lawyer should emphasize the special job of a jury and let the potential jurors know that the lawyer understands that their lives have been interrupted. Most people have a negative impression of lawyers in general, and are anxious to have such an idea confirmed. When questioning the jury the lawyer should be open and willing to listen without judging. It may be beneficial to memorize the names and occupations of the potential jurors, if possible. Although some consider memorizing the names of potential jurors to be a contrived ploy, it is an early sign to the potential jurors that the lawyer has worked hard and is prepared for the case. Also, calling people by their name will appeal to their ego and communicate a sense of friendliness.

ESTABLISH CREDIBILITY

In the initial stage of voir dire, a lawyer should also strive to establish credibility with the jury panel. The lawyer should not try to put the jury in awe of his or her abilities. If the prospective jury perceives the lawyer as clever and brilliant, this may alienate some, and they may develop sympathy for the other side. A lawyer may consider cultivating the image of the underdog and ask for the jurors' help in overcoming the clever, opposite counsel. However, any appearance of unfairness to the opposite counsel should be avoided. The lawyer should be polite and courteous at all times.

Preparation and an intimate working knowledge of the case are the keys to establishing credibility. Potential jurors will be able to tell if the lawyer is operating without sufficient knowledge of the case. Also, preparation will allow the lawyer to stand confident before the court and the potential jurors. Even if a totally unexpected event takes place, the lawyer should handle it with an air of confidence and ease. A lawyer's own insecurity or lack of ease can be a fatal blow to credibility with potential jurors.

The lawyer should incorporate the above suggestions into his or her own personal style. It will usually be apparent when a lawyer is affecting a characteristic for the jury's benefit. Most people are unable to consistently and believably maintain an uncomfortable style. Part of the jury's credibility assessment will be whether or not the lawyer seems authentic and honest. If the jury does not believe that the lawyer is authentic, much of the lawyer's credibility is lost.

DECLARE WEAKNESSES

The lawyer should also declare any weaknesses in the case or in the client's character during voir dire. This conveys sincerity and softens the impact of the information when presented by opposite counsel. Such a disclosure may also assist the lawyer in picking the jury. If the client is a corporation, which has been the subject of negative publicity, or an individual which has been convicted of a felony, the attorney will want to address such issues and make the jurors commit to deciding the case fairly despite such weaknesses. Hiding the weaknesses during jury selection only allows the opposite counsel to bring them out during trial, when such revelations can be much more damaging to the case and to the credibility of the lawyer.

TYPES OF QUESTIONS

The attorney should make it clear that he or she cares about the client and is interested in each juror individually. Voir dire allows jurors to express their attitudes and thoughts on issues. Voir dire is the only opportunity for the jurors to express their opinions, except when they render the verdict. Open-ended questions allow jurors to

tell the lawyer about their experiences and background. Many will consider it flattering when an attorney takes a personal interest in their opinions and experiences. Closed questions, however, may be useful when the questions are directed at the entire panel to seek out specific opinions or when attempting to pin a juror down on an issue.

Unnecessary or embarrassing questions should be avoided whenever possible. If an embarrassing question is necessary it should always be prefaced with an explanation regarding why such information is needed. The lawyers should avoid words like bias, prejudice or prejudgment when questioning the jury panel. Such words have a negative connotation and will usually draw an automatic negative response. The attorneys should not use complex language, and any legal terms should be defined.

Many times a lawyer will be able to identify a potential juror with strong opinions against the client's position. If the lawyer questions the potential juror in an attempt to have the juror disqualified, many fear that the opinions would influence the rest of the panel. The influence, however, would be much greater if that person is left on the panel and takes part in rendering the verdict. Allowing the potential juror to voice his or her opinions may result in a dismissal for cause, thus preserving a peremptory challenge. Also, the lawyer may be able to defuse potentially dangerous ideas or opinions, which could otherwise influence other potential jurors.

The plaintiff's lawyer should also anticipate opposite counsel's questions when developing the voir dire questions. If defense counsel's question can be predicted, the plaintiff may be able to mitigate the input somewhat. For example, in a case with a large corporation as a defendant, defendant's counsel may elicit commitments from the panel that they will not decide the case based on sympathy. A plaintiff may defuse this somewhat by asking if the prospective jurors understand that the purpose of putting on evidence is to develop the facts of the case and not to create sympathy.

During the questioning the lawyer may determine that it would be beneficial to have one of the jurors serve as foreperson of the jury. The lawyer may consider directing subtle questions at such a juror to bring out the leadership qualities of the juror.

When phrasing the questions for voir dire the lawyer should avoid the use of overbroad statements. For example, if a lawyer represents an insurance company in a case involving the refusal of benefits and asks the panel if they feel that insurance companies sometimes deny valid claims, most of the panel will raise their hands. Those that do not respond are jurors who would favor the lawyer's position. The lawyer has now identified his or her strongest jurors for the other side to strike. A more effective course would be to narrow the question, replacing "sometimes" with "always" or "routinely." Narrow phrasing may identify jurors who would be dangerous to your case without revealing your strongest jurors.

RELUCTANT OR SHY MEMBERS OF THE PANEL

Often a potential juror will be reluctant to answer questions with more than yes or no answers. This may happen despite a lawyer's best attempts to create a friendly conversational atmosphere. In order to put such people at ease a lawyer should demonstrate empathy with the person's situation and show genuine interest in the person's answers. After putting the person at ease start out with easy questions, like questions about his or her employment and hometown. Once the person starts talking carefully return to the opinion questions.

DIFFICULT MEMBERS OF THE PANEL

Another problem may occur if a person is openly hostile or defensive to the lawyer's questions. In such a situation it is very easy to get into argument with the potential juror and become frustrated. Both responses can be deadly injuries to the lawyer's credibility. Never argue with a member of the jury panel. Always be polite and courteous. Showing anger or insecurity will only diminish the lawyer in the minds of the other potential jurors. If a person presents an openly hostile attitude the lawyer must deal with it at that time. Avoiding a hostile member of the panel will also cause a loss of credibility. The lawyer should politely, yet firmly, inquire into the reason for the potential juror's hostility and allow the juror to talk. Many times the judge will dismiss

such a juror for cause and the lawyer may gain credibility by tactfully handling a situation.

FAVORABLE MEMBERS OF THE PANEL

Many lawyers will avoid questioning a favorable member of the panel hoping that the opposite counsel will overlook the juror when making peremptory strikes. Such a ploy may work in certain circumstances. Often it is obvious to all sides when a person holds opinions favorable to one side, and a peremptory challenge of such a person is almost guaranteed. When such a situation arises the lawyer must accept that such a juror will be dismissed. The lawyer, however, may still want to give the juror an opportunity to voice his or her opinions as to why someone should favor the lawyer's position.

DISQUALIFYING A POTENTIAL JUROR

If the questions reveal a prejudice held by a potential juror the lawyer should attempt to make the potential juror disqualify himself or herself. In order for such a potential juror to be dismissed for cause the lawyer must extract a statement from the potential juror affirming that he or she could not set aside his or her prejudice and give fair consideration to the evidence.

A sympathetic approach to the potential juror is usually the most successful in acquiring a disqualifying statement. Such a statement is difficult to acquire and must be coaxed out of a juror. Questions should be phrased regarding the jurors "beliefs" and "opinions." The juror must admit that it would take more evidence than that required by the law in order for the juror to find against his or her prejudice.

If a potential juror does not believe that punitive damages or damages for pain and suffering should be awarded, the plaintiff's attorney would want to have the person removed. An attempt to have the person disqualify himself or herself as a juror may be conducted as follows:

Q. As a juror, you understand that you are obligated to follow the law as instructed by the judge?

Q. Many people, including myself, disagree with different aspects of the law, and don't you agree that it would be difficult for someone who strongly disagrees with a point of law to render a verdict based on that law?

Q. It is fair to the parties in this action for them to know that each juror will discharge their duties in accordance with the law, based on the evidence presented. Don't you agree?

Q. You understand, don't you, that my client, Izveri Painful, is asking for monetary compensation (punitive damages) for the injuries he received?

Q. Mr. Painful is entitled to know that you will apply the law in this case objectively, even if you disagree with the law. That is fair isn't it?

Q. Part of the damages includes pain and suffering (punitive damages), and as a juror you would be responsible for awarding such damages. If you feel it would be difficult for you to consider these damages as a valid part of the claim, that is perfectly understandable, but Mr. Painful is entitled to a jury that can apply the law as instructed by the judge. Do you think that your feelings toward this type of damages would make it difficult for you to accept the law regarding such damages?

Q. It would probably have to be an exceptional case for you to consider awarding such damages wouldn't it?

Another situation where an attorney may attempt to disqualify a potential juror occurs when the client is a defendant in a case where the plaintiff's situation could invoke the sympathy of a potential juror who has experienced similar circumstances. An attempt to disqualify such a person may be conducted as follows:

Q. I understand that because of your experiences you may have sympathy for the plaintiff's situation. That is certainly understandable, but you understand, don't you, that a juror must not let sympathy interfere with his or her decision in the case?

Q. We all feel some sympathy for the plaintiff because he was injured, but if that were allowed to influence the decision, then my client would not be getting a fair trial, would he?

Q. Don't you agree that my client is entitled to have the case decided on the facts of the case?

Q. If you felt that your previous experiences or any natural sympathy you feel toward the plaintiff would influence your decision as a juror, you would tell us, wouldn't you?

Q. Do you feel that due to your previous experience and any natural sympathy that it would be difficult for you to decide this case, based only on the facts?

The lawyer should tread lightly when pursuing the disqualification of a potential juror. If the prospective juror states firmly that he or she can be fair, further questioning may alienate that prospective juror and others. If the juror will not disqualify himself or herself, make the juror commit to setting aside prejudices and deciding the case fairly. Also make such a juror promise not to influence other jurors regarding such a prejudice. The lawyer may want to add that if someone else attempts to influence the juror regarding such prejudice, the juror will recognize such an attempt and disregard it.

SEEKING COMMITMENTS FROM JURORS

During voir dire, the lawyer will also want to have the jurors commit to following the law and awarding the client a judgment if the client's case is proven. Such a commitment may be inquired into when questioning the panel generally, but it is more effective when an affirmative promise is extracted from an individual juror. The plaintiff's lawyer may also inquire as to whether or not a prospective juror would award a large verdict if the evidence substantiated a large verdict. Many people feel that it is unethical for someone to collect a large amount of punitive damages in a case.

As noted above, if such a prospective juror will admit that he or she could not award money damages if the case is proven, the judge may dismiss that prospective juror for cause. Even if the judge will not dismiss the prospective juror, a peremptory strike may be appropriate. If counsel does not wish to use a peremptory challenge, then the potential juror must commit to set aside his or her prejudices and decide the case fairly.

Defense counsel, especially those representing large or wealthy defendants, may seek a commitment that any award will be based only on the facts, and comparative wealth will not be considered. Pursuing such a commitment, however, should be

carefully considered and formulated. It is possible that such a line of questioning could emphasize the wealth of the defendant in the jurors' minds rather than minimize that factor.

CATCHALL QUESTIONS

At the end of the voir dire a lawyer should always indicate that he is about to finish and ask the panel if there is anything that has not been mentioned which could affect a juror's ability to be fair and impartial. No matter how complete the voir dire someone may hold information back waiting for the lawyers to ask specifically about such information. If the lawyer makes it clear that voir dire is almost complete a general open-ended question gives a prospective juror an opportunity to reveal any information that they may have withheld.

ANTICIPATING JURORS' REACTIONS

Predicting others' behavior is always an uncertain business, but there are general principles which a lawyer may rely on. It has been suggested that the facts of the case are the most important predictors of a jury's decision. The next variable considered is the credibility of the witnesses, then the effectiveness of the lawyers, and finally the jury's own internal factors. The attorney must work with the facts and present them in an effective clear manner to the jury. The lawyer should also attempt to personalize the client and his or her witness and begin to build up their credibility in jury selection. The effectiveness of the lawyer will depend on the considerations mentioned above. The lawyer may be able to manipulate the last factor by selecting jurors during voir dire that will be open to the client's case.

Generally, a lawyer should look for characteristics which allow a prospective juror to identify with the client. People will naturally favor a side if they can imagine themselves in the same position. However, if a prospective juror identifies with the client through a shared occupation, through race or ethnic background, or some other factor obvious to the other jurors, it may not be wise to pick that juror. Such a person may normally be an excellent juror for the client, but if that person is the only one

sharing that characteristic with the client, he or she will be self-conscious of the similarity. Such a juror may actually lean towards the other side in an effort to illustrate his fairness and impartiality.

If a person was previously a party to a lawsuit, that person will most likely favor that same side of the case. In a personal injury case, a person who was previously injured will require some probing. If the person did not employ a lawyer and settled the case satisfactorily with the insurance company, that person may be more favorable for the defense. Also, if the person was unable to collect due to a lack of insurance, this may favor the defense. If the person hired a lawyer to pursue the claim, that person would probably favor the plaintiff. A person who has been a defendant in a lawsuit will generally be a defendant's juror, but proper investigation into the circumstances should always be explored.

Another factor to consider is gender. In certain cases a person may favor another of the same gender if the injury is one which may be unique to people of that gender. Examples of such a case would be sexual harassment charges made against men wherein other men may be more sympathetic toward the defendant than women. Also, women may favor a woman who has been the victim of a defective birth control device. Generally, however, it appears that men and women both tend to be less forgiving toward those of the same gender rather than someone of the opposite gender.

NONVERBAL COMMUNICATION

A key to determining the attitudes and beliefs of potential jurors is nonverbal behavior. Many times a juror's underlying feelings are communicated more clearly through his or her facial expressions or movements rather than his or her verbal answers. Also, a person's dress and carriage can assist an attorney in identifying background similarities between the juror and the client. Frequent eye contact and affirmative nods or smiles tend to reveal a juror's disposition toward a certain side.

There are many different nonverbal signals which could reveal a potential juror's attitudes. The following is a list of some nonverbal cues which may be revealing:

- (1) eye contact;

- (2) facial expressions;
- (3) posture;
- (4) gestures;
- (5) speech;
- (6) dress and accessories (e.g. briefcases, purses, books, etc.).

GROUP DYNAMICS OF THE JURY

Although much focus is placed on an individual juror's beliefs and opinions, the jury should also be viewed as a whole. The jury may be considered as a group of people engaged in a multi-party negotiation. Keeping this view in mind, a lawyer should exercise challenges based on how a potential juror would affect jury functioning along with the potential juror's background and opinions. Categorizing jurors may help a lawyer predict how a juror will affect the group dynamics of the jury. Four categories may be used to classify potential jurors' personalities:

(1) **Leaders** exert the most control over the other jurors. Leaders are usually talkative, sociable and initiate interaction with others.

(2) **Followers** are usually submissive and support members of the jury that appeal to them. Followers may be easily influenced, lack assertive and verbal skills, and respond with short answers.

(3) **Negotiators** seek compromise and the maintenance of order. They act as arbitrators and attempt to resolve conflicts. They may see both sides of an issue and seek a compromise based on others' feelings rather than their own view of the facts.

(4) **Resisters** will not change their views once they have formulated an opinion. They are rigid people who are often outspoken and develop opinions quickly. They are articulate and do not waffle in their opinions.

GRADING SYSTEM

It is a good idea to develop some type of system for ranking or grading potential jurors. Such systems vary from lawyer to lawyer. Some use plus and minus signs; some use numbers or letters to indicate a potential juror's attitudes. Such a system is

important to provide a shorthand method for recording impressions of the potential jurors. When evaluating the members of the panel the following factors should be considered:

- (1) physical appearance;
- (2) economic status;
- (3) similar experiences;
- (4) attitudes expressed;
- (5) leadership qualities.

COURTROOM/JURY CONSULTANTS

In the last decade trial lawyers across America have found it very useful to retain the expertise of courtroom consultants. More often than not consultants are psychologists or sociologists who have expertise in linguistics and have had extensive research and experience in the judicial process. Consultants offer services ranging from conducting mock trials to countywide surveys based upon potential jury voir dire. Experience in jury trials will often allow attorneys to develop skills to determine the feelings and responses of potential jurors simply by the body language demonstrated during voir dire. Consultants, however, often sit anonymously in the courtroom during jury selection in order to view juror responses. The consultant's views can be immensely valuable in choosing those persons who are best suited for the case.

When preparing a case lawyers usually become so immersed in the facts and their arguments that it is difficult to maintain objectivity. Such a response is normal because the more people are exposed to information the more likely they are to believe it is true. Trial consultants can provide an objective viewpoint to develop strategy and evaluate reactions of potential jurors.

Many consultants observe that they are often brought into the case too late. Consultants may work best when retained six months before trial in order to evaluate the strength of a case. One type of case that consultants believe will benefit least from research is one where everything rests on a party's credibility. A consultant in that case,

however, may still be valuable to assist the attorney when choosing a jury which may believe the party's story.

A consultant is usually helpful, but the relative cost of a consultant, when compared to the damages involved, should be kept in mind by the lawyer. A convenient rule of thumb is that a consultant may not be justified if the damages involved are less than \$500,000. Other factors, however, may justify the use of a consultant. The case may be the first of many similar cases against a defendant, and a victory for the plaintiff could set a precedent. Another case which may justify the use of a consultant would be one which involved a party whose reputation would be greatly affected by the outcome of the case.

CONCLUSION

Many times the best tool in jury selection is the lawyer's intuition combined with thoughtful case-specific questions posed to the jury panel. Such questions are the result of careful preparation by the lawyer. The lawyer should look at the facts and personalities involved in the case and develop a "theme" which the lawyer will use to present the case. The lawyer should then develop a profile of the "ideal juror" for that case. Once the previously mentioned projects are completed it should be apparent which factors will be important in the jury selection process and these factors should be used to develop the questions for voir dire.

Motions in Limine

Expert Witnesses

Hon. Michelle Weston

Supreme Court Justice, Kings County, Brooklyn

Motion Practice During Trial (Motions *in limine* through Post Trial Motions)

I. Motions that should be made before trial

1. Summary Judgment Motions.

- a. Timing. CPLR 3212(a) provides that a summary judgment shall be made no later than a date set by the court, which shall be no earlier than 30 days after the filing of the note of issue. In the event no such date is set, a summary judgment motion shall be made no later than 120 days after the note of issue has been filed. This deadline is strictly enforced and cannot be extended without leave of the court upon a finding of good cause (see Brill v City of New York, 2 NY3d 648, 652 [2004]; but see Bennett v St. John's Home, 128 AD3d 1428 [4th Dept.] [plaintiff waived claim that defendant's summary judgment motion was untimely by stipulating to extend the 120-day period before the motion was made and where the court accepted the stipulation], affd 26 NY3d 1033 [2015] [declining to consider the timeliness issue as unpreserved]). Good cause requires a "satisfactory explanation for the untimeliness" of the motion, regardless of the merits of the motion (Brill v City of New York, 2 NY3d at 652; see Miceli v State Farm Automobile Ins. Co., 3 NY3d 725 [2004]). Thus, an untimely, but meritorious, summary judgment motion will not be considered absent a showing of good cause for the delay. To be considered, an argument for good cause must be raised in the initial moving papers, and not for the first time in reply papers (see Nationstar Mortgage LLC v Weisblum, 143 AD3d 866 [2d Dept. 2016]; Goldin v New York and Presbyterian Hosp., 112 AD3d 578 [2d Dept. 2013]; Bissell v New York State Dept. of Transp., 122 AD3d 1434 [4th Dept. 2014]; Cabibel v XYZ Assoc., LP, 36 AD3d 498 [1st Dept. 2007]). **Note 1:** A local rule or a judge's part rules may shorten the 120-day period. In Kings County, Uniform Civil Term Rules of the Supreme

Court, Part C, Rule 6 requires litigants to move for summary judgment no later than 60 days after filing of the note of issue. The Second Department has upheld the 60-day deadline and has refused to extend it without a showing of good cause (see Goldin v New York and Presbyterian Hosp., 112 AD3d 578 [2d Dept. 2013]). In some cases, a preliminary conference order setting forth a date by which summary judgment motions must be filed will trump other rules (see Crawford v Liz Claiborne, 11 NY3d 810 [2008] [where local rule and judge's rule differed, local rule prevailed since the preliminary conference order directed summary judgment motions to be filed in accordance with the local rule]; Waxman v Hallen Construction Company, Inc., 139 AD3d 597 [1st Dept. 2016] [no good cause to extend the 60-day deadline set forth in a preliminary conference order of one judge simply because the reassigned judge's rules allowed for 120 days]). **Note 2:** A court can consider an untimely cross-motion for summary judgment if (1) the initial motion is timely, (2) the cross-motion involves the same or substantially similar issues as the initial motion, and (3) the cross-motion is a true cross-motion under CPLR 2215 (see Kershaw v Hospital for Special Surgery, 114 AD3d 75 [1st Dept. 2013]).

- b. Substance. The movant must make a prima facie showing of entitlement to judgment as a matter of law by submitting proof, in admissible form, demonstrating the absence of any material issues of fact (Pullman v Silverman, 28 NY3d 1060, 1062 [2016], citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). If this initial burden has not been met, the motion must be denied regardless of the sufficiency of the opposing papers (see Pullman v Silverman, 28 NY3d at 1062, citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; but see Oleg Barshays D.C., P.C. v State Farm Insurance Co., 14 Misc.3d 74, 76 [App. Term, 2d & 11th Jud. Dists.

2006] [although movant's submissions did not establish a prima facie case, the court invoked its power to search the record and considered the opposition papers in determining that a prima facie case existed]). However, if this initial burden has been met, the burden then shifts to opponent to present proof, in admissible form, showing the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d at 324). With respect to the submissions of both the movant and the opponent, bare, conclusory assertions are insufficient (see Pullman v Silverman, 28 NY3d at 1062, citing Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853). Also insufficient are expert conclusions that assume facts not supported by the evidence (see Abrams v Bute, 138 AD3d 179, 195 [2d Dept.], lv denied 28 NY3d 910 [2016] [internal citations omitted]). **Note:** Any movant for summary judgment runs the risk that the court will invoke its power to search the record and grant summary judgment in the opponent's favor without the need for a cross motion (see CPLR 3212[b]). This power, however, is limited to issues that were presented to the court on the motion (see Dunham v Hilco Construction Co., 89 NY2d 425 [1996]).

2. Motions pursuant to Frye v United States (293 F. 1013 [1923])
 - a. Timing. While there is no prescribed time period within which to move for a Frye hearing, it is highly advisable that such a motion be made well in advance of trial to avoid delaying the proceedings and wasting the jury's time (see Larose v Pathare, 29 Misc3d 1203[A] [Sup. Court Richmond County] [2010]; Drago v Tishman, 4 Misc3d 354 [Sup. Court, N.Y. County 2004]).
 - b. General Acceptance. Frye sets forth the threshold standard for admissibility of novel scientific evidence in New York State. Novel scientific evidence is admissible

as long as it is based upon “a principle or procedure [that] has ‘gained general acceptance’ in its specified field” (People v Wesley, 83 NY2d 417, 422 [1994], quoting Frye v United States, 293 F 1013, 1014). “[T]he particular procedure need not be ‘unanimously endorsed’ by the scientific community but must be ‘generally accepted as reliable’” (People v Wesley, 84 NY2d at 423, quoting People v Middleton, 54 NY2d 42, 49 [1981]). ‘Deduction, extrapolation, drawing inferences from existing data, and analysis are not novel methodologies and are accepted stages of the scientific process’” (*id.* quoting Ratner v McNeil-PPC, Inc., 91 AD3d 63, 71 [2d Dept. 2011]).

The burden of establishing general acceptance rests on the party seeking to introduce the scientific evidence (see Del Maestro v Greco, 16 AD3d 364 [2d Dept. 2005]). In assessing the reliability of novel scientific evidence, courts must not be concerned with the conclusions themselves, but rather the reliability of the scientific principles and methodologies on which those conclusions are based (see Parker v Mobil Oil Corp., 7 NY3d 434, 446-447 [2006]; Lugo v New York City Health & Hospitals Corp., 89 AD3d 42, 56 [2d Dept. 2011]). While the absence of textual support directly on point is relevant in assessing a theory’s weight, it is irrelevant in determining the theory’s admissibility (LaRose v Corrao, 105 AD3d at 1009-1010, citing Zito v Zabarsky, 28 AD3d at 46). As long as a “‘synthesis of various studies or cases reasonably permits the conclusion reached by the . . . expert,’” the reliability of the expert’s theory will have been demonstrated (LaRose v Corrao, 105 AD3d at 1010, quoting Zito v Zabarsky, 28 AD3d 42, 44 [2d Dept. 2006]).

Underscoring the reliability component is the Second Department’s decision in Krackmalnik v Maimonides Medical Center (142 AD3d 1143 [2d Dept. 2016]). In Krackmalnick, plaintiff’s expert espoused a novel theory

of causation relating to infant plaintiff's cerebral palsy (2014 WL 12625065 [Sup Ct, Kings County 2014]). Infant plaintiff was born with normal Apgar scores, no respiratory distress, no organ damage and no spasticity. She had a normal brain CT scan shortly after birth followed by a normal brain MRI four months later. Nevertheless, she began to exhibit neurological deficits, which became more profound and catastrophic over time. After holding a *Frye* hearing, Supreme Court rejected, as scientifically unreliable, plaintiff's expert's proposed theory that the child's neurological deficits were caused by perinatal hypoxic ischemic encephalopathy. In doing so, the Court rejected plaintiff's expert's theory that infant plaintiff's normal MRI four months after birth was the result of pseudonormalization. In the absence of any radiologic proof of brain atrophy months after infant plaintiff's birth, Supreme Court dismissed the scientific reliability of Dr. Adler's theory that infant plaintiff's progressive neurological disability was due to cerebral palsy associated with intrapartum hypoxia.

On appeal, the Second Department reversed. The Court noted that scientific reliability is not measured by whether "a majority of the scientists involved subscribe to the conclusion," but by whether the theory espoused follows "generally accepted scientific principles and methodology in evaluating clinical data to reach [the] conclusion[]" (142 AD3d at 1144, quoting *Zito v Zabarsky*, 28 AD3d at 44). The Second Department concluded that plaintiff's expert's testimony was not based on novel theories and, in fact, did not even warrant a *Frye* hearing (*id.*).

- c. *Foundation*. Even if novel scientific evidence meets the threshold "general acceptance" test under *Frye*, it still must meet the requirement for a proper foundation, *i.e.*, a determination that "the accepted methods were appropriately employed in a particular case" (*Parker v*

Mobil Oil Corp., 7 NY3d at 447). “[E]ven though [an] expert is using reliable principles and methods and is extrapolating from reliable data, a court may exclude the expert’s opinion if ‘there is simply too great an analytical gap between the data and the opinion proffered’” (Cornell v 360 West 51st Street Realty, LLC, 22 NY3d 762, 781 [2014], quoting General Electric Co. V Joiner, 522 US 136, 146 [1997]). Thus, where the scientific studies do not show causation, but rather support a “risk,” “linkage” or “association” between the scientific theory and the claimed injury, the expert’s testimony should be precluded as without foundation (see Cornell v 360 West 51st Street Realty, LLC, 22 NY3d at 781).

3. Motions to Preclude Expert Testimony.

- a. Timing. CPLR 3101(d)(1)(i) provides that, upon request, “each party shall identify each person upon whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion.” The ostensible purpose of the statute is to promote satisfactory disclosure so that the parties may adequately prepare for trial (see Silverberg v Community General Hosp. of Sullivan County, 290 AD2d 788 [3d Dept. 2002]). Contradictory testimony at trial may surprise and prejudice adversaries who have the right to rely on the expert disclosure in preparation of their defense (see Caccioppoli v City of New York, 50 AD3d 1079 [2d Dept. 2008]; Gregory v Mulligan, 266 AD2d 344 [2d Dept. 1999]). The problem is that there is no prescribed time within which a party is required to respond to a demand for an expert disclosure notice (see Rivers v Birnbaum, 102 AD3d 26 [2d Dept. 2012]). Indeed, a party can wait until the eve of trial to submit a CPLR 3101(d) notice, which effectively defeats

the purpose of the statute. A late CPLR 3101(d) notice precludes a party from effectively moving for summary judgment. Moreover, it may prompt a late request for a Frye hearing, or a late motion to preclude an expert from testifying on the ground that the proposed testimony contained in the expert disclosure notice is outside the scope of the pleadings. Such motions should be made in advance of trial if the basis for the motion is evident before the trial begins (see Rivera v Montefiore Medical Center, 28 NY3d 999 [2016] [trial court did not abuse its discretion in denying, as untimely, plaintiff's mid-trial motion to preclude defendant's expert testimony on the ground that the expert's CPLR 3101[d] notice was deficient]). However, in the absence of timely disclosure, it is almost impossible for the opponent to make such motions before jury selection begins.

- (i) In Rivers v Birnbaum (102 AD3d 26), the Second Department acknowledged that there is no time within which a party must comply with a demand pursuant to CPLR 3101(d)(1)(i). There, defendants failed to respond to plaintiffs' request for expert disclosure more than a year after the request had been made. Plaintiffs had submitted their own expert disclosure notice and filed a note of issue before receiving any response to their request. When defendants moved for summary judgment, plaintiffs sought to preclude defendants' expert affirmations on the ground that defendants failed to respond to plaintiff's demand for expert disclosure pursuant to CPLR 3101(d)(1)(i) before the note of issue was filed. In rejecting plaintiff's argument, the Second Department concluded that CPLR 3101(d)(1)(i) "does not specify when a party must disclose its expected trial experts upon receiving a demand," nor does it set forth any sanction for noncompliance (id. at 35). Citing to the statute's language and its purpose of

promoting prompt settlements, the Court opined that the statute contemplates that disclosure might not occur until close to the commencement of trial (id. at 37-38). Nevertheless, the Court acknowledged the possibility that a trial court, in its discretion and under its authority to supervise discovery, may impose its own deadline for complying with a demand pursuant to CPLR 3101(d)(1)(i), as well as its own sanctions for noncompliance (id. at 39)

- b. Qualifications. A witness need not be a specialist in a particular field in order to qualify as an expert. As long as the witness is skilled in a particular field through experience, study or observation, the witness is qualified to render an expert opinion in that field (Meiselman v Crown Hts. Hosp., 285 NY 389, 398-399 [1941]; de Hernandez v Lutheran Medical Center, 46 AD3d 517 [2d Dept. 2007]). In the end, it is left to the trial court's discretion to determine whether an expert is qualified to testify (see People v Jones, 171 AD2d 691 [2d Dept. 1991]).
- b. Admissibility. The decision to admit expert testimony remains within the trial court's discretion (see People v LeGrand, 8 NY3d 449, 455-456 [2007]; De Long v County of Erie, 60 NY2d 296 [1983]). To be admissible, an expert's testimony must be (1) necessary to explain something that is outside the ken of the jury and from which the jury would benefit and, (2) relevant. Expert testimony is admissible "where the conclusions to be drawn from the facts 'depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence'" (People v Cronin, 60 NY2d 430, 432 [1983], quoting Dougherty v Milliken, 163 NY 527, 533 [1900]). Thus, issues that call for a professional opinion or technical knowledge will often require testimony from an

expert. In cases that turn on eyewitness identification, with no corroborating evidence, a jury would benefit from expert testimony on the accuracy of the eyewitness identification (see People v LeGrand, 8 NY3d 449, 456-457 [2007]; see also People v Boone ___ NY3d ___, 2017 NY Slip Op 08713 [December 14, 2017] [where a witness's identification of defendant is at issue, and the witness and the defendant are of different races, the court, upon request, is required to charge the jury on the cross-race effect, even in the absence of expert testimony]).

c. At Trial Ruling-An example

Plaintiffs sought to supplement their CPLR 3101(d) notice, after openings, to include expert testimony as to two theories of negligence against defendants. The theories would be in the alternative placing liability either vicariously or as a specific act of negligence.

Defendants argued that plaintiffs were improperly attempting to add a new theory against them after the commencement of the trial. Defendants further claimed they were not on notice and that they prepared their defense based solely upon one type of liability-vicarious liability. Therefore, defendants argued that either plaintiffs be precluded from supplementing the 3101(d) notice to include a new theory of liability, or due to the prejudice to the defendants, a mistrial should be granted.

This issue arose following opening statements. In his opening statement, co-defendant asserted that he properly removed plaintiff's decedent's lymph node and that it was the hospital, not him, that was responsible for fixing the specimen for pathology. Immediately following openings, plaintiffs requested to amend the 3101(d) notice to include, based upon co-defendant's opening, whether it was the hospital's or the surgeon's decision to send a non-fixed specimen to pathology so that a flow

cytometry could be conducted. Plaintiffs contend this was always their theory and it was not a surprise, since the prior pleadings in this case had set forth this theory of liability.

The intent of CPLR 3101(d)(1)(i) is to provide all parties timely disclosure of expert witness information so that they may adequately and thoroughly prepare for trial (see Silverberg v. Community General Hosp. of Sullivan County, 290 A.D.2d 788 [3d Dept. 2002]). When a party wishes to supplement their disclosure, especially during the trial, a court must consider whether the belated disclosure is willful or intentional and whether it is prejudicial to the opposing party (see Young v. Long Island University, 297 A.D.2d 320 [2nd Dept. 2002]). CPLR3101(d)(1)(i) does not mandate that a party be precluded from proffering expert testimony merely because of noncompliance (see 1861 Capital Master Fund, LP v. Wachovia Capital Mkts., LLC, 95 A.D.3d 620 [1st Dept 2012]). It is left to the sound discretion of the trial court to address expert disclosure issues (SCG Architects v. Smith, Buss & Jacobs, LLP, 100 A.D.3d 619 [2nd Dept 2012]; McColgan v. Brewer, 84 A.D.3d 1573 [3rd Dept 2011]).

The potential prejudice from this ruling is obvious to both sides; however, in weighing the relevant factors in this particular case plaintiffs were allowed to supplement the 3101(d) notice.

Rationale: Plaintiffs' theory of liability did not change. Even if plaintiffs' original intent was to offer evidence of the doctor's negligence, based upon the deposition testimony of the hospital witness, which demonstrated joint responsibility between the doctor and the hospital staff, the hospital should have anticipated the possible supplement to the expert's testimony. Thus, the argument of "trial by ambush" was without merit. Plaintiffs

were merely buttressing their theory in light of the statements made during openings (Sadek v. Wesley, 117 A.D.3d 193 [1st Dept 2014]).

In addition, any prejudice would be alleviated by the granting of an adjournment or by the fact that the hospital had ample time to discuss this issue with an expert if desired (see McCluskey v. Shapiro, 273 A.D.2d 284 [2nd Dept 2000]).

In conclusion, plaintiffs' conduct was neither willful nor intentional, but rather the consequence of reacting to the proposed testimony alluded to in opening statements.

II. *In Limine* Motions

- a. Definition. An *in limine* motion is a motion that seeks an evidentiary ruling. It does not involve the merits of the underlying controversy and does not affect a substantial right of a party (see Rondout Elec. v Dover Union Free School Dist., 304 AD2d 808, 811 [2d Dept. 2003]). Thus, a motion that effectively seeks dismissal should never be made at trial before a plaintiff has rested. Such a motion is not an *in limine* motion, but rather is akin to a summary judgment motion, the submission of which would be untimely (see Ofman v Ginsberg, 89 AD3d 908 [2d Dept. 2011]; West Broadway Funding Associates v Friedman, 74 AD3d 798 [2d Dept. 2010]; City of New York v Mobil Oil Corp., 12 AD3d 77 [2d Dept. 2004]).

- b. Motions to Preclude Testimony- Hearsay

Any out-of-court statement offered for its truth is inadmissible hearsay. A party may seek an evidentiary ruling on the admissibility of a statement prior to the testimony being received at trial. An out-of-court statement may be received

under one of the following recognized exceptions, provided that the evidence is reliable and the probative worth of the statement is not outweighed by its prejudicial effect (see Nucci v Proper, 95 NY2d 597, 602 [2001]).

(i) *Declaration Against Interest*. A party may seek to introduce an out-of-court statement made by a nonparty on the ground that it is a declaration against interest. To qualify as a declaration against interest, the following four criteria must be satisfied:

“(1) the declarant is unavailable; (2) the declaration when made was against the pecuniary, proprietary or penal interest of the declarant; (3) the declarant had competent knowledge of the facts; and (4) there was no probable motive to misrepresent the facts” (Basile v Huntington Utilities Fuel Corp., 60 AD2d 616, 617 [2d Dept. 1977], citing Richardson, *Evidence* [Prince, 10th ed.], §257).

The moving party may assert that any statement contrary to the position taken during the trial should be admissible for its truth. The counter argument of course is that the statement constitutes hearsay and would not qualify as a declaration against interest

(ii) *Excited Utterance*. To qualify under the excited utterance exception to the hearsay rule, the statement must be made while under the influence of a startling event that is “sufficiently powerful to render [the declarant’s] normal reflective processes inoperative” (People v Cantave, 21 NY3d 374, 381 [2013], quoting People v Vasquez, 88 NY2d 561, 574 [1996]; see People v Leach, 137 AD3d 1300 [2d Dept. 2016]). Essential to this exception “is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that [the declarant’s] reflective capacity was stilled” (People v Cantave, 21 NY3d at 381, quoting People v Nieves, 67 NY2d 125, 135 [1986]).

(iii) *Present Sense Impression*. “[S]pontaneous descriptions of events made substantially contemporaneously” with the observation of the events are admissible, provided that there is sufficient corroboration (People v Brown, 80 NY2d 729, 734-735 [1993]; see People v Jones, 28 NY3d 1037 [2016]).

(iv) *Business Record Exception*. Records generated in the regular course of business pursuant to CPLR 4518(a) or certified pursuant to CPLR 4518(c) fall within a recognized exception to the hearsay rule (see e.g. Berkovits v Chaaya, 138 AD3d 1050, 1051 [2d Dept. 2016] [“A hearsay entry in a hospital record is admissible under the business record exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient”]).

(v) *Dying Declaration*. Statements that are made with “a sense of impending death, with no hope of recovery” (People v Nieves, 67 NY2d 125, 132 [1986]; see also People v Elder, 108 AD3d 1117 [4th Dept. 2013]). Expressions of belief or suspicions, as opposed to factual statements, are inadmissible (see People v Gumbs, 143 AD3d 403 [1st Dept. 2016], lv. denied 28 NY3d 1145 [2017]).

c. *Party Admission*

Unlike a declaration against interest, a party admission does not have to be against the declarant’s interest at the time it was made (see People v Swart, 273 AD2d 503, 505 [3d Dept. 2000]). As long as the statement is inconsistent with a party’s position at trial and there is proof connecting the party to the statement, the statement is admissible as a party admission (see Coker v Bakkal Foods, Inc., 52 AD3d 765, 766 [2d Dept. 2008]; see also Kamolov v BIA Group, LLC, 79 AD3d 1101, 1102 [2d Dept. 2010]).

Even assuming the statement is inconsistent with the position at trial, there must be sufficient proof linking the statement to party (see Cuevas v Alexander’s, Inc., 23 AD3d 428, 429 [2d

Dept. 2005]; Gunn v City of New York, 104 AD2d 848, 849-850 [2d Dept. 1984]). “[S]ince the source of the statement remains, at best, unclear, [movant] failed to establish that [defendant’s] records contain an admission so as to otherwise justify the statement’s disclosure to the jury” (Echeverria v City of New York, 166 AD2d 409,410 [2d Dept. 1990]).

d. *Motion in Limine - Attempting to limit damages*

A defendant may move to preclude a plaintiff from pursuing a loss-of-chance theory, i.e. limit damages. Generally, such a basis for the motion in limine would be considered premature.

Initially, it should be noted that whether New York has adopted a loss-of-chance theory of liability remains an unresolved question of law (see e.g. Wild v Catholic Health System, 21 NY3d 951 [2013] [declining to review, as unpreserved, defendant’s claim that New York State has not yet adopted the loss-of-chance theory of liability]). Nevertheless, a plaintiff’s inquiries into whether a defendant’s actions deprived plaintiff of an appreciable chance of a cure are proper to establish proximate cause. In determining proximate cause, a “plaintiff’s expert need not quantify the exact extent to which a particular act or omission decreased a patient’s chances of survival or cure, as long as the jury can infer that it was probable that some diminution in the chance of survival had occurred” (Jump v Facelle, 275 AD2d 345, 346 [2d Dept. 2000]; see also D.Y. v Catskill Regional Medical Center, ___ AD3d ___, 2017 N.Y. Slip Op. 08577 [3d Dept. 2017]; Clune v Moore, 142 AD3d 1330 [4th Dept. 2016]; Fellin v Sahgal, 35 AD3d 900 [2d Dept. 2006]).

Thus, in proving proximate cause, a plaintiff may show that a failure to diagnose diminished plaintiff’s chance of a better outcome (see Goldberg v Horowitz, 73 AD3d 691, 694 [2d Dept. 2010]; Alicea v Ligouri, 54 AD3d 784, 786 [2d

Dept.2008]). In contrast, a defendant may urge the court to adopt the proportionate recovery standard set forth in Birkbeck v Central Brooklyn Medical Group, (2001 N.Y. Slip Op. 40133[U] [Sup. Ct. Kings County]). However, nothing in the New York cases cited by Birkbeck require a plaintiff to quantify, in percentages, the loss of a chance of a cure. Of course, a jury may consider what impact a plaintiff's poor prognosis or diminished life expectancy may have on any pecuniary loss (see Schneider v Memorial Hospital for Cancer and Allied Diseases, 100 AD2d 583, 584 [2d Dept. 1984]). However, there is no requirement that a plaintiff's recovery be specifically limited to a percentage of chance of survival.

III. Trial Motions

1. *Motion for Judgment During Trial (Directed Verdict)*. CPLR Rule 4401 provides, in part, that “[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified.” Thus, unless the basis for the motion is a damaging admission, a motion made by either a plaintiff or a defendant for a directed verdict must be made at the close of the adversary's case. If it is made prior to the close of the opponent's case, the motion will be denied as premature, even if there is merit to the motion (see Griffin v Clinton Green South, LLC, 98 AD3d 41 [1st Dept. 2012]); Cass v County Coop Ins. Co., 94 AD2d 822 [3d Dept. 1983]).

Example - Medical Malpractice Cases. Sometimes a defendant will move for an order granting a directed verdict pursuant to CPLR § 4401 on the grounds that the evidence submitted is legally insufficient to establish proximate cause. Specifically, defendant may claim that nothing in plaintiffs' proof

demonstrates that the departures deprived plaintiff of a substantial loss of chance of survival, or that an earlier diagnosis would have increased the chance of survival.

In cases alleging medical malpractice, a plaintiff must establish proximate cause by presenting sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing plaintiff's injury (see Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2d Dept. 2005]). The fact that an "expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury" is irrelevant, "as long as evidence is presented from which the jury may infer that the defendant's conduct diminished plaintiff's chance of a better outcome or increased [the] injury" (Alicea v Ligouri, 54 AD3d 784, 786 [2d Dept. 2008], quoting Flaherty v Fromberg, 46 AD3d 743, 745 [2d Dept. 2007]; see Semel v Guzman, 84 AD3d 1054, 1055-1056 [2d Dept. 2011]).

Where there is sufficient proof from which the jury may infer that defendant's negligence resulted in a delayed diagnosis which, in turn, decreased plaintiff's chance for a better outcome (see Semel v Guzman, 84 AD3d at 1056), that is sufficient. A jury can infer that plaintiff would have had a better outcome had defendant's omissions not delayed the diagnosis (see Goldberg v Horowitz, 73 AD3d 691 [2d Dept. 2010]).

2. *Motion for Judgment (Lack of Informed Consent)*. CPLR Rule 4401-a provides that after a plaintiff's case, a court must grant a defendant's motion to dismiss a plaintiff's lack of informed consent claim if the plaintiff has failed to present expert testimony. The difference between this Rule and CPLR Rule 4401 is that it applies only to lack of informed consent claims and requires mandatory dismissal in the absence of expert testimony.

3. *Motion for a Continuance or a Mistrial.* “At any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice” (CPLR 4402). A motion for a mistrial or a continuance is committed to the sound discretion of the trial court. Motions for a continuance are usually granted when an unexpected event arises at trial and an adjournment is a reasonable remedy (see *Notrica v North Hills Holding Co., LLC*, 43 AD3d 1119 [2007]).
4. *Motion for a New Trial or to Confirm or Reject or Grant Other Relief after Reference to Report or Verdict of Advisory Jury.* CPLR Rule 4403 refers to the verdict of an advisory jury or the report of a referee. The Court may accept or reject the verdict or recommendation and can make its own findings. A party moving to confirm, rehear or reject the findings has 15 days from the rendering of the advisory verdict or recommendation within which to do so.
5. *Post-Trial Motion for Judgment and New Trial (CPLR Rule 4404[a]).* Such motions shall be made “before the judge who presided at the trial within fifteen days after decision, verdict or discharge of the jury” (CPLR Rule 4405). This limitation is inapplicable where the relief is granted on the court’s own motion.

There are five types of relief contemplated under a motion pursuant to CPLR Rule 4404(a):

(a) Judgment Notwithstanding the Verdict (JNOV). CPLR Rule 4404(a) provides that a court, upon motion or on its own initiative, may set aside a verdict and direct judgment in favor of a party entitled to judgment as a matter of law.

“To sustain a determination that a jury verdict is not supported by sufficient evidence, as a matter of law, there must be ‘no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury

on the basis of the evidence presented at trial” (Nicastro v Park, 113 AD2d 129, 132 [2d Dept. 1985], quoting Cohen v Hallmark Cards, Inc., 45 NY2d 493, 499 [1978]). In deciding whether a jury’s verdict is legally sufficient, the trial court must view the evidence in a light most favorable to the prevailing party, giving the prevailing party the benefit of every favorable inference that can reasonably be drawn from the evidence (Szczerbiak v Pilat, 90 NY2d 553, 556 [1997]).

It is not the function of the court to weigh the evidence when making this determination, but rather it is a question of law. The motion must be determined whether, as a matter of law, judgment should be awarded in the movant’s favor.

- (b) **Setting Aside the Verdict as Against the Weight of the Evidence.** CPLR Rule 4404(a) permits a judge to set aside a verdict as against the weight of the evidence.

Whether a jury’s verdict is against the weight of the evidence involves a discretionary determination. A jury verdict is against the weight of the evidence if the jury could not have reached the verdict based on “any fair interpretation of the evidence” (Ramirez v Mezzacappa, 121 AD3d 770 [2d Dept. 2014]). “Only where the jury’s resolution of a factual issue is clearly at variance with the proffered testimony does the failure to set aside the verdict and direct a new trial constitute an abuse of discretion” (Fisk v City of New York, 74 AD3d 658, 659 [1st Dept. 1990]). Where a court finds that the verdict is against the weight of the evidence, the relief is a new trial.

- (c) **New Trial on Damages.** The amount of damages to be awarded is a question for the jury, “whose determination is entitled to great deference” (Fryer v Maimonides Medical Center, 31 AD3d 604, 608 [2d Dept. 2006]). A court may order a new trial on damages only where the court finds that the jury’s award deviates materially from reasonable compensation

(see CPLR 5501[c]; Quijano v American Transit Ins. Co., 155 AD3d 981 [2d Dept. 2017]). In determining what is reasonable compensation, courts may look to comparable cases for guidance (Quijano v American Transit Ins. Co., 155 AD3d 881).

- (d) Hung Jury. CPLR Rule 4404(a) authorizes a court to order a new trial when “the jury cannot agree after being kept together for as long as is deemed reasonable by the court.”
- (e) Interest of Justice. A court may order a new trial in the interest of justice.

IV. Timing of Motions - Preservation

A motion will effectively preserve an issue for appeal if it is specific and is made contemporaneously with the alleged error so that the trial court has the opportunity to remedy the error (see People v Balls, 69 NY2d 641 [1986]).

1. Examples:

(a) Mistrial Motions. A motion for a mistrial should be preceded by a specific, contemporaneous objection in order to preserve an issue for appeal (see People v Romero, 7 NY3d 911 [2006]; People v White, 153 AD3d 1369 [2d Dept. 2017]; Rivera v Bronx-Lebanon Hosp. Ctr., 70 AD2d 794 [1st Dept. 1979]; Schein v Chest Serv. Co., 38 AD2d 929 [1st Dept. 1972]). Thus, an attorney who objects to comments on summation should not wait until the end of summation to voice his or her objection in a motion for a mistrial. While some attorneys may not wish to disrupt the flow of an adversary’s summation, it is crucial that the attorney nonetheless challenge any objectionable remarks in a timely fashion in order to preserve an error on summation. However, in certain civil

cases, a court may entertain an untimely motion for a mistrial in the interest of justice (see Smith v Rudolph, 151 AD3d 58 [1st Dept. 2017]).

(b) Motion for a Trial Order of Dismissal. A general motion for a trial order of dismissal will not preserve a specific claim on appeal (see CPL 470.05[2]; People v Gray, 86 NY2d 10 [1995]).

VI. Tips on How to Write an Effective Motion.

1. Clarity
2. Specificity
3. Brevity
4. Principled
5. Disclose Adverse Authority

Opening Statements

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Opening Statements

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Law: CPLR R 4016. Opening and Closing Statements

(a) Before any evidence is offered, an attorney for each plaintiff having a separate right, and an attorney for each defendant having a separate right, may make an opening statement. At the close of all the evidence on the issues tried, an attorney for each such party may make a closing statement in inverse order to opening statements.

First Opportunity to Present the Case to The Jury (other than Voir Dire):

- Shape the jury's perspective of the entire trial
- Establish credibility (enables jurors to trust the testimony, documents, and other evidence you will submit to them)

Purpose:

- Peak further interest: movie trailer
- Present most compelling parts of your claim rather than entire claim
- Not mundane recitation of facts
- Not argument (arguments may not precede the introduction of evidence)

Theme of The Case:

- What does the case center around? i.e., Personal responsibility? Unheeded complaints?
- All evidence should fit around theme
- Theme should resonate with people

Opening of The Opening:

- Cut to the chase - Shows Confidence and preparation
- Set up: story of people, events and evidence
- Once is enough: “I will prove...”, “the evidence will establish...”

Presentation:

- Present facts in a manner that leaves only one conclusion (don't misstate facts)
- Personalize your client
- Your client suffered real harm and is entitled to compensation
- Who are the players
- Ultimate responsibility (Argument?)
- Don't refer to inadmissible evidence
- Don't discuss opponent's evidence

Style:

- Contract between you and jury – “I promise I will...; you promise you will...”
- But beware, Broken Promises

Weaknesses In Your Case:

- No witnesses
- Accident not reported
- Failure to continue medical treatment
- Failure to seek medical treatment immediately after accident

Harmful Facts:

- Surveillance video
- Criminal convictions (recent in time)
- Prior injury/claim to/for same body part being claimed in this case
- Admissions in hospital records/police reports
- Contradicting witness(es)

Visual Aids:

- Picture tells a thousand words
- Already pre-marked in evidence?
- Notice to court?
- Notice to adversary?

Defense Opening:

- Must address issues raised by plaintiff's opening – silence is a tacit admission
- Clear denial of liability
- Plaintiff's omissions

Damages:

- To discuss or not to discuss – depends on you and your jury
- And if you do, how specific will you be

- Hard vs. soft damages
- Specific amount of money damages? Will you turn the jury off?

Will Great Opening Win Your Case? Bad Opening Lose Your Case?

- Jurors do not make up their minds either way after opening. Claim that 80% of jurors decide case at opening is false. See, William L. Burke, Ronald L. Poulson, and Michael J. Brondino, *Fact or Fiction: The Effect of the Opening Statements*, 18 J. Contemp. L. 195 (1992).

FAILURE TO TIMELY OBJECT

The plaintiffs' challenge to comments made by defense counsel in his opening statement is unpreserved for appellate review, since the plaintiffs failed to seek curative instructions or immediately move for a mistrial. *Crosby v Barry*, 2017 NY Slip Op 07705 (2d Dep't.)

Defendant did not preserve his challenges to the prosecutor's opening statement and summation.

Defendant either failed to object, made generalized objections, or, when his objections were sustained, did not request any further relief.... *People v Perez (David)*, 2017 NY Slip Op 51434(U) (App. Term 1st Dep't).

The defendant's contention that he was deprived of a fair trial by certain comments made by the prosecutor during his opening statement and summation is unpreserved for appellate review, since the defendant either failed to object to the challenged remarks or made only a general one-word objection. *People v Spigner*, 2017 NY Slip Op 06468 (2d Dep't.)

The defendant's contention that he was deprived of a fair trial by statements made by the prosecutor during her opening statement and on summation is unpreserved for appellate review because defense counsel did not object to the challenged remarks. *People v Lopez-Miralles*, 2017 NY Slip Op 06377 (2d Dep't.)

The defendant's contention that he was deprived of his right to a fair trial due to improper remarks made by the prosecutor during his opening statement and summation is unpreserved for appellate review since the defendant failed to object to any of the remarks he now challenges. *People v. King*, 2016 NY Slip Op 08092 (2d Dep't.)

OPENING THE DOOR IN OPENING

The defense counsel opened the door to the admission of those statements in his opening statement. *People v. Santos*, 2017 NY Slip Op 04300 (2d Dep't.)

Here, defense counsel opened the door during his opening statement by describing defendant and LaDuke as "basically mirror images of each other." Therefore, it was proper for the People to submit evidence that Shedd identified defendant in a photo array and that, when

given a separate photo array containing LaDuke's picture, he did not recognize any photographs. *People v. LaDuke*, 2016 NY Slip Op 04978 (3d Dep't.).

Defense counsel opened the door to this testimony by emphasizing during her opening statement that the girls were not the only witnesses to the Brown murder, and that in fact 8 to 10 people had witnessed the shooting, thus suggesting that there would be no reason for the defendant to single out just three of the witnesses against his brother. *People v. Harris*, 117 A.D.3d 847, 985 N.Y.S.2d 643 (2d Dep't. 2014)

DIRECTED VERDICT AFTER OPENING (but see, Judicial Admissions)

Plaintiffs' opening statement warranted dismissal of the negligence and negligent battery claims, because the claim that defendant Shepard used excessive force in handcuffing plaintiff Vaynshelbaum is fatally inconsistent with the negligence claims. However, plaintiffs' opening statement did not make any factual admissions that were fatal to their intentional battery claim based on Officer Shepard's alleged use of excessive force. *Vaynshelbaum v City of New York*, 2016 NY Slip Op 04302 (1st Dep't.).

During his opening statement, the workers' counsel admitted that the worker had removed his eye gear just prior to the accident, and, after he did so, he was struck by the flying debris. The appellate court held that this admission absolved the owner of liability under 12 NYCRR 23-1.8(a) and § 241(6). Accordingly, this cause of action was properly dismissed. *Beshay v Eberhart L.P. # 1*, 69 A.D.3d 779, 893 N.Y.S.2d 242 (2d Dep't. 2010).

Dismissal of negligence complaint immediately after plaintiff's opening statement was appropriate, even though such dismissals are disfavored, where complaint, as amplified by bill of particulars and opening statement, did not demonstrate that defendants had breached duty owed to plaintiff. *Perretti v New York*, 132 A.D.2d 537, 517 N.Y.S.2d 272 (2d Dep't 1987).

Court properly dismissed complaint at completion of plaintiff's opening statement for failure to state cause of action where plaintiff's counsel, by admissions and statements, subverted plaintiff's alleged cause of action. *Musso v St. Thomas Aquinas Church*, 213 A.D.2d 529, 624 N.Y.S.2d 912 (2d Dep't 1995).

[T]he court should not dismiss [after opening] unless there is "no doubt" that the plaintiff cannot recover....If, nonetheless, on the opening it becomes obvious that the suit cannot be maintained because it lacks a legal basis or, when taken in its strongest light, cannot succeed, the court has the power to dismiss and such rulings have been upheld. *De Vito v. Katsch*, 157 A.D.2d 413, 556 N.Y.S.2d 649 (2d Dep't. 1990).

JUDICIAL ADMISSION ON OPENING

A factual assertion made by an attorney during an opening statement is a judicial admission. A judicial admission is not itself dispositive but merely evidence of the fact admitted. *Tullett Prebon Fin. Servs. v. BGC Fin., L.P.*, 111 A.D.3d 480, 975 N.Y.S.2d 18 (1st Dep't. 2013)

The trial court properly directed a verdict in plaintiffs' favor on the issue of defendants' negligent maintenance of the steps on which the injured plaintiff fell, based on defense counsel's admissions of negligence during his opening statement, which were not refuted by the evidence presented at trial, and were "fatal" and "ruinous" to any defense on this issue. *Echavarria v. Cromwell Assocs.*, 232 A.D.2d 347, 347, 648 N.Y.S.2d 600 (1st Dep't. 1996).

Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary. Informal judicial admissions are facts incidentally admitted during the trial. These are not conclusive, being merely evidence of the fact or facts admitted. *Wheeler v. Citizens Telcoms. Co. of N.Y., Inc.*, 18 A.D.3d 1002, 795 N.Y.S.2d 370 (3d Dep't. 2005)

Direct & Cross Examination

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ANNUAL MEETING JANUARY 25, 2018

Trial Techniques
Direct and Cross Examination

By:

Heather Palmore
Michael C. Tromello
Thomas Valet

"Yes, there's such a thing as luck in trial law, but it only comes at 3 o'clock in the morning. You'll still find me in the library looking for luck at 3 o'clock in the morning."

Louis Nizer

Preparation

- Convey a sense of confidence (aka "swagger").
- Organize your evidence in advance—where permitted, pre-mark the evidence - know which witness will be the foundation for the introduction of that evidence.
- If the evidence is not admitted during the trial, you it cannot be mentioned during summation.
- Know your theme. Know what you need to prove and know which witness and/or evidence will get you to your destination - What is your theme?????
- A good theme should be brief, interesting, obvious and easy to remember. *"This case is about a greedy general contractor who put profits over safety."*

Direct & Cross Examination

Direct

- Properly prepare your witness -- but don't over prepare -- you don't want your witness to sound rehearsed - know what you want to accomplish with each witness and how each witness fits into your overall theme.
- Ask short, direct, open ended questions -- "*who, what, where, when and how*" are good leads.
- During direct, the witness is the star -- stay in the background.
- Avoid leading questions -- *Questions that suggest an answer* -- Use transitional questions to get to the facts of your case. "*I direct your attention to September 20, 2017*" -- then go back to "*who, what, where, when and how*" (See Exhibit A).

Direct & Cross Examination cont'd

Direct

- Listen carefully to the witness' answer -- make sure that they have adequately responded to the question -- if necessary ask follow up questions to clarify.
- Explain non-verbal responses to preserve the record. Make sure you make a record of all judicial decisions.
- Freeze frame the event -- be patient but not boring. (See Exhibit B)
- Know the rules of evidence and the predicate questions that need to be asked and answered in order to move something into evidence.
- Properly voir dire the expert witness to enhance their testimony whether you want it admitted or want it excluded. (Exhibit C)

Direct & Cross Examination cont'd

Cross

- Remember, unlike direct, the attorney is the star – ask leading questions only.
- Have a plan – know what you want to accomplish – don't allow the witness to recite a narrative – be patient – don't jump the gun – be prepared when the Judge curtails the cross to move the case along. (See Exhibit D)
- Not every witness needs to be cross-examined.
- Getting the witness to agree with generally accepted principles along with their prior statements – clearly identify any inconsistencies in the testimony.
- Be nice until it's time not to be nice – set up the witness before attacking – make sure you end on high note. (Exhibit D)

1 THE COURT: Okay. Even though the Plaintiff
2 hasn't yet rested, we're shifting now to the
3 Defendant's case. Just understand that the Plaintiff
4 may have additional evidence to present. Okay.

5 MS. PALMORE: The defense calls [REDACTED]
6 [REDACTED] a witness called on behalf of
7 Defendant, after having first been duly sworn by the Court
8 Clerk, was examined and testified as follows:

9 THE CLERK: State your name and address for
10 the record.

11 THE WITNESS: [REDACTED]
12 [REDACTED]

13 DIRECT EXAMINATION

14 BY MS. PALMORE:

15 Q Good afternoon.

16 A Good afternoon.

17 Q I'm going to ask you to keep your voice up so the
18 jury can hear you.

19 A Okay.

20 Q If I can't hear you, that means the jurors can't
21 hear you. Back on February 12, 2012 were you employed?

22 A Green Bay Sanitation.

23 Q And how long were you employed there?

24 A It's going to be 30 years.

25 Q And what is your position at Green Bay Sanitation?

1 A I'm a truck driver.

2 Q And what does those duties and responsibilities
3 entail?

4 A What are the duties?

5 Q Yes.

6 A Picking up garbage, driving, help -- my help.
7 That's what I do.

8 Q And what region or area do you pick up garbage?

9 A So many areas, different places like Queens, some
10 days Great Neck, different routes.

11 Q I'm going to ask that you keep your voice up so
12 the jurors can hear you. Okay?

13 A Okay.

14 Q Now back on February 12, 2012, were you working
15 that day?

16 A Where did I work?

17 Q Where were you working?

18 A In Queens.

19 Q And what part of Queens were you assigned to?

20 A Well, we started -- the garage is on Merrick
21 Boulevard. So I drive delivery. I come down Liberty Avenue
22 to Sutphin Boulevard. I make a left turn on Sutphin
23 Boulevard. I make a right turn at 105th Avenue.

24 Q Let me stop you there. My question to you is what
25 area or region were you supposed to be picking up garbage on

1 February 12, 2012?

2 A Started work on Liverpool Street.

3 Q And can you describe to the jury or share with the
4 jury the route that you took from your garage at Green Bay
5 Sanitation in route to Liverpool?

6 A Yes. I come down Merrick Boulevard to Liberty
7 Avenue. I made a right turn on Liberty Avenue. I drove
8 down to Sutphin Boulevard. At Sutphin Boulevard, I turned
9 left and on 105th Avenue, I made a right turn. I passed
10 Waltham Street and Liverpool Street. I made a right turn
11 and stopped in the middle of the block.

12 Q That would be the first stop?

13 A Stop.

14 Q The middle block of Liverpool?

15 A Right.

16 Q And that would be between 105th and Sutphin;
17 correct?

18 A Liberty Avenue.

19 Q Liberty Avenue; correct?

20 A Correct.

21 Q Now on the date of February 12, 2012, can you
22 share with this jury what time you began work?

23 A I start work like 6:00, 6:30.

24 Q Was there anybody with you at about 6:00 or 6:30
25 on February 12, 2012?

1 A Yes, my helper.

2 Q who is your helper?

3 A Fabian Yunger. I don't know if I pronounced it
4 correctly.

5 Q Can you share with the jury what Fabian Yunger's
6 job is, if you know?

7 A He's my helper.

8 Q what is he supposed to do?

9 A He's supposed to pick up garbage.

10 Q While you drive the truck?

11 A Not exactly. We help each other because he's my
12 helper. That doesn't mean he has to work by himself on the
13 back of the truck. I get out of the truck and move
14 containers also. We help each other.

15 Q Now back on February 12, 2012, did there come a
16 time when Fabian Younger proceeded to your first stop at
17 Liverpool? Yes or no?

18 A Yes.

19 Q And can you share with the jury from the time you
20 left the garage at Merrick Boulevard, the route that you
21 took to Liverpool on February 12, 2012?

22 MR. OGEN: Objection. Asked and answered.

23 THE COURT: Yes. This is about the third
24 time. Move on.

25 MS. PALMORE: Your Honor, I asked him what

1 his route was?

2 THE COURT: And he answered.

3 MS. PALMORE: That was in general. Now I'm
4 asking specifically as to February 12, 2012.

5 THE COURT: Followed the same route?

6 THE WITNESS: Yes.

7 THE COURT: Next question.

8 Q Once you arrived at Sutphin Boulevard, can you
9 share with this jury what you observed when you got to
10 Sutphin Boulevard on February 12, 2012?

11 A I was at a traffic light. I saw the blue van in
12 front of me, and I drove west, and he drove east.

13 Q Stop there. And so at the traffic light, you
14 observed a blue van facing you?

15 A Yes.

16 Q And when you saw this blue van facing you on
17 Sutphin Boulevard, did you make any observations as to how
18 many people were in the vehicle?

19 A Yes.

20 Q And how many people were in the vehicle?

21 A Three persons.

22 Q And can you describe them?

23 A Yes.

24 Q What did they look like?

25 A It was two males, one female in the middle.

1 Q A female in the middle?

2 A Yes.

3 Q And there was a male driver?

4 A A male driver.

5 Q And a male closer to the passenger door?

6 A Exactly.

7 Q And once you made this observation of these
8 individuals in this blue van on Sutphin Boulevard, what did
9 you see next?

10 A Well, I see they make a left -- right turn on
11 Sutphin Boulevard. And I make left turn right behind this
12 vehicle.

13 Q And when they made their right, you made your
14 left. You were behind them?

15 A Yes.

16 Q And what street was this that you turned on from
17 Sutphin?

18 A From Liberty to Sutphin.

19 Q And did there come a point in time when you saw
20 this vehicle turn again?

21 A 105th Avenue.

22 Q And did that car make a right or left?

23 A He made a right turn.

24 Q And is it the same car that you saw back on
25 Sutphin?

1 A Exactly the same.

2 Q And when you saw the car make that right on 105th,
3 were you behind that car?

4 A Yes.

5 Q And that's the next thing that you observed as the
6 car made a right turn on to 105th Avenue?

7 A As he drove on 105th, I make a right on 105th
8 Avenue right behind the vehicle. He stopped at the stop
9 sign at Waltham Street.

10 Q The stop sign on Waltham and 105th controls the
11 traffic on 105th?

12 A Exactly.

13 Q And did that blue car come to a stop?

14 A Yes.

15 Q And what did you observe the blue car do after it
16 came to a stop?

17 A He pulls on the side of the road on 105th Avenue
18 and parked right on the right side.

19 Q The right side of 105th after you crossed over
20 Waltham?

21 A Exactly.

22 Q Do you know how far distance-wise from the corner
23 that car parked from 105th?

24 A From the corner?

25 Q Yes.

1 A There is a fire hydrant right there. So I figure
2 from the fire hydrant to the corner, it's 20 feet.

3 Q And did that car park in front of the fire
4 hydrant?

5 A Yes.

6 MS. PALMORE: I would like to show the
7 witness what has been received in evidence as
8 Plaintiff's Exhibit No 1.

9 (Officer handing witness exhibit.)

10 Q Mr. Mar, I'm showing you what has been marked as
11 Plaintiff's Exhibit 1 in evidence. Do you recognize what is
12 depicted in that photograph?

13 A Yes, I do.

14 Q And what is that?

15 A This is the corner from the intersection of
16 Waltham Street and 105th Avenue?

17 Q And we can agree that the cars that are there in
18 this photograph are not the same cars that were there that
19 day; correct?

20 A Correct.

21 Q Is the area where the Plaintiff parked his car
22 indicated on that photograph?

23 A Right here is a UPS truck parked right in the same
24 spot.

25 MS. PALMORE: Can I ask the witness to take

1 his pen and mark with an X where he saw the Plaintiff
2 park his vehicle.

3 Q And put your initials there, Mr. Mar.

4 A Excuse me?

5 Q Put your initials.

6 THE COURT: You asked him to mark with a X?

7 MS. PALMORE: Yes.

8 THE COURT: Either an X or his initials is
9 fine.

10 THE WITNESS: I'll put an X first.

11 THE COURT: That's fine.

12 MS. PALMORE: Your Honor, may I have this
13 published to the jury?

14 THE COURT: Go ahead.

15 (Officer showing the jury photograph.)

16 MS. PALMORE: Thank you.

17 Q After you saw the blue van park in front of the
18 hydrant, what did you do?

19 A I proceeded -- I passed the intersection. I
20 stopped at the stop sign. I continued to drive.

21 Q And when you stopped at the stop sign, did you
22 come to a complete stop, a rolling stop, or something else?

23 A A real stop, a full stop.

24 Q And when you were at the stop sign, was this blue
25 van already parked, or was it still moving?

1 A It was parked.

2 Q And did you make any observations while you were
3 at the stop sign?

4 A Yes.

5 Q Please tell the jury what you observed.

6 A I saw a male come from the right side of the van.

7 Q When you say the right side of the van, is that
8 the passenger's side?

9 A Exactly.

10 Q Closest to the curb?

11 A Exactly.

12 Q Did you see anybody else exit the vehicle?

13 A The driver was out of the vehicle, and the lady
14 come out of the van too.

15 Q Where did they come out of the van?

16 A From the right side.

17 Q Did you see the driver's door open?

18 A No.

19 Q After you stopped at the stop sign, what did you
20 do?

21 A I proceeded to continue to drive.

22 Q And as you passed the blue van -- withdrawn.
23 Approximately from the stop sign to where the blue van was,
24 how far was it away?

25 A Like 25 feet.

1 Q And at the point where you proceeded through the
2 stop sign, can you estimate your speed?

3 A I just come out of the stop sign. How fast the
4 truck was going, five miles.

5 Q And, by the way, can you describe the truck that
6 you were driving in terms of dimensions?

7 A My truck is a Mack truck. It's 36 feet long,
8 8 feet wide, and 12 feet high.

9 Q And can you describe the layout of the truck,
10 meaning are there any devices or anything that protrudes or
11 anything like that?

12 A No.

13 Q Is there a piece of the truck that is available to
14 let water out?

15 A Yes.

16 Q And can you describe that piece?

17 A That's a valve, a water valve on the side of the
18 truck, on the right side, like, one or two feet higher from
19 the ground where the step for the helper right there.

20 Q And what's the purpose of that valve?

21 A To drain the water.

22 Q And when you say drain water, that's when you put
23 garbage in, and people may have to get the compactor to come
24 down and press and water comes out?

25 MR. OGEN: Objection.

1 THE COURT: Sustained.

2 Q What's the purpose of that valve?

3 A Drain the water when it's too much water when we
4 dump, the truck is full of water. When we have to dump, we
5 drain the water.

6 MS. PALMORE: Can I have the witness shown
7 Plaintiff's Exhibit 6?

8 (Officer handing the witness exhibit.)

9 THE COURT: I'm showing what has been
10 received into evidence as Plaintiff's Exhibit 6. Do
11 you recognize that photograph?

12 A Yes, I do.

13 Q And what does that photograph depict?

14 A The back of the truck. After the rear wheels,
15 there are four feet. After the rear wheels, five feet.

16 Q So approximately 30 feet back from the front of
17 the vehicle?

18 A Exactly.

19 Q And what apparatus is depicted in that photograph?
20 what is in that photograph?

21 A That's a step for the helper to hang on and the
22 valve.

23 Q That's the valve you were talking about with the
24 water?

25 A Exactly.

1 MS. PALMORE: Your Honor, may I have that
2 photograph published to the jury?

3 THE COURT: Go ahead.

4 (Jury looking at the photograph.)

5 Q Good afternoon, Mr. Mar. Again, I've just handed
6 you what has been received in evidence as Plaintiff's
7 Exhibit 3, 4 and 5.

8 Do you recognize the photographs?

9 A Yes.

10 Q what do they depict?

11 A My truck.

12 Q when you say my truck --

13 A My truck that I work with.

14 Q Is that the truck that was involved in the
15 accident?

16 A Exactly.

17 Q And is the area which you just described in --

18 MS. PALMORE: Can I see the photographs to my
19 left with the valve?

20 Q And do any of those photographs depict the valve
21 that you were talking about earlier?

22 A Yes.

23 Q which one of those photographs?

24 A This one. This is number 5.

25 MS. PALMORE: Your Honor, can I have

1 Plaintiff's 3, 4 and 5 published to the jury?

2 THE COURT: Yes, you may. But can we do it
3 all at once? Let's go.

4 (Photographs being shown to the jury)

5 Q Mr. Mar, from the time that you were at the stop
6 sign until the time that you proceeded down 105th, at any
7 time did you ever see the driver's door open?

8 A No.

9 Q Did you feel anything as you were passing down
10 105th?

11 A When I drive on 105th I feel something like the
12 truck drive in a hole, it shake a little, that's what I
13 felt.

14 Q And at any point in time while you were driving
15 down 105th after you passed the car did you look back?

16 A I looked in the mirror, yes.

17 Q What did you see?

18 A A person standing on the side of the van with the
19 door open.

20 Q And at some point in time did get to Liverpool?

21 A Yes.

22 Q And did make a right or left?

23 A I make a right.

24 Q And did you come to a stop at Liverpool?

25 A Yes.

1 Q What was the purpose of that stop?

2 A The purpose?

3 Q What was the purpose of stopping?

4 A Picking up the garbage.

5 Q Finally, I'm going to show you what has been
6 received no evidence as Plaintiff's 9, 10 and 11. I'm going
7 to ask that you look at Plaintiff's Exhibit 9 first. Do
8 you recognize that photograph?

9 A I never see before, but I recognize the van.
10 That's the van.

11 Q And how do you know it to be the van that was
12 involved in the accident?

13 A This part of the door.

14 Q When you say this part, what are you pointing to?

15 A Because that's the part of the van, the door
16 when -- with the valve. When he came to me and he told me
17 you hit my van, I look at the van. I look where I hit it.
18 I didn't see anything on door. The door was -- I got to the
19 door I saw a little dent. So I look at that spot. I look
20 at the highest; I went to my truck. I saw the valve was a
21 little tip of blue paint on the valve.

22 Q That's the value that you were talking about
23 earlier?

24 A Yes.

25 Q And is that the only damage you observed to the

1 door?

2 A Exactly the same. Even that was not much -- this
3 is changed. This is not true.

4 Q So what you're saying is what is depicted in that
5 photograph at the bottom --

6 A That much damage, it wasn't at the time of the
7 accident.

8 Q And did you see the damage to Mr. Solomon's
9 vehicle on the night of the accident?

10 A Yes, I did.

11 Q So with respect to that photograph all the other
12 damage that you see on the door that was not as a result of
13 this accident?

14 A No.

15 Q At some point in time did the police come?

16 A It was two hours after, yes, police came.

17 Q And during those two hours that you were waiting
18 for the police, did you talk to the Plaintiff in this case,
19 yes or no?

20 A Yes.

21 Q And did you observe him doing anything?

22 A Yes.

23 Q what was he doing?

24 MR. OGEN: Objection.

25 THE COURT: Overruled.

1 A He tried to close his door because the door was
2 stuck. It was not closed. It was like this space, and he
3 forced the door to close because that night was freezing and
4 he couldn't stand up with the door open. So he fix his door
5 and make it close.

6 Q And did you see him taking any photographs?

7 A Yes.

8 Q And was there a passenger in his car?

9 A Yes.

10 Q Did you speak to the passenger?

11 A Yes.

12 Q Did the passenger take any photos?

13 A All over the car, the truck, he take pictures of
14 everything from the front of the truck to the rear, and his
15 vehicle too.

16 Q So let me get this correct. The passenger took
17 photographs of both vehicles?

18 A Both vehicles. Even Mr. Solomon, he take pictures
19 of his vehicle and my vehicle.

20 MS. PALMORE: I have no further questions,
21 your Honor.

22 THE COURT: Counsel.

23 CROSS EXAMINATION

24 BY MR. OGEN:

25 Q Good afternoon, Mr. Mar.

1 A Good afternoon.

2 Q You and I have met before; right?

3 A Yes.

4 Q That was -- you were at a deposition, do you
5 recall that?

6 A Yes.

7 Q And in that deposition you also testified like you
8 did today?

9 A Yes.

10 Q And in that deposition you had an interpreter,
11 didn't you?

12 A Yes.

13 Q Portuguese interpreter?

14 A Yes. Brazilian, exactly.

15 Q And today you're here to testify without the help
16 of an interpreter; correct?

17 A Yes.

18 Q Okay. And is that because your English has gotten
19 much better for the last year?

20 A I'm not saying it got much better, but interpreter
21 I get, I can tell is not help me.

22 Q You didn't like the way the interpreter
23 interpreted?

24 A Yes.

25 THE COURT: Ask him a question.

1 [REDACTED] - by Defendant - Direct [REDACTED]
2 [REDACTED] M.D.,
3 [REDACTED], New York, New York,
4 having been first duly sworn/affirmed, testified as follows:

5 THE COURT: Thank you.

6 You may be seated.

7 You may inquire.

8 DIRECT EXAMINATION

9 BY MR. [REDACTED]

10 Q. Good morning, Dr. [REDACTED]

11 A. Good morning.

12 Q. So this morning I introduced you to Mr. [REDACTED]
13 plaintiff's counsel.

14 This is [REDACTED] at the plaintiff's table.

15 This is [REDACTED] who you met for the first
16 time this morning.

17 A. Yes.

18 Q. All right.

19 This is a small room. Speak maybe a little bit
20 louder than your normal speaking voice so that the jurors
21 can all hear you. Fair enough?

22 A. Yes.

23 Q. All right.

24 First I will bring out some of your credentials.

25 Are you a physician licensed to practice medicine
26 and/or surgery in the State of New York?

1 [REDACTED] - by Defendant - Direct [REDACTED]

2 A. Yes.

3 Q. Can you, and I will segment this, could you tell
4 us a little bit about where you went to medical school, and
5 give us the year of graduation, and some of your
6 post-graduate studies, internship, residency, that type of
7 thing?

8 A. I went to the [REDACTED] in
9 [REDACTED], and spent four years as a medical student
10 there.

11 Upon graduation I came to New York City and became
12 an intern, and then that was followed by a residency in
13 general surgery and chief resident in general surgery. That
14 was followed by a residency in plastic and reconstructive
15 surgery and chief resident in plastic and reconstructive
16 surgery.

17 At the completion of my training, I opened medical
18 offices in Connecticut as well as in New York.

19 Q. Okay. How many years was the training in general
20 surgery of that residency?

21 A. It was the internship plus four years of general
22 surgery.

23 Q. So five in total?

24 A. Yes.

25 Q. And the plastic -- and am I saying it correctly,
26 plastic and reconstructive residency?

1 [REDACTED] - by Defendant - Direct [REDACTED]

2 A. Yes.

3 Q. How many years was that residency?

4 A. Two.

5 Q. And was that after the surgical residency?

6 A. Yes.

7 Q. Did there come a time when you became board
8 certified?

9 A. Yes.

10 Q. Board certified by the National Board of Examiners
11 in Plastic and Reconstructive Surgery?

12 A. The American Board of Medical Specialties, and
13 plastic and reconstructive surgery belongs to that board.

14 Q. Okay. Now, during the course of your career, not
15 currently, but during the course of your career, did you
16 maintain hospital privileges where you were able, had the
17 ability to admit a patient for your particular surgical
18 specialty to do work on a particular patient?

19 A. Yes.

20 Q. Give us a sense of the hospitals that you have
21 been affiliated with historically.

22 A. [REDACTED], [REDACTED], [REDACTED]
23 [REDACTED], [REDACTED]
24 [REDACTED]

25 Q. Are you licensed to practice currently in
26 Connecticut?

1 [REDACTED] - by Defendant - Direct [REDACTED]

2 A. Yes.

3 Q. Now, we've heard, at least as part of a question
4 and answer, that sometimes plastic and reconstructive
5 surgeons maintain their own surgical operating suite as part
6 of their office. Do you do that or do you do all of your
7 work at a hospital?

8 A. I work in the hospital, and I also work in two
9 surgicenters.

10 Q. Tell us what the surgical centers are?

11 A. [REDACTED]
12 [REDACTED]

13 Q. Is the first one New York and the second one
14 Connecticut?

15 A. Yes.

16 Q. For how many years have you been in private
17 practice?

18 A. Since [REDACTED]

19 Q. Did you always have a desire to become a plastic
20 and reconstructive surgeon?

21 A. No.

22 Q. How did that evolve, give us a sense?

23 A. I always wanted to be a doctor. Then as I was
24 exposed to medicine with that desire to be a physician, I
25 gravitated to surgery, and during my general surgery I was
26 introduced to various subspecialties, and plastic and

1 [REDACTED] - by Defendant - Direct [REDACTED]
2 reconstructive surgery was a goal, and I focused on that as
3 what I wanted to do with my medical career.

4 Q. Okay. And have you within that specialty from the
5 time you became board certified had various offices up until
6 the present time?

7 A. Since [REDACTED] when I went into private practice I
8 practiced plastic and reconstructive surgery.

9 Q. Other than hospital affiliations -- let me
10 withdraw that.

11 What hospitals do you maintain as potential places
12 where you can admit patients currently as a doctor?

13 A. The hospitals I mentioned.

14 Q. And other than the hospitals, you have a private
15 office in the State of New York?

16 A. Yes.

17 Q. Where is that? What's the address in the State of
18 New York?

19 A. [REDACTED], New York, New York.

20 Q. That's the office where I met you most recently
21 over the last couple of weeks to discuss the issues of this
22 case?

23 A. Yes.

24 Q. You have an office in Connecticut, also?

25 A. I do.

26 Q. Ballpark, on average, tell us how much time do you

1 [REDACTED] - by Defendant - Direct [REDACTED]
2 spend in the City of New York in the office and how much
3 time do you spend in Connecticut, so we have a sense?

4 A. Approximately 50/50.

5 Q. Now, during of course of your professional life
6 have you submitted any articles that have been peer-reviewed
7 and actually been published?

8 A. I did a few.

9 Q. During the course of your professional life, have
10 you received any honors or awards or grants or anything of
11 that nature?

12 A. I did.

13 Q. Your current surgical, I use the word, load, your
14 current surgical schedule, has it tapered down at all? Are
15 you still in active practice?

16 A. I'm in active practice.

17 Q. Give us a sense currently in the last year or two,
18 what type of procedures do you do from the most frequent, if
19 you can, to the most minimal, as far as statistical?

20 A. Well, my focus is cosmetic surgery, but that's a
21 broad specialty. So it includes the head and neck, eyelid
22 tucks, facelifts, nose jobs, reconstructing the ear, and the
23 body is breast surgery, breast lifts, breast reduction,
24 breast augmentation, liposuction of every part of the body
25 probably, and abdominoplasty, body contouring.

26 Q. Fair enough.

1 [REDACTED] - by Defendant - Direct [REDACTED]

2 Now, before -- withdrawn.

3 Did there come a time when my office and I asked
4 you to review issues pertaining to this case, the Goldstein
5 case, against a Dr. [REDACTED]

6 A. Yes.

7 Q. By the way, do you know of Dr. [REDACTED] personally or in
8 any fashion?

9 A. No.

10 Q. Do you have any connection with the pediatric
11 plastic and surgical division up at [REDACTED]

12 [REDACTED]

13 A. No.

14 Q. Now, did there come a time several years ago when
15 materials were given to you in relationship to this case to
16 review?

17 A. Yes.

18 Q. And am I correct that you have never examined Mara
19 or any of her breast configurations or anything of that
20 regard?

21 A. No.

22 Q. I'm allowed to ask you this and lead you.

23 Did you review a document known as a Bill of
24 Particulars which outlines the claims of the plaintiff?

25 A. Yes.

26 Q. Did you review the hospital record from [REDACTED]

1 [REDACTED] - by Defendant - Direct [REDACTED]
2 as well as Dr. [REDACTED] office records which we are going to get
3 to during this trial?

4 A. Yes.

5 Q. Did you review the deposition testimony that was
6 taken of the plaintiff, [REDACTED] her mother, as well as Dr.
7 [REDACTED] testimony that Mr. [REDACTED] took?

8 A. Yes.

9 Q. And did you review the office records and the
10 operative reports, the three, by the subsequent primary
11 doctor, [REDACTED]

12 A. Yes.

13 Q. Now, let me just get away from this case and ask
14 you, over the course of your professional life, have you
15 been asked by lawyers, whether they be lawyers prosecuting a
16 case or lawyers like myself defending the doctor, to review
17 records pertaining to any type of cosmetic or plastic or
18 reconstructive surgery and give the lawyers your opinion?

19 A. Yes.

20 Q. Let's say in the last five years, how many
21 assignments would you say you get a year? I don't mean
22 trial testimony, but lawyers who say, Doctor, would you take
23 a look at this case and let me know what you think as your
24 opinions, how many times does that happen per year, let's
25 say, over the last five years?

26 A. Two to three times a year, perhaps less.

1 [REDACTED] - by Defendant - Direct [REDACTED]

2 Q. All right.

3 And if you find merit to the claims for the
4 plaintiff or if you find merit --

5 MR. [REDACTED]: Objection. Now he is
6 leading.

7 MR. [REDACTED]: Fair enough.

8 Q. Tell us --

9 MR. [REDACTED]: Sorry. I should stand. I
10 apologize.

11 THE [REDACTED]: That's okay.

12 MR. [REDACTED]: That's fine.

13 Q. Tell us, how does it work? Does there come a
14 point in time when you speak to the lawyer on one side or
15 the other and give your opinion?

16 MR. [REDACTED]: Objection to leading, yes or
17 no.

18 THE COURT: Sustained.

19 Q. Yes or no, how does it work, as far as your
20 review?

21 THE COURT: That's what makes it leading,
22 that it can be answered with a yes or no.

23 MR. [REDACTED]: Fair enough.

24 THE COURT: We have certain rules about
25 whether it's your witness or the other side's witness,
26 and what kind of questions you can ask, and if it's

1 [REDACTED] - by Defendant - Direct [REDACTED]
2 cross-examination we allow the lawyer to ask questions
3 that require a yes or no answer, but on direct
4 examination when it's your witness you have to let the
5 witness do the talking, that's where the testimony will
6 come from.

7 So let's not have leading questions.

8 Q. Let's talk about this case.

9 Did there come a point several years ago when you
10 met with a lawyer from my office, a Ms. [REDACTED], to discuss
11 these issues?

12 A. Yes.

13 Q. And most recently, did --

14 MR. [REDACTED] This is part of the
15 preliminary, the legal basis --

16 THE COURT: He is just getting ready.

17 MR. [REDACTED] He is getting ready, okay.

18 Q. Did you and I meet several times over the last
19 several weeks where I delivered daily testimony, not daily,
20 records, copies for you, and you and I chatted about the
21 issues?

22 A. Yes.

23 Q. Lastly, did I provide you the testimony of Dr. Wu
24 that was taken on Tuesday that I've ordered, as well as the
25 testimony of Dr. [REDACTED], the plaintiff's expert witness? Did
26 I provide that to you?

1 [REDACTED] - by Defendant - Direct [REDACTED]

2 A. Yes.

3 Q. Now, are you familiar with the Inverted-T surgical
4 procedure with regard to performing breast reduction
5 surgery?

6 A. Yes.

7 Q. Are you familiar with the procedure known as the
8 Hall-Findlay lollipop or vertical incision technique?

9 MR. [REDACTED] I object. He is leading.

10 THE COURT: I'll allow these two preliminary
11 questions, but then stop leading the witness.

12 MR. [REDACTED] Okay.

13 Let me withdraw that.

14 Q. What is the Hall-Findlay procedure, as far as
15 breast reduction?

16 A. To put it in simple terms, it's a lollipop
17 incision so the incisions go around the nipple and it ends
18 up with a vertical scar.

19 Q. Is there any difference, if any, between the
20 Inverted-T procedure and the Hall-Findlay with regard to the
21 extent of the incision?

22 MR. [REDACTED] Objection.

23 THE COURT: Sustained as to form.

24 Q. Describe for us the incisions that are made as
25 part of the Inverted-T operation, not the Hall-Findlay.

26 A. With the Inverted-T incisions, the result is a

1 [REDACTED] - by Defendant - Direct [REDACTED]
2 scar around the nipple areola, and a vertical limb, which is
3 a scar, and then a scar in the region of the inframammary
4 crease. So there's more scarring secondary to the
5 Inverted-T than there is to the Hall-Findlay.

6 (Continued on next page.)
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[REDACTED] - by Defendant [REDACTED]

DIRECT EXAMINATION

BY MR. [REDACTED]

Q. Now, what's the goal of breast reduction surgery, Doctor, in your opinion?

A. Primarily it's considered -- a reduction mammoplasty is considered reconstruction. It's done to relieve symptoms secondary to overly large breasts.

Q. Now, I'm going to ask you to assume that in this case, before the surgery, [REDACTED] as a [REDACTED] had various symptoms. You are aware of that from reviewing the records, correct?

A. Yes.

Q. The symptoms included, among other things, back pain that required her to have chiropractic treatment and annoyance with regard to these large, pendulous breasts. The bras that she was wearing would cause indentations in the shoulders and she had pain.

Is that something, those symptoms, something that you're familiar with with regard to, based on this trial record, preoperatively the need for breast reduction surgery?

MR. [REDACTED]: Objection.

THE COURT: Sustained as to form.

Q. What are some of the symptoms with regard to pendulous breast, particularly in an adolescent, that would

1 [REDACTED] - by Defendant [REDACTED] Direct

2 allow the patient to be a candidate for breast reduction?

3 A. The symptoms related to the younger person, but
4 also across the board, any woman that has large, pendulous
5 breast generally complain of shoulder, neck and back pain
6 into the shoulders, difficulty wearing clothing, difficulty
7 with participating in normal daily activities and working in
8 those activities, rashes.

9 Q. Now, I'm going to ask you to assume that when [REDACTED]
10 was taken to surgery during August of calendar year 2010,
11 that Dr. [REDACTED] made some preoperative markings on both breasts.
12 My first question is are you familiar with such type of
13 preoperative markings?

14 A. Yes.

15 MR. [REDACTED] Can I set the easels up, Judge;
16 it will just take a second?

17 THE COURT: Yes.

18 (Pause.)

19 Q. Doctor, I'm going to put before you -- Doctor, I'm
20 going to show you, so the record is clear, what's marked as
21 Plaintiff's 2 in evidence. It's a series of all of the
22 photographs pertinent to [REDACTED] and this case. I'm going to
23 just focus you to the packet behind the pink sheet, which we
24 agree are the preoperative photographs.

25 The first question: As you look at those
26 photographs, the preoperative photographs, do you have an

1 [REDACTED] - by Defendant [REDACTED] Direct
2 opinion as to whether or not they demonstrate breast
3 hypertrophy?

4 A. Yes.

5 MR. [REDACTED]: Your Honor, he continues to
6 lead, what do they show.

7 THE COURT: Don't suggest the answer in the
8 question, that's what makes it a leading question.

9 Please don't lead.

10 Q. We've had testimony, Doctor, during this trial
11 record from every witness that the patient had hypertrophy
12 breasts or large breasts. Do you agree?

13 A. Yes.

14 Q. What is breast hypertrophy?

15 A. It's an enlargement of the breast.

16 Q. Can you turn to the last photograph that has the
17 preoperative markings, please? Doctor, as I think I've told
18 you, we have a rather large depiction of the preoperative
19 markings that has some data here that Dr. [REDACTED] drew just
20 yesterday. I'm going to put this up in front of the jury as
21 I question you.

22 Doctor, is there any purpose to the
23 preoperative markings?

24 A. Yes.

25 Q. Tell us what it is, what they are?

26 A. The preoperative markings are an indication of the

1 [REDACTED] - by Defendant [REDACTED] - Direct
2 location of the nipples-areola from the midclavicular line
3 to the nipple and the upper sternal notch down through the
4 mid line. The new location of the nipple-areola complex is
5 designated and the length of the infra-mammary crease is
6 indicated, which you can't see here. And in essence, the
7 template, which is the mosque template, indicates the area
8 that is to be created as the pedicle.

9 Q. Could I ask you to come down here. I'm not going
10 to have you come down and go back and forth, but could I ask
11 you to come down here, with the Court's permission, in front
12 of this drawing? If I could ask you to stay on this side of
13 the drawing and use this pen as an indicator.

14 Can you show the jury, given your last
15 answer, what the markings demonstrate, the black lines, what
16 do they demonstrate.

17 A. The black lines indicate anatomical landmarks, and
18 within the design from the mosque is the pedicle that is to
19 be created to perform the reduction and to relocate the
20 nipple-areola complex.

21 Q. Now, is there -- do you have an opinion as to
22 whether or not the nipple, of necessity, will be elevated as
23 a result of a surgical procedure such as this?

24 MR. [REDACTED] Objection, leading.

25 THE COURT: Sustained.

26 Q. Is the nipple elevated as part and parcel of a

1 [REDACTED] - by Defendant [REDACTED] Direct
2 procedure such as this?

3 MR. [REDACTED]: Objection.

4 THE COURT: Sustained.

5 MR. [REDACTED]: We have this on the record
6 already.

7 Q. What happens to the nipple as part and parcel of
8 the operation, Doctor?

9 A. The nipple is relocated to be centered at the apex
10 of the breast.

11 Q. What happens to the areas to the left and right or
12 medial and lateral to the tissue that's supposed to be
13 removed, what happens to those areas?

14 A. Well, as the surgery proceeds, the medial aspect
15 beneath the skin, which is breast tissue and, the lateral
16 aspect, which is lateral to the flap, is dissected and
17 breast tissue is removed.

18 Q. You can go back. Thank you very much.

19 (Pause.)

20 Q. Are you familiar with a term known as an en bloc
21 resection?

22 MR. [REDACTED]: Objection.

23 THE COURT: Sustained.

24 Q. What is a en bloc resection of tissue given breast
25 surgery?

26 A. An en bloc resection of breast tissue means that

1 [REDACTED] - by Defendant [REDACTED] Direct
2 the major portion of the tissue that's removed, in this
3 instance breast tissue is taken away, connected to each
4 other. So the medial and the lateral aspects of the breast
5 are removed in unity.

6 Q. The breast tissue removed in a surgery such as
7 this, Doctor, what is breast tissue made of?

8 A. Breast tissue is called stroma. So it's -- it
9 consists of glandular tissue. To get down to a microscopic
10 level, there are glands that make milk, but every breast is
11 also a unit that consists of other structures, primarily
12 fat. So depending upon the unique variability of that
13 particular patient, there could be more fat and less stroma,
14 which is the breast gland or there could be more gland and
15 less fat. But generally it comprises a significant amount
16 of both breast tissue and fat, which are intermixed, so you
17 don't dissect out every bit of fat or breast separate from
18 the other structure.

19 So en bloc designates that you remove that
20 designated portion of breast and fat that's intermixed with
21 one another.

22 Q. Doctor, I'm going to ask you to assume that we've
23 heard that in the preoperative discussions the potential for
24 diminished or absent breast feeding ability postoperative,
25 if the patient were to become pregnant and have a child
26 later on might be impaired. That was the testimony of

1 [REDACTED] - by Defendant [REDACTED] Direct

2 Dr. [REDACTED]

3 Do you have an opinion as to whether or not
4 that situation can develop postoperatively later on in a
5 breast that's operated upon such as these breasts were
6 operated upon?

7 A. Yes.

8 Q. Why is that? Why does the breast feeding ability
9 be diminished or absent as a result of the breast tissue
10 being removed?

11 A. Many times an enlarged breast presses around all
12 of the breast tissue and the ductal system is impaired, so
13 that even though milk is produced it can't come out through
14 the breast. So that's just a normal event that can occur.
15 And from surgery it could just be a disruption of the gland
16 making milk and having access to the tubules that eventually
17 lead to the nipple where the baby can suckle.

18 Q. Now, during the course of this surgery, the
19 pathology department received tissue from the right and left
20 breast --

21 MR. [REDACTED]: Objection, leading.

22 MR. [REDACTED]: This record is in evidence.

23 THE COURT: I don't know what the question is
24 going to be, but obviously counsel's very sensitive to
25 the leading nature of the question. So please be
26 careful about the way you word it.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 MR. [REDACTED] Yes, your Honor.

3 Q. Doctor, I'm going to read from part of the
4 pathology report with regard to the right breast first of
5 all. Department received breast tissue that weighed
6 968 grams. Do you have a sense in relationship to pounds as
7 to how that relates, grams to pounds?

8 A. Close to 2 pounds.

9 Q. Okay. It says the tissue consists of
10 approximately 20, irregularly shaped pieces of fibro adipose
11 tissue. What is fibro adipose tissue, Doctor?

12 A. Well, there are septa within the breast and
13 anatomy.

14 Q. How do you spell that?

15 A. Septa, S-E-P-T-A. So there's divisions, and
16 that's fibrous tissue. There are several divisions that
17 separate the lobules from the next lobule from the next
18 lobule. So that's part of the structure, the basic
19 structure of the breast. It's a significant portion because
20 it's what supports and suspends the breast, so the
21 ligaments, the fibrous tissue, are just part of the breast
22 anatomy.

23 Q. Now, I'm going to ask you to assume that these
24 records from the hospital that are in evidence for the right
25 and the left breast mention various pieces of tissue ranging
26 in size, and they range in size from 2.0 by 1.8 by

1 [REDACTED] - by Defendant [REDACTED] Direct
2 .6 centimeters to the largest at 26 by 16 by 4 centimeters.
3 I'm going to ask you to assume that Dr. [REDACTED] has testified
4 that the larger piece represented the en bloc resection and
5 that the smaller pieces within that range represented
6 refinement of removed tissue, so as to maintain symmetry
7 between the right and left operative breast.

8 My first question is: Do you have an opinion
9 as to the operating surgeon to achieve symmetry, as best as
10 possible, if that's consistent with proper surgical
11 practice?

12 A. Yes, it is.

13 Q. Now, I'm going to ask you to assume that during
14 the course of the operation after one breast, in this case
15 the right breast first, was operated upon, the breast tissue
16 was tacked temporarily, the other breast, in this case the
17 left breast, was then operated upon with regard to the gross
18 removal of tissue, and then after that there were several
19 comparisons with the patient being elevated on the operating
20 table to achieve symmetry by means of removing additional
21 pieces of tissue.

22 My question is: Do you have an opinion with
23 a reasonable degree of medical certainty, as to whether such
24 technique to achieve symmetry by removal of additional
25 pieces, other than the en bloc resection, is consistent with
26 proper surgical breast reduction practice?

1 [REDACTED] - by Defendant [REDACTED] Direct

2 A. Yes, it is.

3 Q. By the way, whenever I ask for an opinion, if I
4 don't put the phrase reasonable medical probability or
5 certainty, you understand that you will only give an opinion
6 with that force and effect, correct?

7 A. Yes.

8 Q. You've been asked questions like that in the few
9 times you've been in court before, correct?

10 A. Yes.

11 Q. Now, why is it at all important to achieve
12 symmetry during the course of the breast reduction surgery?

13 A. Well, the symmetry is important because that's the
14 pathway to symmetry postoperatively.

15 Q. Just so we're clear on the record: If a patient
16 has somewhat asymmetric breasts, one size larger than the
17 other preoperatively, why is symmetry important even during
18 the operation to achieve it postoperatively?

19 A. Rarely will breasts be exactly symmetrical. The
20 goal is to make them more equal than they were beforehand.
21 That lends itself to a better looking breast
22 postoperatively.

23 Q. While we're on the operation I want to ask you
24 direct your attention to the elapsed time of the surgery.
25 The anesthesia, general anesthesia, was supplemented and I'm
26 going to ask you to assume, according to the hospital record

1 [REDACTED] - by Defendant [REDACTED] Direct
2 in evidence, there's no dispute about it, the general
3 anesthesia was supplemented by what's known as an additional
4 local, regional block. The testimony was that was done to
5 possibly diminish the postoperative pain?

6 MR. [REDACTED] Can I note my objection?

7 MR. [REDACTED] This is testimony in the record.
8 Judge, can we approach on this?

9 THE COURT: Take the jury out, please.

10 (Whereupon, the jury retired from the
11 courtroom.)

12 THE COURT: Doctor, could you step out?

13 (Whereupon the witness stepped out of the
14 courtroom.)

15 THE COURT: It appears one of the jurors is
16 taking notes.

17 MR. [REDACTED]: I think she may be drawing.

18 MR. [REDACTED]: I saw the other day juror number
19 2, is it the woman?

20 THE COURT: That's the juror we've noticed
21 take notes.

22 MR. [REDACTED] I saw her doodling, making
23 circles, and I had a little concern. I didn't address
24 it because I didn't know if it had to do with your
25 questioning when you were cross examining.

26 MR. [REDACTED] I think she's just doodling.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 If you want to not have the doodling that's fine, I
3 don't care. Some people work better when they are
4 doing that. I don't care, whatever you guys want.

5 MR. [REDACTED] I don't care if she doodles.

6 MS. [REDACTED] I don't either.

7 MR. [REDACTED] My concern is on this issue is
8 that if she's the only one taking notes then we're
9 going to have a scribe as opposed to they all taking
10 notes.

11 THE COURT: If you're asking me to give them
12 a charge on note taking and provide pads and pencils I
13 will, if you're not then I won't. Just tell me what
14 you want to do.

15 MR. [REDACTED]: I have no objection.

16 MR. [REDACTED]: Actually, I'm just speaking
17 because it takes me by surprise. That's the only
18 reason I'm speaking.

19 MR. [REDACTED]: It doesn't take you by
20 surprise because you saw her doing it yesterday you
21 said.

22 MR. [REDACTED] No, I saw her doodling, like as
23 if you're nervously doing things like this while she
24 sat on her feet. That's what I meant.

25 MS. [REDACTED] I hadn't noticed.

26 MR. [REDACTED]: Whatever inquiry you want to

1 [REDACTED] - by Defendant [REDACTED] Direct
2 make, Judge, is fine by me, I have no objection.

3 Going back, if I may, to my objection. Why
4 doesn't he just ask what is your understanding as to
5 the type of anesthesia, why was this type of anesthesia
6 used, why is he always leading and telling her what the
7 information is?

8 THE COURT: Counsel, I told you if you object
9 I will absolutely keep him in line.

10 Do not lead.

11 MR. [REDACTED] May I be heard? I totally agree
12 I should not lead, however, when there is a record, a
13 trial record, with a hospital record that talks about
14 the elapse time of the surgery and anesthesia, that
15 talks about general anesthesia, and talks about not
16 only the hospital record in evidence but the testimony
17 from [REDACTED] as well as [REDACTED] and Dr. [REDACTED] that
18 there was a supplemental regional block. My position
19 is at this point in the trial I'm allowed to refer to
20 the testimony in the record as a hypothetical as
21 opposed to just saying what's a regional block.

22 THE COURT: Then pose it that way, but you
23 don't pose it that way. In fact, you inject a lot of
24 other things. There is no dispute, we all agree on
25 this, you'll see --

26 MR. [REDACTED] I'll leave that out.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 THE COURT: No, you don't leave it out, you
3 put it into almost every single question.

4 MR. [REDACTED] I will leave that out, but I'm
5 referring to the trial record, I will not put any issue
6 with regard to agreement or disagreement on it. I'll
7 be guided in that regard.

8 THE COURT: Mr. [REDACTED], if he leads and you
9 object I will sustain your objection.

10 MR. [REDACTED]: Thank you, your Honor.

11 MR. [REDACTED] We're going to leave the
12 doodling alone? It's fine with me.

13 (Whereupon, the jurors entered the courtroom
14 and resumed their respective seats in the jury box.)

15 THE COURT: So in trials, if jurors like to
16 take notes we say, sure, you can take notes, but there
17 are some rules about the notes. So if any of you wants
18 to take notes we'll provide you with pads, we'll
19 provide you with pens. During any break you leave the
20 notes in the courtroom, when you come back to the
21 courtroom the notes will be there for you to resume
22 your note taking, and when you deliberate is the first
23 time you'll be allowed to take your notes with you into
24 the jury room.

25 Here's the thing, note taking should not
26 become a distraction from the proceedings. Notes may

1 [REDACTED] - by Defendant [REDACTED] Direct

2 be inaccurate. The only record that you can rely on in
3 the trial is our official record, that's why we have
4 court reporters taking down all of the questions, all
5 of the answers, all of the things that are said.

6 In your deliberations you can use the notes
7 to refresh your own recollection of the testimony, an
8 aid to your own memory, if you will, but you shouldn't
9 use your notes to try to convince somebody else who's
10 memory is failing on the jury that that's what was
11 said.

12 Any question about what the testimony was
13 should be reconciled by having the Court Reporter read
14 that testimony back to you. That's the official
15 record. For those of you who don't take notes, you
16 shouldn't rely on another person's notes because
17 someone else took notes that maybe they have a better
18 recollection.

19 Again, the only notes that should be used to
20 refresh your recollection would be the Court Reporter's
21 record read back to you on that point. So we did
22 notice somebody's been writing and we're going to have
23 to ask you to not do that, unless you want note pads
24 and pens provided by us and you leave the notes in the
25 courtroom whenever you go into the jury room.

26 Is there anybody who would like to take

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[REDACTED] - by Defendant [REDACTED] Direct
notes?

Can we get note pads, please?

(Pause.)

THE COURT: Let's get the witness, please.

(Whereupon, the witness resumed the witness
stand.)

THE COURT: All right, you may inquire.

MR. [REDACTED] Thank you, Judge.

Q. Doctor, before we had this little break we were
talking about the elapse time of the surgery.

I'm going to ask you to assume that from the
total operating time, including the administration of
anesthesia, that the trial record, our trial record as well
as the hospital record in evidence, indicates that there was
general anesthesia and there was also a supplemental
regional block. Are you familiar with the term regional
block, even though you're not an anesthesiologist?

A. Yes.

Q. Tell the jury what it is in the context of this
surgery while the patient is getting general anesthesia?

A. It's isolating the nerve supply to the breast
tissue itself. So by doing the regional block, the pain
fibers were targeted and it would produce less pain
postoperatively than otherwise the patient would experience.

Q. Now, I want to focus on the actual surgical elapse

1 ██████████ - by Defendant ██████████ Direct
2 time. The surgical elapse time is slightly more than four
3 and a half hours. We have documentation in the hospital
4 record when surgery starts, in military time, and when it
5 ends in military time. Given the nature of this operation
6 and all aspects of the operation, do you have an opinion as
7 to whether or not four and a half hours, a little bit extra
8 time, is consistent with proper operative technique?

9 MR. ██████████: Objection, leading.

10 THE COURT: Sustained.

11 Q. Doctor, do you have an opinion with regard to the
12 four and a half hours elapse time in this case?

13 MR. ██████████: Objection sustained -- oh, I
14 made the ruling, Judge.

15 THE COURT: That's okay. I will allow it.
16 My ruling trumps his.

17 MR. ██████████: Trumps, that's the first time
18 that's in this trial record.

19 Q. Do you have an opinion with regard to the surgical
20 time of four and a half hours, in relationship to what was
21 done on both of these breasts and this reduction
22 technique --

23 A. Yes.

24 Q. -- as to whether it's consistent with proper
25 practice?

26 A. It is.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 Q. Why do you say that, give us the benefit of your
3 opinion fleshing it out?

4 A. It's a meticulous surgery. It's required for
5 attention to detail and control of bleeding, creating a
6 flap, maintaining the blood supply to the flap, rotating
7 tissue in and closing the wound. It is very common to take
8 three and a half, five, even six hours, that's not uncommon.

9 Q. In your experience, given this type of surgery, do
10 you have an opinion as to whether it could be competently
11 performed in two and a half hours?

12 MR. [REDACTED]: Objection, leading.

13 THE COURT: Sustained.

14 Q. We've had testimony in this trial record from
15 Dr. Jane Petro who indicated and testified that in her hands
16 she could probably do the surgery in two and a half hours.
17 My question is, given that surgeon's technique and her
18 abilities and her mind set and speed, can an operation be
19 done in two and a half hours?

20 MR. [REDACTED]: Objection.

21 THE COURT: Sustained.

22 Q. Doctor, is there variability, in your opinion,
23 with regard to different qualified surgeons, in the elapse
24 time potential that an operation like this would take?

25 MR. [REDACTED]: Objection.

26 THE COURT: Sustained.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 Q. Consistent with proper surgical practice, is there
3 any variability in the elapsed time that surgery like this
4 would take, in your opinion?

5 MR. [REDACTED]: Objection.

6 THE COURT: That I'll allow.

7 THE WITNESS: Yes.

8 Q. Why do you say that? What goes into your answer
9 of yes?

10 A. It depends upon the surgeon's technique, the use
11 of what instruments they use. I, quite frankly, have never
12 participated in a breast reduction or done a breast
13 reduction by myself that took two and half hours. I just
14 haven't ever had that experience. I don't know anyone that
15 does this type of surgery in two and a half hours.

16 Q. Now, I'd like to ask you about postoperative
17 situations with regard to the operating breast, the
18 operative breasts and the concept of healing.

19 The trial record reflects the testimony of
20 Dr. Wu that a minimum of six months is something that she
21 entertains with regard to the healing process for operations
22 such as this.

23 MR. [REDACTED]: Objection.

24 THE COURT: I haven't heard the question yet.

25 Q. Do you have an opinion as to whether or not such
26 thinking of a minimum of six months for postoperative

1 [REDACTED] - by Defendant [REDACTED] Direct
2 healing is consistent with plastic and reconstruction
3 thinking concerning the healing period?

4 MR. [REDACTED] Objection. Same.

5 THE COURT: Sustained.

6 Q. Doctor, is there a range of variability at all
7 with regard to postoperative healing for breasts that have
8 been reduced?

9 A. Objection.

10 THE COURT: Sustained.

11 Q. Doctor, do you have an opinion with regard to
12 postoperative healing time periods?

13 A. Yes.

14 Q. Could you give us your opinion in the lapse time?

15 A. The opinion that's expected on the part of
16 surgical wound healing is six to 12 months. It is usually a
17 little bit more than even 12 months. It is rare for -- I've
18 never seen it, that wound healing occurs within six months.

19 (Continued on next page.)

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1 [REDACTED] - by Defendant [REDACTED]

2 Q. Now, when you use the phrase "wound healing" in
3 relationship to the breasts that have been operated upon,
4 what are you talking about?

5 A. Well, the breast has been injured, it's an
6 intentional injury by making incisions, removing tissue,
7 closing the area that was operated upon, and that's
8 considered a wound.

9 Q. Now, during the course of this surgery, Doctor,
10 what physiologically, if anything, happens to the tissue
11 within the breast that has been removed and the tissue
12 adjacent to that tissue that has been removed? What happens
13 to it?

14 A. Well, the tissue that's removed is gone, so it's
15 removed from the body, it's handed usually to the scrub
16 nurse who then gives it to the circulating nurse, and the
17 operation continues. So attention is directed to
18 controlling the bleeding, maintaining a dry operative site,
19 and continuing the operation.

20 Q. What happens physiologically, if anything, to the
21 tissue that's remaining within the breast that has been the
22 subject of the cutting with the scalpel, there's been
23 testimony in this record, the cutting with the Bovie
24 electric cautery, that's been testified to in this record,
25 and this tissue that will be reapproximated as part of the
26 operative procedure that's been testified to in this case by

1 [REDACTED] - by Defendant [REDACTED]

2 Dr. [REDACTED] What happens to that tissue physiologically?

3 A. Well, the tissue is approximated, and it's sewn
4 together, and it begins to heal.

5 Q. In what fashion does it begin to heal from the
6 moment it begins to heal throughout the time frame that you
7 told us it should be healing? What happens to it?

8 A. Well, collagen formation begins, fibroplasia,
9 which is scarring, develops, and there's a whole cascade of
10 other healing elements that pour into the site in order to
11 start the healing process, and it continues during the
12 surgery, and it's going on after the surgery, and actually
13 continues for the rest of the patient's life.

14 So the wound, which is what we just discussed,
15 bringing the edges together, both of the breasts, and
16 ultimately the skin, is forming collagen, and there is an
17 enzyme which melts the collagen, and more collagen is
18 formed, so it's remodeling, and healing, and improving over
19 the course of the patient's life.

20 Q. Postoperative pain: What happens to the patient's
21 appreciation of postoperative pain immediately and as the
22 weeks and months go by?

23 A. Pain is variable. The perception of pain is
24 variable. There are many patients who require only Extra
25 Strength Tylenol for pain management immediately following a
26 surgery. There are other people who need something

1 [REDACTED] - by Defendant [REDACTED]
2 stronger. Today with the hydrocodone crisis pain management
3 is strictly monitored, and very small amounts of a narcotic
4 are prescribed in the immediate post-op period, and
5 substitute narcotics are prescribed if the patient persists
6 in moderate to severe pain, but that is unusual.

7 Q. I want to talk to you about vascular supply to the
8 remaining tissues of the breast as part and parcel of the
9 operation.

10 First question: Is there a vascular supply to the
11 nipple and areola complex of the breast before it's operated
12 upon?

13 A. There is a very rich arterial vascular supply to
14 the entire breast including the nipple-areola complex?

15 Q. Doctor, do you have an opinion as to whether or
16 not there is any risk intraoperatively to the blood supply
17 to the nipple and areola complex as part and parcel of the
18 operative procedure?

19 A. There is always a risk.

20 Q. What is the risk?

21 A. Well, the supply could be totally cut away, cut
22 off.

23 Q. How can the -- surgically how can the supply be
24 interrupted, in your opinion?

25 A. There would have to be extensive, non-customary
26 approaches surgically to injure parts of the breast that

1 [REDACTED] - by Defendant [REDACTED]

2 shouldn't be touched.

3 Q. Okay. Now, am I correct that you have an
4 awareness that there was nipple retraction after this
5 surgery for both breasts?

