

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

Page 1

1 SUPREME COURT OF THE STATE OF NEW YORK
 2 COUNTY OF NEW YORK : PART 56
 3 -----X
 4 MARK PEREZ,
 5 Plaintiff,
 6 - against -
 7 LIVE NATION WORLDWIDE, INC.,
 8 Defendant(s).
 9 -----X
 10 Index No. 158373/2013 November 8, 2019
 11 71 Thomas Street
 12 New York, New York

13

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

15

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

17 For Plaintiff:

18 MORELLI LAW FIRM PLLC
 19 777 Third Avenue
 20 New York, New York 10017
 21 BY: BENEDICT MORELLI, ESQ.
 22 DAVID T. SIROTKIN, ESQ.
 23 MICHAEL S. SCHLESINGER, ESQ.
 24 ALEXANDER R. MORELLI, ESQ.
 25

(Appearances continued on next page)

Page 3

1 (Off-the-record discussion held)
 2 THE COURT: On the record.
 3 Is there a record we need to make, folks?
 4 MR. O'HARA: Not at this time.
 5 THE CLERK: The caption?
 6 THE COURT: Oh, yes.
 7 The caption is amended to Mark Perez versus Live
 8 Nation Worldwide Incorporated.
 9 MR. O'HARA: Yes, that's correct.
 10 MR. MORELLI: Yes.
 11 Okay. We will begin shortly when the jury
 12 arrives.
 13 (Brief pause)
 14 THE CLERK: This is the case of Mark Perez,
 15 plaintiff, against Live Nation Worldwide Inc. defendant,
 16 Index number 158373 of 2013.
 17 Counsel, your appearances for the record.
 18 MR. MORELLI: Benedict P. Morelli for the
 19 plaintiff.
 20 MR. SIROTKIN: David Sirotkin also for the
 21 plaintiff.
 22 MR. SCHLESINGER: Michael Schlesinger, for the
 23 plaintiff.
 24 MR. MORELLI: Alexander Morelli, for the
 25 plaintiff.

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1 APPEARANCES CONTINUED:
 2
 3 For Defendant:
 4
 5 CONNELL FOLEY LLP
 6 1085 RAYMOND BOULEVARD
 7 Newark, New York 07102
 8 BY: JEFFREY L. O'HARA, ESQ.
 9 MATTHEW W. BAUER, ESQ.
 10
 11 - and -
 12 HAWORTH BARBER & GERSTMAN, LLC
 13 505 Main Street
 14 Hackensack, New Jersey
 15 BY: SCOTT HAWORTH, ESQ.
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 17
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 19
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 21
 22
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 25

RACHEL C. SIMONE
 LAURA LUDOVICO
 SENIOR COURT REPORTERS

Page 4

1 MR. O'HARA: Good morning, Your Honor.
 2 Jeffrey O'Hara, and Matthew Bauer of Connell
 3 Foley, on behalf of defendant.
 4 MR. HAWORTH: Good morning, your Honor.
 5 Scott Haworth FROM Haworth Barber & Gertsman, also
 6 on behalf of the defendant.
 7 THE CLERK: Is the jury satisfactory to the
 8 plaintiff and defendant?
 9 MR. MORELLI: The jury is satisfactory.
 10 MR. O'HARA: The jury is satisfactory, your Honor.
 11 THE COURT: Will the members of the jury please
 12 raise your right hands.
 13 (Jury of six plus three alternate jurors duly
 14 sworn/affirmed.)
 15 THE CLERK: Please be seated.
 16 Your Honor, the jury has been sworn and affirmed.
 17 THE COURT: Thank you, Lewis.
 18 Good morning, everybody. Welcome to New York
 19 Supreme Court. I am Judge John Kelley. I am the judge who
 20 will be presiding over this case.
 21 We are about to start the trial of the case about
 22 which you have heard some details during jury selection.
 23 There are some instructions that you should have in order
 24 that you better understand what you will see and what you
 25 will hear as well as how you will conduct yourselves during

Preliminary Charge Page 5

1 this trial.

2 As you probably know, the party who brings a

3 lawsuit is called the plaintiff. In this action the

4 plaintiff is Mark Perez. Mr. Perez is suing to recover for

5 injuries that he sustained on June 26, 2013. The party

6 against whom the suit is brought is called the defendant.

7 In this action the defendant is Live Nation Worldwide

8 Incorporated. And in this part of the case, you are only

9 going to be deciding the amount of money that will

10 compensate the plaintiff for injuries that he sustained as a

11 result of this accident.

12 When I have completed these opening instructions,

13 the attorneys are going to make opening statements in which

14 they will tell you more about their claims so that you will

15 have a better understanding of the evidence. What is said

16 during opening statements is not evidence. The evidence in

17 this case is going to come from one of four sources; from

18 live witness testimony, from testimony taken before the

19 trial, from exhibits such as photographs and other

20 documents, or from facts that may be stipulated by the

21 parties as being true. And so that you are aware, an

22 examination before trial which is also referred to as a

23 deposition -- you may hear the phrase come up -- is

24 testimony that was taken under oath before the trial began.

25 It is entitled to equal consideration by you even though it

Preliminary Charge Page 6

1 was taken before the trial and outside of this courtroom.

2 Now, trials have a certain order to them. The

3 plaintiff always makes an opening statement before the

4 defendant. After the opening statements the plaintiff will

5 introduce evidence in support of his claim. Normally a

6 plaintiff will produce all of his witnesses in evidence

7 before the defendant starts their case, but in this case we

8 may have to vary that order in order to accommodate

9 scheduling. If it does happen I will give you further

10 instructions at the time. Just be aware that it can happen.

11 After the plaintiff has finished introducing

12 evidence, the defendant may present witnesses and exhibits.

13 If they do, then the plaintiff may be permitted to offer

14 additional evidence to rebut the defendant's evidence.

15 After both sides have finished introducing the

16 evidence, the attorneys again will speak to you in closing

17 statements. In summing up they will point out what they

18 believe the evidence has shown, what inferences or

19 conclusions they believe you should draw from the evidence,

20 and what conclusions they believe you should reach as your

21 verdict. Again, what the attorneys say is not evidence.

22 Under our system, the order of summation is reversed so that

23 the defendant will sum up first and the plaintiff will go

24 last.

25 At times during the trial an attorney may make an

Preliminary Charge Page 7

1 objection or a motion concerning some legal issue in the

2 case. Be aware that I do try to have arguments relating to

3 objections or motions when you are not in the room, but

4 sometimes things do happen when you are here. Please know

5 that I will be making all of my rulings based solely upon

6 the law. You must not conclude from any ruling or, for that

7 matter, from anything that I say in this trial that I favor

8 either party to this lawsuit.

9 After summations I am going to instruct you on the

10 rules of law that apply to the case, and then you are going

11 to go back to the jury room to deliberate. Your job is

12 going to be to decide what facts have or have not been

13 proven and then apply the rules of law that I give to you to

14 those facts. Your decision is going to be based on the

15 evidence that was admitted during this trial. You are the

16 sole and exclusive judges of the facts. Now, on the other

17 hand, keep in mind that a few moments ago you swore an oath,

18 and in that oath you agreed, you swore an oath to accept the

19 rules of law that I give to you whether you agree with them

20 or not. You are not to ask, consider, or accept any advice

21 about the law from anyone other than me. As the sole judges

22 of the facts, you are going to have to decide which of the

23 witnesses you believe, what portion of their testimony you

24 may accept, and what weight you give to it.

25 At times during the trial I may sustain objections

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1 to questions and you may hear no answer, or where an answer

2 has been made I may grant a motion to strike it from the

3 record, in which case you must disregard it and dismiss it

4 from your minds. You may not draw any inference or

5 conclusion from an unanswered question, nor may you consider

6 stricken testimony in reaching your decision. The law

7 requires that your decision be made solely upon the evidence

8 that is before you, and any proof that I exclude from your

9 consideration will be excluded because it is not legally

10 admissible.

11 Having said that, the law does not require you to

12 accept all of the evidence that is admitted during the

13 trial. In deciding what evidence you will accept, you must

14 make your own evaluation of each witness's testimony and

15 then decide how much weight to give to it. A witness's

16 testimony may not conform to the facts as they occurred for

17 several reasons; for instance, because the witness is

18 intentionally lying, because the witness did not accurately

19 see or hear what happened, because the witness's

20 recollection is faulty, because the witness's testimony

21 simply was not clear to you.

22 Folks, there is no magical formula for evaluating

23 testimony. In your everyday affairs you decide for

24 yourselves the reliability of things that people tell you.

25 And the same tests that you use in your everyday dealings

Preliminary Charge Page 9

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

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

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

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

Preliminary Charge Page 10

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

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

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

Preliminary Charge Page 11

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

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

25 Finally, just so you have a heads up, cellphones

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

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

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

Preliminary Charge Page 13

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

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

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

Preliminary Charge Page 14

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

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

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

Preliminary Charge Page 15

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

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

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

Preliminary Charge Page 16

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

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

12 I mention the lunch break also because between
13 1:00 and 2:00, one of the peculiar things about this
14 building is that the court actually rents this space from a
15 private building. This is not actually a courthouse. And
16 for that reason and the particular layout of this building
17 this entire floor is closed between 1:00 and 2:00. I bring
18 this to your attention for two reasons: One, you can't stay
19 in the jury room during lunch. There are accommodations
20 downstairs, but you can't stay here. Secondly, the room
21 will be locked. Of course we are not responsible for
22 anything that you leave behind; but if you do leave
23 something behind, bear in mind you are going to be without
24 it for an hour. So make sure during the lunch hour you take
25 everything you need with you.

<p>Preliminary Charge Page 17</p> <p>1 Keep in mind that the room back there is not 2 soundproof. If there does come a time that you can hear 3 what is going on outside of the jury room, please buzz us 4 and let us know and we will make sure things are kept down. 5 Finally, I want to talk to you about what I 6 consider to be one of my most important roles in this case, 7 to make sure you are in the best position to pay attention 8 to the evidence. So I am a firm believer in frequent 9 breaks. I am going to be watching you throughout the trial. 10 Don't think I am weird. I am just trying to monitor. I 11 will watch you throughout the trial to try to get a handle 12 on whether everybody is okay. We usually take a break at 13 least once an hour to let everybody stretch their legs, 14 whatever. And if I am missing a cue, if I am not noticing 15 that you are in distress or somehow uncomfortable or 16 distracted, do me a favor and raise your hand and let me 17 know that you need a break. The answer will never be no and 18 the reason will never have to be explained. I don't care 19 what your reason is. If you need to stretch your legs, get 20 a drink of water, use the bathroom; I don't care. If you 21 need a break, you are thinking about that and not thinking 22 about what is going on here, which is where I need you to 23 focus. 24 All right. Mr. Morelli? 25 MR. MORELLI: Your Honor, based on what you said,</p>	<p>Opening - by Plaintiff - B. Morelli Page 19</p> <p>1 the defendants are responsible for the damages resulting for 2 Mark Perez's workplace accident where he fell from a height 3 while performing work for an upcoming concert at the Jones 4 Beach Theater. So that's where it happened, something you 5 didn't know. 6 On June 26, 2013, you will learn that Mark, who is 7 in the courtroom -- and just so I can introduce you to the 8 family, that's mom on the left, and sister, and dad, and 9 Mark, and brother, okay? They do have names but I am going 10 to tell you that in the PowerPoint so that you have a little 11 suspension. 12 So he not only had massive brain injuries at the 13 time, but he had a fractured skull, ribs were fractured, 14 seven as a matter of fact, he had spinal fractures, and he 15 was in and out of consciousness at the scene on the ground. 16 He was also bleeding from his nose. 17 At that time 911 was called, and he was taken from 18 the scene of the accident. Actually, he was airlifted 19 immediately to Nassau University Medical Center. 20 Now, when he got to Nassau University Medical 21 Center -- and I want you to know that these are some of the 22 things from the medical records -- he was admitted to the 23 surgical intensive care unit. They diagnosed him with a 24 traumatic brain injury. He had a fractured skull. He had 25 multiple facial fractures. He had a subdural hematoma.</p>
<p>Opening - by Plaintiff - B. Morelli Page 18</p> <p>1 maybe we should take five minutes only because my opening 2 will be at least an hour. That's the only reason. 3 THE COURT: Okay. So we will take five minutes 4 and then we will come back and get started. 5 (Jury steps out of courtroom) 6 THE COURT: Anything for the record, counsel? 7 MR. O'HARA: No, sir. 8 (Short recess taken) 9 COURT OFFICER: All rise. Jury entering. 10 (Jury enters courtroom) 11 THE COURT: Counsel. 12 MR. MORELLI: May it please the Court, Honorable 13 Judge Kelly, esteemed counsel, Mr. O'Hara, Mr. Haworth, 14 members of the jury; good morning. 15 I am going to take some time I am going to use a 16 PowerPoint so that you can see basically what I am saying. 17 I am probably saying more. 18 The first thing that we are going to talk about is 19 why are we here. You did hear a number of things in jury 20 selection. I spoke to you all pretty much at length, 21 especially yesterday. So I want to tell you that we are 22 here because we are going to determine the full extent of 23 the damages sustained by Mark Perez for the injuries that he 24 suffered on June 26, 2013. 25 As you know, it has already been determined that</p>	<p>Opening - by Plaintiff - B. Morelli Page 20</p> <p>1 That's bleeding in the brain. And you are going to learn 2 during the trial that there was not only bleeding in the 3 brain itself, but there was bleeding in the skull around the 4 brain. And you will hear from at least one expert witness, 5 one doctor who will tell you what the significance of that 6 is. You will also find that he had multiple hemorrhages. I 7 think we know what that is, but it will be described during 8 the trial. 9 He had seven fractured ribs, spinal fractures and 10 a punctured collapsed lung. And oftentimes when you have 11 fractured ribs, often your rib punctures your lung, which is 12 called a pneumothorax. That's what he had. So now they had 13 to decide at the medical center what they were going to do 14 about this, and what they had to do was medically induce a 15 coma. What does that mean and why do they do that? Well, 16 when you have a traumatic brain injury like that and you 17 have a fractured skull, the problem that you have is that 18 the pressure builds up in the head, and if they don't 19 relieve that pressure you die, okay? So in order to relieve 20 the pressure in his head, they put Mark in a coma purposely, 21 okay? 22 Also, he was on life support, he was on a 23 ventilator. He wasn't able to breathe for himself at that 24 point, so he was on a ventilator. He also wasn't able to be 25 fed by mouth as a result of that, so he needed a feeding</p>

Opening - by Plaintiff - B. Morelli Page 21

1 tube. Generally that feeding tube goes in your side, and
2 that's how you are fed.
3 (Continued on next page)
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Opening - by Plaintiff - Morelli Page 23

1 reason that he's wearing a helmet will become apparent to
2 you during this trial, and that's because they are
3 protecting his brain and that's because -- and I have a
4 slide that will show you -- that's because he had to have
5 fairly immediate brain surgery in order to relieve the
6 pressure and to save his life. So after he left Southside
7 he still had to go to rehab at the St. Charles
8 Rehabilitation Center.
9 And he was not only and inpatient but and an
10 outpatient there, you will learn, and he was doing physical
11 therapy for traumatic brain injury and coordination
12 disorder. And one of the reasons that that's done is
13 because your brain is everything that you are; your
14 coordination, your memory, all of these things that you're
15 going to hear from doctors. And you're not coordinated
16 anymore. I mean, they just opened up your head, okay?
17 So in this coordination disorder he had to do
18 balance coordination because he had to regain some sort of
19 balance, as you saw in the photo, they were helping him try
20 to walk, and neuromuscular re-education. Well, that's a
21 fancy word for trying to find out how to use your muscles
22 again because even though it was a short period of time,
23 your brain is interrupted and now you also almost have to
24 start from scratch.
25 So also, they do what they call occupational

