In The Matter Of:

Perez v.

Live Nation

November 8, 2019

New York Supreme Court

Original File 2019-1108-Perez v Live Nation (Greenwald).txt

Min-U-Script® with Word Index

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 56

----------X

MARK PEREZ,

Plaintiff,

- against -

LIVE NATION WORLDWIDE, INC.,

Defendant(s).

----------X

Index No. 158373/2013 November 8, 2019
71 Thomas Street
New York, New York

B E F O R E: HONORABLE JOHN J. KELLEY, JSC, and a Jury

A P P E A R A N C E S:

For Plaintiff:

MORELLI LAW FIRM PLLC
777 Third Avenue
New York, New York 10017
BY: BENEDICT MORELLI, ESQ.
DAVID T. SIROTKIN, ESQ.
MICHAEL S. SCHLESINGER, ESQ.
ALEXANDER R. MORELLI, ESQ.

(Appearances continued on next page)

APPEARANCES CONTINUED:

For Defendant:

CONNELL FOLEY LLP
1085 RAYMOND BOULEVARD
Newark, New York 07102
BY: JEFFREY L. O'HARA, ESQ.
MATTHEW W. BAUER, ESQ.

- and -

HAWORTH BARBER & GERSTMAN, LLC
505 Main Street
Hackensack, New Jersey
BY: SCOTT HAWORTH, ESQ.

RACHEL C. SIMONE
LAURA LUDOVICO
SENIOR COURT REPORTERS

(Off-the-record discussion held)

THE COURT: On the record.

Is there a record we need to make, folks?

MR. O'HARA: Not at this time.

THE CLERK: The caption?

THE COURT: Oh, yes.

The caption is amended to Mark Perez versus Live Nation Worldwide Incorporated.

MR. O'HARA: Yes, that's correct.

MR. MORELLI: Yes.

Okay. We will begin shortly when the jury arrives.

(Brief pause)

THE CLERK: This is the case of Mark Perez, plaintiff, against Live Nation Worldwide Inc. defendant, Index number 158373 of 2013.

Counsel, your appearances for the record.

MR. MORELLI: Benedict P. Morelli for the plaintiff.

MR. SIROTKIN: David Sirotkin also for the plaintiff.

MR. SCHLESINGER: Michael Schlesinger, for the plaintiff.

MR. MORELLI: Alexander Morelli, for the plaintiff.

MR. O'HARA: Good morning, Your Honor. Jeffrey O'Hara, and Matthew Bauer of Connell Foley, on behalf of defendant.

MR. HAWORTH: Good morning, your Honor. Scott Haworth FROM Haworth Barber & Gertsman, also on behalf of the defendant.

THE CLERK: Is the jury satisfactory to the plaintiff and defendant?

MR. MORELLI: The jury is satisfactory.

MR. O'HARA: The jury is satisfactory, your Honor.

THE COURT: Will the members of the jury please raise your right hands.

(Jury of six plus three alternate jurors duly sworn/affirmed.)

THE CLERK: Please be seated.

Your Honor, the jury has been sworn and affirmed.

THE COURT: Thank you, Lewis.

Good morning, everybody. Welcome to New York Supreme Court. I am Judge John Kelley. I am the judge who will be presiding over this case.

We are about to start the trial of the case about which you have heard some details during jury selection. There are some instructions that you should have in order that you better understand what you will see and what you will hear as well as how you will conduct yourselves during

Preliminary Charge Page 5

this trial.

As you probably know, the party who brings a lawsuit is called the plaintiff. In this action the plaintiff is Mark Perez. Mr. Perez is suing to recover for injuries that he sustained on June 26, 2013. The party against whom the suit is brought is called the defendant. In this action the defendant is Live Nation Worldwide Incorporated. And in this part of the case, you are only going to be deciding the amount of money that will compensate the plaintiff for injuries that he sustained as a result of this accident.

When I have completed these opening instructions, the attorneys are going to make opening statements in which they will tell you more about their claims so that you will have a better understanding of the evidence. What is said during opening statements is not evidence. The evidence in this case is going to come from one of four sources; from live witness testimony, from testimony taken before the trial, from exhibits such as photographs and other documents, or from facts that may be stipulated by the parties as being true. And so that you are aware, an examination before trial which is also referred to as a deposition -- you may hear the phrase come up -- is testimony that was taken under oath before the trial began. It is entitled to equal consideration by you even though it

Preliminary Charge Page 6

was taken before the trial and outside of this courtroom.

Now, trials have a certain order to them. The plaintiff always makes an opening statement before the defendant. After the opening statements the plaintiff will introduce evidence in support of his claim. Normally a plaintiff will produce all of his witnesses in evidence before the defendant starts their case, but in this case we may have to vary that order in order to accommodate scheduling. If it does happen I will give you further instructions at the time. Just be aware that it can happen.

After the plaintiff has finished introducing evidence, the defendant may present witnesses and exhibits. If they do, then the plaintiff may be permitted to offer additional evidence to rebut the defendant's evidence.

After both sides have finished introducing the evidence, the attorneys again will speak to you in closing statements. In summing up they will point out what they believe the evidence has shown, what inferences or conclusions they believe you should draw from the evidence, and what conclusions they believe you should reach as your verdict. Again, what the attorneys stay is not evidence. Under our system, the order of summation is reversed so that the defendant will sum up first and the plaintiff will go last.

At times during the trial an attorney may make an

Preliminary Charge Page 7

objection or a motion concerning some legal issue in the case. Be aware that I do try to have arguments relating to objections or motions when you are not in the room, but sometimes things do happen when you are here. Please know that I will be making all of my rulings based solely upon the law. You must not conclude from any ruling or, for that matter, from anything that I say in this trial that I favor either party to this lawsuit.

After summations I am going to instruct you on the rules of law that apply to the case, and then you are going to go back to the jury room to deliberate. Your job is going to be to decide what facts have or have not been proven and then apply the rules of law that I give to you to those facts. Your decision is going to be based on the evidence that was admitted during this trial. You are the sole and exclusive judges of the facts. Now, on the other hand, keep in mind that a few moments ago you swore an oath, and in that oath you agreed, you swore an oath to accept the rules of law that I give to you whether you agree with them or not. You are not to ask, consider, or accept any advice about the law from anyone other than me. As the sole judges of the facts, you are going to have to decide which of the witnesses you believe, what portion of their testimony you may accept, and what weight you give to it.

At times during the trial I may sustain objections

Preliminary Charge Page 8

to questions and you may hear no answer, or where an answer has been made I may grant a motion to strike it from the record, in which case you must disregard it and dismiss it from your minds. You may not draw any inference or conclusion from an unanswered question, nor may you consider stricken testimony in reaching your decision. The law requires that your decision be made solely upon the evidence that is before you, and any proof that I exclude from your consideration will be excluded because it is not legally admissible.

Having said that, the law does not require you to accept all of the evidence that is admitted during the trial. In deciding what evidence you will accept, you must make your own evaluation of each witness's testimony and then decide how much weight to give to it. A witness's testimony may not conform to the facts as they occurred for several reasons; for instance, because the witness is intentionally lying, because the witness did not accurately see or hear what happened, because the witness's recollection is faulty, because the witness's testimony simply was not clear to you.

Folks, there is no magical formula for evaluating testimony. In your everyday affairs you decide for yourselves the reliability of things that people tell you. And the same tests that you use in your everyday dealings

are the tests that you should apply during your deliberations. For instance, you might consider whether a witness is interested in the outcome of a case, consider a witness's biases or prejudice, the witness's age, appearance, the manner in which the witness gives testimony on the witness stand, the opportunity that the witness had to observe the facts, or simply the probability or improbability of the witness's testimony when you consider it in light of the other evidence in the case. These are all types of things that you can consider to determine how much weight you are going to give to a witness's testimony.

If it appears that there is a conflict in the evidence, you will have to consider whether the conflict can be reconciled by fitting together the different versions. If that's not possible, then you are going to have to decide which of the conflicting versions you do accept.

Now, this trial is obviously not going to end today. It is going to take several weeks to get to the point where it is time for you to deliberate. So because you are not in the courtroom with me all the time, I want you to keep in mind some rules to follow while you are not here.

In fairness to the parties it is very important that you keep an open mind throughout the trial, and only after you have heard both sides fully and only after I have

given you my final charges will you deliberate to reach a verdict only upon the evidence presented to you in this courtroom. Please do not discuss this case with anyone during the trial. That also means -- and this is very important and often overlooked -- that you cannot start talking and discussing anything about the case, anything that you saw or heard in this courtroom among yourselves until I tell you it is time to start deliberations. So when you go back into the jury room, if you happen to go to lunch together, or whatever, you cannot talk about what you saw or heard in this courtroom until I tell you that it is time to deliberate the case.

Also, you may not do any independent research on any topic that you hear about in the testimony or that you see in any of the exhibits.

Now, one of the things about jury service that I want to make you aware of, and I am giving you this based upon my personal experience because, believe it or not, I sat as a juror many years ago in this very same building, okay? There will be times when you are going to be sitting back in the jury room. You are going to wait for us to start, and you are going to have absolutely no idea what is going on, and nobody is telling you what is going on. I am afraid that those times are unavoidable. I can assure you that when that happens there is a really good reason, like

we have an issue that we have to work out, or something serious is going on where we can't start on time. I really try to avoid those things. That's why I have everybody in a little earlier than the start time to try to get that stuff resolved, but it does happen.

Now, while you are back in the jury room you can use your electronic devices. I have absolutely no problem with that. But there are a couple of rules you do have to follow. While you are in this courtroom, all of your electronic devices must be turned off. I mean off, not simply on vibrate. I mean off. I don't want any distractions whatsoever. Also, you may not use any internet services or social media to research any of the topics concerning the trial or post anything concerning the trial on social media. That means you can't research the law or facts, nor may you look up any information on any of the attorneys, the parties, the witnesses, or even me. After the case is over you are going to be free to share your experiences on social media involving the trial, and you will be free to do whatever research you want to do, but not until the trial is over. Now, to be clear, I didn't tell you that you can't use social media. I told you can't do anything concerning this trial, posts concerning this trial, okay?

Finally, just so you have a heads up, cellphones

and laptops and tablets will not be permitted in the jury room at all when you are deliberating the case at the very end. My officer is going to collect them from you at that time. If this creates a hardship, please send out a note to me that details why. I will determine whether I can make any appropriate accommodations, but I will tell you it needs to be a really, really serious issue. Chances are it is going to be declined, so be prepared that you will not have your electronic devices, any of them, during your final deliberations.

Now, following these instructions is necessary because the law requires you to consider only the testimony and the evidence that you see and hear in this courtroom, and the parties are depending upon you to fairly and impartially only consider the admitted evidence. To allow outside information to affect your judgment would not only be unfair to the parties, but it would likely require this case having to be retried at tremendous expense in front of another jury, and none of us wants that to happen.

Now, I also caution you not to permit anyone to discuss anything about this case in your presence. If anyone does so despite your telling the person not to, report that to me as soon as you are able. Bear in mind that you should not discuss with your fellow jurors either that fact or any other fact that you find necessary to bring

Preliminary Charge Page 13

to my attention. Although it is normal human tendency to talk with people with whom you come into contact, while you are jurors please do not talk with any of the parties, the attorneys, or the witnesses whether inside or outside of the courtroom. I don't mean just don't talk about the case. I mean don't talk to them at all, not even to pass the time of day. This is the only way that we can be assured of your absolute impartiality.

On that note, again drawing upon my own personal experience as a trial lawyer myself, there always were awkward moments as a lawyer when I would run into jurors outside of the courtroom. If it appears to you that the attorney is ignoring you or the party or the witness is ignoring you, ladies and gentlemen, they are. They are because they have to. They are bound to follow those same rules, too. I only bring this to your attention because it was always uncomfortable for me to wonder whether the jurors were considering that as some sort of sign of disrespect or slight. It is not. Please keep that in mind, okay?

Now, under the law, at the end of the case only six jurors are going to deliberate the case when submitted for final consideration. You will probably notice that there are nine of you. At the end of the case we are going to select the six jurors that are actually going to deliberate on the case. The other jurors are going to be,

Preliminary Charge Page 14

basically, held in reserve. You will be here but won't actually participate in deliberations. You will get more information on that at the end of the case. But we don't know who the six trial jurors are actually going to be at this point, so all of you are required to pay the same careful attention to the trial so that if you are needed, assume you are probably going to be needed, you will be fully familiar with the case at the end. And the fact that there are extra jurors does not mean that any of you are free to excuse yourselves from jury duty. As a duly chosen juror, it is your obligation to be here, and be here when you are supposed to be here and ready to work.

A question that is frequently asked, so I will get it out of the way right now, is that we do not permit jurors to take notes during the trial. When it is time for your deliberation, please be aware that you will have access to all of the evidence, and there will be a court reporter available to read back any testimony that you want to have read back.

There are a couple of things before we start with opening statements that I do want to talk to you about, and the first is scheduling. You will notice as this case goes along that there is going to be a lot of witnesses that are going to be called, expert witnesses that are going to be paid a large sum of money to be here. For that reason I

Preliminary Charge Page 15

need you to be here on time. What I am going to do is I am going to make a promise to you, okay? If I know that I am not going to need you until a little later in the morning, if I can let you go early or give you a little extra lunch period or something like that, I am not going to keep you in the back room for the sake of keeping you in the back room. I am going to be as respectful of your time as I humanly can be. My pledge to you is to only have you here when I actually think we are going to need you when we are going to be working. That's my promise to you.

Now I need you to make a promise to me. I need you to be here when I tell you to be here. There is a lot going on in this case. There are a lot of moving parts. There are witnesses that can't come back either the second half of the day or the next day or whatever. I need you to promise me you will be here on time and ready to work. Can everybody promise me that? Okay. And the other thing is that in New York City most of us get here by public transportation. If it rains, leave early because the trains don't work, okay? I have full confidence in everybody that you can do it. I had a trial last year that literally covered all four nor'easters, and every juror was here every time they were supposed to be here, so I know it can be done.

So unless I tell you otherwise -- and I will give

Preliminary Charge Page 16

you as much advance information as I can as to down time as I possibly can, unless I tell you otherwise, I need you downstairs every day at 9:15 in the morning and after lunch at 2:00. Our court officer will let you know specifically where to gather and everything else, and you will be brought up.

You should also be aware that our lunch break is usually from 1:00 to 2:00. When I say "usually," I mean almost, almost, almost always. And we try to end testimony somewhere around 4:30, but it depends upon the needs of the witness as to how that goes.

I mention the lunch break also because between 1:00 and 2:00, one of the peculiar things about this building is that the court actually rents this space from a private building. This is not actually a courthouse. And for that reason and the particular layout of this building this entire floor is closed between 1:00 and 2:00. I bring this to your attention for two reasons: One, you can't stay in the jury room during lunch. There are accommodations downstairs, but you can't stay here. Secondly, the room will be locked. Of course we are not responsible for anything that you leave behind; but if you do leave something behind, bear in mind you are going to be without it for an hour. So make sure during the lunch hour you take everything you need with you.

Keep in mind that the room back there is not soundproof. If there does come a time that you can hear what is going on outside of the jury room, please buzz us and let us know and we will make sure things are kept down.

Finally, I want to talk to you about what I consider to be one of my most important roles in this case, to make sure you are in the best position to pay attention to the evidence. So I am a firm believer in frequent breaks. I am going to be watching you throughout the trial. Don't think I am weird. I am just trying to monitor. I will watch you throughout the trial to try to get a handle on whether everybody is okay. We usually take a break at least once an hour to let everybody stretch their legs, whatever. And if I am missing a cue, if I am not noticing that you are in distress or somehow uncomfortable or distracted, do me a favor and raise your hand and let me know that you need a break. The answer will never be no and the reason will never have to be explained. I don't care what your reason is. If you need to stretch your legs, get a drink of water, use the bathroom; I don't care. If you need a break, you are thinking about that and not thinking about what is going on here, which is where I need you to focus.

All right. Mr. Morelli?

MR. MORELLI: Your Honor, based on what you said,

maybe we should take five minutes only because my opening will be at least an hour. That's the only reason.

THE COURT: Okay. So we will take five minutes and then we will come back and get started.

(Jury steps out of courtroom)

THE COURT: Anything for the record, counsel?

MR. O'HARA: No, sir.

(Short recess taken)

COURT OFFICER: All rise. Jury entering.

(Jury enters courtroom)

THE COURT: Counsel.

MR. MORELLI: May it please the Court, Honorable Judge Kelly, esteemed counsel, Mr. O'Hara, Mr. Haworth, members of the jury; good morning.

I am going to take some time I am going to use a PowerPoint so that you can see basically what I am saying. I am probably saying more.

The first thing that we are going to talk about is why are we here. You did hear a number of things in jury selection. I spoke to you all pretty much at length, especially yesterday. So I want to tell you that we are here because we are going to determine the full extent of the damages sustained by Mark Perez for the injuries that he suffered on June 26, 2013.

As you know, it has already been determined that

the defendants are responsible for the damages resulting for Mark Perez's workplace accident where he fell from a height while performing work for an upcoming concert at the Jones Beach Theater. So that's where it happened, something you didn't know.

On June 26, 2013, you will learn that Mark, who is in the courtroom -- and just so I can introduce you to the family, that's mom on the left, and sister, and dad, and Mark, and brother, okay? They do have names but I am going to tell you that in the PowerPoint so that you have a little suspension.

So he not only had massive brain injuries at the time, but he had a fractured skull, ribs were fractured, seven as a matter of fact, he had spinal fractures, and he was in and out of consciousness at the scene on the ground. He was also bleeding from his nose.

At that time 911 was called, and he was taken from the scene of the accident. Actually, he was airlifted immediately to Nassau University Medical Center.

Now, when he got to Nassau University Medical Center -- and I want you to know that these are some of the things from the medical records -- he was admitted to the surgical intensive care unit. They diagnosed him with a traumatic brain injury. He had a fractured skull. He had multiple facial fractures. He had a subdural hematoma.

That's bleeding in the brain. And you are going to learn during the trial that there was not only bleeding in the brain itself, but there was bleeding in the skull around the brain. And you will hear from at least one expert witness, one doctor who will tell you what the significance of that is. You will also find that he had multiple hemorrhages. I think we know what that is, but it will be described during the trial.

He had seven fractured ribs, spinal fractures and a punctured collapsed lung. And oftentimes when you have fractured ribs, often your rib punctures your lung, which is called a pneumothorax. That's what he had. So now they had to decide at the medical center what they were going to do about this, and what they had to do was medically induce a coma. What does that mean and why do they do that? Well, when you have a traumatic brain injury like that and you have a fractured skull, the problem that you have is that the pressure builds up in the head, and if they don't relieve that pressure you die, okay? So in order to relieve the pressure in his head, they put Mark in a coma purposely, okay?

Also, he was on life support, he was on a ventilator. He wasn't able to breathe for himself at that point, so he was on a ventilator. He also wasn't able to be fed by mouth as a result of that, so he needed a feeding

Opening - by Plaintiff - B. Morelli Page 21

tube. Generally that feeding tube goes in your side, and that's how you are fed.

(Continued on next page)

Opening - by Plaintiff - Morelli Page 22

MR. MORELLI: And let's just go back for one second and notice the dates because Mark was in the hospital for a month, the first hospital, from June 26th to July 25th. And after that, he didn't go home, he went to another hospital. He went to the Southside Hospital on July 25th when he left Nassau Medical Center and he was there until August 6th. And he was admitted to the brain injury unit because that's they needed to do for him at that time and he underwent comprehensive rehabilitation program for brain injuries and that involves many different types of therapies and because they do it seemingly better at Southside, that's why they sent him there, because they were going to specialize in giving him the therapy that he needed. And that's him. And you will see this photo, you know, during the trial. We'll enter it into evidence.

He had physical therapy, occupational therapy, speech therapy, recreational therapy and neuropsychology. And you're going to hear from the witnesses exactly what those things are and why they do them and I'm not going to take the time to go through every single one and tell you exactly what it is, but I'm going to leave it for the witnesses to talk to you about that, but each one of these things are trying to get Mark back to some sort of normalcy.

Now, you see that he's wearing a helmet. And the

Opening - by Plaintiff - Morelli Page 23

reason that he's wearing a helmet will become apparent to you during this trial, and that's because they are protecting his brain and that's because -- and I have a slide that will show you -- that's because he had to have fairly immediate brain surgery in order to relieve the pressure and to save his life. So after he left Southside he still had to go to rehab at the St. Charles Rehabilitation Center.

And he was not only and inpatient but and an outpatient there, you will learn, and he was doing physical therapy for traumatic brain injury and coordination disorder. And one of the reasons that that's done is because your brain is everything that you are; your coordination, your memory, all of these things that you're going to hear from doctors. And you're not coordinated anymore. I mean, they just opened up your head, okay?