6 MR. [REDACTED]: Leading.

7 THE COURT: Sustained.

8 Q. Doctor, nipple retraction, is that a subject
9 matter that you reviewed in this case?

10 MR. [REDACTED]: Objection.

11 THE COURT: Sustained.

12 Q. Well, what postoperative conditions did you review
13 in this case?

14 A. I reviewed the appearance of the patient's
15 breasts, the scarring that resulted, and the nipple areola
16 complex with the nipples that had been reconstructed, and at
17 the moment, from the review of the photographs, the nipples
18 are now erect and prominent.

19 Q. Now, in reviewing this case, did you arrive at any
20 opinion with regard to the cause or causes of the nipple
21 retraction that occurred in this case?

22 A. I did.

23 Q. What did you take into consideration?

24 A. I took into consideration the vascular supply to
25 the nipple -- I'm just going to say nipple, but it's that
26 whole complex -- to the nipple, and there was no evidence

1 [REDACTED] - by Defendant [REDACTED]
2 that the blood supply to or from the nipple had occurred.
3 The nipple was pink, it was rosy, there is no indication
4 during the surgery that the blood supply had been damaged at
5 all. It wasn't bluish. It wasn't darker than a light blue,
6 violaceous color. So that was an assurance that the
7 integrity of the blood supply to the nipple had been
8 maintained to the completion of the surgical procedure.

9 Q. Did you arrive at any opinion as to the cause or
10 causes of the nipple retraction that occurred in both
11 breasts?

12 A. (There was no verbal response.)

13 Q. Did you arrive at an opinion?

14 A. Yes.

15 Q. And what is or was your opinion as to the cause or
16 causes?

17 A. Well, I alluded to septae which are fibrous bands
18 that run throughout the breast. And part of wound healing
19 can be a contraction of the fibrous network which is very,
20 very extensive, permeating beneath the nipple throughout the
21 entire breast tissue, supporting the neurovascular supply to
22 the nipple. And part of wound healing is the formation of
23 scar and contraction of that scar so the scar pulls in.
24 It's not centrifugal where it goes out, but, rather, it
25 pulls in. And as those bands shrunk, that affected the
26 appearance of the nipple and pulling that inward.

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[REDACTED] - by Defendant [REDACTED]

Q. Doctor, what you just described, do you have an opinion as to whether or not that takes time or can happen immediately in your opinion?

A. It would --

MR. [REDACTED]: Objection.

THE COURT: Overruled.

A. It would take time.

Q. Okay. Now with the nipples being retracted immediately post-op, I will ask you to assume that when [REDACTED] first looked at her breasts when the bandages were removed she saw the nipples not being out, and that when she went to Dr. [REDACTED] office about six days later, that was the condition. Dr. [REDACTED] has no note about that, but then in October, less than two months later, Dr. [REDACTED] has in her postoperative notes, nipples still retracted.

Do you have an opinion as to how the nipples became retracted in this case in the immediate postoperative period, Doctor?

MR. [REDACTED]: Objection.

THE COURT: Sustained.

MR. [REDACTED]: Judge, so that I can address an issue with the court, I hate to do this, could we approach and have the jury leave?

THE COURT: Sure.

MR. [REDACTED]: Thank you.

1 [REDACTED] - by Defendant [REDACTED]

2 (The jury exited the courtroom and
3 the following occurred:)

4 THE COURT: Doctor, you have to step
5 outside.

6 (The witness exits the courtroom.)

7 MR. [REDACTED] Your Honor, I submit that the
8 last question had absolutely nothing that was not
9 contained in the trial record. We have an admission
10 and testimony from the plaintiff that she saw her
11 nipples retracted from the first time she saw them.
12 The defense admits that, we are not contesting that,
13 that they were retracted when she came to Dr. [REDACTED]
14 office. Although there is no notation, we don't
15 contest the fact that they are not retracted.

16 In October the doctor says they are still
17 retracted, and based upon that information, which has
18 not been challenged, and is part of the "foundation" of
19 this case there is absolutely no way that I can
20 possibly think other than to adopt that clinical
21 situation and ask my expert witness if she has an
22 opinion, I am not suggesting anything, as to the reason
23 or reasons, if any, as to why those nipples were
24 retracted in the early time frame.

25 THE COURT: Counsel, I am not sure what you
26 are asking. The question had been asked and answered

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[REDACTED] - by Defendant [REDACTED]
at the point when counsel objected.

MR. [REDACTED]: I am not following you, Judge.
I am really not following you.

THE COURT: Did you want to add something?

MR. [REDACTED]: What I want to add, not only
was it asked and answered, Judge, but additionally he
keeps on doing this, he keeps on telling the witness
what he wants to say, and rather than saying what is
your understanding as to this patient, as to what
happened postoperative, and what do you mean by that,
and why did it happen like that, and then say -- he
wants to, he wants to jump-start this. He wants to say
this, this, this, this, this, and then he wants to say
what do you think rather than developing it from his
witness as to what her understanding is. He's
injecting his understanding of the evidence, his
interpretation of the evidence, rather than asking this
witness what do you know.

MR. [REDACTED]: Let me respond.

MR. [REDACTED]: He is doing her job.

MR. [REDACTED]: Let me respond to that.

The witness has just given an answer that the
concept of fibrosis and bank takes time and --

THE COURT: That's right. That's what the
witness said.

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[REDACTED] - by Defendant [REDACTED]

MR. [REDACTED] Judge, --

MR. [REDACTED]: What do you mean by that?

How much time? Could you please --

MR. [REDACTED] This is my examination,

Mr. [REDACTED].

And once the witness talks about how it happens with regard to the finalization of contracture, I want to ask her, is there an element that allows it to happen in an earlier time frame. She can say yes or no. I am suggesting nothing to this witness.

We have testimony in the record, Judge, that --

THE COURT: You have to stop telling her what the record has already established because the record -- no, no, no -- you can go with the hospital records that she has seen.

MR. [REDACTED] And the testimony.

THE COURT: You can even say there has been testimony, but what you do, you conclude what the record -- basically you usurp the role of the jury as to what all of this information means.

MR. [REDACTED] I don't want to argue with you, Judge.

THE COURT: So you can't keep telling her what's already established in our record. If you want

1 [REDACTED] - by Defendant [REDACTED]
2 to point to testimony, point to testimony. If you want
3 to point to a record, point to a record, but stop
4 taking the role of the jury and telling this witness
5 what the testimony has already established.

6 MR. [REDACTED] Judge, bear with me a second.
7 How can I possibly focus the witness on an
8 element of a pathology happening, namely the retracted
9 nipples from the immediate postoperative period, and
10 elicit an opinion physiologically with the witness
11 telling us if she has an opinion, and then the basis of
12 the opinion, so that counsel can cross-examine her on
13 it without establishing the fact that the trial record,
14 the questions and answers, and the hospital record, and
15 the doctors records, have established that there was
16 retracted nipples in the immediate postoperative
17 period? What am I supposed to say, what did you find?

18 MR. [REDACTED] Yeah.

19 MR. [REDACTED] I have to focus her on this
20 just like he focused Dr. [REDACTED] on the hypotheticals.

21 THE COURT: Counsel, I realize you have a
22 style.

23 MR. [REDACTED] It's a hypothetical basis.

24 THE COURT: I will agree with Mr. [REDACTED]
25 that the style is objectionable at certain points in
26 time.

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[REDACTED] - by Defendant [REDACTED]

You can ask the witness to assume a fact --

MR. [REDACTED] That's what I'm doing.

THE COURT: No, that's not what you are doing.

You can ask the witness to assume a fact.

You know what the charge is that the jury gets at the conclusion of this case, that if they find the facts different from those facts which you asked the witness to assume, then they can feel free to reject the expert's testimony.

MR. [REDACTED]: Of course.

THE COURT: But you do not just ask her to assume a fact. You ask her to assume a conclusion that's already been reached on the basis of the record that's been established in this courtroom.

MR. [REDACTED]: Okay. Maybe --

THE COURT: So just ask her to assume certain facts, that's all. Is that so difficult?

MR. [REDACTED]: Let me just, so we can have the question early without chopping up my direct, I don't mean you, counsel chopping up my direct, I am asking her to assume that there was an early notation of nipple retraction that persisted, and with that, does she have an opinion as to what the cause or causes are. I put the word --

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[REDACTED] - by Defendant [REDACTED]

THE COURT: That question in that form would be permissible.

MR. [REDACTED] I submit then other than using the word assume, and making the question shorter, I'm -- I'm not going to argue with you.

THE COURT: You made it a lot shorter. You didn't inject a lot of other things into it.

MR. [REDACTED] I am not being facetious when I say this. I am not -- I wouldn't have objected to that question.

MR. [REDACTED] Of course not.

And the fact that I put in the question that Mara --

THE COURT: Counsel, do you want, do you want that read back to you so you know exactly what your question will be?

MR. [REDACTED] No, I think I have the ability to be able to do it on my own, quite frankly.

THE COURT OFFICER: Jury entering.

(The jury entered the courtroom and the following occurred:)

THE COURT: Let's continue.

Q. Dr. [REDACTED] I will ask you to assume that the nipples of [REDACTED] during the immediate postoperative period when the bandages were first removed and noticed by

1 [REDACTED] - by Defendant [REDACTED]
2 the patient, that the nipples were, in fact, retracted.

3 With that assumption I will ask you, do you have
4 an opinion, given the nature of this reduction surgery, as
5 to any cause or causes of that immediate nipple retraction
6 bilaterally?

7 A. I don't.

8 Q. Okay. Now, Doctor, what is scar tissue in
9 relationship to the operative breasts? What is it?

10 A. It's fibrosis. It's the laying down of collagen.
11 It's other healing factors that are attracted to the injured
12 site. And that's how the body mends itself.

13 Q. Now, preoperatively there was a diagnosis in the
14 operative report of massive pubertal hypertrophy of the
15 breast with a code number of 611.1.

16 Do you have an opinion as to what is massive
17 pubertal hypertrophy?

18 MR. [REDACTED]: Objection. Asked and
19 answered.

20 THE COURT: I assume this is preliminary.

21 MR. [REDACTED]: Yes.

22 THE COURT: Go ahead.

23 Q. What is massive pubertal hypertrophy?

24 A. It's an enlargement of the female breast at the
25 time of puberty which is responsive to the hormones, and
26 it's an overgrowth of breast tissue. So it's a young girl,

1 [REDACTED] - by Defendant [REDACTED]
2 can happen as early as 12 in this these days, even younger,
3 where the breasts enlarge to massive proportions, and they
4 are not on birth control pills, and they are going through a
5 normal phase of their lives, but the breast is a target for
6 the influence of the hormones.

7 Q. Now, do you have any opinion with regard to the
8 concept of density of young patients breasts, the concept of
9 density?

10 A. The density is that the breast consists of more
11 glandular tissue than fat. So, as I mentioned before, the
12 breast consists of various tissue types, but a dense breast
13 is primarily the glandular tissue itself called the stroma
14 of the breast.

15 Q. When the stroma is operated upon such as a
16 technique of the Hall-Findlay and the reduction technique,
17 what happens, if anything, in your opinion to the stroma in
18 the immediate postoperative period?

19 A. Well, the stroma that remains behind is there,
20 it's physically present, it has his blood supply intact, and
21 the tissue, the breast tissue that's brought together begins
22 the healing process.

23 Q. All right. Now I want to ask you about some
24 aspects of the breast reduction, and it's going to be a
25 hypothetical so just bear with me.

26 I will ask you to assume based upon the testimony

1 [REDACTED] - by Defendant [REDACTED]
2 of the operating surgeon, Dr. [REDACTED] that after the
3 preoperative markings were done, that she incised about the
4 mosque pattern with the template, and the line that she drew
5 down medial and lateral from the mosque template, and she
6 incised by means of going deep down with a scalpel and Bovie
7 cautery.

8 First question: Are you familiar with the term
9 scalpel and Bovie cautery in that setting?

10 MR. [REDACTED]: I object to the preliminary.

11 MR. [REDACTED]: I am missing the basis for
12 this.

13 THE COURT: I'll allow it.

14 The best way for him to elicit an opinion is
15 to ask the expert to assume certain facts. Now at the
16 end of this case I will be giving you a charge, and it
17 talks about expert testimony, and it's going to say
18 that if you find the facts different from the facts
19 that the expert is asked to assume, then you are free
20 to reject the opinion of the expert. So, counsel is
21 going to ask the witness to assume certain facts which
22 may or may not be the same as the facts that you find.

23 Go ahead.

24 MR. [REDACTED]: Agreed.

25 Q. I am asking to you assume the facts, factual
26 picture, based upon the testimony of Dr. [REDACTED] who was here

1 [REDACTED] - by Defendant [REDACTED]
2 yesterday talking about the various steps of the operation;
3 you understand that?

4 A. I do.

5 Q. Okay. Now I was asking you before I was
6 interrupted the concept of using a scalpel as well as a
7 Bovie to go deep down in the incision lines not only to get
8 deep down, but also to incidentally stop bleeding.

9 THE COURT: Sustained.

10 All right. Now you are adding things, all
11 right. If you have a question, ask a question.

12 Q. I am going to ask you to assume that Dr. [REDACTED]
13 testified that she utilized the scalpel to go deep down
14 toward the chest wall, and utilized the Bovie to also cut
15 tissue, and incidentally used the Bovie to create or allow
16 for hemostasis.

17 Are you familiar with those terminologies?

18 A. Yes.

19 Q. What do they mean in the concept of a breast
20 reduction surgery, cutting deep down and using the Bovie for
21 hemostasis?

22 A. It's how you separate the tissues that are to be
23 removed from the tissues that stay behind. It's an incision
24 line, and whether you use a scalpel, which does not create
25 hemostasis, or you augment it with the electric cautery that
26 cuts, but as it cuts, it also cauterizes. So that's

1 [REDACTED] - by Defendant [REDACTED]
2 commonly used in many surgeries including breast reduction.

3 Q. Now I will go further and ask you to assume that
4 after making the planes, P-L-A-N-E-S, of cutting, Dr. Wu
5 testified that she removed an en bloc piece of tissue, and
6 that she then, on the pillar, on medial and lateral sides,
7 went underneath to scoop out additional pieces of tissue
8 that she testified was reflected in the additional pieces of
9 the right breast and the left breast in our pathology
10 department report that we have in the hospital record.

11 MR. [REDACTED]: Objection.

12 THE COURT: Can we take the jury out,
13 please?

14 (The jury exited the courtroom and
15 the following occurred:)

16 (The witness exits the courtroom.)

17 THE COURT: Mr. [REDACTED].

18 MR. PIRROTTI: Yes, your Honor.

19 Why isn't he just asking on direct, what is
20 your understanding as to what was done with this
21 surgery? What happened next to your understanding?
22 Why is he injecting himself and saying this was done,
23 that was done, this was done, that was done?

24 THE COURT: So here's the problem: The
25 testimony of Dr. [REDACTED] is that she had no recollection of
26 this individual surgery, and if it's not reflected in

1 [REDACTED] - by Defendant [REDACTED]
2 her operative report, and it wasn't reflected in her
3 testimony, then it's additional to that which we have
4 before this jury.

5 This idea of, and then she went down and
6 scooped out, she doesn't remember the order that she
7 did this. She doesn't remember which direction she did
8 any incisions. She doesn't remember this particular
9 surgery. So if you are basing it on the operative
10 report, give the doctor the operative report and ask
11 her to look at it. Ask her to see the way the surgery
12 was done because if it wasn't in the operative report,
13 there's no -- the doctor, Dr. [REDACTED] had no recollection
14 of it.

15 MR. [REDACTED]: Your Honor, I disagree with
16 you.

17 If I may be heard, number one, yesterday
18 there was testimony subject to cross-examine -- look,
19 the last thing I want to do is chop up my direct here.
20 I really am not doing this purposely.

21 Yesterday the doctor was asked, given the
22 nature of what she understood this operation to entail,
23 she used her operative report with regard to protecting
24 the pedicle, making the planes, using the scalpel,
25 using the Bovie. It's right in there. And she
26 described what that operative report, which was

1 [REDACTED] - by Defendant [REDACTED]
2 contemporaneous with the August 25, 2010 operation,
3 was. So the fact --

4 THE COURT: Maybe I missed it. Show me the
5 operative report, and show me the part where it says
6 she then went down underneath and scooped out
7 additional tissue.

8 MR. [REDACTED] Judge --

9 THE COURT: I'm sorry. That's what you just
10 said to this witness.

11 MR. [REDACTED] Yes, your Honor. You are
12 usurping the fact that the jury -- you will find that
13 because the doctor has no recollection in 2014 and 2017
14 of the technique of what she did, and why she is
15 describing -- counsel can say on his summation she has
16 no recollection, and she's making it up, but we have a
17 trial record where he did not object and say that she
18 can't testify to the technique that she was trained in,
19 and what she would do as part of her custom and
20 practice of doing the operation.

21 So it would -- let me finish -- it would be
22 impossible, Judge, to have a defense expert comment on
23 the operative technique in any case where the doctor
24 says that's how I did it and how I always did it
25 because the doctor can't remember everything going back
26 to 2010 by 2014 or '17.

1 [REDACTED] - by Defendant [REDACTED]

2 THE COURT: So show me where she indicates
3 that after dissecting that en bloc piece she then went
4 in and underneath and scooped out.

5 MR. [REDACTED]: "Inferiorly breast skin flaps
6 were raised with Mayo scissors and scalped down to
7 the pectoris fascia. All breast tissue inferior to the
8 pedicle was removed. Superiorly the mosque markings
9 were incised, and breast tissue lateral to the pedicle
10 were excised taking care not to undermine superiorly,
11 to preserve superior --"

12 THE COURT: Why is it that you're not just
13 giving the operative report or what's contained in the
14 operative report to the witness?

15 MR. [REDACTED]: Because I --

16 THE COURT: Because I don't take that to be
17 what you just said, but let the expert opine about what
18 the operative report indicates. As a lay person I
19 don't read that to be "and then I went back in and
20 scooped out from underneath." So let's let the witness
21 give testimony. Why are you adding testimony?

22 MR. [REDACTED]: Very simply, I am not giving
23 testimony. I am recalling a trial record without an
24 objection, without a motion to strike. I am recalling
25 the substance of a trial record, which I might add at
26 this point --

1 [REDACTED] - by Defendant [REDACTED]

2 THE COURT: Show me the testimony then.

3 MS. [REDACTED] May we have a moment, your Honor?

4 THE COURT: Yes. I just got the testimony
5 this morning. I am happy to look at it.

6 MR. [REDACTED]: I didn't print it yet because
7 my printer was down at 6:00 o'clock this morning, but I
8 am certain that Ms. [REDACTED] has it. This technique was
9 done in excruciating detail over the lecture for the
10 one hour that Mr. [REDACTED] mentioned yesterday.

11 MR. [REDACTED]: Yes.

12 MS. NUNN: I have it.

13 MR. [REDACTED] If I could mention one thing,
14 your Honor, --

15 THE COURT: Ms. [REDACTED] you and I would have a
16 much briefer record.

17 MS. [REDACTED] I think so.

18 THE COURT: I do think that's true.

19 MS. [REDACTED] I have an opportunity to be
20 heard, please.

21 MR. [REDACTED]: I know but let me just
22 finish --

23 THE COURT: No, no, no. You know what,
24 really, let's just isolate the issue before us and
25 discuss it to its conclusion.

26 I take it you used the word index as did I

1 [REDACTED] - by Defendant [REDACTED]
2 and found the word "scoop" or "scooping?"

3 MS. [REDACTED] Yes, your Honor.

4 Your Honor, I'm at page 767. I am going to
5 line 21. I am happy to read it for your Honor, I am
6 happy to wait for counsel to find it, but it is, in
7 fact, part of the trial record.

8 MR. [REDACTED] Yeah, I don't dispute --

9 THE COURT: Then read the testimony to the
10 witness.

11 MR. [REDACTED] Also, please, your Honor, one
12 thing he said I didn't object to, I said specifically
13 she is talking about custom and practice, not what she
14 did.

15 MS. [REDACTED] As she's entitled to.

16 THE COURT: Right, but that's not what was
17 represented to the expert.

18 MR. [REDACTED] Right, that she actually did
19 this.

20 THE COURT: So confine yourself to that
21 which truly was elicited. You can read -- you can ask
22 the expert to assume that there was testimony, and read
23 from page 767. You can ask the expert to assume, and
24 show her the operative report, and show her the
25 language of the operative report. That you are
26 permitted to do.

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[REDACTED] - by Defendant [REDACTED]

Let's continue.

MR. [REDACTED] I respectfully object to your
Honor's ruling.

THE COURT: So noted.

(Continued on next page.)

1 [REDACTED] - by Defendant [REDACTED] Direct

2 DIRECT EXAMINATION

3 BY MR. [REDACTED]

4 (Whereupon, the jurors entered the courtroom
5 and resumed their respective seats in the jury box.)

6 (Whereupon, the witness resumed the witness
7 stand.)

8 THE COURT: Please sit down.

9 Rephrase your question, please.

10 MR. [REDACTED] I'd like to get the records
11 marked in evidence first, please.

12 (Pause.)

13 BY MR. [REDACTED]

14 Q. Dr. [REDACTED], I'm going to put before you what's
15 been marked as Plaintiff's Exhibit 1 in evidence. Part of
16 those records have the doctor's operative report, the
17 two-page operative report. I'm going to leave page 2 in
18 front of you, particularly the first paragraph.

19 Can you take a look at that operative report?

20 My first question is: Is that the report
21 that I'd asked you when we first started your review
22 qualifications that you had actually reviewed as part of
23 this case?

24 A. I did.

25 Q. Could you tell our jury quantity of information
26 and particularity of an operative report consistent with

1 [REDACTED] - by Defendant [REDACTED] Direct
2 proper surgical practice in calendar year 2010, as to
3 whether that operative report has, in your opinion,
4 appropriate or inappropriate details.

5 A. It's a standard operative report.

6 Q. I'm going to ask you to assume that the template
7 which has standard operative descriptions supplemented by
8 the particular markings or --

9 THE COURT: I don't know what his question is
10 going to be.

11 MR. [REDACTED] May I continue with it?

12 THE COURT: I have to hear it.

13 MR. [REDACTED] He's already given me the
14 finger, Judge.

15 THE COURT: Not that kind of finger.

16 MR. [REDACTED] No, this finger.

17 THE COURT: The naughty finger.

18 MR. [REDACTED] He's telling her.

19 THE COURT: Thank you.

20 Go ahead.

21 BY MR. [REDACTED]

22 Q. Doctor, I'm going to ask you to assume that the
23 testimony in this trial record is that Dr. [REDACTED] when she's
24 testified during this trial, had no independent recollection
25 of doing this operation and she testified that in her
26 opinion she has no recollection whether this operation went

1 [REDACTED] - by Defendant [REDACTED] Direct
2 swimmingly and by the book. And I'm going to ask you to
3 assume that the doctor had created in testimony that the
4 template for this operation, and then she testified as to
5 the details of her operation, according to custom and
6 practice, without an independent recollection that what's
7 described in the operative report was actually
8 contemporaneous with this operation for Mara Goldstein.

9 MR. [REDACTED] Objection.

10 THE COURT: Maybe there's a subtlety that I
11 didn't get but so far I didn't hear anything
12 objectionable.

13 MR. [REDACTED]: Template. He's telling her --

14 MR. [REDACTED] Judge, he --

15 THE COURT: Go ahead.

16 MR. [REDACTED] Judge, I would just like the
17 courtesy of doing my examination without the
18 gesticulation from my adversary, which I never did to
19 him while he had Dr. [REDACTED] on the stand.

20 THE COURT: You both have very distinct
21 styles.

22 MR. [REDACTED] And I'm happy with mine,
23 frankly.

24 BY MR. [REDACTED]:

25 Q. Doctor, I'm going to ask you to assume that
26 operative report is that operative report, and I'm going to

1 [REDACTED] - by Defendant [REDACTED] Direct
2 ask you to assume that Dr. [REDACTED] as I just said before I was
3 interrupted, had no specific recollection. All right.

4 The technique, according to custom and
5 practice, that the doctor testified to yesterday, of
6 incising with the scalpel and using the bovie, and I'm going
7 to go further, on the pillars, lateral and medial, scooping
8 out, we have testimony in the record that she scooped out
9 tissue that's reflected that went to pathology. Do you have
10 an opinion as to whether or not that represents proper
11 technique or not?

12 MR. [REDACTED] Objection.

13 THE COURT: Overruled.

14 A. Yes.

15 Q. Thanks for bearing with the length of that
16 question, by the way.

17 By the way, whenever you've appeared in court
18 before, have lawyers put hypothetical questions to you?

19 MR. [REDACTED] Objection.

20 THE COURT: Sustained.

21 Q. Now, during the course of this operation, Dr. Wu
22 testified according to custom and practice that after the
23 large piece of tissue was removed, the en bloc, from both
24 breasts, that she instructed anesthesia -- according to
25 custom and practice, with no specific recollection, to
26 elevate the electric bed, maintain the anesthetic

1 [REDACTED] - by Defendant [REDACTED] Direct
2 propensities and check for symmetry of the right breast and
3 left breast several times, in addition to removing extra
4 tissue, as is reflected in the path report, to achieve
5 symmetry. You with me thus far?

6 A. I am.

7 MR. [REDACTED] Objection.

8 THE COURT: This is a fair question he's
9 asking her to assume. If the jury finds the facts to
10 be different from those which the expert has been asked
11 to assume, they are free to reject the opinion and the
12 conclusions to be drawn from the opinion.

13 BY MR. [REDACTED]

14 Q. Now, Doctor, do you have an opinion, with
15 reasonable medical certainty or probability, as to the
16 concept of elevating the bed and checking several times, as
17 Dr. [REDACTED] testified to is her custom and practice, without a
18 specific memory going back to August of 2010, represents
19 proper surgical intraoperative processes? Do you have an
20 opinion?

21 A. Yes.

22 Q. What is your opinion?

23 A. That behavior is appropriate. It adhere's to the
24 standard of care.

25 Q. What is the function or benefit, if any, to such
26 behavior intraoperatively, that we just were addressing,

1 [REDACTED] - by Defendant [REDACTED] Direct
2 elevating the bed, checking for symmetry, potentially
3 removing tissue several times; what's the benefit?

4 A. To reaching the optimal final result.

5 Q. May I ask you, are the photographs still in front
6 of you?

7 A. Yes.

8 Q. I'm going to address you not to bra photographs --

9 MR. [REDACTED] Mr. [REDACTED]

10 MR. [REDACTED] Yes, sir.

11 MR. [REDACTED] Don't feel you have to call me
12 sir.

13 MR. [REDACTED]: I didn't mean any disrespect.

14 THE COURT: All this is an aside, it has
15 nothing to do with the case. It goes along with what I
16 once told you, whatever the attorneys say in the course
17 of their examination is not evidence in the case.

18 BY MR. [REDACTED]

19 Q. Dr. [REDACTED] that photograph that I've outlined
20 in the postoperative, I'm going to ask you to assume that it
21 is a frontal photograph after Dr. [REDACTED]'s three procedures.
22 The patient is bare breasted in that photograph, correct?

23 A. Yes.

24 Q. Could you hold it up to the jury so they see which
25 one I'm specifically referring to, the top photograph.

26 My question to you is: Given the nature of

1 [REDACTED] - by Defendant [REDACTED] Direct
2 the preoperative status and size of this patient's breast,
3 given the operations performed by Dr. [REDACTED] and given the
4 revisions as described by Dr. [REDACTED] do you have an opinion
5 as to the appearance, quality and result ultimately achieved
6 with regard to this patient's breasts, left and right?

7 A. Yes.

8 Q. What is your opinion?

9 A. I think the breasts are beautiful.

10 Q. Let me direct your opinion to some aspects of the
11 breasts. Can you look specifically at the lollypop vertical
12 scar?

13 A. Yes.

14 Q. I'm going to ask you to assume that the vertical
15 scar was created by Dr. [REDACTED] according to her recollection --
16 no recollection, according to her custom and practice, she
17 cut the skin. I'm going to ask you to assume that on
18 several occasions, namely, two, the trial record reflects,
19 according to Dr. [REDACTED]'s records in evidence, that he
20 opened up partially the vertical scar on both breasts on two
21 occasions to get rid of the redundant skin under the
22 breasts. You're familiar with those procedures?

23 A. Yes.

24 Q. With the initial incision and opening up the
25 incisions two times, partially to remove that tissue, do you
26 have an opinion as to the quality or lack of quality or

1 [REDACTED] -- by Defendant [REDACTED] direct

2 egregiousness or lack of egregiousness of the vertical,
3 lollipop scar by those postoperative photographs?

4 A. The scar is acceptable.

5 Q. I want to address the position of the nipple and
6 areola complex, I'll call it the nipples even though I'm
7 referring to both parts of that tissue, fair enough?

8 A. Yes.

9 Q. What is your opinion, if anything, with regard to
10 the ultimate placement of those nipples after this surgery?

11 A. They are in the proper position, it's the apex of
12 the breast.

13 Q. When you say as a surgeon "the apex of the
14 breast," what does apex of the breast mean in lay language?

15 A. Well, the breast is a three-dimensional structure,
16 it's a pyramid. So frequently it's referred to as a
17 pyramid-like structure. So the chest wall is the base of
18 the pyramid and the breast rises off of it in three
19 dimensions, so it has height, it has length and it has width
20 and at the top of the breast is situated the nipple. So
21 this is a reflection of that.

22 I can't see the clavicle but I can see the
23 super sternal notch and the distances that are visible with
24 the photo cut off are compatible with what's esthetically
25 acceptable in this particular type of surgery.

26 Q. I'm going to skip ahead. I want to --

1 [REDACTED] - by Defendant [REDACTED] Direct

2 MR. [REDACTED] May I ask, what page was she
3 referring to, please?

4 MR. [REDACTED] Yes.

5 (Pause.)

6 MR. [REDACTED] I'll put my initials and a check
7 mark so you know I referred to it.

8 MR. [REDACTED] Thank you so much.

9 (Pause.)

10 BY MR. [REDACTED]

11 Q. Now, I'm going to refer -- and put before the
12 witness -- the two photographs of the patient in the red and
13 black bras.

14 Now, Doctor, the same question I asked you
15 with regard to the breasts without a garment on them, the
16 garment being the bras. First, do you see a portion of the
17 nipple and areola complex being visible in both of those
18 photographs?

19 A. Yes.

20 Q. Does that affect in any fashion the opinion that
21 you gave to the jury that the nipple-areola complexes were
22 in an elevated but proper position?

23 A. Not from these photos.

24 Q. Why do you say not from these photos?

25 A. Because the bra could be manipulated to move the
26 breast tissue around. There's pushup bras, bras that

1 [REDACTED] - by Defendant [REDACTED] Direct
2 minimize the breast, there's clothing that accentuates,
3 there's clothing that camouflages. So the location of the
4 bra and the underwire does not appear appropriate in
5 either -- from what I can discern from this photograph, in
6 either picture.

7 Q. There has been testimony, although Dr. [REDACTED] has no
8 independent recollection of what she did on August 25, 2010,
9 but according to the custom and practice and the aspects of
10 the Hall-Findlay operative procedure, that the original
11 placement preoperatively of the nipple and areola complex as
12 a result of the technique of the surgery, Dr. [REDACTED] testified,
13 it allows, after the tissue resected and the pillars or
14 flaps are brought together, for a natural elevation of the
15 nipple complex.

16 My first question is: Are you aware of such
17 movement as part and parcel of this operation?

18 A. Yes.

19 Q. When I say movement, I mean of the nipple?

20 A. Yes.

21 Q. Is there any way to absolutely, I mean in your
22 opinion, within millimeters, to predict where the nipple
23 will reside postoperatively, notwithstanding the
24 preoperative mosque markings, in your opinion?

25 MR. [REDACTED] Objection.

26 THE COURT: Overruled.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 A. I don't quite understand that question.

3 Q. Let me tell you, I almost don't understand it
4 myself so let me give it to you again.

5 I wanted to know, with the mosque markings,
6 the preoperative markings of the template, the drawings on
7 the breast, together with the preoperative measurement --
8 let me just get to them so you don't have any question.

9 (Pause.)

10 Q. Given the mosque markings as part of my question,
11 and the following measurement according to the operative
12 report in evidence, the new nipple position was marked at
13 the level of the intra-mammary fold, IMF, approximately
14 22 centimeters from the sternal notch. The standard skin
15 markings for a vertical reduction mammoplasty were marked on
16 the patient using a keyhole template. A nipple marker was
17 used to mark the new dimensions of the areola.

18 My question is: Do you have an opinion with
19 reasonable medical certainty, aside from the mosque
20 template, marking the new nipple position potentially at
21 22 centimeters from the sternal notch; do you have an
22 opinion as to whether or not that measurement comports with
23 appropriate surgical practice, Doctor?

24 A. Yes, it does.

25 Q. Reflecting on the anatomy and reflecting on the
26 distance, what is the basis of your opinion to our jury?

1 [REDACTED] - by Defendant [REDACTED] Direct

2 A. The basis is the ideal location of the nipple.
3 And there's a range. So it could be 19 inches, it could be
4 22 inches, so it's generally not less than 19 and not more
5 than 22, 23.

6 Q. Are you familiar with the term called ptosis of
7 the nipple preoperatively?

8 A. Ptosis of the nipple or ptosis of the breast.

9 Q. Of the breast, together with the nipple?

10 A. Yes.

11 Q. What is meant by that, ptosis?

12 A. Droopy.

13 Q. We have testimony in this trial record from Dr. Wu
14 that the grading of ptosis can be from one to three, this
15 was a grade two. First of all, do you have an opinion as to
16 whether or not the grading of one to three, three being more
17 severe than one, as she testified to, is an appropriate
18 presurgical term?

19 A. Yes.

20 Q. What is grade two, Doctor?

21 A. Grade two is where the nipple is at the level of
22 the crease and not below the key. It's still on the breast
23 mound but it is now sagging to the level of the crease.

24 Q. Now, with regard to the questions that I put
25 before you thus far, I want to ask you globally: Do you
26 have an opinion with a reasonable degree of medical

1 ██████████ - by Defendant ██████████ Direct
2 certainty as to whether or not the preoperative assessment
3 and markings, before we get to the surgery and the cutting,
4 do you have an opinion as to whether or not what's reflected
5 in this operative report and on the preoperative photograph,
6 as to whether or not those preoperative markings comported
7 with proper, preoperative assessments before the patient was
8 cut?

9 A. Yes.

10 Q. What's the basis -- what goes into your opinion
11 that you said yes?

12 A. It's based on the anatomical location of the
13 breasts and the location of the nipple in reference to the
14 breast, the excessive tissue, the ptosis that's present and
15 the mass of the breast to be removed and the relocation of
16 the nipple.

17 Q. Now, I want to ask you: Some aspects that were
18 testified to with regard to the intraoperative cutting and
19 manipulation, once again so we're clear, Dr. Wu had no
20 independent recollection of what she did and she based her
21 description that I'm going to incorporate, that we had
22 yesterday, on custom and practice and that she created to
23 whatever degree this surgical template and description.

24 I'm going to ask you to assume that she cut
25 deep down with the scalpel and the bovie that we talked
26 about already, she removed tissue that's reflected in the

1 [REDACTED] - by Defendant [REDACTED] Direct
2 pathology report, en bloc and multiple small pieces right
3 breast and left breast, she undermined and scooped out,
4 according to the trial record she testified, on the pillars
5 on the medial and lateral and at some point approximated the
6 left and right pillars, and as a result of that the
7 nipple-areola complex in the pedicle was elevated up and the
8 nipple, she testified, was placed within the upper part of
9 the mosque template.

10 Do you have an opinion with reasonable
11 medical certainty as to whether those aspects of the
12 intraoperative manipulation maneuvers and cutting comported
13 with appropriate breast reduction surgical practice for the
14 whole technique?

15 MR. [REDACTED]: Objection.

16 THE COURT: Overruled.

17 A. Yes.

18 Q. May I ask you what's the basis for the opinion
19 that it comported?

20 A. It's normal anatomy. The desired result is
21 achieved by following the road map.

22 Q. I'm going to ask you to assume, and I'm reflecting
23 now on Dr. Sultan's results. I'm not reflecting, I'm
24 referring to the removal of the excess skin that he
25 addressed. I'm going to talk about his addressing the
26 retracted nipples.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 His operative reports indicate that, among
3 other things, he introduced cutting devices to free up
4 glandular and fibrous bands and he was not completely
5 successful on the first operation, left or right.

6 The second operation, the left nipple was
7 somewhat elevated out but the right was persistently
8 retracted.

9 And then the third operation in January of
10 2012, even after harvesting fat from the earlier operation,
11 he utilized a purse string on the right nipple to hold it
12 up, then he used something known and described as donuts,
13 according to the plaintiff, that she wore for a number of
14 months, to keep the nipples protected. She didn't wear a
15 bra and she had to walk around for a number of months
16 without anything that would push the nipples in.

17 What is your assessment of what he did to
18 evert or get the nipples out? Just summation, what did he
19 do?

20 A. In essence everything he did is appropriate.

21 Q. And the technique dealt with what, in successive
22 fashion to release the inverted nipples -- retracted
23 nipples?

24 A. The attempt initially was to release banding,
25 fibrotic tissue and to allow the nipple to evert, and
26 subsequently I believe he did little flaps -- I'd have to

1 [REDACTED] - by Defendant [REDACTED] Direct

2 look at his op report -- which is another approach.

3 Finally he resorted to autologous fat, which
4 is taking fat out of one part of the body, putting it under
5 the nipple to have it avert, and protecting the nipple
6 subsequently so that no trauma interrupted the healing
7 process of all of those procedures, particularly the last
8 one.

9 Q. Now, I'm going to ask you to assume the retracted
10 nipples, I'd like to know if you have an opinion as to
11 whether or not the recurrence of the retracted nipples
12 indicated some type of surgical departure on the part of Dr.
13 Wu doing this operation?

14 A. That's not obvious from reviewing the records.

15 Q. Now, I'm going to ask you to assume that we had a
16 witness here on Wednesday, Dr. [REDACTED]. And Dr. [REDACTED]
17 offered an opinion and two theories as to why the retracted
18 nipples happened.

19 One theory was that Dr. [REDACTED] the operating
20 surgeon, must have undermined tissue under the nipple and
21 areola complex to cause a space to allow the nipple to
22 retract.

23 And the second theory, that she must have put
24 sutures around the nipple area deep into the tissue to allow
25 for some constriction of tissue to allow the nipples to
26 retract.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 The second part of my question, I'm going to
3 ask you to assume that Dr. [REDACTED] testified, according to her
4 custom and practice with no independent recollection, that
5 she never went near the underside of the nipple and areola
6 complex and altered the tissue whatsoever, and that the only
7 suturing she did was on the medial and lateral pillars to
8 bring them together as a skin envelope and gently tacked the
9 reduced areola tissue to the surrounding skin.

10 With that theory by Dr. [REDACTED] and Dr. [REDACTED]
11 custom and practice technique, do you have an opinion as to
12 whether or not Dr. [REDACTED] surgery deviated from the way in
13 which it should be done to reduce the breasts?

14 MR. [REDACTED]: Objection.

15 THE COURT: This is subject to
16 cross-examination.

17 A. Yes.

18 Q. What is your opinion?

19 A. My opinion is that --

20 Q. Could you keep your voice up?

21 A. Yes.

22 So I do have an opinion.

23 Q. What is your opinion?

24 A. It's based upon the pedicle. And the pedicle is
25 primary to the success of the surgery. The pedicle is the
26 beginning and the end of a successful operation. So if it

1 [REDACTED] - by Defendant [REDACTED] Direct
2 was undermining of the nipple it would have compromised the
3 blood supply to the nipple. And that didn't happen here.
4 At the end of the operation the nipple was healthy, it was
5 pink, it was everted. And as far as closing the skin of the
6 areola to the adjacent skin, that's done very gently and
7 very carefully where the edges are approximated, they aren't
8 big chunks of tissue that are pulled together tightly. It
9 just wasn't in the acceptable way to do the surgery so that
10 didn't happen.

11 Q. Now, I want to focus before I finish on the
12 postoperative period. I'm going to ask you to assume that
13 after the patient came back six days later, on August 31,
14 the operation being August 25, the patient came back in
15 October. In October of 2010. Let me just get the record so
16 I'm accurate.

17 (Pause.)

18 Q. I'm going to pull up October so you have it in
19 front of you.

20 In October, Dr. [REDACTED] computer was down. It
21 says Crown is down again. She puts down that the nipple
22 still retracted. And then at the bottom, I may need
23 revision of nipple. Scheduling something for February 2011.

24 Later on the patient came back, in January of
25 2011. In January 2011, Dr. [REDACTED] says: Among other things in
26 the note I am happy to revise the nipple and the dog ears.

1 [REDACTED] - by Defendant [REDACTED] Direct

2 This can be done in the operating room, which I prefer, as
3 it will be more comfortable for the patient, or in the
4 office.

5 I would prefer to do this after she is one
6 year out, August 2011, but she's going off to college and
7 she has summer camp, where she's a counselor, therefore, it
8 looks like June 2011 is going to be more feasible.

9 I'm going to ask you to assume that the
10 patient did not return to Dr. [REDACTED] My question is: Do you
11 have an opinion with regard to the elapse time of, as you
12 told us earlier, six months or a year, as to whether or not
13 that plays any role in scheduling properly when a revision
14 of these nipples, as well as the dog ears, will be
15 undertaken?

16 A. Could you say that again?

17 Q. Undertaken.

18 A. Say the whole thing again.

19 MR. [REDACTED] Could I ask you to read it back?

20 THE COURT: Please read it back.

21 (Record read.)

22 BY MR. [REDACTED]

23 Q. Understand or shall I rephrase?

24 A. I believe I understand it.

25 It's the clinical judgment of the examining
26 physician that healing has progressed and within another

1 [REDACTED] - by Defendant [REDACTED] Direct
2 three months, which would be June, or six months, depending
3 upon what she saw and felt on the examination, the tissue
4 would be ready for revision.

5 MR. [REDACTED] Could we take a short break. I
6 think I'm almost finished, I just want to check my
7 notes.

8 THE COURT: Yes.

9 MR. [REDACTED] Thank you, your Honor.
10 (Whereupon, the jury retired from the
11 courtroom.)

12 (Recess.)
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1 [REDACTED] - by Defendant - Direct [REDACTED]

2 THE COURT OFFICER: Jury entering.

3 (The jury entered the courtroom and
4 the following occurred:)

5 Q. Doctor, I will ask you some questions that are
6 independent of the actual facts or suppositions or testimony
7 in this case.

8 In your practice, in your professional life, have
9 you had patients who you have operated upon in plastic and
10 reconstructive surgeries who have needed revisions?

11 A. Yes.

12 Q. Have you had complications in your surgeries?

13 A. Yes.

14 Q. Have you had patients who you knew had been
15 operated upon by other plastic and reconstructive surgeons,
16 and came to you for second opinions or secondary revisions,
17 and left the first doctor?

18 A. Yes.

19 Q. To your knowledge, have patients who after you
20 operated upon them left your care for revisions or
21 complications happening, and went to other doctors in the
22 metropolitan community?

23 A. Probably.

24 Q. Okay. Now, as you reviewed this case and the
25 circumstances of this case, did you determine any departures
26 from surgical technique on the part of the attending

1 [REDACTED] - by Defendant - Direct [REDACTED]
2 surgeon, Dr. [REDACTED]

3 A. No.

4 Q. As a practical matter, you charge for the time
5 spent reviewing the materials?

6 A. Yes.

7 Q. Can you tell the jury in 2017 what you would be
8 charging on an hourly basis?

9 A. \$350.

10 Q. And if you're here, let's assume you are here
11 until 4:00 o'clock today or 4:30, how will you compute the
12 day?

13 A. The day is charged at 5,000.

14 Q. Okay. All right.

15 Have you ever reviewed a case for the law firm
16 where I am senior partner, [REDACTED], before
17 this case, according to your recollection?

18 A. Yes.

19 Q. Okay. Did you and I work -- do you have a memory
20 of you and I actually working on a trial in 2006 or so on a
21 case?

22 A. Yes.

23 Q. All right. Between 2006 and this particular case,
24 have you and I had any cases together individually?

25 A. No.

26 MR. [REDACTED] Thank you so much.

Direct/Cross Exercise

Fact Pattern: On November 21, 2008, Clumsy Joe was involved in a slip and fall accident at Macy's due to a wet floor. He has chronic back problems. Dr. Pain is an orthopedist that has treated Clumsy Joe for back pain for the past 10 years.

Direct-

Q: What is your full name?

A: Clumsy Joe

Q: Where do you live?

A: 69 Lottery Drive, Brooklyn, New York.

Q: How long have you lived at this address?

A: All my life.

Q: Do you live with anyone?

A: My mother, father, wife and son.

Q: What are your parents' names?

A: Rich Joe and Mary Joe.

Q: What is your wife's name?

A: Golddigger Joe.

Q: What is your son's name?

A: Clumsy Joe Jr.

Q: How old is Clumsy Joe Jr.?

A: 5

Q: What is your educational background?

A: High School Diploma

Q: Are you employed?

A: ~~Used Car Salesman~~

Counselor for developmentally disabled children

Transition from background information to date of accident.

Transitional Question: Now, I would like to direct your attention to November 21, 2008, at approximately 12:00 pm. Where were you?

A: At Macy's.

Q: Which Macy's?

A: The one on 34th Street and 7th Avenue, NYC.

Q: Why were you at Macy's?

A: Shopping for a birthday present for my wife, Golddigger.

Q: Was anyone with you?

A: No, I was alone.

Q: Where you shopping for anything in particular?

A: I was shopping for a diamond necklace for Golddigger.

Q: What floor were you on?

A: The first floor.

Q: What department were you in?

A: The jewelry department.

Q: What happened next?

A: The sales clerk was showing me necklaces. Many were very expensive. I asked him if there were any cheaper ones. He asked me to come to the end of the counter where a bunch of boxes were piled up. I had to walk around the boxes when I slipped and fell and landed on my back.

Q: Do you know the name of the store clerk?

A: Yes, he was a young man about 20 years old. I believe his name was Jimmy. I don't remember his last name.

Q: How did you know his name was Jimmy?

A: He told me and he had a name plate on his shirt pocket.

Q: What caused you to slip?

A: After slipping and falling, I felt water seeping through my pants. I saw that I was sitting in a puddle of water.

Q: After you slipped on the water, what happened?

A: I fell on my back.

Q: Please describe the puddle.

A: I was clear water covering an area of about 18 inches just in front of the counter to the left of the stack of boxes.

Q: Describe for us how you slipped.

A: While looking at the diamond necklaces for my wife Golddigger, I had to take a step around the boxes. I moved with my right foot slid and I fell backwards landing on my lower back and then flat on my entire back.

Q: How did you feel as you sat in the puddle of water?

A: I felt so much pain in my back shooting down my left leg.

Q: Can you describe the pain?

A: I felt like someone had taken 10,000 pins and pushed them into my back at one time. I felt sharp pains throughout my back shooting down my leg.

Q: What happened next?

A: The sales clerk, who was showing me the jewelry, came from behind the counter and tried to help me up. He had to move the boxes to get to me. When I tried to move, the pain became intense. So he told me to sit still while he called for help. As I sat there I notice that behind the boxes was a water fountain that appeared to be leaking.

Q: What happened next?

A: The store manager arrived and asked me how I felt and whether I could move. The store clerk brought a chair over and both of them helped me up so I could sit in the chair.

Q: Then what happened?

A: The store manager asked me if I wanted an ambulance called and I told them yes. The store clerk brought me over a towel to dry off my pants and gave me a glass of water.

Transition from actual event to treatment.

Q: Did there come a time that an ambulance arrived?

A: Yes, it took about 20 minutes for the ambulance to arrive.

Q: What, if anything happened during that 20 minutes?

A: Jimmy, the store clerk stayed with me. We made some small talk about buying jewelry. He was getting ready to go back to college. I pointed out to him that the water fountain was leaking. He said it's been leaking for weeks.

Q: What happened next?

A: The medical personnel came and asked me questions.

Q: What did you tell them in response to their questions?

A: I slipped and fell due to water while looking at diamond necklaces for my wife Golddigger. I told them I could hardly move without intense pain in my lower back. I told them that the pain was shooting down my leg.

Q: Without telling us what they said, tell us what they did?

A: They put a back brace on me; put me on a stretcher and transported me to the hospital.

Q: What hospital?

A: Windfall University Hospital.

Q: What happened once you arrived at Windfall University?

A: X-rays and an MRI were taken of my back.

Q: Did you discuss the results of the x-rays and MRI with the medical personnel at Windfall University Hospital?

A: Yes, they told me I had a herniated disc and that I need to see a neurologist.

Q: What happened next?

A: I was given some pain medication.

Q: Where you admitted to the hospital or treated and released?

A: I was treated and released

Q: Where you given any instructions for follow-up care?

A: Yes, I was told to see Dr. Pain for follow-up care

Q: Did you go to see Dr. Pain?

A: Yes, that afternoon.

CROSS OF DR. PAIN- Assume Dr. Pain testified that Clumsey Joe has a herniated disc that is impinging on his nerve causing shooting pain going down his leg. Assume Dr. Pain attributes this to the slip and fall in Macy's. I want to show that Dr. Pain knew Clumsy Joe had chronic back pain prior to accident and attempt to cast doubt on the causal connection as stated by Dr. Pain.

Good Morning Dr. Pain.

Q: You would agree that not every fall causes acute back pain?

A: Yes.

Q: You agree that it is important to discuss a patient's prior medical history before rendering a diagnosis, correct?

A: Yes.

Q: You would agree that it is important to keep accurate records concerning a patient, correct?

A: Yes.

Q: Dr. Pain, you treated Clumsy Joe on November 21, 2008, true?

A: Yes.

Q: You treated Clumsy Joe prior to November 21, 2008, correct?

A: Yes.

Q: In fact you treated Clumsy Joe a week before November 21, 2008, true?

Yes.

Q: More specifically, you treated him for back pain a week before November 21, 2008, correct?

Yes.

Q: More specifically, you treated Clumsy Joe on November 14, 2008

Q: At the request of plaintiff's counsel you provided him with a written report regarding Clumsey's Joe's back problems, correct?

A: Yes

Q: He told you he needed the report to give to Macy's attorney?

A. I don't recall what he needed it for

Q: And that report is dated, May 5, 2009, correct?

A: Yes

Q: This report was about Clumsy Joe's accident in Macy's?

A: Yes and his physical condition as a result

Q: Despite the fact that you treated Clumsy Joe on November 14, 2008, a week before his accident in Macy's, your report to the plaintiff's attorney makes no reference of any treatment by you of Clumsy Joe prior to his accident in Macy's on November 21, 2008, correct?

A: Yes, he didn't ask me to comment about any prior treatment.

Q: In fact, you have been treating Clumsy Joe intermittently for back pain for the past 10 years?

A: Yes.

Q: Yet, you make no mention of this on your report of November 21, 2008?

A: No.

Q: Clumsy Joe has suffered from back pain for several years?

A: Yes.

1 COURT OFFICER: Part 9 Hearing Calendar. In the
2 Matter of Sawaran Singh versus Aslam Siddique Index Number
3 12842 of 2012. Counsels, appearance for the record, starting
4 with the plaintiff.

5 MR. [REDACTED] For the plaintiff. The law firm of
6 attorney of record [REDACTED]

7 [REDACTED] And it's by [REDACTED]
8 [REDACTED]

9 MR. [REDACTED]: For the defendant, [REDACTED]
10 [REDACTED], of [REDACTED]

11 THE COURT: Good morning.

12 MR. [REDACTED]. Good morning, your Honor.

13 MR. [REDACTED]. Good morning.

14 THE COURT: We are here to have a hearing on the
15 plaintiff's motion in limine to preclude defendant's expert
16 witness.

17 MR. [REDACTED]. That's correct, your Honor.

18 THE COURT: And in support, I have a motion and
19 Exhibits A through L, from the plaintiff, which I am going to
20 mark as Court Exhibit 1 in the damages phase of the trial.
21 Because we've finished liability a few months ago. Then, I have
22 an opposition from defense counsel, along with Exhibits A
23 through U, and I will mark this as Court Exhibit 2. And I am
24 ready to proceed. Except, Mr. [REDACTED] said he had a motion
25 with regard to the motion. So, what?

1 MR. [REDACTED]: Thank you, Judge. Actually, it's
2 two motions. The first motion -- excuse me one second. I now
3 have had a chance to review plaintiff's counsel's papers, your
4 Honor, and it is our contention that there was no affidavit or
5 expert evidence whatsoever in the motion; I asked alternatively
6 that the motion not be considered because of that, that it be
7 tabled. Or, in the alternative, that any personal opinions
8 plaintiff's counsel expresses as to what he thinks the
9 biomechanical expert should go about doing, their duty, should
10 not be considered by the court.

11 THE COURT: Is there a requirement that the motion
12 in limine even be in writing?

13 MR. [REDACTED]: In this case, there was, because
14 you've ordered it.

15 THE COURT: I did not.

16 MR. [REDACTED]: The phone call that we had, I asked
17 you -- I said to you, I don't even have papers, and you said
18 yes, you have to get in papers by such a day. I am entitled to
19 know whether you want the papers to be exchanged --

20 THE COURT: I did not.

21 MR. [REDACTED]: You absolutely did.

22 MR. [REDACTED]: Judge, in that conference, you did.
23 You've stated that I should put together a written motion to
24 explain the parameters that I am going against. There was such
25 a conversation, your Honor.

1 THE COURT: I remember that Mr. [REDACTED] sent me a
2 copy of Dr. [REDACTED]'s report, and we scheduled a hearing, but I
3 don't recall ever requiring anybody to put anything in writing.
4 But, in any event, it's helpful that you both have, because now
5 we have a record. In the meantime, there is no requirement that
6 an attorney who requests a hearing with regard to the preclusion
7 of an expert witness has to have an expert witness in order to
8 support that motion.

9 MR. [REDACTED] Note my exception.

10 THE COURT: Okay.

11 MR. [REDACTED] The second motion is, I have marked
12 -- please bear with me, your Honor, I do this as respectfully as
13 I can, I have marked as Defense Exhibit for Identification A,
14 maybe you can mark it as a next court exhibit, and your article
15 entitled "The use of biomechanical engineers in motor vehicle
16 accidents and trials." And I want to quote from the paragraph
17 and Page 2, it says as follows: Some biomechanical engineers
18 retained to testify are unwilling to admit they cannot form a
19 trustworthy conclusion from the information given to them.
20 Nonetheless, they use deductive reasoning, extrapolation and
21 inference, and report their conclusions as based on sound
22 science. Unfortunately, with what appears to be a good deal of
23 hocus pocus, and use of complicated and intimidating
24 mathematical formulas, they can sometimes fool a judge and jury.
25 It is the judge's role to preclude testimony that will not be

1 useful to the jury, which includes testimony that is misleading,
2 inaccurate, or irrelevant.

3 Let the record reflect that I have quoted the entire
4 paragraph without any redactions whatsoever. I would offer this
5 -- I don't know what the next exhibit number is.

6 THE COURT: Three.

7 MR. [REDACTED]: May I respond?

8 MR. [REDACTED]: I haven't finished my application.

9 MR. [REDACTED]: I am sorry.

10 THE COURT: He hasn't said what his application is, he
11 just said he wants to mark my article from the New York State
12 Bar Journal.

13 MR. [REDACTED]: Fair enough.

14 COURT OFFICER: This is going to be a court exhibit?

15 THE COURT: I guess so. This is Court Exhibit 3, a
16 copy of the article that I've submitted to the February 2016 New
17 York State Bar Association Journal, that was an article that I
18 modified from a report that I wrote for the Science for Judge's
19 Program, which is a national program. Proceed.

20 Is there an application related to this?

21 MR. [REDACTED]: Yes, Judge. As I've moved before
22 the liability trial, on the record, and I move again, I think
23 that this paragraph has given me great cause, because the truth
24 of the matter is, is that description that you've used in that
25 paragraph, as far as experts committing hocus pocus, I think

1 that's something to be said about every biomechanical expert.
2 And I think that I have to respectfully protect the record and
3 ask your Honor to seriously consider recusal.

4 MR. [REDACTED] May I be heard on that, your Honor?

5 THE COURT: I just want to understand. I should
6 recuse myself on the basis that I have an opinion?

7 MR. [REDACTED] Well, not just because you have an
8 opinion, just having an opinion would not give me a concern.
9 What concerns me is that your opinion seems to be, how shall I
10 said it, hardened and absolute, which may not allow you the
11 wherewithal to be flexible should you actually hear something
12 that was good and acceptable under the law.

13 THE COURT: Okay. I take this as a motion that I
14 should recuse myself because I am not stupid enough for you to
15 take advantage of. Okay, your opposition?