Opening - by Plaintiff - Morelli Page 22

1 MR. MORELLI: And let's just go back for one
2 second and notice the dates because Mark was in the
3 hospital for a month, the first hospital, from June 26th to
4 July 25th. And after that, he didn't go home, he went to
5 another hospital. He went to the Southside Hospital on
6 July 25th when he left Nassau Medical Center and he was
7 there until August 6th. And he was admitted to the brain
8 injury unit because that's they needed to do for him at
9 that time and he underwent comprehensive rehabilitation
10 program for brain injuries and that involves many different
11 types of therapies and because they do it seemingly better
12 at Southside, that's why they sent him there, because they
13 were going to specialize in giving him the therapy that he
14 needed. And that's him. And you will see this photo, you
15 know, during the trial. We'll enter it into evidence.
16 He had physical therapy, occupational therapy,
17 speech therapy, recreational therapy and neuropsychology.
18 And you're going to hear from the witnesses exactly what
19 those things are and why they do them and I'm not going to
20 take the time to go through every single one and tell you
21 exactly what it is, but I'm going to leave it for the
22 witnesses to talk to you about that, but each one of these
23 things are trying to get Mark back to some sort of
24 normalcy.
25 Now, you see that he's wearing a helmet. And the

Opening - by Plaintiff - Morelli Page 24

1 therapy, which is improving his hand strength and dexterity
2 for activities of daily living. They have to make sure
3 that he is able to button his own shirt, so to speak,
4 right? And it's not so to speak, it's actually what they
5 were doing.
6 So also, he had to do speech therapy because when
7 you have brain surgery like this and you have such a
8 profound traumatic brain injury, and you will hear how
9 profound during this trial, you have to do speech therapy,
10 and the speech therapy is because you have to now learn to
11 control your breathing, finding words and rate of speech,
12 which all comes fairly naturally to all of us. I mean,
13 sometimes we might miss a word, we forget, you know, what
14 is that word again, but that's different from this. That's
15 different from this. So you have to control the breathing,
16 he's trying to find the words, they're trying to figure out
17 the rate of speech. This is all a re-education for him.
18 Okay. So now let's talk about the brain
19 surgeries that Mark Perez has already had. And I say
20 "already" because we're going to talk about the future. So
21 on June 26, 2013, which is the date of this incident, he
22 had a right hemispherectomy, bone flap in abdomen. And
23 somebody might say, what is that? Well, here's what
24 happens and I will tell you why they do it. They cut off
25 about 40 percent of his skull. They cut it off on the

Opening - by Plaintiff - Morelli Page 25

1 right side and then they took it and they did abdominal
2 surgery and they took his skull and they put in his
3 stomach, in his abdomen, and then they closed him up.
4 You say what? What? Well, there's a reason that
5 they do that. There's actually a number of reasons why
6 they do that. One reason is because they want to keep the
7 skull from getting infected, they want it to be sterile,
8 okay, so to speak. And they also have found historically
9 that if they don't do that, when it comes time to put it
10 back or explant it, there's times when they misplace
11 because it's months later or a year later or something, so
12 they want this skull to be with the person. So now this is
13 one of the things they do when they cut someone's skull off
14 and they know that there's going to be future surgery,
15 something that I hadn't heard about.
16 So now what happened was after -- and they call
17 it a bone flap, and only a bone flap because now you have
18 this piece of skull and it look like a flap. So on 10/8 of
19 2013, as you could see, not quite four months later, they
20 now are going to explant the bone flap from the abdomen,
21 take it out, another surgery to open up the stomach, take
22 out the bone and put it back on his head. Now, you know,
23 the mouth is a beautiful instrument because with the mouth
24 everything sounds easy, okay, but this is bigtime surgery
25 and you're going to hear about that.

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1 So unfortunately, for Mark, because sometimes
2 they can explant this part of the skull and everything goes
3 according to plan, so to speak, and with Mark it didn't
4 necessarily go according to plan because he suffered a
5 number of infections. So as a result of that, in January
6 of 2015, as you could see, a fairly long period later, more
7 than a year, they now had to take that off because it was
8 infected, so it's no longer doing its job. And the reason
9 that it has to be there is because it has to protect the
10 brain, okay? Otherwise, you have to wear a helmet
11 everywhere you go, because if God forbid a million times
12 that Mark falls and hits his head in a certain way, he can
13 die.
14 So now what did they do? They used titanium mesh
15 in place of his skull when they did this cranioplasty in
16 January of 2015, but again, Mark had a problem. So now in
17 May of 2015 they did another cranioplasty and a removal of
18 the titan drum mesh. And you will hear that every single
19 time that your head is opened up and you have to now
20 replace the bone or make some changes, it's interrupting
21 the brain, it's interrupting the brain, it's causing more
22 damage, more damage, but no choice, they have to do it. So
23 this is Mark's life. Now, as you see here, it says surgery
24 done in two parts with two different surgeons and the
25 reason that it says that is because you've got a

Opening - by Plaintiff - Morelli Page 27

1 neurosurgeon and then you have a plastic surgeon in order
2 to fix the head the best you can. So that's with reference
3 to the brain surgeries.
4 Now let's talk about epilepsy because you're
5 going to hear a fair amount about epilepsy in this case.
6 Mark has been diagnosed by multiple doctors with
7 posttraumatic epilepsy. Now, please understand that it's
8 not unusual when you have a severe traumatic brain injury
9 for you to possibly have or get traumatic epilepsy, it's
10 not unusual. And Mark did get traumatic epilepsy from this
11 traumatic brain injury, he did. But as you will hear later
12 on, it didn't manifest itself until around 2015 when he had
13 his first major seizure.
14 Okay. And you're going to hear from the family,
15 and we're going to show you specifically, that lately he's
16 had seizures actually on Memorial Day and it's recorded for
17 you. So he has frequent seizures, including numerous rand
18 mal seizures and you will hear what that means. You will
19 see that your body -- you're not in control of your body,
20 you're twitching and you become incontinent so that it just
21 goes. And that's what happens during these seizures. His
22 seizures are uncontrolled by medication.
23 Now, you're going to hear more specifically what
24 that means. He's still having seizures, even though he's
25 been on a number of different medications for seizures. He

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1 is still having them. So now that doesn't necessarily mean
2 that the medication is not helping at all, it's just not
3 helping enough to stop them. Understood? Not helping
4 enough to stop them, right? And you're going to also hear
5 that the medications that people take for seizures so that
6 they don't have them, has its own side effects, it's own
7 side effects. So it's not just, hey, look, you take the
8 medicine and you're okay and a little Advil and you're
9 good. No, it's not like that. And he's constantly at risk
10 of having another seizure every single day, every single
11 minute.
12 Now, I'm going to talk to you about who Mark
13 Perez was prior to June 26, 2013. Now, let me be clear
14 with you about what I mean about that. Mark is in the
15 courtroom today, he's dressed in a suit and he walks and
16 talks, okay? And I don't mean to disrespect him in any
17 way, but you know that it's my job to tell you the whole
18 story, the story that you can't see when you see him
19 dressed in a suit. Wow! He's in a suit, he's not in
20 wheelchair, okay, he must be okay. No. So that's why I'm
21 taking the time to talk to you about who he was before.
22 There he is with his girlfriend, who he was with
23 for approximately eight years. And that's him when he was:
24 DJ'ing. Now, that's not something they were doing when I
25 was a kid, but that's what they do now. There are a lot of

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

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

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

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

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

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

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

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1 college.

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

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

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

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

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

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1 injuries.
2 So what about his testimony? Well, he's going to
3 tell you about Mark Perez's overall physical and cognitive
4 health. And you should know that Dr. Greenwald saw Mark in
5 February of 2017 and he saw Mark again in June of 2019 to
6 be able to update so that when he spoke to you, he will
7 have seen him very recently. And he's going to tell you
8 the effects of Mark's traumatic brain injury and consequent
9 impairment.
10 And you will notice it says causally related to
11 the injury. He's going to tell you what this injury caused
12 for Mark because there's a number of things that don't meet
13 the eye. It's like we spoke about, you know, when you meet
14 somebody and you make a determination right away that you
15 like them or you don't like them, right, and you don't
16 really know them, okay. And we also hear that term don't
17 judge a book by its cover. Okay, well, the cover is a heck
18 of a lot better than he is.
19 So post-traumatic epilepsy, I mentioned that to
20 you. He's going to talk about cognitive linguistic
21 impairment. Let him explain exactly what that is. And he
22 has left hemiparesis, a weakness on that side. Head pain.
23 Now, you're going to hear that, and I will show you, that
24 Mark also has chronic headaches and I want to differentiate
25 for you this head pain and the chronic headaches because

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1 they're not the same, all right? He's had so many
2 interruptions to his head, as you've already seen, that he
3 has this pain that's regular pain. Then he -- regular
4 pain. And then he has chronic headaches. Very different
5 from the head pain.
6 So he has light and noise sensitivity and you're
7 going to learn that when you have a severe traumatic brain
8 injury like this, you're sensitive not only to light, but
9 to noise. So you can't now be in large groups at a concert
10 or something like that because you can't tolerate it.
11 He has emotional dysregulation. Well, that's a
12 fancy way of saying that he's not emotionally the same as
13 he was and that he has so many different emotional
14 problems. He's suffering from depression, and it's not
15 only one doctor that says that, but his doctor -- his
16 psychiatrist who's treating him says that. He's suffering
17 from anxiety and fatigue.
18 And one of the things that he's anxious about and
19 one of the things he's depressed about is his future. What
20 is his future? He thinks about that all the time. He
21 talks to his psychiatrist about that all the time. When am
22 I or if I'm going to have another seizure? He also has
23 post-traumatic stress disorder because what happened to him
24 is certainly very unusual. And he is going to, as
25 Dr. Greenwald will tell you, require a lifetime of medical

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1 care for his cognitive, emotional, psychological
2 impairments, post-traumatic epilepsy, all caused by diffuse
3 brain damage.
4 Now, what the heck does that mean? Well, diffuse
5 brain damage means it covers a lot of the brain, many of
6 the lobes of the brain. You're going to hear how many
7 lobes are on the right side, how many lobes are on the left
8 side and he has diffuse brain damage. It isn't only in one
9 little spot. And you're also going to learn that there's
10 no further healing of Mark's brain injury that can be
11 expected. The brain doesn't regenerate itself. That's not
12 what it does. When it's dead, it's dead, okay?
13 So these impairments are permanent and his
14 condition will deteriorate over time. So, in other words,
15 it's not only, hey, how is he now? He's not getting
16 better, what's the future progression? To get worse, to
17 deteriorate. So when you have a severe traumatic brain
18 injury, you're going to learn that it doubles your risk of
19 Parkinson's disease and dementia. Now, not everyone gets
20 Parkinson's disease, thankfully, not everyone gets
21 dementia, thankfully, but many people, when they get older,
22 unfortunately, do. Some people even get it when they're
23 younger. And although not everyone gets it, the risk is
24 there in the normal population of dementia and Parkinson's
25 disease, but the risk for Mark is two times the risk for

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

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

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

25 Now, you are going to learn from his testimony

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

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

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

Opening - by Plaintiff - B. Morelli Page 39

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 spine. We will let Dr. Lubliner explain that to us.
2 So what is his prognosis for his permanent
3 impairments? Well, he believes he will need shoulder
4 surgery to reduce the AC separation, and he will need
5 insertion of hardware, okay? That's his opinion. Permanent
6 weakness of the right shoulder, the loss of range of motion,
7 permanent recurrent pain. This is on top of all the
8 problems he has. Permanent decreased sensation of the left
9 upper and lower extremities, limitation of activities of
10 daily living, and permanent inability to participate in
11 sports, to lift, and the ability to work.
12 Now, what I want you to understand is that Mark,
13 because he won't give up. He won't. He is going to the
14 gym. One day he was in the gym trying to do some cardio and
15 he had an epileptic seizure. He fell off the treadmill.
16 You are going to hear about that. So even though he is
17 trying, it doesn't work out so good.
18 Now let's finish the puzzle. Dr. Schwartz. Who
19 is Dr. Schwartz? Dr. Theodore Schwartz is also board
20 certified by the American Board of Neurological Surgery. He
21 is a brain surgeon and a professor of neurosurgery at Weill
22 Cornell Medical College, New York Presbyterian Hospital,
23 director of epilepsy surgery of Epilepsy Research
24 Laboratory.
25 Now, you are going to hear from Dr. Schwartz, and

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1 mostly what we are going to talk about with Dr. Schwartz is
2 what about specifically the surgeries? You know, how do you
3 do them, why do you do them the way you do them? Because he
4 does them. But we are going to specifically -- and I
5 already told you that they had to save his life and decrease
6 the pressure in his head, you know that; but we are going to
7 talk to him about brain trauma and the permanent injury to
8 multiple areas of his brain. But we are going to focus his
9 attention and my questions on posttraumatic epilepsy because
10 that is one of his specialties, epilepsy and dealing with it
11 and surgery for it. Okay? You are going to hear that
12 Mark's epileptic seizures have persisted in spite of
13 multiple medications.
14 Now, I am not sure if he has been on four
15 different medications. I believe there are five different
16 medications he has been on. They all have different side
17 effects. They all might have worked to a certain degree,
18 but the seizures continue. You are going to hear that
19 that's one of the absolutely profound problems that mark
20 has. And so what Dr. Schwartz says is that the trauma and
21 injury led to his neuropsychological and cognitive and motor
22 impairments. He is saying yeah, that's what is causing the
23 problems for him. And, he says, that the fear of having
24 seizures are known to cause social and behavioral anxieties.
25 And he states that because he is dealing with these people

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1 who have seizures, people who have epilepsy. He is dealing
2 with them. That's what he does.
3 So that's his testimony. What is his prognosis?
4 That all of mark's deficits are permanent, that he will
5 require a cranioplasty to repair the large defect in his
6 head to protect his brain.
7 Now, let me explain to you that there is no
8 dispute that he right now needs further brain surgery, okay,
9 right now. Right now, okay? Now, one can say, Well, you
10 know, we see a defect in his head, will that brain surgery
11 make it look better? Possibly, but that's not the main
12 reason for the surgery. The main reason for the surgery is
13 to protect his brain because if we don't do that, then he
14 will have to wear a helmet everywhere he goes, and he is
15 status continuous state of seizures that follow each other
16 without recovery of consciousness.
17 You are going to see a video of, unfortunately,
18 mark having a seizure not too long ago at the beginning of
19 the summer. And he will likely have future seizures because
20 that's the way it goes. You see, the medicine doesn't make
21 it better, it controls it, all right? So there is a
22 difference between taking medicine that cures you and
23 medicine that controls you. Most times there are these
24 medicines that help us with the affects of the problem, but
25 they are not creating anything to make it better. If, in