So in this coordination disorder he had to do balance coordination because he had to regain some sort of balance, as you saw in the photo, they were helping him try to walk, and neuromuscular re-education. Well, that's a fancy word for trying to find out how to use your muscles again because even though it was a short period of time, your brain is interrupted and now you also almost have to start from scratch.

So also, they do what they call occupational

Opening - by Plaintiff - Morelli Page 24

therapy, which is improving his hand strength and dexterity for activities of daily living. They have to make sure that he is able to button his own shirt, so to speak, right? And it's not so to speak, it's actually what they were doing.

So also, he had to do speech therapy because when you have brain surgery like this and you have such a profound traumatic brain injury, and you will hear how profound during this trial, you have to do speech therapy, and the speech therapy is because you have to now learn to control your breathing, finding words and rate of speech, which all comes fairly naturally to all of us. I mean, sometimes we might miss a word, we forget, you know, what is that word again, but that's different from this. That's different from this. So you have to control the breathing, he's trying to find the words, they're trying to figure out the rate of speech. This is all a re-education for him.

Okay. So now let's talk about the brain surgeries that Mark Perez has already had. And I say "already" because we're going to talk about the future. So on June 26, 2013, which is the date of this incident, he had a right hemicraniectomy, bone flap in abdomen. And somebody might say, what is that? Well, here's what happens and I will tell you why they do it. They cut off about 40 percent of his skull. They cut it off on the

right side and then they took it and they did abdominal surgery and they took his skull and they put in his stomach, in his abdomen, and then they closed him up.

You say what? What? Well, there's a reason that they do that. There's actually a number of reasons why they do that. One reason is because they want to keep the skull from getting infected, they want it to be sterile, okay, so to speak. And they also have found historically that if they don't do that, when it comes time to put it back or explant it, there's times when they misplace because it's months later or a year later or something, so they want this skull to be with the person. So now this is one of the things they do when they cut someone's skull off and they know that there's going to be future surgery, something that I hadn't heard about.

So now what happened was after -- and they call it a bone flap, and only a bone flap because now you have this piece of skull and it look like a flap. So on 10/8 of 2013, as you could see, not quite four months later, they now are going to explant the bone flap from the abdomen, take it out, another surgery to open up the stomach, take out the bone and put it back on his head. Now, you know, the mouth is a beautiful instrument because with the mouth everything sounds easy, okay, but this is bigtime surgery and you're going to hear about that.

So unfortunately, for Mark, because sometimes they can explant this part of the skull and everything goes according to plan, so to speak, and with Mark it didn't necessarily go according to plan because he suffered a number of infections. So as a result of that, in January of 2015, as you could see, a fairly long period later, more than a year, they now had to take that off because it was infected, so it's no longer doing its job. And the reason that it has to be there is because it has to protect the brain, okay? Otherwise, you have to wear a helmet everywhere you go, because if God forbid a million times that Mark falls and hits his head in a certain way, he can die.

So now what did they do? They used titanium mesh in place of his skull when they did this cranioplasty in January of 2015, but again, Mark had a problem. So now in May of 2015 they did another cranioplasty and a removal of the titan drum mesh. And you will hear that every single time that your head is opened up and you have to now replace the bone or make some changes, it's interrupting the brain, it's interrupting the brain, it's causing more damage, more damage, but no choice, they have to do it. So this is Mark's life. Now, as you see here, it says surgery done in two parts with two different surgeons and the reason that it says that is because you've got a

neurosurgeon and then you have a plastic surgeon in order to fix the head the best you can. So that's with reference to the brain surgeries.

Now let's talk about epilepsy because you're going to hear a fair amount about epilepsy in this case. Mark has been diagnosed by multiple doctors with posttraumatic epilepsy. Now, please understand that it's not unusual when you have a severe traumatic brain injury for you to possibly have or get traumatic epilepsy, it's not unusual. And Mark did get traumatic epilepsy from this traumatic brain injury, he did. But as you will hear later on, it didn't manifest itself until around 2015 when he had his first major seizure.

Okay. And you're going to hear from the family, and we're going to show you specifically, that lately he's had seizures actually on Memorial Day and it's recorded for you. So he has frequent seizures, including numerous rand mal seizures and you will hear what that means. You will see that your body -- you're not in control of your body, you're twitching and you become incontinent so that it just goes. And that's what happens during these seizures. His seizures are uncontrolled by medication.

Now, you're going to hear more specifically what that means. He's still having seizures, even though he's been on a number of different medications for seizures. He

is still having them. So now that doesn't necessarily mean that the medication is not helping at all, it's just not helping enough to stop them. Understood? Not helping enough to stop them, right? And you're going to also hear that the medications that people take for seizures so that they don't have them, has its own side effects, it's own side effects. So it's not just, hey, look, you take the medicine and you're okay and a little Advil and you're good. No, it's not like that. And he's constantly at risk of having another seizure every single day, every single minute.

Now, I'm going to talk to you about who Mark Perez was prior to June 26, 2013. Now, let me be clear with you about what I mean about that. Mark is in the courtroom today, he's dressed in a suit and he walks and talks, okay? And I don't mean to disrespect him in any way, but you know that it's my job to tell you the whole story, the story that you can't see when you see him dressed in a suit. Wow! He's is in a suit, he's not in wheelchair, okay, he must be okay. No. So that's why I'm taking the time to talk to you about who he was before.

There he is with his girlfriend, who he was with for approximately eight years. And that's him when he was: DJ'ing. Now, that's not something they were doing when I was a kid, but that's what they do now. There are a lot of

DJ's. And he was, you know, up until the time of his injury, a talented graphic artist. That's what he was doing the day that he was injured, he was working at that concert site doing graphics. He was an entrepreneur and a DJ.

And I want you to know that his father will tell you, because his father has a business and Mark used to work with his dad and he was a good deal closer, so that when his dad was trying to get business, he would often rely on Mark because of Mark's ability to talk to people because of Mark's personality and he would be a good deal closer. He was a leader, he was very confident.

And you're going to hear from more than one doctor, it's not disputed, that when you have a brain injury as severe as this, it affects your behavior, it affects who you are, so that he's not the same. He's not a leader or confident, outgoing, socially popular. Those are all of the things that he was.

And here he is standing next to a very small plane that you couldn't get me in in a hundred years because he was an aspiring pilot and he actually was taking pilot lessons, okay? And he was independent, active and ambitious, ambitious because he was doing all of these things when he was in his 20s. The accident happened when he was 30-years old, 30.

And so I'll show you, even though you see them in court, it's a close-knit family. They're here today, but grandma is in the picture and she's not here today. Okay, so that's who they are. Mom is Linda and dad is Paul, brother is Justin, sister is ANNE Cezanne.

Now, let's talk a little bit about the work that Mark did before. Impact Images, that was his father's marketing and advertising company. And what did Mark do there? Well, he did creative things for his dad; he did art direction, project management, graphic design. He was very good at creating websites. You know, some things just come naturally to people. He had natural talent, you're going to hear that, natural talent. Some people go to school and get masters degrees, some people leave early. Some of the most successful people in America dropped out of college and became successful and own the biggest companies in the country.

And Mark, he wanted to work, he wanted to make money and he worked for a large tattoo company. And you're going to see this photo in evidence because this was graphics that he did for this tattoo company. He did marketing for them, advertising, social media development, website development, many, many things, many different things and he worked there for a while at the same time he was DJ'ing social events throughout high school and

college.

Now, he went to college, but only for a short period of time. But during this period of time he was doing DJ'ing. He was not a guy who sat around, he was a guy who was ambitious. He was going to be somebody. And his work, First Up Media, because he decided after working at the tattoo company doing all of these things, he said, you know, maybe I'll start my own company and I'll work for myself, I'll give it a shot, let's see what happens. And he developed his own business to represent companies, to market them and their products, not only in print and digitally, but also, audio visual. And what companies did he do this for? Well, he developed projects for JC Penny, Bed Bath & Beyond, Macy's and the New York Islanders, to name a few.

So what about him socially? Well. You already know that he liked to fly small planes, had a large group of friends, he liked boating. That's him with his girlfriend, him working out at the gym. And you can't necessarily see it in there, but he's wearing one of those belts that you wear when you you're lifting, right? That's what he liked. And you could see that he's a little bit huskier there. He liked sports and spending time with family. That's him driving in the car with his grandmother.

Now, this is a piece of the puzzle because I look at this case and I say to you that I'm trying to put this puzzle together for you. So that's a puzzle piece and that actually will be the first doctor you hear from, Dr. Greenwald, who will testify sometime today, and he's the first piece of the puzzle.

So let's know a little bit about him. You're going to hear about it when he comes in and I'm going to ask him about his credentials, but we'll just go over them quickly now. He's board certified in brain injury medicine. And by the way, there's not that many people who could say that, all right, and it's what he does. He doesn't do it on the side. He's a brain injury doctor and he'll tell you how many people he deals with is his specialty. He is board certified. You're going to hear about what board certified means because after you become a doctor and you are licensed you can go further by taking the test and doing extra things to become board certified, which I won't bore you with it now. We're going to hear about it, okay?

And he's the medical director of JFK Johnson Rehabilitation Center for Head Injuries and that is in New Jersey? He's on the board of trustees, as you see, for the Brain Injury Alliance of New Jersey. And this JFK Johnson Rehab Center treats a lot of people that have brain

Opening - by Plaintiff - Morelli Page 33

injuries.

So what about his testimony? Well, he's going to tell you about Mark Perez's overall physical and cognitive health. And you should know that Dr. Greenwald saw Mark in February of 2017 and he saw Mark again in June of 2019 to be able to update so that when he spoke to you, he will have seen him very recently. And he's going to tell you the effects of Mark's traumatic brain injury and consequent impairment.

And you will notice it says causally related to the injury. He's going to tell you what this injury caused for Mark because there's a number of things that don't meet the eye. It's like we spoke about, you know, when you meet somebody and you make a determination right away that you like them or you don't like them, right, and you don't really know them, okay. And we also hear that term don't judge a book by its cover. Okay, well, the cover is a heck of a lot better than he is.

So post-traumatic epilepsy, I mentioned that to you. He's going to talk about cognitive linguistic impairment. Let him explain exactly what that is. And he has left hemiparesis, a weakness on that side. Head pain. Now, you're going to hear that, and I will show you, that Mark also has chronic headaches and I want to differentiate for you this head pain and the chronic headaches because

Opening - by Plaintiff - Morelli Page 34

they're not the same, all right? He's had so many interruptions to his head, as you've already seen, that he has this pain that's regular pain. Then he -- regular pain. And then he has chronic headaches. Very different from the head pain.

So he has light and noise sensitivity and you're going to learn that when you have a severe traumatic brain injury like this, you're sensitive not only to light, but to noise. So you can't now be in large groups at a concert or something like that because you can't tolerate it.

He has emotional dysregulation. Well, that's a fancy way of saying that he's not emotionally the same as he was and that he has so many different emotional problems. He's suffering from depression, and it's not only one doctor that says that, but his doctor -- his psychiatrist who's treating him says that. He's suffering from anxiety and fatigue.

And one of the things that he's anxious about and one of the things he's depressed about is his future. What is his future? He thinks about that all the time. He talks to his psychiatrist about that all the time. When am I or if I'm going to have another seizure? He also has post-traumatic stress disorder because what happened to him is certainly very unusual. And he is going to, as Dr. Greenwald will tell you, require a lifetime of medical

Opening - by Plaintiff - Morelli Page 35

care for his cognitive, emotional, psychological impairments, post-traumatic epilepsy, all caused by diffuse brain damage.

Now, what the heck does that mean? Well, diffuse brain damage means it covers a lot of the brain, many of the lobes of the brain. You're going to hear how many lobes are on the right side, how many lobes are on the left side and he has diffuse brain damage. It isn't only in one little spot. And you're also going to learn that there's no further healing of Mark's brain injury that can be expected. The brain doesn't regenerate itself. That's not what it does. When it's dead, it's dead, okay?

So these impairments are permanent and his condition will deteriorate over time. So, in other words, it's not only, hey, how is he now? He's not getting better, what's the future progression? To get worse, to deteriorate. So when you have a severe traumatic brain injury, you're going to learn that it doubles your risk of Parkinson's disease and dementia. Now, not everyone gets Parkinson's disease, thankfully, not everyone gets dementia, thankfully, but many people, when they get older, unfortunately, do. Some people even get it when they're younger. And although not everyone gets it, the risk is there in the normal population of dementia and Parkinson's disease, but the risk for Mark is two times the risk for

Opening - by Plaintiff - Morelli Page 36

us, okay?

(Continued on next page.)

Opening - by Plaintiff - B. Morelli Page 37

MR. MORELLI: (Continuing) you are going to learn that he can never work again and needs full-time supervision, and I'm going to show you that you could look like you are better than are you, all right? Because most of what is going on with Mark is internal. It's not that you can't see that his head is deformed because it is, but it is worse inside.

Then we are going to hear from Dr. Lipton. Now, this isn't necessarily going to be in order, it is just another piece of the puzzle. And Dr. Lipton is board certified, you are hearing that term again, in radiology and neuroradiology. He is an associate professor of clinical radiology. He is the associate director of Gruss Magnetic Resonance Research Center. And you are going to find that not only is he at the Einstein College of Medicine, he is the director of radiology, but he has developed and directs programs that investigate traumatic brain injury and cognitive disabilities from that brain injury.

Now, the reason that you are going to hear from Dr. Lipton is because Dr. Lipton is going to go through with you the CAT scans from Mark at the beginning when he was first in the hospital in 2013, CAT scans from later on, MRIs that had been done so that you can see what you can't see today, okay?

Now, you are going to learn from his testimony

Opening - by Plaintiff - B. Morelli Page 38

that traumatic brain injuries and the affect they have on cognitive function; in other words, how you think, how you feel, what your memory is, how you speak and whether you could find the words. And he is going to speak about the use of radiology in diagnosing and treating traumatic brain injuries because that's what he does. And we are going to talk about extensive encephalomalacia. You are going to hear that term before Dr. Lipton takes the stand. You know what "extensive" means. "Encephalomalacia" is dead brain. Some people call it "brain rot," some people call it "dead brain," okay? That's what it is. And Mark, unfortunately for him, has extensive encephalomalacia. He has a herniation of the brain through the dural defect.

Now, you are going to see that it is a heck of a lot more complicated than somebody just has a head injury. And he has diffuse cerebral atrophy.

Now, we know what "diffuse" means. Many of us might know that "atrophy" is. If you had an injury ever to your leg or if you had knee surgery, it could get smaller, lose contour, lose its muscle; so it atrophies, it gets smaller. So not only does he have dead brain, but he has diffuse cerebral atrophy. And he will talk about the relationship between those injuries to the cognitive impairments. In other words, these are the injuries, but what kind of deficits does he have as a result of it? Many,

Opening - by Plaintiff - B. Morelli Page 39

many, many. I am not going to speak to you for two-and-a-half hours about every single thing. Let's hear it from them, okay? And he will use the actual CT scans and MRIs so that there will be no question about this injury, no question.

Now, Mark is missing a significant amount of brain tissue which will not regenerate. That's his prognosis. We have the diagnosis of traumatic brain injury, cognitive deficits, all these problems with atrophy, diffuse brain damage. That's the diagnosis. That's what has already happened. That's what is happening now. That's what we are saying is wrong.

When we talk about a prognosis, okay, we talk about what we expect to be in the future. It will not regenerate. That is brain damage is permanent and progressive. And as he gets older it doesn't get better for him. It doesn't actually, generally speaking, get better for any of us when we get older. For him it is times, times, and times that, okay?

So, let's go to it the next part of the puzzle, Dr. Gordon who, actually, I believe, might be testifying before Dr. Lipton.

Now, as you see, this is starting to form a skull. We are just trying to put the puzzle together.

Dr. Gordon. Well, what is Dr. Gordon doing? He

Opening - by Plaintiff - B. Morelli Page 40

is vice chair of the department of rehabilitation medicine at Mount Sinai School of Medicine. He is the former codirector of the Mount Sinai NFL Center for Neurological Care. And as you can see, he is the chair of research counsel of the Brain Injury Association of America. This is what he does. He doesn't do anything else. He tests people who have brain injuries to see what their cognitive deficits are. He does multiple tests for hours and has done multiple tests for hours of Mark. And he not only did it a number of years ago, but he did it more than once. So he subjected Mark to these cognitive tests to find out all things about him. What is his what they call his motor speed. What is his memory like, what is his functioning and other manners. That's what he is looking for. So he found profound cognitive deficits in all of the domains of cognitive function that he assessed, that he looked at. He is suffering from severe anxiety, depression, and symptoms of posttraumatic stress.

Now, you are going to hear in this case that we are not one part of ourselves. We are all together so that when something is going wrong, real wrong, it affects other things that might not be going wrong, so to speak. And you are going to find that you are going to hear that when someone is suffering from anxiety and depression, that changes even the ways they can test so that when you are

Opening - by Plaintiff - B. Morelli Page 41

looking to find out what are his cognitive deficits, you have to take the whole person, you know? When someone is depressed and anxious about having seizures, it changes the ball game. So here are all the deficits that Dr. Gordon found. You are going to hear specifically what it means not from me, okay? Motor speed, attention, information processing speed, verbal fluency, visual perception, linguistic function, memory.

Now, the interesting thing is that when we get down to executive functions, that's a very, very specific item and it takes in a lot of different things. I gave examples there: Memory, problem solving, planning, attentional control, and how you act in terms of being inhibited or not inhibited. So it changes a person's behavior all together. That's what we are talking about. We are talking about the whole person.

What is Dr. Gordon's prognosis? Because of the length of time between his injury and evaluation, his cognitive deficits are viewed as permanent and there will be no further improvement. He will never be able to return to any form of employment. That is what you are going to hear in this case. That is the truth. That is what we are going to be proving to you in this case even though he walks and talks, okay? His traumatic brain injury has totally disabled him for the rest of his life.

Opening - by Plaintiff - B. Morelli Page 42

So what is the next piece of the puzzle? Dr. Fayer is a board certified psychiatrist, and Mark goes to him and speaks to him about the problems that he has and how he is feeling. And let's look at Dr. Fayer. He is also board certified by the American Board of Psychiatry and Neurology. He is board certified by the National Board of Medical Examiners. He is an attending physician at Mount Sinai. He is a consultant for the United States Department of Justice.

You are going to see that Dr. Fayer is very experienced in what he does. And because he spent sometime with Mark speaking to him and asking Mark about his problems and finding out how Mark feels, he says that he has clinically severe neuropsychiatric disorder. And we are going to ask him what is that, what does that mean. There are a lot of different psychiatric disorders that people can have.

His injury has had a substantial psychological impact on his life. I think you already can tell that. And he has aphasia. What is that? It's the loss of the ability to understand or express speech because of brain damage. He has difficulty staying on point. Difficulty in concentration and attention. He is frustrated by his inability to express himself.

I am going to stop there for a second just to say

Opening - by Plaintiff - B. Morelli Page 43

to you that you are going to hear and you are going to hear from the first witness that when somebody is aware of their disability there is more suffering involved. You are going to hear that Mark has said that he feels trapped, okay, so that this inability to express yourself is so different from the way Mark used to be when he was closing deals, and he was DJ'ing, being very flamboyant, had a girlfriend for eight years. It is very, very different. He has trouble reading, cannot follow plots watching TV or movies. So when I talk about conscious pain and suffering, these are some of the things I am talking about. You know I talked to you in jury selection a lot about that.

He is distracted in any noisy environment. He has global anxiety. He is worried about the future. He worries about his brain and if he will have seizures in the future, or will he have premature dementia. Because he knows, he knows that that's one of the things that can happen to him. He knows that he has a much greater risk of two times risk of that happening to him. So what is Dr. Fayer's prognosis? That he will require a lifetime of psychiatric treatment to help him deal with his problems. And his treatment will need to be supplemented with psychiatric medications for all of the things -- not only for his traumatic brain injury, but for depression, anxiety, and his sleep disorder because he has trouble sleeping also.

Opening - by Plaintiff - B. Morelli Page 44

Now, understand the difference between a psychologist and a psychiatrist is that one is a medical doctor, as we spoke about, I think, in jury selection. Dr. Fayer is a medical doctor so he is not only able to treat him psychologically and psychiatrically, but he can prescribe medication for Mark without him having to go to someone else.

So let's look at the next part of the puzzle. The next part of the puzzle is Dr. Lubliner. Dr. Lubliner was called in after the fact to review medical records in this case and to make certain decisions as to his orthopedic injuries. He is also board certified in orthopedic surgery, he is an assistant clinical professor at New York University Hospital, he is a former associate chief of sports medicine at the Hospital for Joint Diseases. So you will hear, you know, and it is interesting to say that he is going to discuss and explain the orthopedic injuries Mark has sustained as a result of the accident. And, you know, I hate to minimize anything, but there are times when people have the injuries that Mark had orthopedically and it's substantial. In this case it is the least of his problems, okay?