16 MR. [REDACTED]: I object to that characterization.

17 THE COURT: That's all I can take it as.

18 MR. [REDACTED]: I have read your entire article, at
19 length, several times, that is one paragraph, a certain context.
20 Your Honor went out of her way, in my opinion, to give both
21 sides -- in fact, your Honor cited case law from New Jersey
22 indicating that where appropriate, and where the proper,
23 evidentiary foundations are laid, and proper scientific
24 information and background information is given to the expert,
25 that it is not junk science. Your Honor has gone through the

1 history of these type of motions in limine, where some are
2 originally considered junk science and now they are not
3 necessarily considered so. So, I found the article to be
4 overwhelmingly fair. And to read one paragraph where your Honor
5 did say that there are times when biomechanicals come in without
6 full information at their disposal, it is hocus pocus, and other
7 judges have found the same thing. I think the whole purpose of
8 a Frye hearing here, as outlined in your Honor's article, is to
9 get to the root of the information to see if the expert has an
10 adequate basis for forming his or her opinion, and make a ruling
11 thereon. I find no bias whatsoever. I find this to be a very
12 even-handed article.

13 THE COURT: If I were to agree with you, Mr.
14 [REDACTED], it would be a chilling effect on the entire
15 judiciary that they have no right to have any writings
16 published. Because whatever they write about, will result in a
17 barrage of motions that they recuse themselves. This is a jury
18 trial not a bench trial.

19 MR. [REDACTED]: For purposes of this hearing, this
20 is a bench trial, because you make the final decision.

21 THE COURT: I understand that. I am denying your
22 motion. And we need to move on, and actually have our hearing.

23 So, is your witness here?

24 MR. [REDACTED]: Yes, your Honor.

25 MR. [REDACTED]: Your Honor, may we go off the record for

1 one second?

2 THE COURT: Of course.

3 (Whereupon, a discussion was held off the record.)

4 THE WITNESS: Good morning, your Honor.

5 THE COURT: Good morning.

6 COURT OFFICER: Raise your right hand, sir

7 D R. [REDACTED], after having first been
8 duly sworn was examined and testified as follows:

9 THE WITNESS: I do.

10 COURT OFFICER: Please, state your name and address
11 for the record.

12 THE WITNESS: My name is [REDACTED]. I am an Adjunct
13 Professor in the Department of Bioengineering in the [REDACTED]
14 [REDACTED] Biomechanical Engineering Consultant. My
15 business address is [REDACTED]

16 [REDACTED]
17 COURT OFFICER: Thank you. Would you like some water?

18 THE WITNESS: Yes, please.

19 MR. [REDACTED]: May I ask the doctor to keep his voice
20 up?

21 THE COURT: Yes, please.

22 THE WITNESS: Absolutely.

23 DIRECT EXAMINATION

24 BY MR. [REDACTED]:

25 Q Dr. [REDACTED] this is an evidentiary hearing, please keep

1 your answers audible. And if you don't understand the question,
2 please let me know.

3 A. I do.

4 Q I would like to start out with your educational
5 background, sir?

6 A. Sure.

7 Q. Starting with how long have you been in the United
8 States?

9 A. I have been here since 1999.

10 Q. Before that, where were you born?

11 A. I was born in [REDACTED]

12 Q. And while you were in [REDACTED] did go to a medical school?

13 A. Yes. I attended medical school, and I graduated from
14 school of medicine in 1994.

15 Q. What is the name of that medical school?

16 A. [REDACTED]

17 Q. And after you graduated, did you practice medicine?

18 A. I did practice medicine for five years.

19 Q. And please tell the Court, for the record, what type of
20 medicine you practiced?

21 A. I was a general practitioner, P.C.P..

22 Q. In your capacity as general practitioner, did you also
23 from time-to-time treat victims of trauma?

24 A. I did.

25 Q. Okay. And after you came to the United States, did you

1 begin a new course of study?

2 A. Yes, I did.

3 Q. And was that course of study in the field of
4 bioengineering?

5 A. Yes.

6 Q. Please explain, for the Court's benefit, what is the
7 field of bioengineering, or biomechanics?

8 A. Biomechanics is a branch of science that applies the
9 laws of physics and principles of engineering to living systems in
10 general and the human body in particular.

11 Q. Now, did you take a course of study and at some point
12 graduate with a Master's of Science?

13 A. Yes, I did. I got my Bachelor's of Science first, and
14 then I went on to get my Master's degree in Biomechanics from the

15 [REDACTED]

16 Q. After that, did you then get a Doctorate from the
17 Department of Bioengineering at the [REDACTED]

18 A. Yes. In 2011, I graduated with my Ph.D., which is a
19 Doctorate degree, in the field of biomechanics.

20 Q. Do you currently hold any teaching positions?

21 A. That is correct. I am Adjunct Professor in the Department
22 of Bioengineering at the [REDACTED].

23 Q. And does the [REDACTED] have a medical
24 school?

25 A. Yes.

1 Q. And do you lecture or interact with medical students?

2 A. Yes.

3 Q. Please explain, for the Court's benefit, your
4 interaction or lecturing of medical students at the University of
5 Pittsburgh Medical School?

6 A. The students that I deal with are either undergrads or
7 graduate students in the school of engineering. And at sometimes in
8 the courses and seminars that we have in the School of Engineering,
9 Department of Bioengineering, we also have attendees from the school
10 of medicine. And for some research projects, we also have
11 participants -- medical students participating in our research
12 studies, supervised.

13 Q. So, we are clear. Does medical students rotate through
14 and sit through lectures in your area of expertise?

15 A. Yes.

16 Q. And are you also a principal -- president and principal
17 scientist of a particular type of LLC?

18 A. Yes.

19 Q. Please tell the Court what that is?

20 A. It's [REDACTED]. And as I mentioned, I am
21 a biomechanics engineering consultant, and I perform those tasks as a
22 consultant under the name [REDACTED].

23 Q. Are you a member of any societies or organizations?

24 A. Yes, I am.

25 Q. Please tell us some of them, what they are?

1 A. I am a member of biomedical -- I am sorry. I am a
2 member of American Society of Mechanical Engineers. I am a member of
3 the American Society of Biomechanics. I am a member of the
4 Biomedical Engineering Society. I am also member of S.A.E.
5 International, which stands for Society of Automotive Engineers.

6 Q. Now, in terms of car safety, would you briefly describe
7 some of the safety devices that biomechanical engineers develop and
8 implement in terms of car safety?

9 A. Absolutely. Actually, we will start with the designing
10 of the model of the car itself, the exterior and the features that
11 are included in terms of the crush, stiffness, and crumple zone, that
12 basically the car is designed to absorb the energy as a result of the
13 impact. And the interior of the vehicle, we have devices such as air
14 bags, and seat belts, headrests, and also the design of the new seats
15 are also a byproduct of biomechanical engineering studies, and
16 obviously the purpose is to make the vehicle safer for the occupant
17 inside.

18 Q. Have you testified before in the State of New York?

19 A. Yes.

20 Q. About how many times have your testimony been received,
21 to testifying to, in the State of New York?

22 A. More than 30 times.

23 MR. [REDACTED] For the record, your Honor, I will
24 just note that although I could not attach all 35 examples, I
25 did attach certain Appellate Term, [REDACTED] and

1 [REDACTED] Exhibits D and E in my exhibit package.

2 THE COURT: D is --

3 MR. [REDACTED]: [REDACTED]

4 THE COURT: Appellate Term First Department. And E is
5 Supreme Court Bronx County, which is in the First Department.

6 MR. [REDACTED]: Right.

7 THE COURT: We are in the Second Department.

8 MR. [REDACTED]: I am well aware of that.

9 Q And you testified in Kings County, Brooklyn, before?

10 A. Yes.

11 Q. And have you testified in Queens County?

12 A. Yes, sir.

13 Q As a matter of fact, you have testified before Justice
14 Francois Rivera in a case called [REDACTED]?

15 A. I believe so.

16 Q. And last year you testified in a case called [REDACTED]
17 [REDACTED] in Queens before Judge [REDACTED]?

18 A. Yes.

19 Q. Did you also testify in front of [REDACTED] in
20 another case where you were involved here in Kings County not too
21 long ago?

22 A. That's correct.

23 Q. And that would be [REDACTED]?

24 A. I believe so.

25 Q. I would like to go into, briefly, an explanation for

1 the Court's benefit, as to the overall plan, or design, of the modern
2 American automobile vehicle. What is the intention, that you are
3 aware of, that biomechanical science lends to the design of the
4 modern American automobile?

5 MR. [REDACTED]: Objection.

6 MR. [REDACTED]: What's the objection?

7 MR. [REDACTED]: No relevance to what we are dealing with
8 or whether or not he is qualified to testify.

9 MR. [REDACTED]: I am laying the foundation.

10 THE COURT: I don't understand the question. Are you
11 talking about the Model T? What are you asking him to say?

12 MR. [REDACTED]: If I said the modern automobile,
13 obviously I am not talking about the Model T, Judge, from the
14 1920s.

15 THE COURT: There is a huge difference between
16 different automobiles currently on the market with regard to
17 their safety features, their -- you know, I mean, a generic
18 question isn't really helpful.

19 MR. [REDACTED]: I will rephrase the question.

20 Q In terms of the biomechanical contribution to car safety
21 in the last 10 to 15 years, are you aware of any minimum standards
22 that are set by the Federal Government?

23 A Yes. There are multiple standards that are being set by
24 the Federal Government; and as such, car manufacturers are mandated
25 to perform specific tests for the safety of the vehicles they make,

1 and sometimes those tests are done by federal agencies themselves,
2 sometimes those tests are done by third parties. But it is my
3 understanding that there are multiple federal guidelines that
4 manufacturers have to adhere to and comply with in order to be able
5 to actually sell their product.

6 MR. [REDACTED]: Note my objection to hearsay, on simply
7 relying on what other people do, and what other agencies do.

8 MR. [REDACTED]: It's a Frye hearing, Judge.

9 MR. [REDACTED]: I am preserving my record.

10 Q. In terms of those federal requirements, are you aware
11 that some automobiles are required to adhere to them or to your
12 knowledge do all have to adhere to them?

13 A. Every single car that is being marketed in the United
14 States has to pass those tests and those guidelines.

15 Q. Would that include the Chrysler Pacifica that the
16 plaintiff was sitting in on the day of the subject accident?

17 A. Absolutely.

18 Q. I would like to discuss with you the specifics of this
19 case --

20 A. Sure.

21 Q. -- and run through some of your opinions, the basis for
22 them, and your conclusions. Now, did you receive certain materials
23 in order to prepare for your opinion?

24 A. Yes.

25 Q. And did you issue a report?

1 A. Yes.

2 MR. [REDACTED] Your Honor, for the record, that
3 report is Exhibit B, the packets of materials, and the doctor's
4 curriculum vitae is Exhibit C to those packets of materials
5 provided. Also, I would like the Court to take judicial notice
6 of Exhibit A in the defendant's package of submissions, an
7 excerpt of the reference manual on Scientific Evidence Third
8 Edition of the Federal Judicial Center, where it says, as
9 annexed, citing Page 942: Common personal injury cases may also
10 present issues on which engineering testimony may be helpful.
11 Such disputes often turn on testimony as to how a particular
12 trauma occurred. Our discussion of biomechanical engineering
13 highlights some of those issues. In a car accident case,
14 properly qualified engineers may provide opinion testimony
15 regarding how an accident occurred, putting reconstruction of
16 the conduct of each of the parties and how the conduct affected
17 the accident. I would like to point out that before I actually
18 begin the substance of my discussion with Dr. [REDACTED], that will
19 be our position which I will reiterate on a summations that I
20 would like to give, that under the Frye standard, which New York
21 has used and continues to use, that it is not an inquiry into
22 the methodology of the expert, but rather it involves, quote,
23 counting of heads, unquote. So, that the inquiry is focused not
24 on gatekeeping, but rather the doctor, or the expert, that
25 follows the standard procedures for their particular specialty.

1 And lastly, before I begin, I want to point out to your Honor
2 that the other prevailing law in New York State, on cases that
3 I've cited in my papers, notably the case of Mottot v. Ward, 48
4 New York 2d 455 Court of Appeals 1979. An expert testimony is
5 received by the courts of the State of New York to a reasonable
6 degree of medical or scientific certainty and not to an absolute
7 degree of 100 percent certainty. With that, I will proceed with
8 the substance.

9 Q. So, Dr. [REDACTED] I refer you to your report, and please
10 indicate for the record what is the date of your report?

11 A. I have the report with me.

12 THE WITNESS: May I refer to my report, your Honor?

13 THE COURT: Yes. The one from -- this one?

14 THE WITNESS: Yes.

15 A. The date of my report is June 26, 2014.

16 Q. And on Page 2 of that report, do you indicate the
17 materials that you've reviewed?

18 A. Yes.

19 Q. And please tell us, for the record, what is it that
20 you've reviewed?

21 A. I have reviewed the Port Authority of New York and New
22 Jersey Motor Vehicle Crash Report. I have received color photographs
23 of the subject 2004 Chrysler Pacifica. I also received a summary, a
24 Claim Summary and Estimate of Record. I have received some medical
25 records pertaining to the plaintiff. I received a Verified Bill of

1 Particulars listing --

2 Q Don't skip over that, be specific. What did you get, what
3 did you review?

4 A. In terms of medical records, I reviewed two radiology
5 reports by Dr. [REDACTED]; an MRI report by Dr. [REDACTED]; and an
6 operative report by Dr. [REDACTED]

7 Q. After that, did you review a document what's known as a
8 Verified Bill of Particulars?

9 A. That's correct. Then, I received some Notice of Expert
10 witness calling Dr. [REDACTED] and Dr. [REDACTED] as experts, and I reviewed
11 their reports. I also reviewed transcript of the Examination Before
12 Trial of the drivers' two vehicles involved in the accident.

13 Q. Did you review the deposition of the plaintiff, Mr.

14 [REDACTED]

15 A Yes.

16 Q And did you review the deposition of the defendant, [REDACTED]

17 [REDACTED]

18 A. I did.

19 Q. Now, attendant to your report, do you have a
20 bibliography?

21 A Yes. At the very end of my report starting on Page 13, I
22 have all the references that I've cited and I use to substantiate my
23 opinions.

24 Q. Just for example, is one of these references Number 1,
25 is that 2004 Chrysler Pacifica, features and specifications?

1 A. Yes. Beside the material --

2 Q Just yes or no?

3 A. Yes.

4 Q. Okay. And there are approximately -- not
5 approximately, under a total of 53 textbooks that you have referred
6 to?

7 A. Yes. That's correct.

8 Q. Please tell us how the biomechanical engineers go about
9 their tasks of reconstructing an accident and estimating the forces
10 applied in that accident?

11 A. Well, this task is not different from any other task
12 that is being done under scientific methodology. Meaning that the
13 scientists or an engineer collecting data and facts, and based on
14 that information, using an established methodology to form specific
15 calculations. And the goal for an accident reconstruction task is
16 first to determine the severity of the accident. And it has been
17 established in the field of biomechanics and accident reconstruction
18 that calculating or determining change in velocity of the vehicles
19 involved, also known as delta-V, is the best indicator of the
20 severity of an accident. And that would be the first goal for a
21 biomechanical engineer, or an accident reconstructionist, to perform
22 those tasks and calculations based on established methodologies and
23 determine at least a range or better a number for delta-V or changing
24 velocity of the cars in the accident.

25 Q. Is this methodology something that you made up or is it

1 something that biomechanical engineers use in their everyday tasks?

2 A. It's something that is established in this field.

3 That's not something that I innovated or created. I just use
4 established methodology in the field of accident reconstruction and
5 biomechanics.

6 Q. And is the formula known as delta-V, is that something
7 you made up or is that something that biomechanical engineers use in
8 their day-to-day scientific analysis?

9 A That's what biomechanical engineers use on a daily basis,
10 and I just follow those footsteps.

11 Q. Now, you've also mentioned before physics --

12 A. Yes.

13 Q. -- as being part of your analysis. Is part of the
14 physics, analysis of an accident, Newton's Third Law?

15 A Yes.

16 Q Before we go there, let me just ask this question. What
17 is Newton's Third Law, for the record?

18 A. Newton's Third Law of motion states that for every
19 action there is an equal and opposite reaction.

20 Q And is that something that biomechanical engineers use in
21 their day-to-day analysis or is that something you've decided to use?

22 A. No. They use it on a daily basis, scientists in
23 general, especially mechanical and biomechanical engineers.

24 Q. When you made your conclusion, did you do it based upon
25 all of your experience as both a medical doctor and a biomechanical

1 engineer?

2 A. Yes, sir.

3 (There was a brief pause in the proceedings.)

4 MR. ANTHONY: Can we have the last question read back.

5 (whereupon, the requested portion of the testimony was
6 read back.)

7 Q. The question is, [REDACTED], when you made your
8 calculations and came to your conclusions, did you make your
9 conclusions based upon your experience, knowledge and training as
10 both a medical doctor and a biomechanical engineer?

11 A. Yes.

12 Q. One of the things that you've reviewed, and I see that
13 you have told us, is the police and accident report; is that correct?

14 A. Yes.

15 Q. In the police and accident report, are there
16 indications of what's known as a VIN, or Vehicle Identification
17 Number?

18 A. Yes.

19 Q. Is that important for your analysis?

20 A. Yes. Knowing the VIN of the vehicle is like having the
21 birth certificate of that specific vehicle, which allowed you to
22 collect information regarding the year, make and model, some
23 specifications of the vehicle, bells and whistles in that car. All
24 of those things are associated with that VIN, the 17-digit and number
25 combination that allows you to gather all of that information.

1 Q Now, as part of your analysis, were you also provided with
2 a copy of the estimator's --

3 A. Yes.

4 Q. -- report on the damage?

5 A. Correct.

6 Q. And is that actually referred to in your report?

7 A. Yes.

8 Q. I would like you to turn to that report, that part of
9 one of the things that you were given, that estimator's report, and
10 I'd like you to take it out of your folder, please.

11 A. I did.

12 THE COURT: I am sorry. I don't know what he is
13 looking at.

14 MR. [REDACTED]: I am about to mark it.

15 THE COURT: Is one of the things submitted as
16 materials reviewed in his report?

17 MR. [REDACTED]: Of course.

18 THE COURT: They are not numbered, they just have
19 dots.

20 MR. [REDACTED]: I will refer you to the exact place
21 in the report that he talks about it. He talks about it, I
22 believe, on Page 2 of his report. It says here, Claim Summary
23 and Estimate of Record for 2004 Chrysler Pacifica, four-door
24 wagon, dated December 1, 2011.

25 THE COURT: Okay.

1 MR. [REDACTED]: I would like to have this marked as
2 the next exhibit for your Honor. May I give it to the officer?

3 THE COURT: Yes. Court Exhibit 4.

4 THE WITNESS: Thank you.

5 Q. Now, Dr. [REDACTED], in reviewing this exhibit, are there
6 specific -- leave that out of your book, are there indications in
7 this damage estimate report as to what specific equipment was found
8 in the particular car that the plaintiff was in on the date of the
9 accident?

10 A. Yes. They are listed in this estimate, yes.

11 Q. Okay. And without reading the whole list, is that the
12 complete list there?

13 A. Yes, it is.

14 MR. [REDACTED]: Can I see it, please?

15 MR. [REDACTED]: Sure.

16 Q. In reviewing this estimate of repair, did you also
17 factor into the equipment that was specifically in this automobile?

18 A. Yes.

19 Q. And did you also make note of the amount of estimated
20 repair?

21 A. Yes.

22 Q. Now, what was the total amount of the estimated repair?

23 A. According to this document, it was \$7,378.89.

24 Q. And how much of that were labor costs?

25 A. About half of it.

1 Q. Okay. And to your knowledge, do labor costs vary from
2 region to region?

3 A. Of course.

4 Q. Now, in addition to this -- so far, we have been
5 talking about the police accident report and the estimate of damages.
6 Were you able to pull the manufacturers documents regarding this
7 particular make and model?

8 A. Yes.

9 Q. For this specific year as well?

10 A. Yes.

11 Q. And were you able to supplement it with the specific
12 equipment noted in that report?

13 A. Yes.

14 Q. That was specific for this vehicle?

15 A. Yes, that was specific for this vehicle.

16 Q. Now, if I were to ask you whether or not you were at
17 the scene of the accident, what would you tell me?

18 A. I wasn't there.

19 Q. Okay. And let's talk about some of the textbooks that
20 you've cited?

21 A. Okay.

22 Q. Does any of the textbooks that you've cited in your
23 bibliography deal with the subject of photogrammetry?

24 A. Yes.

25 Q. What is photogrammetry?

1 A Photogrammetry is a technique or methodology that allow
2 you to make measurements based on the photographs of an object; in
3 this case, a vehicle.

4 Q Is that a computer program?

5 A Yes. You can use a computer to perform that, yes.

6 Q Okay. And are these part of the things that you do in
7 every review?

8 A Yes.

9 Q Okay. So, can you give us an example in everyday life,
10 maybe one or two, where an investigating engineer or scientist is not
11 actually able to measure the particular object that's being
12 investigated?

13 A I think a good example that I usually make to my
14 students is a meteor crashing into earth millions or thousands of
15 years ago. Obviously, we did not witness that crash because it
16 happened before our time. But based on the size of the crate,
17 scientists and engineers can calculate the velocity, and also the
18 mass or weight of that object, that meteor, coming from space and
19 hitting the ground. So, it's a good example that you don't have to
20 see the action itself, the occurrence, but obviously science helps
21 you to find out the specifics regarding that.

22 Q And just so we understand your example, when a meteor hits
23 the earth, is it destroyed?

24 A Yes.

25 Q Is it your testimony that based upon the circumference

1 of the hole, and the depth of the hole, are we able to estimate the
2 speed and the mass of this object?

3 A Absolutely.

4 Q Is the use of photogrammetry as a standard, is that
5 something you decided to invent or is that something that
6 biomechanical engineers use in everyday analysis of accidents?

7 A It's being used everyday for different accidents and
8 for other different applications as well, yes.

9 Q Is there any part of your analysis that is not part or
10 accepted in the field of biomechanical engineering in terms of how
11 you went about to perform your calculations?

12 A Absolutely not.

13 MR. [REDACTED] objection.

14 MR. [REDACTED]: what's the objection?

15 MR. [REDACTED] calls for alternative conclusion.

16 MR. [REDACTED]: No, he has to actually say that.

17 Because, otherwise, we have to stop, I wouldn't be able to offer
18 him.

19 Q So, let's get into two specifics, we have the delta-V --

20 A Yes.

21 Q Now, just give us a very simple understanding of what the
22 delta-V is, how it plays into what you do as a biomechanical engineer
23 investigating accidents?

24 A As I mentioned, it has been accepted in the field as
25 the best indicator of the severity of the accident. It means that

1 when two objects, in this case two vehicles, make contact, obviously
2 one is moving faster than the other one. And when the target vehicle
3 is being struck by the bullet vehicle, the velocity of both vehicles
4 change as it is a result of the impact. Because some of the moving
5 energy of the faster vehicle is being delivered and transferred to
6 the other vehicle; and as a result of this transfer of energy, the
7 velocity of both objects, both vehicles, change. The higher the
8 change in the velocity, the more severe the accident. So, that's why
9 engineers like to put a number associated with some specific
10 accidents, so when they discuss or relate to others, that would be a
11 good understanding of the severity of the accident in terms of using
12 -- instead of using terms such as heavy impact versus light impact,
13 which is not defined, and is not necessarily consistently perceived.
14 We use numbers, and it's been established in this field that it is a
15 good indicator of the severity of accidents, and that was the aim for
16 performing the accident reconstruction for this accident.

17 Q. Now, in addition to the delta-V calculation, is there
18 another analysis that go part and parcel with your analysis and
19 report?

20 A. Yes. The calculation of delta-V was the goal, but
21 there is more than one way to calculate based on the amount
22 information you have. For this case, I had more than enough
23 information to perform not one analysis but two analyses. So, I
24 calculated basically delta-V in two different ways, and those
25 analysis and calculations were independent and separate from each

1 other.

2 Q. What are they known as?

3 A. The first one is called Crush Energy Analysis, and it
4 basically says that if you can observe the amount of deformation or
5 crush in a vehicle, in a vehicle, then that allows you to use
6 established methodology to calculate the amount of energy, as I've
7 mentioned, kinetic energy being transferred to that object; and based
8 on that, you can calculate the change in velocity or delta-V.

9 Q. Why is doing that calculation important to your analysis?

10 A. As I said, that's the first goal of performing the
11 biomechanical engineering analysis to understand the severity of the
12 accident. We need to know what type of accident it was, we need to
13 understand the location of damage, the point of impact, the direction
14 of movement, and also the severity. That's the key to proceed with
15 the second part, which would be the injury analysis, based on the
16 severity of the accident, so we'll be able to compare this accident
17 with the studies, and investigate the accidents that have been done
18 before.

19 Q. Now, the two analyses that you are talking about, is that
20 something you made up, is that something that biomechanical engineers
21 use in their everyday analysis of accidents?

22 A. Those methodologies and calculations are being used by all
23 the accident reconstructionists and biomechanical engineers on a
24 daily basis

25 Q. Page 4 -- excuse me, Page 3 of your report, you made

1 certain initial incident summaries; do you see that?

2 A. Yes.

3 Q. Now, do you see, at the time and location, that heading?

4 A. Yes.

5 Q. And do you actually have a paragraph starting with
6 Sawaran Singh?

7 A. Yes.

8 Q. Okay. And based upon the testimony of the plaintiff, in
9 reviewing all of the materials, do you know where Mr. [REDACTED] was
10 sitting in the Chrysler Pacifica 2004 wagon?

11 A. He was sitting in the driver's seat and he was operating
12 the vehicle.

13 Q. And how did you find that out?

14 A. It's coming from his testimony directly, and it was
15 noted in the police accident report.

16 Q. And in his testimony, do you also see his height and
17 weight?

18 A. Yes.

19 Q. Okay. And how many other people were passengers in
20 that vehicle?

21 A. I believe his brother, his wife, and his two kids were
22 also riding in the car at the time.

23 Q. Explain the total weight of those five passengers in
24 that car in term of any effect on your analysis?

25 A. Well, I had the exact weight of the driver himself,

1 because he testified to that, 170 to 180 pounds, and I chose the
2 lower number, obviously.

3 Q. Why did you chose the lower number?

4 A. For the plaintiff's car, seems to be I don't know the
5 exact weight of the participants -- I am sorry, the occupants, we
6 tried to go with the lower number at all possible, because one of the
7 goals for my accident reconstruction and engineering analysis was
8 aiming for the worse case scenario. In that case, I would like to
9 have the lower weight for the vehicle in the range that is
10 acceptable. I didn't know the exact weight of the vehicle at the
11 time. I have the weight of the empty car with no occupants coming
12 from the manufacturer based on all of the occupants inside the car.
13 I assumed it had some fuel in it. And also, I added the occupants'
14 weight based on their age and gender. I did not know the exact
15 weight of those occupants, but I picked the mean or average weight
16 for that age and gender for those occupants, which has been
17 acceptable as a reasonable estimate for the actual weight.

18 Q. Is that something that you accepted or your field in
19 general?

20 A. No. It's been accepted in the field that if you don't
21 know the exact number, you are allowed with a reasonable degree of
22 certainty to go with the average, and its been accepted.

23 Q. Let's assume the deviation on either side of the mean,
24 explain how the mean translates to deviation on either side?

25 A. Well, obviously, mean is just the average, and it could

1 be a little bit higher or a little bit lower. But the fact remains
2 that the range may be five percent above or five percent below. The
3 fact remains that at the end of the day, up to one hundred pounds of
4 difference, total, for that vehicle, would not make a significant
5 difference in the calculations.

6 Q. What if it was a six-hundred-pound difference, let's
7 pick that number, how would that affect your calculation?

8 A. It could affect the ultimate delta-V by one mile per
9 hour.

10 Q. What was your delta-V in this case?

11 A. It was less than seven miles per hour.

12 Q. Let's say it was the case where it was another 600 pounds
13 in the vehicle, what would the delta-V be in terms of miles per hour?

14 A. If it was heavier, it would bring down the delta-V to
15 something between five and six miles per hour.

16 Q. And in the other direction, would it bring down the
17 delta-V?

18 A. If it was lighter than 600 pounds, it would bring up
19 the delta-V to the range between seven and eight miles per hour.

20 Q. Just stop there for a second. I would like you to tell
21 us for the record what do you mean by the delta-V of seven miles an
22 hour or less?

23 A. The point is to describe what happened to the vehicle as a
24 result of the impact. It was traveling in the same direction of the
25 other car, we like to call the Lincoln as the striking vehicle, the

1 bullet vehicle, because it was moving faster, obviously, otherwise
2 there wouldn't be contact between the two cars; and we call the
3 Pacifica as the target vehicle, or the struck vehicle at the time.
4 So, they are both moving in the same direction. And the Pacifica at
5 one point being struck by the Lincoln; and as a result, some energy
6 is being transferred to the Pacifica from the Lincoln because it was
7 traveling faster. It means that at one point, immediately, the
8 velocity of the Pacifica increased suddenly, that sudden increase in
9 the velocity of speeds of the vehicle as a result of the impact is
10 being called delta-V, or change in velocity. My calculations show
11 that the velocity of the Pacifica increased suddenly by something
12 between six or seven miles per hour as a result of the rear-end
13 impact by the Lincoln.

14 Q Okay. Now, in terms of everyday forces that were exerted
15 in this particular vehicle, on this vehicle, can you estimate
16 comparable everyday activity or force to the force that you
17 calculated?

18 A. Absolutely. One reason that we calculate delta-V is
19 because it can be translated, and that can be the basis for the
20 calculation of the acceleration of the vehicles and the occupants
21 inside. In this vehicle, one way to describe it is the relationship
22 between that force or the acceleration -- and the acceleration of the
23 gravity, or G, which stands for gravity. Delta-V at less than seven
24 miles an hour can translate to something around 3G as a result of the
25 impact, or three times the acceleration due to the gravity.

1 Q. Is there any activities of everyday life where human
2 beings are subject to 3Gs?

3 A. For a person in height and weight of the driver of the
4 Pacifica, the plaintiff, that force on his lumbar spine, or the lower
5 back, would be comparable to the force if he bends forward and grabs
6 a bag of grocery shopping, or two gallons of milk, that's the amount
7 of force that is comparable when being hit from behind as a seated
8 driver while the seat bag is holding you back, and you are belted,
9 the amount of motions and forces he experienced in this accident are
10 comparable to bending forward and grabbing a box or a bag of grocery
11 shopping around ten pounds.

12 Q. Any other type of comparable 3G activities we might do
13 in our everyday life?

14 A. As compared to?

15 Q. Like when you are in an amusement park, and you are riding
16 a rollercoaster, and it goes down the hill, explain that to us?

17 A. It's more than 3Gs, some of them are slower, so it would
18 be comparative to 2 or 3Gs, specifically with the amusement park
19 example. Whereas riding the bumper car in an amusement park, you can
20 easily get 3G or 4Gs of acceleration as a result of bumping into each
21 other, those are comparable to what he experienced in this accident.

22 Q. I would like to refer you to specifically, did you see
23 any evidence, either pictures or testimony, as to where the host
24 vehicle, where Mr. [REDACTED] was sitting in, where was it struck?

25 A. It was struck in the rear, on the rear bumper, mostly

1 toward the left corner of the vehicle.

2 THE COURT: Then your report is incorrect.

3 THE WITNESS: That's not my saying, your Honor, it's
4 coming from the police accident report.

5 MR. [REDACTED] He didn't say that his report was
6 incorrect, I am asking him if there is evidence as to where the
7 impact occurred, and you automatically assumed that I said that
8 he was wrong.

9 THE COURT: No. It says, Page 3, that the impact was
10 on the right, and he just testified it was on the left. Stop
11 being hostile.

12 Q Could you clarify that, Dr. Toosi?

13 A. The incident summary, as I said, at the top of that
14 section, has, according to the Motor Vehicle Crash Report by the
15 police officer, that's what is indicated --

16 THE COURT: I wouldn't know, I don't have a copy, it
17 was never put into evidence.

18 MR. [REDACTED]: He is telling you.

19 THE COURT: Okay. You wrote in here that the Pacifica
20 had an impact area --

21 MR. [REDACTED]: What page are you looking at,
22 Judge?

23 THE COURT: The bottom of Page 3, the third bullet
24 from the bottom. The Pacifica had an initial impact area at the
25 center of the rear, and a principal impact area at the right of

1 the rear. So, this comes from the police report?

2 THE WITNESS: That comes directly from the police
3 accident report. Those are not my words.

4 THE COURT: It wasn't in evidence. But didn't you
5 just testify left and not right?

6 THE WITNESS: That's correct. Center and left.

7 THE COURT: So, this says center and right?

8 THE WITNESS: Again, that's what the police officer
9 noted in his report, and I am just --

10 Q Did you see the pictures?

11 A. Yes.

12 Q. Let's look at the pictures.

13 A. Sure.

14 Q. According to the pictures, is your estimate of center
15 and left correct?

16 A. Yes.

17 THE WITNESS: The police officer mentioned right, but
18 the physical evidence indicated that the point of impact is in
19 the middle and the damage is toward the left, your Honor, right
20 side intact.

21 THE COURT: Okay.

22 THE WITNESS: Thank you.

23 Q. Now, let's talk about what you stated in your report,
24 specifically the motion of Mr. [REDACTED], you talked about, on Page 10 of
25 your report, Occupant Kinematics. In the second paragraph, you talk

1 about Newton's Law of Motion; do you see that?

2 A. Yes.

3 Q. Now, explain for the record what is the motion, the
4 initial motion, after an impact such as this, and then what happens
5 to the body after the initial motion?

6 A. According to the Newton's First Law of Motion, if an
7 object is moving, it stays at the same speed until the external force
8 is being applied to it; or if stationed, it remains stationed until
9 external force is being delivered. When a car is being hit from
10 behind, before the impact it was traveling at a certain speed, as a
11 result of the impact, it's going fast, because energy was delivered
12 from behind from the striking vehicle to the struck vehicle.

13 Q. What was the initial direction after the rear impact?

14 A. It would move forward faster than it was moving before.

15 Q. We are talking about the body?

16 A. As a result, at the moment of the impact, the occupants
17 is in the same speed that it was traveling before. If you look from
18 outside, it is a relative motion of the occupant with respect to the
19 vehicle that appears to be rear-ended.

20 Q. Please address yourself specifically to the direction that
21 the body goes in upon a rear impact?

22 A. The occupants, as a result of the rear impact, would
23 initially move rear-ward, backward, toward the seats.

24 Q. And then, what would be the reaction after that?

25 A. After being stopped by the seat and the headrest, while

1 most of the energy is being absorbed by the padding and the frame of
2 the seat, up to 70 percent, the remainder of that energy, the 30
3 percent left, would make the occupants to move forward at the
4 velocity that is one-third of the original. So, they eventually
5 follow the rest of the occupants and they move forward; but
6 initially, they were moving backward.

7 Q. So we understand rear impact. In a rear impact, it's
8 your understanding, and your testimony about the laws of physics, the
9 laws of motion of the body, does the body go back initially and then
10 forward?

11 A. Yes, sir.

12 Q. Okay. Is that your personal opinion, or was that based
13 upon what's accepted by the scientific community?

14 A. It's the laws of physics, not my opinions.

15 Q. Are the laws of physics accepted by the biomechanical
16 community?

17 A. Absolutely.

18 Q. Are they used by the biomechanical community in their
19 everyday analysis and approach in investigating accidents?

20 A. Yes, sir.

21 Q. There was no pictures or analysis of the other vehicle,
22 explain why you didn't do that, or why you didn't need it?

23 A. The focus of this analysis was to understand the amount
24 motions and forces that the driver of the Pacifica experienced that
25 day. As such, I focused on that vehicle, and I had enough information

1 to calculate the delta-V and forces that was delivered to that
2 vehicle.

3 Q. And the way you describe how you did your analysis, is
4 that something you personally came up with or is that what
5 biomechanical engineers do in their everyday analysis?

6 A. They do it in everyday analysis.

7 Q. And the method that you just described, is that
8 accepted by the biomechanical community?

9 A. Absolutely.

10 Q. Now, did you have a VIN number of the other vehicle?

11 A. Yes, I did.

12 Q. And were you able to explore and examine the
13 manufacturer's information about that other vehicle?

14 A. Yes.

15 Q. What was that other vehicle?

16 A. It was a Lincoln Town Car. And based on the
17 information from the VIN, we know that it was a 2001 Lincoln Town Car
18 Executive L, four-door Sedan. We were able to get the information
19 about that car from the VIN, and get the actual weight of that car.

20 Q. Please explain, did you read the defendant's
21 deposition?

22 A. Yes.

23 Q. Based upon that, or any other information, including the
24 police report, were you able to ascertain how many persons were
25 located in that vehicle at the time of the impact?

1 A. Yes.

2 Q. How many people?

3 A. Only the driver was in that vehicle.

4 Q. Okay. Again, if you do the same analysis as before,
5 you take a median in terms of the weight of the person and the
6 vehicle?

7 A. That's correct. I didn't have the weight of Mr.
8 Siddique, so I assumed the average weight, or the mean weight, for a
9 60 to 69 year old male, for him.

10 Q. Let's assume, for the sake of argument, that you had
11 the medical records of every person --

12 A. Yes.

13 Q. -- involved in this accident, would those weights be
14 accurate?

15 A. Whatever would be the weight at the time that medical
16 record was taken, but it doesn't necessarily mean it would be the
17 same exact at the time of accident, because body weight may fluctuate
18 and change.

19 Q. Again, if the weight of the Lincoln Town Car were hundreds
20 of pounds higher or lower, how, if at all, would that affect your
21 mean and calculation?

22 A. It would affect the calculation by the decimal point.
23 Instead of six point seven miles per hour, it would be perhaps six
24 point eight, or maybe six point six, but it would be insignificant.

25 Q. Why do you say that, explain that as clearly as you

1 can?

2 A. Well, I knew the weight of that specific car but not
3 the driver; for that, I assume, and it's estimated an average weight
4 of a person that age and gender.

5 Q. When you say that age and gender, do you mean the
6 driver of the other vehicle, my client?

7 A Yes. Exactly. 198 pounds for him. So, it might be his
8 exact weight, but we didn't know. So it is just a reasonable
9 representation of the weight of the driver, it could be higher, it
10 could be lower. There could be, I don't know, a bag in back of that
11 car, in the trunk, weighing one hundred pounds, or having some other
12 additional equipment that we didn't know about that, it would change
13 the weight of the vehicle by a hundred to two hundred pounds,
14 perhaps. But that would not effect the calculations significantly.
15 I have done this before that I have had some information and some
16 reasonable estimate that eventually down the road I received
17 additional information, so I re-calculated; and every single time, at
18 the end, the ultimate goal, which was the delta-V, did not change
19 significantly, maybe by a decimal point, six point seven versus six
20 point eight.

21 Q. Even where it does change, it could change no more than
22 a mile an hour?

23 A. Exactly. If we have a six or seven-hundred-pound
24 difference, then instead of six miles per hour, it could be seven
25 miles per hour, or five miles an hour. So, we go up by one mile,

1 down, or go up.

2 Q. It wouldn't go up by 50 miles an hour?

3 A. No.

4 Q. After you apply the biomechanical principles, Newton's
5 First Law and Third Law, and based upon all of the information that
6 you had, did you come to a Crush Energy Analysis -- Accident Analysis
7 and Crush Energy Analysis, on Page 7 of your report?

8 A. Yes, sir

9 Q. What is that?

10 A. As I said, delta-V was calculated in two ways, they
11 were done separately and independently. One was this Crush Energy
12 Analysis, that you just asked about, of course the other one is
13 momentum analysis that we may talk about later. But for the crush
14 energy, as the name says, based upon the amount of crush, or residual
15 deformation absorbed in a vehicle, engineers are capable to calculate
16 the amount of energy being transferred to that vehicle.

17 Q. As part of your calculations, did you also use
18 photogrammetry?

19 A. Yes.

20 Q. Did you explain that before?

21 A. As I said, photogrammetry simply states you can make
22 measurements while using photographs. The other name would be image
23 analysis. When you have the photo, you can make measurements.

24 Q. Now, on Page 7, 8 and 9, you use various mathematical
25 formulas; do you see them?

1 A. Yes.

2 Q. Are these formulas that you've made up?

3 A. No. They are coming directly from the text and the
4 accident reconstruction articles.

5 Q. Are these formulas accepted in the biomechanical
6 community?

7 A. Absolutely.

8 Q. Pull out your police accident report.

9 A. Yes.

10 (There was a brief pause in the proceedings.)

11 MR. [REDACTED]: May it please the Court, may I give
12 this to the officer for the next exhibit?

13 THE COURT: Sure. I am just writing on it what
14 exhibit number it is. This isn't evidence, it's the court
15 exhibit.

16 MR. [REDACTED]: There is no evidence, there is no
17 jury, they are all court exhibits.

18 THE COURT: Right. This is Court Exhibit 5.

19 MR. [REDACTED]: I am also going to --

20 THE COURT: This is not a police report.

21 MR. [REDACTED]: It is not.

22 THE COURT: No. This is your client's report, MV104,
23 filled out by the defendant.

24 THE WITNESS: New York and New Jersey authority --

25 MR. [REDACTED]: One second. This is the Port

1 Authority report, your Honor, it says so here. It is a
2 different report than the New York City Police Department.

3 THE COURT: Okay. Let me see it.

4 THE WITNESS: Because of the location of the
5 accident--

6 MR. [REDACTED] It's not an MV104, it's a different
7 form, but the information is there.

8 THE COURT: They are not required to sign it?

9 MR. [REDACTED] Apparently not. But the ledger is
10 in the upper right-hand corner on the second page, it clearly
11 shows it's a port authority form.

12 MR. [REDACTED] I will stipulate it's not the normal
13 report. It was a port authority police officer. I believe
14 there was a second page, it may not be included there.

15 THE COURT: I have the second page. It's a little
16 hard to read, but it does say near the top Port Authority New
17 York and New Jersey. So, it is signed, they just signed it at
18 the top instead of at the bottom. Okay.

19 MR. [REDACTED]: Thank you.

20 THE WITNESS: Thank you.

21 MR. [REDACTED] Also, your Honor, may I also give
22 to the officer, and the Court, various photographs reviewed by
23 Dr. [REDACTED]

24 THE COURT: Okay. So, this is six photos printed on
25 white paper.

1 MR. [REDACTED]: It should be color photographs,
2 your HONOR.

3 THE COURT: Yes, color photos printed on white paper.
4 I will put a sticker on them. This is Exhibit 6.

5 MR. [REDACTED]: May I proceed?

6 THE COURT: Yes.

7 Q. Now, let's talk about your Accident Analysis on the top
8 of Page 7. Is there a separate paragraph that begins with that
9 phrase? Do you see it, Dr. Toosi, Accident Analysis?

10 A Accident reconstruction research?

11 Q No. The top of Page 7?

12 A. Accident Analysis, yes.

13 Q. What is the gist of that analysis that you performed?

14 A. As I said, this is the very first step of the
15 biomechanical analysis to perform accident analysis, or accident
16 reconstruction, to understand a couple of major factors, including
17 the speed, the energy, the forces involved, so that would be the
18 severity of the accident, and also how the cars made contact, so the
19 point of impact and the direction of movement as a result of impact,
20 and so forth.

21 Q. And did you next discuss a concept in the heading Crush
22 Energy Analysis?

23 A. Yes. As I said, if you can observe the amount of
24 deformation or crush in a car, you can retrospectively calculate the
25 amount of energy that was delivered to that vehicle as a result of

1 the impact. And based on that, you can calculate the change in
2 velocity of the car as a result of the collision.

3 Q. Page 8, there is a paragraph that begins with a 2004
4 Chrysler Pacifica?

5 A. Yes.

6 Q. Would you read that whole sentence into the record?

7 A. The 2004 Chrysler Pacifica, wheel base 116 point 3
8 inches, is being considered a Class 2 multi-purpose vehicle, with
9 wheel base more than 104.5 inches.

10 Q. Are these designations that you made up or is it
11 accepted in the scientific community in which you practice?

12 A. They are accepted, they are coming directly from the
13 paper that has been peer reviewed and accepted in the field.

14 Q. Finish the rest of that?

15 A. For which the generic rear crush stiffness coefficients
16 are.

17 Q. Are there published standards for comparable vehicles
18 in terms of crush stiffness?

19 A. Yes.

20 Q. And about how many years has Chrysler been
21 manufacturing Chrysler Pacifica, to your knowledge?

22 A. This line of the production, if I can take a look.
23 (There was a brief pause in the proceedings.)

24 A. My records show that from 2004 to 2008, for this
25 specific chain of Pacifica.

1 Q And how long have you been manufacturing Chrysler
2 Pacificas?

3 A For years.

4 Q 10, 15?

5 A Absolutely. Yes.

6 Q And in all that time, has any specific crush depth been
7 performed on a Chrysler Pacifica?

8 A Not for a Chrysler Pacifica, no.

9 Q Has it been performed for comparable vehicles?

10 A Yes, it has.

11 Q What kind of comparable vehicles?

12 A SUVs and crossovers are comparative types that can go
13 under the name multi-purpose vehicles or wagons.

14 Q Why haven't they performed any specific to the Chrysler
15 Pacifica model?

16 A It wasn't needed.

17 Q Why wasn't it needed?

18 A Because they have very comparable numbers for this line
19 of production, so it didn't mean that they had to go and do it one by
20 one. I mentioned that crush was being done by federal agencies,
21 nothing has been done on Pacifica.

22 Q And have they done on other SUV Chrysler vehicles?

23 A Yes.

24 Q Are they done on other comparable models of other SUVs and
25 crossovers?

1 A. Yes.

2 Q. Based upon your understanding of the standards of your
3 scientific community, is that a proper analysis?

4 A. Yes. It's a reasonable estimate of the coefficients for
5 the cars, it belongs to that generic line and production.

6 Q. And according to federal standards that you are aware
7 of, do certain cars have to meet a minimum crush stiffness type of
8 test?

9 A. Absolutely.

10 Q. Is that as compared to all cars or is that just the
11 Chrysler Pacifica?

12 A. All vehicles.

13 Q. Now, you then come to Momentum Analysis on Page 9, do you
14 see that?

15 A. Yes.

16 Q. And what was your analysis of that?

17 A. As I said, it was the second analysis that I performed
18 based on the information provided. And it was completely independent
19 from the Crush Energy Analysis, meaning that it had nothing to do
20 with the extent of damage to either vehicle. It's basically telling
21 us, based on the conservation of momentum, which is another law of
22 physics, that the two objects made contact, the momentum, just like
23 energy, is being transferred from one to the other, from the faster
24 to the slower, and it makes the slower object to move fast. So, if
25 you have with estimate of the weight of the object, and the speed or

1 velocity of that object, you can calculate the amount of momentum
2 being transferred. Now, it's vice versa if you have the amount of
3 momentum, then you can calculate the change in velocity of that
4 object as a result of the impact, and that's what I did for this
5 case.

6 Q. Here's a very important question, most important
7 question. In making your calculations, do you need both of these
8 analyses or could you use one or the other?

9 A One would be sufficient.

10 Q. In this case, were you able to use both.

11 A Yes. Because I had enough information to perform both,
12 yes.

13 Q. Now, what was the -- in your momentum analysis on Page
14 9, did you give a number for closing velocity?

15 A. Yes. Closing velocity is the difference between the
16 velocity or between the speed of the two cars at the time of the
17 impact. So, if one is stopped, the other one is moving at 10 miles
18 per hour at the time, the closing velocity will be 10 miles per hour.

19 Q In this case, what was the closing velocity?

20 A Based on the testimony of the plaintiff, both vehicles
21 were moving. So the Pacifica was not stopped even though that is not
22 consistent with the testimony of the driver of the Lincoln. But I
23 accepted the plaintiff's testimony that the car was traveling -- he
24 did not give us any speed. But based on the facts that no air bag
25 deployed in the Lincoln Town Car -- let's step back for a second. If

1 a car is being involved in a frontal collision between 9 to 15 miles
2 per hour, the air bag will deploy. So, I could estimate 9 or 10 or
3 11 miles per hour for the difference between the velocity of the
4 Lincoln; and the Pacifica, I chose 15, which is like the upper bound
5 of that closing velocity range. As I said, I aim for the worse case
6 scenario. If it was anything more than 15 miles per hour difference
7 between the two velocities, then the air bag would deploy, which it
8 did not. That's why you see that 15 as the upper bound for the
9 closing velocity, the difference between the velocity of the two
10 vehicles at the time of impact. For example, if the Pacifica was
11 going five miles per hour, the Lincoln could not be going more than
12 20 miles per hour. If the Pacifica was going 10 miles, the Lincoln
13 could not go anything more than 25 miles per hour, the difference is
14 not going to be more than 15.

15 Q. Let's talk about your analytical results at the bottom
16 of page 9, tell us what conclusion you came to?

17 A. I did two analyses separate and independent from each
18 other, one gave me six point seven miles per hour as a result of the
19 impact delta-V for the Pacifica, and the other gave me six point nine
20 miles per hour delta-V as a result of the impact for Pacifica.

21 Q. Are those significant deviations in those two tests?

22 A. They define a range. And if you even consider five or
23 ten percent, they are considered the same range. Since they were
24 both below seven miles per hour, I just rounded up the delta-V of the
25 Pacifica in this accident less than seven miles per hour as a result

1 of the activity and impact.

2 Q. Are all of the conclusions that you have given so far a
3 reasonable degree of scientific certainty?

4 A. Absolutely.

5 Q. You then talk about injury analysis; do see that?

6 A. Yes.

7 Q. First of all, let's go back to Occupant Kinematics on the
8 top of Page 10, you've already discussed that in terms of the motion
9 of the body when hit from the rear?

10 A. Yes.

11 Q. Just so we are clear. Did you know where the plaintiff
12 was sitting?

13 A. Yes, sir.

14 Q. How did you know that?

15 A. He testified to that, and it was consistent with the
16 police accident report.

17 Q. Now, let's talk about your injury analysis. Did you
18 see the Bill of Particulars?

19 A. Yes.

20 Q. Did you see the list of injuries claimed?

21 A. Yes.

22 Q. And did you also see the radiology reports and the
23 operative report of Dr. [REDACTED]?

24 A. Yes.

25 Q. Tell us about your analysis of the alleged injuries

1 versus the forces that were released by this impact?

2 A. Well, the whole idea of calculating the delta-V was to
3 understand the amount of forces and energies being delivered to that
4 object, the Pacifica, and how it would affect the motions of the
5 occupants inside that car. We talk about a rear-end impact with
6 cars, the initial motion of the person going backward; at that point,
7 the body is being stopped with the seat belt, seatbag and headrest,
8 and then bounces forward much lower speed, one-third of the original
9 speed. He testified that he was wearing his seatbelt, which is
10 important, because a seatbelt is engaged and it stopped the body from
11 moving forward significantly. There is usually about an inch of
12 slack in the seatbelt before it engages as a result of the movement;
13 but after that, it holds tight against the torso and the shoulder of
14 the person and it stops the body from moving forward, and that's the
15 design of the seatbelt for safety.

16 Q. I am going to read you a line of Page 10 just above the
17 words "Injury Analysis" in your report. You have stated: This
18 accident provided no mechanism to exceed physiological range of
19 motion of Mr. Singh's cervical or lumbar spine.

20 Do you see that?

21 A. Yes.

22 Q. What did you mean by that?

23 A. Well, as I was talking about the movement of the
24 person, the lumbar spine, which is the lower back, is being supported
25 by the seat behind it, which is having a cushion and frame, and that

1 absorbs energy. And then, when the body bounces forward, he is
2 belted with a shoulder harness and a lap belt, the lap belt goes
3 around your hip to stop the lower part of your body from moving
4 forward; as such, the lumbar spine, the lower back, experiences very
5 limited movement with respect to the vehicle, very close to nothing,
6 because it has no way to go backward because of the seat, and the
7 seat was not broken, so it performed its function and its job. And
8 then, he was belted, so he couldn't move forward significantly
9 because the shoulder harness stops the torso, the lap belt stops the
10 hip from moving forward. As such, the body, specifically the lumbar
11 spine, did not experience any motion such as bending forward
12 significantly beyond what it could tolerate, which we call
13 hyperflexion; or it couldn't go bending backward more than what it
14 could tolerate, or beyond the threshold of damage to the body, which
15 we call hyperextension. So, without hyperextension or hyperflexion,
16 there is no mechanism to cause any injury in terms of disc herniation
17 or disc bulging in the lumbar spine, because it requires a certain
18 amount of force and a specific type of mechanism, and we did not have
19 either of them in this accident.

20 Q. The studies you've relied upon for this information and
21 conclusions, are they as to the general population or do they do
22 studies on every individual in the country?

23 A. They are for the general population.

24 Q. Are there studies done on every person living in the
25 United States?

1 A It's physically impossible.

2 Q. Nevertheless, do biomechanical engineers accept the
3 general population studies?

4 A. Yes. Because the seat belt is for everybody, not just
5 for a specific height or weight. So, they are considered the range
6 -- the variety of the occupants inside the car, male, female, tall,
7 short. But they are designed the way to perform their job
8 considering the changes or variation in a population.

9 Q. In this case, did you actually know the plaintiff's
10 height and weight?

11 A. Yes, I did.

12 Q. How did you know that?

13 A. From his testimony.

14 Q. Now, you talk about, at the bottom of Page 10 going over
15 to Page 11, you talk about various parts of the anatomy, they were
16 discussed in the Bill of Particulars. Could you elaborate or tell us
17 your opinion about each area that is claimed to be injured in this
18 case as you've discussed it on Page 10 and 11 and up to Page 12, up
19 to the word "conclusions"?

20 A. Well, based on what I noticed in the verified Bill of
21 Particulars, Mr. [REDACTED] claims to have sustained multiple disc bulges
22 in his lumbar spine, and also cervical and lumbar radiculopathies as
23 a result of this accident.

24 Q. What was the nature of the operation performed by Dr.

25 [REDACTED]?

1 A. I have to take a look at this. I have the medical with
2 me. He performed a lumbar discectomy, and compression of the L3-L4,
3 and L4-L5 discs under fluoroscopy.

4 Q. To your knowledge, does this report indicate whether
5 any fusions had been performed?

6 A. Not to my knowledge. Not based on his report.

7 Q. Okay. Now, getting back to your analysis on Pages 10,
8 11, up to the middle of Page 12, what was your opinion, to a
9 reasonable degree of scientific certainty, as to whether or not the
10 mechanism or forces released in this incident in terms of each of the
11 areas of the body that is claimed to be injured?

12 A. Well, as I said, any specific type of injury requires a
13 certain amount of force beyond the threshold, beyond the line to
14 cause that injury. And also, it requires certain type of mechanism,
15 which is basically the way that force or the load would interact with
16 the human body, the way it's being delivered, the way the angle of
17 the delivery, the object delivering that force, the interaction of
18 the body and the reaction of the body through that force, all comes
19 under the big umbrella that we like to call mechanism. Since we
20 don't have a certain amount of force, and it's a specific type of
21 mechanism, then we are not going to have a certain type of injury; a
22 different type of injury, but not that one. So, for any injury
23 analysis, the biomechanical engineer has to discover a certain amount
24 of force to see if the force is beyond what the body part can
25 tolerate, and also to understand if the mechanism of the injury

1 exists in the accident or the set up. And that's what I reviewed in
2 that section.

3 Q. Did you also note a finding of spinal stenosis in the
4 records you reviewed?

5 A. Yes.

6 Q. What is spinal stenosis?

7 A. Spinal stenosis, just like the spine, has like a canal
8 inside that nerves can exist and actually branches out; so if it
9 becomes a little narrow, it puts pressure on those nerves and can
10 cause symptoms.

11 Q. What causes spinal stenosis?

12 A. Many things, the most common cause is aging, the wear and
13 tear process that happens to all of us as we age, and it happens over
14 time.

15 Q. Do you have an opinion, to a reasonable degree of
16 scientific certainty, as to whether or not Mr. [REDACTED] suffered any of
17 the injuries claimed in his Bill of Particulars due to the accident
18 that is the subject of this lawsuit?

19 A. Yes, I have an opinion.

20 Q. What is your opinion?

21 A. Since the amount of force, based on my accident
22 reconstruction, was not significant enough, and he also did not
23 experience any hyperflexion or hyperextension of the lumbar spine, my
24 opinion was that his lumbar spine bulges were not caused by this
25 accident.

1 Q What about all of the other injuries claimed?

2 A. The focus for this report was reviewing disc bulges,
3 and signs and symptoms of the radiculopathy, which is a complication
4 of the disc bulge, or disc herniation, and that's what I performed
5 for this accident.