Opening - by Plaintiff - B. Morelli Page 48

1 fact, he can control the seizures, obviously he is looking
2 for that. So, he says he will likely have future seizures,
3 and he may require additional brain surgeries for his
4 seizures.
5 Now, the reason Dr. Schwartz is saying that is
6 because Dr. Schwartz, when he saw him, knew the seizures
7 that he had because he started having them in 2015, but he
8 doesn't know if he is going to have them the day after he
9 saw him, or later the day he saw him, or a week after he saw
10 him. He doesn't know. So he is saying that if, in fact,
11 you are going to continue to have these future seizures, we
12 might have to do something about it. We might have to do
13 more surgery on you for that specifically.
14 And he will never be able to drive or fly a plane.
15 I think when you talk about flying a plane, you certainly
16 agree he won't be able to do that. It is not that he
17 doesn't have the ability to drive a car, it is that he can't
18 drive a car because if he has a seizure, he can kill himself
19 or other people, okay? So he can't drive a car. It is not
20 about whether or not he is physically able to, all right?
21 Now, after we have finished the skull and we know
22 all of the doctors who are going to testify, six doctors in
23 all, medical doctors, we are going to hear from Edmond
24 Provder. What does "life care planner" mean? What he does
25 and what his profession is he takes all of the medical

Opening - by Plaintiff - B. Morelli Page 49

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

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

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

Opening - by Plaintiff - B. Morelli Page 50

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

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

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

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

23 (Continued on next page)
24
25

Opening - by Plaintiff - Morelli Page 51

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

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

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

Opening - by Plaintiff - Morelli Page 52

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

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

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

23 Eight years is a long time.

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

Opening - by Plaintiff - Morelli Page 53

1 or no one ever talks to him, but we all know that when we
2 feel that somebody is off, it's off-putting to us.
3 So what about this case that you're going to be
4 hearing? When I say Mark defies the odds, I mean in one
5 way Mark defies the odds. He didn't die. Because at the
6 time when he had, and you're going to hear about the
7 Glasgow Coma Scale. It measures your ability at a certain
8 time, and I'll let the doctor be very specific about it.
9 And all of a sudden the measurements of his awareness, this
10 coma scale, plummeted. And when it plummeted they said,
11 unh-uh, unh-uh, we got to do surgery on this guy like right
12 away. And the family was told that he had a ten percent
13 chance of survival, that he wasn't going to live.
14 Ninety percent is not good, it's only good if that's your
15 mark in school. So Mark defies the odds, but he endures
16 the consequences every single day.
17 That's our case in a nutshell. Believe me, it's
18 only a nutshell. I hope that you understand that I took
19 this time because I thought it was necessary, but no
20 numbers now. Please wait until the end of the case, hear
21 everything and do what I know you're going to do, which is
22 the right thing.
23 THE COURT: Thank you, Mr. Morelli.
24 Ladies and gentlemen, let me give you a break and
25 we'll come back with the defendant's opening argument.

Opening - by Plaintiff - Morelli Page 54

1 THE COURT OFFICER: All rise, jury exiting.
2 (Jurors exited the courtroom.)
3 THE COURT: Is there an issue?
4 MR. HAWORTH: Yes, there are tow issues, Your
5 Honor. The first one relates to Dr. Schwartz. There's a
6 motion regarding Dr. Schwartz's planned testimony from the
7 plaintiff regarding future brain surgeries other than the
8 immediate surgery, the craniectomy. Everything -- all of
9 the epilepsy surgeries, we have a pending motion to
10 preclude all of that essentially because he's says, well,
11 if seizures remain intractable, he might have these various
12 procedures, he may. And I can read it right into the
13 record. He says he might require additional brain surgery
14 to implant electrodes to determine the source of his
15 seizures and then another surgery to remove the abnormal
16 part of his brain. This would be a three long week
17 admission to the hospital with two separate surgeries and
18 require a period of several months for recovery. He might,
19 might even be a candidate for a brain or vagal stimulator.
20 And as I argue --
21 MR. MORELLI: Excuse me, Your Honor, do we have
22 to argue this now when we have a witness? I mean, nothing
23 is going to happen now that's any different.
24 THE COURT: Well, I'm not really too sure right
25 now. In the first instance, I believe that I gave you a

Opening - by Plaintiff - Morelli Page 55

1 ruling on this part of the application, although we haven't
2 put it on the record and if that's what we're doing to
3 place this on the record, then that's fine, but maybe now
4 is not the time.
5 Secondly, if you're objecting to any part of the
6 opening statement, if you read my court rules, which are
7 very clear, objections must be contemporaneous with the
8 statements, we don't do them at the end. So if you're
9 making an objection to the opening, unless there's
10 something catastrophic that I didn't hear, it's been
11 waived.
12 MR. HAWORTH: What I am doing, Your Honor, is
13 bringing to the Court's attention that knowing that there's
14 a pending motion, and I'm unaware respectfully, of any
15 ruling on that motion Your Honor --
16 MR. O'HARA: As am I, Your Honor.
17 THE COURT: I told you guys that the -- you know,
18 that you have sufficient notice of what that potential
19 opinion is going to be. It doesn't have to be expressed in
20 the medical reports or reports that you received to a
21 reasonable degree of medical certainty. We're on notice of
22 what the potential testimony is. This isn't a surprise.
23 MR. O'HARA: Your Honor, with --
24 MR. MORELLI: I also think that you just said one
25 person argues --

Opening - by Plaintiff - Morelli Page 56

1 MR. O'HARA: With respect, Your Honor --
2 THE COURT: And that is correct.
3 MR. MORELLI: One person argues --
4 THE COURT: We have one party -- I'm going hear
5 from one attorney at a time concerning whatever it is that
6 we're doing here.
7 MR. HAWORTH: Your Honor, I think you're
8 referring to the street corner discussion.
9 THE COURT: I am. The street corner motion
10 argument, yes.
11 MR. HAWORTH: I wasn't there for that. I had
12 already left to go back to the office, so I didn't hear it,
13 but let me just make a point, Your Honor, if I may. If we
14 look at the cases, some of which are cited by the plaintiff
15 themselves, if we look at the cases, they're clear that
16 "if" and "might" are not the standard. You have -- this
17 one's the Second Department --
18 THE COURT: But what we're talking about with
19 respect to, Mr. Haworth, is whether or not you have notice
20 to go forward to defend that position, not whether that
21 testimony may be legally sufficient on the witness stand.
22 Those are two different issues.
23 MR. HAWORTH: I would respectfully -- well, I
24 agree, but disagree, Your Honor, respectfully.
25 THE COURT: Okay.

Opening - by Plaintiff - Morelli Page 57

1 MR. HAWORTH: My position is that yes, we're on
2 notice from the report, but the notice isn't the issue.
3 We're not objecting to the notice, we're objecting to the
4 planned substantive testimony as set forth in the report
5 because the cases say that if and might don't do it. You
6 need a reasonable degree of medical certainty. The only
7 thing that Dr. Schwartz says to a reasonable degree of
8 medical certainty is if an event that hasn't happened,
9 happens, then if that happens, we might need to do this.
10 In the cases --
11 THE COURT: Well, this is something that we will
12 be discussing, I'm sure, at great length when the testimony
13 actually happens and I hear the foundational evidence.
14 MR. HAWORTH: Okay. What I would like to do,
15 Your Honor, is reserve then my right to continue this
16 argument before Dr. Schwartz testifies.
17 THE COURT: As a pretrial motion in limine, the
18 motion is denied. Let's be clear about that. The motion
19 is denied.
20 In terms of what the actual witness says and what
21 the foundation for the testimony, of course that objection
22 can be raised later on, of course it can. I want to hear
23 what he actually has to say. I want to see with what
24 degree of certainty he can express his opinion, what he
25 actually does say.

Opening - by Plaintiff - Morelli Page 58

1 MR. HAWORTH: I'd like to have a hearing outside
2 the presence of the jury first before we contaminate the
3 jury with testimony that we contend is inadmissible. If he
4 says something different then, well, then he says something
5 different then, but I would like to have a hearing outside
6 the presence of the jury to avoid the prejudice of jury
7 hearing about four or five additional brain surgeries
8 without a basis to say that, without a foundational basis,
9 as Your Honor says.
10 THE COURT: I don't think that's necessarily
11 warranted.
12 MR. O'HARA: Judge, may I just --
13 THE COURT: Okay.
14 MR. O'HARA: -- because I was the only one on
15 behalf of the defense on the corner the day that this was
16 discussed.
17 THE COURT: All right. So this is going to be
18 the last time then that we take this as a tag team
19 approach?
20 MR. O'HARA: Yes, sir. I appreciate that, Judge,
21 but I must create a record because the Court said that it
22 made a ruling on the street on the day of the discussion
23 and my recollection is fundamentally different. The Court
24 specifically said that we were having a general discussion
25 and you --

Opening - by Plaintiff - Morelli Page 59

1 THE COURT: You're right, but I believe that in
2 other context I think we had discussions recently where I
3 told you, you know, my feelings on this issue. Did I make
4 a formal ruling? You're right.
5 So that the record is completely and abundantly
6 clear about our street corner encounter, you folks were
7 directed to be here -- what was it Monday afternoon or
8 Monday after you finished jury selection? I had another
9 jury that was out. There was issues regarding scheduling
10 that we needed to hammer down. That jury didn't finish up
11 until basically right at the lunch hour where everybody had
12 to leave. I actually ran into everybody outside and that's
13 where this discussion had happened for scheduling purposes
14 and these issues were discussed at that point in time.
15 Just so that any weirdness in the record is resolved by
16 what exactly that meant.
17 MR. MORELLI: And you asked us to see you the
18 next day at 9:00 a.m.
19 MR. O'HARA: I need to make clear, Your Honor,
20 because I was the only lawyer there on behalf of Live
21 Nation and the Court specifically indicated that we would
22 be given an opportunity to argue the matter on the record
23 because of the significance of the issue and there has
24 not -- until you just said the motion is denied, there
25 hasn't been that opportunity and we had not been apprized

Opening - by Plaintiff - Morelli Page 60

1 that that motion was, in fact, denied.
2 THE COURT: All right. So I will give you the
3 opportunity to make your record, okay?
4 MR. O'HARA: Thank you, Your Honor.
5 THE COURT: All right. I've researched the
6 issue. I'm comfortable with the ruling, but you can
7 certainly make your record for appeal. I have no problem
8 with that whatsoever, but, you know, what's in your papers,
9 is in your papers.
10 MR. O'HARA: Thank you, sir.
11 THE COURT: Now, I need to give you guys a break.
12 MR. O'HARA: Yes.
13 THE COURT: Okay. And then we'll come out
14 because I don't want to cut your opening statement in half.
15 MR. O'HARA: Thank, Judge.
16 (Brief recess taken.)
17 MR. O'HARA: Our position on the photographs and
18 our position on the videotape is recorded in written
19 communications back and forth with plaintiff's counsel. We
20 objected and we made a motion in limine relating to the
21 photographs and the videotape. Mr. Morelli, as we
22 represented to the Court, indicated that he would limit the
23 number of photographs. We specifically said we would
24 object to the usage of video and we would present it to
25 Your Honor. It remains as part of the motion in limine

Opening - by Plaintiff - Morelli Page 61

1 that is before the Court. There has been and never was a
2 representation that had been resolved and it remains open.
3 So based on that, we continue with the position
4 that it is improperly something that was referenced and
5 should be something that the Court addresses at so whether
6 or not it's appropriate.
7 THE COURT: Okay. Let me just simply say, I was
8 under the impression through our discussions that there
9 were two issues that were -- for me to really determine as
10 motions in limine in this case. And when I say motions in
11 limine, I mean that to be any degree of potential urgency.
12 One was the involvement of the Tatoon Lou in the case and
13 the scope of his testimony -- the depositions, the scope of
14 his testimony and how it relates to the life care plan was
15 the big issue.
16 And the second issue was the one that we spoke
17 about just before the break. The rest of it, I thought
18 that you guys had either worked out or were going to work
19 out, and it wasn't until a very short time ago, just before
20 the start of openings, that I knew that there was any
21 remaining issues with regard to these. In fact, the copies
22 of the motion papers that you had given me, you had,
23 Mr. O'Hara crossed out certain things because I asked you,
24 what is it that I need to be focused on? And you had
25 actually crossed out everything except for those two

Opening - by Plaintiff - Morelli Page 62

1 issues. So I apologize in the sense that I wasn't aware
2 that there was a remaining issue on those things until now.
3 And Mr. Haworth was talking about, a few moments
4 ago, concerning references to the videotape that was --
5 references by Mr. Morelli in his opening statement. If
6 it's still an issue, it's still an issue. He made the
7 representations in his opening statement. If it comes in,
8 it comes in. If it doesn't come in, he's going to be stuck
9 with that and the consequences of that. So I'm just
10 saying, you know, had I realized that there was still an
11 issue with regard to these other things, I would have
12 actually focused on those to at least give you a little bit
13 of guidance for today.
14 MR. O'HARA: And I appreciate that, Your Honor.
15 If one looks at what I wrote on the motions, it
16 specifically says about the photographs and the video, that
17 it's being discussed with counsel and we continued the
18 discussions with counsel.
19 MR. MORELLI: Your Honor, he keeps referencing
20 photographs. We worked that out today.
21 MR. HAWORTH: It's not completely worked out,
22 Your Honor.
23 MR. MORELLI: Scott, Scott.
24 MR. HAWORTH: We worked out part of it.
25 MR. MORELLI: Scott, relax, okay?

Opening - by Plaintiff - Morelli Page 63

1 We worked out the photographs for the opening and
2 he told me the photographs that he would agree to and I
3 told him that before I offered anything, that I would go
4 back with him and work it out. That's what I said.
5 THE COURT: Okay.
6 MR. MORELLI: Okay. We haven't had a chance to
7 do that because --
8 THE COURT: Mr. O'Hara, you tell me, we're almost
9 five minutes to 12, is this going to be an issue with the
10 length of time that's available for your opening this
11 morning?
12 MR. O'HARA: No, sir.
13 THE COURT: Okay. I just want to make sure
14 first.
15 So you can continue.
16 MR. MORELLI: Okay. So the photographs are not
17 an issue.
18 We're going to deal with the video at a later
19 time, Your Honor, said. You know, I'm a big boy, all
20 right? So let's get to it. I have a witness here for an
21 hour and a half already.
22 MR. HAWORTH: Just real quick Judge.
23 My anticipation is that during the break
24 Mr. Morelli and I will sit down with the photographs that
25 he wants to use for the balance of the trial, we will make

Opening - by Plaintiff - Morelli Page 64

1 every good faith effort to work out what we will consent to
2 and what we won't and if we can't agree, we'll come back to
3 Your Honor. If we can agree, all the better.
4 MR. MORELLI: Fair enough.
5 THE COURT: I still have to take a look at the
6 video and look at the motions for the video.
7 MR. HAWORTH: Yes, Your Honor.
8 THE COURT: Have you folks responded --
9 plaintiffs responded to their application? I don't
10 remember seeing a reply.
11 MR. MORELLI: I don't think --
12 MR. SIROTKIN: Your Honor, I don't think we did
13 because I think we were under that impression regarding
14 the --
15 MR. MORELLI: The video was taken by his brother.
16 He's going to testify to it. I don't understand how it
17 doesn't come in. Under what theory?
18 THE COURT: I don't know, I haven't read --
19 assuming it wasn't an issue, I didn't read it.
20 MR. MORELLI: No, I understand, but to say it's
21 prejudicial, every single thing I'm doing in the case is
22 supposed to be prejudicial and everything they're supposed to
23 do is prejudicial. I don't get it.
24 THE COURT: Undue prejudice, that's what we're
25 talking about. That's the issue.