He has a joint separation in his right shoulder. He had rib fractures, facial fractures, transverse process fractures. That's fractures of very specific part of your

Opening - by Plaintiff - B. Morelli Page 45

spine. We will let Dr. Lubliner explain that to us. So what is his prognosis for his permanent impairments? Well, he believes he will need shoulder surgery to reduce the AC separation, and he will need insertion of hardware, okay? That's his opinion. Permanent weakness of the right shoulder, the loss of range of motion, permanent recurrent pain. This is on top of all the problems he has. Permanent decreased sensation of the left upper and lower extremities, limitation of activities of daily living, and permanent inability to participate in sports, to lift, and the ability to work.

Now, what I want you to understand is that Mark, because he won't give up. He won't. He is going to the gym. One day he was in the gym trying to do some cardio and he had an epileptic seizure. He fell off the treadmill. You are going to hear about that. So even though he is trying, it doesn't work out so good.

Now let's finish the puzzle. Dr. Schwartz. Who is Dr. Schwartz? Dr. Theodore Schwartz is also board certified by the American Board of Neurological Surgery. He is a brain surgeon and a professor of neurosurgery at Weill Cornell Medical College, New York Presbyterian Hospital, director of epilepsy surgery of Epilepsy Research Laboratory.

Now, you are going to hear from Dr. Schwartz, and

Opening - by Plaintiff - B. Morelli Page 46

mostly what we are going to talk about with Dr. Schwartz is what about specifically the surgeries? You know, how do you do them, why do you do them the way you do them? Because he does them. But we are going to specifically -- and I already told you that they had to save his life and decrease the pressure in his head, you know that; but we are going to talk to him about brain trauma and the permanent injury to multiple areas of his brain. But we are going to focus his attention and my questions on posttraumatic epilepsy because that is one of his specialties, epilepsy and dealing with it and surgery for it. Okay? You are going to hear that Mark's epileptic seizures have persisted in spite of multiple medications.

Now, I am not sure if he has been on four different medications. I believe there are five different medications he has been on. They all have different side effects. They all might have worked to a certain degree, but the seizures continue. You are going to hear that that's one of the absolutely profound problems that mark has. And so what Dr. Schwartz says is that the trauma and injury led to his neuropsychological and cognitive and motor impairments. He is saying yeah, that's what is causing the problems for him. And, he says, that the fear of having seizures are known to cause social and behavioral anxieties. And he states that because he is dealing with these people

Opening - by Plaintiff - B. Morelli Page 47

who have seizures, people who have epilepsy. He is dealing with them. That's what he does.

So that's his testimony. What is his prognosis? That all of mark's deficits are permanent, that he will require a cranioplasty to repair the large defect in his head to protect his brain.

Now, let me explain to you that there is no dispute that he right now needs further brain surgery, okay, right now. Right now, okay? Now, one can say, Well, you know, we see a defect in his head, will that brain surgery make it look better? Possibly, but that's not the main reason for the surgery. The main reason for the surgery is to protect his brain because if we don't do that, then he will have to wear a helmet everywhere he goes, and he is status continuous state of seizures that follow each other without recovery of consciousness.

You are going to see a video of, unfortunately, mark having a seizure not too long ago at the beginning of the summer. And he will likely have future seizures because that's the way it goes. You see, the medicine doesn't make it better, it controls it, all right? So there is a difference between taking medicine that cures you and medicine that controls you. Most times there are these medicines that help us with the affects of the problem, but they are not creating anything to make it better. If, in

Opening - by Plaintiff - B. Morelli Page 48

fact, he can control the seizures, obviously he is looking for that. So, he says he will likely have future seizures, and he may require additional brain surgeries for his seizures.

Now, the reason Dr. Schwartz is saying that is because Dr. Schwartz, when he saw him, knew the seizures that he had because he started having them in 2015, but he doesn't know if he is going to have them the day after he saw him, or later the day he saw him, or a week after he saw him. He doesn't know. So he is saying that if, in fact, you are going to continue to have these future seizures, we might have to do something about it. We might have to do more surgery on you for that specifically.

And he will never be able to drive or fly a plane. I think when you talk about flying a plane, you certainly agree he won't be able to do that. It is not that he doesn't have the ability to drive a car, it is that he can't drive a car because if he has a seizure, he can kill himself or other people, okay? So he can't drive a car. It is not about whether or not he is physically able to, all right?

Now, after we have finished the skull and we know all of the doctors who are going to testify, six doctors in all, medical doctors, we are going to hear from Edmond Provder. What does "life care planner" mean? What he does and what his profession is he takes all of the medical

Opening - by Plaintiff - B. Morelli Page 49

records, he takes interviews with the family, he takes other information from past employers or anything that he can read or hear or see, and he tries to put it in a way to not only give an opinion about Mark's future, but put it in financial terms so that you know that this is what he is going to need in the future, because understand that he also comes with a long resume as a certified rehabilitation counselor. He is not a doctor, okay? He is a certified life care planner since 1973. I even think that's a long time ago. And you will see that he served as a vocational expert for the social security administration for over a decade, he provided testimony in over 2,500 SSDI hearings, Social Security hearings.

Now, you know, he is experienced in this. And when we talk about "vocational," he is going to be rendering an opinion that Mark is not able to be employed, okay? You are going to hear that if somebody is going to say that he could go into what he has done before, it is just poppycock because he has tried and he can't, okay?

So certainly you are going to hear testimony from Mr. Provder that -- his testimony is based on a review of his medical records, interviews and the testimony in the case because he reads also the depositions that were given of Mark Perez. He will testify as to the nature of Mark's future medical care and rehabilitation needs. And he will

Opening - by Plaintiff - B. Morelli Page 50

testify to what it will cost. That's what it will come down to, what it will cost.

Now, you have noticed I have not and I will not in my opening statement talk to you about amounts of money okay? It is not time for that. First the evidence then we talk about money. First you hear it and see it, then we discuss it. You so don't think that I am forgetting. It is purposeful. It is not time. Okay?

So what will he need? Physical therapy, occupational therapy, psychiatric treatment, neurological care, hematology care, home care.

Now, understand that not only will he most likely need future surgery, but he needs to be supervised especially because he has seizures and he doesn't know when he is going to have them. And you are also going to learn that if in fact, they do epilepsy surgery on this young man, it is going to take two or three surgeries to do that, do implants into his brain. They actually do these kind of surgeries, all right? It doesn't mean it is going to work. And every time you go in, every single surgery, the next surgery that he needs right now is another interruption, more damage to the brain, and you are going to fine that.

(Continued on next page)

Opening - by Plaintiff - Morelli Page 51

MR. MORELLI: And you're going to find that when they go in, it's difficult to like peel off the brain to be able get to what you're doing because they have to find out where the seizures are starting from to be able to go and take care of it. That's his future. So he will testify as to Mark's unemployability in the future.

And then we're going to turn to Dr. Dwyer. She's an economist and she will testify to you that she is research associate professor at SUNY and she was the past chair of the Department of Healthcare Policy and Management at SUNY. And she's going to come in and take what Mr. Brogdon said and she's going to bring it all to the numbers, bring it all to the numbers, not Morelli, the expert, bring it all to the numbers. And as I told you, she will testify as to the nature and extent the economic loss suffered by Mark.

Now, economic loss is separate an apart from conscious pain and suffering and loss of enjoyment of life, separate and apart. It's a number that you're going to be able see and feel. That's different, different. There's different items of damage in this case that Mark is entitled to from you. It's our only day in court. We don't come back again. This economic loss includes income loss, future health care costs, loss in Social Security earning. And she'll also calculate the total loss from all

Opening - by Plaintiff - Morelli Page 52

categories outlined by the life care plan. That's her job and that's what she'll be doing.

Now, let's talk about Mark's life now. He no longer is independent. What do you mean by that, Morelli? Most of the time he's with his brother Justin or his dad or his mom. Does he go out alone sometimes, walk to the gym? Yes. Does he live alone? No. He stays with them, he stays with his parents, he lives with his brother at different times, but he doesn't -- he's not that independent guy, he's not that social guy, he's not the guy who's flying planes.

He's unemployable. You're going to see that he also suffers from fatigue. You also will hear that he needs take naps because his brain gets tired. He can't drive and you know the reason, he can't fly a plane and you know the reason. He's damaged goods. So I mean, one can say, well, that wasn't very nice, but he had this girlfriend for eight years and they were talking about possibly getting married and he had the accident. Now he is who he is and she left him, okay? So that's just another thing that what happened and you'll hear about it and decide whether or not, hey, it was all for the better. Eight years is a long time.

He can't maintain a relationships or make new friends. That doesn't mean that he never talks to anybody

or no one ever talks to him, but we all know that when we feel that somebody is off, it's off-putting to us.

So what about this case that you're going to be hearing? When I say Mark defies the odds, I mean in one way Mark defies the odds. He didn't die. Because at the time when he had, and you're going to hear about the Glasgow Coma Scale. It measures your ability at a certain time, and I'll let the doctor be very specific about it. And all of a sudden the measurements of his awareness, this coma scale, plummeted. And when it plummeted they said, unh-uh, unh-uh, we got to do surgery on this guy like right away. And the family was told that he had a ten percent chance of survival, that he wasn't going to live. Ninety percent is not good, it's only good if that's your mark in school. So Mark defies the odds, but he endures the consequences every single day.

That's our case in a nutshell. Believe me, it's only a nutshell. I hope that you understand that I took this time because I thought it was necessary, but no numbers now. Please wait until the end of the case, hear everything and do what I know you're going to do, which is the right thing.

THE COURT: Thank you, Mr. Morelli.

Ladies and gentlemen, let me give you a break and we'll come back with the defendant's opening argument.

THE COURT OFFICER: All rise, jury exiting.

(Jurors exited the courtroom.)

THE COURT: Is there an issue?

MR. HAWORTH: Yes, there are tow issues, Your Honor. The first one relates to Dr. Schwartz. There's a motion regarding Dr. Schwartz's planned testimony from the plaintiff regarding future brain surgeries other than the immediate surgery, the craniectomy. Everything -- all of the epilepsy surgeries, we have a pending motion to preclude all of that essentially because he's says, well, if seizures remain intractable, he might have these various procedures, he may. And I can read it right into the record. He says he might require additional brain surgery to implant electrodes to determine the source of his seizures and then another surgery to remove the abnormal part of his brain. This would be a three long week admission to the hospital with two separate surgeries and require a period of several months for recovery. He might, might even be a candidate for a brain or vagal stimulator.

And as I argue --

MR. MORELLI: Excuse me, Your Honor, do we have to argue this now when we have a witness? I mean, nothing is going to happen now that's any different.

THE COURT: Well, I'm not really too sure right now. In the first instance, I believe that I gave you a

ruling on this part of the application, although we haven't put it on the record and if that's what we're doing to place this on the record, then that's fine, but maybe now is not the time.

Secondly, if you're objecting to any part of the opening statement, if you read my court rules, which are very clear, objections must be contemporaneous with the statements, we don't do them at the end. So if you're making an objection to the opening, unless there's something catastrophic that I didn't hear, it's been waived.

MR. HAWORTH: What I am doing, Your Honor, is bringing to the Court's attention that knowing that there's a pending motion, and I'm unaware respectfully, of any ruling on that motion Your Honor --

MR. O'HARA: As am I, Your Honor.

THE COURT: I told you guys that the -- you know, that you have sufficient notice of what that potential opinion is going to be. It doesn't have to be expressed in the medical reports or reports that you received to a reasonable degree of medical certainty. We're on notice of what the potential testimony is. This isn't a surprise.

MR. O'HARA: Your Honor, with --

MR. MORELLI: I also think that you just said one person argues --

MR. O'HARA: With respect, Your Honor --

THE COURT: And that is correct.

MR. MORELLI: One person argues --

THE COURT: We have one party -- I'm going hear from one attorney at a time concerning whatever it is that we're doing here.

MR. HAWORTH: Your Honor, I think you're referring to the street corner discussion.

THE COURT: I am. The street corner motion argument, yes.

MR. HAWORTH: I wasn't there for that. I had already left to go back to the office, so I didn't hear it, but let me just make a point, Your Honor, if I may. If we look at the cases, some of which are cited by the plaintiff themselves, if we look at the cases, they're clear that "if" and "might" are not the standard. You have -- this one's the Second Department --

THE COURT: But what we're talking about with respect to, Mr. Haworth, is whether or not you have notice to go forward to defend that position, not whether that testimony may be legally sufficient on the witness stand. Those are two different issues.

MR. HAWORTH: I would respectfully -- well, I agree, but disagree, Your Honor, respectfully.

THE COURT: Okay.

MR. HAWORTH: My position is that yes, we're on notice from the report, but the notice isn't the issue. We're not objecting to the notice, we're objecting to the planned substantive testimony as set forth in the report because the cases say that if and might don't do it. You need a reasonable degree of medical certainty. The only thing that Dr. Schwartz says to a reasonable degree of medical certainty is if an event that hasn't happened, happens, then if that happens, we might need to do this.

In the cases --

THE COURT: Well, this is something that we will be discussing, I'm sure, at great length when the testimony actually happens and I hear the foundational evidence.

MR. HAWORTH: Okay. What I would like to do, Your Honor, is reserve then my right to continue this argument before Dr. Schwartz testifies.

THE COURT: As a pretrial motion in limine, the motion is denied. Let's be clear about that. The motion is denied.

In terms of what the actual witness says and what the foundation for the testimony, of course that objection can be raised later on, of course it can. I want to hear what he actually has to say. I want to see with what degree of certainty he can express his opinion, what he actually does say.

MR. HAWORTH: I'd like to have a hearing outside the presence of the jury first before we contaminate the jury with testimony that we contend is inadmissible. If he says something different then, well, then he says something different then, but I would like to have a hearing outside the presence of the jury to avoid the prejudice of jury hearing about four or five additional brain surgeries without a basis to say that, without a foundational basis, as Your Honor says.

THE COURT: I don't think that's necessarily warranted.

MR. O'HARA: Judge, may I just --

THE COURT: Okay.

MR. O'HARA: -- because I was the only one on behalf of the defense on the corner the day that this was discussed.

THE COURT: All right. So this is going to be the last time then that we take this as a tag team approach?

MR. O'HARA: Yes, sir. I appreciate that, Judge, but I must create a record because the Court said that it made a ruling on the street on the day of the discussion and my recollection is fundamentally different. The Court specifically said that we were having a general discussion and you --

THE COURT: You're right, but I believe that in other context I think we had discussions recently where I told you, you know, my feelings on this issue. Did I make a formal ruling? You're right.

So that the record is completely and abundantly clear about our street corner encounter, you folks were directed to be here -- what was it Monday afternoon or Monday after you finished jury selection? I had another jury that was out. There was issues regarding scheduling that we needed to hammer down. That jury didn't finish up until basically right at the lunch hour where everybody had to leave. I actually ran into everybody outside and that's where this discussion had happened for scheduling purposes and these issues were discussed at that point in time. Just so that any weirdness in the record is resolved by what exactly that meant.

MR. MORELLI: And you asked us to see you the next day at 9:00 a.m.

MR. O'HARA: I need to make clear, Your Honor, because I was the only lawyer there on behalf of Live Nation and the Court specifically indicated that we would be given an opportunity to argue the matter on the record because of the significance of the issue and there has not -- until you just said the motion is denied, there hasn't been that opportunity and we had not been apprized

that that motion was, in fact, denied.

THE COURT: All right. So I will give you the opportunity to make your record, okay?

MR. O'HARA: Thank you, Your Honor.

THE COURT: All right. I've researched the issue. I'm comfortable with the ruling, but you can certainly make your record for appeal. I have no problem with that whatsoever, but, you know, what's in your papers, is in your papers.

MR. O'HARA: Thank you, sir.

THE COURT: Now, I need to give you guys a break.

MR. O'HARA: Yes.

THE COURT: Okay. And then we'll come out because I don't want to cut your opening statement in half.

MR. O'HARA: Thank, Judge.

(Brief recess taken.)

MR. O'HARA: Our position on the photographs and our position on the videotape is recorded in written communications back and forth with plaintiff's counsel. We objected and we made a motion in limine relating to the photographs and the videotape. Mr. Morelli, as we represented to the Court, indicated that he would limit the number of photographs. We specifically said we would object to the usage of video and we would present it to Your Honor. It remains as part of the motion in limine

that is before the Court. There has been and never was a representation that had been resolved and it remains open.

So based on that, we continue with the position that it is improperly something that was referenced and should be something that the Court addresses at so whether or not it's appropriate.

THE COURT: Okay. Let me just simply say, I was under the impression through our discussions that there were two issues that were -- for me to really determine as motions in limine in this case. And when I say motions in limine, I mean that to be any degree of potential urgency. One was the involvement of the Tatoo Lou in the case and the scope of his testimony -- the depositions, the scope of his testimony and how it relates to the life care plan was the big issue.

And the second issue was the one that we spoke about just before the break. The rest of it, I thought that you guys had either worked out or were going to work out, and it wasn't until a very short time ago, just before the start of openings, that I knew that there was any remaining issues with regard to these. In fact, the copies of the motion papers that you had given me, you had, Mr. O'Hara crossed out certain things because I asked you, what is it that I need to be focused on? And you had actually crossed out everything except for those two

issues. So I apologize in the sense that I wasn't aware that there was a remaining issue on those things until now.

And Mr. Haworth was talking about, a few moments ago, concerning references to the videotape that was -- references by Mr. Morelli in his opening statement. If it's still an issue, it's still an issue. He made the representations in his opening statement. If it comes in, it comes in. If it doesn't come in, he's going to be stuck with that and the consequences of that. So I'm just saying, you know, had I realized that there was still an issue with regard to these other things, I would have actually focused on those to at least give you a little bit of guidance for today.

MR. O'HARA: And I appreciate that, Your Honor. If one looks at what I wrote on the motions, it specifically says about the photographs and the video, that it's being discussed with counsel and we continued the discussions with counsel.

MR. MORELLI: Your Honor, he keeps referencing photographs. We worked that out today.

MR. HAWORTH: It's not completely worked out, Your Honor.

MR. MORELLI: Scott, Scott.

MR. HAWORTH: We worked out part of it.

MR. MORELLI: Scott, relax, okay?

We worked out the photographs for the opening and he told me the photographs that he would agree to and I told him that before I offered anything, that I would go back with him and work it out. That's what I said.

THE COURT: Okay.

MR. MORELLI: Okay. We haven't had a chance to do that because --

THE COURT: Mr. O'Hara, you tell me, we're almost five minutes to 12, is this going to be an issue with the length of time that's available for your opening this morning?

MR. O'HARA: No, sir.

THE COURT: Okay. I just want to make sure first.

So you can continue.

MR. MORELLI: Okay. So the photographs are not an issue.

We're going to deal with the video at a later time, Your Honor, said. You know, I'm a big boy, all right? So let's get to it. I have a witness here for an hour and a half already.

MR. HAWORTH: Just real quick Judge.

My anticipation is that during the break Mr. Morelli and I will sit down with the photographs that he wants to use for the balance of the trial, we will make

every good faith effort to work out what we will consent to and what we won't and if we can't agree, we'll come back to Your Honor. If we can agree, all the better.

MR. MORELLI: Fair enough.

THE COURT: I still have to take a look at the video and look at the motions for the video.

MR. HAWORTH: Yes, Your Honor.

THE COURT: Have you folks responded -- plaintiffs responded to their application? I don't remember seeing a reply.

MR. MORELLI: I don't think --

MR. SIROTKIN: Your Honor, I don't think we did because I think we were under that impression regarding the --

MR. MORELLI: The video was taken by his brother. He's going to testify to it. I don't understand how it doesn't come in. Under what theory?

THE COURT: I don't know, I haven't read -- assuming it wasn't an issue, I didn't read it.

MR. MORELLI: No, I understand, but to say it's prejudicial, every single thing I'm doing in the case is supposed to prejudicial and everything they're supposed to do is prejudicial. I don't get it.

THE COURT: Undue prejudice, that's what we're talking about. That's the issue.

Opening - by Plaintiff - Morelli Page 65

MR. MORELLI: I know, but he has epilepsy. They can't see what a seizure looks like?
THE COURT: All right. Now, when is the brother supposed to testify? When is the video coming into play?
MR. MORELLI: Oh, you have time.
THE COURT: Okay. So you have time that means to address --
MR. MORELLI: Yes, we have time.
THE COURT: -- their papers?
MR. MORELLI: Yes, absolutely.
THE COURT: All right. Let's not wait any longer, let's get the jury out.
Everybody is ready?
MR. MORELLI: Yes.
MR. O'HARA: Yes.
THE COURT: Then if we have any time before the lunch break, then you can make whatever record you need to make on the other issues.
MR. MORELLI: I would like to put the witness on even before lunch if I can to get some time in.
THE COURT: I don't know how much time that's going to be.
MR. MORELLI: Half an hour.
THE COURT: I think.
MR. MORELLI: Yes.