6 Q. Are there studies that look at the results of accidents
7 from, say, cadavers, dummies, live people?

8 MR. [REDACTED]: I object to this.

9 A. Yes.

10 THE COURT: Rephrase. Studies on cadavers, dummies,
11 are not proper evidence.

12 MR. [REDACTED]: I will rephrase.

13 THE COURT: I have a question. So, Dr. [REDACTED] just
14 said, unless I misunderstood, that you did not consider any of
15 the alleged injuries other than to his lumbar spine in your
16 report, is that what you just said?

17 THE WITNESS: Yes, your Honor.

18 THE COURT: Okay.

19 Q Do you have a copy of the Bill of Particulars with you?

20 A. I do have it.

21 THE COURT: He list it in his report.

22 THE WITNESS: I list it in my report, you are right,
23 your Honor.

24 THE COURT: It's in his report. It's on Page 4,
25 "Claimed Injuries."

1 THE WITNESS: Yes.

2 MR. BALSON-COHEN: Okay.

3 Q what area of the body was the operation to?

4 A The lumbar spine, which is the lower back.

5 Q Is that the area you were commenting on?

6 A. Yes, sir.

7 Q. Do you also opine on radiculopathy?

8 A. Yes, sir.

9 Q. what did you say, if anything, about this?

10 A. Well, none of it could have been caused by this
11 accident, because of the lack of significant force and lack of the
12 mechanism.

13 Q. On top of Page 12, did you also perform an analysis of
14 the cervical spine?

15 A. Yes.

16 Q. Okay. Did you write it in any of your reports?

17 A. Yes, it's included.

18 Q what was your analysis of the cervical spine?

19 A. The cervical spine, first of all, did not manifest in
20 the medical records of any type of disc bulge or herniation.

21 Q. what does it say in the Bill of Particulars?

22 A. Cervical radiculopathy, which is basically nerve pinch
23 in the cervical spine, which is the neck. But based on the analysis
24 that I performed, the amount of motion that the neck experienced in
25 this accident, as the medical records actually are consistent with

1 that, did not cause any injuries such as disc bulge or herniation
2 that can cause complication such as radiculopathy. So, there has to
3 be some other causes for that radiculopathy, it's not caused by this
4 accident, because there was no disc bulge or herniation in the
5 cervical spine.

6 Q. I am going to read you a portion of your analysis on
7 the cervical spine, on the top of Page 12, and I ask you to comment
8 on it. You say: Results of this analysis demonstrate that head
9 accelerations and corresponding neck loads experienced by Mr. Singh
10 were also substantially lower than those experienced during riding
11 bumper cars or activities such as hopping, skipping rope, falling
12 into a chair, or running with a blunt stop.

13 Do you see that?

14 A. Yes.

15 Q. Explain that for the record?

16 A. As I said, the numbers for this accident show that the
17 delta-V was in the range of seven miles per hour, and that would
18 translate into approximately 3Gs of acceleration for the different
19 parts of the body. And in those activities, the amount of
20 acceleration, or G force, could be up to eight or nine Gs, which is
21 much more of what he could experience in that accident. And those
22 activities would not cause any disc bulge or herniation, this
23 accident did not cause any disc bulge or herniation. So, my analysis
24 was consistent with the other facts regarding this accident.

25 Q. Now, did you also review the physical examination

1 report of the defendant's independent medical evaluator?

2 A Yes, I did.

3 Q Is that Dr. [REDACTED]?

4 A Yes.

5 Q Okay. And just so we are clear. In your analysis of
6 whether this force created injuries, did you comment on both the
7 cervical and lumbar spine?

8 A Yes.

9 Q And are those opinions to a reasonable degree of
10 scientific certainty?

11 A Yes.

12 Q And the manner which you went about your analysis, is
13 that accepted analysis, criteria, and study as performed or accepted
14 in your field of expertise?

15 A Absolutely.

16 Q Is there any part of your analysis, or methodology that
17 you used, alien to, foreign from, or not part of the accepted
18 techniques used by biomechanical engineers?

19 A No, sir.

20 Q Now, I would like to go to your conclusions on Page 12. I
21 would like to read to you what you say: Based on the biomechanical
22 accident analysis presented above, within a reasonable degree of
23 scientific certainty, the loads and mechanisms required to cause
24 traumatic injuries to Mr. [REDACTED] spine were not present in the
25 accident of October 24, 2011. Thus, Mr. [REDACTED] lumbar spine disc

1 bulges and his cervical and lumbar radiculopathies cannot reasonably
2 be attributed to the subject incident.

3 Do you see that?

4 A Yes.

5 Q. Doctor, can you please explain that for the benefit of
6 this record?

7 A. As I said, we have to analyze the amount of forces and
8 also the mechanisms that are responsible for such injuries. In this
9 case, my analyses and calculations show that we don't have
10 significant amount of force, he also did not have the right mechanism
11 for the cervical spine, which is the neck, or the lumbar spine, which
12 is the lower back, to go through injuries that has been claimed.
13 Specifically, the lumbar spine, the claim of disc bulges, and also
14 radiculopathy, which is pinch of nerves of the cervical spine, the
15 lumbar spine, could not be caused by this accident.

16 Q. I would like to read parts of the paragraph before the
17 word "conclusions," and I would ask you to comment on that: Based on
18 these biomechanical analyses, the subject incident provided no
19 mechanism or loads for a cervical or lumbar spinal injury or
20 exacerbation of any existing cervical or lumbar spinal pathology that
21 Mr. Singh might have had before this accident. Mr. [REDACTED] lumbar
22 spine disc bulges and cervical or lumbar radiculopathies are due to
23 degenerative changes compatible with his chronological age, and/or
24 repetitive loads during activities of daily living, rather than
25 forces and motions that he experienced in the subject incident. This

1 analysis is consistent with the reviews of Mr. Singh's spine imaging
2 studies in which no acute traumatic finding was identified but
3 degenerative changes were found. It is notable that the scientific
4 literature has shown a high incidence of abnormal radiographic
5 findings in the cervical and lumbar spines of asymptomatic subjects.

6 Will you explain that for the record, please?

7 A Yes. I think the first part is that, and this sounds
8 redundant, I think that we don't have enough amount of force or the
9 right mechanisms to create those injuries. So what could explain the
10 presence of multiple disc bulges in his spine, quite simply the wear
11 and tear process, which, scientifically, the degeneration process of
12 the spine, that happens to all human bodies sooner or later, and it's
13 just a manifestation of that. Simply because it was found, the disc
14 bulge was found after the accident, by no way means that it was
15 caused by the accident, if we do not have the amount of force that is
16 required or the mechanism that would be required to cause that.
17 Having that said, if it was an acute traumatic, you would see other
18 signs in those MRIs taken and reviewed by the radiologists. I just
19 relied upon their findings, it's not my opinion. They didn't find
20 any fracture, they didn't find any dislocation, they didn't find any
21 damage to facet articles, they didn't find any bleeding or
22 inflammation of the nerves around the spine, they did not find any
23 acute traumatic finding in those MRIs that's consistent with what I
24 am saying. I am saying that those disc bulges were pre-existent, and
25 they were not caused by the accident; if they were, then you would

1 see other findings in those MRIs.

2 Q. I just want to go back to the pictures, briefly. Based
3 upon your review of the information and the estimate, the damage
4 repair estimate, was that damage and repair estimate, and the
5 pictures, taken before or after the vehicle was repaired?

6 A. My understanding is that they were taken before the
7 repair was done.

8 Q. And are the opinions you have just expressed to a
9 reasonable degree of scientific certainty?

10 A. Absolutely.

11 Q. I would like -- the final part of my presentation, Dr.
12 Toosi, I would like to go through a few concepts and challenge you on
13 a few things --

14 THE COURT: Mr. [REDACTED], I was going to take a break
15 when you were done. I thought you were almost done.

16 MR. [REDACTED]: We need to have a breakdown of --

17 THE COURT: Are you almost done?

18 MR. [REDACTED]: No.

19 MR. [REDACTED]: I have to use the men's room.

20 MR. [REDACTED]: I think we all do.

21 THE COURT: Okay.

22 (Whereupon, a recess was taken, after which the
23 following occurred.)

24 THE COURT: Back on the record. All right, continue.

25 MR. [REDACTED]: Thank you, your Honor.

1 BY MR. [REDACTED]:

2 Q. Dr. [REDACTED], I would like to discuss with you certain
3 concepts, and then I am going to challenge you with some important
4 questions. First, I would like to get an idea about the population
5 studies that you've relied upon, and whether they included
6 individuals of comparable gender and age of the plaintiff in this
7 case?

8 A. Yes, I did.

9 Q. And tell us a little bit about that, whether they were
10 large studies, small, anywhere in between?

11 A. Both. Some of them are having, you know, larger
12 numbers, some of them are smaller. But the fact remains that for
13 some specific movement, specifically, and mechanisms, the number --
14 the subjects doesn't matter. Just like when you asked me about how
15 many apples drop from the tree to prove that, you know, gravity
16 works, one or two. But we have some good sample sizes from most of
17 those studies that show that this type of motion and forces repeat
18 again and again and again.

19 Q. When you say "large sample sizes," what are we talking
20 about in terms of numbers?

21 A. I will have to check my documents, I have the articles
22 with me. But we are talking about up to 30 to 40 different subjects
23 in one study, then combine the total up, like hundreds of different
24 studies that they are using the same subjects and approach.

25 Q. Do they include males of compatible age of the plaintiff

1 here?

2 A. Yes.

3 Q. Did you make a calculation of the forces released based
4 upon the information that you've obtained and relied upon through the
5 information that was given to you?

6 A. Yes.

7 Q. And from the information that you were given, let's
8 talk about some other factors. Were you able to discern the make and
9 model of the subject vehicle?

10 A. Yes.

11 Q. And were you able to discern whether the plaintiff --
12 where the plaintiff was sitting in the vehicle?

13 A. Yes.

14 Q. And you have already told us; correct?

15 A. Yes.

16 Q. Were you able to discern whether the plaintiff was
17 wearing a lap belt and a shoulder belt?

18 A. Yes.

19 Q. And you have already told us about that?

20 A. Yes, sir.

21 Q. And you've already discussed with us the direction of
22 the impact and the velocity of the impact?

23 A. Yes.

24 Q. And, I would like to get into another few concepts to
25 challenge you with. Now, in order to do your calculations, do you

1 need to be at the scene of the accident when it happens?

2 A. No.

3 Q. Is that opinion just your opinion, or is that the
4 generally accepted opinion by biomechanical engineers in the
5 scientific community?

6 A. It's generally accepted.

7 Q. And did you examine the plaintiff himself about the
8 medical evaluation?

9 A. No.

10 Q. Is that necessary for your calculations?

11 A. Absolutely not.

12 Q. Is that your personal opinion, or is that the accepted
13 opinion of the biomechanical scientific community?

14 A. It's accepted in the field.

15 Q. Now, you have indicated that you've looked at certain
16 photographs taken after the accident; is that correct?

17 A. Yes.

18 Q. And based upon -- so we are clear for the record. Were
19 those pre or post repair photographs?

20 A. Pre-repair.

21 Q. Now, do you need to review photographs of the other
22 vehicle?

23 A. Not necessarily.

24 Q. Why do you say that?

25 A. Because the focus was on the motions of the plaintiff, and

1 he was riding in the Pacifica, and that was the focus of the
2 analysis.

3 Q. And, in terms of your crush stiffness data, would you
4 say that your analysis is flawed or correct?

5 A. It's correct. It's using comparable numbers not exact
6 numbers, because they did not exist, but we are using comparable
7 numbers in a reasonable range.

8 Q. Are you aware of certain opinions that there may not be
9 a correlation between delta-V and these individual's injuries?

10 A. No.

11 Q. Do the scientific community, in terms of the
12 biomechanical community, do they accept the delta-V as an indicator
13 as to the cause of injuries?

14 A. Yes

15 Q. One of the things that I wanted to ask you about is
16 that of the 35 times that you've testified, and your reports, how
17 many have been in Brooklyn, Queens, or Staten Island, approximately?

18 A. I would say more than half.

19 Q. Have you ever testified before Judge [REDACTED]
20 before?

21 THE COURT: That's me.

22 THE WITNESS: Yes, ma'am.

23 A I believe I have.

24 Q. And at that time, did you actually give your
25 testimony--

1 A That was my understanding.

2 Q -- after showing up to court?

3 A That's my understanding.

4 Q And did the police accident report indicate the nature
5 of the weather, or the testimony?

6 A Yes.

7 Q What did you learn from that?

8 A All resources, the police accident report, the
9 plaintiff and the defendant testified that it was a clear day and the
10 roads were dry.

11 Q And has that had any significance in your review of the
12 case in terms of the surface of the roadway?

13 A Actually, not. Because in none of those calculations, the
14 coefficients of friction was required to form the calculation. So,
15 it didn't make a difference if it was icy or dry, even though I know
16 it was dry, but I didn't need to use it anyhow.

17 Q Is that something that is accepted in the biomechanical
18 scientific community or is that just your personal opinion?

19 A No. There are methodologies that you need to know the
20 coefficients of friction of the road, but none of those were used in
21 this case.

22 Q Just to review. I would like to end with a few final
23 concepts. Did you feel that you had sufficient photographic evidence
24 to make your calculations?

25 A Yes.

1 Q Did the area where the impact occurred, was that
2 demonstrated in the pictures that you have reviewed?

3 A Yes.

4 Q Okay.

5 THE COURT: Do you mean the location on the road or on
6 the car?

7 MR. [REDACTED]: On the car, Judge.

8 THE COURT: Okay.

9 A Yes.

10 Q Your crush stiffness analysis, is it based upon
11 out-dated or flawed articles?

12 A No.

13 Q Why do you say that?

14 A The methodology is actually -- can be found in any
15 textbook of accident reconstruction, and I've cited two of them in my
16 report. So, it's not out-dated, it's established, and it's being
17 used on a daily basis.

18 Q Are you actually required under the standards of care
19 in the biomechanical community to go out with a tape measure and
20 measure?

21 A No.

22 Q Why do you say that?

23 A Again, if you have enough information, then you don't have
24 to, necessarily, attend the scene to inspect the vehicle with any
25 device, and I did not.

1 Q. In many cases, has it been your experience that the
2 vehicles have either been destroyed or repaired before the case gets
3 started?

4 A. Most of the time, that's the case.

5 Q. Do biomechanical science have to extrapolate and
6 analyze accidents even when the physical structure is not available?

7 A. Yes

8 Q. Now, would you say that the following statement is true
9 or false, that the speed of the defendant's vehicle was unknown to
10 you; if not, was it important?

11 A. Well, the exact speed was unknown. But I have enough
12 evidence to understand the difference between the velocity of the
13 defendant's car, and the plaintiff's, and it was recorded by my
14 analysis, not for both.

15 Q. Did you give an upward limitation of 15 miles an hour?

16 A. Yes.

17 Q. The difference between the two vehicles?

18 A. Yes, sir.

19 Q. Does anything about what you had, prevent you from
20 performing a valid biomechanical analysis?

21 A. No.

22 Q. Why do you say that?

23 A. As you've seen in my reports, I have performed not one but
24 two analyses based on the documents and facts and information
25 provided using the established methodology in the field of accident

1 reconstruction and biomechanics.

2 Q. Those two analyses, are they independent or linked?

3 A. They are independent.

4 Q. Now, you are not licensed to practice medicine in New
5 York; is that true?

6 A. That's correct.

7 Q. Based upon your experience as a doctor in Iran, did you
8 have specialized knowledge or information as to the workings of the
9 human body?

10 A. Yes.

11 MR. [REDACTED] I reserve any redirect, your Honor.

12 THE COURT: All right.

13 MR. [REDACTED] Do you want me to start now? I am going
14 to be awhile.

15 THE COURT: I would rather you start now. I certainly
16 would not want you to run out of time.

17 MR. [REDACTED] That's fine.

18 CROSS-EXAMINATION

19 BY MR. [REDACTED]:

20 Q. Doctor, you refer to the -- sir, you refer to the use
21 of a photogrammetry?

22 A. Yes.

23 Q. You used that in this analysis?

24 A. Yes, I did.

25 Q. Find me in your report anywhere where the word

1 "photogrammetry" exist?

2 A. The word is not in the report, but that's how I
3 measured. I have the measurements, the estimate of the measurements
4 of the crush.

5 Q Sir, you knew you were coming to court, you knew there
6 would be an expert exchange of a document analyzing your analyses;
7 correct?

8 A Yes.

9 Q. You have done this hundreds of times before; correct?

10 A. Not hundreds of time, but many times.

11 Q In your testimony that you gave within the last two years,
12 you said you've prepared over one hundred reports for defendants?

13 A. It's in general, for my clients, not just defendants.

14 Q. Okay. In that same testimony, I can look it up if you
15 want, but you've testified before Judge Rothenberg, here in this
16 county, that you have testified only for the defendants, and you gave
17 a minimal input on one claimant's report; do you remember giving that
18 testimony?

19 A. I agree with the part that I testified --

20 MR. [REDACTED]: I have to object. This line of
21 questioning is appropriate for a jury, but has no basis in a
22 Frye hearing as to how many people he testified to before.
23 That's not a Frye consideration. He can testify only for
24 defendants, that is not the basis to keep him out of the Frye.

25 MR. [REDACTED]: I am referring to his report, your

1 Honor, and what should be kept in his report and what should
2 not. He referred to photogrammetry in his analysis here --

3 THE COURT: That's fine. But the question about what
4 he testified to in other cases is not relevant.

5 MR. [REDACTED]: Okay.

6 Q. Sir, find me in your report, that was exchanged to the
7 plaintiff's attorney's office, as part of the expert witness
8 exchange, find me in the report where the word "photogrammetry"
9 exist?

10 A The word is not there, sir.

11 Q Okay. And it's not in the footnote; is it?

12 A No, it's not.

13 Q But in prior reports, you have put the word
14 photogrammetry; correct?

15 A Sometimes I do, sometimes I don't.

16 Q And photogrammetry is a very specialized technique; is it
17 correct?

18 A For complex cases, yes, which this wasn't a complex
19 case.

20 Q Sir, photogrammetry involves the use of a special
21 \$15,000 camera, and going and marking the car, and looking at the
22 car, in and of itself; does it not?

23 A For complex cases that you don't know the point of impact,
24 you don't know the velocity, you don't know what happened to the car
25 after the impact; yes, you use that equipment because that is

1 required.

2 Q. So here you were using photographs that were furnished
3 to you, that someone took at some repair shop, or other place that
4 you don't know of; correct?

5 A. That's correct.

6 Q. You never physically saw the car of which you have seen
7 the photographs; correct?

8 A. That's true.

9 Q. And you don't know anything about the camera that was
10 used; correct?

11 A. That's correct.

12 Q. So, you don't know the angle at which it was taken;
13 correct?

14 A. That's correct.

15 Q. You don't know the sunlight at which it was taken?

16 A. That's correct.

17 Q. You don't know whether it was a 1080 camera, or
18 something of a higher resolution, you don't know the resolution of
19 the camera?

20 A. That's correct.

21 Q. You don't know if there are shadows that affect the
22 photographs; do you?

23 A. I don't.

24 Q. Okay. You were working off of six color photographs?

25 A. Yes, sir.

1 Q. You never saw the Lincoln Town Car?

2 A. I never did.

3 Q. You never saw a photograph of the Lincoln Town Car?

4 A. That's correct.

5 Q. The only description that you saw of the Lincoln Town
6 Car and the Pacifica was based upon -- the only description you saw
7 of the Lincoln Town Car was based upon a police report; correct?

8 A. And the testimony of the driver, that's correct.

9 Q. And that police report has an error in it; correct?

10 A. That's correct.

11 Q. So that was suspect to begin with, would you agree with
12 me?

13 A. I wouldn't use that term "suspect," but the police
14 report speaks for itself.

15 Q. Well, the police report says the impact happened to the
16 rear of the right of the car as oppose to the rear of the left of the
17 Pacifica; is that correct?

18 A. Well, the point of impact was at the center but the
19 damage is more toward the left, I agree with that.

20 Q. Were you given the testimony of Mr. Siddique from the
21 liability trial?

22 A. I don't believe so.

23 MR. [REDACTED]: objection. This report was
24 prepared before the liability trial, so that would be
25 impossible, Judge. I move to strike the question.

1 THE COURT: He meant before his testimony.

2 Q Did you have an opportunity to prepare a supplemental
3 report for today's Frye hearing?

4 A I have not done such a thing.

5 Q Between the day of the liability verdict and today, you
6 were not given any information about Mr. [REDACTED]'s testimony?

7 A I have not received any photographs.

8 Q Your estimation of how the accident happened was pretty
9 much a straight hit in the rear?

10 A It wasn't a complete head-on, because as you can see, the
11 damage is not uniform across the rear of the Pacifica. There is
12 basically no damage to the right corner of the car, but there is more
13 damage to the left. So it wasn't a complete head-on, it wasn't a
14 complete crash between the two bumpers, the front bumper of the
15 Lincoln and the rear bumper of the Pacifica.

16 Q But your mathematical analyses took into effect that it
17 was a hit in the rear case?

18 A It was bumper to bumper, yes.

19 Q It was a linear momentum type of a calculation as oppose
20 to an angular momentum type of calculation?

21 A I agree with that.

22 Q Linear momentum is where one car strikes the other one
23 dead-on; correct?

24 A That's correct.

25 Q An angular momentum is where there is a side swipe or an

1 angular component to the impact; correct?

2 A. I generally will agree with that, yes.

3 Q. Were you ever told at any point, by counsel for Mr.
4 [REDACTED], that Mr. [REDACTED] testified at a liability trial that the
5 plaintiff got off of an exit and came back onto the roadway, and
6 that's what caused the accident?

7 MR. [REDACTED]: Objection. That has no relevance
8 whatsoever, it's not the cause of the accident, that's not
9 before the biomechanical engineer, or any expert in the damages
10 trial, that's been decided by the liability trial. I will say
11 it again, there is no --

12 THE COURT: That is not what he asked him.

13 MR. [REDACTED]: That's exactly what he asked him.

14 THE COURT: No, it's not.

15 MR. [REDACTED]: He said the cause of the accident,
16 that's exactly what he just said. Read the question back and
17 listen to it. It's not a proper question for a Frye hearing.

18 THE COURT: The question, as I understand it, was, did
19 you come to learn that the defendant testified at the trial that
20 it was in fact an angular collision.

21 MR. [REDACTED]: I would like you to read the last
22 question back, Judge. That's not the question.

23 MR. [REDACTED]: I will withdraw it.

24 THE COURT: I will withdraw what I said, Mr. [REDACTED]
25 can withdraw what he said, and let's move on.

1 MR. [REDACTED] I will adopt your Honor's question.

2 Q. Were you ever told that the defendant testified at the
3 liability phase of the trial that it was an angular impact as oppose
4 to a linear impact?

5 A. I did not see or review that testimony.

6 Q. Okay. And you would have had to have used a different
7 mathematical formulation if there was an angular component to this
8 contact; correct?

9 A. That's not correct. First of all, as I said, it wasn't
10 completely linear, it was more linear than angular. Second, if you
11 look at my calculations on Page 8, you would see that it consider two
12 twenty degrees of an angle, just based on what I observed in those
13 photographs, because it wasn't head-on, it wasn't flushed, you can
14 see more damage on the left side of the bumper, that means that it
15 was hit at more than 10 degrees, 20 degrees for the sake of worse
16 case scenario. It was not a complete head-on, it was a linear
17 momentum with some angle involved.

18 Q. Didn't you tell me in you answer about five questions
19 ago that you look at this as a straight linear momentum problem?

20 A. It is a linear --

21 Q. Yes or no, Doctor?

22 A. Sir, I am answering your question --

23 MR. [REDACTED]: objection. Let him answer the
24 question.

25 THE COURT: Okay.

1 A. It is a linear momentum analysis. And I agree that it
2 is closer to linear but it has an angle to it, it's not a side swipe.

3 Q. That's not what you told me before. You said you
4 analyzed this as a linear momentum type problem; correct?

5 A Well, my report is right here. It's a linear momentum
6 with an angle.

7 MR. [REDACTED]: Objection.

8 THE COURT: Can you please both stop talking at the
9 same time.

10 Dr. [REDACTED], where in your report do you say you used a
11 twenty degree deviation from?

12 THE WITNESS: The top of Page 8, your Honor, if you
13 see there is a length of 54 inches, which is absolutely
14 exaggeration of what I observed in the photos. Next, we have a
15 tatter, which stands for angle, instead of 180 degrees, which
16 would be head-on, I use 160 degrees, which means a 20 degree
17 difference from a complete head-on linear momentum. So, it is a
18 linear momentum analysis with an angle to it.

19 Q. Didn't you tell us before that there are two different
20 -- withdrawn. I am going to ask you to answer my questions yes or
21 no.

22 A I will try.

23 Q. If you can't answer it yes or no, let me know and I
24 will rephrase it.

25 A. Yes, sir.

1 Q. Fair enough?

2 A. Absolutely.

3 Q. Okay. You told me a few minutes ago that there were
4 two different formulas to be used, one is for linear momentum and one
5 is for angular momentum; correct?

6 A. That's correct.

7 Q. And you just said in your answer a minute ago that you
8 use an exaggeration when considering angular momentum in a linear
9 momentum analysis; isn't that correct?

10 A. No, it was not about the angular part, it was about the
11 length of the crush.

12 Q. But you did say you exaggerated; did you not?

13 A. Yes.

14 Q. And there is a bit of speculation going on here in
15 terms of how precise the photographs are, in terms of clarity;
16 correct?

17 A. No. There is no question about that, they are very
18 clear.

19 Q. Did you take the photographs?

20 A. I did not.

21 Q. Did you examine the camera?

22 A. I did not.

23 Q. How were the photographs sent to you?

24 A. Excuse me?

25 Q. How were the photographs sent to you?

1 MR. [REDACTED]: Note my objection for the record.
2 You can make whatever ruling you want.

3 THE COURT: Your objection is for how he got his
4 photographs?

5 MR. [REDACTED]: No. I am objecting -- just let me
6 finish my objection, your Honor. This line of questioning about
7 what camera was taken, and all of that, has nothing to do with
8 biomechanical science. This is just purely bunk and
9 showmanship, and the plaintiff's personal opinion, which I am
10 going to get to in my summation, about how things should be
11 done, it has nothing to do with science.

12 THE COURT: I don't know about summations, this is a
13 motion.

14 MR. [REDACTED]: Your Honor, I am entitled to inquire as
15 to--

16 THE COURT: Yes. Okay. How did you get the
17 photographs by digital, E-mail, by mail? I don't know what help
18 this is going to be to me.

19 THE WITNESS: Your Honor, I received the photographs
20 that I have with me, they are copies of the current photographs,
21 I have not taken them, I don't know the camera. But those
22 photographs clearly depict the location and the extent of
23 damage, and that was enough for me.

24 Q. It doesn't show the extent of damage if you had used a
25 photogrammetry camera, a specialized camera; is that correct?

1 A That's not true. For such a simple impact that you can
2 see even without any specialized camera, we can observe the location
3 and extent of damage, there is no need for a \$15,000 camera.

4 Q You are telling us that the amount of damage to the
5 other car has no relevance whatever to what went on in this accident?

6 A That's not what I am saying. What I am saying is that
7 the damage to that car was not part of my Crush Energy Analysis,
8 because simply I did not have photos of that car.

9 Q But your Crush Energy Analysis, that was part of the
10 photogrammetry, which you claim to have used but you didn't put them
11 in the four corners of your report; correct?

12 A It is in the four corners of my report. In terms of
13 the photogrammetry, the information is coming from that calculation.

14 Q Where is the word photogrammetry in your report?

15 MR. [REDACTED]: Objection. Asked and answered nine
16 times already.

17 THE COURT: Can you clarify your last answer.

18 THE WITNESS: Your Honor, I may have used
19 photogrammetry because I have photographs that I have made
20 measurements. The term is not necessarily stated in my report,
21 but it is in the references that I have used in my report.
22 There is a chapter in one of those textbooks that I have used --

23 Q Tell me --

24 THE COURT: I don't understand what you are saying.
25 Where in your report do you talk about reaching your conclusions

1 based upon the photographs?

2 THE WITNESS: The top of Page 8, your Honor, I mention
3 that based on the forgoing information, the crush measurements
4 were conservatively estimated.

5 THE COURT: Where is that?

6 THE WITNESS: At the top of Page 8, the first
7 paragraph, the third sentence after Figures 1 and 3, it reads:
8 Based on the forgoing information, the crush measurements were
9 conservatively estimated. That estimation comes from
10 photogrammetry, your Honor.

11 THE COURT: Okay. So, you are estimating from the
12 picture that the length of the damage from side-to-side was 54
13 inches?

14 THE WITNESS: Yes, your Honor.

15 THE COURT: That the angle of impact was 160 inches
16 -- I am sorry, 160 degrees?

17 THE WITNESS: Yes.

18 THE COURT: What is the C?

19 THE WITNESS: The C is the depth of the crush, which
20 is considered here as two point five inches.

21 MR. [REDACTED]: What is the number?

22 THE WITNESS: Two point five inches.

23 MR. [REDACTED]: Thank you.

24 THE COURT: So, the deepest indentation was two point
25 five inches?

1 THE WITNESS: Yes. And I considered across of 54
2 inches, your Honor, which is again another part of exaggerating
3 the numbers, that we can observe ranging, for the worse case
4 scenario.

5 THE COURT: Where was the worse points?

6 THE WITNESS: The worse is the left corner, and you
7 can see it because there is some crumble on the left quarter
8 panel, which is less than two inches, but I increase it up to
9 two inches, then I add 40 percent off the top of that, and I
10 came up with two point five inches of the depth for the crush.

11 THE COURT: Okay. You mean the left quarter panel?

12 THE WITNESS: Yes, your Honor.

13 THE COURT: But, the left quarter panel damage was
14 caused by an impact to the rear bumper.

15 THE WITNESS: Exactly. So it's pushed in. And that's
16 the depth of the crush in that part, which is not necessarily as
17 uniform a crush across the whole bumper, but I considered that
18 the maximum crush of deformation for the length of 54 inches,
19 which only actually applies to the 12 inches on the left corner
20 of the car.

21 Q. Now sir, in prior reports that you have given, you have
22 referred to photogrammetry --

23 MR. [REDACTED]: Judge, I object to "prior reports,"
24 it has nothing to do with this case.

25 THE COURT: Mr. [REDACTED], I am going to sustain that.

1 Q. Are you a member of the American Society of
2 Photogrammetry and Remote Sensing, sir?

3 A Am I a member --

4 Q Are you member of that organization, American Society of
5 Photogrammetry and Remote Sensing?

6 A Yes.

7 Q You are a member of that organization?

8 A I have heard about it, yes.

9 Q Not have you heard about it. Are you a member of that
10 organization?

11 A A member? I am sorry. No, I am not a member. I
12 apologize.

13 Q. And there are, as I said before, special cameras that
14 are used and special markings have to be placed on vehicles in order
15 to do a correct photogrammetric analysis; correct?

16 MR. [REDACTED]: Objection. Who is this attorney to
17 say what is a correct analysis? He is giving testimony. I
18 object to the form of the question, and ask that it be stricken
19 from the record. How can he say what's correct, he doesn't have
20 an expert, he doesn't have a degree, he has nothing. And he is
21 telling your Honor what's correct. He used the word correct in
22 his question --

23 THE COURT: It doesn't matter, it wasn't done in this
24 case.

25 MR. [REDACTED] well, I disagree with that. And

1 you are going to see on my redirect that it was done, a form of
2 it.

3 Q. Sir, are you familiar with and do you recognize a
4 scientific paper entitled Photogrammetry for Documentation and
5 Vehicles Defamation, a Tool in a System for Advanced Accident Data
6 Collection?

7 A. Yes, sir.

8 Q. You have referenced that paper before in your text?

9 A. I have, that's correct.

10 Q. But that's not referenced in this report here today;
11 correct?

12 A. But it wasn't an advanced car accident.

13 Q. Is that a determination that you've made whether or not
14 it's an advanced or simple car accident?

15 A. Yes.

16 Q. How do you make that determination?

17 A. Based on my knowledge, testimony, information,
18 expertise, education, a combination of all -- putting all of those
19 pieces of information together, that's solving a puzzle, not just
20 like one piece of information or one piece of testimony, put them all
21 together, and that's what I have done, that's my job.

22 Q. The pieces of the puzzle that you don't need are the
23 photographs of the other car or the photogrammetry evidence of the
24 other vehicle; correct?

25 MR. [REDACTED] objection. who is he to say what

1 the pieces of the puzzle should be. Can't he ask a question
2 without giving us his testimony, his personal opinion? Can't he
3 ask questions without testifying? Because if he wants to do
4 that, I am going to call him as a witness.

5 THE COURT: You need to stop being so argumentative
6 and hostile, counsel. Mr. Anthony, please ask the witness a
7 question --

8 MR. [REDACTED] Okay.

9 THE COURT: -- without a speech.

10 Q. Sir, were these photographs taken with a semi-symmetric
11 camera as referred to --

12 THE COURT: Asked and answered.

13 Q. You have never personally inspected the car; correct?

14 A. I already answered that.

15 Q. Humor me and answer it again. You never inspected either
16 car; correct?

17 A. I did not.

18 Q. You never went to the scene of the accident; correct?

19 A. Correct.

20 Q. And it's your position that it's good and accepted
21 accident reconstruction procedure to not go to a scene of an
22 accident?

23 A. For the methodology that I have used, yes, sir.

24 Q. So, you never measured the grading of the roadway;
25 correct?

1 A. That's correct.

2 Q. You don't know the exact speed of the vehicles;
3 correct?

4 A. That's correct.

5 Q. You don't know the contour of the roadway in terms of
6 whether or not it was curved in one direction or the other; do you?

7 A. I don't.

8 Q. Did you go on Google Earth to try to look at the scene
9 of the accident?

10 A. I might have, but it didn't have anything to do with my
11 methodology.

12 Q. Well, if you did, wouldn't you have put that in your
13 report as something that you had reviewed?

14 A. Not necessarily, because it's not part of my
15 methodology.

16 Q. Do you know what the roadway was made out of, whether
17 macata, asphalt, concrete, or any other substance?

18 A. I don't know.

19 Q. It's your opinion that friction does not matter?

20 A. For the methodology I have used, it does not matter.

21 Q. And your delta-V calculation is based on certain
22 estimations; correct?

23 A. That's correct.

24 Q. And you are making estimations based upon vehicles
25 other than the Chrysler Pacifica in terms of crash worthiness?

1 A. That's correct.

2 Q. So, you looked at other SUVs, or other vehicles of that
3 nature, and extrapolated from that information and attributed it to
4 the Chrysler Pacifica; is that correct?

5 A. Not me, a group of scientists and engineers reviewed all
6 of the vehicles for many members of that group and they came up with
7 the average number for that group, and I used that article, that is a
8 peer review, and published and established in the field. I did not
9 do it.

10 THE COURT: You have to stop, this is lunch time. Can
11 you give us the cite of that article before we stop?

12 THE WITNESS: Yes. The article is cited as Number 9
13 in my report, your Honor, and can be found at the end of Page
14 13. As I said, Number 9, the article was done by D.E. Siddall
15 and T.D. Day, updating the vehicle class categories.

16 THE COURT: It says it was written in 1996.

17 THE WITNESS: That's correct.

18 THE COURT: How would that apply to a 2004 car?

19 THE WITNESS: Well, the numbers don't change
20 significantly, your Honor, over the years, because they are
21 still using the same technology for the rear and front bumpers.

22 THE COURT: You said there was no such thing as a
23 Pacifica vehicle until the year 2000.

24 THE WITNESS: That's what I am saying. We are talking
25 about the category, and we are talking about the class of the

1 vehicle. There are some of them that are crossovers and SUVs
2 that fall in that category, it's not specific for Pacifica. And
3 as I said, Pacifica was not tested individually.

4 THE COURT: I thought it was listed in the grouping of
5 the vehicles for equivalent cohorts.

6 THE WITNESS: That's correct, Judge.

7 THE COURT: No, it's not, it didn't exist when they
8 wrote that article.

9 THE WITNESS: Judge, the similar car, maybe not
10 Pacifica, but we have SUVs and crossovers before Pacifica, which
11 is not a new car, it might be a new model for Chrysler, but it's
12 not necessarily a new type of car.

13 THE COURT: I see. We are going to break.

14 MR. [REDACTED]: Two o'clock or 2:15, your Honor?

15 THE COURT: Two-fifteen.

16 (Whereupon, a luncheon recess was taken at this time.)

17 * * *

18 A F T E R N O O N S E S S I O N

19 * * *

20 (The following then occurred in open court out of the
21 presence of the jury:)

22 THE COURT: Let's continue where we left off.

23 MR. [REDACTED] Judge, just one comment I want to make
24 on the record, if I may. I know Mr. [REDACTED] is objecting
25 to my knowledge of physics or what I know; however, when I

1 cross-examine the doctor, I use my knowledge of medicine; when I
2 cross-examine an economist, I use my knowledge in that field.
3 So, I think the objection is misplaced.

4 MR. [REDACTED]: I have no problem with that, Judge.
5 The problem I have is when he phrases a question to say, now
6 sir, the correct way to do something is this; that, I think, is
7 objectionable.

8 THE COURT: Right. And that's what I've sustained.

9 BY MR. [REDACTED]:

10 Q Sir, you've enumerated the driver based upon his
11 deposition testimony; correct?

12 A. Yes.

13 Q When you did not know the weight of the four occupants of
14 the vehicle, so you used the fiftieth percentile for the age of that
15 person who was in the car; correct?

16 A. That's correct.

17 Q. So, that's an estimation you've made; correct?

18 A. That's correct.

19 Q. And, did you know that one of the occupants of the
20 vehicle was going to the airport?

21 A. I believe so.

22 Q. Okay.

23 A. I have to refresh my memory.

24 Q Will you take my word for it?

25 A. Yes.

1 Q. You don't know the amount of the luggage that person
2 had, the weight thereof, or anything with respect to that?

3 A. I don't know. It would just make the car heavier, of
4 course.

5 Q Obviously. Okay. Now, when we broke for lunch, you were
6 talking about an article about crash worthiness of similar vehicles
7 to the 2004 Chrysler Pacifica; correct?

8 A Correct.

9 Q That was an article that was published in the 1990s; am I
10 right about that?

11 A. You are right.

12 Q And that would have been before the Chrysler Pacifica was
13 in existence; correct?

14 A. That's correct.

15 Q And when they do crash worthiness of SUVs or -- what was
16 the other term you used?

17 THE COURT: Crossovers.

18 Q. Crossovers.

19 MR. [REDACTED]: Thank you.

20 Q When you use a comparison of SUVs and other crossover
21 vehicles, they are going from the high-end of crash worthiness to the
22 low-end of crash worthiness; correct?

23 A. I believe so.

24 Q And some of the vehicles are more crash worthy than
25 others?

1 A That is true.

2 Q. So, what did you do, you used the fiftieth percentile
3 in terms of what that study found, how did you make your analysis?

4 A. That's what they took, they took the average of all of
5 those numbers, the highs and lows for that category. I don't use
6 that average.

7 Q. So, you don't know where, had they tested the Chrysler
8 Pacifica, where that would have fallen into the average; is that
9 correct?

10 A. That is correct.

11 THE COURT: I have a question. Are crossover vehicles
12 exempt from the requirements for cars like SUVs are?

13 THE WITNESS: No, they are not.

14 THE COURT: So crossovers are required to comply with
15 the automobile requirements but SUVs are not?

16 THE WITNESS: They are also required.

17 THE COURT: No, SUV are considered trucks by the
18 federal regulations, so they have different requirements.

19 THE WITNESS: Different, but they have requirements,
20 that's my answer, your Honor. Maybe not the same requirement,
21 but they to have to comply with certain requirements for their
22 category, whatever it is.

23 THE COURT: Right. So, what defines a crossover
24 vehicle and how's that different from an SUV?

25 THE WITNESS: well, again, they fall in the category

1 that is in that paper, you can see, as --

2 THE COURT: That paper was written 10 years ago.

3 THE WITNESS: Correct.

4 THE COURT: Right now, what's the difference?

5 THE WITNESS: The difference between what, your Honor?

6 THE COURT: SUV and a crossover vehicle?

7 THE WITNESS: Well, SUVs are a little bit higher in
8 terms of the chair seat. And other than that, there might be
9 some differences in their -- what they call suspension of the
10 car, so they are a little bit more supporting. But crossovers
11 are closer to Sedans when it comes to the height of the chair
12 seat, and also the specifications for their suspension. That's
13 probably the major differences between those categories. Other
14 than that, they are large vehicles with long wheel base, and
15 they usually, for the same manufacturer, they use the same
16 technology for the bumpers and the design of the interior.

17 Q. Following up on the Judge's question. When the
18 articles to which you refer in your bibliography reference Number 9,
19 when it says "Updating the Vehicle Class Categories," an article from
20 1996, you said that includes SUVs and crossover vehicles?

21 A. I believe so.

22 Q. So then, if they have different requirements, which
23 you've just said yes to the Judge about, which ones did you use, did
24 you use the -- did the article separate between the SUVs and the
25 crossover vehicles?

1 A. In this article, they have like a common term called
2 multipurpose, that would cover that multipurpose vehicle. So, it's
3 not a van, it's not a truck, but they combine that category as a
4 multipurpose, that is the term.

5 Q So, there is even a wider range in the amount of
6 requirements and the crash worthiness based upon the fact that there
7 are several types of vehicles that are being tested for that study;
8 correct?

9 A. Possibly.

10 Q. Okay. You didn't take part in that study?

11 A. No.

12 Q. In fact, out of your several pages of footnotes here,
13 your 53 citations, did you author any of these?

14 A Not in those articles, no.

15 Q Did you not take part in any of the studies or research or
16 any of those 53 things that you've cited?

17 A. Not in those articles.

18 Q. And when you refer to physics, textbooks therein, from
19 Bibliography Reference Number 10 from Halliday-Resnick Fundamentals
20 of Physics 8th Edition, 2008, that's an 8-year-old physics book;
21 correct?

22 A. That's correct.

23 Q They are probably up to the 12th or 13th edition by now?

24 A. I would think so, possibly.

25 Q In fact, most physics books are being updated yearly for

1 college physics courses?

2 A If not yearly, every year, or every other year.

3 Q. So there may be old science in the book; correct?

4 A Well, science is 400 years, since Isaac Newton.

5 Q. When I took physics, they didn't know what a proton

6 was--

7 MR. [REDACTED] objection. He is testifying as a--

8 THE COURT: Mr. [REDACTED], please.

9 Q. Okay. Let's talk about Mr. [REDACTED], if we may. Now, you

10 know he was the driver of the vehicle sitting in the driver's seat;

11 correct?

12 A Yes.

13 Q But you don't know the angle at which his body was turned;

14 correct?

15 A. He didn't testify to that, he said that he was looking

16 forward.

17 Q. He said he was looking forward. But at the time of

18 impact, you don't know whether he might have been looking at the side

19 view mirror which caused his head to tilt?

20 A He was looking straight, that was his testimony, as far as

21 I know.

22 Q. Would you agree with me that when most people drive,

23 they periodically look to the side view mirrors?

24 A. That's possible.

25 Q. And people in cars, is it possible that they are

1 turning their heads to engage in some conversation while generally
2 looking forward?

3 A It is possible.

4 Q You don't know how high up or down his seat was on the
5 Z axis; correct?

6 A Correct.

7 Q And you don't know how close he was to the steering wheel
8 or back from the steering wheel, you don't know how the seat was
9 adjusted in that way; correct?

10 A That is correct.

11 Q And you don't know the tilt of his seat; correct?

12 A Correct.

13 Q Some folks have a seat that goes almost to a 90 degree
14 angle, and other's with a seat that go back to a 45 degree angle, or
15 135 degree angle, depending upon your frame of reference?

16 A I don't know about that.

17 Q And that was never asked of him at his deposition;
18 correct?

19 A That is correct.

20 Q There is also an adjustment latch, for lack of a better
21 word, or an adjustment slot for a seat belt usually around the top of
22 the door of a car?

23 A Yes.

24 Q So, you don't know where that was set to; do you?

25 A I don't know.

1 Q. You don't know how much slack there was in the seat
2 belt; correct?

3 A. That's correct.

4 Q. You don't know if the seat belt was in good working
5 order on the date of the accident; correct?

6 A. I know he was belted, that's the extent of my
7 knowledge.

8 Q. You know that the car came equipped with a seat belt,
9 but you don't know how much slack or how many problems --

10 A. That is correct.

11 MR. [REDACTED]: Objection. It's assuming there
12 were any problems. The question is improper.

13 Q. You never examined the seat belt; did you?

14 A. I did not.

15 Q. Okay. And there was -- now, let's talk about what you
16 did examine. You examined the damage estimates for the vehicle,
17 correct, other than the photographs?

18 A. I did.

19 Q. Now, you were relying on the work of someone else in
20 figuring out what the damage is?

21 A. Again, the damage was --

22 Q. Just yes or no. You were relying on the work of
23 someone else?

24 A. Partially, yes.

25 Q. Now, some of them -- you could have seen thousands of

1 photographs; correct?

2 A. Exactly.

3 Q. And then there could have been damage to the interior
4 of the car that there were no photographs of; correct?

5 A. It would have been irrelevant anyway.

6 Q Well, if there was some crumble on the inside of the car,
7 wouldn't it be relevant?

8 A No. Because the methodology is based on the exterior of
9 the vehicle and what you observe in terms of residual deformation, it
10 has nothing to with the interior.

11 Q. So, if the inside of the truck bends or the manifold or
12 the muffler bends as part of the accident, that's not part of your
13 calculations in terms of delta-V?

14 A. No. Again, we are talking about the body of the car,
15 bumper attached to body, and the damage was observable, so that's
16 what we need to see.

17 Q. You are talking the damage that was absorbed by the
18 vehicle; are we not?

19 A Going back to the methodology that is established based on
20 what you can see on the exterior of the vehicle, it has nothing to do
21 with the interior.

22 Q. I don't know if you are answering my question, or maybe
23 you are not understanding my question. My question is, when you are
24 examining the delta-V, you are looking at the amount of damage to the
25 impacted vehicle?

1 A. That's correct.

2 Q. Where the damage come from -- comes to; correct?

3 A. The damage that comes from the energy being transferred to
4 the exterior of the vehicle, yes.

5 Q. But there can be damage transferred to the interior of the
6 vehicle as well; correct?

7 A. It is possible.

8 Q. So, there is -- have you seen instances, in your vast
9 experience as a biomechanical engineer, where, for example, there is
10 buckling in the truck where the spare tire fits in before an accident
11 but the spare tire doesn't fit in after the accident?

12 MR. [REDACTED]: Objection. Now he is asking him to
13 speculate. I object to this line of inquiry.

14 MR. [REDACTED]: I am asking if he has ever seen it.

15 MR. [REDACTED]: Judge, "ever seen it" is not this
16 case.

17 THE COURT: It assume facts not in evidence. We don't
18 know if there was a spare tire in the car.

19 MR. [REDACTED]: That's my whole point, your Honor. He
20 doesn't know if there is a spare tire, he doesn't if there is
21 interior damage to the fixtures of the car. There are no
22 interior pictures of the buckling in the truck where the spare
23 tire fits.

24 Q. Sir, were there any photographs of the inside of the
25 car showing any damage?

1 A No.

2 Q. Okay. So, if there was any such damage and the person
3 making the estimate missed it, they missed it, it's not based on your
4 examination; correct?

5 A. Again, we didn't do anything with my calculations, if
6 it was or it wasn't, it wouldn't make any difference, that's the
7 point I am trying to make. The point is that it's based on what you
8 can observe outside of the car. As good representative of what
9 damage was sustained by the car, that can be transferred and
10 translated to some damage inside of the car, the trunk, or so forth.

11 Q. If there is damage to -- if there is crumble to the
12 outside of the vehicle, right, that could exist, and you saw that in
13 the photographs; right?

14 A Right.

15 Q From the perspective of which the photographs were taken?

16 A. Right.

17 Q. There can also be crumble inside of the vehicle;
18 correct?

19 A. It is possible.

20 Q And that does not come into your component of delta-V?

21 A. No, sir.

22 Q. But you did rely upon the estimator's costs of the
23 repair of the vehicle based upon what the estimator saw; correct?

24 A. Not the costs, sir.

25 Q. I am sorry?

1 A. Not the costs. The cost of the repair had nothing to
2 do with my analysis. Because if it was \$7,000, this is the number
3 that I have, it has nothing to do with the cost. Cost can differ
4 from one body shop to another body shop.

5 Q. But wasn't that part of your analysis, though, wasn't
6 it marked as a court exhibit what the estimate of the damage was, and
7 how much the labor costs were, and so forth?

8 A There was a question about that. But the reason I
9 included it in my report is because it provided all the trims and
10 bells and whistles of that car, not because of the price of the
11 damage or the estimate. So, I learned other things rather than the
12 amount, the monetary amount of the damage.

13 Q. while you were learning about bells and whistles and
14 the trimmings of the car, wouldn't it be important for you as --

15 A. Yes.

16 Q. -- as those being part of the car, to know if they were
17 damaged; correct?

18 A. Not for the damage. I am trying to find the closest --
19 the right estimated weight for that vehicle. So, the more I know
20 about the equipment, the better I can come up with that estimated
21 number.

22 Q. If certain trims or bells and whistles were knocked off
23 or dented in, that might have to go into your analysis; is that
24 correct?

25 A Again, it has nothing to do with the dents, I am just

1 talking about getting a better understanding of the vehicle that was
2 involved in this accident.

3 Q. So, for the purposes of the primary point of impact,
4 you are interested in the denting and crumpling to the vehicle, but
5 not to the trimming of the vehicle, or the interior of the vehicle;
6 is that what you are telling us?

7 A. Again, the trim has something to do with the weight,
8 which is important, but not the interior, that's correct.

9 Q. Getting back to Mr. [REDACTED] So, you don't know his
10 exact positioning in the vehicle; correct?

11 A. I think you already asked, and I said no.

12 Q. And that could have an effect on how the body is moved
13 upon impact; right?

14 A. That would be relevant, yes.

15 Q. If the body was twisted or turned in any way, that
16 would also add a rotational component to his body movement, which
17 would change your analysis of him going straight back in the seat and
18 then going forward at one-third of the force?

19 MR. [REDACTED]: I am going to object, because not
20 here, or not even at trial, can counsel proffer this
21 speculation, because the plaintiff is on record that he looked
22 straight ahead. So this is counsel's attempt to inject new
23 facts into the case when they were actually precluded me from
24 doing that. I object to this line of questioning.

25 MR. [REDACTED]: Judge, I didn't go into this in the

1 liability part of the trial, we are now in the damages part of
2 the trial.

3 MR. [REDACTED]: The plaintiff testified, under
4 oath, that he looked straight ahead. You can not now say that
5 he was twisted and looked to have a conversation with somebody
6 else in the cabin, that is not evidence preserved. The
7 testimony is that he was looking straight ahead, that means his
8 eyes are straight ahead, his body is straight ahead.

9 THE COURT: I am confused. Your client testified that
10 he started to exit in an exit lane and then changed his mind and
11 was coming back in, so there is a possibility that he would be
12 looking over his shoulder to merge back into traffic.

13 MR. [REDACTED]: Not only was it rejected by the
14 jury, the version of the facts that is controlling here is the
15 plaintiff's version of the facts. My client was not in the
16 vehicle with the plaintiff, and he can't know what he was doing,
17 other than his vehicle moved from side to side. The vehicle
18 moving from one lane to the other, doesn't mean that his body is
19 twisted, that's an assumption. This is the kind of thing where
20 I would not be able to do with an expert, but they are going to
21 try to rewrite the story in this case.

22 THE COURT: Nobody is rewriting anything. Didn't your
23 client testify that the plaintiff was exiting and then came back
24 into the lane?

25 MR. [REDACTED]: What does that have to do with

1 where his head was turned? He never saw where his head was.
2 Changing lanes has nothing to do with -- he was not in the cabin
3 with the plaintiff, he was in another car down the road.

4 MR. [REDACTED]: Might I add --

5 MR. [REDACTED]: And by the time his car came back
6 on the roadway, that's when the impact happened, not as he was
7 changing lanes, he had already come back into the lane in front
8 of him. So when he came back into the lane in front of him, and
9 he was looking straight ahead, that's when the impact happened.
10 So this whole nonsense about doing this this way is just
11 inserting garbage facts, which can't come out because they are
12 not true, even on the defendant's point of view. You change
13 lanes, Judge, you are in the lane, you change lanes, and you are
14 looking ahead, and that's when the impact happens. The impact
15 did not happen in between lanes.

16 THE COURT: No. I don't know how many feet after --
17 if you credit the defendant's version of the facts, the
18 plaintiff started to exit and then changed his mind and moved
19 back into the lane, which is the right lane of moving traffic,
20 on the Van Wyck. So --

21 MR. [REDACTED]: And he was already in that lane,
22 that was the testimony.

23 THE COURT: I don't know.

24 MR. [REDACTED]: Judge, all I can tell you is --

25 THE COURT: I don't know how many feet it was.

1 MR. [REDACTED] So, if we don't know how many feet
2 that was, we are free to speculate, to make up factual
3 scenarios, which can't possibly be used at trial, which can't
4 possibly be used by anybody except the plaintiff's lawyer in
5 this informal setting? I object to this. By your own rules of
6 logic and foundation, this question comes from nowhere and from
7 no one.

8 MR. [REDACTED] The jury found that the plaintiff was
9 negligent, but the plaintiff's negligence was not a substantial
10 factor in causing the injury, if I remember the verdict
11 correctly.

12 THE COURT: I don't remember.

13 MR. [REDACTED]: So that's my recollection. We don't
14 know what the jury opined to. The plaintiff was not
15 specifically asked well enough time-wise when he was looking
16 forward in terms of the impact, he said generally he was looking
17 forward.

18 MR. [REDACTED] That's right, generally he was
19 looking forward. And from that word, we are extrapolating that
20 he looked to the side? I don't understand that.

21 MR. [REDACTED] All drivers look to the side.

22 MR. [REDACTED] All drivers look to the side, all
23 drivers, you know, may scratch their eyes, I don't know what
24 that means. This is not a place to speculate about ninety
25 different fact patterns.

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THE COURT: Didn't we get the verdict?

MR. [REDACTED]: Judge, it was right, the plaintiff was found to be negligent but no proximate cause, I can concur on that.

THE COURT: What month was it?

MR. [REDACTED]: March.

THE COURT: Okay. Continue, Mr. [REDACTED]

MR. [REDACTED]: Thank you, your Honor.

MR. [REDACTED]: You have overruled my objection?

THE COURT: I am going to ask that you change the subject.

MR. [REDACTED]: Okay.

BY MR. [REDACTED]:

Q. You talked about certain population sizes for crash testing; correct?

A. Right.

Q. And you referred to a number of crash testing articles within the bibliography of your report that was submitted as part of the package here; correct?

A. Correct.

Q. Now, were there any studies that solely tested folks in their mid-fifties?

A. I don't believe so.

Q. Okay. Is it fair to say that you don't know how many people are in their 50s were part of any of these tests?

1 A. I'd have to look back.

2 Q. Okay.

3 A. I don't know off the top of my head.

4 Q. In some of these studies, I believe you said, may have had
5 30 or 40 people on them, some of them may have had fewer people;
6 correct?

7 A. That is correct.

8 Q. So, some of these studies used cadavers?

9 A. Different type of studies, but yes.

10 Q. Some of the studies used crash test dummies?

11 A. Yes.

12 Q. And some studies used animals?

13 A. Animals?

14 Q. Animals?

15 A. I don't think I referred to any animals.

16 Q. Were there a number of these studies that used folks in
17 the military such as the Navy or the Armed Forces?

18 A. Yes.

19 Q. And some of these studies involved folks being put on
20 sleds where they were either crashed into a wall or crashed into a
21 solid object?

22 A. That's correct.

23 Q. And part of it was for crash testing and military
24 operations; correct?

25 A. That is correct.

1 Q. And in the crash tests that were done, the subjects had
2 to sign a waiver?

3 A. True.

4 Q. And in the crash test studies that were done, the folks
5 who were aware of the fact that a crash was imminent; correct?

6 A. For most of it, but not for all.

7 Q. Okay. But, the overwhelming majority of these tests,
8 folks knew something was going to be happening; correct?

9 A. Most of them, yes.

10 Q. And we have no evidence anywhere on the record that Mr.
11 Singh knew that he was going to be struck seconds or moments before
12 he was struck?

13 MR. [REDACTED]: Objection. It's irrelevant
14 inquiry, what Mr. Singh knew. And counsel wants to imply to you
15 that knowing whether you are going to get hit by a car, or not
16 knowing, is a difference -- makes a difference in how the
17 injuries may or may not occur. He has proffered no expert
18 testimony or evidence about that, and therefore he really can't
19 ask this.