<p>Opening - by Plaintiff - Morelli Page 65</p> <p>1 MR. MORELLI: I know, but he has epilepsy. They 2 can't see what a seizure looks like? 3 THE COURT: All right. Now, when is the brother 4 supposed to testify? When is the video coming into play? 5 MR. MORELLI: Oh, you have time. 6 THE COURT: Okay. So you have time that means to 7 address -- 8 MR. MORELLI: Yes, we have time. 9 THE COURT: -- their papers? 10 MR. MORELLI: Yes, absolutely. 11 THE COURT: All right. Let's not wait any 12 longer, let's get the jury out. 13 Everybody is ready? 14 MR. MORELLI: Yes. 15 MR. O'HARA: Yes. 16 THE COURT: Then if we have any time before the 17 lunch break, then you can make whatever record you need to 18 make on the other issues. 19 MR. MORELLI: I would like to put the witness on 20 even before lunch if I can to get some time in. 21 THE COURT: I don't know how much time that's 22 going to be. 23 MR. MORELLI: Half an hour. 24 THE COURT: I think. 25 MR. MORELLI: Yes.</p>	<p>Opening - by Defendant - O'Hara Page 67</p> <p>1 that were here, I have a pretty tough cold, so if I cough, 2 I'm trying to stay away from you, but it is nothing that I 3 can do, okay? 4 So what is the answer to Mr. Morelli's question, 5 why are we here? Well, there are certain things about this 6 case that are not in dispute. There is no dispute that 7 Mr. Perez was injured on June 26, 2013. There is no 8 dispute regarding the injuries that he sustained and the 9 care and treatment that he had, none. There is a dispute, 10 and you will hear extensive evidence on only those issues 11 that Live Nation contests, only the issues that Live Nation 12 contests. 13 You now understand that this case concerns a 14 traumatic brain injury and the effects of that injury on 15 Mr. Perez up to today and into the future and what his 16 future will hold. And there is a significant question, a 17 very serious question, as to the extent of the effect of 18 that injury and what the future will ultimately hold for 19 him. There is no dispute that he had serious brain surgery 20 and then required three procedures relating to the flap and 21 there's no dispute that he will need another surgery and we 22 have never and will not contest in this case that is 23 required. 24 There is however, a significant question as to 25 how he's doing today and how he will do in the future based</p>
<p>Opening - by Defendant - O'Hara Page 66</p> <p>1 MR. O'HARA: We'll see how long I take, Judge. I 2 hope to be -- 3 THE COURT: I think he's got to be at least 45 4 minutes, but I could be wrong. 5 MR. O'HARA: I'm hopeful that I'll be 30, Your 6 Honor. 7 MR. MORELLI: Yes, he told me 30. If he is, he 8 is, if it isn't, it isn't. 9 THE COURT: All right. 10 THE COURT OFFICER: All rise. Jury entering. 11 (Jurors entered the courtroom.) 12 THE COURT: Mr. O'Hara. 13 MR. O'HARA: Thank you, Your Honor. May it 14 please the Court, counsel, the Perez family, ladies and 15 gentlemen of the jury. 16 Jury selection one the things that we talked 17 about is nothing that lawyers say is evidence, right in the 18 middle throughout the entire case. You've now heard an 19 overview as to what the plaintiff intends to prove in 20 connection with the damages claims that are being advanced 21 on behalf of Mr. Perez. 22 What I am going to do is a pact it is a promise 23 what I'm about to outline for you, we will prove on behalf 24 of Live Nation in defense of the damages case. 25 And much like yesterday, for some of you folks</p>	<p>Opening - by Defendant - O'Hara Page 68</p> <p>1 upon, not information that as a lawyer I'll present to you, 2 but through experts that have credentials that, you heard 3 this phrase during jury selection, that are impeccable, 4 that are beyond reproach, because as the representative of 5 Live Nation, I'm going to put before you objective evidence 6 confirmed by world renowned experts to establish exactly 7 what the future looks to being can like for Mr. Perez and 8 what is reasonable to anticipate. 9 Now, there will be a question about whether or 10 not Mr. Perez has particular signs, symptoms and sequelae 11 going forward from his brain injury. You are going to hear 12 from, as you heard, a neurologist on behalf of the 13 plaintiff, Mr. Greenwald. You will also hear from 14 Dr. Jordan on behalf of the defense. And it's really 15 important to understand who Dr. Jordan is before he comes 16 to testify. He has a bachelor of neurophysiology from 17 Penn, he went to Harvard Medical School, he did an 18 internship and residency at UCLA and Cornell and he is 19 board -- and he is board certified in neurology. 20 He examined Mr. Perez, and the evidence will 21 show, on two occasions; November 24, 2015 and then 22 July 12th of 2019. Dr. Jordan will come before you and 23 talk about how Mr. Perez presented in terms of the physical 24 determination and whether it was consistent with the 25 neurologic findings and the signs and symptoms that should</p>

Opening - by Defendant - O'Hara Page 69

1 be anticipated with an injury of this sort. He will tell
2 you without reservation based upon the evidence that is
3 before him, not only from the evaluation, but also his
4 record review, that the exact extent of cognitive
5 impairment is difficult to understand in this case.
6 Why? What will the evidence show? The evidence
7 will show that Mr. Perez has issues with the effort that he
8 has put forth in all of the evaluations and examinations
9 that were done by the defense experts, that there are test
10 results, not only on the physical examination, but the
11 neuropsychological testing that you heard some comments
12 about, and we will go in length with our experts, that
13 demonstrate that there is embellishment associated with the
14 responses. And why is that important? The doctor will
15 explain to you that there are certain things that are
16 reasonably anticipated based upon a neurologic injury and
17 there are certain things that do not have a rational
18 medical explanation.
19 And the term embellishment is not an adjective,
20 it's not calling someone a name. It's actually a specific
21 finding based upon a test, that you will hear, called the
22 test of memory malingering, okay? And you will learn that
23 during the course of the evaluations of Mr. Perez over the
24 past four years, that in addition to there being questions
25 about the effort that has been put forth, there are

Opening - by Defendant - O'Hara Page 70

1 findings on physical examination that are medically
2 unexplainable, that don't make sense despite the
3 understanding of what the injury is.
4 You will learn that his physical strength and
5 general recovery is good. You will learn that he has
6 bilateral, meaning both sides of the body, tone in his
7 upper extremities and tone in his lower extremities. You
8 will learn that he is active in his personal life and is
9 continued to be conscious of his physical appearance and
10 the fact he does, in fact, continue to go to exercise,
11 which you will learn from Dr. Jordan is inconsistent with
12 some of the left-sided weakness on examination and the
13 findings that he saw when he saw him, not once, but twice.
14 Dr. Jordan will also identify for you as part of
15 his review more than just the two examinations. Dr. Jordan
16 will talk to you about Mr. Perez's treating neurologist and
17 the fact that what he saw, meaning Dr. Jordan, in his two
18 examinations, is inconsistent with even the findings of
19 Mr. Perez's treating neurologist Dr. Bruno, who will not be
20 called in the plaintiff's case.
21 Ultimately, Dr. Jordan will tell you that there
22 is no physiologic and no neurologic explanation that he can
23 give you based on the medical science that he is an expert
24 in to explain why there are certain findings that are
25 inconsistent with prior examinations and what he sees on

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1 his evaluation.
2 You will also hear from Dr. Ambrose. You will
3 learn that Dr. Ambrose has impeccable credentials. That
4 after medical school she pursued, in the field of physical
5 rehabilitation and medicine, a masters at Mount Sinai
6 School of Medicine, an internship and residency at Albert
7 Einstein Medical Center. That she, too, as is Dr. Jordan,
8 is board certified in her specialized field. And as
9 Mr. Morelli points out, there aren't a lot of people in her
10 particular field that are board certified in brain injury
11 medicine. She is, too. She is as well.
12 What you will learn from Dr. Ambrose, who, also,
13 as part of the evaluation by examination did an examination
14 on August 29, 2019. And she will come before you and she
15 will explain to you what were her findings on physical
16 examination? What were her findings with respect to tests
17 that she performed on Mr. Perez? And in particular, she
18 will talk to you about a Rey's 15-Item test, which is
19 something different from the Tomm® test, the test of memory
20 that I talked about before, memory malingering. And what
21 will Dr. Ambrose tell you? That when a patient scores
22 below a particular level, it's considered in their field to
23 be malingering.
24 Now, we're not suggesting that Mr. Perez, and the
25 evidence is not going to suggest, that Mr. Perez is faking.

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1 What we're going to suggest and what we're going to present
2 is we recognize that as Live Nation we are responsible for
3 the fair and reasonable damages that you determine, but it
4 has to be something based upon fair and reasonable
5 objective evidence.
6 MR. MORELLI: Objection, Your Honor. Argument.
7 THE COURT: Overruled.
8 MR. O'HARA: You will hear from Dr. Ambrose, as
9 you will hear from Dr. Jordan, based upon the evidence in
10 this case, their view as to whether or not there are
11 findings that are consistent with malingering.
12 (Continued on next page.)
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1 MR. O'HARA: (Continuing) You will also hear from
2 Dr. Ambrose. There was discussion about surgery that may be
3 needed in the future, and I will talk about the
4 neurosurgical needs in a minute. You will hear that one of
5 the findings that she tried to elicit was sensory loss, and
6 that much like Dr. Jordan's findings on examination, she
7 could find no medical explanation not only as a physiatrist
8 and a specialist in rehabilitation medicine, but as a board
9 certified brain injury medicine specialist that made medical
10 sense as to why there was sensory loss. It was inconsistent
11 with her education, training and experience in the field.
12 She will explain that to you.
13 You will also hear and you heard an outline of
14 what the plaintiff intends to prove with respect to his left
15 side and how he walks, that his gait pattern, the way that
16 he walks is normal based upon the review of the medical
17 records from his treating neurologist, yet she can't explain
18 why medically there are no findings of muscle weakness,
19 there are no findings of tone abnormalities, and there is no
20 lower extremity sensory disturbances. Again, we are
21 responsible for the current condition that you find from the
22 evidence that is objectively fair and reasonable. No more
23 and no less.
24 Now, what will Dr. Ambrose concede? She outlines
25 and she will come before you and testify that there is no

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1 doubt that Mr. Perez is injured and will need physician care
2 in the future. None. There is no doubt that he needs
3 another cranioplasty procedure which is to address the
4 removal of the mesh, and he needs a cosmetic procedure to
5 place another piece in. There is no dispute to that. There
6 is no doubt that he will benefit from future therapy because
7 while the plateau for improvement in brain injury occurs as
8 a general matter you will hear from all the experts between
9 two to five years after the incident, that when you get to
10 wherever your plateau is, if you don't go through the
11 therapy in the future you have the potential to drop off
12 over time; hence, the need for future therapy. And live
13 Nation recognizes that it is responsible to provide this
14 young man with fair and reasonable future care and treatment
15 for the injuries that we are responsible for. No more and
16 no less.
17 You will also hear from Dr. Ambrose as well as all
18 of the experts in this case both on the plaintiff's side and
19 the defense side that Mr. Perez does not have a need for
20 24-hour-a-day-seven-day-a-week supervision. Won't have it
21 next week, won't have it next month; and no one will be able
22 to come before you and tell you more likely than not he will
23 at some point. No one.
24 Now, there are items that are in dispute in terms
25 of how well he is going to do in the future and we are going

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1 to bring forth quality top flight experts to explain to you
2 why we are taking the position that we are taking, but there
3 are other items not in dispute. There is no dispute that
4 there are over \$300,000 in past medical expenses. None.
5 That's our responsibility. There is no dispute that he is
6 entitled to be reimbursed for wages that were reasonably
7 lost from the time of the incident until today. None.
8 There is no dispute that he is entitled to future income
9 loss based upon the reasonable forecast of who he was and
10 what he was likely to do. And you will hear we will
11 actually bring forth experts that not only talk about his
12 employment history where he was making somewhere in the
13 neighborhood of \$20,000 to \$35,000 a year, the experts will
14 come before you and talk with you about the items that are
15 not part of -- items that come off of the gross and the net
16 loss to this man. I will stand before you at the end of
17 this case, as I am doing right now, and say we are
18 responsible for that. And we know based upon what he made
19 for the period of time that is the foundation for the
20 opinions for the future that we will owe somewhere in the
21 neighborhood of \$185,000 for his past lost income and that
22 we know we are responsible if you assume a reasonable future
23 for the young man somewhere in the neighborhood of
24 \$1.25 million in future income loss. It remains to be seen
25 whether the plaintiff accepts that or whether they attempt

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1 to put forth something that is beyond what we believe is
2 fair and reasonable. It remains to be seen what they are
3 going to do on that topic.
4 With respect to the -- I'm sorry?
5 THE COURT: Is there a problem?
6 MR. O'HARA: He is talking so I stopped.
7 MR. MORELLI: No. I was just mentioning something
8 to him.
9 THE COURT: Continue, please.
10 MR. O'HARA: There is doubt that his life care
11 plan needs forecast by Dr. Ambrose will be priced by Kim
12 Kushner, a certified life care planner. And there is an
13 economist we will bring before you, Dr. Freifelder who will
14 also talk about the fair and reasonable future costs for the
15 life care that he needs.
16 Now, you will hear testimony possibly about the
17 need for surgery associated with epilepsy, and, in
18 particular, seizures. And it is important to understand who
19 the defense will call to address that.
20 Werner Doyle, Columbia University Medical School,
21 Roosevelt Hospital internship and residency in general
22 surgery, NYU internship and residency in neurosurgery, Yale
23 University fellowship in epilepsy surgery. And he will come
24 before you and testify that anything is possible; but in
25 order to make a medical determination that, in fact, the

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1 surgery that was described that requires two or three
2 procedures that includes the insertion of electrodes to try
3 to determine where the seizures are, you don't just go do
4 that. There is a process by which Dr. Doyle will tell you.
5 You evaluate the patient's history, the patient's evaluation
6 examination, and then you give an opinion, a recommendation
7 to the family that is based on good and accepted medical
8 science.
9 He will tell you in this case that there is a lack
10 of objective evidence for purposes of what is called EEGs,
11 electroencephalograms. You will hear, he also will confirm
12 to you that in this case there is a lack of records from any
13 medical provider for care or treatment relating to seizures.
14 There are virtually no records from anywhere. And we don't
15 criticize the Perez family for their recollection of what
16 they see, but a doctor, as Dr. Doyle will tell you, must
17 make a recommendation based upon the full medical picture.
18 In this case it doesn't exist. No one is going to be able
19 to come before you and in good conscience say more likely
20 than not it is going to be required. In fact, if
21 Dr. Schwartz testifies and stays consistent with his report,
22 the evidence will show --
23 MR. MORELLI: Objection, your Honor. Objection.
24 There is nothing in evidence, and the report is not
25 something that goes in evidence.