Opening - by Defendant - O'Hara Page 66

MR. O'HARA: We'll see how long I take, Judge. I hope to be --
THE COURT: I think he's got to be at least 45 minutes, but I could be wrong.
MR. O'HARA: I'm hopeful that I'll be 30, Your Honor.
MR. MORELLI: Yes, he told me 30. If he is, he is, if it isn't, it isn't.
THE COURT: All right.
THE COURT OFFICER: All rise. Jury entering.
(Jurors entered the courtroom.)
THE COURT: Mr. O'Hara.
MR. O'HARA: Thank you, Your Honor. May it please the Court, counsel, the Perez family, ladies and gentlemen of the jury.
Jury selection one the things that we talked about is nothing that lawyers say is evidence, right in the middle throughout the entire case. You've now heard an overview as to what the plaintiff intends to prove in connection with the damages claims that are being advanced on behalf of Mr. Perez.
What I am going to do is a pact it is a promise what I'm about to outline for you, we will prove on behalf of Live Nation in defense of the damages case.
And much like yesterday, for some of you folks

Opening - by Defendant - O'Hara Page 67

that were here, I have a pretty tough cold, so if I cough, I'm trying to stay away from you, but it is nothing that I can do, okay?
So what is the answer to Mr. Morelli's question, why are we here? Well, there are certain things about this case that are not in dispute. There is no dispute that Mr. Perez was injured on June 26, 2013. There is no dispute regarding the injuries that he sustained and the care and treatment that he had, none. There is a dispute, and you will hear extensive evidence on only those issues that Live Nation contests, only the issues that Live Nation contests.
You now understand that this case concerns a traumatic brain injury and the effects of that injury on Mr. Perez up to today and into the future and what his future will hold. And there is a significant question, a very serious question, as to the extent of the effect of that injury and what the future will ultimately hold for him. There is no dispute that he had serious brain surgery and then required three procedures relating to the flap and there's no dispute that he will need another surgery and we have never and will not contest in this case that is required.
There is however, a significant question as to how he's doing today and how he will do in the future based

Opening - by Defendant - O'Hara Page 68

upon, not information that as a lawyer I'll present to you, but through experts that have credentials that, you heard this phrase during jury selection, that are impeccable, that are beyond reproach, because as the representative of Live Nation, I'm going to put before you objective evidence confirmed by world renowned experts to establish exactly what the future looks to being can like for Mr. Perez and what is reasonable to anticipate.
Now, there will be a question about whether or not Mr. Perez has particular signs, symptoms and sequelae going forward from his brain injury. You are going to hear from, as you heard, a neurologist on behalf of the plaintiff, Mr. Greenwald. You will also hear from Dr. Jordan on behalf of the defense. And it's really important to understand who Dr. Jordan is before he comes to testify. He has a bachelor of neurophysiology from Penn, he went to Harvard Medical School, he did an internship and residency at UCLA and Cornell and he is board -- and he is board certified in neurology.
He examined Mr. Perez, and the evidence will show, on two occasions; November 24, 2015 and then July 12th of 2019. Dr. Jordan will come before you and talk about how Mr. Perez presented in terms of the physical determination and whether it was consistent with the neurologic findings and the signs and symptoms that should

Opening - by Defendant - O'Hara Page 69

be anticipated with an injury of this sort. He will tell you without reservation based upon the evidence that is before him, not only from the evaluation, but also his record review, that the exact extent of cognitive impairment is difficult to understand in this case.

Why? What will the evidence show? The evidence will show that Mr. Perez has issues with the effort that he has put forth in all of the evaluations and examinations that were done by the defense experts, that there are test results, not only on the physical examination, but the neuropsychological testing that you heard some comments about, and we will go in length with our experts, that demonstrate that there is embellishment associated with the responses. And why is that important? The doctor will explain to you that there are certain things that are reasonably anticipated based upon a neurologic injury and there are certain things that do not have a rational medical explanation.

And the term embellishment is not an adjective, it's not calling someone a name. It's actually a specific finding based upon a test, that you will hear, called the test of memory malingering, okay? And you will learn that during the course of the evaluations of Mr. Perez over the past four years, that in addition to there being questions about the effort that has been put forth, there are

Opening - by Defendant - O'Hara Page 70

findings on physical examination that are medically unexplainable, that don't make sense despite the understanding of what the injury is.

You will learn that his physical strength and general recovery is good. You will learn that he has bilateral, meaning both sides of the body, tone in his upper extremities and tone in his lower extremities. You will learn that he is active in his personal life and is continued to be conscious of his physical appearance and the fact he does, in fact, continue to go to exercise, which you will learn from Dr. Jordan is inconsistent with some of the left-sided weakness on examination and the findings that he saw when he saw him, not once, but twice.

Dr. Jordan will also identify for you as part of his review more than just the two examinations. Dr. Jordan will talk to you about Mr. Perez's treating neurologist and the fact that what he saw, meaning Dr. Jordan, in his two examinations, is inconsistent with even the findings of Mr. Perez's treating neurologist Dr. Bruno, who will not be called in the plaintiff's case.

Ultimately, Dr. Jordan will tell you that there is no physiologic and no neurologic explanation that he can give you based on the medical science that he is an expert in to explain why there are certain findings that are inconsistent with prior examinations and what he sees on

Opening - by Defendant - O'Hara Page 71

his evaluation.

You will also hear from Dr. Ambrose. You will learn that Dr. Ambrose has impeccable credentials. That after medical school she pursued, in the field of physical rehabilitation and medicine, a masters at Mount Sinai School of Medicine, an internship and residency at Albert Einstein Medical Center. That she, too, as is Dr. Jordan, is board certified in her specialized field. And as Mr. Morelli points out, there aren't a lot of people in her particular field that are board certified in brain injury medicine. She is, too. She is as well.

What you will learn from Dr. Ambrose, who, also, as part of the evaluation by examination did an examination on August 29, 2019. And she will come before you and she will explain to you what were her findings on physical examination? What were her findings with respect to tests that she performed on Mr. Perez? And in particular, she will talk to you about a Rey's 15-Item test, which is something different from the Tomm® test, the test of memory that I talked about before, memory malingering. And what will Dr. Ambrose tell you? That when a patient scores below a particular level, it's considered in their field to be malingering.

Now, we're not suggesting that Mr. Perez, and the evidence is not going to suggest, that Mr. Perez is faking.

Opening - by Defendant - O'Hara Page 72

What we're going to suggest and what we're going to present is we recognize that as Live Nation we are responsible for the fair and reasonable damages that you determine, but it has to be something based upon fair and reasonable objective evidence.

MR. MORELLI: Objection, Your Honor. Argument.

THE COURT: Overruled.

MR. O'HARA: You will hear from Dr. Ambrose, as you will hear from Dr. Jordan, based upon the evidence in this case, their view as to whether or not there are findings that are consistent with malingering.

(Continued on next page.)

MR. O'HARA: (Continuing) You will also hear from Dr. Ambrose. There was discussion about surgery that may be needed in the future, and I will talk about the neurosurgical needs in a minute. You will hear that one of the findings that she tried to elicit was sensory loss, and that much like Dr. Jordan's findings on examination, she could find no medical explanation not only as a physiatrist and a specialist in rehabilitation medicine, but as a board certified brain injury medicine specialist that made medical sense as to why there was sensory loss. It was inconsistent with her education, training and experience in the field. She will explain that to you.

You will also hear and you heard an outline of what the plaintiff intends to prove with respect to his left side and how he walks, that his gait pattern, the way that he walks is normal based upon the review of the medical records from his treating neurologist, yet she can't explain why medically there are no findings of muscle weakness, there are no findings of tone abnormalities, and there is no lower extremity sensory disturbances. Again, we are responsible for the current condition that you find from the evidence that is objectively fair and reasonable. No more and no less.

Now, what will Dr. Ambrose concede? She outlines and she will come before you and testify that there is no

doubt that Mr. Perez is injured and will need physician care in the future. None. There is no doubt that he needs another cranioplasty procedure which is to address the removal of the mesh, and he needs a cosmetic procedure to place another piece in. There is no dispute to that. There is no doubt that he will benefit from future therapy because while the plateau for improvement in brain injury occurs as a general matter you will hear from all the experts between two to five years after the incident, that when you get to wherever your plateau is, if you don't go through the therapy in the future you have the potential to drop off over time; hence, the need for future therapy. And live Nation recognizes that it is responsible to provide this young man with fair and reasonable future care and treatment for the injuries that we are responsible for. No more and no less.

You will also hear from Dr. Ambrose as well as all of the experts in this case both on the plaintiff's side and the defense side that Mr. Perez does not have a need for 24-hour-a-day-seven-day-a-week supervision. Won't have it next week, won't have it next month; and no one will be able to come before you and tell you more likely than not he will at some point. No one.

Now, there are items that are in dispute in terms of how well he is going to do in the future and we are going

to bring forth quality top flight experts to explain to you why we are taking the position that we are taking, but there are other items not in dispute. There is no dispute that there are over $300,000 in past medical expenses. None. That's our responsibility. There is no dispute that he is entitled to be reimbursed for wages that were reasonably lost from the time of the incident until today. None. There is no dispute that he is entitled to future income loss based upon the reasonable forecast of who he was and what he was likely to do. And you will hear we will actually bring forth experts that not only talk about his employment history where he was making somewhere in the neighborhood of $20,000 to $35,000 a year, the experts will come before you and talk with you about the items that are not part of -- items that come off of the gross and the net loss to this man. I will stand before you at the end of this case, as I am doing right now, and say we are responsible for that. And we know based upon what he made for the period of time that is the foundation for the opinions for the future that we will owe somewhere in the neighborhood of $185,000 for his past lost income and that we know we are responsible if you assume a reasonable future for the young man somewhere in the neighborhood of $1.25 million in future income loss. It remains to be seen whether the plaintiff accepts that or whether they attempt

to put forth something that is beyond what we believe is fair and reasonable. It remains to be seen what they are going to do on that topic.

With respect to the -- I'm sorry?

THE COURT: Is there a problem?

MR. O'HARA: He is talking so I stopped.

MR. MORELLI: No. I was just mentioning something to him.

THE COURT: Continue, please.

MR. O'HARA: There is doubt that his life care plan needs forecast by Dr. Ambrose will be priced by Kim Kushner, a certified life care planner. And there is an economist we will bring before you, Dr. Freifelder who will also talk about the fair and reasonable future costs for the life care that he needs.

Now, you will hear testimony possibly about the need for surgery associated with epilepsy, and, in particular, seizures. And it is important to understand who the defense will call to address that.

Werner Doyle, Columbia University Medical School, Roosevelt Hospital internship and residency in general surgery, NYU internship and residency in neurosurgery, Yale University fellowship in epilepsy surgery. And he will come before you and testify that anything is possible; but in order to make a medical determination that, in fact, the

Opening - by Defendant - O'Hara Page 77

surgery that was described that requires two or three procedures that includes the insertion of electrodes to try to determine where the seizures are, you don't just go do that. There is a process by which Dr. Doyle will tell you. You evaluate the patient's history, the patient's evaluation examination, and then you give an opinion, a recommendation to the family that is based on good and accepted medical science.

He will tell you in this case that there is a lack of objective evidence for purposes of what is called EEGs, electroencephalograms. You will hear, he also will confirm to you that in this case there is a lack of records from any medical provider for care or treatment relating to seizures. There are virtually no records from anywhere. And we don't criticize the Perez family for their recollection of what they see, but a doctor, as Dr. Doyle will tell you, must make a recommendation based upon the full medical picture. In this case it doesn't exist. No one is going to be able to come before you and in good conscience say more likely than not it is going to be required. In fact, if Dr. Schwartz testifies and stays consistent with his report, the evidence will show --

MR. MORELLI: Objection, your Honor. Objection. There is nothing in evidence, and the report is not something that goes in evidence.

Opening - by Defendant - O'Hara Page 78

THE COURT: Overruled.

MR. O'HARA: If Dr. Schwartz comes into this courtroom and testifies consistent with what he has authored in this case, he will tell you he cannot within reasonable medical certainty say that it is more likely than not it might be necessary, it might not.

Now, Dr. Doyle is going to come before you, as Dr. Ambrose is going to come before, and he is going to say he does need the cranioplasty. There is no doubt he needs that. And Kim Kushner will come before you and tell you that it is something that we are responsible for and give you the specific amount of what we believe the procedure should cost. We accept that, but we must defend the claim to the extent there is a suggestion of anything that is not more likely than not fair and reasonable. No more and no less.

Lastly, you will hear from Dr. Barr in the field of neuropsychology. You heard a little about the neuropsychological testing. Dr. Barr will come before you with a bachelor of science in psychology from the University of Michigan, a master's and a Ph.D in psychology from the New School for Social Research here in New York City, neuropsychological training at Mount Sinai, clinical neuropsychology internship and externship experience at the Bronx VA, at the Boston VA, the Greenery Head Injury Program, as well as at Yale University.

Opening - by Defendant - O'Hara Page 79

As I said to you, the experts in this case have -- the phrase that was used was "impeccable credentials."

What will Dr. Barr tell you? Mr. Perez returned to driving. Let me say it again. Mr. Perez returned to driving. Mr. Perez has a driver's license that is valid today. Mr. Perez and his family will tell you that despite the suggestion that he shouldn't drive, on occasion he does. He does. That's not going to be in dispute.

You will also learn that Mr. Perez attempted on multiple occasions to return to work, all a positive sign, but that the neuro testing results -- excuse me, the neuropsychological testing, many of the tests are within the average range before the accident. There are no indications in the neuropsychological testing that he reviewed to suggest profound neuropsychological deficits. There are none in the tests, and that there is inconsistencies in the neuropsychological scores. He will come before you and explain to you why that is important, much like you will hear from Dr. Ambrose, much like you will hear from Dr. Jordan that it is not medically explainable other than the possibility of outside factors influencing someone who is participating in the tests and what kind of outside factors are replete in Mr. Perez's medical records. And what outside factors will you hear from Dr. Barr? The

Opening - by Defendant - O'Hara Page 80

lawsuit. The lawsuit.

You will also hear from Dr. Barr that there is a specific test that he will go into in-depth about, this test of memory malingering; and that Mr. Perez is showing scores below the acceptable range that demonstrate full and fair effort.

Lastly, we will bring Dr. Freifelder before you who is the defense economist. It is important because the calculations in this case clearly are from a math perspective, there are formulas to determine what things cost, how many times you will need them in the future, and how you would prepare for and pay for those today. And to the extent that there is anything that is fair, reasonable and objectively our responsibility, we accept it. No ifs and or butts about it. Dr. Freifelder, you will hear, has not one, not two, but three degrees from the Wharton Business School at the University of Pennsylvania, year in and year out the premier business school in America in terms of the ranking that it has. He has a bachelor of science in actuarial science. He has a master's and a Ph.D in operations research and statistics. What he will do is he will come before you and he will analyze the background and experience associated with the work that was performed by Mr. Perez before the incident, and he will give you the forecast I talked about before about what is a fair and

reasonable expected future income loss. He will also come before you after all of the defense experts testify, including Kim Kushner as the life care planner, and he will outline for you why in his expert opinion the future medical care that is reasonably anticipated based upon the evidence that is in this record is somewhere between $2 million and $3 million for his full life.

This is a hard topic but I am going to touch upon it anyway. Any person that has a severe injury such as Mr. Perez, any person that has long-term condition that includes some of the difficulties that he is going to struggle with, there is the medical reality that it affects life expectancy. Why is that important? From a scientific perspective there is a line. 50 percent of the population and one person get above the average life expectancy, and 49.999 percent of the population other than one is below life expectancy. And as part of this case you will hear the life expectancy tables without medical conditions.

The medical reality of what the future may hold for Mr. Perez is an effect on his future life expectancy which affects what the long-term costs will be, assuming that these conditions do not allow him to live a full life. And let me be clear. We hope he lives it until he is 125 years old. We hope he is the one that overcomes all odds. But the experts that are going to come before you are going

to tell you that the reality of the medical conditions that he has makes that difficult to forecast as being likely. It is more likely not accurate. And you are going to have to weigh that in how you evaluate what is fair for the future economic loss and fair for the future life care plan because, as I said to you, Live Nation accepts that it is responsible for the fair, reasonable, and objective costs associated with his life care plan, his economic loss, and what you believe to be the pain and suffering that he consciously suffers. And in evaluating that you have to be open-minded. You have to listen to all the evidence. You have to weigh the information that will come from the experts because none of the treaters are on our witness list. All of the experts that we have as part of defending a case is to retain them, to give them the entirety of the record, and ask them to do an evaluation, which has been done in this case. Uniquely, it is also the same thing that the plaintiff is going to do. They are going to call almost all hired experts, almost all other than Dr. Fayer who was someone that was identified as a psychiatrist that is treating him. And what you will find if you weigh the credible evidence is that he is not faking, but he is malingering. And he has signs and symptoms that when they touch him, and when they manipulate him, and when they try and test him don't make medical sense. The only thing that

it can being attributed to based upon the evidence that you will hear from the experts on behalf of the defense is a lack of effort. And what affects effort? Outside factors such as lawsuits.

Please keep an open mind. I say these things recognizing that on behalf of the company. The family is here, and I mean everything I say with the utmost respect, but this is about being fair. This is about being reasonable. This is about being just. And everyone of you committed to do that no matter how you personally feel. And if you do that, I am confident that you will find the position that is advanced on behalf of Live Nation is, in fact, fair, reasonable and just.

Thank you.

THE COURT: Are you ready to start?

MR. MORELLI: Yes.

THE COURT: Does anyone on the jury need a break or can we start a witness? Okay. So we will call our first witness. But before we do that and before I forget, I want to give you a little heads up for future planning.

We are off on Monday for Veteran's Day. We are off on Tuesday afternoon. We will not be working beyond 1:00 on Tuesday. The following Tuesdays after that I am going to have you come in a little bit late because I have motions on other cases that I have to deal with. That's

starting on November 19 and November 26. This coming Tuesday, however, is going to be a normal start time. That's going to be the first day back after the three-day weekend. So on Tuesday you are going to be reporting at 9:15 downstairs and we will be working until 1:00. Of course we are down on Thanksgiving. We are also down on the day after Thanksgiving, November 29.

So those are all the little tweaks that I know of at this point in time. As more information becomes available I will let you know that.

Finally, one other thing I want to remind you or tell you about is that no one ever knows what the temperature of this courtroom is going to be. I suggest you dress for three seasons, okay? That's just the way it is. It can be very different in the morning and afternoon and day to day, so I have no idea.

Thank you.

Mr. Morelli, call your first witness, please.

MR. MORELLI: Thank you.

(Brian Greenwald, MD takes the witness stand and is duly sworn/affirmed.)

THE CLERK: State your name and address for the record, spelling your name.

THE WITNESS: Dr. Brian Greenwald, B-R-I-A-N G-R-E-E-N-W-A-L-D. My work address is 65 James Street,

Edison, New Jersey.
THE CLERK: You may be seated.
THE COURT: Dr. Greenwald, I ask you to speak in a loud clear voice so everybody on the jury can hear you. Please wait for the attorney asking you a question to finish before you start to answer. If there is an objection or you see an attorney stand up as if they are going to be objecting, I ask you to stop talking, do not say anything. Allow me to rule on the objection before any answer is made.
If you are called upon to answer a question that can be done with a simple yes or no I am going to ask you please limit your response to yes or no. If that's not possible, let the attorney know that it is not possible to answer with a yes or no. If they want a further explanation they can ask, but under no circumstances should you volunteer anything beyond the scope of the question itself. Please only answer the question given to you.
Now, if you need a break for any reason please let me flow. Understand that during any breaks you may not interact with any of the jurors under any circumstances, and you may not discuss your testimony, past or present or future, with any of the attorneys during your break, okay?
THE WITNESS: Yes.
THE COURT: Thank you.
Counsel.