20 MR. [REDACTED] It's not my job to do that, it's his
21 verdict.

22 MR. [REDACTED] It's your job -- let me make this
23 clear, Judge. This is what I have this whole problem with. The
24 problem is that counsel --

25 THE COURT: All right. All right. Stop fighting.

1 There is no foundation that if you brace yourself, your injuries
2 are different. So, it's an inappropriate question. Move on.

3 Q Sir, can you tell us if you brace yourself, are you most
4 likely to be injured than if you don't brace yourself?

5 A. What type of injury are you talking about? You can't
6 just generally put in the word injury. What injuries, sir?

7 Q. In any type of injury?

8 A. No. You can't say that for any type of injury.

9 Q. You refer to Mr. [REDACTED] -- the load on his body as
10 being the same as picking up a two gallon, or approximately 10-pound
11 milk carton; correct?

12 A Bending forward while standing and grabbing two gallons of
13 milk at the same time, one in each hand, in comparison.

14 Q. Would you agree with me that if someone ages, that is a
15 little more of a difficult task than someone in their twenties?

16 A. Generally. I would agree with that, yes.

17 Q. If somebody has underlying spinal stenosis, that could
18 cause problems?

19 A. That is possible.

20 Q And spinal stenosis is not only caused by degeneration,
21 sometimes it's a congenital problem?

22 A. That's correct.

23 Q Some folks are born with narrow spinal canals; correct?

24 A. That's correct.

25 Q. So, you are making the assumption here that any spinal

1 stenosis he had was based upon the degeneration?

2 A. It's coming from the observation of the radiology
3 reports that they did not see any congenital, but they observed
4 degenerative changes. So, it's not my diagnosis.

5 Q. But they said degenerative changes to the spine, they
6 didn't say degenerative spinal stenosis; correct?

7 A. That's correct.

8 Q. And you never saw Dr. [REDACTED]'s report?

9 A. I don't think so.

10 Q. That was exchanged after your report, that was never sent
11 to you so that you could amend your report; correct?

12 A. That is correct.

13 Q. Now, I know you have been trained as a doctor in Iran?

14 A. Yes.

15 Q. Have you ever heard of the theory of the eggshell
16 patient?

17 MR. [REDACTED] That's a legal doctrine, your
18 Honor, and we've learned that the first week in law school. I
19 ask that counsel not be allowed to ask this either.

20 THE COURT: Sustained. Rephrase.

21 Q. Are there some patients who are more frail than others
22 due to osteoporosis, due to age, due to any number of factors?

23 A. Yes.

24 Q. Someone could fall down on the ground and bounce right
25 back up, playing Rugby; correct?

1 A. Correct.

2 Q. And another person, taking the same fall, can then
3 break a hip; correct?

4 A. That is possible.

5 Q. It depends on their bone structure and any number of other
6 factors; correct?

7 A. Many factors could be involved, yes.

8 Q. Age is one of those factors; correct?

9 A. I agree.

10 Q. Now, your calculations in your conclusions --
11 withdrawn. I believe you said that your calculations and conclusions
12 were co-dependent upon both medicine and biomechanical concepts?

13 A. In general, yes

14 Q. I just want to get back to one thing about the damages
15 report from the estimate from the Pacifica, the summary and estimate.
16 If they miss something in that claim estimate, you aren't able to
17 examine a car and see if their claim was correct; is that a fair
18 comment?

19 A. I wouldn't know. It wouldn't have any affect on my
20 analysis anyway.

21 Q. You said that when you were talking about photogrammetry--
22 am I pronouncing that correctly?

23 A. You are doing a fine job, sir.

24 Q. You said when you teach students about photogrammetry,
25 you use the concept of the meteor hitting the earth to calculate the

1 meteoric velocity?

2 A. It wasn't for photogrammetry, but the general concept
3 of not necessarily being able to see something but making a
4 conclusion based on the physical evidence.

5 Q. You said you use that with students; correct?

6 A. Yes.

7 Q. And there is some margin of error involved in that meteor
8 example; is there not?

9 A. Yes.

10 Q. You don't know if there is aftershock that affected the
11 size of the hole; correct?

12 A. I am not, obviously, a physicist to do that, so I wouldn't
13 know. But I assume there is some error involved.

14 Q. You don't know any of the earth science, or the
15 erosion, or anything that took place in the thousands of years since
16 the meteor hit?

17 A. Correct.

18 Q. So, there is a margin for error when you are making
19 determinations as to velocity from an impact in the example that you
20 used with your student?

21 A. Sure.

22 Q. And I am sure you train your students about the margins
23 of error; correct?

24 A. Absolutely.

25 Q. And some margins of error are acceptable, and some

1 margins of error are less than acceptable?

2 A. I generally agree with that.

3 Q And the more estimates that you put into any given report,
4 or a calculation, or a lab study, or an analysis, the more that's
5 estimated, the greater the chance of the margins for error?

6 A. Generally, I agree.

7 Q. You said in your report, and you said here, I believe,
8 that the cars were traveling the same direction; is that correct?

9 A. Generally, yes.

10 Q Okay. But you did say, in response to my question about
11 angular momentum and one of the Judge's questions, that you
12 considered a 20 degree angle of impact?

13 A That is correct.

14 Q So, that would mean the cars were not traveling precisely
15 in the same direction if there is a 20 degree angle of contact?

16 MR. [REDACTED] I object on the ground of
17 conceptual logic. Traveling in the same direction has nothing
18 to do with what angle you hit. If you are traveling east, and
19 you are hit at an angle, the cars are still traveling east, it
20 has nothing to do with the angles. I think counsel should
21 correct the form of his question. Objection to form.

22 MR. [REDACTED] I will, so that you can understand.

23 Q. So, is a straight line the distance between two points?

24 A Yes.

25 Q If we draw a straight line between you and I, that's the

1 closest distance between two points; correct?

2 A. That's correct.

3 Q. And two things can be traveling in the same direction,
4 between you and I, on that straight line; correct?

5 A. Yes.

6 Q. Or they may be coming at somewhat of an angle from me
7 to you; correct?

8 A. Correct.

9 Q. So, part of your analysis considers a 20 degree angle
10 between the cars traveling in the same general direction but not on
11 the same straight line; correct?

12 A. That is correct.

13 Q. But when I asked you before about if you did as a straight
14 linear momentum problem, and earlier on, you said yes?

15 A. I did say yes.

16 MR. [REDACTED]: Objection. Asked and answered
17 several times.

18 Q. And you indicated that in your opinion the impact was
19 somewhere less than seven miles per hour; correct?

20 A. The change in velocity of the Pacifica was less than
21 seven miles per hour.

22 Q. If I am correct, you refer to that as being 3Gs;
23 correct?

24 A. Correct.

25 Q. That's three times the force of gravity?

1 A That's correct.

2 Q So, if I were to fall to the floor, that would be 1G,
3 correct, because the force of gravity is knocking me down?

4 A. That's correct.

5 Q. So, for me to hit the floor at 3Gs, it would be instead
6 of someone throwing me to the ground at 32 feet per second square,
7 what would the calculation become?

8 A. Close to 100.

9 Q One hundred feet per second square?

10 A. Second square?

11 Q. Isn't it closer to 128? Don't we double it for every
12 G?

13 A. No. What do you mean "double it"?

14 Q. The acceleration of gravity has speed per second square
15 on it; doesn't it?

16 A That's correct, 3 times 32 point two, less than 100.

17 Q. Now we go from 32 to 64 to 128; don't we?

18 A. No, that would be square, not three times. You are
19 asking about 3G. 3G would be 3 times 32 point two feet per second
20 square.

21 Q Okay. If I throw the ball off a building, the first
22 second it goes is 32 feet; correct?

23 A. Correct.

24 Q. The second second, because we have to square the feet
25 per second square, the second second it goes 64 feet; correct?

1 A. That's not correct. It seems like you are confusing
2 the units with the actual number, that change in velocity per times,
3 so feet per second, per second.

4 Q. Feet per second per second?

5 A. Does that make sense?

6 Q. Isn't gravity an acceleration not constant force?

7 A. It is.

8 Q. It is not velocity at 32 feet per second, but 32 feet
9 per second square?

10 A. Exactly, throughout the fall.

11 Q. So, he is doubling every second by the fall; is he not?

12 A. No, that's why you are confused. It's going to be a
13 constant value of 32 point two throughout the free fall.

14 Q. But by your calculations, that would be close to 100 feet
15 per second; correct?

16 A. Yes.

17 Q. And you describe that as being on a rollercoaster?

18 A. Yes.

19 Q. And you describe that as being on bumper cars?

20 A. Possibly.

21 Q. And you describe that as a sudden stop from running?

22 A. That's correct.

23 Q. When you say a sudden stop from running, would that be
24 like a baseball outfielder running into a wall as a sudden stop?

25 A. Not running into a wall, you are jogging on a sidewalk

1 and you hit the red light and you stop suddenly, that jolts to your
2 neck, and brain, and cervical spine is around three or three and a
3 half Gs.

4 Q. So, it's three and three and a half Gs now?

5 A. May be more. I have to look at the articles. But
6 around that, comparison, it's a comparable number.

7 Q. How high would you go? I mean, you've said that
8 before. Could it be four? Could it be five?

9 A. It could be five, yes.

10 Q. The more Gs that one sustains, the greater the
11 whiplash, or the tort, or whatever you want to call it, on the body?

12 MR. [REDACTED]: No. Objection. Objection to form.
13 It's not whatever you want, it has to be something, it can't be
14 whatever.

15 THE COURT: Please. It's not the same thing.

16 Q. Well, five is greater than three in terms of G forces;
17 correct?

18 A. That's correct.

19 Q. And when we talk about bumper cars, have you ever been
20 to an amusement park?

21 A. Yes, I have.

22 Q. In bumper cars, are there usually signs up that folks of a
23 certain age, or folks who have certain physical abnormalities
24 shouldn't ride the bumper cars?

25 MR. [REDACTED]: objection to this line of

1 questioning, it has nothing to do with a Frye hearing. What
2 warnings on bumper cars passenger are given?

3 MR. [REDACTED]: He opened the door.

4 MR. [REDACTED]: I didn't open any door. It has
5 nothing to do with a Frye hearing.

6 THE COURT: Keep yelling. Overruled.

7 MR. [REDACTED]: I am trying to speak as --

8 THE COURT: He compared it in his written report to a
9 bumper car.

10 MR. [REDACTED]: What does a warning, when you go
11 into a bumper car, have to do with a Frye hearing? That's what
12 I am objecting to.

13 THE COURT: Well, when you use a comparison with
14 something that can be dangerous, it needs to be explained.
15 Overruled.

16 Q. Sir, folks with degenerative -- degenerative back
17 conditions, or neck conditions, or osteoporosis, or elderly folks, or
18 folks who are more frail, shouldn't be riding bumper cars; correct?

19 A. I don't know about the waiver. Two days ago, for my
20 daughter's birthday, we were in the amusement park, we drove the
21 bumper cars, and we didn't sign anything.

22 Q. I am not asking you about a waiver, I am asking you
23 about the signs being up near the bumper cars?

24 A. I am sorry?

25 Q. Signs.

1 MR. [REDACTED] signs?

2 A. Signs. It could be signs, I didn't see any.

3 Q. How about rollercoasters, have you ever seen signs at
4 rollercoasters about people with certain conditions shouldn't be
5 riding on the rollercoasters?

6 A. I don't ride the rollercoaster, so I can't say anything

7 Q. You said that the driver of the vehicle would have went
8 back at a certain force, however many Gs it was, somewhere between
9 three and five, based on your prior answer --

10 MR. [REDACTED] No. No. No. Objection. Three to
11 five has to do with the person running to a stop, he said
12 nothing about Gs, about there is more miles per hour when
13 someone is hit in the back. So, stop mixing apples and oranges.

14 THE COURT: Correct. Rephrase.

15 Q. Didn't you say the impact on Mr. [REDACTED] would be similar
16 to someone coming to a sudden stop from running?

17 A. I said there would be comparable.

18 Q. You said someone coming to a sudden stop from running
19 would be somewhere between three and five Gs; correct?

20 A. Possibly.

21 Q. So, Mr. [REDACTED] would have, upon impact, gone backwards
22 into his seat, somewhere between three and five Gs?

23 A. Actually, less than 3G, because we calculate it for
24 him. That range is for all of these activities that I gave you. But
25 for this case, we calculated the Gs based on delta-v, and it's less

1 than 3Gs going back less than 1G moving forward.

2 Q. Is the comparative to bumpers cars and rollercoasters
3 coming to a short stop while running incorrect?

4 A They are still in the range of 3G going back. If your
5 bumper car runs into -- someone runs into you from behind, you
6 experience something around 3G or so.

7 Q. And by the way, you don't know if that was the original
8 seating that was in the car; do you?

9 A. I don't know.

10 Q. You don't know the thickness of the seating, the amount
11 of padding, you don't know anything about that?

12 A. I don't.

13 Q. That would have an impact upon how much his body motion
14 would have been absorbed by the seat back; right?

15 A. Generally, it's about three-thirds of energy,
16 generally, in average. But exactly, for this case, no, I don't.

17 Q. You don't know where the headrest was located; do you?

18 A. No.

19 Q. You don't know if the headrest was attached; do you?

20 A. This car comes with a headrest.

21 Q. You don't know if the headrest was on the seat?

22 A. I don't think you can remove the headrest from the
23 driver or the front passenger seat.

24 Q. Didn't you read the biomechanical article a week ago
25 how you can remove a headrest and break the window if the car

1 submerged?

2 MR. [REDACTED]: Judge, really, really. A submerged

3 vehicle, that came out a week ago --

4 THE COURT: Sustained.

5 Q. Did you subscribe to the Journal of Biomechanics, sir?

6 A. Yes, I have.

7 Q. Yes or no. Did you see that article there?

8 A. No.

9 MR. [REDACTED] objection. It came out a week ago.

10 Really.

11 MR. [REDACTED] Actually, two weeks ago.

12 MR. [REDACTED]: I am sorry, two weeks ago. My

13 mistake.

14 THE COURT: Sustained.

15 Q. And I might have covered this, but you considered 20
16 percent of a rotational component in terms of your calculations?

17 A. Yes.

18 Q. I think that was your tangent calculations in terms of
19 the mathematical formulation that you used?

20 A. That's correct.

21 Q. That's not your own mathematical formula, that was
22 something drawn up by physicists?

23 A. Yes. Its been in the textbooks I just used.

24 Q. The older edition of textbooks; correct?

25 MR. [REDACTED]: Note my objection, Judge. Physics

1 doesn't change. I don't know where this whole line of thought
2 is coming from. Physics hasn't changed since Isaac Newton
3 demonstrated in his laws of motion. Really, this is beyond me.

4 Q Has physics changed over the years, sir? Has it changed
5 over the years?

6 A Newtonian Physics, Laws of Physics, those principles don't
7 change, no, not really, in the last 400 years.

8 Q. So, one science is relevant; right?

9 A. But that is not -- that wasn't Newton.

10 THE COURT: Now you are being argumentative.

11 Q. So, what do you do, you plug these things into a
12 computer, or you do it by pen? I am not being sarcastic. Is there a
13 computer program that you use to plug numbers into, or do you do it
14 by pad and pen, or by hand calculator, how do you come up with these
15 calculations?

16 A. I put them in Excel sheet, Microsoft Excel.

17 Q. And then, when you put it on the Excel sheet, does that
18 go into a program that's in your computer to come up -- to give you
19 the data?

20 A. Not the program, the program is Excel, I already put
21 the formula that's coming from the textbook. So when you plug the
22 number, the length, the angle, the depth, then it re-calculates based
23 on the formula that is there.

24 Q It's based upon the variables that you plug in, some of
25 which are exact and some of which are estimates?

1 A. That's correct.

2 Q. You testified that no air bags deployed in the bullet
3 vehicle, which is the striking vehicle; correct?

4 A. That is correct.

5 Q Now, we don't know, because we don't have no information
6 about the bullet vehicle, whether or not the air bag sensors were
7 working on that vehicle; correct?

8 A. Well, it was a vehicle on the road, so it would be
9 reasonable to assume that it's in working condition, and it passed
10 inspection; so I had no reason to believe otherwise, basically.

11 Q You don't know if that vehicle was inspected a month ago,
12 a day ago, or three years ago, correct, before the accident?

13 A Usually inspections are annual. But either way, I don't
14 know. That's correct.

15 Q. Actually, they are not annual anymore. But you don't
16 know when it was inspected; fair enough?

17 A. That is correct.

18 Q. You don't know if the inspection was overdue?

19 A. I don't know.

20 Q. And if the side of the vehicle, as oppose to the front
21 of the vehicle, comes into contact with the struck vehicle, it may
22 not trigger the air bag sensors; correct?

23 A. Well, if there is frontal or longitude in our
24 components -- anyway, even if it's a side impact, if there is
25 longitude in our component, that can trigger the air bag to deploy.

1 Q It can, but it doesn't have to; correct?

2 A Correct. But this one was a front for sure.

3 Q Well, that's based on your not seeing any photographs,
4 that's based upon the description of the accident that you had?

5 A It's based on the testimony of the two drivers that were
6 involved in the incident.

7 Q But not the trial testimony, which said one vehicle was
8 swerving from side to side?

9 A At the --

10 MR. [REDACTED] I object. Again, we are recasting
11 the testimony, it was not side to side.

12 THE COURT: I don't think that was what was said.

13 MR. [REDACTED] That was absolutely not what was
14 said. But it was a nice try by counsel.

15 THE COURT: Okay.

16 MR. [REDACTED] Can we just stop with the nonsense and
17 the comments.

18 THE COURT: You live in Pennsylvania?

19 THE WITNESS: Yes, your Honor.

20 THE COURT: So, you've just testified that the New
21 York State City vehicle inspection is required to inspect the
22 air bag, what is the basis for that conclusion?

23 THE WITNESS: Not -- no, your Honor, I didn't say
24 that. Inspections are either annual or every other year. They
25 go through all of their equipments in the car, air bags are

1 included.

2 THE COURT: Do you know if they do that in New York?

3 THE WITNESS: Not for sure, no.

4 THE COURT: You are just assuming?

5 THE WITNESS: Based on what we have in Pennsylvania,
6 that's correct.

7 MR. [REDACTED] Let the record reflect that every
8 inspection in New York State, I know this for a fact, has to
9 inspect the sensors of the thing. So -- that was counsel's
10 question. Sensors are mandated to be inspected. In New York,
11 in 2011, when this accident happened, it had to be annually.
12 Because my client's vehicle was a commercial vehicle, it must be
13 done annually, not every five years. So, we know about the
14 sensors, and we know when the inspections occur.

15 MR. [REDACTED] Now who is testifying.

16 THE COURT: well, that's very unhelpful, because you
17 are an attorney.

18 MR. [REDACTED] But that's the law. I know the
19 law.

20 THE COURT: Is it possible for a vehicle to have
21 working air bag sensors if there is no air bag in the vehicle?

22 THE WITNESS: No. Because they have to sense
23 something. So, they are going hand-in-hand, basically, you have
24 to have the air bag, and then you have to have sensors that work
25 and trigger the air bag deployment.

1 THE COURT: So, the sensors are sending the existence
2 of the air bags? I thought they were sensing the impact on the
3 car.

4 THE WITNESS: That's correct. You are correct, your
5 Honor. They sense the impact and the impulse, which is the
6 deceleration of the vehicle, and if it's followed by a hit, if
7 it's triggered, the sensors, then it's going to cause
8 deployment. But they have to be connected to the air bags to
9 cause the deployment. I don't know if I've answered your
10 question.

11 THE COURT: If somebody removed the air bags after an
12 accident, the sensor would not work?

13 THE WITNESS: Well, they may work, send a signal, but
14 if they are not connected to the air bag, there won't be any air
15 bag deployment.

16 THE COURT: That's not what I asked you. Would a car
17 whose air bags were removed still be able to pass inspection
18 with working sensors?

19 THE WITNESS: No.

20 THE COURT: Because the sensors would not pass the
21 test?

22 THE WITNESS: That's correct.

23 THE COURT: Okay.

24 MR. [REDACTED]: May I, your Honor?

25 THE COURT: Yes.

1 BY MR. [REDACTED]

2 Q. I thought a couple of questions ago you said that
3 sensors may work even though there were no air bags in the car?

4 MR. [REDACTED] He never said that. That is
5 absolutely ridiculous. He said at the point of the impact, it
6 may or may not trigger the sensor. He never said that.

7 THE COURT: Would you let your witness take care of
8 himself? That's not what he said, Mr. [REDACTED]

9 MR. [REDACTED]: Okay. My mistake.

10 Q. Now, you are not licensed to practice medicine in the
11 United States; correct?

12 A. Correct.

13 Q. And back in [REDACTED] where you completed medical school,
14 you were not an orthopedist?

15 A. No, I was not.

16 Q. You were not a radiologist?

17 A. Correct.

18 Q. You were not a neurologist?

19 A. No.

20 Q. You did not work in an acute trauma center?

21 A. True.

22 Q. You never gave an epidural injection?

23 A. That's correct.

24 Q. You never gave cortisone and steroid injection?

25 MR. [REDACTED] Note my objection. Cortisone and

1 steroid injections have no place in this Frye hearing. None of
2 this has anything to do with a Frye hearing.

3 THE COURT: Did you practice medicine after you
4 finished medical school?

5 THE WITNESS: Yes.

6 THE COURT: You got licensed in [REDACTED]

7 THE WITNESS: Yes.

8 THE COURT: How many years did you practice medicine
9 before you came to the United States?

10 THE WITNESS: Five years, your Honor.

11 THE COURT: Okay. Continue.

12 Q. You worked in a general practice facility; correct?

13 A. Correct.

14 Q. And you dealt with common colds, and simple -- people
15 coming to the doctor's office for --

16 A. For anything that they needed, if they needed help,
17 yes.

18 Q. And if they needed orthopedic or neurological or
19 radiological help, you would send them elsewhere to a specialist?

20 A. I would refer, exactly.

21 Q. Okay. So, if someone came to you and you suspected
22 that he had lumbar, or cervical, or orthopedic, or neurological
23 pathology, you would forward them to a specialist; correct?

24 A. Yes, sir.

25 Q. You are not a member of the American Medical

1 Association; correct?

2 A Correct.

3 Q. You never took any courses to become licensed in the
4 United States; correct?

5 A. I did not.

6 Q. In fact, the United States did -- up until a couple of
7 weeks ago, did not recognize, due to economic sanctions --

8 MR. [REDACTED]: Let's get into what the Secretary
9 of State did for the last eight years, by all means, that will
10 decide this motion.

11 MR. [REDACTED] I am getting somewhere, your Honor. If
12 we are done with the lectures.

13 THE COURT: I am going to overrule the objection.
14 Because Mr. [REDACTED] is going to prove that he could have been a
15 doctor if it weren't for government policy.

16 Q. Well, my point is that there is now a government policy
17 where you can become a doctor; correct?

18 A. That's not correct. Many of my colleagues from [REDACTED]
19 took that test 20 years ago, or 15 years ago, and they are practicing
20 medicine right now. I didn't take the test.

21 Q. You have chosen not to take the test; correct?

22 A. Correct.

23 Q. And you have been in this country for how long?

24 A. Seventeen years now.

25 Q. So, when you came here, you could have taken the test

1 and done your residency and internship, and pass your medical boards
2 here; is that correct?

3 A Yes.

4 Q. You chose not to do that, and you chose to change
5 careers; right?

6 A. Yes.

7 Q. And are you familiar with the fact that in this
8 country, you are not suppose to give medical opinions if you are not
9 a licensed medical professional?

10 MR. [REDACTED] objection. Judge, we are at a Frye
11 hearing, not a medical board in Albany.

12 THE COURT: Overruled.

13 A. I can't treat patients, but actually I give medical
14 opinions, almost on a daily basis, to my other colleague that work as
15 a team in the V.A. hospital in [REDACTED]. So I am part of the
16 treating team, but I am not a treating physician.

17 Q. Are you allowed to write prescriptions?

18 A. No. That's what I am saying, I am not treating anyone.
19 You asked about medical opinion, those are different.

20 Q. You are not suppose to give medical opinions; correct?

21 MR. [REDACTED] objection. That's counsel's
22 opinion, and I object to it.

23 THE COURT: Rephrase.

24 Q. Are you telling this Court that you give medical
25 opinions in [REDACTED] without the status of patients?

1 A. Yes.

2 Q. Without being a licensed doctor to practice in the
3 United States?

4 A. Yes. Again, I am not treating any patients. But I am
5 capable of giving a medical opinion, and I have. And my medical
6 credentials have been accepted by the U.S. Government.

7 Q. What branch of the U.S. Government has accepted your
8 credentials?

9 A. The National Institute of Health awarded me not once but
10 twice with a fellowship and a scholarship to perform medical research
11 in this country, which I have, partially for my Master's degree in
12 Science, and partially for my Ph.D., based on my M.D.. Back then, I
13 did not have the Ph.D, so post Doctor of Fellowship was based on my
14 medical degree, which was accepted, and my credentials were accepted
15 by the U.S. Government and the V.A. Administration.

16 Q. You are telling us that the U.S. Government -- you are
17 not telling us the U.S. Government allows you to treat patients;
18 correct?

19 A. That's correct.

20 THE COURT: No, Mr. [REDACTED], he said he did research.
21 Are we almost done here?

22 MR. [REDACTED] I am close to being done here, your
23 Honor. Let me just check through my notes.

24 (There was a brief pause in the proceedings.)

25 Q. And you were never shown Dr. [REDACTED]'s report, on behalf

1 of the plaintiff's attorneys, who indicated that Mr. [REDACTED]'s injuries
2 were caused by this accident; were you?

3 MR. [REDACTED] objection. It has nothing to do
4 with a Frye hearing, once again. It has nothing to do with this
5 hearing or the criteria by which your Honor admits or doesn't
6 admit this doctor's testimony.

7 MR. [REDACTED] He brought up the documents for the
8 doctor's review.

9 MR. [REDACTED]: You are not permitted to ask him
10 about these documents for a Frye hearing, that's my point
11 That's a good question for the jury, it's not a good question
12 for your Honor.

13 MR. [REDACTED] It's a yes or no question, your Honor.

14 THE COURT: Overruled.

15 A. No, I have not

16 MR. [REDACTED] I have no further questions.

17 THE COURT: Redirect?

18 MR. [REDACTED]: Your Honor, I would like to refer
19 you to Exhibit K on the plaintiff's deposition, on the
20 plaintiff's papers. K as in Kansas.

21 THE COURT: One second.

22 MR. [REDACTED] officer, can you give this to the
23 Judge to mark it as the next exhibit.

24 THE COURT: I don't have the repair estimate, I have
25 never seen it.

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MR. [REDACTED]: We've marked it. It's in evidence.

THE COURT: I gave it to the witness to talk about and I never got it back.

MR. [REDACTED]: Give it to the Judge. Anything that we've marked, give it back to the Judge.

THE WITNESS: Absolutely.

MR. [REDACTED]: Give the whole thing back.

THE COURT: This isn't the one I've marked.

THE WITNESS: Maybe the pages are replaced, your Honor. But this is the same document.

THE COURT: I wrote court exhibit at the top -- there we go. This is seven. This is K in plaintiff's motion?

MR. [REDACTED]: That's correct.

THE COURT: Do you want me to show it to the witness?

MR. [REDACTED]: Please.

THE WITNESS: Thank you.

RE-DIRECT EXAMINATION

BY MR. [REDACTED]:

Q Dr. [REDACTED], when was this article written?

A. 1994.

Q. Okay. The date on the top, look at this date here.

A. Actually, received by 1992.

Q. If I do the math, between 1992 and today, is how many years?

A. I would say about 24 years.

1 Q. In 24 years, has computer sciences advanced?

2 A. Absolutely.

3 Q. Now, I want to show you the computer that's listed in
4 this article; do you see that?

5 A. Yes.

6 Q. If I was to go out, Dr. [REDACTED] and try to buy such a
7 computer, I would have to go to the Smithsonian and look for it;
8 wouldn't I?

9 MR. [REDACTED] Objection.

10 THE COURT: That's a little sarcastic.

11 MR. [REDACTED]: But true.

12 MR. [REDACTED] objection.

13 Q. Now, in this case, we've already established that you
14 didn't use a \$15,000 camera, but did you use the photogrammetry
15 process in your office with the pictures that you got?

16 A. Absolutely. Otherwise, I wouldn't have those numbers.

17 Q. Okay. And describe how you do it, do you insert it in
18 the machine, how do you do it?

19 A. Well, we have the photographs, we upload them into the
20 computer, and then we have photographs of the intact vehicle, the
21 same year, make and model, we compared them, we draw lines, and there
22 is some process in between, involved, the estimates, we figure that
23 the computer takes care of itself by calculating the angles, the
24 length, and the depth, and usually increase it by up to 20 percent,
25 just to make sure that you are talking about mistakes, the margin of

1 error, or inclusiveness, to include more to make sure that I am not
2 missing anything.

3 Q okay. The two point five, is that inches?

4 A. Yes.

5 Q. okay. And is that the end result of your using the
6 photogrammetry process?

7 A. Yes.

8 Q. Now, the photogrammetry program in your computer, is
9 that something you developed or is that something that's accepted
10 generally in the scientific investigation by the biomechanical
11 community?

12 A. Generally accepted in the field.

13 Q. I would like to talk to you about the fact that it was
14 brought up that Reference Number 9 was drafted before Chrysler
15 Pacifica went to production.

16 A. Yes.

17 Q. Remember that line?

18 A. Yes.

19 Q. Now, the crash stiffness requirements, are they set by
20 the Federal Government?

21 A. Yes, they are.

22 Q. were they set at the time that that article was
23 written, Number 9?

24 A. Actually, it was set way before that.

25 Q. Had it changed by the time the Chrysler Pacifica came

1 into being?

2 A No, because further regulations are still effect.

3 Q. Is that why the Chrysler Pacifica was never tested
4 among other reasons?

5 A. Among other reasons, yes, because they were tested, it
6 wasn't needed to be tested.

7 Q. And, the crash test stiffness of criterion, an the
8 article which you denominate Number 9 in your bibliography, would
9 those have been the same criterion applicable to the Chrysler
10 Pacifica in this case?

11 A. Absolutely.

12 Q. And was the Chrysler Pacifica, was that denominated a
13 crossover?

14 A. Yes.

15 Q. Just to be specific. As you have testified before,
16 it's a crossover because it does have room for a lot of people,
17 there's a bumper, basically it's the same height within margin of the
18 passenger cars?

19 A. Yes.

20 Q. As part of the treatment of patients, as a medical
21 doctor in Iran, would you see patients who suffered from trauma?

22 A. I have seen, yes.

23 Q. And I know this may seem like a silly question, Doctor,
24 but for the record, can we just have you opine, does human physiology
25 change between [REDACTED] and the United States?

1 A. It doesn't. It's universal.

2 Q. And you were asked about Dr. [REDACTED]'s report. I want
3 you to assume that Dr. [REDACTED] is not and has never been a
4 biomechanical engineer. Did you use any of the reports that you've
5 got to make your calculations?

6 A. No. None of those medical records have anything to do
7 with my calculations.

8 Q. And let's talk linear versus angular.

9 A. Yes.

10 Q. That subject was brought up. Now, we talk about the
11 160, is that a consideration of an angular approach?

12 A. The linear momentum is the name of the methodology.
13 And linear doesn't necessarily mean --

14 Q. I meant to say angular. Is it in recognition of an
15 angular approach to two vehicles that are in contact?

16 A. It brings into account that they were in an angle, yes,
17 but not necessarily angular calculations.

18 Q. But, putting that into your calculations, if it were
19 not an angular consideration, what would the 160 be?

20 A. One-hundred-eighty degrees, that would be head-on,
21 completely matched.

22 Q. And is the angular calculation that you did based upon
23 some of the physical evidence that you saw, the point of impact?

24 A. That's correct

25 Q. Now, although the Chrysler Pacifica was -- did come out

1 about 1999, 2000, the Chrysler Corporation had manufactured the Dodge
2 Caravan prior to that; hadn't they?

3 A. That's correct.

4 Q. And many of the features of the Dodge Caravan, are they
5 similar to the Pacifica in terms of the number of people that they
6 can hold and the height above the ground?

7 A. Yes, sir.

8 Q. And is the Dodge Caravan, also manufactured by the
9 Chrysler Corporation, part of the overall crossover, or analysis, in
10 that 1994 article of the number of vehicles that were looked at?

11 A. They were included, yes.

12 Q. Now, counsel gave you a number of examples, for lack of
13 a better word, used his own -- he said throwing himself to the floor.
14 Do you remember those questions?

15 A. Yes, sir.

16 Q. Well, throwing one self to the floor, was that the same
17 thing or is that different than being protected by an automobile
18 that's a number of tons?

19 A. That's a hard comparison, actually. It's different.

20 Q. My question is this, we do know that you've seen the
21 evidence in the record that Mr. [REDACTED] fell out of the car?

22 A. That's correct.

23 Q. Did you ever see any evidence that he fell out of the
24 car?

25 A. No. There is nothing.

1 Q. Did you see any evidence that he was belted?

2 A. Yes.

3 Q. Okay. And let's talk about this one hundred feet per
4 second. Tell us how should we, as a lay person, how shall we look at
5 that?

6 A. At the concept of G?

7 Q. Yes?

8 A. Well, the number one hundred feet per second, when you
9 compare Gs, it's -- first of all, it's accepted as a nice measure
10 indicator of the acceleration and force. And second, you have to
11 compare it to activities that are associated with that number.
12 That's why I brought those silly examples of the bumper cars or
13 rollercoasters, that you would experience up to three, four, five Gs,
14 maybe for some of them seven Gs, but I have to take a look. But the
15 fact remains for this car, that because the car experienced 3Gs, it
16 doesn't necessarily mean that it was exactly the acceleration of the
17 person. Because, when you are seated and you are surrounded by the
18 occupants' compartment, the friction between your body and the seat,
19 the seat belt, the headrest, and the seat back, they all have an
20 affect to minimize your motion. So, 3G would be like the maximum
21 number of acceleration of forces for the vehicle in general. As it
22 goes for the occupants inside, it would basically vanish and decrease
23 because of those factors that are involved, friction and seat belt
24 being the most important ones. Again, the number one hundred may
25 sound big, but the fact remains that 3G, again, is just something

1 that you are running and you are stopping at the red light. So, that
2 acceleration of your head and crane and neck would experience around
3 three, three and a half Gs easy.

4 Q. When the average person ascends a staircase, are they
5 subject to the G forces?

6 A. Absolutely.

7 Q. The G forces get stronger as you walk further heights?

8 A. Well, no, these are two different concepts. We are
9 talking about energy and we are talking about the acceleration.
10 Acceleration of the gravity is going to be 32 point two almost every
11 where on earth. Even if you are on top of the Empire State Building,
12 it's the same gravity. But coming down from a higher height, then it
13 is going to be associated with transfer to more energy. By the time
14 you hit the ground, it's a different concept.

15 Q. By the way, on the Bill of Particulars talks about
16 depression, anxiety, fear, and emotional of second shock, you have no
17 opinions about that?

18 A. Absolutely not.

19 Q. Because the calculations you are talking about can't
20 measure depression, correct?

21 A. That's correct. Calculation is about external force to
22 the physical parts of the human body, I can't talk about anxiety or
23 depression.

24 Q. I want to make sure we are clear about the 1992
25 photogrammetry article the plaintiff attached that was 24-years-old;

1 the type of technology that was available then, is that the same or
2 is it different today?

3 A. It is different. Actually, there are other equipments
4 that have been added to the system, obviously I mentioned about the
5 computer and advancement of technology. Actually, there is a better
6 version of that article in the chapter of one of my references,
7 textbooks, there is a whole chapter about photogrammetry and how we
8 can use it, and many people use it. So, the technique is still the
9 same. The concept is that when you have the technique and you know
10 how to use it, you can calculate and take measurements out of the
11 photo, that is the concept. And obviously, for the more complex
12 cases, more complex and complicated equipment is required.
13 otherwise, you can do it with this system.

14 Q. Now, did you prepare your report in a particular year?

15 A. This report?

16 Q Yes.

17 A. It was in 2014.

18 Q In 2014, did you have to use a \$15,000 camera like you did
19 in 1992, or were computer programs available where you can stick a
20 photograph in and have it ready?

21 A I didn't have to use that \$15,000 camera.

22 Q. Why is that?

23 A. First of all, it wasn't a complex case.

24 Q. Technologically-wise, tell me why not?

25 A. Technologically, it wasn't required. Because I had the

1 right photographs to upload into my computer and feed the system, and
2 that's what I did.

3 Q. The method you are using, the photogrammetry, is that
4 an accepted method in the biomechanical community or is that your
5 personal opinion?

6 A. No. It is absolutely accepted in the field of
7 biomechanics, and even in others.

8 Q. Counsel mentioned something about there was an article
9 in 2008, and he said its been eight years since then, one of the
10 articles that you refer to.

11 A. Okay.

12 Q. But the 2008 article, relative to the 2011 accident,
13 was only three years; correct?

14 A. I think we were talking about the textbook.

15 Q. That's correct, the textbook?

16 A. That's the textbook, it's published in 2000.

17 Q. So, the textbook, the physics book, might have gone
18 through one or more --

19 A. Editions.

20 Q. -- editions between 2008 and 2016. The time-period we
21 are talking about is 2008 to 2011; correct?

22 A. Correct.

23 Q. And between 2008 -- have they revised Newton's First
24 Law?

25 A. Absolutely not.

1 Q. And between 2008 and today, have they revised Newton's
2 Third Law?

3 A. No.

4 Q. And between 2008 and today, have they revised any of
5 the physics principles that you have been relying upon to make your
6 calculations?

7 A. Absolutely not.

8 Q. One final area. Dr. Toosi, the point of the asteroid
9 example that you give to your students is that the asteroid is
10 destroyed and can never be exempt, is that one of your points?

11 A. Absolutely. I mentioned it, yes.

12 Q. And, even though an asteroid, or the bullet, as we call
13 it, is destroyed, can we tell the depth and the speed based upon the
14 hole left in the earth?

15 A. Yes. That's the point.

16 Q. And comparing to here, based upon the accepted method of
17 the biomechanical community, although you have never seen the
18 vehicle, do you actually know what the vehicle was?

19 A. Yes.

20 Q. And is the VIN number of the bullet, my client's
21 vehicle, in the police accident report?

22 A. That is correct.

23 Q. From that, were you able to obtain certain information?

24 A. Yes.

25 Q. Although there may be variances up or down, are the

1 conclusions that you have given to a reasonable degree of scientific
2 certainty?

3 A Absolutely.

4 MR. [REDACTED]: Final question.

5 Q. Does the biomechanical scientific community require
6 opinions to be to a reasonable degree of scientific certainty, or do
7 they require all opinions to be 110 percent correct?

8 A. Well, in the science community --

9 MR. [REDACTED] There is no such thing as 110 percent.

10 Q. One hundred percent?

11 A One hundred percent would be, in science, practically
12 impossible. So, it has to be in the range that is reasonable and
13 accepted by the rest of the community. So, yes, to a reasonable
14 degree of scientific certainty. So, 100 percent is out of reach,
15 unfortunately.

16 MR. [REDACTED] Thank you.

17 MR. [REDACTED] A few follow-ups, your honor, based on
18 what was covered.

19 THE COURT: Go ahead.

20 RE-CROSS-EXAMINATION

21 BY MR. [REDACTED]

22 Q. Sir, the more recent article on photogrammetry that you
23 said is referred to in your references, which reference number is
24 that?

25 A. There are two of them. They are not articles, sir,

1 they are textbooks of accident reconstruction, and they are numbered
2 five and six. Vehicle Accident Analysis and Reconstruction Methods,
3 that's the second edition, and it's published in 2011.

4 Q. Okay. You don't have any of either those with you here
5 today; do you?

6 A. Unfortunately, I don't. The reason I didn't bring them
7 with me is because the references are, and the textbooks, they are
8 big and heavy. I am sorry.

9 Q. Understood. With photogrammetry, there are certain
10 margins of error, correct, when using any sort of camera?

11 A. Yes.

12 Q. Even today?

13 MR. [REDACTED] Just note my objection. "Any sort
14 of camera." No camera was used here. Where are we going with
15 this line of questioning? No camera was used.

16 Q. Sir, did you look at the photographs?

17 A. I did not.

18 Q. Did somebody draw pictures or did you use photographs
19 taken by a camera?

20 A. Taken by a camera.

21 Q. You looked at six photographs; correct?

22 A. That's correct.

23 Q. Okay. You don't know what the distance away from the
24 object was; do you?

25 A. That's correct, I do not.

1 Q. You don't know what the focal was; do you?

2 A. No, I don't.

3 Q. You don't know what the speed of the film was; correct?

4 A. That's correct.

5 Q. You don't know whether or not focusing on one portion
6 the car might have blurred another portion of the car, which is part
7 of the focal point determination; correct?

8 A. They seem clear to me, they are not blurry.

9 Q. Nor the lighting condition under which they were taken;
10 correct?

11 A. That's correct.

12 Q. You are telling us that in almost the exact replica of
13 the Pacifica was the Dodge Caravan?

14 A. No. No. No. I never said that. Counsel was asking
15 me that --

16 MR. BALSON-COHEN: I never said that either, just so
17 we are clear for the record. I just have to object to -- it's
18 one thing to give his own opinion, but then to be Steven
19 Balson-Cohen, I never said that.

20 THE COURT: My notes indicate that the witness
21 testified that vehicle at issue is similar to a Dodge Caravan.

22 MR. [REDACTED]: Similar. But he didn't --

23 MR. [REDACTED]: I will rephrase the question, your
24 Honor.

25 Q. Sir, the vehicle in question, the Pacifica, which was

1 involved in the accident, was similar to a Dodge Caravan; correct?

2 A. Yes.

3 Q. They are both Chrysler vehicles?

4 A. They are both made by the same manufacturer, yes.

5 Q. And different branches of Chrysler use the same prototype
6 for vehicles but they hold different names, they may be Dodge, or
7 Plymouth, or whatever the case may be?

8 A. Right. Chrysler has Town and Country, which is a
9 version of the Dodge Caravan.

10 Q. Instead of looking at the Dodge Caravan to make the
11 calculations in this case, you looked at the generic study, footnote
12 Number 9, that shows an overarching range of vehicles, crossovers as
13 well as SUVs; correct?

14 A. Correct.

15 Q. As oppose to comparing to the closest car possible to
16 the one involved in the subject accident?

17 A. That's correct.

18 Q. A follow-up with one question about seat belts, and I
19 just want to ask you. Seat belts protect you from forward motion;
20 correct?

21 A. That's correct.

22 Q. Seat belts do not stop sideways motions; correct?

23 A. That is correct.

24 Q. Sideways accidents are unprotected by seat belts; is that
25 correct?

1 A. I agree, in general.

2 Q So, for the rotational component of an impact, a seat belt
3 doesn't help with the sideways; correct?

4 A. The motion you are indicating is side by side, it's not
5 rotational. Some rotation can be stopped by the shoulder harness.

6 Q. There are vector analysis involved, there is a forward
7 vector, and there is a sideways vector; correct?

8 A. Correct.

9 Q. You don't know what -- you estimated 20 degrees angle,
10 but you don't know how the plaintiff was turned or how the car was
11 angled?

12 MR. [REDACTED] objection. We went over this
13 ninety times, and I didn't go into this on my redirect.

14 THE COURT: Sustained.

15 MR. [REDACTED] I am done.

16 MR. [REDACTED] One last question.

17 RE-DIRECT EXAMINATION

18 BY MR. [REDACTED]

19 Q. I think you said this before, but I think some of us
20 here need to hear it again. The Number 9 --

21 A. Yes.

22 Q. -- that article --

23 A. Yes.

24 Q. -- does that include the Dodge Caravan study?

25 MR. [REDACTED] objection.

1 Q You said it before. What's the answer?

2 A. It is included --

3 MR. [REDACTED] Objection.

4 THE COURT: I didn't rule on the objection, and the
5 reason, and the answer, and everything was said at the same
6 time, so we are not going to have a record. So, I don't
7 understand. What is the basis of your objection?

8 MR. [REDACTED] This has been gone over four times. And
9 the comment that some of us who don't understand --

10 MR. [REDACTED] I will rephrase.

11 THE COURT: We are comparing the car in question to
12 the Dodge Caravan, even though you have just testified that it's
13 really the Town and Country that you should have compared it to?

14 MR. [REDACTED] He never said that.

15 THE WITNESS: I did not say that, your Honor.

16 THE COURT: I don't understand.

17 MR. [REDACTED] He said the Town and Country was
18 the Chrysler version of the Caravan. He didn't say that was the
19 closest one.

20 Q Just so we are clear, Doctor, Number 9 in your
21 bibliography, did that study include the Dodge Caravan?

22 A. I believe so, yes. The answer is yes.

23 Q You believe so or you know so?

24 A. I would have to definitively check the list. But that
25 is including the most common one, the Dodge Caravan being the most

1 recent.

2 Q. So, when you say you believe so, you are guessing?

3 A. No, that's my testimony, it is included.

4 MR. [REDACTED]: I would like to make a final couple
5 of points on the record.

6 THE COURT: Are we finished with the witness?

7 MR. [REDACTED]: We are.

8 THE COURT: You may go, sir.

9 THE WITNESS: Thank you, your Honor.

10 MR. [REDACTED]: Doctor, I will speak to you
11 outside.

12 THE WITNESS: All right.

13 THE COURT: We are not going to get a copy of Number
14 9?

15 MR. [REDACTED]: Hold on.

16 (There was a brief pause in the proceedings.)

17 MR. [REDACTED]: I have Page 5 of Class 1 referring
18 to the Dodge Caravan.

19 THE COURT: Can we mark it?

20 MR. [REDACTED]: Do you have any objections to
21 giving it to the Judge?

22 MR. [REDACTED]: No. Can I get a copy of it? Because it
23 wasn't included in this packet. If I can get a copy of it, that
24 will be good.

25 MR. [REDACTED]: I only have one copy.

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THE COURT: All right. We'll make copies.

MR. [REDACTED] Do you want to mark it, Judge?

THE COURT: Sure. Eight.

MR. [REDACTED] I will E-mail it to you. Tell him to send me one, and you will have it within 24 hours, counsel.

Page 5 has the reference to the Dodge Caravan, for the record.

THE COURT: Mr. [REDACTED] you could also look it up on the S.A.E. website.

MR. [REDACTED] Judge, they charge you \$35 per article.

MR. [REDACTED] I will provide it for free, Judge.

THE COURT: Okay. Okay.

MR. [REDACTED] You use to be able to look all of those things up.

THE COURT: Write a letter to Lexus. I don't know what to say.

MR. [REDACTED] Final thoughts, your Honor. Let me back into it in an interesting way. I've recently cross-examined the plaintiff's orthopedic expert; as a matter of fact, last week I cross-examined one in front of Judge Billings, it was a biomech case. An orthopedic surgeon said he didn't know the mechanism of the injury, didn't read the plaintiff's deposition. And I pointed out to the jury that although he didn't know how the accident happened, or whether the shoulder hit the side, because in that case it was a shoulder injury, he

1 was able to testify and give his opinion that the accident was a
2 causal connection even though the information showed otherwise.
3 This is what we have in all of these biomech cases. Counsel is
4 saying he doesn't know enough, or it's too much of a guess, or
5 any number of one hundred different things; to use some of the
6 words he used, it's not exact. So, in terms of the
7 biomechanical, they are scientists like medical doctors. In
8 this case, whatever doctor is called by the plaintiff, I
9 guarantee you that their opinions will be to a reasonable degree
10 of medical certainty and not to an absolute degree of medical
11 certainty; just like I call biomechanical experts to a
12 reasonable degree of scientific certainty not to an absolute
13 degree of certainty. But he says, in his papers, he doesn't
14 know the exact speed, and I agree, we don't know the exact
15 speed, and we don't have to know exactitude. The question is
16 whether or not, even with using the median, whether we have
17 enough information on either side, and if it affects anything,
18 if it affects it by a lot, which the doctor said it doesn't,
19 that is sufficient, reliable scientific evidence. The sine qua
20 non, the hallmark of the Frye standard, isn't to second-guess
21 what the doctor did, or the expert. The controlling point of
22 the Frye standard was, and has been since the 1920s, does the
23 opinions elicited, or stated, by these so-called experts, are
24 they in conformity with the medical or scientific community in
25 which they are on behalf, and counsel has offered no evidence

1 from anywhere to contradict that proposition. Now, yes, they
2 have to know the make and model of the vehicle, the weight, the
3 curb weight, the proximate weight, they have to know how many
4 people, all of these things are discussed. Some of the pivotal
5 points that your Honor made in her article, are they belted, are
6 they not belted, all of those areas we have gone into with great
7 pain over this entire day. Whatever counsel criticizes, I would
8 suggest, is his own personal criticism, and not based upon
9 anything that the scientific community, in the biomechanical
10 field, does or does not do. And I am willing to concede that
11 what he has brought up today, if at all, is proper
12 cross-examination, just like I've cross-examined his orthopedic
13 surgeon, in this case, or in any case, who doesn't know all of
14 the facts, doesn't know the history of the patient, doesn't know
15 the pre-existing conditions or anything. So, the question is,
16 is our doctor exact, no, and no expert can ever be. No expert
17 can be standing on the street corner in the hopes that there
18 would be an accident. We have a three-year statute of
19 limitations, cars are repaired or destroyed, either in the
20 accident or after, and it is not possible to get to every one.
21 The standard is, are there scientific basis in the biomechanical
22 community to make these calculations. None of the calculations
23 that Dr. Toosi made are formulas that he made up himself. The
24 information on whether or not he has enough information,
25 ultimately, is left to the jury. But, as a matter of law, he

1 has all of the requisites that biomechanical engineers use. And
2 what counsel didn't do, which I am sure you've noticed very
3 clearly, is that he never asked him assume this weight or that
4 weight, the reason why he didn't do that is because even if you
5 assume that, and I even gave him an example of 600 pound heavy
6 or 600 pound lower, the degree of fluctuation is not
7 significant. So, in terms of his ability, does he have the
8 knowledge and the training to give opinions which may invade on
9 the medical providence, yes, I would suggest that he does. He
10 has specialized knowledge and training, he has treated patients,
11 some of them in trauma. I should note that I think it's at
12 least one department that says that you don't need to have a
13 medical degree to give such an opinion. In this case, we
14 actually have an expert who has a medical degree, who has
15 practiced medicine. The final point I will make is that, is he
16 trained as well as a neurologist, no, but that's grits for the
17 mill, that's cross-examination, and that is stuff for the jury
18 to consider. It's not a basis to totally preclude this expert.
19 It's not junk science. My expert is well-trained in both
20 medicine and biomechanics, and he does the same calculations as
21 everybody in the community. And I am sure you can point to one
22 hundred things he didn't know, that counsel says is important,
23 but there is no evidence before your Honor that anything that he
24 didn't have would be viewed as a kibosh on his opinion from the
25 biomechanical community. And on the 1992 photogrammetry

1 article, I can only say this to your Honor, is that, as the
2 doctor testified, he no longer needed a \$50,000 camera, we have
3 computers programs in the office that can do that. So, for all
4 of those reasons, I would suggest to your Honor that we have
5 more than met our burden. And I respectfully ask that you would
6 admit Dr. Toosi, subject to the full parameters of whatever
7 counsel's cross-examination may be.

8 MR. [REDACTED] May be heard, your Honor?

9 THE COURT: Yes

10 MR. [REDACTED]: Okay. Number one, it is not incumbent
11 upon me to call any sort of experts to disprove Dr. [REDACTED], it's
12 their burden to show that Dr. [REDACTED] is a proper witness. Dr.
13 [REDACTED] had dozens of areas where he was speculating, where he was
14 estimating. He referred to studies, he referred to taking a
15 fiftieth percentile of studies, he referred not knowing how many
16 50-year-olds, such as the plaintiff, were in the studies. He
17 knew nothing about the plaintiff's positioning other than
18 looking forward. And he was ambivalent about whether it was a
19 straight hit in the rear or an angular hit in the rear. He
20 finally conceded that he used the 20 degrees, although that may
21 not comport with what was stated at the liability trial. He
22 also used a generic -- the reference number 9, he used a generic
23 study of the whole grouping of SUVs and crossovers, where he
24 could have just looked up the data of the car that was similar
25 to the Chrysler Pacifica, the Dodge Caravan, which he testified

1 was just about similar to the car. While it's included within
2 that study, it's not the exact car. On the one hand, he wants
3 to say that physics hasn't changed in the last 400 years, but
4 then he wants to say that photogrammetry has changed over the
5 last several years. There is just too much estimation and too
6 many of his beliefs. He said "I believe" a number of times.
7 When I tried to corner him on whether that's something he knows
8 or something he believes; on several occasions he said, well
9 that's what I believe, and not something that's steeped in
10 science. So, for all of those reasons, and for all of the
11 answers that he didn't have to questions about weights, about
12 positioning, about how the plaintiff may have been turned, or
13 seated, or what angle the seat was at, these are all factors
14 that, frankly, he did not know the answer to. So, there is too
15 many holes in his testimony for him to testify as to the field
16 of biomechanics. As to medicine, he said they are co-dependent,
17 his biomechanical knowledge and his medical knowledge. Courts
18 in that department found that he is not permitted to discuss
19 medicine, he is not licensed to practice medicine in New York
20 State, or anywhere in the United States for that matter. He was
21 not a neurologist, an orthopedist, a radiologist, but he is
22 giving opinions. And the fact that he says he gives medical
23 opinions, I think, is a breach of protocol, but I will look that
24 up; and if he is allowed to testify, I will ask him on
25 cross-examination. Based upon the gaps in his testimony, and

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the fact that he is not a licensed practicing medical doctor, he should be precluded, or excluded.

THE COURT: Okay. So, I am reserving decision. I have to read this large pile of stuff that you have admitted, and the exhibits. I will send you my decision.

MR. [REDACTED] Thank you, your Honor.

MR. [REDACTED] Thank you, your Honor.

MR. [REDACTED] I will accept the decision by E-mail.

THE COURT: Okay.

MR. [REDACTED] I concur.

THE COURT: Okay.

MR. [REDACTED] Do you want my card? My E-mail is on my card.

THE COURT: I have your card from the trial. May I ask one thing?

MR. [REDACTED] Off the record, your Honor?

THE COURT: The record is closed. Off the record.

(whereupon, a discussion was held off the record.)

The preceding transcript is certified to be a true and correct record of the proceedings in this matter.

[Handwritten Signature]

[REDACTED]
[REDACTED]

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 the witness stand.)

3 THE COURT OFFICER: Jury entering.

4 (The jury entered the courtroom and
5 the following occurred:)

6 THE COURT: Please sit down.

7 We are missing a couple. There you go.

8 Mr. [REDACTED], cross-examination.

9 MR. [REDACTED] Thank you, your Honor.

10 CROSS-EXAMINATION

11 BY MR. [REDACTED]:

12 Q. Just some preliminary matters.

13 The first time we met was outside in the hall when
14 I introduced myself. I am [REDACTED]

15 A. Yes.

16 Q. Thank you.

17 I represent [REDACTED] okay (indicating)?

18 A. Yes.

19 Q. Sorry. You have to respond verbally.

20 A. Okay. Yes.

21 Q. You gave your address to this jury. It was one of
22 the first questions out of the gate. You gave your address
23 in New York, correct?

24 A. I did.

25 Q. Okay. But actually where your voter address is,
26 is in Connecticut, right?

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 A. Yes.

3 Q. So really your address is in Connecticut, that's
4 like New Haven County, right?

5 MR. [REDACTED]: Objection.

6 Q. Right?

7 THE COURT: Overruled.

8 A. That's correct.

9 Q. So your address -- you have two office addresses.
10 One of your office addresses is in New York City, right?

11 A. Yes.

12 Q. And another office address is in Connecticut,
13 correct?

14 A. Yes.

15 Q. But you chose to only give to this jury when asked
16 what your address was, was your New York City address; is
17 that correct, Doctor?

18 A. Yes.

19 Q. So now with respect to what you reviewed, your
20 testimony before this jury is predicated upon the records
21 that were generated during the course and the care of Mara
22 Goldstein, correct?

23 A. Yes.

24 Q. Now, the person who is in control of creating that
25 record with respect to [REDACTED] is the individual
26 physician that's writing about that patient, correct?

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 A. Yes.

3 Q. So then, therefore, you are relying upon the
4 truth, the veracity, the completeness and the fairness of
5 the record that is created by Dr. [REDACTED] correct?