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1 THE COURT: Overruled.
2 MR. O'HARA: If Dr. Schwartz comes into this
3 courtroom and testifies consistent with what he has authored
4 in this case, he will tell you he cannot within reasonable
5 medical certainty say that it is more likely than not it
6 might be necessary, it might not.
7 Now, Dr. Doyle is going to come before you, as
8 Dr. Ambrose is going to come before, and he is going to say
9 he does need the cranioplasty. There is no doubt he needs
10 that. And Kim Kushner will come before you and tell you
11 that it is something that we are responsible for and give
12 you the specific amount of what we believe the procedure
13 should cost. We accept that, but we must defend the claim
14 to the extent there is a suggestion of anything that is not
15 more likely than not fair and reasonable. No more and no
16 less.
17 Lastly, you will hear from Dr. Barr in the field
18 of neuropsychology. You heard a little about the
19 neuropsychological testing. Dr. Barr will come before you
20 with a bachelor of science in psychology from the University
21 of Michigan, a master's and a Ph.D in psychology from the
22 New School for Social Research here in New York City,
23 neuropsychological training at Mount Sinai, clinical
24 neuropsychology internship and externship experience at the
25 Bronx VA, at the Boston VA, the Greenery Head Injury

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1 Program, as well as at Yale University.
2 As I said to you, the experts in this case have --
3 the phrase that was used was "impeccable credentials."
4 What will Dr. Barr tell you? Mr. Perez returned
5 to driving. Let me say it again. Mr. Perez returned to
6 driving. Mr. Perez has a driver's license that is valid
7 today. Mr. Perez and his family will tell you that despite
8 the suggestion that he shouldn't drive, on occasion he does.
9 He does. That's not going to be in dispute.
10 You will also learn that Mr. Perez attempted on
11 multiple occasions to return to work, all a positive sign,
12 but that the neuro testing results -- excuse me, the
13 neuropsychological testing, many of the tests are within the
14 average range before the accident. There are no indications
15 in the neuropsychological testing that he reviewed to
16 suggest profound neuropsychological deficits. There are
17 none in the tests, and that there is inconsistencies in the
18 neuropsychological scores. He will come before you and
19 explain to you why that is important, much like you will
20 hear from Dr. Ambrose, much like you will hear from
21 Dr. Jordan that it is not medically explainable other than
22 the possibility of outside factors influencing someone who
23 is participating in the tests and what kind of outside
24 factors are replete in Mr. Perez's medical records. And
25 what outside factors will you hear from Dr. Barr? The

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1 lawsuit. The lawsuit.
2 You will also hear from Dr. Barr that there is a
3 specific test that he will go into in-depth about, this test
4 of memory malingering; and that Mr. Perez is showing scores
5 below the acceptable range that demonstrate full and fair
6 effort.
7 Lastly, we will bring Dr. Freifelder before you
8 who is the defense economist. It is important because the
9 calculations in this case clearly are from a math
10 perspective, there are formulas to determine what things
11 cost, how many times you will need them in the future, and
12 how you would prepare for and pay for those today. And to
13 the extent that there is anything that is fair, reasonable
14 and objectively our responsibility, we accept it. No ifs
15 and or butts about it. Dr. Freifelder, you will hear, has
16 not one, not two, but three degrees from the Wharton
17 Business School at the University of Pennsylvania, year in
18 and year out the premier business school in America in terms
19 of the ranking that it has. He has a bachelor of science in
20 actuarial science. He has a master's and a Ph.D in
21 operations research and statistics. What he will do is he
22 will come before you and he will analyze the background and
23 experience associated with the work that was performed by
24 Mr. Perez before the incident, and he will give you the
25 forecast I talked about before about what is a fair and

<p>Opening - by Defendant - O'Hara Page 81</p> <p>1 reasonable expected future income loss. He will also come 2 before you after all of the defense experts testify, 3 including Kim Kushner as the life care planner, and he will 4 outline for you why in his expert opinion the future medical 5 care that is reasonably anticipated based upon the evidence 6 that is in this record is somewhere between \$2 million and 7 \$3 million for his full life.</p> <p>8 This is a hard topic but I am going to touch upon 9 it anyway. Any person that has a severe injury such as 10 Mr. Perez, any person that has long-term condition that 11 includes some of the difficulties that he is going to 12 struggle with, there is the medical reality that it affects 13 life expectancy. Why is that important? From a scientific 14 perspective there is a line. 50 percent of the population 15 and one person get above the average life expectancy, and 16 49.999 percent of the population other than one is below 17 life expectancy. And as part of this case you will hear the 18 life expectancy tables without medical conditions.</p> <p>19 The medical reality of what the future may hold 20 for Mr. Perez is an effect on his future life expectancy 21 which affects what the long-term costs will be, assuming 22 that these conditions do not allow him to live a full life. 23 And let me be clear. We hope he lives it until he is 125 24 years old. We hope he is the one that overcomes all odds. 25 But the experts that are going to come before you are going</p>	<p>Proceedings Page 83</p> <p>1 it can being attributed to based upon the evidence that you 2 will hear from the experts on behalf of the defense is a 3 lack of effort. And what affects effort? Outside factors 4 such as lawsuits.</p> <p>5 Please keep an open mind. I say these things 6 recognizing that on behalf of the company. The family is 7 here, and I mean everything I say with the utmost respect, 8 but this is about being fair. This is about being 9 reasonable. This is about being just. And everyone of you 10 committed to do that no matter how you personally feel. And 11 if you do that, I am confident that you will find the 12 position that is advanced on behalf of Live Nation is, in 13 fact, fair, reasonable and just.</p> <p>14 Thank you. 15 THE COURT: Are you ready to start? 16 MR. MORELLI: Yes. 17 THE COURT: Does anyone on the jury need a break 18 or can we start a witness? Okay. So we will call our first 19 witness. But before we do that and before I forget, I want 20 to give you a little heads up for future planning. 21 We are off on Monday for Veteran's Day. We are 22 off on Tuesday afternoon. We will not be working beyond 23 1:00 on Tuesday. The following Tuesdays after that I am 24 going to have you come in a little bit late because I have 25 motions on other cases that I have to deal with. That's</p>
<p>Opening - by Defendant - O'Hara Page 82</p> <p>1 to tell you that the reality of the medical conditions that 2 he has makes that difficult to forecast as being likely. It 3 is more likely not accurate. And you are going to have to 4 weigh that in how you evaluate what is fair for the future 5 economic loss and fair for the future life care plan 6 because, as I said to you, Live Nation accepts that it is 7 responsible for the fair, reasonable, and objective costs 8 associated with his life care plan, his economic loss, and 9 what you believe to be the pain and suffering that he 10 consciously suffers. And in evaluating that you have to be 11 open-minded. You have to listen to all the evidence. You 12 have to weigh the information that will come from the 13 experts because none of the treaters are on our witness 14 list. All of the experts that we have as part of defending 15 a case is to retain them, to give them the entirety of the 16 record, and ask them to do an evaluation, which has been 17 done in this case. Uniquely, it is also the same thing that 18 the plaintiff is going to do. They are going to call almost 19 all hired experts, almost all other than Dr. Fayer who was 20 someone that was identified as a psychiatrist that is 21 treating him. And what you will find if you weigh the 22 credible evidence is that he is not faking, but he is 23 malingering. And he has signs and symptoms that when they 24 touch him, and when they manipulate him, and when they try 25 and test him don't make medical sense. The only thing that</p>	<p>Proceedings Page 84</p> <p>1 starting on November 19 and November 26. This coming 2 Tuesday, however, is going to be a normal start time. 3 That's going to be the first day back after the three-day 4 weekend. So on Tuesday you are going to be reporting at 5 9:15 downstairs and we will be working until 1:00. Of 6 course we are down on Thanksgiving. We are also down on the 7 day after Thanksgiving, November 29.</p> <p>8 So those are all the little tweaks that I know of 9 at this point in time. As more information becomes 10 available I will let you know that.</p> <p>11 Finally, one other thing I want to remind you or 12 tell you about is that no one ever knows what the 13 temperature of this courtroom is going to be. I suggest you 14 dress for three seasons, okay? That's just the way it is. 15 It can be very different in the morning and afternoon and 16 day to day, so I have no idea.</p> <p>17 Thank you. 18 Mr. Morelli, call your first witness, please. 19 MR. MORELLI: Thank you. 20 (Brian Greenwald, MD takes the 21 witness stand and is duly sworn/affirmed.) 22 THE CLERK: State your name and address for the 23 record, spelling your name. 24 THE WITNESS: Dr. Brian Greenwald, B-R-I-A-N 25 G-R-E-E-N-W-A-L-D. My work address is 65 James Street,</p>

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

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

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

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

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1 to better diagnose, evaluate, and treat persons with brain
2 injury.
3 Q And you had occasion, Dr. Greenwald, to see and examine
4 Mark Perez; is that correct?
5 A Yes, I have seen him twice.
6 Q And any time that you have to refer to your records
7 with reference to specific things I ask you, feel free to do that
8 to refresh your recollection if you need to, okay?
9 A I will.
10 Q When was the first time that you had occasion to see
11 Mark Perez? And just to be fully clear, I had called you and
12 asked you to see Mark Perez and to evaluate him and evaluate what
13 care was necessary for him and the permanency of his injuries, if
14 any; is that correct?
15 A That's correct.
16 Q Would you tell us when you saw him?
17 A Initially I saw him in my office in New Jersey on
18 February 21, 2017.
19 Q At that time, was he accompanied by anyone?
20 A Yes. He was seen with his brother Justin.
21 Q At that time, February of 2017, did you conduct an
22 examination of Mr. Perez?
23 A I did. I did what I would normally do on any patient I
24 was seeing. I took a comprehensive history, I reviewed a
25 substantial amount of records that were in this case, and then

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1 beyond that I did a physical examination.
2 Q Okay.
3 Now, without getting specific about the accident
4 itself because we are dealing post-accident in this case, okay,
5 you did learn that he fell from a height; is that correct?
6 A I did.
7 Q And can you tell us other than that, after that what
8 you found, what you learned?
9 A Sure.
10 After falling from this height he was taken by
11 helicopter to Nassau University Medical Center, a major trauma
12 center near Jones Beach. He came in, he had altered mental
13 status, a CT scan showed bleeding. He then had further
14 alteration in his mental status, a deterioration in his mental
15 status due to increased bleeding in his head. And he was taken
16 urgently over to the operating room where a large amount of bone
17 was removed from the right side of his head to both deal with the
18 bleeding that was going on and the swelling that was going on in
19 the brain.
20 Interestingly, what they do with that bone is they
21 actually put it into his abdominal cavity. It is a term called
22 marsupialization referring to kangaroos. They actually put it in
23 an abdominal pouch to keep the bone viable so that some day it
24 could be put back into him.
25 The swelling and the hemorrhage was dealt with.

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1 He stayed there in the hospital for about a month. Because of
2 the severity of his injury, he required a tube in his throat
3 called a tracheostomy to help him breathe and to get off the
4 ventilator. He required a gastrostomy, a tube in his stomach.
5 Because he wasn't able to eat by mouth, the tube was so food
6 could be directly put into his stomach.
7 After about a month of medical stabilization he
8 was transferred to a brain injury rehabilitation center at
9 Southside Hospital, a known center, part of the Northwell system
10 that takes care of persons with traumatic brain injuries like we
11 see in Mr. Perez's case.
12 The CT scans during his hospitalization showed
13 hemorrhage and damage to multiple areas of the brain, areas of
14 the brain that we know are more susceptible to this type of
15 trauma, the frontal lobes, the temporal lobes on both sides of
16 his brain. We see hemorrhage, bleeding into this area.
17 He goes for inpatient rehabilitation at Southside
18 he is treated there by a rehabilitation physician like myself, a
19 brain injury specialist. He has physical therapy, occupational
20 therapy, speech therapy, psychology, recreational therapy.
21 Really, the challenges that people face after such
22 severe brain injury aren't really for one area to be taken care
23 of. They need, sort of, really, a cross-section of therapists to
24 work on such basic skills like swallowing again, getting him to
25 recognize himself and the people around him. So it is dealing

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1 with, sort of, the thinking, memory, attention, concentration,
2 mood, pain issues that he was dealing with.
3 After being at Southside he then went on to an
4 outpatient rehabilitation at St. Charles, which is more in
5 eastern Long Island closer to where I went to school at
6 Stonybrook. Again, he had outpatient treatment for all these
7 challenges.
8 That gives you, sort of, the early part of his
9 care. Shall I continue on?
10 Q Do you have anything with you to explain to the jury
11 the anatomy of the brain because you mentioned a number of things
12 so far? You mentioned lobes, you know, frontal lobes and lobes
13 on both sides, right and left. Can you tell us about that and
14 explain the significance of what you are talking about?
15 A Sure.
16 If we don't have anything to put up there, I do
17 have my skull model here.
18 MR. MORELLI: May he use that, your Honor?
19 MR. O'HARA: No objection, your Honor.
20 THE WITNESS: Would it be okay if I stood in front
21 of the jury while I was using it?
22 THE COURT: Sure.
23 (Continued on next page)
24
25

Dr. Greenwald - by Plaintiff - Direct/Morello Page 93

1 MR. HAWORTH: Your Honor, may I position myself
2 so I can see?
3 THE COURT: Of course. You don't need my
4 permission to move about. Feel free.
5 MR. HAWORTH: Thank you, Your Honor, I appreciate
6 it.
7 A So I'm opening up this skull kind of like what they
8 did with Mr. Perez where they took out this piece of skull and
9 inserted into his abdomen. This one is a little easier to take
10 off than what they had to do as far as sawing off his skull to
11 do that. But when we take out the skull, we look at this
12 magical thing called the brain.
13 I love looking at the brain, I have to admit because
14 this tissue here, this soft tissue here, that is the same
15 consistency as formed jello, our brains are very soft, is
16 everything that we are. So it's our personality, our mood, our
17 movements, our vision, our hearing. Everything about us is
18 trapped up in this crazy looking structure called the brain
19 encased in this tough scull of ours. You might think about who
20 we are is the house that we own or the car that we drive or the
21 spouse that we have. Everything is here in this crazy-looking
22 structure called the brain, in this miraculous incredibly
23 complicated structure.
24 The brain, it helps us -- it connects from the top of
25 our head out to our spinal cord, allowing to us do all of our

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1 movements. Everything that the brain does works through
2 electrical activity, small electrical activity, working
3 throughout the brain, connecting up to different parts of the
4 brain and letting us think, letting us hear, letting us see.
5 All of our memory is there trapped up in our head in this
6 brain.
7 So we can appreciate in the brain that there's two
8 hemispheres, the two halves of the brain sitting in front of us
9 called the hemispheres. When we look then at a side view of
10 the brain, we then appreciate that it's actually broken up into
11 four lobes. Each of the hemispheres is broken up into four
12 lobes.
13 So we have the frontal lobe sitting here in front of
14 our -- under our forehead. It's probably the best developed of
15 the lobes of the brain. It's really makes us humans. It's the
16 largest of the lobes of our brain. It's very important for
17 emotions, for behavior, for memory and for what we call higher
18 level thinking. So insight, judgment, sometimes what's called
19 executive functioning. So again, the higher level thinking
20 that makes us the humans that we are. The frontal lobe is
21 sometimes considered who we are, our personality, because of
22 its importance in the brain.
23 We can see here on the side of the brain is an area
24 called the temporal lobe. The temporal lobe sits near to our
25 ear. It's also very important for our movements, for our

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1 sensation, for our memory. You know, it's a very important
2 lobe also.
3 Seen in the back here, what's called the occipital
4 lobe, sitting in the back of our head. Very important for
5 vision and it's certainly also a very important area, although
6 maybe no area of the brain is not important.
7 The parietal lobe sits up here, so more at the top of
8 our head. So it brings a lot of information together. It sort
9 of tells our body where it is in space, taking can information
10 from the other lobes and from the brainstem and pulling that
11 all together.
12 We can see at the bottom, as we look is the brainstem,
13 the brainstem. The brainstem controls our very basic function,
14 so it controls our heart rate -- even our heart rate is
15 controlled by the brain -- our respiratory rate. Even our
16 pupillary size is controlled by the brainstem.
17 One of the things that's important to look at when we
18 look at the skull also, because this I think really is critical
19 in this case in particular, is that when we look at the skull
20 base, the way that the brain is sitting inside the skull base,
21 is that this area -- this area towards the front of the skull
22 base and this area towards the middle part the skull base sits
23 very close to the soft brain of ours. It sits very close to
24 this brain, which I said is the same consistency as formed
25 jello.