MR. MORELLI: Thank you.
BRIAN GREENWALD, MD, having been called on behalf of Plaintiff, first having been duly sworn, was examined and testified as follows:
DIRECT EXAMINATION
BY MR. MORELLI:
Q Dr. Greenwald, good afternoon.
A Good afternoon.
Q Dr. Greenwald, you and I know each other, correct?
A Yes, we do.
Q And we have had occasion to speak about Mark Perez and about his case on more than one occasion; is that true?
A That's correct.
Q And the last time we spoke about it was when?
A Last night.
Q So you know when you -- and you have testified before in cases, have you not?
A Yes, I have.
Q I in my opening statement gave the jury some understanding of your credentials, all right, but if you would just tell the jury some of the credentials that you think are important?
A Shall I start with my education?
Q Please.
A I grew up here in New York City. I did my

undergraduate training at the State University of New York at Stonybrook. I stayed on at Stonybrook for an additional four years for my medical school straining. I then opened up a AAA map and said, How can I get really far from eastern Long Island after having spent eight years here? And I did internship at the University of California, San Francisco. After coming back from the west coast, I then did three years of residency training at Kessler Institute in New Jersey. After those three years of residency training in the field of physical medicine and rehabilitation, I then went on to do a fellowship training specifically in the area of brain injury rehabilitation to take care of persons who had suffered traumatic brain injury. And I worked over that year in research and clinical work and academic work in taking care of people with traumatic brain injury.
After finishing my fellowship, after all those years of education, my first job out was the director of trauma rehabilitation at University Hospital in Newark, New Jersey, a large trauma center, taking care of people right after the trauma, traumatic brain injury, concussive injury, so sort of the full spectrum of care for people. After being there for three years, I then went on to be the director at Mount Sinai Medical Center in New York City. I was the director of their brain injury rehabilitation center for about ten years.
Then after finishing up that ten years at Mount Sinai where I was very involved with direct patient care,

research, teaching; JFK Johnson Rehabilitation Institute which is a well-known center for brain rehabilitation in New Jersey asked me to come there to be their leader, to be the leader of the care of patients there, to lead their research, to lead their educational efforts. I have been there now about seven years.
So that gives you an idea of my education and clinical background. I have been lucky enough to be involved in the direct care of patients with brain injuries. I continue to take care of patients on an inpatient basis and outpatient basis, many like what Mark is going through today.
In fact, looking at his records, as some of my trainees are the people who have had a chance to care for him, I am the director of the fellowship program there at JFK, I'm an associate professor at two medical schools in New Jersey, both Robert Wood Johnson Medical School and Hackensack Meridian Medical School.
I have been lucky to win many awards for my research, my clinical care, my teaching. And I have also had a chance to publish about 35 or so peer-reviewed articles, again with the research that I have done, in how to improve quality of care for persons with traumatic brain injury. I've had the chance to write a book on fatigue issues and traumatic brain injury. I have also lectured much more than 100 times across the country to clinicians, neurosurgeons, neurologists, physiatrists like myself, psychologists, therapists of all sorts teaching them

to better diagnose, evaluate, and treat persons with brain injury.

Q And you had occasion, Dr. Greenwald, to see and examine Mark Perez; is that correct?

A Yes, I have seen him twice.

Q And any time that you have to refer to your records with reference to specific things I ask you, feel free to do that to refresh your recollection if you need to, okay?

A I will.

Q When was the first time that you had occasion to see Mark Perez? And just to be fully clear, I had called you and asked you to see Mark Perez and to evaluate him and evaluate what care was necessary for him and the permanency of his injuries, if any; is that correct?

A That's correct.

Q Would you tell us when you saw him?

A Initially I saw him in my office in New Jersey on February 21, 2017.

Q At that time, was he accompanied by anyone?

A Yes. He was seen with his brother Justin.

Q At that time, February of 2017, did you conduct an examination of Mr. Perez?

A I did. I did what I would normally do on any patient I was seeing. I took a comprehensive history, I reviewed a substantial amount of records that were in this case, and then

beyond that I did a physical examination.

Q Okay.

Now, without getting specific about the accident itself because we are dealing post-accident in this case, okay, you did learn that he fell from a height; is that correct?

A I did.

Q And can you tell us other than that, after that what you found, what you learned?

A Sure.

After falling from this height he was taken by helicopter to Nassau University Medical Center, a major trauma center near Jones Beach. He came in, he had altered mental status, a CT scan showed bleeding. He then had further alteration in his mental status, a deterioration in his mental status due to increased bleeding in his head. And he was taken urgently over to the operating room where a large amount of bone was removed from the right side of his head to both deal with the bleeding that was going on and the swelling that was going on in the brain.

Interestingly, what they do with that bone is they actually put it into his abdominal cavity. It is a term called marsupialization referring to kangaroos. They actually put it in an abdominal pouch to keep the bone viable so that some day it could be put back into him.

The swelling and the hemorrhage was dealt with.

He stayed there in the hospital for about a month. Because of the severity of his injury, he required a tube in his throat called a tracheostomy to help him breathe and to get off the ventilator. He required a gastrostomy, a tube in his stomach. Because he wasn't able to eat by mouth, the tube was so food could be directly put into his stomach.

After about a month of medical stabilization he was transferred to a brain injury rehabilitation center at Southside Hospital, a known center, part of the Northwell system that takes care of persons with traumatic brain injuries like we see in Mr. Perez's case.

The CT scans during his hospitalization showed hemorrhage and damage to multiple areas of the brain, areas of the brain that we know are more susceptible to this type of trauma, the frontal lobes, the temporal lobes on both sides of his brain. We see hemorrhage, bleeding into this area.

He goes for inpatient rehabilitation at Southside he is treated there by a rehabilitation physician like myself, a brain injury specialist. He has physical therapy, occupational therapy, speech therapy, psychology, recreational therapy.

Really, the challenges that people face after such severe brain injury aren't really for one area to be taken care of. They need, sort of, really, a cross-section of therapists to work on such basic skills like swallowing again, getting him to recognize himself and the people around him. So it is dealing

with, sort of, the thinking, memory, attention, concentration, mood, pain issues that he was dealing with.

After being at Southside he then went on to an outpatient rehabilitation at St. Charles, which is more in eastern Long Island closer to where I went to school at Stonybrook. Again, he had outpatient treatment for all these challenges.

That gives you, sort of, the early part of his care. Shall I continue on?

Q Do you have anything with you to explain to the jury the anatomy of the brain because you mentioned a number of things so far? You mentioned lobes, you know, frontal lobes and lobes on both sides, right and left. Can you tell us about that and explain the significance of what you are talking about?

A Sure.

If we don't have anything to put up there, I do have my skull model here.

MR. MORELLI: May he use that, your Honor?

MR. O'HARA: No objection, your Honor.

THE WITNESS: Would it be okay if I stood in front of the jury while I was using it?

THE COURT: Sure.

(Continued on next page)

MR. HAWORTH: Your Honor, may I position myself so I can see?

THE COURT: Of course. You don't need my permission to move about. Feel free.

MR. HAWORTH: Thank you, Your Honor, I appreciate it.

A So I'm opening up this skull kind of like what they did with Mr. Perez where they took out this piece of skull and inserted into his abdomen. This one is a little easier to take off than what they had to do as far as sawing off his skull to do that. But when we take out the skull, we look at this magical thing called the brain.

I love looking at the brain, I have to admit because this tissue here, this soft tissue here, that is the same consistency as formed jello, our brains are very soft, is everything that we are. So it's our personality, our mood, our movements, our vision, our hearing. Everything about us is trapped up in this crazy looking structure called the brain encased in this tough scull of ours. You might think about who we are is the house that we own or the car that we drive or the spouse that we have. Everything is here in this crazy-looking structure called the brain, in this miraculous incredibly complicated structure.

The brain, it helps us -- it connects from the top of our head out to our spinal cord, allowing to us do all of our

movements. Everything that the brain does works through electrical activity, small electrical activity, working throughout the brain, connecting up to different parts of the brain and letting us think, letting us hear, letting us see. All of our memory is there trapped up in our head in this brain.

So we can appreciate in the brain that there's two hemispheres, the two halves of the brain sitting in front of us called the hemispheres. When we look then at a side view of the brain, we then appreciate that it's actually broken up into four lobes. Each of the hemispheres is broken up into four lobes.

So we have the frontal lobe sitting here in front of our -- under our forehead. It's probably the best developed of the lobes of the brain. It's really makes us humans. It's the largest of the lobes of our brain. It's very important for emotions, for behavior, for memory and for what we call higher level thinking. So insight, judgment, sometimes what's called executive functioning. So again, the higher level thinking that makes us the humans that we are. The frontal lobe is sometimes considered who we are, our personality, because of its importance in the brain.

We can see here on the side of the brain is an area called the temporal lobe. The temporal lobe sits near to our ear. It's also very important for our movements, for our

sensation, for our memory. You know, it's a very important lobe also.

Seen in the back here, what's called the occipital lobe, sitting in the back of our head. Very important for vision and it's certainly also a very important area, although maybe no area of the brain is not important.

The parietal lobe sits up here, so more at the top of our head. So it brings a lot of information together. It sort of tells our body where it is in space, taking can information from the other lobes and from the brainstem and pulling that all together.

We can see at the bottom, as we look is the brainstem, the brainstem. The brainstem controls our very basic function, so it controls our heart rate -- even our heart rate is controlled by the brain -- our respiratory rate. Even our pupilary size is controlled by the brainstem.

One of the things that's important to look at when we look at the skull also, because this I think really is critical in this case in particular, is that when we look at the skull base, the way that the brain is sitting inside the skull base, is that this area -- this area towards the front of the skull base and this area towards the middle part the skull base sits very close to the soft brain of ours. It sits very close to this brain, which I said is the same consistency as formed jello.

Part of the importance of that is that the frontal lobe, sitting again, sort of close to this jagged part of the skull base and the temporal lobe sitting again, here in the middle part, again, this jagged skull base, are very susceptible to trauma. No matter what direction the head is hit is very susceptible to trauma.

And as we see in Mark's case, we see those areas of the brain significantly effected due to the trauma to his head. His frontal lobe, again, so important for emotions, behavior, higher level thinking. And his temporal lobe is so important for memory, so important for sensation, so important for motor function. Those are some of the key things to understanded.

In our little brains here there's about a hundred billion brain cells, so it's certainly -- it not only looks complicated when we look at it with our naked eye, but microscopically it's an incredible complicated structure.

One other thing I'll mention also is that the two hemispheres are connected by something called to the corpus callosum, C-A-L-L-O-S-U-M, which connects to two hemispheres and is also very susceptible to injury when we have such trauma to the head because we have the movement of the two hemispheres. There's no seatbelt in the head. The brain is just sitting there floating in a little bit of cerebral spinal fluid. So when you have as much trauma to the head as we see in this case, enough to even crack the skull before it was

taken off, you can get damage to this middle part of the brain, that corpus callosum.

Q Now, Dr. Greenwald, if you would tell us what your examination of Mark Perez consisted of the first time you saw him in February of 2017 --

A So my examination --

Q -- almost three years ago, almost.

A My examination always starts with just hearing people's history, right? How well are they able to express themselves? How much memory of the situation that they have. I always review the records before I see the person so I have a general understanding of what actually happened to them based on the medical records. So that's really where it starts. His brother Justin also added some additional information where information was necessary.

And then taking a comprehensive history, so history both of the situation, but also, of his previous medical issues. In Mark's case there was really -- he was a healthy gentleman. Prior to this injury there wasn't so much. We talked a little bit about his social history, his work history, his educational history. And then we talked about what are the challenges, what type of problems was he suffering from since this injury that he sustained back in June of 2013?

Then my physical examination, which comes next, is really a head-to-toe evaluation looking at literally everything

from his head down to his toes. We're looking at his heart, his lungs, his abdomen, his neurologic examination, his head examination, his gait, his ability to walk, his strength, his sensation. Really a comprehensive neurologic and general examination.

THE COURT: Can I just see counsel very quickly?

MR. MORELLI: Sure.

(WHEREUPON, a discussion was held off the record, at the side bar, in the presence of the Court and counsel and out of the hearing of the jury.)

BY MR. MORELLI:

Q Dr. Greenwald, if you would, before we break for lunch, can you characterize for the jury what you say is a traumatic brain injury, what is that?

A So a traumatic brain injury is an external force to the head -- caused by an external force to the head, injuring the soft tissues of the brain inside it. That really -- causing the type of neurologic impairments, causing the brain to be unable to do the things that we needed to do.

Q Now, with reference to a traumatic brain injury, this is what you deal with every day, correct?

A That is correct.

Q Is there a way to categorize what kind of traumatic brain injury someone has?

A Yes, there is.

Q Okay. In order to be able to tell another doctor if another doctor treats the patient, this is the level of traumatic brain injury?

A Yes, there are generally accepted ways of discussing that.

Q Can you tell us?

A Sure. So there's two main ways that we discuss severity of injury. So one is at the time of the accident itself. So we see in Mark's case he comes in, he's initially more confused, they see smaller hemorrhages. Initially, his Glasgow Coma Scale score was 14.

Q What is that? What does that mean?

A So the Glasgow Coma Scale score, which is something that's been around is a way of evaluating people since the 1980s, is a way of looking at people's level of arousal, their level of consciousness. This is critical and really shown to be critical in Mark's case because it allows you to establish a baseline when they come in. We know that people, after such trauma to the head, are at high risk of sudden onset of swelling, sudden, you know, increasing of hemorrhage. So it allows us to establish a baseline for them and then monitor that baseline as they are in the emergency room, as they are in those acute care services.

I say it was so important in Mark's case in particular because he comes in and his initial GCS is 14. He gets some

initial scans, he's being observed there in the emergency room --

Q That 14, is that --

A I'm sorry --

Q What does that tell?

A The scale ranges from three at the lowest end, which looks at people's motor abilities, their eye opening abilities and their verbal abilities to a high of 15. So when he comes in, he actually doesn't look so bad.

What ends up happening then over those coming hours as they're monitoring him there, then he has a sudden deterioration in is mental status. They do a CAT scan, a stat or a sudden CAT scan was done. He's at significant blooming or increase in the hemorrhages that he had in his head. They recognize that it's a surgical emergency, his brain is being compressed, he's at high risk for dying. They take him off to the operating room and do the surgeries that we talked about; taking out that skull, taking out those hemorrhages.

There's doubt that that sudden deterioration that he had in his Glasgow Coma Scale put him into the severe brain injury category and there would be nobody who would, I think, really question that otherwise. This is someone who has a severe traumatic brain injury.

We can look at the other end of the spectrum also, as far as other measures of severity. So when we look at the

length of time that Mark showed confusion, the time that he was in what is called this posttraumatic confusion, that's another measure of severity that people have looked at and is associated with outcomes. So the longer that people remain in this posttraumatic confusion, the less likely they are to make a good outcome.

Mark, we can see throughout his hospital course, you know, he needed a tube in his throat because he wasn't able to swallow, he needed a tube in his stomach -- I'm sorry -- he need a tube in the throat because he was not able to get off the ventilator, he needed a tube in his stomach because he wasn't able to swallow. He gets to rehabilitation a month after his injury and he's still showing evidence of confusion. There's no doubt that this is another measure of a severe injury.

So Glasgow Coma Scale score, you know, after the deterioration, severe injury, length of post-traumatic confusion, severe injury, the more severe the injury, the less likely you are to make a good recovery. What we think we see in Mark's case is not only a severe injury, but a diffuse injury also, you know affecting -- you know, we talked about how there's eight lobes in the brain, four in each side. Both of his frontal lobes, these critical structures that make us who we are, devastated, both of his temporal lobes, devastated and we'll see more about that, but, you know, significant

scarring and death of tissue in these critical lobes that give us who we are and give us our memory and our ability to do things that make us who we are.

MR. MORELLI: Is this a good time, Judge?

THE COURT: Yes. We need to take break at this point because we have to -- security has to sweep the floor and shut down the floor. So I'm going to excuse everybody for lunch.

Please remember my instructions. You may not perform any research in any way, shape or form, you can't discuss the case with anyone, you can't start talking about the case amongst yourselves, nothing about what you saw or heard in the courtroom, you can't post anything concerning the trial on social media, you may not interact with the parties, witnesses or attorneys. Other than that, have a great lunch. Please report back downstairs at 2:00, okay? Thank you.

(Jurors exited the courtroom.)

THE COURT: Counsel, anything for the record before we break?

MR. HAWORTH: No, nothing new. I'm going to get you that cite, Judge.

THE COURT: Okay.

(WHEREUPON, there is a luncheon recess taken and the case adjourned to 2:00 p.m.)

(Off-the-record discussion held)

THE COURT: For the record, we are going to make a record later on.

MR. MORELLI: Yes.

COURT OFFICER: All rise. Jury entering.

(Jury enters courtroom)

THE COURT: Mr. Morelli, please continue.

MR. MORELLI: Thank you.

Q Dr. Greenwald, I think when we left off, I had asked you about traumatic brain injury. I think I asked you about whether or not there are ways to define the level of traumatic brain injury, correct?

A That's correct. We talked about the severity of injury.

Q Right. And you talked about the diffuse injury in this case, correct?

A Both the severe and diffuse injury.

Q Can you tell us about those two things and how they differ?

A Sure.

We talked about the severe injury. We were talking about that Glasgow coma scale score, came in higher and then went lower. It told us about that expanding hemorrhage in his head, taken off to the OR to do the removal of the bone, removal of the hemorrhages. We talked about his length of

posttraumatic confusion, yet another measure of severity. So, really, the two measures that we talked about severe injury are the length of posttraumatic confusion, this initial coma that we see with the expanding hemorrhage. Really he meets criteria for having sustained a severe traumatic brain injury.

What I would say in addition to the severity of the injury is the diffuseness of the traumatic brain injury. We talked already about how it involved the two frontal lobes and the importance of the frontal lobes. We talked about how involved both temporal lobes and how these are critical for who we are, for our cognition, memory, thinking, attention, concentration, personality, emotions; really everything that we are being in these four critical lobes out of only eight lobes in our brain.

What we see in Mr. Perez's case, Mark's case, we see injury to that corpus collasum that we had a chance to talk about when I was showing that model of the brain. So we also see injury to the area of the brain, to those big white matter tracts, those big telephone wires that connect up the two halves of the brain. We see hemorrhage there also. So, again, it's not only a severe injury, but a diffuse injury.

The point of severity of injury, the point of why we as doctors think about severity of injury is that the more severe injury, the less likely it is the person is going to recover, right? So the more severe that brain is damaged, the

less likely it is the person is going to have a good outcome.

I think when you also then in Mark's case we think about also the diffuseness of the injury, how much of the brain was involved with this injury, all these four lobes we talked about on both sides of the brain. It really just compounds the challenge of trying to make a good recovery. It makes it that much less likely. A severe brain injury is very difficult to come back from. A diffuse sever traumatic brain injury makes it that much less likely.

Q Now, when we talk about traumatic brain injuries and you say that, actually, what you do you often have to characterize it or put it in terms of -- is there such a thing as a mild traumatic brain injury?

A There is.

Q Is there such a thing as moderate?

A Yes, there is.

Q Do they call it that?

A Yes, moderate severity traumatic brain injury.

Q Okay. And then there is severe, correct? Is that the most severe category, and do they call it "severe"?

A Yes.

Q Which category would you say that Mark falls into, is it the third one "severe"?

A There is no question that he is in the severe traumatic brain injury category.

Q And so if somebody was to say that -- if a doctor was to say or anyone would come in and say to this jury that Mark has a mild traumatic brain injury, do you see any way that that's possible, that it could be characterized as that?

A Just to clarify, when we talk about a mild traumatic brain injury, we are talking about a concussion. So we have all gotten more familiar with concussions, discussion about it with regards to our athletes, children who get concussions. But what we are talking about with a concussion is someone who had, sort of, a brief loss of consciousness, maybe a brief alteration in their thinking. You can certainly have a host of symptoms; headaches, visual issues, mood issues after a concussion. But you know, generally in a concussion or this mild traumatic brain injury, the CT scan, you know, will be normal, a standard MRI would expected to be normal.

There is no question that this gentleman, that Mr. Perez suffered a severe traumatic brain injury by the commonly used and well-accepted criteria for severe traumatic brain injury, a severe diffuse traumatic brain injury. There is no way someone could come in here and honestly say that this gentleman suffered a mild traumatic brain injury or a concussion.

Q Now, let me ask you this: Does Mark Perez have traumatic epilepsy?

A He does.

Q Can you tell the jury what you base that on?

A Sure.

So epilepsy is -- we are talking about seizures here, right? We talked earlier about the brain, the way it works, the way it communicates with itself and the way it communicates with the rest of the body is through electrical activity. It is very orchestrated electrical activity. One part of the brain talks to another part of the brain through electrical wiring that we have in our head. We talked before about that there are about a hundred billion brain cells in our head all working through, sort of, microelectrical activity.

When you have had the type of damage that we see in this case, we see scarring and dead brain tissue; unfortunately that has an effect on the ability of that orchestration of the electrical activity. Some of that is why he has some of the problems that he has; the paralysis on the left side, the difficulty with his thinking. Unfortunately, sometimes that electrical activity also can become a storm of electrical activity.

What a seizure is is a storm of electrical activity, uncontrolled, unorchestrated electrical activity. Then how it becomes epilepsy is because it happens again and again despite treatment. Why are we talking about it as posttraumatic epilepsy? Well, obviously this all started after his traumatic brain injury.

Q So is it your opinion with a reasonable degree of

medical certainty that Mark Perez has traumatic brain injury?

A I have no question about that.

Q And traumatic epilepsy?

A I have no question about that.

Q Okay.

And could you tell the jury with reference to traumatic epilepsy, what do you base that on? We heard that it is subjective. What does "subjective" mean?

A "Subjective" would mean it is to the eye of the beholder. It is what you think you are seeing.