6 A. Yes.

7 Q. Okay. And same question, so I don't have to ask
8 them of every physician, the same thing with the other
9 physicians, right?

10 A. Yes.

11 Q. So, therefore, when you're giving your opinion,
12 you are relying upon what was written in her office notes,
13 correct?

14 A. Yes.

15 Q. You're relying upon what was written in her
16 operative note, correct?

17 A. Yes.

18 Q. You are assuming also that everything written
19 therein is contemporaneous, as stated by Mr. [REDACTED], by Dr.
20 [REDACTED] of Dr. [REDACTED] treatment of [REDACTED]?

21 A. Right. Yes.

22 Q. You also are assuming that what was dictated or
23 was typewritten was fully done by the physician, correct?

24 A. Yes.

25 Q. Not some prescribed formula, right?

26 A. Right.

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 Q. It's not some template of what happened before,
3 right?

4 A. Correct.

5 Q. Well, you know by virtue of reading everything
6 that a template was used with respect to office notes,
7 right; you understand that?

8 A. Yes.

9 Q. And you also know that -- do you know what else,
10 what other templates were used in this case?

11 A. No.

12 Q. I thought that Mr. [REDACTED], when he was leading you
13 originally in the questions --

14 MS. [REDACTED] Objection.

15 Q. -- he asked you, you reviewed X, you reviewed Y,
16 and you said you reviewed the trial testimony of Dr. [REDACTED]

17 A. I did.

18 Q. So, therefore, when you read the testimony of Dr.
19 [REDACTED] then you know for a fact that she was using templates in
20 her operative report then, right?

21 A. Well --

22 Q. Right, Doctor?

23 A. Well, she would use a template as a basic
24 beginning of the operative report.

25 MR. [REDACTED] Is that --

26 MR. [REDACTED]: I am sorry?

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 MR. [REDACTED]: Let her finish.

3 THE COURT: Let her finish. Otherwise, you
4 don't get a proper record.

5 A. Templates are very, very commonly used, but they
6 are adjusted as the operative report is completed to
7 specifically address what happened to that patient, what
8 sutures were used, how much blood loss occurred, the end of
9 the surgery, what transpired from the anesthesia, to the
10 discharge, to the recovery room. So the template includes
11 the name of the patient, date of surgery, date of birth,
12 type of anesthesia, it depends if it's general anesthesia,
13 if it's monitored anesthesia care. Those are things that
14 are changed. Blood loss is changed, sutures are changed
15 from patient to patient. The amount of tissue removed is
16 altered from patient to patient.

17 So a template means that it's a guide. You don't
18 have to retype or redictate what questions are being asked.
19 The template defines that.

20 MR. [REDACTED]: I move to strike.

21 THE COURT: Overruled. I'll let it stand.

22 Q. So you use templates?

23 A. I do.

24 Q. So with regard to this though, you weren't aware,
25 you just said before in your testimony to this jury that you
26 weren't aware that Dr. [REDACTED] used templates outside of the

1 [REDACTED] - by Defendant - Cross [REDACTED]
2 patient record that she writes, the progress note? You
3 weren't aware that what she did was use a template in her
4 operative report, right? Right? It's a yes or no.

5 A. I don't know what you are asking me.

6 Q. Okay. What I am asking, you said before in your
7 sworn testimony that outside the progress note, you were not
8 aware of any other templates that were used, right?

9 A. Well, if I answered that that way, I know that she
10 used a template for the operative report.

11 Q. It's a yes or no, Doctor.

12 A. It's not a yes or no.

13 Q. Yes, it is.

14 MR. [REDACTED] Objection.

15 THE COURT: If she can't answer it yes or
16 no, she can't answer it yes or no.

17 Q. If you can't answer anything yes or no, would you
18 mind letting me know?

19 A. Not at all.

20 Q. This is not the first time you have testified,
21 correct?

22 A. Correct.

23 Q. I mean, in court over the years since the early,
24 what is it, 19 -- late 1980s you have been testifying; is
25 that right?

26 A. Yes.

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 Q. And as a matter of fact, you've been testifying
3 each and every year almost since then. That's correct
4 statement, is it not?

5 A. No.

6 Q. So with regard to your -- you gave testimony on
7 April 19, 1996 in the matter of [REDACTED]. Do
8 you recall that case?

9 A. No.

10 Q. Do you recall that case being in the Superior
11 Court of New Jersey?

12 A. No.

13 Q. So you've testified in the Superior Court of New
14 Jersey, you've testified in Connecticut, and you've
15 testified in New York, have you not?

16 A. Yes.

17 Q. You not only have testified in court, but you have
18 also testified with respect to the Department of
19 Professional Medical Conduct, haven't you?

20 A. No.

21 Q. Did you ever give an affidavit to the Department
22 of Professional Medical Conduct on behalf of someone?

23 A. I did, yes.

24 Q. Okay. So you're saying that you didn't testify
25 before the Department of Medical Conduct, but you gave an
26 affidavit in support of a doctor who was being charged with

1 [REDACTED] - by Defendant - Cross [REDACTED]
2 misconduct, right?

3 A. I don't recall.

4 MR. [REDACTED]: Could you please advise the
5 witness to speak louder? He is blocking her and I
6 can't hear. I don't mind the blocking --

7 THE COURT: If you would, speak up.

8 THE WITNESS: Sure.

9 MR. [REDACTED]: I am not trying to block him.

10 THE COURT: All right, gentlemen. If the
11 witness speaks up, it will satisfy everybody.

12 MR. [REDACTED]: Thank you.

13 Q. In the matter of Dr. [REDACTED]
14 [REDACTED] do you recall that?

15 A. No.

16 Q. Do you recall that that was in the State of New
17 York, Department of Health, State Board for Professional
18 Medical Conduct?

19 A. I don't recall.

20 Q. Do you recall that in that case you testified or
21 gave an affidavit on behalf of a doctor in which it
22 concerned mammoplasty reduction?

23 A. I don't recall.

24 Q. Do you recall that in that case --

25 MR. [REDACTED]: This is objected to in light --

26 THE COURT: Sustained.

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 Q. Do you recall at all -- tell me if this refreshes
3 your recollection or not, in that case also templates were
4 used?

5 A. I don't recall the case.

6 Q. Lastly, to see if this can refresh your
7 recollection --

8 MR. [REDACTED]: This is objected to.

9 THE COURT: Sustain.

10 Q. So now with respect to this case, you not only
11 testify in court on behalf of defendants, but you mostly do
12 defendant work, right?

13 A. Yes.

14 Q. The percentage is what? I am talking about
15 medical malpractice cases. What is the percentage?

16 A. It's a low percentage.

17 Q. Sorry?

18 A. It's a low percentage for the plaintiff.

19 Q. Is it 99.9 percent that you testify in medical
20 malpractice cases in court on behalf of a defendant doctor;
21 is that a correct statement?

22 A. No.

23 Q. Well, in looking at your -- you've testified in
24 1994, do you recall, the case of [REDACTED]? That
25 was in New Jersey, Hudson County.

26 A. No.

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[REDACTED] - by Defendant - Cross [REDACTED]

Q. Do you recall that was for the defendant?

A. I don't recall the case.

Q. How about [REDACTED], New Jersey, Bergen County; do you recall that?

A. No.

Q. Do you recall answering certain questions under oath in that case with interrogatories?

A. I don't recall the case.

Q. I will get there.

[REDACTED]
[REDACTED] New York, Richmond County, you testified on behalf of the defendant in that case in the medical malpractice case; do you recall that?

A. No.

Q. That was with regard to, see if it refreshes your recollection, removal of a cyst from the right cheek?

A. I don't recall.

Q. Okay. And the other case, the [REDACTED] case, does it refresh your recollection that it was nasal surgery?

A. I don't recall.

Q. What about the case of [REDACTED], [REDACTED] New York County, in 2000? You testified on behalf of the defendant in a medical malpractice case.

A. I don't recall.

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 Q. And the negligent use of staples to close a wound,
3 does that refresh your recollection at all?

4 A. Not at all.

5 Q. [REDACTED], New York County, a medical
6 malpractice case on behalf of the defendant?

7 A. I don't recall.

8 Q. It was a negligent performance of a breast
9 reduction case. Does that in any way refresh your
10 recollection?

11 A. No, it doesn't.

12 Q. What about [REDACTED]? You
13 testified on behalf of the defense in 2001 in Richmond
14 County. Do you remember that?

15 A. No.

16 Q. Improper circumcision on an infant.
17 Does that refresh your recollection?

18 A. No.

19 Q. And how about, maybe this one rings a bell for
20 you, please, 2001, the case is [REDACTED]

21 [REDACTED] New York County, Bronx. Do you remember that
22 one?

23 A. No.

24 Q. It was a medical malpractice. You were noticed as
25 a witness in this case. Do you know if you ever took the
26 stand in that case?

1 [REDACTED] - by Defendant - Cross [REDACTED])

2 A. I don't remember.

3 Q. Do you know that you were retained by [REDACTED]
4 [REDACTED] in that case? Does that refresh your
5 recollection?

6 A. It doesn't.

7 Q. Can you tell me, please, 2001, the [REDACTED]
8 [REDACTED] case, New York State, Richmond County, 2001, you
9 testified for the defense in a medical malpractice case; do
10 you recall that?

11 A. No.

12 Q. What about the fact that [REDACTED] was
13 the defense counsel? Does that refresh your recollection
14 now?

15 A. No.

16 Q. Now, I know you may not recognize Ms. [REDACTED]. Do
17 you recognize her?

18 A. Who?

19 Q. Ms. [REDACTED]

20 A. No.

21 Q. I'm sorry?

22 A. I mean, I met her outside, but --

23 Q. But the partners from her firm, you know, [REDACTED]
24 [REDACTED]

25 A. Yes.

26 Q. And you review many cases for them, do you not?

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 A. Not many.

3 Q. Well, what do you say?

4 A. I have no idea.

5 Q. Oh, it's not that it's not many, you just don't
6 have any idea?

7 A. I don't.

8 Q. So you realize that's two different things, right?
9 How can you say not many if you don't have an idea?

10 MR. [REDACTED]: Objection. Argumentative.

11 MS. [REDACTED]: Objection.

12 THE [REDACTED]: Sustained.

13 Q. Now, with regard to the case of [REDACTED].

14 [REDACTED] New York County, New York, 2002, that was a
15 medical malpractice case regarding a facelift and eye
16 surgery. Do you recall testifying in that case?

17 A. No.

18 Q. How about the [REDACTED] case, Federal
19 District Court? Do you recall testifying in federal
20 District Court?

21 A. No.

22 MR. [REDACTED]: May I ask Mr. [REDACTED] a
23 private question on this? It may save me some trouble.

24 THE COURT: Sure.

25 Do you want to go into the hallway or --

26 MR. [REDACTED]: No, I will chat with him here.

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 THE COURT: Great.

3 (Discussion off the record.)

4 THE COURT: Gentlemen, remember that there
5 is a jury sitting right there. If I can hear you --

6 MR. [REDACTED]: You will clarify that?

7 MR. [REDACTED]: I did.

8 MR. [REDACTED]: Thank you, Judge.

9 Q. With regard to the [REDACTED] case, do you
10 recall -- let's say it this way so that -- whether you
11 testified in any of these cases or you gave an affidavit or
12 you were retained to be consulted, in any of them, in any
13 way, in anything I read before, do any of those ring a bell?

14 A. No.

15 Q. Either way, whether you testified, you gave an
16 affidavit or were consulted, in any way?

17 A. No.

18 Q. Okay. Now, the [REDACTED] case, that federal
19 case, do you recall whether you gave testimony on behalf of
20 the defense or you wrote an affidavit or what you did?

21 A. I don't recall.

22 Q. The [REDACTED] case, that was in
23 2006. Was that with [REDACTED]

24 A. I don't know.

25 Q. And that was a Labor Law case. That's unusual.

26 You were called as a witness on a Labor Law case on behalf

1 [REDACTED] - by Defendant - Cross [REDACTED]
2 of the defense?

3 MR. [REDACTED]: Judge, these comments --

4 THE COURT: Sustained.

5 Q. With regard to this Labor Law case -- in other
6 words, you testify also not in just medical malpractice
7 cases, but some law firms retain you to do an examination of
8 an injured plaintiff, right, and then you render a report,
9 right?

10 A. I have examined injured patients and rendered
11 reports.

12 Q. And then you're called sometimes to testify in
13 court contradictory to the treating plaintiff's testimony,
14 right?

15 MR. [REDACTED]: Objection.

16 A. I don't recall.

17 THE COURT: She doesn't recall. That was
18 the answer. I will let that answer stand.

19 I will ask you to speak as loudly as you can
20 because I am just not sure our jurors are all hearing
21 you.

22 MR. [REDACTED]: I am almost done on this
23 line.

24 Q. In the [REDACTED] case, New York County, do
25 you remember in that case being retained by [REDACTED]

26 [REDACTED]

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 A. No.

3 Q. So I don't know whether you testified in that. I
4 am asking, do you recall whether or not you testified in
5 that case?

6 A. I don't recall the case.

7 Q. And was that, let's see if this refreshes your
8 recollection, excessive administration of propofol and
9 fentanyl prior to facial anesthetic [sic.] surgery.

10 Do you recall testifying in that kind of case or
11 giving a report or an affirmation?

12 A. No, no.

13 Q. And the [REDACTED] case, that was also for
14 a defendant, do you recall that case in 2011?

15 A. No.

16 Q. All right. Do you recall it being a bilateral
17 breast reconstruction leading to some nipple asymmetry; do
18 you recall that?

19 A. No.

20 Q. Do you recall whether or not you gave an affidavit
21 or a report or anything like that?

22 A. I don't.

23 Q. Let's finish it up with the [REDACTED] case versus

24 [REDACTED]. Do you recall being asked to give an affirmation
25 in that case?

26 A. I don't recall.

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 Q. Do you remember [REDACTED] happened to be at that
3 time the partner of Dr. [REDACTED]; do you remember that?

4 A. No.

5 MR. [REDACTED]: This is objected to.

6 THE COURT: She said no. I will let that
7 answer stand, but let's move along.

8 Q. The last one is 2016, [REDACTED] in New
9 York, Nassau County; do you recall that case?

10 A. No.

11 Q. And that was a -- does it refresh your
12 recollection that you also testified as to the failure to
13 properly perform breast reconstruction in that case?

14 A. No.

15 Q. So with respect to these matters, you have
16 testified approximately how many times in a medical
17 malpractice case?

18 A. I don't know.

19 Q. All right. And so is it more than 50?

20 A. I doubt it, but I can't say yes or no to that.

21 Q. All right.

22 So you earn a certain percentage of money doing
23 these defense cases for medical malpractice case defendants,
24 correct?

25 A. Yes.

26 Q. Now, you read Dr. [REDACTED]'s daily copy, did you not?

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 A. Yes.

3 Q. And did you read that basically she does, you
4 know, when she reviews cases, it's 50 percent for the
5 plaintiff, 50 percent for the defendant?

6 MR. [REDACTED]: Objection. I can't hear.

7 THE COURT: You are speaking so fast. I try
8 to sometimes take notes on what you are saying. If I
9 can't get it, how are they getting it? I am not trying
10 to get word for word. I am trying to get generally.
11 So, please, slow down.

12 MR. [REDACTED]: Yes, your Honor. I
13 apologize. I apologize to the jury.

14 Q. Can you tell me, please, you read Dr. [REDACTED]'s
15 record. You read Dr. [REDACTED]'s record, and you read that she
16 reviews cases, and sometimes it's about a 50/50 split; do
17 you recall that?

18 A. No.

19 Q. So, with regard to the amount of money you earn
20 per year with respect to testifying in these cases for these
21 defendant doctors and these law firms or all defense law
22 firms, how much do you earn per year?

23 A. Some years nothing. Some years maybe 20, \$25,000.

24 Q. In this case you're paid -- you heard Mr. [REDACTED]
25 say that you spent time, you met with each other over the
26 course of this trial, right?

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[REDACTED] - by Defendant - Cross [REDACTED]

A. Yes.

Q. And how much time did you spend with him over the course of the week or two weeks?

A. Well, last night I met with him for an hour.

MR. [REDACTED]: Please, a little slower.

THE COURT: Last night she met with him for an hour.

A. And when I reviewed the medical records, it was seven to eight hours.

Q. You charge how much an hour?

A. 350.

(Continued on next page.)

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]

2 CROSS-EXAMINATION

3 BY MR. [REDACTED]:

4 Q. You said 350?

5 A. Yes.

6 Q. And what else -- for today you're charging how
7 much?

8 A. 5,000.

9 Q. So -- and when were you first retained?

10 A. Several years ago.

11 Q. When you say several years ago, when?

12 A. Three, two.

13 Q. Do you have your notes when you were retained and
14 when you reviewed the records?

15 A. I don't have any notes with me today regarding the
16 case.

17 Q. You did not bring any notes?

18 A. No.

19 Q. Do you have your record so we can see what records
20 you reviewed?

21 A. Well, I testified initially as to what records I
22 reviewed.

23 Q. I know that but I'm asking do you have them here
24 in court, the records that you reviewed?

25 A. Do I have a copy of the records I reviewed?

26 Q. Here in court, outside or with your lawyer?

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]

2 A. No.

3 Q. When you reviewed the records, did you highlight
4 anything, make any Post-its, take any notes, write something
5 on the computer?

6 A. No.

7 Q. So with all of these records that you reviewed,
8 the bill of particulars, thousands of pages of transcript
9 with regard to the medical records, no notes whatsoever?

10 A. No.

11 Q. No highlighting, no tabbing, no nothing?

12 A. Right.

13 Q. Let me ask this: With regard to texts that
14 concern the Hall-Findlay technique prior to August 25, 2010,
15 do you -- have you reviewed any texts with respect to the
16 Hall-Findlay technique?

17 A. No.

18 Q. Are there any journals or articles that you rely
19 upon or did rely upon on or before August 25, 2010, in order
20 to learn how to do the technique?

21 A. No.

22 Q. Did you attend any lectures at any point or at any
23 time prior to August 25, 2010, in order to see how the
24 Hall-Findlay technique is done?

25 A. I go to medical meetings.

26 Q. So back in August 25, 2010, would you say that you

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]
2 were experienced in doing the Hall-Findlay technique?

3 A. That's seven years ago. You're saying 2005 --
4 2010?

5 Q. Yes, Doctor.

6 A. Well, I was familiar with the superior vertical
7 lollypop incision which was pioneered by Dr. [REDACTED], so I
8 don't know exactly when there was a modification made by
9 Dr. Hall-Findlay, but the basic principles of the
10 development of the medial superior flap is very familiar.

11 Q. Wait a second. I asked you if back on August 25,
12 2010, if you were familiar with doing the Hall-Findlay
13 technique. Is the answer yes or no?

14 A. I don't know.

15 Q. But you're here giving testimony about what the
16 standard of care is at that time in doing a Hall-Findlay
17 technique. Do you realize that?

18 A. Yes.

19 Q. Do you know when the Hall-Findlay technique was
20 introduced to the community?

21 A. It was several years ago. Exactly what year, I
22 don't recall.

23 Q. So you don't know as you sit here today whether it
24 was 1999?

25 A. It's a modification of the Lejour and I don't know
26 when the modification --

1 [REDACTED] - by Defendant [REDACTED] Cross, [REDACTED]

2 MR. [REDACTED] I didn't hear. Modification of?

3 THE WITNESS: Dr. Lejour, who pioneered this
4 particular flap and modifications come in. There are
5 several modifications that keep appearing, some have
6 credibility, some don't, but exactly the date when I
7 was familiar with Hall-Findlay I don't recall.

8 Q. Doctor, you understand that Dr. [REDACTED] testified that
9 she did the Hall-Findlay technique here?

10 A. Yes.

11 Q. And you understand --

12 MR. [REDACTED]: Withdrawn.

13 Q. When was the first time that Dr. [REDACTED] met
14 Dr. Hall-Findlay and heard her lecture?

15 MR. [REDACTED] Objection.

16 MS. [REDACTED] Objection.

17 THE COURT: Overruled.

18 A. I don't recall.

19 Q. You read her testimony?

20 A. I did.

21 Q. Doctor, there is sworn testimony here that in
22 1999, during her residency, Dr. [REDACTED] heard a lecture of
23 Dr. Hall-Findlay. Can you please assume that.

24 A. I recall it now that you stated it. I recall
25 reading that in Dr. [REDACTED] testimony.

26 Q. Very good.

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 So some 11 years before August 25, 2010,
3 physicians like yourself were doing the Hall-Findlay
4 technique, right?

5 A. Yes.

6 Q. But you're saying here to this jury that you don't
7 even know if you were doing it at that time August 25, 2010.
8 That's your testimony, right?

9 A. I'm not sure when I began doing it but pedicle
10 flaps are something that form the foundation of
11 reconstructive surgery. So whether it's the Hall-Findlay,
12 the Lejour, the scoop, the Wise, this is a work in progress,
13 so I am familiar with pedicles, I am familiar with the
14 anatomy and I am very comfortable doing procedures based
15 upon fundamental principles.

16 Q. Are you saying on August 25, 2010, that the
17 Hall-Findlay technique was evolving?

18 MR. [REDACTED] Objection.

19 THE COURT: Overruled.

20 A. I'm saying pedicle flaps are constantly evolving.

21 Q. That's not my question. My question is are you
22 saying to this jury that the Hall-Findlay technique on
23 August 25, 2010 was evolving?

24 A. Yes. According to Dr. Hall-Findlay it has
25 evolved, she has perfected her method, she has changed her
26 methodology, she has refined the technique. That's part of

1 [REDACTED] - by Defendant [REDACTED] - Cross, [REDACTED]
2 the process.

3 Q. Doctor, not in August 25, 2010, she introduced it
4 in the late '90s, right?

5 MR. [REDACTED]: I object to this. Is he
6 testifying?

7 THE COURT: It's fine on cross examination,
8 I'll allow it, but let's move along.

9 You can answer that last question, or not.

10 Are you withdrawing it?

11 MR. [REDACTED]: I am, your Honor.

12 THE COURT: All right.

13 MR. [REDACTED]: I think I've established the
14 point.

15 Q. Now, with respect to the healing issue here, it is
16 your opinion, as you said to this jury, that when someone
17 makes an incision using the scalpel and using the bovie
18 cautery that the natural tissue of a human body immediately
19 starts to form scar tissue, during the surgery in fact.
20 That's your point?

21 A. No.

22 Q. No?

23 A. No.

24 Q. So -- I'm sorry. Right after the surgery and
25 there's a closing, are you saying that scar tissue and bands
26 are forming right then and there at that point?

1 [REDACTED] - by Defendant [REDACTED] Cross [REDACTED]

2 A. I'm saying that during the surgery, the body
3 reacts by pouring healing factors into the area injured, but
4 as the process is ongoing there's no formation of scar. The
5 wound is approximated, and usually within six hours the
6 wound is closed. And that's an acceleration of the healing
7 process, but the completion of the healing process is
8 ongoing. It usually takes six to 12 months before it's
9 stable.

10 Q. Six to 12 months before these bands form?

11 A. Six to 12 months before the scar tissue is stable.

12 Q. So now --

13 A. And I'm saying not that the bands form, I'm saying
14 there's contracture of the fibrous tissue of the breast.

15 Q. You're saying the contracture of the fibrous
16 tissue and --

17 MR. [REDACTED]: Withdrawn.

18 Q. You're saying that six days later that these
19 fibrous tissue or these bands are what is pulling down and
20 retracting these nipples?

21 MR. [REDACTED]: Objection.

22 THE COURT: Overruled.

23 A. I didn't say six days later, I said at six hours,
24 at the completion of the surgery, generally the wound edges
25 are bridging, they've sealed. That's not always the case.
26 But I'm not saying six days.

1 ██████████ - by Defendant ██████████ - Cross/██████████

2 Q. You're not saying that -- if the nipples were
3 retracted six days later, you're not saying bands in these
4 fibrous tissue are what is pulling down on these nipples,
5 right?

6 A. I don't know. I don't know when the bands start
7 pulling down on the nipple.

8 Q. You read the testimony of Dr. ██████████, as you said
9 before, didn't you?

10 A. I didn't read it completely. It was given to me
11 late last night, but I did read a significant part of it,
12 but I didn't read all of it.

13 Q. When Mr. ██████████ asked you did you review X and
14 review Y, did you just say -- you said you reviewed it, you
15 didn't say you reviewed it partially or skimmed it,
16 whatever?

17 A. I reviewed her examination before trial. But I
18 was not given her trial testimony until late yesterday
19 evening.

20 Q. Would you agree with me that trial testimony is
21 important to you?

22 MR. ██████████ Judge, what day? I can only get
23 it at a certain -- what day?

24 THE COURT: The question was --

25 Read it back.

26

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 BY MR. [REDACTED]

3 Q. Do you agree, Dr. [REDACTED] trial testimony is
4 important to you, yes or no?

5 A. Yes.

6 Q. Now, you met with Mr. [REDACTED], right?

7 A. Yes.

8 Q. Did he and you speak?

9 A. Yes.

10 Q. Did he and you speak about the trial testimony?

11 A. Yes.

12 Q. Did he impart to you what you thought was
13 important?

14 A. Yes.

15 Q. So really what happened here with regard to the
16 trial testimony with Dr. [REDACTED] is that you didn't actually
17 review her testimony because you got it late last night, you
18 heard her trial testimony as summarized by Mr. Habian?

19 A. Both.

20 Q. You only skimmed it?

21 A. Depends what you say by skew -- I skimmed it. I
22 spent a couple hours, but by 11, 11:30 at night I felt it
23 was wise to sleep.

24 Q. With regard to this meeting from Mr. -- with
25 Mr. [REDACTED], did Mr. [REDACTED] tell you what Dr. [REDACTED] testified to
26 as to the healing process and when the scars and bands

- 1 ██████████ - by Defendant ██████ - Cross/██████████
2 formed, yes or no?
- 3 A. I don't recall that.
- 4 Q. I'm asking you did he tell you that, what she
5 said?
- 6 A. No. Not specifically with what bands formed. I
7 don't recall that.
- 8 Q. How about was Ms. ██████ there in that meeting?
- 9 A. No.
- 10 Q. Was Dr. ██████ there in that meeting?
- 11 A. No.
- 12 Q. Have you ever spoken to Dr. ██████
- 13 A. No.
- 14 Q. You said you were retained some several years ago,
15 right?
- 16 A. A couple of years.
- 17 Q. A couple to you is two?
- 18 A. Two or three.
- 19 Q. Fair enough. During that two or three year period
20 of time, did you ever meet Dr. ██████
- 21 A. No.
- 22 Q. Did you ever talk to her about it?
- 23 A. I do not know Dr. ██████
- 24 Q. That's not my question. My question is did you
25 ever have a meeting between yourself, Mr. ██████, Dr. ██████ to
26 talk about what you did?

1 [REDACTED] - by Defendant [REDACTED] Cross, [REDACTED]

2 (Reporter requested clarification.)

3 THE COURT: Read me back the last thing you
4 have.

5 (Record read.)

6 THE COURT: Finish your question.

7 MR. [REDACTED]: I'll rephrase it.

8 Q. During the meeting, did you ever ask for a meeting
9 between yourself, Mr. [REDACTED], Dr. [REDACTED] to discuss what
10 happened with regard to the care of [REDACTED]?

11 A. No.

12 Q. Now, I'm going to read to you what Dr. [REDACTED]
13 testified to, then I'm going to ask you some questions,
14 okay?

15 MR. [REDACTED]: Is this Tuesday or yesterday? I
16 need to know.

17 MR. [REDACTED]: I'm going to tell you the
18 page.

19 MR. [REDACTED]: Please.

20 MR. [REDACTED]: It's July 13, 2017.

21 MR. [REDACTED]: Yesterday.

22 MR. [REDACTED]: Page 704.

23 Q. That was yesterday's testimony.

24 Again, you may not have had an opportunity to
25 review the entire thing, but you and Mr. [REDACTED] spoke and he
26 told you what he thought about the day's testimony, right?

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]
2 MR. [REDACTED]: Objection.
3 THE COURT: Overruled.
4 THE WITNESS: What was the question?
5 MR. [REDACTED]: Can I have it read back?
6 THE COURT: Yes.

7 (Record read.)

8 A. Yes.

9 Q. Let's go to page 704, starting line 21.

10 "Q Now, you're saying with regard to healing and
11 the formation of fibrous tissue bands, things like
12 that, are you saying those things form before six
13 weeks?

14 "A No."

15 Going on to the next page.

16 "Q They don't, right?

17 "A I don't know. I don't know."

18 Going to line ten.

19 "Q Doctor, you agree with me like as you -- with
20 your experience, education, training, background, you
21 know that bands do not form before six weeks, right?

22 "A Probably not.

23 "Q So bands would not explain why six days later
24 her nipples are retracted, right?

25 "A Correct."

26 Did you hear that testimony that I just read?

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 A. Yes.

3 Q. Do you agree with Dr. [REDACTED]

4 A. In six days bands have not developed, is that the
5 question?

6 Q. I read to you multiple things. Here's the
7 question. I asked her -- I'll repeat it again, Doctor.

8 "Q Now, you are saying with regard to healing
9 and formation of fibrous tissue, bands, things like
10 that, are you saying those things form before six
11 weeks?

12 "A No."

13 Do you agree with Dr. [REDACTED]

14 A. Before six weeks or six days? Because I thought
15 you mixed the days with the weeks. Do they form within six
16 weeks? That's the healing process, and it's well
17 established at that time fibrosis is occurring.

18 Q. Before six weeks is the question?

19 A. Before six weeks?

20 Q. Not at six weeks before six weeks?

21 A. How much before the healing process begins
22 immediately.

23 Q. So in other words, you disagree with what Dr. [REDACTED]
24 testified under oath?

25 MR. [REDACTED]: Objection.

26 THE COURT: Overruled.

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]

2 A. I don't really grab a concept of what you're
3 trying to explain to me.

4 Q. Doctor, would you agree that you are a top class
5 plastic surgeon?

6 A. I don't like that term.

7 Q. How about top flight plastic surgeon?

8 A. I just don't like that terminology.

9 Q. Okay. How about first class?

10 A. Again, I don't like that terminology.

11 Q. How about the degree of your education, training
12 and background, would you agree that you are a very
13 competent plastic surgeon?

14 A. Yes.

15 Q. Would you agree that you have nearly a 100 percent
16 success rate in the things that you do?

17 A. No.

18 Q. Would you agree that your success rate approaches
19 100 percent?

20 A. No. I don't know anyone who approaches
21 100 percent.

22 MR. [REDACTED]: May I take the opportunity now
23 to do that?

24 THE COURT: Yes.

25 (Pause.)

26 Q. Before I begin asking you some questions, we --

1 ██████████ - by Defendant ██████████ - Cross ██████████
2 outside the presence of the jury we watched these videos,
3 did we not?

4 A. Yes.

5 Q. There's two videos, are there not?

6 A. Yes.

7 Q. They are part of your website, are they not?

8 A. Yes.

9 Q. This is, like, something where somebody clicks on
10 your website, they can click on it and listen to it and
11 that's one segment, right?

12 A. Yes.

13 Q. There's another segment, which if they want to
14 they can click on and listen to it too, right?

15 A. Yes.

16 Q. It's a two stage process?

17 A. Yes.

18 Q. What you said in this promotional -- whatever you
19 want to call it, this video, is it full, fair, accurate and
20 complete?

21 A. In this particular video? It's a video that was
22 edited so it was --

23 Q. It wasn't edited by me, right?

24 A. No.

25 MR. ██████████ Objection.

26 THE WITNESS: It wasn't edited by me, it was

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]
2 by the person who did the video.

3 Q. But you approved to it being on your website,
4 right?

5 A. Yes.

6 Q. It's what if anybody wants to they can go on your
7 website and look at it and listen to it, right?

8 A. Yes.

9 MR. [REDACTED]: For the record, on the bottom
10 right-hand corner it says: Dell update. I don't know
11 how to get rid of it. It's on my laptop.

12 THE COURT: It has nothing to do with the
13 video?

14 MR. [REDACTED]: Right. I didn't want to start
15 doing anything wrong.

16 (Video played for the jury.)

17 Q. Did I play that clip in full, to your best
18 recollection?

19 A. Yes.

20 Q. It's not that anybody, including myself, edited.
21 That's a full version, is it not?

22 A. To the best of my knowledge, yes.

23 (Second video played for the jury.)

24 BY MR. [REDACTED]:

25 Q. That was the second portion of the video, correct?

26 A. Yes.

1 [REDACTED] - by Defendant [REDACTED] - Cross, [REDACTED]

2 Q. This is the video that we watched together with
3 all counsel and the Judge, outside the presence of the jury;
4 isn't that right?

5 A. Yes.

6 Q. So if we can, you fortunately have a success rate
7 that is very, very high and it approaches 100 percent,
8 right?

9 A. In some instances.

10 Q. You don't say in some instances in the video,
11 right?

12 A. I didn't say in some instances, correct.

13 Q. So are you saying to this jury that you left that
14 out?

15 A. No. This is a summary.

16 Q. It's a yes or no.

17 MR. [REDACTED]: It wasn't a yes or no. May she
18 answer it?

19 THE COURT: Let's read back the question,
20 please.

21 (Record read.)

22 THE COURT: Yes or no?

23 A. I left what out?

24 THE COURT: Apparently she doesn't understand
25 the question.

26 Q. You said to this jury that it's a hundred percent

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]
2 in some instances. So you're saying that people watching
3 your video, you left out a hundred percent in some instances
4 on your video, right?

5 A. Yes.

6 Q. You did that on purpose?

7 A. What did I do on purpose?

8 Q. To take out that it's a hundred percent in some
9 instances?

10 MR. [REDACTED]: Objection to form.

11 THE COURT: Overruled.

12 A. The success rate approaches a hundred percent.

13 Q. I know that's what I said, but you said in some
14 instances. You didn't say that on your video, but you said
15 that here to this jury.

16 A. I didn't say it on the video.

17 Q. So are you saying that your video is misleading?

18 MR. [REDACTED]: Objection.

19 THE COURT: Overruled.

20 A. It's a video. It's a marketing tool. It's been
21 edited. It's not a consultation. It's information for the
22 patient. Each patient is unique. This is not serving as my
23 consultation with the patient.

24 So the goal of cosmetic surgery, the goal of
25 all surgery is to improve the patient. So that's what this
26 implies. If there was a failure rate of a portion or a

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]
2 significant complication rate, then it would not be
3 acceptable.

4 Q. So you're telling this jury, then, that actually
5 you have many, many, many times where you have to have
6 revisions of your patient?

7 A. No, I don't.

8 Q. You laughed?

9 A. Because you're putting words in my mouth that are
10 contrary to fact.

11 Q. So you don't have many, many, many times where you
12 have to redo your surgery?

13 A. Correct.

14 Q. I mean to say that would kind of be a little
15 silly, right?

16 A. I didn't use the word silly.

17 Q. It wouldn't be right?

18 A. It would be inappropriate.

19 Q. So if Mr. [REDACTED] told this jury that many, many,
20 many times that revisions have to be done after a surgery,
21 that would be inappropriate, right?

22 MR. [REDACTED]: Respectfully object. I said
23 many surgeons, not many times.

24 THE COURT: Thank you, thank you, thank you.

25 Again, what the attorneys say is not
26 evidence.

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 Q. Right?

3 THE COURT: There is no question.

4 MR. [REDACTED] May I rephrase the question?

5 THE COURT: Yes.

6 Q. So if Mr. [REDACTED] had indicated during his opening
7 words to the effect that many, many, many times, you know
8 revisions have to be done after surgery, that would be
9 inappropriate, right?

10 MR. [REDACTED] Objection.

11 THE COURT: Overruled.

12 A. I have no idea.

13 Q. You just said when I said many, many, many that it
14 would be inappropriate, so if Mr. [REDACTED] says it it doesn't
15 matter, does it?

16 MR. HABIAN: Judge, objection.

17 THE COURT: Let me just give this
18 instruction. I have repeatedly said what the attorneys
19 say is not evidence in the case. What the attorneys
20 say in their opening statements is not evidence in the
21 case. What the attorneys say in their summations is
22 not evidence in the case.

23 Ask a question based on the evidence, please.

24 MR. [REDACTED]: Yes.

25 Q. So with regard to your patients, when you talk to
26 them about the risks -- let's say it this way -- do you tell

1 ██████████ - by Defendant ██████████ Cross ██████████
2 them many, many, many times there's a risk that you're going
3 to need other surgeries; do you tell them that?

4 A. I don't use adjectives, I say there are risks and
5 I describe the risks.

6 Q. But do you -- what I'm asking you is, do you tell
7 them the percentage of your revision rate?

8 A. I don't know anyone who talks about percentages to
9 a patient.

10 Q. That's not my question. I'm asking you what you
11 do. I don't care what anybody else does.

12 MR. ██████████: I object to that.

13 THE COURT: Sustained.

14 Ask a question, please.

15 Q. Can you tell us, when you're talking to a patient,
16 you talked about how important the consultation is in your
17 video, right?

18 A. Yes.

19 Q. And to educate your patient, right?

20 A. Yes.

21 Q. And for you to have the degree of education,
22 right?

23 A. I have the what?

24 Q. The degree of your education, you and your
25 colleagues, you spoke about how you keep up-to-date on all
26 this information as being a medical physician, right?

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██████████ - by Defendant ██████████ - Cross/██████████

A. Yes.

Q. So in this situation you're talking to the patient, do you tell the patient, at all, anything other than what's in your video, which says that your success rate is nearly or reaches a hundred percent?

A. The consultation with the patient is not a film clip. It's an intense dialogue. The medical history is obtained, the patient's goals are reviewed, the patient is examined, the consultation allows the patient time to ask and have all of their questions asked and answered; the risks, the benefits, the alternatives, the possible complications are explained. So it's not a few minutes of a video clip.

(Continued on next page.)

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 MR. [REDACTED]: I move to strike as not being
3 responsive.

4 Can I have it read back?

5 THE COURT: Overruled. I'll allow it to
6 stand.

7 Q. Doctor, all I'm asking you is, when you sit down
8 with the patient, your patients see your video, it says your
9 success rate reaches nearly 100 percent. Do you tell them
10 anything else other than that?

11 A. Oh, I tell them a lot of things other than that.

12 Q. I mean, about your success rate.

13 A. I tell them what the risks are, and if they're at
14 greater risk or lesser risk, and the care is taken preparing
15 the patient for minimizing risk, but risks exist. So I
16 don't minimize the risk which means the possible
17 complication and complications can happen. That is
18 explained to the patient.

19 Q. My question to you is, do you tell the patient
20 that the complication rate is nearly in your experience less
21 than, because you're almost at nearly 100 percent success
22 rate, do you tell them it's less than one percent with me?

23 A. You are taking everything out of context.

24 Q. No, I'm sorry, I don't think I am.

25 MR. [REDACTED]: I object to this.

26 THE COURT: Sustained.

1 [REDACTED] - by Defendant - Cross [REDACTED]

2 MR. [REDACTED]: Withdrawn. Withdrawn.

3 Withdrawn.

4 Q. With respect to the discussion that you have about
5 the risk, you're saying that you tell your patients then
6 that there's a risk of nipple retraction when you are doing
7 a breast reduction, right?

8 MR. [REDACTED] Objection.

9 THE COURT: Overruled.

10 A. I discuss the possible complications, and I
11 address the nipple, particularly in a younger woman, and the
12 variations can be anywhere from an inverted nipple, which is
13 unusual, it's not a common event, to necrosis of the nipple
14 where the entire nipple could be lost, where there could be
15 an open wound and excessive scarring can happen. That is
16 explained thoroughly to the patient.

17 Q. Do you know that in this case Dr. [REDACTED] didn't tell
18 [REDACTED] about retraction or inverted nipples?

19 A. Well, not everybody does. They discuss the
20 nipple.

21 MR. [REDACTED] Excuse me.

22 Q. So with respect --

23 MR. [REDACTED]: Excuse me.

24 THE COURT: We will break here for lunch.

25 Don't talk about the case among yourselves or
26 with anybody else. Don't do any independent research.

Proceedings

1
2 Mr. [REDACTED]

3 MR. [REDACTED] Thank you, your Honor.

4 With your permission.

5 Q. Doctor, I left off with the question, and the
6 question was, you know from the testimony that you reviewed,
7 and what you were told by Mr. [REDACTED] and the testimony
8 specifically of Dr. [REDACTED] that she never told Mara or her
9 mother specifically that retracted nipples could happen as a
10 result of this surgery; you know that, right?

11 A. Yes.

12 Q. Okay.

13 THE COURT: I just want to tell the jury
14 that there is no claim in this action for failure to
15 obtain informed consent.

16 MR. [REDACTED] Correct.

17 Thank you, your Honor.

18 THE COURT: Let's continue.

19 Q. Now, you said this was a meticulous surgery,
20 correct?

21 A. Yes.

22 Q. So meticulous, you said it takes sometimes
23 three-and-a-half to four hours, right?

24 A. Or longer.

25 Q. Or longer, right, that's what you said.

26 Sometimes it could take five or six hours, you

Proceedings

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said?

A. Yes.

Q. And I assume by virtue of that because this is a meticulous surgery, as you testified to, right?

A. Yes.

Q. It's complex, it's difficult, correct?

A. Well, it's complex, but it's a standard approach to a breast reduction.

Q. Okay. It's a complex surgery?

A. Right. It's not a difficult surgery.

Q. But, again, you read Dr. ██████ testimony.

Going to page 114, line six:

"Question: Do you recall it being complex?"

"Answer: No, I don't specifically recall it being complex."

Do you recall reading that question and answer?

A. I don't believe I read that portion.

Q. So your opinion then differs from Dr. ██████ opinion who did this surgery, right?

A. I'm talking about the surgery in general, that it is a complex operation, in my opinion.

Q. So your opinion differs from Dr. ██████ opinion then?

A. Apparently.

Q. Now, with respect to taking two, two-and-a-half

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hours, you read a lot of testimony about that aspect to do this surgery, right?

A. Yes.

Q. And you are aware that Dr. [REDACTED], [REDACTED], testified in this case about the length of time that it would take to do that type of surgery like that was done on Mara, right?

A. Yes.

Q. And it would be fair to say that your recollection of the testimony is that you said it would take two-and-a-half, three hours something like that?

MR. [REDACTED]. Objection.

THE WITNESS: She said two-and-a-half.

THE COURT: Overruled.

Q. Two-and-a-half. Thank you so much.

Do you also recall the testimony of [REDACTED]

A. I don't recall that case at all.

Q. What case?

A. [REDACTED].

I thought -- I misunderstood. The way you phrased the question, I thought it was somebody else entirely.

Q. Do you know who [REDACTED] is?

A. [REDACTED].

Q. [REDACTED], do you know who that is?

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A. I believe it's her mother.

Q. Yes.

So did you read her testimony?

A. I did, but not recently.

Q. How about her daily copy testimony from trial?

A. I did not read that.

Q. But you did read what she stated in her testimony at her deposition, you're saying?

A. Yes.

Q. So did Mr. [REDACTED] tell you what Dr. [REDACTED] told her and [REDACTED] as to how long it would take to do this surgery?

A. I don't recall him telling me.

Q. Okay. So, you're not aware that Dr. [REDACTED] told [REDACTED] and her mom that it would take about two-and-a-half to three hours?

MS. [REDACTED] Objection.

THE COURT: Overruled.

A. I'm not -- could you repeat that, please?

MR. [REDACTED]: Sure. Can we read it back?

THE COURT: Read it back, please.

(The testimony as requested was read by the reporter.)

A. No.

Q. So you said you don't anybody who can do this surgery in two-and-a-half, three hours, but now you have two

Proceedings

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2 people that can; do you understand that?

3 MR. [REDACTED]: Objection.

4 THE COURT: Overruled.

5 A. Yes.

6 Q. Do you understand that?

7 A. Yes.

8 Q. So you are saying to you that's something new that
9 you just learned from this trial?

10 A. No, I know that some people do reductions in two,
11 two-and-a-half hours, but it's a different operation than
12 the one that Dr. [REDACTED] performed.

13 Q. But you're not really familiar with the
14 Hall-Findlay technique as of August 25, 2010?

15 A. I am familiar --

16 MR. [REDACTED]: Objection.

17 THE COURT: Overruled.

18 A. I am familiar with that procedure as to when it
19 was introduced, and I don't know the exact date that Dr.
20 Findlay introduced her take on the superior pedicle, but I
21 am very familiar with the procedure since its inception.

22 Q. But you don't know when it was incepted, is that
23 the word?

24 A. I don't know. I never heard it.

25 Q. You don't know the date of inception. So you
26 don't know if it was 1995, '99, 2000, 2011, 2012; you don't

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know --

MR. [REDACTED]: Objection.

Q. -- right?

THE COURT: Overruled.

A. I don't -- I don't know when it was introduced, but I am very familiar with it. I am extremely familiar with it.

Q. You said in your video that you have there on your web that it's incumbent upon you and your colleagues to remain current with the medical education that's necessary to perform your job, did you not?

A. I did.

Q. And would you agree that it's not only incumbent upon you, it's incumbent upon all physicians who were doing breast reduction on or about August 25, 2010; would you agree with me?

A. I don't know about the date because I am still not familiar with the date, but taking your word for it, if 2010 was the beginning of Dr. [REDACTED]'s education and her refining over the course of the years, then that's when I was introduced to it. But do I remember the exact date? No, I don't.

(Continued on next page.)

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]

2 BY MR. [REDACTED]:

3 Q. Do you understand --

4 MR. [REDACTED]: Withdrawn.

5 Q. What is the date of the surgery here?

6 A. The date of the surgery goes back to when the
7 patient was 16 years old. So today I think she's 20, 21
8 years old.

9 Q. That's not my question. I'm asking you the date
10 of the surgery?

11 A. August 15. I have to do the arithmetic to go back
12 seven years, so that would be about 2010, August 25, 2010.

13 Q. So you understand when I'm asking about August 25,
14 2010, I'm not asking you about Hall-Findlay and when she
15 developed her procedure, I'm talking about the date of the
16 surgery. Do you understand that?

17 A. Well, you're jumping around, which I understand
18 you're not focused on each item. One minute it's the
19 surgery, the next is the technique.

20 Q. So you're testifying you're getting confused about
21 the dates?

22 A. I'm not confused at all.

23 Q. My questions to you have been on or before
24 August 25, 2010, whether or not you were familiar with the
25 Hall-Findlay technique, and your answer was I don't know
26 about that at that time?

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 MR. [REDACTED] Objection.

3 Q. And the time that I'm --

4 THE COURT: Sustained as to form.

5 Q. In the beginning of my cross-examination of you we
6 talked about your testimony is in reliance upon the medical
7 record. Do you have Dr. [REDACTED]'s medical record in front of
8 you, Doctor?

9 A. Yes, I do.

10 Q. Would you mind going -- we have the Bates stamp in
11 the right corner, it kind of makes it easy. It's at page
12 8/14. It's a fax imprint. Do you see that?

13 A. Page eight of 14.

14 MR. [REDACTED]: May I approach, please, your
15 Honor?

16 THE COURT: Yes.

17 (Pause.)

18 Q. We're talking about this page in the right-hand
19 corner?

20 A. Yes.

21 Q. Doctor, I want to ask you, can you take a look at
22 this, take your time. You've seen this before haven't you?

23 A. I've seen the record before.

24 Q. That's what I mean. As a matter of fact, you've
25 seen it several times?

26 A. Yes.

1 [REDACTED] - by Defendant [REDACTED] Cross [REDACTED]

2 Q. Can you tell me where on this page -- and this is
3 the first postoperative visit some six days later, after the
4 surgery, August 31, 2010, right?

5 A. Yes.

6 Q. Where does it say on this page there were
7 retracted nipples?

8 A. It says nipples viable with sensation, and it does
9 not say retracted nipples.

10 MR. [REDACTED]: Move to strike the beginning
11 part and ask if the rest of the answer stand, please.

12 THE COURT: Yes.

13 Q. Now, Doctor, now what I'd like to do is, you see
14 you're relying upon the medical record that says positive
15 sensation, left greater than right. Right?

16 A. Yes.

17 Q. Now, do you know if any part of this record used
18 by Dr. [REDACTED] is a template?

19 A. I don't know.

20 Q. You never consulted her daily copy about that,
21 right? Right, Doctor?

22 A. Yes.

23 Q. And you never spoke to Dr. [REDACTED] about that, right,
24 Doctor?

25 A. Yes.

26 Q. So therefore, you're relying upon a medical record

1 ██████████ - by Defendant ██████████ Cross/██████████
2 that's generated by Dr. ██████████ Would that be a correct
3 statement?

4 A. Yes.

5 Q. And just so you know, Dr. ██████████ testified that she
6 typed everything here and that she used her template. I'd
7 like you to please assume those facts. Can you do that?

8 A. Sure.

9 Q. Now, with positive sensation, do you know from
10 Mara's testimony, whether it's daily copy from this trial or
11 from EBT testimony, whether or not she ever had nipple
12 sensation; do you know?

13 A. That was variable.

14 Q. You're saying from ██████████'s testimony that you read,
15 our daily copy from this trial --

16 A. I didn't see the daily copy from ██████████'s trial
17 testimony.

18 Q. You weren't supplied that?

19 A. No.

20 Q. So did Mr. ██████████ tell you what she said about
21 that?

22 A. Said my -- yes.

23 Q. So he told you that -- let me finish, Doctor,
24 please, the question.

25 Mr. ██████████ told you that ██████████'s testimony
26 before this jury was that her nipple sensation was variable?

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 A. No. Her -- she did not have nipple sensation.

3 Q. Oh. So with regard to this fact, you know then --
4 do you have any reason to disagree with what [REDACTED] testified
5 to and what Mr. [REDACTED] told you? Do you have any reason to
6 disagree with that?

7 A. No.

8 Q. So again, you, as an expert physician -- and you
9 have to go by the truth and veracity of what you read,
10 correct?

11 A. Yes.

12 Q. So your understanding when you're reviewing this
13 case, so to speak, the glasses that you're looking through
14 or the prism that you're looking through, are these records
15 generated by Dr. [REDACTED]?

16 A. Yes.

17 Q. Now, you're saying complications are from surgery,
18 that happens, right?

19 A. Yes.

20 Q. You agree with me that you, as a physician, if
21 there's a complication -- I'm going to use your word,
22 complication, but if there's a complication you want to
23 learn from it, do you not?

24 A. Yes.

25 Q. You want to become better, correct?

26 A. I want to do my best to avoid a complication.

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]

2 Q. Correct, and that's by virtue of your planning,
3 your education, training and background and experience,
4 right?

5 A. Yes.

6 Q. So that before you start a procedure, you want to
7 make sure you have all those components in place, would you
8 agree?

9 A. Yes.

10 Q. We go to the next date, October 12, which is page
11 9 of 2014, right?

12 A. Yes.

13 Q. Now, you have an understanding as to why this is
14 handwritten, right?

15 A. Yes.

16 Q. Crown is down, the computer is down so she hand
17 wrote her note, correct?

18 A. Yes.

19 Q. Now, we have here a complaint about the Crown in
20 the first two lines. Then it talks about nipple still
21 retracted?

22 A. Yes.

23 Q. Now, still to you means still -- meaning it's
24 present on this day, right?

25 A. Yes.

26 Q. But it's still means that it was from before,

1 [REDACTED] - by Defendant [REDACTED] - Cross [REDACTED]

2 right?

3 A. Yes.

4 Q. And you're aware of an e-mail that was sent from
5 [REDACTED] to Dr. [REDACTED] about that, right?

6 A. Yes.

7 Q. You've read that e-mail, correct?

8 A. Yes.

9 Q. Now, when a patient of yours makes an inquiry to
10 you, would you agree that you try as best as you can to
11 respond to that inquiry, correct?

12 A. Yes.

13 Q. Would it be correct to say if a question is asked
14 of you that you give a reply which is thoughtful, would you
15 agree?

16 A. Yes.

17 Q. That you try to make sure that you give that
18 patient enough information so as to satisfy that patient.
19 Would you agree?

20 A. Yes.

21 Q. And with respect to that e-mail, you saw that a
22 request was made, there were two questions, one about
23 Steristrips, you know, do they fall off or not, what should
24 I do with them? There is a second question about the fact
25 that I can't still see the nipples, is that normal? You
26 read that, right?

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED]

2 A. Yes.

3 Q. And you also read that the second part was never
4 responded to by Dr. [REDACTED], right?

5 A. Yes.

6 Q. So in that respect, would you agree with me that
7 the -- Dr. [REDACTED] was not thoughtful in her response to the
8 patient's inquiry; would you agree with that?

9 A. No.

10 Q. For you, the fact that Dr. [REDACTED] decided to
11 respond to the Steristrips but not respond to something
12 about retracted nipples is acceptable to you, would you
13 agree? That's your point of view?

14 A. I can't say yes or no to that.

15 Q. So let's put this in your shoes. Patient makes an
16 inquiry to you, something about retracted nipples.
17 Retracted nipples, that's something that's important, would
18 you agree?

19 A. Yes.

20 Q. Something that should not happen, right?

21 A. Right.

22 Q. And you say, right, it shouldn't happen because
23 it's not supposed to happen, right?

24 A. Yes.

25 Q. Has it ever happened to you in the Hall-Findlay
26 technique?

1 [REDACTED] - by Defendant [REDACTED] - Cross, [REDACTED]

2 A. No.

3 Q. That goes to -- would you agree with me, tell me
4 if I'm wrong, that goes to because of your experience in how
5 to do it, would you agree?

6 A. Yes.

7 Q. Would it go for your planning in how you do it,
8 would you agree?

9 A. Yes.

10 Q. Would you also agree that you have made sure that
11 you were educated in how to do that procedure properly,
12 would you agree?

13 A. Yes.

14 Q. Now, you said you can't respond to me yes or no
15 with respect to the fact that Dr. [REDACTED] did not reply.
16 Let me follow through with that a little bit.

17 On that point, if a patient has a concern
18 about something that's important, like retracted nipples,
19 you agree with me that that should be a concern to the
20 physician, would you agree?

21 A. Yes.

22 Q. And you, I think, reiterated very articulately in
23 your video that how a patient feels is important, right?

24 A. Yes.

25 Q. And you talked about the trust between you and
26 your patient, did you not?

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 A. I did.

3 Q. That is a critical component to the
4 physician/patient relationship, correct?

5 A. Yes.

6 Q. And if someone has a question, you want to try the
7 best you can to answer that question because then that's
8 going to make the patient feel better, would you agree?

9 A. Yes.

10 Q. And that the goal is that you don't want to keep
11 the information to yourself, you want to impart your
12 education, training and experience to that patient when that
13 patient has a question?

14 A. Yes.

15 Q. And you saw that that was not done in that e-mail
16 by Dr. [REDACTED] right?

17 A. Yes.

18 Q. So now, would you agree with me that if
19 somebody -- if a patient has a question about something
20 that's very important, and it's something of a concern,
21 would you agree that not responding to that patient and
22 answering that question is a departure from acceptable
23 medical practice?

24 A. No.

25 Q. You're just saying it's not good but not a
26 departure from accepted medical practice, right?

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 A. Yes.

3 Q. Because by not responding, you're depriving
4 information to the patient, right?

5 A. Not necessarily.

6 Q. Now, complications, the best way -- you know that
7 when you --

8 MR. [REDACTED]: Withdrawn.

9 Q. You know that when you generate a medical record
10 that maybe one of your patients may go see somebody else for
11 a second opinion, right?

12 A. Yes.

13 Q. And that the other doctor may rely upon your
14 medical record, right?

15 A. Yes.

16 Q. What you saw, right?

17 A. Yes.

18 Q. What your opinion is, correct?

19 A. Yes.

20 Q. And so you try to create a medical record that,
21 let's say you're not even there that day. You have
22 partners?

23 A. No.

24 Q. You're by yourself?

25 A. Yes.

26 Q. So it is impossible for you to remember every

1 [REDACTED] - by Defendant [REDACTED] - Cross/[REDACTED] i

2 patient; isn't that right?

3 A. Yes.

4 Q. You have a lot of patients, do you not?

5 A. Yes.

6 Q. You're a very successful plastic surgeon, are you
7 not?

8 A. Yes.

9 Q. So how many patients do you see in a given day,
10 would you say?

11 A. It's variable.

12 Q. Between what and what?

13 A. Fifteen to 20.

14 Q. You see patients how many days a week?

15 A. A couple.

16 Q. Again, I apologize, is a couple two or three?

17 A. Again, it's variable. Depends on the surgical
18 schedule, depends on morning or afternoon, so it's a
19 variable.

20 Q. So you have a surgery day, right?

21 A. I have surgery days. So sometimes it's a Monday,
22 sometimes it's a Friday. It's variable.

23 Q. It depends upon what your surgical suite can give
24 you or what the hospital can give you, right?

25 A. Both, yes.

26 Q. So it is impossible for you to remember each and

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]
2 every patient, so that's why you want to create a detailed
3 record, so that you can refer back to it yourself, don't
4 you?