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1 Part of the importance of that is that the frontal
2 lobe, sitting again, sort of close to this jagged part of the
3 skull base and the temporal lobe sitting again, here in the
4 middle part, again, this jagged skull base, are very
5 susceptible to trauma. No matter what direction the head is
6 hit is very susceptible to trauma.
7 And as we see in Mark's case, we see those areas of
8 the brain significantly effected due to the trauma to his head.
9 His frontal lobe, again, so important for emotions, behavior,
10 higher level thinking. And his temporal lobe is so important
11 for memory, so important for sensation, so important for motor
12 function. Those are some of the key things to understood.
13 In our little brains here there's about a hundred
14 billion brain cells, so it's certainly -- it not only looks
15 complicated when we look at it with our naked eye, but
16 microscopically it's an incredible complicated structure.
17 One other thing I'll mention also is that the two
18 hemispheres are connected by something called to the corpus
19 callosum, C-A-L-L-O-S-U-M, which connects to two hemispheres
20 and is also very susceptible to injury when we have such trauma
21 to the head because we have the movement of the two
22 hemispheres. There's no seatbelt in the head. The brain is
23 just sitting there floating in a little bit of cerebral spinal
24 fluid. So when you have as much trauma to the head as we see
25 in this case, enough to even crack the skull before it was

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1 taken off, you can get damage to this middle part of the brain,
2 that corpus callosum.
3 Q Now, Dr. Greenwald, if you would tell us what your
4 examination of Mark Perez consisted of the first time you saw
5 him in February of 2017 --
6 A So my examination --
7 Q -- almost three years ago, almost.
8 A My examination always starts with just hearing
9 people's history, right? How well are they able to express
10 themselves? How much memory of the situation that they have.
11 I always review the records before I see the person so I have a
12 general understanding of what actually happened to them based
13 on the medical records. So that's really where it starts. His
14 brother Justin also added some additional information where
15 information was necessary.
16 And then taking a comprehensive history, so history
17 both of the situation, but also, of his previous medical
18 issues. In Mark's case there was really -- he was a healthy
19 gentleman. Prior to this injury there wasn't so much. We
20 talked a little bit about his social history, his work history,
21 his educational history. And then we talked about what are the
22 challenges, what type of problems was he suffering from since
23 this injury that he sustained back in June of 2013?
24 Then my physical examination, which comes next, is
25 really a head-to-toe evaluation looking at literally everything

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1 from his head down to his toes. We're looking at his heart,
2 his lungs, his abdomen, his neurologic examination, his head
3 examination, his gait, his ability to walk, his strength, his
4 sensation. Really a comprehensive neurologic and general
5 examination.
6 THE COURT: Can I just see counsel very quickly?
7 MR. MORELLI: Sure.
8 (WHEREUPON, a discussion was held off the record,
9 at the side bar, in the presence of the Court and
10 counsel and out of the hearing of the jury.)
11 BY MR. MORELLI:
12 Q Dr. Greenwald, if you would, before we break for
13 lunch, can you characterize for the jury what you say is a
14 traumatic brain injury, what is that?
15 A So a traumatic brain injury is an external force to
16 the head -- caused by an external force to the head, injuring
17 the soft tissues of the brain inside it. That really --
18 causing the type of neurologic impairments, causing the brain
19 to be unable to do the things that we needed to do.
20 Q Now, with reference to a traumatic brain injury, this
21 is what you deal with every day, correct?
22 A That is correct.
23 Q Is there a way to categorize what kind of traumatic
24 brain injury someone has?
25 A Yes, there is.

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1 Q Okay. In order to be able to tell another doctor if
2 another doctor treats the patient, this is the level of
3 traumatic brain injury?
4 A Yes, there are generally accepted ways of discussing
5 that.
6 Q Can you tell us?
7 A Sure. So there's two main ways that we discuss
8 severity of injury. So one is at the time of the accident
9 itself. So we see in Mark's case he comes in, he's initially
10 more confused, they see smaller hemorrhages. Initially, his
11 Glasgow Coma Scale score was 14.
12 Q What is that? What does that mean?
13 A So the Glasgow Coma Scale score, which is something
14 that's been around is a way of evaluating people since the
15 1980s, is a way of looking at people's level of arousal, their
16 level of consciousness. This is critical and really shown to
17 be critical in Mark's case because it allows you to establish a
18 baseline when they come in. We know that people, after such
19 trauma to the head, are at high risk of sudden onset of
20 swelling, sudden, you know, increasing of hemorrhage. So it
21 allows us to establish a baseline for them and then monitor
22 that baseline as they are in the emergency room, as they are in
23 those acute care services.
24 I say it was so important in Mark's case in particular
25 because he comes in and his initial GCS is 14. He gets some

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1 initial scans, he's being observed there in the emergency
2 room --
3 Q That 14, is that --
4 A I'm sorry --
5 Q What does that tell?
6 A The scale ranges from three at the lowest end, which
7 looks at people's motor abilities, their eye opening abilities
8 and their verbal abilities to a high of 15. So when he comes
9 in, he actually doesn't look so bad.
10 What ends up happening then over those coming hours as
11 they're monitoring him there, then he has a sudden
12 deterioration in is mental status. They do a CAT scan, a stat
13 or a sudden CAT scan was done. He's at significant blooming or
14 increase in the hemorrhages that he had in his head. They
15 recognize that it's a surgical emergency, his brain is being
16 compressed, he's at high risk for dying. They take him off to
17 the operating room and do the surgeries that we talked about;
18 taking out that skull, taking out those hemorrhages.
19 There's doubt that that sudden deterioration that he
20 had in his Glasgow Coma Scale put him into the severe brain
21 injury category and there would be nobody who would, I think,
22 really question that otherwise. This is someone who has a
23 severe traumatic brain injury.
24 We can look at the other end of the spectrum also, as
25 far as other measures of severity. So when we look at the

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1 length of time that Mark showed confusion, the time that he was
 2 in what is called this posttraumatic confusion, that's another
 3 measure of severity that people have looked at and is
 4 associated with outcomes. So the longer that people remain in
 5 this posttraumatic confusion, the less likely they are to make
 6 a good outcome.
 7 Mark, we can see throughout his hospital course, you
 8 know, he needed a tube in his throat because he wasn't able to
 9 swallow, he needed a tube in his stomach -- I'm sorry -- he
 10 need a tube in the throat because he was not able to get off
 11 the ventilator, he needed a tube in his stomach because he
 12 wasn't able to swallow. He gets to rehabilitation a month
 13 after his injury and he's still showing evidence of confusion.
 14 There's no doubt that this is another measure of a severe
 15 injury.
 16 So Glasgow Coma Scale score, you know, after the
 17 deterioration, severe injury, length of post-traumatic
 18 confusion, severe injury, the more severe the injury, the less
 19 likely you are to make a good recovery. What we think we see
 20 in Mark's case is not only a severe injury, but a diffuse
 21 injury also, you know affecting -- you know, we talked about
 22 how there's eight lobes in the brain, four in each side. Both
 23 of his frontal lobes, these critical structures that make us
 24 who we are, devastated, both of his temporal lobes, devastated
 25 and we'll see more about that, but, you know, significant

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1 scarring and death of tissue in these critical lobes that give
 2 us who we are and give us our memory and our ability to do
 3 things that make us who we are.
 4 MR. MORELLI: Is this a good time, Judge?
 5 THE COURT: Yes. We need to take break at this
 6 point because we have to -- security has to sweep the floor
 7 and shut down the floor. So I'm going to excuse everybody
 8 for lunch.
 9 Please remember my instructions. You may not
 10 perform any research in any way, shape or form, you can't
 11 discuss the case with anyone, you can't start talking about
 12 the case amongst yourselves, nothing about what you saw or
 13 heard in the courtroom, you can't post anything concerning
 14 the trial on social media, you may not interact with the
 15 parties, witnesses or attorneys. Other than that, have a
 16 great lunch. Please report back downstairs at 2:00, okay?
 17 Thank you.
 18 (Jurors exited the courtroom.)
 19 THE COURT: Counsel, anything for the record
 20 before we break?
 21 MR. HAWORTH: No, nothing new. I'm going to get
 22 you that cite, Judge.
 23 THE COURT: Okay.
 24 (WHEREUPON, there is a luncheon recess taken and
 25 the case adjourned to 2:00 p.m.)

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1 (Off-the-record discussion held)
 2 THE COURT: For the record, we are going to make a
 3 record later on.
 4 MR. MORELLI: Yes.
 5 COURT OFFICER: All rise. Jury entering.
 6 (Jury enters courtroom)
 7 THE COURT: Mr. Morelli, please continue.
 8 MR. MORELLI: Thank you.
 9 Q Dr. Greenwald, I think when we left off, I had asked
 10 you about traumatic brain injury. I think I asked you about
 11 whether or not there are ways to define the level of traumatic
 12 brain injury, correct?
 13 A That's correct. We talked about the severity of
 14 injury.
 15 Q Right. And you talked about the diffuse injury in this
 16 case, correct?
 17 A Both the severe and diffuse injury.
 18 Q Can you tell us about those two things and how they
 19 differ?
 20 A Sure.
 21 We talked about the severe injury. We were
 22 talking about that Glasgow coma scale score, came in higher and
 23 then went lower. It told us about that expanding hemorrhage in
 24 his head, taken off to the OR to do the removal of the bone,
 25 removal of the hemorrhages. We talked about his length of

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1 posttraumatic confusion, yet another measure of severity. So,
 2 really, the two measures that we talked about severe injury are
 3 the length of posttraumatic confusion, this initial coma that we
 4 see with the expanding hemorrhage. Really he meets criteria for
 5 having sustained a severe traumatic brain injury.
 6 What I would say in addition to the severity of
 7 the injury is the diffuseness of the traumatic brain injury. We
 8 talked already about how it involved the two frontal lobes and
 9 the importance of the frontal lobes. We talked about how
 10 involved both temporal lobes and how these are critical for who
 11 we are, for our cognition, memory, thinking, attention,
 12 concentration, personality, emotions; really everything that we
 13 are being in these four critical lobes out of only eight lobes in
 14 our brain.
 15 What we see in Mr. Perez's case, Mark's case, we
 16 see injury to that corpus collasum that we had a chance to talk
 17 about when I was showing that model of the brain. So we also see
 18 injury to the area of the brain, to those big white matter
 19 tracts, those big telephone wires that connect up the two halves
 20 of the brain. We see hemorrhage there also. So, again, it's not
 21 only a severe injury, but a diffuse injury.
 22 The point of severity of injury, the point of why
 23 we as doctors think about severity of injury is that the more
 24 severe injury, the less likely it is the person is going to
 25 recover, right? So the more severe that brain is damaged, the

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1 less likely it is the person is going to have a good outcome.
 2 I think when you also then in Mark's case we think
 3 about also the diffuseness of the injury, how much of the brain
 4 was involved with this injury, all these four lobes we talked
 5 about on both sides of the brain. It really just compounds the
 6 challenge of trying to make a good recovery. It makes it that
 7 much less likely. A severe brain injury is very difficult to
 8 come back from. A diffuse sever traumatic brain injury makes it
 9 that much less likely.
 10 Q Now, when we talk about traumatic brain injuries and
 11 you say that, actually, what you do you often have to
 12 characterize it or put it in terms of -- is there such a thing as
 13 a mild traumatic brain injury?
 14 A There is.
 15 Q Is there such a thing as moderate?
 16 A Yes, there is.
 17 Q Do they call it that?
 18 A Yes, moderate severity traumatic brain injury.
 19 Q Okay. And then there is severe, correct? Is that the
 20 most severe category, and do they call it "severe"?
 21 A Yes.
 22 Q Which category would you say that Mark falls into, is
 23 it the third one "severe"?
 24 A There is no question that he is in the severe traumatic
 25 brain injury category.

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1 Q And so if somebody was to say that -- if a doctor was
 2 to say or anyone would come in and say to this jury that Mark has
 3 a mild traumatic brain injury, do you see any way that that's
 4 possible, that it could be characterized as that?
 5 A Just to clarify, when we talk about a mild traumatic
 6 brain injury, we are talking about a concussion. So we have all
 7 gotten more familiar with concussions, discussion about it with
 8 regards to our athletes, children who get concussions. But what
 9 we are talking about with a concussion is someone who had, sort
 10 of, a brief loss of consciousness, maybe a brief alteration in
 11 their thinking. You can certainly have a host of symptoms;
 12 headaches, visual issues, mood issues after a concussion. But
 13 you know, generally in a concussion or this mild traumatic brain
 14 injury, the CT scan, you know, will be normal, a standard MRI
 15 would expected to be normal.
 16 There is no question that this gentleman, that
 17 Mr. Perez suffered a severe traumatic brain injury by the
 18 commonly used and well-accepted criteria for severe traumatic
 19 brain injury, a severe diffuse traumatic brain injury. There is
 20 no way someone could come in here and honestly say that this
 21 gentleman suffered a mild traumatic brain injury or a concussion.
 22 Q Now, let me ask you this: Does Mark Perez have
 23 traumatic epilepsy?
 24 A He does.
 25 Q Can you tell the jury what you base that on?