In Mr. Perez's case we have all this objective, meaning nobody can deny it, evidence of all this trauma throughout his brain. And we know that the number one cause of seizures in the United States is, actually, traumatic brain injury. We know that someone after a severe traumatic brain injury like we see in Mark's case has about a 25 percent lifetime risk. So his whole life, even if he had not had a seizure up until today, he would continue to have that risk over his lifetime.

We see clear evidence, and I had a chance to see a video of Mark where --

MR. HAWORTH: Objection.

THE COURT: Sustained.

Q Let's not talk about that at this time, okay? Let's talk about the fact of traumatic epilepsy, okay. What was it

that made you determine that, because you rendered at least one if not more than one report in this case where you talked about that, correct?

A Yes. It is well-documented in all his medical records and shown on EEG.

Q Now, am I correct, Dr. Greenwald, that Mark suffered this traumatic brain injury in June of 2013?

A That's correct.

Q And that he didn't suffer any seizures until the year 2015?

A I would say that there is a notation of a question of a seizure while he was in the initial hospital at Nassau University, but, really, he was diagnosed with posttraumatic epilepsy starting in about May of 2015.

Q And that's when he had a seizure that, I think, was recognized?

A That's correct.

Q Now, my question is if, in fact, he was injured in June of 2013 and we see the first outward evidence of a seizure in 2015, how do we reconcile that?

A The brain continues to try to heal itself. It continues to scar like you might if you were trying to heal a wound on your skin. We know that the risk of seizures is not just short term after such a traumatic brain injury. Like I said, it lasts over his whole life.

What we see that happened in the short-term before that first seizure that was clearly recognized in May of 2015 is that he had just had surgery. So he had another surgery related to this brain injury, the taking out the bone, putting the bone back in, the infections that he had. So certainly something that is more traumatizing to the body like surgery where you need to be under anesthesia, where your body experiences pain; these lower the seizure threshold and bring that seizure out. It is not that it wasn't sitting there already, but sort of make it clear that this gentleman is going to have a seizure and a seizure disorder.

Q So do you have an opinion with a reasonable degree of medical certainty that it was the injury of June 26, 2013, that manifested the traumatic epilepsy?

A Yes. The traumatic brain injury is the cause of his traumatic epilepsy, the traumatic brain injury that he sustained in 2013.

Q Now, when he had the first cranioplasty to explant the skull that was in his abdomen, you talked about infections. Can you explain that to the jury why that is significant, if it is?

A Sure.

So in the time after his injury, I think it was in about October, they go back into his abdominal cavity where they placed that skull bone, they open up his skin, they place that skull bone back in there. It is put in there with a type of mesh

to keep it in there. The skin is closed as a start. Again, you want bone over that soft brain of ours.

Unfortunately, what ends up happening is that he has a complication of his skin, the skin where the bone was or the bone was replaced. He ends up needing additional surgery for that. It ends up going on to be infected and really compromising the bone that was placed back in there. These are all the surgeries that he required afterwards. He required IV antibiotics, antibiotics that were put into his vein over a prolonged period of time because of the seriousness of the infection, a very strong antibiotic called Vancomycin to treat that was given on an IV-basis because of the seriousness of this infection.

Q Now, when Mark had these future surgeries, the first surgery was to save his life, correct?

A That's correct.

Q And the subsequent surgeries were to put him back together, so to speak, right?

A Yes.

Q Put his head back together?

A Yes.

Q Is that a severe surgery, the second surgery? How does it affect the brain and the body?

A Well --

MR. HAWORTH: Objection.

THE COURT: I don't understand. Do you want to approach?

(Off-the-record discussion held)

THE COURT: The question is withdrawn.

Q Dr. Greenwald, the second surgery that was done on Mark, how did that affect him and his brain at that time?

A There are really two surgeries that were being done at that time. The first surgery is to open the abdominal cavity, open the stomach, take that bone out. That surgery in itself has its own risks. Surgery always has risk of bleeding, of infection, of death.

The second surgery was what I was talking about as far as replacing the bone. When you go back in there you are needing to open up the skin, you are needing to open up the layer underneath there, the dura, to make sure that area is all closed up before you put the bone back in. That in itself, especially in someone who has a traumatic brain injury, has this significant weakness to their body, putting those people under general anesthesia, it is a significant risk.

Q Now, when we talk about the seizures, are there different kinds of epileptic seizures?

MR. HAWORTH: Objection.

THE COURT: Overruled.

A There are. So we have talked about these so far as a general posttraumatic epilepsy, but really there are different

types of seizures. There are seizures that only affect one-half of the brain. That's called a localized seizure. There are seizures that affect both halves of the brain called a generalized seizure. There are seizures where you can see the person still awake. Certain seizures will make the person unconscious. These are more descriptive qualities of the seizure, what you are seeing in the person when they have the seizure. Common things we see in people with seizures also when they are having the seizure is they have loss of bowel and bladder, those basic functions.

These are all descriptive terms of the different categories of seizures, but, really, they all involve the same thing, that uncontrolled electrical activity we just talked about caused by the inability of the brain to be able to orchestrate that electrical activity due to the trauma.

Q So when someone refers to a gran mal seizure, what does that mean?

A A gran mal seizure talks about a seizure that is spread from one part of the brain to the other part of the brain. Usually it is associated with a shaking of both the arms and the legs. Usually it is associated with either a loss or alteration of consciousness. A person either does not remember it or actually appears overtly unconscious. Again, it is often associated with this loss of bowel and bladder function.

Q Now, just generally, you have reviewed all of the

medical records in this case; is that correct?

A That's correct.

Q And you reviewed other things like the deposition transcript of Mark which there was more than one?

A Yes.

Q So when you made a determination about Mark Perez and his condition, you did it based on all of the evidence that you had before you and meeting him, taking a history, and also your experience in this very specific area; correct?

A That's correct.

Q Now, let me ask you this: You weren't in the courtroom when I gave my opening statement, and you weren't in the courtroom when Mr. O'Hara gave his opening statement. You know Mr. O'Hara, right?

MR. HAWORTH: Objection.

THE COURT: Overruled.

Q You know him, don't you, Mr. O'Hara?

A Yes.

Q When he gave his opening statement he told this jury that there was going to be at least one, if not more than one, doctor that was going to come in and say that Mark Perez is faking it?

MR. HAWORTH: Objection, your Honor. Sidebar, please?

THE COURT: The objection is sustained.

MR. HAWORTH: Good enough. Thank you.

Q Here is my question: What does the term "malingering" mean? Do you know that term?

A I do.

Q Why don't you tell the jury what it means?

A The term "malingering" usually used in this type of legal context is a term that means the person is lying, that they are overstating the issues that they have, they are understating the issues that they have, but that they are lying.

Usually, doctors, how they look at malingering or try to figure out if someone is lying or not telling the truth, is to look at evidence from effort, how much effort are they putting forward. There is a simple test that can be done that can give you an idea of how much effort people are putting forward. And I think those tests have some usefulness when we are talking about someone where there is a question of an injury, right? Maybe the person had a concussion, maybe they didn't have a concussion, maybe they are not suffering from as much pain as we think they are suffering from. But in a case like this, a severe traumatic brain injury, we have very objective evidence that there is a severe traumatic brain injury here and we have very specific knowledge of why Mark might not be able to put his best effort forward, right? So when someone is anxious or depressed, they are not putting their best effort forward. They are finding it difficult to put their best effort forward. When

someone has frontal lobe injury to both frontal lobes -- and we know the frontal lobe is so important for initiation and to be able to put your best foot forward -- it's also very difficult to do that. And when someone is in chronic pain -- imagine being in chronic pain and how it would be difficult to put your best foot forward.

So when we think about the brain injury itself, when we think about anxiety and depression, when we think about pain issues, when we think about the thinking issues that are involved with putting your best foot forward; the term "malingering" has no real basis here. It doesn't give us any help.

I wouldn't be surprised if it is difficult for Mark to put his best foot forward, but because of those things we just discussed and not because he has some other rationale for it.

(Continued on next page)

MR. HAWORTH: Objection.
THE COURT: Now? It's a little late.
MR. HAWORTH: I move to strike, Your Honor.
THE COURT: Approach, please.
(WHEREUPON, a discussion was held off the record, at the side bar, in the presence of the Court and counsel and out of the hearing of the jury.)
THE COURT: Overruled. To the extent that this has come up a couple of times, I would like a copy of that. It would be very helpful if I had some knowledge of what was contained in it.
MR. O'HARA: Judge, I'll hand you up my copies if that's okay.
THE COURT: Sure.
(Document was handed to the Court.)
THE COURT: Not that I'll be able to read all of it before it matters, okay?
BY MR. MORELLI:
Q So the term malingering, that's not a medical term, is it?
MR. HAWORTH: Objection.
THE COURT: Overruled.
Q Is it a medical term?
A It's not a term --
THE COURT: Are you asking specifically or are

you asking the term he described or is there a medical term? I'll sustain it because I'm not sure I know what your question is.
MR. HAWORTH: Sidebar, Your Honor.
MR. MORELLI: I'm asking whether the term malingering in this context is a medical term.
THE COURT: Come on up.
(WHEREUPON, a discussion was held off the record, at the side bar, in the presence of the Court and counsel and out of the hearing of the jury.)
THE COURT: We've got a new question coming up, right?
MR. MORELLI: Yes.
THE COURT: Okay. Thank you.
BY MR. MORELLI:
Q Now, Doctor, with reference to what you have seen in the medical records and meeting Mark on more than one occasion and formulating your opinions, do you think that he's exaggerating about anything?
MR. HAWORTH: Objection.
THE COURT: Overruled.
A No.
Q Now, I think you mentioned earlier, but that was before lunch, so I'm going to ask you whether or not he described to you that he was having head pain?

A Yes.
Q Okay. Can you tell the jury what that is and what is the reason for it?
A So in Mark's case you could imagine when someone breaks their arm, so they break a bone in their arm and how that might be painful initially and how people often, the pain doesn't really go away, right? Maybe when the weather changes they feel that pain. Imagine that in your head? Imagine that a part of your skull was sawed out of your head and put into your abdomen. The bone is trying to heal. It doesn't know what has happened here. It's trying to heal.
Then the bone plays back in there again, it's sort of a healing phase, bringing in a lot of inflammation, then infection, then multiple surgeries to the skin, meaning the scalp there, that type of thing. That's the pain that I'm talking about. So I'm not talking about I got to take two Tylenol because I have a headache, I'm talking about someone who has now sort of a chronic inflammatory situation that's in both their scalp and in their skull. They've lost the muscle that you can see there over the temporalis region where that muscle should be because of all of those surgeries that he's had in his skull and it's sort of this chronic pain that now he's left with because of all of these surgical interventions that were certainly necessary to save his life, but it left him with this chronic painful condition of not headaches, but head

pain.
Q Did he also describe to you that he suffers from chronic headaches?
A Yes.
Q And can you tell the jury about that?
A So headaches, in addition, are the most common thing that we see after a traumatic brain injury and headaches are related to changes in the vasculature that we seed around the head. Medications that are used for that are some simple analgesics like Tylenol or Motrin or medications that are sometimes used for migraines to try to deal with some of the vascular changes that we see in migraine headaches, common after all of these significant interventions into the head and the brain itself.
Q You formulated a diagnosis for Mark Perez, did you not?
A Yes.
Q And can you first, tell us, specifically, what is the diagnosis, not the diagnosis in this case, but what is the diagnosis definition?
A So taking all of the information that you learned from the patient, you know, as far as their symptoms, their impairments, the diagnostics, like the MRI's and CT scans, the medical records that you review and coming together and saying with all of that information that I've learned, what is the

specific diagnosis in this case? A critical thing, right, because you can only offer someone treatment once you understand what the diagnosis is.

And so again, the diagnosis that was made in this case that I made, that all of his treating clinicians made, was based on that, based on all of that type of information.

Q And that is coming to a conclusion of what's going on with him, is that what a diagnosis is?

A That's correct.

Q Now, you also formulated a prognosis --

A Yes.

Q -- in this case. Can you tell the jury basically what a prognosis is?

A So a prognosis is trying to understand is this something likely to get better, is something likely to get worse or to stay the same? And again, taking into all of those factors and the time post injury that we are, that's how you come up with a prognosis in such a case.

Q Okay. And, Doctor, I'm going to be asking you specifically about Mark and I'm going to ask you to only answer the questions if you feel that it's within a degree of medical certainty, a reasonable degree of medical certainty; fair enough?

A Yes.

Q Okay. So I'm going to ask you whether or not Mark

Perez is suffering from cognitive deficits?

A Yes, he is.

Q Can you explain that to the jury?

A So cognitive deficits are a fancy term for talking about memory, attention, concentration, insight, judgment, processing speed, sort of all of the things that we think of as our thinking. And we talked already about the areas of the brain that are affected. He's had a chance to have what's called neuropsychological testing a number of times and a chance to do some, what you call, bedside evaluation, physical examination to take a look at some of those different areas.

There is no question that Mr. Perez, Mark, that he's suffering from cognitive impairments.

Q Now, you also formulated a prognosis about Mark's employability; is that correct?

A That's correct.

Q And could you tell us -- tell the jury what you based that on because this is an issue in the case, right?

A So my specialty, the specialty of physical medicine and rehabilitation, is really all about trying to get people back to their maximum -- trying to get them back to whatever they were doing prior to their injury. Certainly, the more severe the injury, the more difficult that is to do.

When I look at employability, and certainly, this comes up regularly, like I said, it's a core part of my

specialty, one of the things that I look at is, well, first of all, what was type of work that the person was doing before, what is their educational background and then what are the symptoms and impairments, what's the part of their disease process?

When we look at Mark's case specifically, obviously, we know that he had this severe, traumatic brain injury, what are the sequelae, what the problems that he continues to suffer from after his severe traumatic brain injury? In Mark's case the list is long. I have it here in my report. The number of things that he continues to suffer from is long. But I think you could really look at them in four categories.

So there's the seizures, right? So this post-traumatic epilepsy that we have a chance to talk about. Seizures themselves make it very unlikely that the person would be employable, just the seizures themselves, the unpredictable nature of the seizures, the medications that people need to take for seizures, which often have cognitive and sedative effects.

There are certainly plenty of people who are living here who are unemployable just based on seizures. We talk about the headaches and the head pain that he has, again, related to all of these surgeries that he's needed to have caused by this significant trauma that he sustained to his head and his brain. Certainly, that chronic pain issue that he

deals with in itself, like I said, there are people who would be unemployable just based on that.

You talk about the cognitive issues he's had, again, related to the severe damage to the devastation to his frontal and temporal lobes, which is so important for people's thinking, memory, attention, concentration, processing speed. So the cognitive two impairments, which honestly, is one of the most disabling issues that we've seen in traumatic brain injuries. That in itself would often make it difficult for people to get back to work. Again, so those challenges that -- and how work, especially the type of work that he was doing, that's where attention, concentration, processing speed, memory insight, judgment, all of those things would be so important.

Then look at the mood issues; the depression, the anxiety, some of the post-traumatic stress symptoms that he continues to suffer from. The depression, I'm sure, relates to some of the things that he's lost, to the chemical changes in the brain from the damage that we see there, from knowing that he won't be able to get back with any of those things.

So when we look at all of those four things, each one individually that could be disabling, you know, the headaches that we talked about, the head pain that we talked about, the seizures that we talked about, the cognitive impairment that we talked about, the mood impairment that we talked about, when you combine those things together and add on the fact that he

has partial paralysis on his left side, that he's suffering from other issues beyond that, let's just take those four core things that each individual could be so disabling, there's really no question at this point now that we're, you know, more than six years post injury and certainly, that Mr. Perez has had treatment for these issues and yet still continues to suffer from them, there's no question that he's permanently disabled with regards to employment and remains unemployable.

Q What is your opinion about his medical and physical and psychological problems and whether those are permanent?

A So the issue about permanency really talks about the healing of the brain. So we know that when someone has had a traumatic brain injury, that the healing continues for some period of time. There is healing. Thank goodness some people do show improvement, do get back to themselves. As we were talking about, that it's more likely when you have a milder injury, less likely when you have a severe injury, as we see in a severe injury case like this. The brain continues to heal for -- it heals quicker earlier on, slower as time goes on, but for about a year. Some people would say maybe that there's a continuation; 18 months, 24 months, but really, the bulk of it, the healing of the brain, is going to happen during that early period of time.

At this point, now that we're six years post injury or certainly, when I saw him initially in 2017 when he was

already, you know, close to four years post injury, there's no question that there's no further healing of the brain that's going to occur on a spontaneous basis. I'm not saying that there's not things that Mark hopefully, can still do or still learn. Those are things that are called compensatory techniques and some of the rehabilitation that he'll hopefully continue to get over time really relates to that and him trying to sort of learn to work with the deficits that he's had, but that's really more working around the problems. That's like me putting these glasses on. So these glasses, they don't fix my eyes, they help me work around the problem that I'm old and need glasses now. Those are the compensatory issues.

The problem that he has -- the brain is as healed as it's going to get. The problems that he has are permanent in nature.

Q Now, when we talk about his problems, his brain injury being permanent in nature, does that mean permanent in static or permanent in progressive or something else?

A Well, unfortunately, when someone has suffered such a traumatic brain injury at a young age, 30-years old, it does have a long-term effect on the person. There's no question that it has a long-term effect on the person.

Imagine when we're born, we're born with a jar of jelly beans, right, each year goes on, we take a little of those jelly beans out of the jar type thing. When we are

around 80 or so we don't have that many jelly beans left, that type of thing. Unfortunately, when we get to that age or towards the bottom of that jelly bean jar, we know that diseases are much more common like Parkinson's and Alzheimer's disease? Unfortunately, after such a severe traumatic brain injury, it's like someone reached into Mark's jelly bean jar and pulled out a whole bunch of those jelly beans and he doesn't have as much reserve, if that's how you want to look at all of those jelly beans, until he gets down to that bottom of the jelly bean jar.

We know that people who have suffered such severe traumatic brain injury have about a doubling of their risk and also, earlier onset -- a higher risk of earlier onset of degenerative diseases like Parkinson's and Alzheimer's disease.

Q So it could be more early onset and also, a doubling of the risk of getting it?

A That's correct.

Q Okay. And the thing that I want to ask you to explain to us and to me is he can walk and talk and yet, you're saying all these things about him that are so severe and so permanent and so progressive, how do you reconcile that?

A It really all speaks to the areas of the brain that are affected. With regards to his walking and talking, I wouldn't say that these are normal. As I could see on my own examination, he has some dragging of his left foot related to

his paralysis. When you talk with him, it's hard for him -- the flow of his thoughts based on some of the cognitive issues that he has is off.

But with that said, yes, he can actually walk and talk, but again, it relates to the areas of the brain that we're talking about. So we talked about the areas of the brain that were most affected in his situation, the frontal lobes, the temporal lobes, the corpus callosum, the area of the brain that connects the two lobes. And so those areas of the brain are causing the cognitive, the thinking, the memory, the attention, the concentration, the processing speed issues, the mood issues that we're dealing with, the insight, the judgment. Those are the areas of the brain that affect those things. So those are the deficits, those are the impairments, those are the disabilities that this gentleman has. Those are the things that are causing him to suffer, those are the things that are causing his lack of independence.

It's true, he is able to walk across the room, but he lacks that -- in some ways I feel that it's almost a worse suffering. He's trapped in this -- a body that's able to do without the thinking ability and the ability to really do the things that he used to be able to do, so he's trapped.

Q We heard something this morning about life expectancy --

MR. HAWORTH: Objection.

BY MR. MORELLI:
Q -- and I'd would like to ask --
THE COURT: Approach, please. Approach, please.
(WHEREUPON, a discussion was held off the record, at the side bar, in the presence of the Court and counsel and out of the hearing of the jury.)
THE COURT: I'm going to allow it.
MR. O'HARA: Can I have the last question?
THE COURT: I'm not sure you finished it.
(The record is read by the reporter.)
BY MR. MORELLI:
Q Yes, I want to ask you, Dr. Greenwald, about life expectancy. We heard something about that this morning and with reference to somebody with a traumatic brain injury, okay? So let me ask you this. Does someone who has a mild traumatic brain injury normally have their life expectancy shortened?
A Someone who has a mild traumatic brain injury, as we sometimes call concussion, does not have their life expectancy shortened.
Q And if someone has a moderate traumatic brain injury, what's the odds of that affecting someone's life expectancy?
A I would say overall, as we move up the severity of injury, the more severe the injury, the more it shortens the person's life expectancy and so a moderate may have some influence on the person's life expectancy, but we really

understand it as someone who's severe traumatic brain injury and how that affects their life expectancy.
Q So you would say that it's impossible for someone to say in the same breath that someone has a mild traumatic brain injury and that's going to shorten their life expectancy, those two things don't fit, do they?
A That's correct.
Q Okay. Now, let's talk about life expectancy and how we come to that and why, you know, we talk about it. Can you tell the jury about that? Let's be upfront about it.
A Sure. So life expectancy speaks about averages, right? So you can say that someone who is a 35-year old male, who is living in the New York City area of a certain raise, you can say that they're expected to live a certain amount.
So what we talk about sometimes is a decreased life expectancy related to different medical conditions. And we know that one of the things that we deal with here is someone who's had a severe traumatic brain injury, on average has a decreased life expectancy of about six or seven years, meaning that the brain injury, over their whole lifetime, and knowing all of the challenges that people suffer after a severe traumatic brain injury, that on average, about six or seven years are stolen from the amount of time that these people get to live.
Q And can you explain, how do we get these numbers? You

said six years, seven years, how do we get that?
A I've been personally involved with some of the research. I've published on that area. It really talks about looking at large quantities of people, being able to compare them, usually based on age, raise and gender, to a non-injured population of similar age, raise and gender, and to say that based on that, that these people appear to live a shorter period of time.
Of course, nobody knows when someone will die, nobody has -- is such a good fortuneteller of that, so we can only speak in averages. So we know after a severe traumatic brain injury that on average, about six or seven years of life expectancy is taken from them.
Q If you could, before you leave, could you describe just what encephalomalacia means and whether or not Mark is suffering from that?
A So I know encephalomalacia, it really means a softening of the brain and what it really is, is just a fancy way of saying a dead brain. And we see evidence on Mark's scans of encephalomalacia of dead brain and what we see around it is what happens when an area of the body dies off is the body is trying to wall that area off, we see a gliosis, which is a scarring. So we see in his case both encephalomalacia, dead brain, and scarring, again, in these critical areas; the frontal lobes, the temporal lobes.