5 A. Yes.

6 Q. So what you see on day six versus what you see on
7 six weeks later, or three and a half months later, you will
8 then have a picture, so to speak, by the virtue of your
9 written word, would you agree?

10 A. Yes.

11 Q. So therefore, with regard to just the written
12 word, let's take the written word. Now, we established that
13 let's put that aside. Let's go to photographic evidence.

14 One of the things that is important for you
15 as a plastic surgeon is to document postoperative results,
16 would you agree?

17 A. Yes.

18 Q. Let's say if you have a complication, you're going
19 to want to document that complication, are you not?

20 A. Yes.

21 Q. You do that not only for yourself so that you can
22 learn from the complication, but you also do it because you
23 want to document it for the chart; you agree?

24 A. Yes.

25 Q. In addition to that, in the event that you want to
26 do a revision sometimes, there's been testimony about

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]
2 this, that you need photographic evidence for the health
3 insurance company; you know that, right?

4 A. Yes.

5 Q. Because they don't want to pay for something if
6 it's not necessary. Fair statement?

7 A. Yes.

8 Q. So therefore, there's two methodologies for you to
9 document what happens to your patient. There's the written
10 document and then there is the photographic document, right?

11 A. Yes.

12 Q. So on August 31, 2010, six days after, you do not
13 have anything written with respect to -- by Dr. [REDACTED]
14 concerning what she visualized concerning the nipples, other
15 than her saying no positive sensation left greater than
16 right. Is that a fair statement?

17 A. Yes.

18 Q. Now, the second day it says nipples still
19 retracted. I think it's inversion --

20 MR. [REDACTED] Incision.

21 MR. [REDACTED]: I'm sorry, wait a second.

22 Thank you.

23 Q. Nipple still retracted. Do you know what that
24 says after that, Doctor?

25 A. Incisions -- I think it's clean.

26 Q. Okay. Now, where it says left slightly greater

1 ██████████ - by Defendant ██████████ Cross/██████████
2 than right, what is that talking about? It's talking about
3 symmetry, right?

4 A. Left slightly smaller. Right, something quite
5 balanced. Right -- but -- left slightly larger but quite
6 balanced. Left slightly greater than right but quite
7 balanced.

8 Q. Is that talking about symmetry of the breast?

9 A. Yes.

10 Q. The ones you talked about that you say are
11 beautiful postoperatively, right?

12 A. Yes.

13 Q. Can we go back up here, nipple still retracted.
14 What's the word after?

15 A. I cannot make that word out.

16 Q. Did you ever ask Mr. ██████████ to ask Dr. ██████████ to tell
17 you what that word is?

18 MR. ██████████: Objection. It's -- object to
19 this.

20 THE COURT: Sustained.

21 Q. Which nipple is more retracted, do you know?

22 A. From this note I don't.

23 Q. How deep is the retraction?

24 A. It just says retracted, it doesn't give any
25 measurement as to depth.

26 Was that the question?

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 Q. Well, I was going to ask that and thank you for
3 anticipating my question. So where are the measurements?

4 A. I've never heard of measuring a nipple retraction.

5 Q. You just said measurement?

6 MR. [REDACTED] Objection.

7 THE WITNESS: I said I don't see any evidence
8 of measurement, if that was your question.

9 Q. Why did you say that?

10 A. Because that was your question.

11 Q. Doctor, if you could listen to my question.

12 Again, if you can't answer my question please
13 tell me to rephrase it, I absolutely will.

14 Can you tell me, please, what about the
15 areola complex, is that described here?

16 A. The areola is not mentioned.

17 Q. Is there any description whatsoever of the areola
18 complex?

19 A. No, but as I mentioned before --

20 Q. The answer is no. Thank you.

21 So now with respect to the visual picture of
22 what we've got here from this October 1, 2010 handwritten
23 statement, you don't have much other than nipple still
24 retracted, right?

25 A. Yes.

26 Q. That's not the way you would do it, right?

1 [REDACTED] - by Defendant [REDACTED] Cross/[REDACTED]

2 MR. [REDACTED] Objection.

3 THE COURT: Sustained.

4 Q. So now, let's go -- oh, also it says here on the
5 bottom -- what does it say on the bottom?

6 A. The bottom of what?

7 Q. The bottom of the page, starting the two lines
8 down on the bottom before the signature, do you know what
9 that says?

10 A. I will. Revision of nipple. Return to office
11 February 2011.

12 Q. Do you think that it says I will?

13 A. I thought that's what the writing is. That's my
14 impression.

15 Q. Do you recall me asking Dr. [REDACTED] at her deposition
16 what it says, and then she told us what it says?

17 A. I don't recall that.

18 Q. Do you think that you being able to know what this
19 says is important in order for you to give testimony to this
20 jury?

21 A. Well, I think my -- yes.

22 Q. And you don't know all the words?

23 A. It's revision of nipple. She's recommending the
24 revision of a nipple.

25 Q. Are you saying that she recommended the revision
26 of the nipple to [REDACTED] or her mother?

1 ██████████ - by Defendant ██████████ Cross/██████████

2 A. That's what this note indicates.

3 Q. Good to you?

4 A. Yes.

5 Q. Could you be wrong?

6 MR. ██████████ Objection.

7 MS. ██████████ Objection.

8 THE COURT: Sustained.

9 (Continued on next page.)

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1 [REDACTED] - by Defendant - Cross

2 Q. The nipple being one, right?

3 A. Yes.

4 Q. What about the other nipple?

5 MS. [REDACTED] Objection.

6 THE COURT: Overruled.

7 Q. What about the other nipple, Doctor?

8 A. It could be just the way she documents her record.

9 Q. You mean faulty?

10 MR. [REDACTED] Objection.

11 MS. [REDACTED] Objection.

12 A. I am not saying faulty.

13 THE COURT: Sustained.

14 Q. You mean she made an error because she said it in
15 the singular?

16 A. No.

17 Q. You said that the nipple issue of retraction was
18 important, right?

19 A. Yes.

20 Q. You said it was concerning, right?

21 A. Yes.

22 Q. Did you know that Dr. [REDACTED] didn't think much of the
23 nipple retraction?

24 A. Well, she was observing the patient.

25 Q. It's a yes or no; do you know?

26 A. I can't answer that.

1 [REDACTED] - by Defendant - Cross

2 Q. Doctor, --

3 A. I cannot answer that question.

4 Q. Okay. So let's read it. Let's go to page 221.

5 MR. [REDACTED]: Can you identify what you are
6 reading from?

7 MR. [REDACTED]: [REDACTED]'s deposition, please.

8 Q. Okay.

9 "Question: Is it correct to say that you
10 did not answer the question of [REDACTED] as set forth in the
11 September 30 2010 e-mail concerning, also I can't see
12 any nipple, is that normal?

13 "Answer: I did not specifically address
14 that, but she was telling me that the Steri-strips were
15 still on her, so I didn't think much of the fact that
16 she couldn't see her nipples at that time, and I
17 thought that, you know, if she thought I didn't
18 adequately answer her questions, she would e-mail me
19 back."

20 So, did you hear me read that question and that
21 answer?

22 A. Now?

23 Q. Yes.

24 A. Yes.

25 Q. Do you understand that that is the testimony of
26 Dr. [REDACTED]

1 [REDACTED] - by Defendant - Cross

2 A. Yes.

3 Q. Okay. So now it's important to you and it's
4 concerning to you, as you just testified, correct?

5 A. Yes.

6 Q. But with regard to Dr. [REDACTED], she didn't think
7 much of it?

8 A. Well, she explains it in her answer that she had
9 Steri-strips applied to the nipple areola complex, and it
10 was, as I interpret this, her sense that the Steri-strips
11 were camouflaging the inversion if it was four days later.

12 Q. Can you please assume the following: That Dr.
13 [REDACTED] testified to this jury that the Steri-strips were
14 only on the incision, not over the nipple; can you please
15 assume that? Can you assume that, please?

16 A. Yes.

17 Q. So with regards to that, whether she pulls them
18 off and maybe she bleeds or not, or the nipples are
19 inverted, you agree with me that the nipple inversion,
20 retraction, is much more significantly important than
21 Steri-strips? Would you agree with me?

22 A. No, because --

23 Q. Would you agree with me? That's all I want to
24 know; yes or no?

25 A. No. No. No.

26 Q. To you the fact that whether or not the

1 [REDACTED] - by Defendant - [REDACTED]
2 Steri-strips fall off or not or should fall off or not is
3 more important than retracted nipples; that's your
4 testimony?

5 A. No.

6 Q. Okay. Do you agree that it's not your intent as a
7 plastic surgeon to have the nipples above a bra line?

8 A. Correct.

9 Q. Okay. And if that -- when you were asked that
10 question --

11 MR. [REDACTED]: The photos are right in front
12 of her.

13 MR. [REDACTED]: Thank you so much.

14 Q. With regard to the height of the nipples, would
15 you agree with me that there's a rule of thumb that you
16 plastic surgeons follow which is if your nipples are just a
17 little lower, it's better than being a little higher; would
18 you agree?

19 A. Not necessarily.

20 Q. Well, Doctor, would you agree with me that in
21 order to lower the nipples then you are going to have scars
22 that are going to be seen above the nipple areola complex,
23 and that's why it's easier to move them up because then the
24 scars would be underneath the breast rather than moving them
25 down; would you agree with me?

26 MR. [REDACTED]: Form.

1 [REDACTED] - by Defendant - Cross

2 A. No.

3 THE COURT: I'll allow it.

4 Q. With regard to the height of the nipple areola,
5 and you can see from the photographs there are two different
6 bras that are being used; you see that, right?

7 A. I have to find that picture.

8 Q. One pink, one black. There are two pictures.

9 A. Yes.

10 Q. You have those two pictures in front of you?

11 A. Yes, yes.

12 Q. Would you agree with me that that is not the way
13 the nipples are supposed to be on a human being? Would you
14 agree with that?

15 A. No.

16 Q. So what I heard you say though when Mr. [REDACTED]
17 asked you was it could be because of the bra?

18 A. Yes.

19 Q. So, in other words, is it your testimony that what
20 [REDACTED] did was like put on a smaller sized bra to
21 push up her breasts in order to shove the nipple out so we
22 can take a picture of that to show to the jury; is that what
23 you are saying?

24 MR. [REDACTED]: Objection.

25 THE COURT: Sustained.

26 Q. When you are saying that the bra could do it, you

1 [REDACTED] - by Defendant - Cross

2 have two separate bras there, okay.

3 A. Yes.

4 Q. Let me ask you, Doctor, if we came into court, if
5 I had three bras, different bras, would that make a
6 difference to you?

7 A. No.

8 Q. If I had five different bras, would that make a
9 difference to you?

10 A. That doesn't matter.

11 Q. How about this, how about if I came in here, into
12 court, and gave you 100 different pictures of a bra showing
13 the nipples above it, would that satisfy you?

14 MR. [REDACTED] Objection.

15 THE COURT: Sustained.

16 Q. Would that satisfy you?

17 THE COURT: Sustained.

18 Q. If I had 100 pictures of 100 different bras with
19 her nipple above the bra line, would that satisfy you that
20 the height of the nipples are wrong?

21 MR. [REDACTED] ATTY objection.

22 THE COURT: Sustained.

23 MR. [REDACTED]: I didn't hear that.

24 THE COURT: Sustained.

25 MR. [REDACTED]: I am sorry, Judge.

26 Q. Now, so with regard to [REDACTED] you are saying the

1 [REDACTED] - by Defendant - Cross

2 height of the nipples are fine?

3 A. In Dr. [REDACTED]'s post-op picture they are
4 beautiful.

5 Q. That's not my question.

6 A. I am saying they are fine.

7 Q. I am asking you about -- the height of her nipples
8 are fine?

9 MR. [REDACTED] Objection. Asked and answered.

10 Q. I didn't ask you about Dr. [REDACTED].

11 THE COURT: Enough, please.

12 Ask your question.

13 Q. Is it your testimony to this jury that the height
14 of Mara's nipples are fine?

15 A. Yes.

16 Q. So you've had then other patients come to you with
17 their bra where their nipples are above the bra line?

18 MR. [REDACTED]: Objection.

19 THE COURT: Overruled.

20 A. The bra is not part of the physical examination.

21 Q. That's not my question.

22 THE COURT: But that's the answer that you
23 got. Let's ask another question.

24 Q. I am not asking you if the bra is part of the
25 physical examination.

26 THE COURT: Ask another question, please.

1 [REDACTED] - by Defendant - Cross

2 Q. What I am asking you is, please, your patients,
3 when they come in to see you, do they tell you, hey, Dr.
4 Moynahan, my nipples are above the bra line?

5 MR. [REDACTED] Objection.

6 THE COURT: Sustained.

7 Q. With regard to this particular procedure, would
8 you agree with me that there was a retraction of the nipple
9 areola complex on the right breast?

10 A. Which picture are you referring to?

11 Q. I am not referring to any picture.

12 A. Yes.

13 Q. Would you also agree that there is an indentation
14 laterally along the inframammary fold of the left breast?

15 A. Yes.

16 Q. Would you agree with me that there was also
17 retraction of the nipple areola complex of the left breast
18 with depression of the whole nipple areola complex?

19 A. Yes.

20 Q. Would you also agree with me that there is an
21 indentation inferolateral of the left breast?

22 A. Yes.

23 Q. Would you also agree with me that there was
24 irregular contour inferiorly of the right breast and the
25 left breast?

26 A. Yes.

1 [REDACTED] - by Defendant - Cross

2 Q. Would you also agree with me that you have learned
3 that the outer side of both breasts are numb?

4 A. I remember hearing that, reading that, yes.

5 Q. That's not supposed to happen, right?

6 A. Well, it could happen.

7 Q. Okay.

8 A. That's one of the risks of surgery.

9 MR. [REDACTED]: I can't hear an answer.

10 THE COURT: That's one of the risks of
11 surgery.

12 A. Loss of sensation.

13 Q. You are saying that's what you tell your patients?

14 A. That sensation is part of the discussion.

15 Q. Sensation of the nipple?

16 A. And the entire operative site.

17 Q. Okay. So that's what you tell your patients?

18 A. Yes.

19 Q. Because you know that can happen?

20 A. Yes.

21 Q. So, you understand though that [REDACTED] has no
22 sensation in her nipples?

23 THE COURT: Since.

24 A. Yes.

25 Q. From the date of the surgery until today's date,
26 you understand that?

1 [REDACTED] - by Defendant - Cross

2 A. Yes.

3 Q. You also understand that one of her complaints,
4 you may disagree, but one of her complaints is that her
5 nipples are too high?

6 A. Yes.

7 Q. Now, that's nine separate things, would you agree
8 with me, that I just read to you?

9 A. I wasn't counting.

10 Q. I did. It's nine separate things that you agreed
11 to that happened, and you agreed that they happened as a
12 result of this surgery, right?

13 A. Yes.

14 Q. I mean, these things, these nine things that I
15 have just mentioned, she didn't have before the surgery,
16 right?

17 A. Yes.

18 Q. And you understand, like what you said in your
19 video, that a woman and her breasts, it's not just the fact
20 that you want to make them smaller, and you want to make
21 sure that she feels good about herself; would you agree?

22 A. It's one of the goals, but this was a
23 reconstructive surgery so that --

24 Q. Did you say reconstructive surgery?

25 A. Yes, breast reduction is a reconstructive surgery.
26 The patient had the surgery done because of significant

1 [REDACTED] - by Defendant - Cross

2 physical complaints.

3 Q. So reconstructive, not reduction, reconstruction,
4 you are saying?

5 A. Reduction is reconstruction.

6 Q. So you use the words synonymously?

7 A. In this instance, yes.

8 Q. Do you know if Dr. [REDACTED] did?

9 MR. [REDACTED] Objection.

10 A. I don't know.

11 THE COURT: She doesn't know. I will let
12 that answer stand.

13 Q. So with regard to this undertaking, would you
14 agree that when you take, undertake to operate on a woman's
15 breasts, that that is something that is very important, and,
16 you know, it's important to the patient, correct?

17 A. Yes.

18 Q. Especially to a [REDACTED] year old, correct?

19 A. Yes.

20 Q. Right. And you make sure that each and every time
21 that you, when you take this undertaking, that you make sure
22 that you do it right; would you agree?

23 A. Well, my goal --

24 Q. To the best of your ability?

25 A. My goal is to do it to the best of my ability.

26 Q. With your education, training and experience at

1 [REDACTED] - by Defendant - Direct [REDACTED]

2 the time that you do it, correct; Doctor?

3 A. Yes.

4 MR. [REDACTED]: Thank you for your time, your
5 Honor.

6 MR. [REDACTED]: Very, very short, your Honor.

7 REDIRECT EXAMINATION

8 BY MR. [REDACTED]

9 Q. When you got the records several years ago, and
10 then you and I had been speaking about the breast surgery,
11 and the standard of care, and the questions that I asked
12 you, as well as Mr. [REDACTED], did you assume that this was a
13 memory contest on your part as far as the particulars of the
14 visits and the ins and outs of the notations?

15 MR. [REDACTED]: Objection.

16 THE COURT: Sustained. Leading.

17 Q. When you review a case like this in relationship
18 to retaining all the, let me say, particulars or nuances of
19 things, how do you review a case with that focus on the
20 particulars, I don't mean the surgery, I mean the incidental
21 things he is asking you about?

22 A. Well, I had to pay attention to what the
23 complaints are of the patient and focus on that.

24 Q. Let me ask you, the nine things, the last one was
25 the height of the nipples, the numbness, the nipple
26 retraction, for all the time it lasted, from August 25th,

1 [REDACTED] - by Defendant - Direct [REDACTED]
2 August 31st, up until finally the resolution of that after
3 January of 2012 with Dr. [REDACTED], did all of those eight or
4 nine things in your opinion require revision?

5 MR. [REDACTED]: Objection.

6 THE COURT: Sustained.

7 Q. Doctor, what was the necessity for revision in
8 this case given the breast reduction that happened? Why was
9 this person a revise candidate?

10 A. To improve the appearance of the breast.

11 Q. Now, counsel asked you about the e-mails, the
12 August 31 situation, the October 10th, and the --

13 MR. [REDACTED]: What's the matter?

14 MR. [REDACTED]: It's leading.

15 THE COURT: No, no, no. He is giving a
16 foundation for his question.

17 Q. Counsel asked you about the e-mails, the first
18 postoperative visit, the October 1, where the computer was
19 down and the doctor is using her handwriting, and the
20 January. January was from August, September, October,
21 November, December, roughly four months and two-and-a-half
22 or three weeks until January 11, not even six months.

23 According to proper practice, should this patient
24 be operated upon for whatever revision she needs within that
25 short period of time according to the standard of care, in
26 your opinion?

Proceedings

1
2 MR. [REDACTED]: Objection.

3 THE COURT: I'll allow it.

4 A. No.

5 Q. Why not?

6 A. Because the wound is still healing, the fibrosis
7 is ongoing, the collagen is remodeling. It would be cutting
8 into cement; you couldn't mobilize the tissue to affect a
9 proper repair.

10 MR. [REDACTED]: I have nothing further.

11 Thank you, Doctor.

12 MS. [REDACTED]: No questions.

13 Thank you, your Honor.

14 MR. [REDACTED]: No questions by me.

15 THE COURT: Thank you.

16 You can step down.

17 THE WITNESS: Thank you, your Honor.

18 (Witness excused.)

19 THE COURT: Mr. [REDACTED], on behalf of Dr. [REDACTED]
20 do you have other witnesses?

21 MR. [REDACTED]: I do not.

22 THE COURT: Do you rest?

23 MR. [REDACTED]: I could say that I want to
24 spend some time, but I want to rest.

25 THE COURT: On behalf of [REDACTED]

26 MS. [REDACTED]: Your Honor, I have no witnesses

Impeachment of someone who has made a prior statement inconsistent with his trial testimony.

Q. Sir, you testified on direct that you saw that the light was red for my client, true?

A. True.

Q. You have no doubt about that?

A. Correct.

Q: In fact, you have a specific recollection as you sit here now of the color of the light?

Now let the jury know that something is awry. Let them know that the battleground has been set:

Q. Sir that wasn't always your position, was it?

A. Yes it was.

Q. Isn't it a fact that you never, ever saw the color of that light?

A. No it is not.

Now, establish the existence of that prior statement:

Q. You spoke to an investigator on the day of the accident, true?

A. True.

Q. You told him you never saw the color of the light, correct?

A. No.

Q. He was writing down notes as you were talking, wasn't he?

A. Yes

Q. He prepared a statement as to what you said, right?

It is very important that you next establish the accuracy of the statement:

Q. You signed that statement didn't you?

A. Yes.

Q. You were aware of the importance of that statement, weren't you?

A. Yes.

Q. You read it before you signed it, true?

A. True.

Q. You checked it for accuracy, right?

A. Right.

Q. It was accurate, true?

A. True.

Q. You would never sign a statement that wasn't accurate, would you?

A. No.

Now, have the document marked for identification. Ask to approach the witness, and drive your point home:

Q. I show you this document marked as plaintiff's one for identification and ask you, isn't it true that on the date of the accident you said you didn't see the color of the light?

A. Yes.

Q. There is no question about that, right?

A. Right.

Notice the total control you can have over the witness. There was no room for him to explain away the inconsistency. You did not even have to offer the document into evidence. This is particularly important where the statement has additional information which hurts your case.



Closing Arguments

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SUMMATIONS IN A CIVIL CASE: PIECES OF THE PUZZLE

By Jesús M. Zeno, Esq.

Summation is trial counsel's last opportunity to convey to the jury the facts of the case in such a way that the verdict will be rendered in his client's favor. An outline of the summation should be made before the note of issue is filed. In some cases, the closing arguments may be outlined at the time the investigation of the case is completed and prior to the commencement of the action. Creating an outline to the closing argument at the inception of the case will allow you to better prepare your case, your witnesses and better conduct depositions. In addition, the outline will facilitate trial counsel's presentation of the evidence during trial. And, it will enable counsel to put together all of the pieces of the case in a succinct and clear fashion during summation.

The outline should have a beginning, middle and an end. Each of these parts may be modified as the trial moves along without drastically changing the gist of the argument. The beginning should address the key conflicts (comparative negligence compared to no negligence) or (causally related injuries compared to an exacerbation of a prior latent condition). The middle part of the outline must point to each testimony, pleading, photo, video or document that relates to the strength of the client's case. However, do not forget to address any alleged weaknesses in the evidence. Use the evidence to perform the balancing test by explaining the problems in the case against the strengths of the case. Try to

diminish its effect on the case in chief. Thus, the strength of the case must outweigh any alleged weakness inferred by the proof. However, do not spend too much time explaining the bad evidence because the jury may forget the strength of your case. The end of the outline should contain catch phrases that relate to the evidence and strength of the case. The intent is for the jury to remember the phrases during the deliberation. The phrases should be tied into the facts in evidence that are highly likely to support the party's contentions.

Deliver your outline to the jury as objectively as possible with the evidence in support thereof. Do not express your opinion. The end result should be that the jury believes that trial counsel presented the truth in an objective and fair way.

In addition, utilize the interrogatories that the jury will read and answer during deliberation. Marshal the facts in your outline to each question that the jury has to answer. For example, in the attached interrogatory, I read the question " Was the Defendant Peralte Bros., Inc. negligent ?" to the jury and recommended that the answer should be "Yes" because the landlord replaced a steady light in the staircase with a sensor light in direct violation of the New York State Buildings Department Code which requires that a light be illuminating the staircase 24 hours a day seven days a week where no windows are available. The landlord's actions also created a hazardous condition because the sensor light did not remain on long enough to allow the plaintiff to complete her walk down the staircase in the

predawn hours on her way to work. Thus, it was also the proximate cause of the accident. This was a simple and concise way to tell the jury the defendant's negligence was the proximate cause of the accident. The jury rendered a liability verdict in favor of my client.

The use of the interrogatories during summation will allow the jury to better understand how to answer each question regardless of its degree of difficulty. The jury will appreciate the way trial counsel marshals the evidence in arriving at the answer to each question and will likely render a verdict in favor of your client. In conjunction with the interrogatories, use language of the law that the judge will charge the jury. If jury charge *PJI 2:77, Duty Towards Others*, will be made to the jury, you may use similar language in your summation without charging the law to the jury. For example, you may say that the defendant driver failed to see the other vehicle that was already in the intersection immediately before the accident.

More importantly, maintain as much eye contact with the panel as possible. Refer to but do not read from your outline. If you read from your outline, you will not maintain any connection with the jury; the summation will not be conversational and will not be fluid. Trial counsel must demonstrate knowledge of the evidence, confidence, a sense of comfort and passion when presenting the truth to the jury. Instead of the outline, use the deposition transcript

to point out the strength in your case or a problem with the adverse party's proof.

Use the pictures, videos and documents to support your outline.

On April 4, 2017, the Court of Appeals held that a party is not deprived of a fair trial if the adverse party during summation utilizes PowerPoint slides of the evidence. See, *People v. Anderson*, 29 N.Y.3d 69 [2017]. The court held that a visual demonstration during summation is evaluated in the same manner as an oral statement. The PowerPoint "slides depicting an already admitted photograph, with captions accurately tracking prior... testimony, might reasonably be regarded as relevant and fair ...commentary on theevidence, and not simply an appeal to the jury's emotions". *Id.* The Court held that when the jury has been properly instructed by the trial judge that what the lawyers say during summation is not evidence and that in finding the facts the jury must consider only the evidence, the PowerPoint slides can be used. *Id.* Although the *Anderson* case was a criminal trial, the decision also applies to civil cases.

Trial counsel can use the Power Point slide to prove to the jury that the defendant was negligent. The Power Point slides will allow the jury to understand the depth, width, height and length of the defect to decide on the question of constructive notice- negligence. See, *Taylor v. New York City Transit Authority*, 48 N.Y.2d 903[1979]. Each department of the Appellate Division has consistently followed the decision of the Court of Appeals in the *Taylor* case that a triable question of fact on the issue of constructive notice exists that can only be

determined by the jury when a photograph of the defect that was taken at or near the time of the accident is submitted. The rationale is that a jury can infer how long the defect existed prior to the happening of the accident. *See, Salvia v. Happauge*, 47 A.D. 3d 791 [2d Dept 2008]; *Sotomayor v. Pafos Realty, LLC*, 43 A.D.3d 905[2d Dep't 2007]; *Degrucio v. 863 Jericho Turnpike Corp.*, 1 A.D.3d 472 [2d Dept 2003]; *Leventhal v. Forest Hills Gardens Corp.*, 308 A.D.2d 434 [2d Dept 2003]; *Degiacomo v. Westchester County Healthcare Corporation, et. al.*, 295 A.D.2d 395 [2d Dept 2002]; *Atkins v. Francesca Realty Associates*, 238 A.D.2d 457 [2d Dept 1997]; *Farrar v. Teichol*, 173 A.D.2d 674[2d Dept 1991]; *Ferlito v. Great South Bay Associates*, 140 A.D.2d 408[2d Dept 1988]; *Calderon v. Noonan Towers Community LLC*, 33 A.D.3d [1st Dept 2006]; *Karten v. Consolidated Edison Company of New York, Inc.*, 109 A.D.2d 126[1st Dept 1986]; *Moons v. Wade Lupe Constr., Inc*, 24 A.D.3d 1005[3rd Dept, 2005]; *Kniffin v. Thruway Food Markets, Inc.*, 177 A.D.2d 920 [3rd Dept 1991]; *Reardon v. Benderson Development Co.*, 266 A.D.2d 869 [4th Dept 1999].

Place all of your proof in power point software as soon as you obtain them before trial.

The style trial counsel utilizes varies according to his or her personality and level of comfort. The novice should shadow a trial counsel who has similar personality and a style that is of interest to you. Preside as a judge in Mock Trial Competitions or develop your own style as you go along, The important factor to

remember is that you put together the pieces of the puzzle in a cohesive and clear way in order obtain a verdict in favor of your client. However, regardless of the style trial counsel exercises, counsel should be completely aware of the do's and don'ts of summation. Otherwise, a mistrial, violation of the Code of Professional Responsibility, contempt of court or a reversal on appeal will be the likely result.

RULES TO KNOW AND ADHERE TO

Wide latitude is given to trial counsel in presenting arguments to the jury during summation. *See, Acosta v. City of New York*, 153 A.D.3d 765 [2d Dept 2017]. The Court in *Acosta* held that during summation, an attorney "remains within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of a plaintiff's proof' without depriving the plaintiff of a fair trial". *Id.* [Citing, *See, Selzer v. New York City Tr. Auth.*, 100 A.D.3d 157, 163 [1st Dept 2012].

In fact, trial counsel can comment to the jury that the defendant did not prove that the plaintiff was negligent. Likewise, defense counsel can say that the evidence did not demonstrate any fault on the part of the defendant. Similarly, either party may comment on the percentage of fault of a party. Thus, counsel may properly make comments concerning the evidence provided that the comments do not deprive the adversary of a fair trial and the comments are not intended to distract or falsely sway the jury away from the truth.

In addition, trial counsel may comment on the value of the plaintiff's injuries provided that the court makes curative instructions to the jury as specified in C.P.L.R. § 4016 (b) (1-3).

However, counsel is forbidden to mention anything concerning insurance coverage for the accident in question if the purpose of the comment is for the jury to find the party liable. *See, Peters v. Wallis*, 135 A.D.3d 922 [2d Dept 2016]; *Grogan, et. al. v. Nizam, et. al.*, 66 A.D.3d 734 [2d Dept 2009]; *Alben v. Mid-Hudson Medical Group, P.C.*, 31 A.D.3d 471 [2d Dept 2006].

Comments of insurance during summation can be made by trial counsel provided that proof of insurance is in evidence for the purpose of demonstrating ownership and control of the instrumentality or to prove bias, motive or interest on the part of the IME physician. *See, Dominicci v. Ford, et. al.*, 119 A.D.3d 1360 [4th Dept 2014] [*Citing, Salm v. Moses*, 13 N.Y.3d 816, 818 [2009]]. A case by case basis approach is made by the trial court in allowing counsel to comment on insurance. Thus, unless it is absolutely necessary for the insurance information to be disclosed during trial, you can be setting yourself up for an appeal and a reversal of the verdict. *See, Peters, Supra* at 923.

More importantly, a thin line exists between prosecuting or defending a case zealously for your client and violating the court rules, the canons of ethics or the code of professional responsibility. *See, Smith v. Rudolph*, 151 A.D.3d 58 [1st Dept 2017]. In *Smith*, the defense counsel engaged in conduct that deprived the

plaintiff of a fair trial. The Appellate Court began its opinion by stating "*We will admire the work of an advocate who performs his or her duties with competence and diligence on behalf of a client. Competent and diligent representation, however, does not mean a lawyer should strive to "win" a case at all cost, if that means harming adversaries and their clients unreasonably and unnecessarily in the process and undermining the authority and integrity of the court.*" *Id.* at 58. The Court in *Smith* affirmed the trial court's decision to set aside the verdict and grant the plaintiff a new trial although the jury returned a liability verdict of 70% against the defendant and 30 % against the plaintiff.

The Court held that the fact that the jury returned a liability verdict against the defendant did not cure defense counsel's misconduct, which constituted fundamental error that deprived the plaintiff of substantial justice and likely affected the verdict. *Id.* The Court emphasized the more egregious conduct of defense counsel included ***denigration of two doctors that treated the plaintiff for the injuries she sustained in the accident.*** Defense counsel **made unsupported assertions that the doctors provided unnecessary treatment as part of a moneymaking conspiracy;** defense counsel's assertions of **his personal view** that the plaintiff was pursuing the lawsuit only because she wanted to ***"take the rest of her life off"*** were also egregious. *Id.* The Court held that defense counsel's denigration of plaintiff's witnesses and unsupported inflammatory comments throughout the trial appear to have been calculated to influence the jury

by considerations which were not legitimately before them and cannot be dismissed as inadvertent, thoughtless or harmless. *Id.*

In *Sanchez v. Manhattan and Bronx Surface Transit Operating Authority*, 170 A.D.2d 402 [1st Dept 1991], the conduct of the defense counsel during summation swayed the jury to render a defense verdict. The Appellate Court reversed the verdict and ordered a new trial because of the improper conduct of the defense counsel. Counsel for the defendant referred to MABSTOA as "**we**" and "**us**" and in summation referred to the defendant's case as "**my side of the story**" which placed her own credibility on the side of her client and *made herself an unsworn witness*. *Id.* [Citing, *Caraballo v. City of New York*, 86 AD2d 580 [1st Dept 1982]]. Defense counsel also characterized the plaintiff's case as a "**bunch of crock**", "**bunch of bunk**" and "**hogwash**". Defense counsel further referred to the plaintiff's medical expert as "**Here comes Howie**" and **misstated** that the expert had his privileges at New York Hospital revoked.

In *Chappotin v. City of New York, et. al.*, 90 A.D.3d 425, 426 [1st Dept 2011], *lv denied*, 19 N.Y.3d 808 [2011], the trial granted the plaintiff's motion to set aside the verdict. Justice Friedman held that defense counsel's entire summation was "*suffused with improper and highly prejudicial remarks*" whose purpose was to prejudice the jury against the plaintiff. *Id.* Defense counsel's references to plaintiffs "**playing the system**" and **being on disability benefits** so contaminated the trial as to deprive the plaintiff of a fair trial. *Id.*

Trial counsel may not bolster his case by accusing the witness of being a "liar". *Gregware v. City of New York*, 132 A. D.3d 51 [1st dept 2015]. Counsel cannot engage in an unfair and highly prejudicial attack upon the credibility of the adverse party's witness or attorney. See, *Berkowitz v. Merriott Corp.*, 163 A.D.2d 52, 53-54 [1st Dept 1990]. In *Berkowitz* a new trial was ordered because defense counsel repeatedly referred to the plaintiff's experts as "hired guns" brought in to "fluff up the case". *Id.*

However, the court in *Gregware* held that although some of the comments made by plaintiff's counsel were highly inflammatory, they did not create a climate of hostility that "*so obscured the issues as to have made the trial unfair*". *Gregware, Supra* at 61-62. The court further held that although referring to the defense witnesses as "**liars**" was highly improper, the remarks were isolated and constituted "*fair comment on the evidence*" and the "*cumulative effect*" of the remarks did not deprive the defendant of a fair trial. *Id.*

PRESERVE THE RIGHT TO SET ASIDE THE VERDICT OR TO APPEAL.

During summation, trial counsel should preserve the right to set aside the jury verdict or to appeal by objecting to any improper comments made by the adversary. The objection should be made immediately after the improper comment is made with the request to the Court to make a curative instruction to the jury. The objection must be made regardless of the magnitude of the improper

comment. The failure to make a timely objection may result in a verdict that will be sustained by the Appellate Court.

In *Chappotin v. City of New York, et. al.*, 2010 N.Y. Slip Op 31845(U) [Sup. Ct., New York County, July 9, 2010], the trial court granted the plaintiff's motion to set aside the verdict. Justice Friedman held that defense counsel's entire summation was "*suffused with improper and highly prejudicial remarks whose purpose was to prejudice the jury against the plaintiff. Id.* Defense counsel's references to plaintiffs "**playing the system" and being on disability benefits** so contaminated the trial as to deprive the plaintiff of a fair trial. *Id.*

However, the appellate court reversed the decision of the trial court and reinstated the verdict. See, *Chappotin v. City of New York, et. al.*, 90 A.D.3d 425,426 [1st Dept 2011], *lv denied*, 19 N.Y.3d 808[2011]. The Appellate Court in *Choppotim* held "*plaintiff failed to object to 13 of the 15 comments of which he now complains"' Plaintiff failed to preserve his objections and the verdict should be reinstated". Id.*

Justice Manzanet-Daniel's dissent states "*Given the egregious nature of the remarks, however, I believe that this Court should reach the issue in the interest of justice".* The dissent further stated defense counsel's remarks were not isolated, but constituted a "*seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined" Id.*

The *Chappotin* case is a textbook example of what will happen to trial counsel if he or she fails to object to improper comments made by the adversary during summation. Although the trial court may grant counsel's motion to set aside the verdict, the appellate court may reverse the decision. Do not let this happen to you.

Counsel should keep in mind that the purpose of summation is not to make improper comments to the jury but to clarify to the jury the issues presented and marshal the important facts from the evidence in a logical and persuasive manner.

IMPROPER COMMENTS

The following are examples of an improper comment or improper conduct of counsel during summation that should be timely objected to on the record.

1. **Race-** *Dunne v. Lemberg*, 54 A.D.2d 955[2d Dept 1976], *appeal denied*, 40 N.Y.2d 809 [1971].
2. **Nationality-** *Reyes v. Arthur Tickle Eng Works, Inc*, 2 A.D.2d 703[2d Dept 1956], *aff'd*, 3 N.Y.2d 837 [1957].
3. **Religion.** *Giuamara v. O' Donnell*, 96 A.D.2d 1049 [2d Dept 1983].
4. **Personal knowledge or opinion of attorney.** Rule 3.4 (d) of the Rules of Professional Conduct; *Doody v. Gottshall*, 67 A.D.3d 1347 [4th Sept 2009].
5. **References to facts not in evidence.** Rule 3.4 (d)(1) of the Rules of Professional Conduct; *Stewart v. Olean Med Group, P.C.*, 17 A.D.3d 1094 [4th Dept 2005].

6. **Appealing to the jury's sympathy.** *People v. Holiday*, 142 A.D.3d 625 [2d Dept 2016].
7. **Attacks on any witness.** *Smith v. Rudolph*, 151 A.D.3d 58 [1st Dept 2017]; *Maraviglia v. Lokshina*, 92 A.D.3d 924 [2d Dept 2012].
8. **Attacks on adverse party.** *McArdle v. Hurley*, 51 A.D.3d 741 [2d Dept 2008].
9. **Attacks on opposing counsel.** *Pareja v. City of New York*, 49 A.D.3d 470 [1st Dept 2008].
10. **Calling a juror by the juror's name.** *People v. Creasy*, 236 N.Y. 205 [1923].
11. **Insurance.** *Peters v. Wallis*, 135 A.D.3d 922 [2d Dept 2016].
12. **Making speaking objections:** *Smith v. Rudolph*, 151 A.D.3d 58 [1st Dept 2017].

CONCLUSION

The purpose of summation is not to make improper comments to the jury but to clarify to the jury the issues presented and marshal the important facts from the evidence in a logical and persuasive manner.

Use the evidence to tell the jury what the case is about and why the jury should render a verdict in favor of your client. Although trial counsel has wide latitude in connecting the pieces of the puzzle to the jury, trial counsel should know the comments that are improper and maintain your summation within the

defined latitude. Make timely objections to the opposing counsel's improper comment to preserve your client's right to a new trial or right to a reversal of the verdict on appeal. Also, respond to any objections that opposing counsel may make during your summation in order to prevent a reversal of the verdict or a new trial. Use your outline.

Delivery is just as crucial as trial counsel's style. A strong and effective delivery will produce greater and better results.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
MARIA ESTELLA HERRERA and GABRIEL HERRERA

Plaintiffs,

-against-

**PLAINTIFF'S JURY
QUESTIONS**

INDEX #: 23493/08

PERALTE BROS. ASSOCIATES, INC and "JOHN DOE"

Defendants.

-----X

We, the undersigned jurors in the above-entitled action concur and answer the following questions in accordance with the instructions of the Court herein mentioned, and report our verdict as hereafter set forth:

1. Was the defendant Peralte Bros. Associates, Inc. negligent?

Yes_____ NO_____

At least five jurors must answer to the above question.

Juror # 1_____

Juror # 4_____

Juror # 2_____

Juror # 5_____

Juror # 3_____

Juror # 6_____

I, the undersigned juror do not concur in the above:

If your answer is "NO" skip to question "3"

If your answer is "Yes", proceed to the next question.

2. Was the negligence of Peralte Bros. Associates, Inc a cause of the accident?

Yes _____ NO _____

At least five jurors must answer to the above question.

Juror # 1 _____

Juror # 4 _____

Juror # 2 _____

Juror # 5 _____

Juror # 3 _____

Juror # 6 _____

I, the undersigned juror do not concur in the above:

PROCEED TO THE NEXT QUESTION.

3. Was the plaintiff Maria Herrera negligent?

Yes _____ NO _____

At least five jurors must answer to the above question.

Juror # 1 _____

Juror # 4 _____

Juror # 2 _____

Juror # 5 _____

Juror # 3 _____

Juror # 6 _____

I, the undersigned juror do not concur in the above:

If your answer is “NO” and your answer to questions “1” and “2” is yes go to question “5”,

If your answer is “Yes”, proceed and answer question 4.

4. Was the negligence of the plaintiff Maria Herrera a cause of the accident?

Yes _____ NO _____

At least five jurors must answer to the above question.

Juror # 1 _____

Juror # 4 _____

Juror # 2 _____

Juror # 5 _____

Juror # 3 _____

Juror # 6 _____

I, the undersigned juror do not concur in the above:

If your answer is “YES to both questions “1” & “2” and/or if your answer is

“YES” to both questions “3” & “4”, **PROCEED TO THE NEXT QUESTION**

Otherwise, **REPORT TO THE COURT**

5. What is the percentage of fault to the defendants?

Defendant Peralte Bros. Associates, Inc. _____%

Plaintiff Maria Herrera _____%

Total Must Equal 100%

At least five jurors must answer to the above question.

Juror # 1_____

Juror # 4_____

Juror # 2_____

Juror # 5_____

Juror # 3_____

Juror # 6_____

I, the undersigned juror do not concur in the above:

REPORT YOUR VERDICT TO THE COURT

Dated: Brooklyn, NY
June 1, 2010

Respectfully Submitted,

Jesus M. Zeno, P.C.
Attorney for the Plaintiff
53 5th Avenue
Brooklyn, NY 11217
(718) 636-1600

Speaker Biographies

WILLIAM PAGEN, ESQ. BIOGRAPHY

William Pagan is a 1987 graduate of the St. John's University School of Law. He obtained an undergraduate degree from Fordham University in 1984. He was admitted to the New York Bar in 1988.

He is admitted to practice in the Federal Southern and Eastern District Courts of New York and has been admitted *pro hac vice* to the United States District Court for the Districts of Puerto Rico and Hawaii, as well as New Jersey Superior Court. His professional memberships include the Puerto Rican Bar Association, American Association for Justice, New York State Trial Lawyers Association, New York County Lawyers Association, New York City Bar Association, and the Bronx, Kings, Queens and New York County Bar Associations as well as the Dominican Bar Association.

He's a member of The Pagan Law Firm, P.C. and has accumulated over twenty-five years experience in trying highly complex medical malpractice cases, serious injuries from construction, lead paint poisoning, municipal premise and general accident cases in State and Federal court in all boroughs of the City of New York, statewide in New York and *pro hac vice* nationwide.

He's a member of The National Trial Lawyers, "Top 100 Trial Lawyers."

HEATHER M. PALMORE, ESQ. BIOGRAPHY

In 20 years of practicing in New York, Heather has established herself as a solid trial attorney, having tried cases throughout the New York metropolitan area. She has tried over 100 cases throughout her career and has had favorable verdicts during her tenure. She has tried high exposure cases in the following areas: construction/Labor Law, auto, commercial premises, property, and discrimination claims. Most recently, she obtained a defense verdict in Kings County against a nationally known plaintiff's firm, after a three week trial. She began her career in the Queens County District attorney's office, where she quickly rose through the ranks as a trial attorney, trying and obtaining convictions in some of the most difficult cases to prosecute, including homicide, sexual battery, robbery and assault cases. Heather was a partner for a number of years at Conway, Farrell, Curtin & Kelly, P.C. before joining CNA as a Senior Litigation Attorney.

Awards: Elsie Van Buren Award for Public Speaking-Cornell University Top 40 Under 40 Awardee, Drum Major Award, Long Island Business News Top 50 Women in Business, New York School Board Association Awardee.

Juris Doctor: Syracuse University College of Law, 1995, with Distinction (Dean's List, Moot Court);

Bachelor of Science: Cornell University, 1992 with Honors (Dean's List, Ford Mellon Scholar – Yale University)

Admitted: New York 1995; U.S. District Courts (2000)

Member: New York State Bar, New York State School Boards Association

HONORABLE SHAWN DYIA L. SIMPSON

BIOGRAPHY

Kings County Supreme Court
320 Jay Street
Brooklyn, NY 11201
(347) 296-1081

Judicial Offices

Justice, Supreme Court, Kings County, Elected, 2017 to 2030

Acting Justice, Supreme Court, Kings County, Appointed by Chief Administrative Judge, 2011; Re-appointed 2014-2016

Judge, Criminal Court of the City of New York, New York County, Designated by Chief Administrative Judge Ann Pfau, 2004 to 2013

Judge, Civil Court of the City of New York, New York County, Elected, 2004 to 2013; Re-elected, 2014 to 2016

Other Professional Experience

Kings County District Attorney's Office

NYS Unified Court System, Court Attorney

Admission to the Bar

NYS, Appellate Division, Second Department, 1991

Education

J.D., University of Pittsburgh School of Law

HONORABLE CARMEN ST. GEORGE

BIOGRAPHY

New York County Supreme Court
80 Centre Street
New York, NY 10013
(646) 386-4613

Judicial Offices

Judge, Court of Claims, Appointed by Governor Andrew Cuomo, 2017 to 2023

Acting Justice, Supreme Court, New York County, Designated by Chief Administrative Judge Lawrence Marks, 2017 to Present

Other Professional Experience

Weitz & Luxenberg, P.C, Associate, 2014 to 2017

Levy Phillips & Konigsberg LLP, Associate, 2003 to 2014

Queens County District Attorneys Office, Assistant District Attorney, 1997 to 2003

Admission to the Bar

NYS, Appellate Division, Second Department, 1998

United States Supreme Court, 2010

United States Court of Appeals for the Second Circuit, 2010

United States District Court, Eastern and Southern Districts of New York, 2002

Supreme Court of New Jersey, 1999

Supreme Court of New York, 1998

Education

J.D., Fordham University School of Law, 1997

B.S., St. John's University, 1993

Professional & Civic Activities

Member, Hispanic National Bar Association

Member, Long Island Hispanic Bar Association

Member, Nassau County Bar Association

Member, New York State Bar Association

Member, Hellenic Lawyers Association

Commissioner, Nassau County Commission on Human Rights, 2004 to 2008

Legal Analyst/Legal Commentator on various TV networks, 2001 to 2016

PETER S. THOMAS, ESQ., P.C.

BIOGRAPHY

CAREER PROFILE:

Peter is a highly talented, skilled and knowledgeable attorney with 24 years experience in both civil and criminal law with a demonstrated track record of providing unmatched legal service. Peter has over 375 combined Civil and Criminal jury trials to verdict in the Supreme, Civil and Criminal courts of the City and State of New York to his credit. Peter recently secured a \$13.5 Million dollar verdict in a wrongful death case in Queens County. Peter is an expert in all aspects of Trial Practice, Personal Injury Litigation, Labor Law, Medical Malpractice, Criminal Defense, Commercial Litigation, Evidence and Appeals. Peter has outstanding research and documentation skills. He is adept at investigating complaints, preparing responses, trial notebooks and interviewing potential clients and witnesses. With particular skills in evaluating the appropriate value of a case, preparing court documents, marked pleadings, jury charges, verdict sheets, memos of law and subpoena requests, he is always prepared. Peter has excellent presentation and communication skills.

EDUCATION:

J.D. – C.U.N.Y at Queens College, 1992

B.A. – S.U.N.Y at Stony Brook, 1989

PROFESSIONAL LICENSES:

State Bar of New York, 1993

State Bar of Connecticut, 1993

Federal District Court - Eastern District of New York, 1995

Federal District Court - Southern District of New York, 1995

PROFESSIONAL ORGANIZATIONS:

American Bar Association

Association of Trial Lawyers of America

Board of Directors of the Brandies Association

New York State Trial Lawyers Association

New York State Bar Association
Queens County Bar Association
Queens County Bar Association Judiciary Committee

AREAS OF PRACTICE:

Personal Injury Litigation, Plaintiff and Defense
Medical Malpractice Litigation, Plaintiff
Labor Law
Products Liability
Criminal Defense
Commercial Litigation
Family Law
Contract Law
Real Estate
Per Diem of counsel to more than 40 different law firms

PROFESSIONAL EMPLOYMENT HISTORY:

1995 - Present Law Offices of Peter S. Thomas, P.C.,
108-18 Queens Blvd., Forest Hills, NY 11375,
1993 - 1995 Law Offices of Rubenstein & Flatow,
16 Court Street, Brooklyn, NY 11241

CLE SEMINARS TAUGHT AT QUEENS COUNTY BAR ASSOCIATION:

Jury Selection in a Civil Case
Trying Liability and Damages in a Motor Vehicle Accident Case
Trying Liability and Damages in a Trip/Slip and Fall Case
Nuts and Bolts of a Civil Trial
Digging Up Dirt on your Adversary's Witnesses

LECTURES:

Lectures on starting and maintaining a solo practice given at CUNY Law School at Queens College, Cardozo Law School, New York Law School and Hofstra Law School.

Additional Skills:

Oral and written fluency in English, French, and Spanish
Windows, WordPerfect, PowerPoint, Word, Westlaw, Lexis-Nexus, and Excel

MICHAEL C. TROMELLO, ESQ.

TROMELLO, MCDONNELL & KEHOE

EMPLOYMENT:

CNA Insurance:

Director/Managing Trial Attorney – CNA - Melville Staff Counsel (2001 to Present)

I supervise and direct all aspects of insurance defense litigation from pleadings through trials and appeals for CNA and its insureds. Our team presently consists of 11 attorneys, 3 paralegals and 7 support staff. We are defending approximately 650 tort cases and 350 WC cases venued in Queens, Nassau and Suffolk Counties. In addition, we prosecute approximately 75 subrogation cases per year.

Director/Managing Trial Attorney – CNA - New York City Staff Counsel (1996 to 2001)

I supervised and directed all aspects of insurance defense litigation from pleadings through trials and appeals for CNA and its insureds in New York City. Our team once consisted of 28 attorneys and 14 support staff. We defended approximately 1600 tort cases venued in New York, Kings and Richmond Counties.

Director/Managing Trial Attorney – CNA - Syracuse Staff Counsel (1992 to 1996)

In addition to handling an individual tort case load of over 200 cases, I supervised and directed all aspects of insurance defense litigation from pleadings through trials and appeals for CNA and its insureds in all counties in "Upstate" NY. (North of Rockland Co.) Our team consisted of 4 attorneys and 3 support staff.

Senior Trial Attorney - CNA - Long Island East Staff Counsel (1988 to 1992)

As a Senior Trial Attorney, I was responsible for all aspects of insurance defense litigation from pleadings through trials and appeals. I regularly handled 125 to 150 tort cases and 40 to 50 premium collection cases. I was responsible for all large subrogation cases and monitored subrogation cases assigned to other staff attorneys. In conjunction with the Managing Attorney, I developed a manual to assist in the processing of large volumes of *Affirmative Litigation*. (Subrogation & Premium Collections)

New York State Attorney General (1987 to 1988)

As the Assistant Attorney General in charge of the Civil Prosecutions Bureau for Suffolk County, I conducted and supervised civil litigation on behalf of NYS to collect money owed from individuals, insurance companies, private agencies, estates, vendors, outside laboratories and hospitals. I trained and coordinated the efforts of a unit of 12 individuals (attorneys, paralegals and support staff); prepared and monitored the unit's budget and submitted periodic reports on the unit's activities to the NYS Attorney General.

Office of the District Attorney, Queens County (1983 to 1987)

As an Assistant District Attorney, I was assigned to the Supreme Court Trial Bureau where I conducted over 30 felony jury trials to verdict. I conducted all related pre-trial hearings and non-jury trials. Other assignments included the Criminal Court and Grand Jury Bureaus.

The City University of New York (CUNY) (1975 to 1983)

As the Assistant Director for Governmental Relations, my primary responsibility was to provide the Director with written memoranda on Federal, State and Municipal legislative proposals concerning education, labor, civil rights, pensions, torts, and contracts. Other responsibilities included assisting in the development and implementation of legislative strategy and acting as the unit's liaison to the Chancellor, his Cabinet, the 18 CUNY College Presidents and the Student Organization representing the University's 160,000 students. In addition, I prepared and monitored the unit's annual budget and handled all administrative matters for the unit's multiple offices which were located in Albany, Washington, D.C., & NYC.

Education:

B.A., Political Science, Queens College (1974)
M.S., Urban Affairs & Administration, Hunter College (1978)
J.D., New York Law School (1982)

Bar Admissions:

New York State - Appellate Division, 1st Department (1983)
U.S. District Court - Southern and Eastern Districts (1987)

THOMAS P. VALET, ESQ.

BIOGRAPHY

Thomas P. Valet practices with the Long Island based firm, Rappaport, Glass, Levine & Zullo, LLP. Before joining RGLZ in 2017, Tom was a founding member of the Rheingold, Valet law firm, where he practiced for more than 30 years.

The majority of Tom's legal career has been devoted to representing plaintiffs in medical malpractice and mass tort cases. Tom is the Past President of the Trial Lawyers Section of the New York State Bar Association and continues to serve on its Executive Committee. He is a current Officer of the New York State Trial Lawyers Association. Tom also served for many years on the Special Committee on Medical Malpractice for the New York City Bar Association, on which he served as Chair for three years.

Tom graduated from Hofstra Law School in 1985 and lives on Long Island with his family, including two sons who are lawyers practicing in New York.

HONORABLE MICHELLE WESTON BIOGRAPHY

Justice Michelle Weston is an Associate Justice of the Appellate Term for the Second, Eleventh, and Thirteenth Judicial Districts. In addition to hearing appeals at the Appellate Term, Justice Weston presides over medical malpractice trials in New York State Supreme Court. Justice Weston's judicial career began in 1989, when she was appointed to Criminal Court. In 1990, she became the first African-American woman elected to Supreme Court in the Second Judicial District. Justice Weston served in the Criminal Term until February 1995, when she was assigned to the Civil Term of Supreme Court. Since then, Justice Weston has presided over matrimonial, guardianship, and medical malpractice actions. Prior to joining the bench, Justice Weston served as an attorney for the Legal Aid Society, followed by private practice.

In addition to her judicial duties, Justice Weston has served as Chair of the Judicial Section, and as Chair of the Committee on Procedures for Judicial Discipline of the New York State Bar Association. She is also an adjunct professor at Brooklyn Law School, where she teaches the Judicial Seminar. Justice Weston is a lifelong resident of Brooklyn.

JESUS M. ZENO, ESQ. BIOGRAPHY

Mr. Zeno has been litigating civil cases since 1986. Since 1990, his law firm in Brooklyn, NY, has specialized in civil litigation. Ninety five per cent of the cases involve all types of personal injury, products liability, medical malpractice, police brutality, 1983 cases and labor law matters. Five percent of the cases involve contested matrimonial, contract, and real property litigation. The firm's work also entails motion practice, conferences, framed issue hearings, arbitrations, jury trials, summary jury trials and bench trials. Mr. Zeno has tried cases to verdict in most of these areas of law on behalf of his firm and other law firms. Mr. Zeno has appealed and argued cases in the Appellate Division.

Prior Employment:

Paul S. Mirman & Associates, associate attorney, personal injury litigation.

Gutman & Mintz, associate attorney, housing litigation.

Law Offices of Peter A. Mc Kay, associate attorney, criminal, matrimonial and immigration.

Education: Baruch College (CUNY) BBA, Syracuse University College of Law JD.

Bar Admission: New York State, Eastern District of New York, Southern District of New York; United States Supreme Court, Washington, DC; State of New Jersey, United States District Court, District of New Jersey.

Bar Association:

Puerto Rican Bar Association - Board Member, Co-chair of the litigation Committee, Co-chair of the Trial Academy Committee, Nominating Committee, Judiciary Committee and Social Media Committee.

New York State Academy of Trial Lawyers

New York State Bar Association- Trial Lawyers Section

Former Member of the New York State Trial Lawyers Association

Former member of the Association of Trial Lawyers of America

Pro Bono: Brooklyn Bar Association; Volunteer Legal Program: Uncontested divorce.

Panelist – Nuts & Bolts of a Trial: Prima Facie Case and Ethics for the Trial Lawyer. Puerto Rican Bar Association two day seminars.

Other Activities: Since 2009 Presiding Judge and scorer in the Empire City Mock Trial Competition; Empire City Mock Trial Championship Competition.