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1 A Sure.
 2 So epilepsy is -- we are talking about seizures
 3 here, right? We talked earlier about the brain, the way it
 4 works, the way it communicates with itself and the way it
 5 communicates with the rest of the body is through electrical
 6 activity. It is very orchestrated electrical activity. One part
 7 of the brain talks to another part of the brain through
 8 electrical wiring that we have in our head. We talked before
 9 about that there are about a hundred billion brain cells in our
 10 head all working through, sort of, microelectrical activity.
 11 When you have had the type of damage that we see
 12 in this case, we see scarring and dead brain tissue;
 13 unfortunately that has an effect on the ability of that
 14 orchestration of the electrical activity. Some of that is why he
 15 has some of the problems that he has; the paralysis on the left
 16 side, the difficulty with his thinking. Unfortunately, sometimes
 17 that electrical activity also can become a storm of electrical
 18 activity.
 19 What a seizure is is a storm of electrical
 20 activity, uncontrolled, unorchestrated electrical activity. Then
 21 how it becomes epilepsy is because it happens again and again
 22 despite treatment. Why are we talking about it as posttraumatic
 23 epilepsy? Well, obviously this all started after his traumatic
 24 brain injury.
 25 Q So is it your opinion with a reasonable degree of

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1 medical certainty that Mark Perez has traumatic brain injury?
 2 A I have no question about that.
 3 Q And traumatic epilepsy?
 4 A I have no question about that.
 5 Q Okay.
 6 And could you tell the jury with reference to
 7 traumatic epilepsy, what do you base that on? We heard that it
 8 is subjective. What does "subjective" mean?
 9 A "Subjective" would mean it is to the eye of the
 10 beholder. It is what you think you are seeing.
 11 In Mr. Perez's case we have all this objective,
 12 meaning nobody can deny it, evidence of all this trauma
 13 throughout his brain. And we know that the number one cause of
 14 seizures in the United States is, actually, traumatic brain
 15 injury. We know that someone after a severe traumatic brain
 16 injury like we see in Mark's case has about a 25 percent lifetime
 17 risk. So his whole life, even if he had not had a seizure up
 18 until today, he would continue to have that risk over his
 19 lifetime.
 20 We see clear evidence, and I had a chance to see a
 21 video of Mark where --
 22 MR. HAWORTH: Objection.
 23 THE COURT: Sustained.
 24 Q Let's not talk about that at this time, okay? Let's
 25 talk about the fact of traumatic epilepsy, okay. What was it

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1 that made you determine that, because you rendered at least one
2 if not more than one report in this case where you talked about
3 that, correct?
4 A Yes. It is well-documented in all his medical records
5 and shown on EEG.
6 Q Now, am I correct, Dr. Greenwald, that Mark suffered
7 this traumatic brain injury in June of 2013?
8 A That's correct.
9 Q And that he didn't suffer any seizures until the year
10 2015?
11 A I would say that there is a notation of a question of a
12 seizure while he was in the initial hospital at Nassau
13 University, but, really, he was diagnosed with posttraumatic
14 epilepsy starting in about May of 2015.
15 Q And that's when he had a seizure that, I think, was
16 recognized?
17 A That's correct.
18 Q Now, my question is if, in fact, he was injured in June
19 of 2013 and we see the first outward evidence of a seizure in
20 2015, how do we reconcile that?
21 A The brain continues to try to heal itself. It
22 continues to scar like you might if you were trying to heal a
23 wound on your skin. We know that the risk of seizures is not
24 just short term after such a traumatic brain injury. Like I
25 said, it lasts over his whole life.

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1 What we see that happened in the short-term before
2 that first seizure that was clearly recognized in May of 2015 is
3 that he had just had surgery. So he had another surgery related
4 to this brain injury, the taking out the bone, putting the bone
5 back in, the infections that he had. So certainly something that
6 is more traumatizing to the body like surgery where you need to
7 be under anesthesia, where your body experiences pain; these
8 lower the seizure threshold and bring that seizure out. It is
9 not that it wasn't sitting there already, but sort of make it
10 clear that this gentleman is going to have a seizure and a
11 seizure disorder.
12 Q So do you have an opinion with a reasonable degree of
13 medical certainty that it was the injury of June 26, 2013, that
14 manifested the traumatic epilepsy?
15 A Yes. The traumatic brain injury is the cause of his
16 traumatic epilepsy, the traumatic brain injury that he sustained
17 in 2013.
18 Q Now, when he had the first cranioplasty to explant the
19 skull that was in his abdomen, you talked about infections. Can
20 you explain that to the jury why that is significant, if it is?
21 A Sure.
22 So in the time after his injury, I think it was in
23 about October, they go back into his abdominal cavity where they
24 placed that skull bone, they open up his skin, they place that
25 skull bone back in there. It is put in there with a type of mesh

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1 to keep it in there. The skin is closed as a start. Again, you
2 want bone over that soft brain of ours.
3 Unfortunately, what ends up happening is that he
4 has a complication of his skin, the skin where the bone was or
5 the bone was replaced. He ends up needing additional surgery for
6 that. It ends up going on to be infected and really compromising
7 the bone that was placed back in there. These are all the
8 surgeries that he required afterwards. He required IV
9 antibiotics, antibiotics that were put into his vein over a
10 prolonged period of time because of the seriousness of the
11 infection, a very strong antibiotic called Vancomycin to treat
12 that was given on an IV-basis because of the seriousness of this
13 infection.
14 Q Now, when Mark had these future surgeries, the first
15 surgery was to save his life, correct?
16 A That's correct.
17 Q And the subsequent surgeries were to put him back
18 together, so to speak, right?
19 A Yes.
20 Q Put his head back together?
21 A Yes.
22 Q Is that a severe surgery, the second surgery? How does
23 it affect the brain and the body?
24 A Well --
25 MR. HAWORTH: Objection.

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1 THE COURT: I don't understand. Do you want to
2 approach?
3 (Off-the-record discussion held)
4 THE COURT: The question is withdrawn.
5 Q Dr. Greenwald, the second surgery that was done on
6 Mark, how did that affect him and his brain at that time?
7 A There are really two surgeries that were being done at
8 that time. The first surgery is to open the abdominal cavity,
9 open the stomach, take that bone out. That surgery in itself has
10 its own risks. Surgery always has risk of bleeding, of
11 infection, of death.
12 The second surgery was what I was talking about as
13 far as replacing the bone. When you go back in there you are
14 needing to open up the skin, you are needing to open up the layer
15 underneath there, the dura, to make sure that area is all closed
16 up before you put the bone back in. That in itself, especially
17 in someone who has a traumatic brain injury, has this significant
18 weakness to their body, putting those people under general
19 anesthesia, it is a significant risk.
20 Q Now, when we talk about the seizures, are there
21 different kinds of epileptic seizures?
22 MR. HAWORTH: Objection.
23 THE COURT: Overruled.
24 A There are. So we have talked about these so far as a
25 general posttraumatic epilepsy, but really there are different

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1 types of seizures. There are seizures that only affect one-half
2 of the brain. That's called a localized seizure. There are
3 seizures that affect both halves of the brain called a
4 generalized seizure. There are seizures where you can see the
5 person still awake. Certain seizures will make the person
6 unconscious. These are more descriptive qualities of the
7 seizure, what you are seeing in the person when they have the
8 seizure. Common things we see in people with seizures also when
9 they are having the seizure is they have loss of bowel and
10 bladder, those basic functions.
11 These are all descriptive terms of the different
12 categories of seizures, but, really, they all involve the same
13 thing, that uncontrolled electrical activity we just talked about
14 caused by the inability of the brain to be able to orchestrate
15 that electrical activity due to the trauma.
16 Q So when someone refers to a gran mal seizure, what does
17 that mean?
18 A A gran mal seizure talks about a seizure that is spread
19 from one part of the brain to the other part of the brain.
20 Usually it is associated with a shaking of both the arms and the
21 legs. Usually it is associated with either a loss or alteration
22 of consciousness. A person either does not remember it or
23 actually appears overtly unconscious. Again, it is often
24 associated with this loss of bowel and bladder function.
25 Q Now, just generally, you have reviewed all of the

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1 medical records in this case; is that correct?
2 A That's correct.
3 Q And you reviewed other things like the deposition
4 transcript of Mark which there was more than one?
5 A Yes.
6 Q So when you made a determination about Mark Perez and
7 his condition, you did it based on all of the evidence that you
8 had before you and meeting him, taking a history, and also your
9 experience in this very specific area; correct?
10 A That's correct.
11 Q Now, let me ask you this: You weren't in the courtroom
12 when I gave my opening statement, and you weren't in the
13 courtroom when Mr. O'Hara gave his opening statement. You know
14 Mr. O'Hara, right?
15 MR. HAWORTH: Objection.
16 THE COURT: Overruled.
17 Q You know him, don't you, Mr. O'Hara?
18 A Yes.
19 Q When he gave his opening statement he told this jury
20 that there was going to be at least one, if not more than one,
21 doctor that was going to come in and say that Mark Perez is
22 faking it?
23 MR. HAWORTH: Objection, your Honor. Sidebar,
24 please?
25 THE COURT: The objection is sustained.

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1 MR. HAWORTH: Good enough. Thank you.
2 Q Here is my question: What does the term "malingering"
3 mean? Do you know that term?
4 A I do.
5 Q Why don't you tell the jury what it means?
6 A The term "malingering" usually used in this type of
7 legal context is a term that means the person is lying, that they
8 are overstating the issues that they have, they are understating
9 the issues that they have, but that they are lying.
10 Usually, doctors, how they look at malingering or
11 try to figure out if someone is lying or not telling the truth,
12 is to look at evidence from effort, how much effort are they
13 putting forward. There is a simple test that can be done that
14 can give you an idea of how much effort people are putting
15 forward. And I think those tests have some usefulness when we
16 are talking about someone where there is a question of an injury,
17 right? Maybe the person had a concussion, maybe they didn't have
18 a concussion, maybe they are not suffering from as much pain as
19 we think they are suffering from. But in a case like this, a
20 severe traumatic brain injury, we have very objective evidence
21 that there is a severe traumatic brain injury here and we have
22 very specific knowledge of why Mark might not be able to put his
23 best effort forward, right? So when someone is anxious or
24 depressed, they are not putting their best effort forward. They
25 are finding it difficult to put their best effort forward. When

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1 someone has frontal lobe injury to both frontal lobes -- and we
2 know the frontal lobe is so important for initiation and to be
3 able to put your best foot forward -- it's also very difficult to
4 do that. And when someone is in chronic pain -- imagine being in
5 chronic pain and how it would be difficult to put your best foot
6 forward.
7 So when we think about the brain injury itself,
8 when we think about anxiety and depression, when we think about
9 pain issues, when we think about the thinking issues that are
10 involved with putting your best foot forward; the term
11 "malingering" has no real basis here. It doesn't give us any
12 help.
13 I wouldn't be surprised if it is difficult for
14 Mark to put his best foot forward, but because of those things we
15 just discussed and not because he has some other rationale for
16 it.
17 (Continued on next page)
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1 MR. HAWORTH: Objection.
2 THE COURT: Now? It's a little late.
3 MR. HAWORTH: I move to strike, Your Honor.
4 THE COURT: Approach, please.
5 (WHEREUPON, a discussion was held off the record,
6 at the side bar, in the presence of the Court and
7 counsel and out of the hearing of the jury.)
8 THE COURT: Overruled. To the extent that this
9 has come up a couple of times, I would like a copy of that.
10 It would be very helpful if I had some knowledge of what
11 was contained in it.
12 MR. O'HARA: Judge, I'll hand you up my copies if
13 that's okay.
14 THE COURT: Sure.
15 (Document was handed to the Court.)
16 THE COURT: Not that I'll be able to read all of
17 it before it matters, okay?
18 BY MR. MORELLI:
19 Q So the term malingering, that's not a medical term, is
20 it?
21 MR. HAWORTH: Objection.
22 THE COURT: Overruled.
23 Q Is it a medical term?
24 A It's not a term --
25 THE COURT: Are you asking specifically or are

Dr. Greenwald - by Plaintiff - Direct/Morelli Page 118

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

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

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

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1 specific diagnosis in this case? A critical thing, right,
2 because you can only offer someone treatment once you
3 understand what the diagnosis is.
4 And so again, the diagnosis that was made in this case
5 that I made, that all of his treating clinicians made, was
6 based on that, based on all of that type of information.
7 Q And that is coming to a conclusion of what's going on
8 with him, is that what a diagnosis is?
9 A That's correct.
10 Q Now, you also formulated a prognosis --
11 A Yes.
12 Q -- in this case. Can you tell the jury basically what
13 a prognosis is?
14 A So a prognosis is trying to understand is this
15 something likely to get better, is something likely to get
16 worse or to stay the same? And again, taking into all of those
17 factors and the time post injury that we are, that's how you
18 come up with a prognosis in such a case.
19 Q Okay. And, Doctor, I'm going to be asking you
20 specifically about Mark and I'm going to ask you to only answer
21 the questions if you feel that it's within a degree of medical
22 certainty, a reasonable degree of medical certainty; fair
23 enough?
24 A Yes.
25 Q Okay. So I'm going to ask you whether or not Mark

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1 Perez is suffering from cognitive deficits?
2 A Yes, he is.
3 Q Can you explain that to the jury?
4 A So cognitive deficits are a fancy term for talking
5 about memory, attention, concentration, insight, judgment,
6 processing speed, sort of all of the things that we think of as
7 our thinking. And we talked already about the areas of the
8 brain that are affected. He's had a chance to have what's
9 called neuropsychological testing a number of times and a
10 chance to do some, what you call, bedside evaluation, physical
11 examination to take a look at some of those different areas.
12 There is no question that Mr. Perez, Mark, that he's
13 suffering from cognitive impairments.
14 Q Now, you also formulated a prognosis about Mark's
15 employability; is that correct?
16 A That's correct.
17 Q And could you tell us -- tell the jury what you based
18 that on because this is an issue in the case, right?
19 A So my specialty, the specialty of physical medicine
20 and rehabilitation, is really all about trying to get people
21 back to their maximum -- trying to get them back to whatever
22 they were doing prior to their injury. Certainly, the more
23 severe the injury, the more difficult that is to do.
24 When I look at employability, and certainly, this
25 comes up regularly, like I said, it's a core part of my

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1 specialty, one of the things that I look at is, well, first of
2 all, what was type of work that the person was doing before,
3 what is their educational background and then what are the
4 symptoms and impairments, what's the part of their disease
5 process?
6 When we look at Mark's case specifically, obviously,
7 we know that he had this severe, traumatic brain injury, what
8 are the sequelae, what the problems that he continues to suffer
9 from after his severe traumatic brain injury? In Mark's case
10 the list is long. I have it here in my report. The number of
11 things that he continues to suffer from is long. But I think
12 you could really look at them in four categories.
13 So there's the seizures, right? So this
14 post-traumatic epilepsy that we have a chance to talk about.
15 Seizures themselves make it very unlikely that the person would
16 be employable, just the seizures themselves, the unpredictable
17 nature of the seizures, the medications that people need to
18 take for seizures, which often have cognitive and sedative
19 effects.
20 There are certainly plenty of people who are living
21 here who are unemployable just based on seizures. We talk
22 about the headaches and the head pain that he has, again,
23 related to all of these surgeries that he's needed to have
24 caused by this significant trauma that he sustained to his head
25 and his brain. Certainly, that chronic pain issue that he

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1 deals with in itself, like I said, there are people who would
2 be unemployable just based on that.
3 You talk about the cognitive issues he's had, again,
4 related to the severe damage to the devastation to his frontal
5 and temporal lobes, which is so important for people's
6 thinking, memory, attention, concentration, processing speed.
7 So the cognitive two impairments, which honestly, is one of the
8 most disabling issues that we've seen in traumatic brain
9 injuries. That in itself would often make it difficult for
10 people to get back to work. Again, so those challenges that --
11 and how work, especially the type of work that he was doing,
12 that's where attention, concentration, processing speed, memory
13 insight, judgment, all of those things would be so important.
14 Then look at the mood issues; the depression, the
15 anxiety, some of the post-traumatic stress symptoms that he
16 continues to suffer from. The depression, I'm sure, relates to
17 some of the things that he's lost, to the chemical changes in
18 the brain from the damage that we see there, from knowing that
19 he won't be able to get back with any of those things.
20 So when we look at all of those four things, each one
21 individually that could be disabling, you know, the headaches
22 that we talked about, the head pain that we talked about, the
23 seizures that we talked about, the cognitive impairment that we
24 talked about, the mood impairment that we talked about, when
25 you combine those things together and add on the fact that he

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

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

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

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

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

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

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

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

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

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

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

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

17 A That's correct.

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

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

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

4 But with that said, yes, he can actually walk and
5 talk, but again, it relates to the areas of the brain that
6 we're talking about. So we talked about the areas of the brain
7 that were most affected in his situation, the frontal lobes,
8 the temporal lobes, the corpus callosum, the area of the brain
9 that connects the two lobes. And so those areas of the brain
10 are causing the cognitive, the thinking, the memory, the
11 attention, the concentration, the processing speed issues, the
12 mood issues that we're dealing with, the insight, the judgment.