Q Now, Doctor, let's just in closing look into the future a bit because obviously, prognosticating is what you have to do every day with patients, correct?
A That's correct.
Q And so if you were to prognosticate with reference to Mark and his future, you know, whether he lives a full life expectancy, which should be pretty long at 36, or a little bit shortened, what do you expect his needs to be, you know, medical needs and talk about, you know, things like light sensitivity, you know, the problems that he's having, are they going to continue and what will his needs be?
A Well, I'll start by saying that I saw him twice, so I saw him and we discussed the issues twice. Just looking at those two references points over about a two-year period, there wasn't a big change, honestly, from the difficulties he was suffering from. You know, so again, sort of all of those different categories; the pain, the seizures, the mood issues, the cognitive issues, he talks about issues also like the left-sided weakness or partial paralysis, which is obviously on my examination also.
We talked a little bit about things like light sensitivity and noise sensitivity. So when we're sitting here today and there's all these fluorescent lights around us and there's, you know, people typing around us and there's all sorts of little distractions that could brother you, my frontal

lobe is working over time to make sure none of those things are bothering me, so I can focus just us on talking to you and giving you this information.

When you've had a damage to that filter, to those frontal lobes, it's hard for you to be able to keep that focus in there and things like lights and noise and the things that we're normally able to sort of filter out, are bothering you. He talks about those type of issues, the pain issues, the challenges that he was suffering. Again, not so different over that two-year period of time between my two evaluations, speaking with his brother on the first evaluation and his father on the second evaluation, again, sort of his need for supervision, his unexpected seizures, things that make it that someone's got to be around for this person who, prior to this injury, was very independent.

Unfortunately, we've already talked about that these challenges are permanent, this is what Mark has to live with. This is his -- this is -- unfortunately, this is the long-term effects of the severe traumatic -- severe and diffuse traumatic brain injury that he has suffered in this situation. These things --

THE COURT: I just want to kind of reign this in because I'm getting a little concerned of time. Would you please answer the question?

MR. MORELLI: Sure.

THE COURT: Thank you.

BY MR. MORELLI:

Q I'm going to ask you, what are his needs going into the future?

A He's going to need ongoing medical care for his seizures, for his mood issues. He's going to need ongoing supervision. He's going to need all of these -- all of these different things relating to impairments that he's having; the psychiatric care, the neurologic care, the supervision care, the rehabilitative care. These are going to be the things that continue to affect him and continue to be his needs over his lifetime.

(Continued on next page.)

DIRECT EXAMINATION (CONTINUED)

BY MR. MORELLI:

Q And that's within a reasonable degree of medical certainty?

A Yes, it is.

Q Thank you.

MR. MORELLI: I have nothing further, your Honor.

THE COURT: Thank you. Let me give the jurors a very short break, and we will pick up with cross-examination.

(Jury steps out of courtroom)

(Short recess taken).

COURT OFFICER: All rise. Jury entering.

(Jury enters courtroom)

THE COURT: Please be seated.

Mr. Haworth.

MR. HAWORTH: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. HAWORTH:

Q Good afternoon, Dr. Greenwald.

A Good afternoon.

Q You testified previously that you authored articles and studies and things like that, right?

A Yes.

Q And you list them on your CV, correct?

A Correct.

Q I believe there is one listed on there, I think it is Number 22 where Anne Felicia Ambrose is a co-author of yours, correct?

A That's a good possibility.

Q You are familiar with Dr. Ambrose, you know who she is?

A I am. I mentored her when she worked at Mount Sinai.

Q And she is a brain injury medicine certified physiatrist, same certification as you; correct?

A Correct.

Q Are you aware that she examined Mr. Perez as well?

A I was told that.

Q Now, you maintain a forensic practice as well as one where you treat patients, correct?

A About 5 or 10 percent of my time is spent doing forensic work, if you call that a forensic practice.

Q I ask you to confine your answers to my question. All I wanted to know is if you maintain a forensic practice.

A Yes.

Q Thank you.

You are here today in your forensic capacity as opposed to your capacity in actually treating patients, correct?

A Yes.

Q You saw Mr. Perez twice. And after you did both times, you wrote his lawyer to tell him what you found; correct?

A That's correct.
Q You never treated Mr. Perez at all, true?
A That's correct.
Q You testified earlier that your training was in "full spectrum of care for people." You didn't do that here with respect to Mr. Perez, correct?
A That's correct.
Q You never sent him to a specialist, any of the types of specialists you mentioned before; you never in the two times and the time that you spent with Mr. Perez and when you wrote to Mr. Morelli, you never said, Mr. Perez should see this kind of specialist or that kind of specialist, and he needs to do that now? Did you ever do that?
A No, I did not.
Q You never had one of his current treating physicians one of his current treating specialists write to you and tell you how he is doing? Did you do that?
A No, they did not write to me and I did not do that.
Q That would happen in your normal day-to-day practice, however, the one you said, I think, is 95 or 90 percent of your time; correct?
A Correct.
Q Also, I just wanted to ask you, your practice is not limited to brain injury, you do spinal cord cases, orthopedic cases, things like that too, don't you?

A I'm sorry. I can't answer that with a yes or no response.
Q Well, let me ask you a different question, then.
I seem to recall a case I tried in the Southern District of New York called Rodriguez against Athenian Houses where you testified. There were orthopedic injuries, spinal injuries at issue in this case, and I recall you it testifying.
My question is: Do you also testify in the area of spinal injury cases?
A Yes. That is part of my training, yes.
Q And Mr. O'Hara came up before. Mr. Morelli asked about him.
Am I correct that you are currently working as a consultant with Mr. O'Hara in a case involving a spinal injury?
A A spinal cord injury, yes.
Q And would it be accurate for me to say, essentially, that when Mr. O'Hara retained you, he told you he wanted you to be objective, call it like you see it; fair to say?
A That's true, yes.
Q Thank you.
Now, in response to Mr. Morelli's questions, you talked a bit to the jury about seizures; do you recall that?
A Yes, I did.
Q Now, you reviewed all the medical records, and I think you issued a report on the order of 70 pages or so; correct?

A That's correct.
Q And around 60, 60-plus pages of that report is your review of the medical records; true?
A That's correct.
Q And of all the records that you reviewed, I saw reports of approximately four or so seizures in the medical records; is that pretty accurate?
A That sounds accurate.
Q And was it reported to you -- strike that.
I take it it was reported to you by the family that there are additional seizures, and you talked about that a bit during your direct examination; correct?
A That's correct.
Q And those seizures can cause Mr. Perez to fall, true?
A That's one of the possibilities, yes.
Q Now, if you know someone is having a seizure problem and they fall and they have concave portion of their head where they need surgery, you want to protect that portion of the brain, don't you?
A Yes.
Q No one prescribed him a helmet, true?
A I can't answer that with a yes or no.
Q Let me ask you this: In reviewing all the medical records that generated over 60 pages of your report, did you find a single medical record that says he needs a helmet and he is

being prescribed helmet wear?
A Yes, he had a helmet on for an extended period of time after his injury.
Q That was at the time of his initial injury after his initial surgeries, correct?
A Yes.
Q My question is now, doctor, I think you know that. I am asking now, do you have anything in all of those records where a doctor wants him to wear a helmet because of seizures because he says he is falling now?
A I did not see that, no.
Q Thank you.
Now, you mentioned briefly, I think on direct EEGs; do you recall that?
A Yes.
Q Now, EEGs are a standard test that is given when someone says or someone is suspected to have epilepsy or a seizure disorder; is that correct?
A That's correct.
Q Seizures aren't a disease of their own, they are a symptom of epilepsy; true?
A That's not true, no.
Q Okay. So you disagree with that?
A I do.
Q Nonetheless, you reviewed the EEG reports?

A I did.
Q Would you agree with me, doctor, that Mark Perez had EEGs, about seven of them from July 15, 2014, through April 2, 2017?
A Yes.
Q Would you agree with that?
A Yes.
Q That's all in your records, right?
A Yes.
Q Every single one of them, there is no epileptiform seen; is that true or not true?
A Right. There are no seizures seen.
Q Now, in one of those, on October 7, 2014, that was done at St. Charles Hospital -- and you talked about his treatment at St. Charles, do you remember that?
A Yes.
Q Okay.
Now, would you agree with me that on October 27, 2014, he had an EEG done at St. Charles?
A Yes.
Q Okay. When I look at the report I see the following: "Patient shaking foot. EEG normal. Clinically looks voluntary."
Did I read that correct?
A Yes.
MR. MORELLI: Your Honor, may we approach?

THE COURT: Yes.
(Off-the-record discussion held)
Q Doctor, we were talking about voluntary foot shaking during an EEG. Did I read that correctly?
A That sounds correct, yes.
Q Now, one indication of a seizure could be part of the body, one of the extremities shaking such as a foot; correct?
A That could be.
Q And when they say "voluntary," that means it is being done like that (indicating) on purpose, not as a result of the seizure; correct?
A Yes.
Q Thank you.
Now, doctor, you are familiar with the difference between subjective and objective complaints, correct?
A That's correct.
Q And when you take a history such as when you met Mr. Perez, you ask how he feels; true?
A That's correct.
Q And patients report their symptoms, true?
A Yes.
Q Would you agree with me that self reports are subjective, you can't measure them?
A Yes, that would be true.
Q Okay. So let me ask you this:

Examples of subjective reports -- because you talked about certain things with Mr. Perez and I just want to ask you -- are fatigue, poor sleep quality, depression, sensitivity to noise, headaches. Those things would be subjective, correct?
A I'm sorry. I can't answer that with a yes no response.
Q Well, do you recall that you testified in Morris County, New Jersey, on March 9, 2018, at a deposition in a case called Knodel against State Farm Indemnity Company?
A Yes, sir, I recall that.
Q Do you recall that counsel asked you about subjective versus objective complaints?
A I don't recall that specifically, but I am sure that they must have if you are asking.
Q Yeah. I mean, I can give you the transcript if you want it, but I don't know want to waste time?
A Okay.
Q So tell me if you need it.
In that case, didn't you testify that fatigue, complaints of fatigue are subjective?
A Yes.
Q And you testified that poor sleep quality, if that's reported, that's subjective too?
A It can be.
Q And depression, a patient reports depression, that's subjective, it is a self report; isn't that true?

A There are ways to measure depression. It sort of goes over both an objective and subjective component to it.
Q That would be the standardized test, the multiple choice, the picture drawing, the memory test; those would be the objective standardized tests, right?
A Yes.
Q We will get to those. But as to depression, there can be a subjective complaint of depression; correct?
A Yes.
Q The same thing with sensitivity to noise?
A Correct.
Q The same thing with headaches, true?
A Yes.
Q And Mark Perez reported symptoms like that among others, true?
A That's correct.
Q Okay. And we just said objective symptoms can be measured.
Now, I take it you would agree there are standardized tests that measure things like -- and you talked about these on direct -- cognition, attention, concentration, memory, processing speed; things like that. Is that a true statement?
A That's correct.
Q And when a patient reports those kinds of things, am I

correct that you want to objectively measure them?
A That's correct.
Q You want to know if the patient is impaired, and if the patient is impaired you want to know the level of impairment, don't you?
A Yes.
Q And as I mentioned briefly before, you administer standardized tests. They are multiple choices, drawing pictures, asking the patient to recall a series of words, figures, numbers words; things like that, true?
A All correct, yes.
Q And if they don't put their full effort into that, you are not going to know whether they are actually impaired, or if they are impaired, the level of that impairment; isn't that so?
A That's true.
Q So you rely on the patient to give it their all, give it their best so that they can be properly treated based upon the level of their impairment, true?
A As best as they can, yes.
Q So you don't want someone to perform worse than they really are because their treatment won't be right?
A Absolutely true.
Q Now, there are standardized effort tests, true?
A Yes.
Q And they fall into, sort of, a general category called

performance validity tests; is that true?
A That's correct.
Q And you give performance validity tests in your own day-to-day practice, don't you?
A I do sometimes, yes.
Q And you give standardized tests that have performance validity testing built into them, don't you do that?
A I usually leave that to the neuropsychologists, yes.
Q Okay. The neuropsychologists do the same thing, don't they?
A That is primarily what they do, yes.
Q Oh, by the way, let me ask you something. You are not a neurologist, correct?
A I am not.
Q You are also not a neurosurgeon, correct?
A I am not.
Q So the various surgeries that you testified about during direct examination, you don't perform those surgeries, right?
A I do not.
Q You don't have the qualifications, the experience to do that, right?
A That's correct.
Q Okay.
Now, the test of memory malingering, are you

familiar with what that is?
A I am.
Q Is that referred to as the TOMM test, the test of memory malingering?
A Yes, it is.
Q And malingering would be performing poorly intentionally for the purpose of secondary gain; is that accurate?
A That would be one of the things that you would categorize as lying, yes.
Q And malingering is a term contained in the DSM, true?
A I don't know.
Q But if I say it, you have no reason to doubt what I am saying?
A I have no reason to doubt.
Q Okay.
Seeking to get an increased award in a lawsuit, that would be an example of malingering, true?
A It would be a reason why someone might malinger, yes.
Q Do you know what the REY 15-Item test is?
A Yes, I do.
Q And that is where you are asked to recall a certain number of numbers, letters, figures, things like that after being shown them for a certain period of time; is that true?
A That's true.

Q And there are 15 items in the test?
A Correct.
Q At the cutoff or validity is 9 or maybe 8 depending upon which study you look at; correct?
A That is true.
Q So if someone scores below an 8 or below a 9, depending on the study you use, the test results that they are giving you are considered to be invalid because that's a performance validity test; true?
A I don't think I look at it as invalid, but I know the term is used sometimes.
Q Okay.
And on the test of memory malingering, the TOMM, they do two trials, Trial 1 and then they do it again; correct?
A Correct.
Q On the first trial I think if you score below a 42 that's considered invalid, and if you score below a 49 on the second go-round, Trial 2, that's invalid; correct? Those are give or take the cutoffs?
A Approximately.
Q Again, I understand there are studies that some say it is a 41 instead of 42 or 43 instead of it 42; but generally what I am saying is correct, true?
A Approximately, yes.
Q Thank you.

And you mentioned before that when you were recounting Mr. Perez's treatment history, that after he left his initial hospitalization he then went to Southside Hospital; do you recall that?
A Yes.
Q And when he went to Southside they did neuropsychological screening, correct?
A Correct.
Q And you have those records, the neuropsychological screening records?
A Yes, I do.
Q And that was on July 25, 2013, that he went there, about a month -- almost exactly a month after the accident; true?
A Yes. He was inpatient there, yes.
Q Okay.
And when they brought him in and did their neuropsychological screening they checked his cognitive status, and that's something standard that they would do, correct?
A That's what they are doing, yes.
Q Okay.
And would you agree with me that they said he was A and O times three, alert and oriented times three?
A Yes.
Q So he was oriented, he knew where he was, he knew what time it was, he was aware of his surroundings, things like that;

true?
A Yes.
Q And when they did the neuropsychological screening they checked his memory, his visual spacial and constructional abilities, language, attention, memory, reasoning, judgment, things like that; you are aware of that?
A I am.
Q In many areas, in fact, he scored average; isn't that true?
A That is true.
Q He had a couple of impairments, but mainly he was average and a couple of low averages; isn't that so?
A Yes.
Q One month after the accident, right?
A Correct.
Q Then he was sent on to further rehabilitation at St. Charles, right?
A That's correct.
Q And you testified about that on direct as well, true?
A That's true.
Q Now, at St. Charles he was treated by Dr. Rebecca Sofir-Kusnetz, correct?
A Yes.
Q And Dr. Kusnetz did a psychodiagnostic evaluation of Mark Perez on August 22, 2013, two months after the accident;

true?
A Yes.
Q And he went with Mr. Perez, his dad, who is seated behind me; correct?
A Yes.
Q And Mr. Perez described most of Mark's cognitive functioning as being intact. That's what he told the doctor; fair to say?
A Yes.
Q And his father further described Mark as pretty focused and described his memory as, and this is a quote, "excellent," true?
A I am open to that being in there. I don't have the record.
Q Do you want me to show you the record or will you take my word for it?
A I will take your word for it.
Q Thank you. I have it.
He further said that his son can be very spontaneous and that his sense of humor is, quote, "appropriate and relevant."
Do you have any reason to disagree with that?
A I have no reason to disagree that it is in the record.
Q Let me show you a copy of the record.
MR. HAWORTH: May I approach?

THE COURT: Sure.
MR. HAWORTH: (To Mr. Morelli) I am showing him the records that I am using.
MR. MORELLI: Sure.
MR. HAWORTH: Thank you.
THE COURT: Are they Bates stamped?
MR. HAWORTH: They are. Of course they are out of order, but they are Bates stamped.
Q (Handing) This is the St. Charles record. That way if I screw up and misread something you can correct me.
A Okay.
Q I am looking at the second page of the St. Charles record where -- and can you see the Bates stamp on the bottom right corner, 00290?
A Okay.
Q And do you see where there are behavioral observations made by Dr. Sofir-Kusnetz?
A Yes.
Q Would you agree with me that Dr. Kusnetz found as follows: "Interpersonal skills were grossly appropriate. He was alert and cooperative with the assessment. Gross expressive and receptive language appeared intact. Observed motor functioning also appeared intact. He was able to provide most details of his personal history."
That's what she found on the behavioral

observation section, correct?
A Yes.
Q And am I also correct that in her final summary and recommendations, the doctor they went to for treatment, finds: "Both he and his father deny any significant cognitive changes since the accident."
That's what it says in that record, correct?
A It does.
Q Again, this is a treating doctor. Someone, that they went to to treat Mr. Perez, not someone to give an evaluation for a lawsuit; correct?
A Correct.
Q I would like you to look at the next part of those St. Charles records, Page 00291, the very next page.
Would you agree with me that that is a neuropsychological evaluation that Dr. Sofir-Kusnetz did in connection with her treatment of Mr. Perez?
A Yes.
Q If you look at the last two pages, specifically the next to the last page numbered 00295, you will see the neuropsychological evaluation score summary. Do you see that?
A I do.
Q Do you see where the test of memory malingering was administered?
A Yes.

Q Now, on Trial 1 he scored below the 42, 43, 41 that we talked about before. He got a 37, true?
A True.
Q And on the second trial, instead of getting a 46, 47, 48 that we talked about as the cutoff before, he got a 38; true?
A Correct.
Q And I would like you to go back to Dr. Sofir-Kusnetz's report based on his scores -- and, by the way, she did a whole bunch of other standardized tests too; correct?
A Yes.
Q And those appear to you, I take it you agree, to be the standard standardized testing that would be done for an evaluation of this type; correct?
A Yes.
Q If you want to treat a patient, that's what you are going to give him; true?
A Yes.
Q And she did it over three days to make sure he wasn't tired, wasn't fatigued, things like that. You want to minimize those things, and that's what this doctor did; correct?
A Correct.
Q Nonetheless, under "summary and recommendations," would you agree with me that she finds as follows regarding Mark Perez: "His performance on the TOMM," the test of memory malingering, "was significantly lower than expected which is not consistent

with an individual with a head injury. As a result, the complex nature of factors affecting his test performance made it difficult to determine the specific nature of his impairment."
That's what she found, correct?
A Correct.
Q I would like you to turn to 00460 in that record.
Now, when you met with Mr. Perez, he recounted to you that he has difficulty sustaining attention; correct?
A Correct.
Q And you talked about that at some length during your direct examination in response to Mr. Morelli's questions, true?
A Yes.
Q Now, that service date from the St. Charles Hospital record, again Dr. Sofir-Kusnetz, is May 1, 2014; correct?
A Yes.
Q Way back then Mr. Perez -- basically, a year after the injury did he or did he not agree with Dr. Sofir-Kusnetz, report to her that he has always had difficulty sustaining his attention, that he's always had that? That's what it says, doesn't it?
A Sort of, yes.
Q I don't want to take "sort of."
A Okay.
Q Let's go back to the page. I will quote it directly. Tell me if I read it incorrectly or correctly:

"Mr. Perez agreed that he has always had difficulty sustaining his attention."
That is a quote that is on that page from that doctor when she was treating Mr. Perez; true statement or not?
A Yes, as the second paragraph --
Q Wait. No, no, no. Is it a true statement or isn't it?
A Yes, it is a true statement.
Q Thank you.
Again, please just answer my questions.
THE COURT: Please don't argue back and forth. Doctor, please answer the question which is asked.
Q Now, we talked before about Dr. Ambrose. And you are aware that as a brain injury medicine certified physiatrist, a former colleague of yours, Dr. Ambrose, examined Mr. Perez recently on August 29, 2019; correct?
A Yes.
Q And she gave him the Rey 15-Item Test which was another performance validity test we talked about before, correct?
A Correct.
Q We talked about the cutoff being 8, 9, typically 9 but some studies say 8; correct?
A 7, 8 or 9, yes.
Q He got a 6, do you disagree with that?
A I don't disagree.
Q And Dr. Ambrose also did a neurological exam, correct?

A Yes.
Q Is it a true statement that your former colleague reported that there were regional sensory changes in the left forearm that deviated from accepted neuroanatomy? Would you agree with that statement?
A I agree that she said that, yes.
Q And "accepted neuroanatomy" means the way the body works, true?
A True.
Q And if something deviates from that accepted neuroanatomy, it essentially means the body doesn't work that way; correct?
A I can't say what Dr. Ambrose meant.
Q Okay. But neuroanatomy is how the body works, do we agree on that?
A Yes.
Q And she said it deviates from that; fair statement?
A Yes.
Q You are familiar with Dr. Barry Jordan, the neurologist; correct?
A Yes.
Q Do you agree he is well-qualified?
A He is.
Q You worked with him?
A We have.

Q He also administered the Rey 15-Item Test, and he did it --
MR. MORELLI: Objection, your Honor. Can we approach?
THE COURT: Yes, of course.
(Sidebar conference held off the record)
(Continued on next page)

BY MR. HAWORTH:
Q Dr. Jordan gave him the Rey 15-item test as well correct?
A Yes.
Q He got a three on that test six weeks earlier from Dr. Ambrose, a six, correct?
A Yes.
Q Are you also familiar with the fact that Dr. Jordan administered something called the Montreal Cognitive Assessment, the MOCA, you're aware of that?
A Yes.
Q And you're aware of how that test works, how it scores?
A Very.
Q Okay. So 26 plus -- it's 30 items, correct?
A It's 30 points.
Q Okay, 30 points. Twenty-six plus points would be normal, true?
A Correct.
Q Mild cognitive impairment would be 22 or so, correct?
A Correct.
Q And an Alzheimer's patient, someone afflicted with Alzheimer's would get a 16 or below, correct?
A Yes.
Q Are you aware that Mr. Perez scored a five out of 30

points, are you aware of that?
A Yes, I am aware.
Q Okay. So he scored well within what someone unfortunately, afflicted with Alzheimer's would score, correct?
A Correct?
Q That would be severe dementia, true?
A Yes.
Q Okay. Now, you mentioned Mr. Perez's gait. Gate is the way he walks, correct?
A Correct.
Q Are you aware that when he examined him, Dr. Jordan noted, quote/unquote, gate was notable for pain, weakness on the left, are you aware of that?
A I did see that in his report, yes.
Q And did you also see in his report where he noted the deliberate and exaggerated nonphysiological use of the left lower extremity, you saw that, too?
A I read that, yes.
Q And nonphysiological use, again, would be the body doesn't work that way, true?
A Yes.
Q Dr. Jordan also saw Mr. Perez in November of 2015, correct?
A Yes.
Q He administered the MOCA that time, too, correct?

A Correct.
Q And again, he scored what someone unfortunately, afflicted with Alzheimer's disease would score, except this time it was a little higher, it was a 13 out of 30 points, true?
A Yes.
Q Now, back during that 2015/2016 time period, you read the transcript of Mr. Perez's testimony, right?
A Yes.
Q He was driving a stick shift Jeep, are you aware of that, he testified to that?
A I believe you.
Q When you drive a stick shift you're moving the stick with you right hand, you're steering the car with your left, you got to use both feet, your right and left, they're doing important things when you're operating that motor vehicle, true?
A Yes.
Q He lived alone for a period of time during that time period; isn't that so?
A Yes.
Q He testified that he drove in the rain at least once that he told us about a couple of days before the dep, before he gave his sworn testimony he drove in the rain, are you aware of that? You must have read that.

A Yes.
Q Okay. And he was going to the gym. We know about that, correct?
A Correct.
Q You've seen Dr. Gordon's reports, correct?
A Yes.
Q And Dr Gordon was retained by Mr. Morelli's office, correct?
A Correct.
Q The more recent report of Dr. Gordon, you're aware, are you not, that Mr. Perez's TOMM® scores, his test of memory malingering scores, were well below the cutoff for validity; isn't that true?
A Correct.
Q Now, Doctor, you did a physical examination of Mr. Perez, correct?
A Yes.
Q And you found four out of five strength on the left, five out of five strength on the right and you -- so therefore, bilaterally you found normal or close normal strength, correct?
A No.
Q Okay. Well, let me ask you this. Four out of five left finger flexors, five out of five right, you found that, right?
A Correct.

Q Okay. And five out of five bilateral shoulder abductors, elbow flexors, elbow extensors, wrist flexors, wrist extensors, correct?
A Correct.
Q Five out of five motor strength bilateral hip flexors, knee extensors, knee flexors, ankle plantar and dorsiflexors, correct?
A Correct.
Q Those were your findings on both occasions when you examined Mr. Perez, both in February 2017 and in June -- recently, June 2019, true?
A True.
Q And by the way, Mr. Perez is right-hand dominant, correct?
A I believe so, yes.
Q Okay. In terms of his medications, when you saw him he was taking 100 milligrams, three pills BID of Tegretol, correct?
A Is this on the first visit?
Q I believe it was the first visit. It may be the second visit or it may have been the same in both, but at some point he was taking Tegretol when you saw him, true?
A Tegretol?
Q And you can refer to your report.
A Thank you.

(Brief pause in the record.)
A Yes, at that second visit he was taking Tegretol.
Q And he was taking 100 milligrams, true?
A That's correct?
Q That's well below the maximum dose; isn't it?
A You see here 100 milligrams, three pills twice a day.
Q You could do a lot more than that, can't you, on Tegretol?
A You go could go up above that, yes.
Q Okay. And Tegretol is for seizures, true?
A It is.
Q And Mr. Perez had previously been on Keppra, K-E-P-P-R-A, true?
A Yes.
Q And he had some side effects on Keppra, some adverse side effects, which can happen with medication, correct?
A Correct.
Q There were no reported side effects on Tegretol, correct?
A I didn't hear of any noted side effects on it, correct, yes.
Q Thank you. And he was also taking Adderall, true?
A He was, yes.
Q And Adderall is used when your concentration isn't so great. That's something that may be prescribed, true?

A Yes.
Q That's not limited to people with traumatic brain injury, everyday people who have issues concentrating take Adderall, true?
A That's correct.
Q And he was taking Xanax, a relatively low dose of Xanax, to help him sleep, correct?
A Yes.
Q No psychoactive medication whatsoever, correct?
A No.
Q No SRI inhibitors, nothing for depression specifically, true?
A No.
Q That's true both times you saw him; isn't it?
A It was not true the first time or the second time.
Q Thank you. You had the opportunity to review the records of Mr. Perez's treating neurologist, correct?
A Correct.
Q The treating neurologist is the person he goes to for help, that's who's actually administering his treatment, not someone retained for a lawsuit, correct?
A That's correct.
Q Now, would you agree with me -- because of time I'm not going to go through every single record if I can avoid it. Three Village Neurology, Dr. Bruno, that's a treating

neurologist, true?
A Yes.
Q And Mr. Perez regularly saw Dr. Bruno, true?
A Yes.
Q There were about a dozen reports or so here of Mr. Perez seeing Dr. Bruno from October 2014 through May 2015. Will you take my word for that?
A Yes, I will.
Q Would you agree with me that in each and every of those reports, every single one, when Mr. Perez goes to Dr. Bruno, Dr. Bruno, in his office note, finds under mental status: He is alert and oriented to person, place and time. He has normal attention and language functioning, do you have any reason to doubt that every single time Mr. Perez saw his treating neurologist, his own treating doctor wrote that?
A I have no reason to doubt that he wrote that.
Q Do you have any reason to doubt that each and every time Mr. Perez saw his treating neurologist Dr. Bruno, Dr. Bruno made a point to note that Mr. Perez's gait, the way he walks was, quote/unquote, normal?
A No, I have no reason to doubt that.
Q Every time it was normal, any reason to doubt that?
A No.
Q Okay. Another treating neurologist, Dr. Xian -- I think is how you pronounce is it, X-I-A-N -- you saw Dr. Xian's

records?
A Yes.
Q Okay. Now, when he saw Dr. Xian more recently, July of 2018, would it be fair to say that Dr. Xian reported that Mr. Perez reported no recurrent seizures? It's in his report: Denies any recurrent seizures, any reason to doubt that?
A I have no reason to doubt that.
Q March 7, 2018, any reason to doubt that Mr. Perez reported less headaches in frequency and severity, frequency was approximately one time a week, any reason to doubt that?
A No.
Q November 8, 2017, any reason to doubt that Mr. Perez reported to his treating neurologist Dr. Xian that he was having no recurrent seizure activity since he went on Tegretol?
A I have no reason to doubt that.
Q Any reason to doubt that Mr. Perez was exercising daily? Daily is what he told his treating doctor, any reason to doubt that?
A No.
Q And that his mood was stable, any reason to doubt that?
A No.
Q His headaches were stable, any reason to doubt that?
A No.
Q No recurrent seizure activity, any reason to doubt

that, Doctor?
A No.
Q By the way, you didn't administer any performance validity tests to Mr. Perez either time you saw him, true statement?
A That's correct.
Q Thank you. I have nothing further.
THE COURT: Thank you.
Counsel, approach please, very quickly.
(WHEREUPON, a discussion was held off the record, at the side bar, in the presence of the Court and counsel and out of the hearing of the jury.)
THE COURT: So we're going to go for about another 15 minutes and that's going to be it for the day. I just want to give you a reminder. Tuesday, 9:15 downstairs. My officer will let you know where to meet.
And I'm just going to remind you right now while we're setting up, don't perform any research overnight, don't talk about the case with anyone -- well, don't do any research about the case whether it's overnight or whenever you're not here. Don't talk about the case to anyone, don't start talking about the case amongst yourselves, don't post anything concerning the trial on social media and don't speak with any of the attorneys, parties or witnesses.

So we'll be seeing you back after this segment on Tuesday at 9:15 a.m.

REDIRECT EXAMINATION

BY MR. MORELLI:

Q Dr. Greenwald, let's take one topic at a time, okay? Let's talk about the seizures because there was questions about seizures in 2013 and 2014, correct?

A Yes.

Q Counsel asked you.

And actually, when I was questioning you earlier, we agreed that the first time that he exhibited seizures, certainly in a grand mal way, was in 2015; is that correct?

A That's correct.

Q Okay. And there's nothing about your opinion about him having traumatic epilepsy that has changed after the questions that you were just asked; am I correct?

A That's correct.

Q Okay.

MR. HAWORTH: Your Honor, I'd like to know what record he's trying to --

MR. MORELLI: I can show it to you. I didn't use it yet.

Give him the date and the Bates stamp.

BY MR. MORELLI:

Q Now, I'm going to ask you, Doctor, the questions by

counsel with reference to there not being any objective testing that showed epilepsy, okay? I'm going to refer you to a test that was done between August 18, 2014 and August 19, 2014. It was an EEG recorded digitally during that period of time?

MR. MORELLI: And what's the Bates stamp number?

MR. SIROTKIN: We don't have a Bates stamp.

MR. MORELLI: Okay.

BY MR. MORELLI:

Q I'm going to ask you to read, if you would, Doctor, the impression that was given from that test, what was the impression?

THE COURT: Sustained to reading it. I don't think this is in evidence.

MR. MORELLI: Well --

THE COURT: Is that going to be your objection?

MR. HAWORTH: Also, I want to see it because I think he may be going beyond the scope of cross.

MR. MORELLI: What?

THE COURT: Why don't you show it to him, please, and do it right over here?

(WHEREUPON, a discussion was held off the record, at the side bar, in the presence of the Court and counsel and out of the hearing of the jury.)

BY MR. MORELLI:

Q So, Doctor, I would ask you to read the EEG

impression, and, once again, between August 18, 2014 and August 19, 2014, as to whether or not there was an objective test.

THE COURT: I just want to clarify. Is there an objection to this because it's not in evidence being read or are you asking him to read it to himself? I'm just not clear where we are.

MR. HAWORTH: It's form over substance. It's fine, he can read it.

THE COURT: Very good.

MR. MORELLI: Thank you.

BY MR. MORELLI:

Q Read it out loud.

A The EEG impression was that this is an abnormal 24-hour EEG due to mild disorganization and intermittent slowing in the right frontotemporal area, which signifies focal cerebral dysfunction. In addition, there are rare right temporal and right frontotemporal sharp waves that are epileptiform, meaning seizures. The three-lead EKG analyzed by the computer software does not show any significant arhythmias. Clinical correlation is suggested.

Q So can you tell us, what is this? Does this mean -- is this suggestive that there was no objective test that showed that there was seizures?

A This shows evidence of seizures even back in 2014.

Q And that's is objective test, not a subjective test, correct?

A That's correct.

Q And now, when we were talking earlier about -- let's deal with -- we were talking earlier about this effort, you know, when you're doing a test and you're not putting forth effort, right?

A Yes.

Q And in a normal person that doesn't have any brain damage or anything, then if they're not putting forth effort, then you could understand about that; am I correct?

A Correct.

Q But what about in Mark Perez's case, you were telling us earlier about this concept of putting forth effort when, in fact, we now know that he had seizure activity even back in 2014 objectively, correct?

A Yes.

Q So tell us about these tests and how accurate they are with reference to putting forth effort?

MR. HAWORTH: Objection.

THE COURT: I need you to approach on this. I'm a little confused.

(WHEREUPON, a discussion was held off the record, at the side bar, in the presence of the Court and counsel and out of the hearing of the jury.)

THE COURT: Overruled.
BY MR. MORELLI:
Q So, Doctor, you were describing earlier and counsel was talking about these TOMM® tests, MOCA tests, all of these tests as if to prove that Mark is --
MR. HAWORTH: Objection.
MR. MORELLI: Generally, I finish, then you object.
THE COURT: Finish the question, please.
BY MR. MORELLI:
Q -- that Mark was exhibiting malingering, correct?
A Yes.
Q And that's what his questions were about?
MR. HAWORTH: Objection.
THE COURT: Overruled now, but --
MR. HAWORTH: Okay. Thank you.
BY MR. MORELLI:
Q That was what his questions were about.
So can you explain to us, when you were talking earlier about this effort and all of the cognitive problems that Mark has, can you reconcile this for us with reference to the time test and this other test?
A So we talked about before how the brain, the frontal lobes in particular, that affect your ability to put forth your best effort, can be inhibited by such brain injury to the

frontal lobe specifically, from a brain perspective, but other things that we know can affect people's effort is people who are in pain, people who are depressed. These also have significant effects on your ability to put it forth effort and it really makes tests like that not useful, especially in a case like this where we see very objective evidence of brain injury and injury to the part of the brain that would help you put your full effort forward. When we see that evidence of the person who is suffering from pain, from depression, from anxiety, these there all known things that could alter your ability to put your full effort forward.
Q Can you tell us, the drug Tegretol, what does it do?
A It has a number of properties, but seizures is what it's most commonly used for has some pain treating qualities for neurologically based pain and some mood stabilizing qualities so it's useful in a number of different areas.
Q Does it have side effects?
A Unfortunately, as all medication does, yes, it does.
Q Okay. And would there be a reason that someone would give, not the highest dose of Tegretol, even if somebody had intractable seizure activity, would there be a reason to do that?
MR. HAWORTH: Objection.
THE COURT: Sustained.
BY MR. MORELLI:

Q Would there be a reason for a practitioner to give less than the highest dose of Tegretol to control epileptic seizures, would there be a reason to do that?
A Yes.
Q Okay. Can you tell the jury what that reason would be?
A The goal is not to give the highest dose that you can give, it's to give a dose that will both help with the problem that you're trying to treat and minimize the risk of side effects.
Q And so is that what you would normally do in your practice if you were treating people?
A Yes.
Q Okay. And when you examined Mark Perez and you reviewed all of the records, you formulated opinions about this case, correct?
A Yes, I did.
Q And your opinions were to a reasonable degree of medical certainty; is that correct?
A Yes.
Q Okay. And were you telling the truth about what your opinion was about this case?
A Absolutely.
Q And have you changed any of your opinions because of the questions by counsel?

A Not at all.
Q Thank you, Doctor.
THE COURT: Okay, Doctor.
MR. MORELLI: One other thing?
MR. SIROTKIN: Just one thing.
(Brief pause in the record.)
BY MR. MORELLI:
MR. MORELLI: Your Honor, I'm going to -- let me just show counsel this. There's just one more thing.
THE COURT: Okay.
BY MR. MORELLI:
Q Just, Doctor, I'm going to refer you to a record from South Shore Neurologic and this is Dr. Xian. You heard counsel reference Dr. Xian?
A Yes.
Q And I highlighted some portions of this dated May 29, 2019. This was an office visit and he writes down: History his present illness. And then he talks about an EEG that was done November 2018, okay? And I just ask you to read the highlighted portions to the jury, please.
(Document was handed to the witness.)
Q That's Dr. Xian, treating doctor.
A This is the interval history from May 29, 2019. The patient developed an episode of a witnessed seizure two days ago. The patient has compliance to the AED, which stands for

antiepileptic drug. The patient denies alcohol intake, sleep deprivation, fever. The patient reported seizure occurred about two hours after taking decongestants. The last seizure prior to this episode was November 2018.

Then November 15, 2018: The patient has a history of seizure disorder, history of traumatic brain injury and headaches. The patient developed multiple recurrent partial seizures recently related to missing Tegretol or missing a meal. The patient did not lose consciousness, left arm tight, unable to talk for a few minutes. EEG from November 2018 reported persistent right frontotemporal slowing, indicative of right frontotemporal structure abnormality and infrequent paroxysmal right frontotemporal sharp waves that are potentially epileptogenic.

Q So is that an objective test?

A Yes, it is.

Q And tell the jury what that means.

A It's just showing objective evidence of the seizures that he's suffering from.

MR. MORELLI: Thank you? I have nothing further, Your Honor.

THE COURT: Very good. Doctor, you can step down.

THE WITNESS: Thank you.

(Witness exits the witness stand.)

THE COURT: Ladies and gentlemen, I've already given you instructions for the weekend. I've told you what time to be back. My only other instruction is to enjoy your three-day weakened. Thank you very much.

THE COURT OFFICER: All rise, jury exiting.

(Jurors exited the courtroom.)

THE COURT: Anything before we close the record?

MR. HAWORTH: Just a quick record.

THE COURT: Yes, go ahead.

MR. HAWORTH: I had requested that the Court permit me to recross the witness. There were two areas where I would have, if I were permitted to, but Your Honor denied that request, I would have asked him on the efforts/malingering questions that Mr. Morelli asked and also, on the last question where the witness read an EEG report that talked about something being intentionally epileptic and then Mr. Morelli followed up and the witness said it's objective evidence of epilepsy, not potential. And that's what the document said, it said potential, but I was denied that opportunity by, Your Honor.

THE COURT: Very good. You read my part rules. My part rules clearly indicate that except for exceptional circumstances, recross-examination is not permitted. I didn't hear anything that Mr. Morelli did that exceeded what was anything more than rehabilitation of what was

going on during direct -- during cross-examination and there was no basis, in my opinion for recross.

MR. HAWORTH: Thank you, Your Honor.

THE COURT: Thank you. Anything else?

MR. HAWORTH: Nothing that we need to do today, Judge.

THE COURT: Okay. So let me go off the record. We will close the record for today.

(WHEREUPON, court is recessed and the case adjourned to Tuesday, November 12, 2019 at 9:30 a.m.)

B

C

D

E

F

G

H

I

J

K

L

M

Q

T

U