13 Those are the areas of the brain that affect those things. So
14 those are the deficits, those are the impairments, those are
15 the disabilities that this gentleman has. Those are the things
16 that are causing him to suffer, those are the things that are
17 causing his lack of independence.

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

23 Q We heard something this morning about life
24 expectancy --

25 MR. HAWORTH: Objection.

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

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

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

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

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1 lobe is working over time to make sure none of those things are
2 bothering me, so I can focus just us on talking to you and
3 giving you this information.
4 When you've had a damage to that filter, to those
5 frontal lobes, it's hard for you to be able to keep that focus
6 in there and things like lights and noise and the things that
7 we're normally able to sort of filter out, are bothering you.
8 He talks about those type of issues, the pain issues, the
9 challenges that he was suffering. Again, not so different over
10 that two-year period of time between my two evaluations,
11 speaking with his brother on the first evaluation and his
12 father on the second evaluation, again, sort of his need for
13 supervision, his unexpected seizures, things that make it that
14 someone's got to be around for this person who, prior to this
15 injury, was very independent.
16 Unfortunately, we've already talked about that these
17 challenges are permanent, this is what Mark has to live with.
18 This is his -- this is -- unfortunately, this is the long-term
19 effects of the severe traumatic -- severe and diffuse traumatic
20 brain injury that he has suffered in this situation. These
21 things --
22 THE COURT: I just want to kind of reign this in
23 because I'm getting a little concerned of time. Would you
24 please answer the question?
25 MR. MORELLI: Sure.

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1 THE COURT: Thank you.
2 BY MR. MORELLI:
3 Q I'm going to ask you, what are his needs going into
4 the future?
5 A He's going to need ongoing medical care for his
6 seizures, for his mood issues. He's going to need ongoing
7 supervision. He's going to need all of these -- all of these
8 different things relating to impairments that he's having; the
9 psychiatric care, the neurologic care, the supervision care,
10 the rehabilitative care. These are going to be the things that
11 continue to affect him and continue to be his needs over his
12 lifetime.
13 (Continued on next page.)
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1 DIRECT EXAMINATION (CONTINUED)
2 BY MR. MORELLI:
3 Q And that's within a reasonable degree of medical
4 certainty?
5 A Yes, it is.
6 Q Thank you.
7 MR. MORELLI: I have nothing further, your Honor.
8 THE COURT: Thank you. Let me give the jurors a
9 very short break, and we will pick up with
10 cross-examination.
11 (Jury steps out of courtroom)
12 (Short recess taken).
13 COURT OFFICER: All rise. Jury entering.
14 (Jury enters courtroom)
15 THE COURT: Please be seated.
16 Mr. Haworth.
17 MR. HAWORTH: Thank you, your Honor.
18 CROSS-EXAMINATION
19 BY MR. HAWORTH:
20 Q Good afternoon, Dr. Greenwald.
21 A Good afternoon.
22 Q You testified previously that you authored articles and
23 studies and things like that, right?
24 A Yes.
25 Q And you list them on your CV, correct?

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1 A Correct.
2 Q I believe there is one listed on there, I think it is
3 Number 22 where Anne Felicia Ambrose is a co-author of yours,
4 correct?
5 A That's a good possibility.
6 Q You are familiar with Dr. Ambrose, you know who she is?
7 A I am. I mentored her when she worked at Mount Sinai.
8 Q And she is a brain injury medicine certified
9 physiatrist, same certification as you; correct?
10 A Correct.
11 Q Are you aware that she examined Mr. Perez as well?
12 A I was told that.
13 Q Now, you maintain a forensic practice as well as one
14 where you treat patients, correct?
15 A About 5 or 10 percent of my time is spent doing
16 forensic work, if you call that a forensic practice.
17 Q I ask you to confine your answers to my question. All
18 I wanted to know is if you maintain a forensic practice.
19 A Yes.
20 Q Thank you.
21 You are here today in your forensic capacity as
22 opposed to your capacity in actually treating patients, correct?
23 A Yes.
24 Q You saw Mr. Perez twice. And after you did both times,
25 you wrote his lawyer to tell him what you found; correct?

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

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

Greenwald - by Plaintiff - Cross / Haworth Page 139

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

Greenwald - by Plaintiff - Cross / Haworth Page 140

1 being prescribed helmet wear?
2 A Yes, he had a helmet on for an extended period of time
3 after his injury.
4 Q That was at the time of his initial injury after his
5 initial surgeries, correct?
6 A Yes.
7 Q My question is now, doctor, I think you know that. I
8 am asking now, do you have anything in all of those records where
9 a doctor wants him to wear a helmet because of seizures because
10 he says he is falling now?
11 A I did not see that, no.
12 Q Thank you.
13 Now, you mentioned briefly, I think on direct
14 EEGs; do you recall that?
15 A Yes.
16 Q Now, EEGs are a standard test that is given when
17 someone says or someone is suspected to have epilepsy or a
18 seizure disorder; is that correct?
19 A That's correct.
20 Q Seizures aren't a disease of their own, they are a
21 symptom of epilepsy; true?
22 A That's not true, no.
23 Q Okay. So you disagree with that?
24 A I do.
25 Q Nonetheless, you reviewed the EEG reports?

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1 A I did.
2 Q Would you agree with me, doctor, that Mark Perez had
3 EEGs, about seven of them from July 15, 2014, through April 2,
4 2017?
5 A Yes.
6 Q Would you agree with that?
7 A Yes.
8 Q That's all in your records, right?
9 A Yes.
10 Q Every single one of them, there is no epileptiform
11 seen; is that true or not true?
12 A Right. There are no seizures seen.
13 Q Now, in one of those, on October 7, 2014, that was done
14 at St. Charles Hospital -- and you talked about his treatment at
15 St. Charles, do you remember that?
16 A Yes.
17 Q Okay.
18 Now, would you agree with me that on October 27,
19 2014, he had an EEG done at St. Charles?
20 A Yes.
21 Q Okay. When I look at the report I see the following:
22 "Patient shaking foot. EEG normal. Clinically looks voluntary."
23 Did I read that correct?
24 A Yes.
25 MR. MORELLI: Your Honor, may we approach?

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

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

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1 A There are ways to measure depression. It sort of goes
2 over both an objective and subjective component to it.
3 Q That would be the standardized test, the multiple
4 choice, the picture drawing, the memory test; those would be the
5 objective standardized tests, right?
6 A Yes.
7 Q We will get to those. But as to depression, there can
8 be a subjective complaint of depression; correct?
9 A Yes.
10 Q The same thing with sensitivity to noise?
11 A Correct.
12 Q The same thing with headaches, true?
13 A Yes.
14 Q And Mark Perez reported symptoms like that among
15 others, true?
16 A That's correct.
17 Q Okay. And we just said objective symptoms can be
18 measured.
19 Now, I take it you would agree there are
20 standardized tests that measure things like -- and you talked
21 about these on direct -- cognition, attention, concentration,
22 memory, processing speed; things like that. Is that a true
23 statement?
24 A That's correct.
25 Q And when a patient reports those kinds of things, am I

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

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1 performance validity tests; is that true?
2 A That's correct.
3 Q And you give performance validity tests in your own
4 day-to-day practice, don't you?
5 A I do sometimes, yes.
6 Q And you give standardized tests that have performance
7 validity testing built into them, don't you do that?
8 A I usually leave that to the neuropsychologists, yes.
9 Q Okay. The neuropsychologists do the same thing, don't
10 they?
11 A That is primarily what they do, yes.
12 Q Oh, by the way, let me ask you something. You are not
13 a neurologist, correct?
14 A I am not.
15 Q You are also not a neurosurgeon, correct?
16 A I am not.
17 Q So the various surgeries that you testified about
18 during direct examination, you don't perform those surgeries,
19 right?
20 A I do not.
21 Q You don't have the qualifications, the experience to do
22 that, right?
23 A That's correct.
24 Q Okay.
25 Now, the test of memory malingering, are you

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1 familiar with what that is?
2 A I am.
3 Q Is that referred to as the TOMM test, the test of
4 memory malingering?
5 A Yes, it is.
6 Q And malingering would be performing poorly
7 intentionally for the purpose of secondary gain; is that
8 accurate?
9 A That would be one of the things that you would
10 categorize as lying, yes.
11 Q And malingering is a term contained in the DSM, true?
12 A I don't know.
13 Q But if I say it, you have no reason to doubt what I am
14 saying?
15 A I have no reason to doubt.
16 Q Okay.
17 Seeking to get an increased award in a lawsuit,
18 that would be an example of malingering, true?
19 A It would be a reason why someone might malingering, yes.
20 Q Do you know what the REY 15-Item test is?
21 A Yes, I do.
22 Q And that is where you are asked to recall a certain
23 number of numbers, letters, figures, things like that after being
24 shown them for a certain period of time; is that true?
25 A That's true.

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

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

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

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1 true?
2 A Yes.
3 Q And he went with Mr. Perez, his dad, who is seated
4 behind me; correct?
5 A Yes.
6 Q And Mr. Perez described most of Mark's cognitive
7 functioning as being intact. That's what he told the doctor;
8 fair to say?
9 A Yes.
10 Q And his father further described Mark as pretty focused
11 and described his memory as, and this is a quote, "excellent,"
12 true?
13 A I am open to that being in there. I don't have the
14 record.
15 Q Do you want me to show you the record or will you take
16 my word for it?
17 A I will take your word for it.
18 Q Thank you. I have it.
19 He further said that his son can be very
20 spontaneous and that his sense of humor is, quote, "appropriate
21 and relevant."
22 Do you have any reason to disagree with that?
23 A I have no reason to disagree that it is in the record.
24 Q Let me show you a copy of the record.
25 MR. HAWORTH: May I approach?

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

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

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1 Q Now, on Trial 1 he scored below the 42, 43, 41 that we
2 talked about before. He got a 37, true?
3 A True.
4 Q And on the second trial, instead of getting a 46, 47,
5 48 that we talked about as the cutoff before, he got a 38; true?
6 A Correct.
7 Q And I would like you to go back to Dr. Sofir-Kusnetz's
8 report based on his scores -- and, by the way, she did a whole
9 bunch of other standardized tests too; correct?
10 A Yes.
11 Q And those appear to you, I take it you agree, to be the
12 standard standardized testing that would be done for an
13 evaluation of this type; correct?
14 A Yes.
15 Q If you want to treat a patient, that's what you are
16 going to give him; true?
17 A Yes.
18 Q And she did it over three days to make sure he wasn't
19 tired, wasn't fatigued, things like that. You want to minimize
20 those things, and that's what this doctor did; correct?
21 A Correct.
22 Q Nonetheless, under "summary and recommendations," would
23 you agree with me that she finds as follows regarding Mark Perez:
24 "His performance on the TOMM," the test of memory malingering,
25 "was significantly lower than expected which is not consistent

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

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

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1 A Yes.
2 Q Is it a true statement that your former colleague
3 reported that there were regional sensory changes in the left
4 forearm that deviated from accepted neuroanatomy? Would you
5 agree with that statement?
6 A I agree that she said that, yes.
7 Q And "accepted neuroanatomy" means the way the body
8 works, true?
9 A True.
10 Q And if something deviates from that accepted
11 neuroanatomy, it essentially means the body doesn't work that
12 way; correct?
13 A I can't say what Dr. Ambrose meant.
14 Q Okay. But neuroanatomy is how the body works, do we
15 agree on that?
16 A Yes.
17 Q And she said it deviates from that; fair statement?
18 A Yes.
19 Q You are familiar with Dr. Barry Jordan, the
20 neurologist; correct?
21 A Yes.
22 Q Do you agree he is well-qualified?
23 A He is.
24 Q You worked with him?
25 A We have.

Greenwald - by Plaintiff - Cross / Haworth Page 158

1 Q He also administered the Rey 15-Item Test, and he did
2 it --
3 MR. MORELLI: Objection, your Honor. Can we
4 approach?
5 THE COURT: Yes, of course.
6 (Sidebar conference held off the record)
7 (Continued on next page)
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Dr. Greenwald - by Plaintiff - Cross/Haworth Page 159

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

Dr. Greenwald - by Plaintiff - Cross/Haworth Page 160

1 points, are you aware of that?
2 A Yes, I am aware.
3 Q Okay. So he scored well within what someone
4 unfortunately, afflicted with Alzheimer's would score, correct?
5 A Correct?
6 Q That would be severe dementia, true?
7 A Yes.
8 Q Okay. Now, you mentioned Mr. Perez's gait. Gate is
9 the way he walks, correct?
10 A Correct.
11 Q Are you aware that when he examined him, Dr. Jordan
12 noted, quote/unquote, gate was notable for pain, weakness on
13 the left, are you aware of that?
14 A I did see that in his report, yes.
15 Q And did you also see in his report where he noted the
16 deliberate and exaggerated nonphysiological use of the left
17 lower extremity, you saw that, too?
18 A I read that, yes.
19 Q And nonphysiological use, again, would be the body
20 doesn't work that way, true?
21 A Yes.
22 Q Dr. Jordan also saw Mr. Perez in November of 2015,
23 correct?
24 A Yes.
25 Q He administered the MOCA that time, too, correct?

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

Dr. Greenwald - by Plaintiff - Cross/Haworth Page 162

1 A Yes.
2 Q Okay. And he was going to the gym. We know about
3 that, correct?
4 A Correct.
5 Q You've seen Dr. Gordon's reports, correct?
6 A Yes.
7 Q And Dr Gordon was retained by Mr. Morelli's office,
8 correct?
9 A Correct.
10 Q The more recent report of Dr. Gordon, you're aware,
11 are you not, that Mr. Perez's TOMM® scores, his test of memory
12 malingering scores, were well below the cutoff for validity;
13 isn't that true?
14 A Correct.
15 Q Now, Doctor, you did a physical examination of
16 Mr. Perez, correct?
17 A Yes.
18 Q And you found four out of five strength on the left,
19 five out of five strength on the right and you -- so therefore,
20 bilaterally you found normal or close normal strength, correct?
21 A No.
22 Q Okay. Well, let me ask you this. Four out of five
23 left finger flexors, five out of five right, you found that,
24 right?
25 A Correct.

Dr. Greenwald - by Plaintiff - Cross/Haworth Page 163

1 Q Okay. And five out of five bilateral shoulder
2 abductors, elbow flexors, elbow extensors, wrist flexors, wrist
3 extensors, correct?
4 A Correct.
5 Q Five out of five motor strength bilateral hip flexors,
6 knee extensors, knee flexors, ankle plantar and dorsiflexors,
7 correct?
8 A Correct.
9 Q Those were your findings on both occasions when you
10 examined Mr. Perez, both in February 2017 and in June --
11 recently, June 2019, true?
12 A True.
13 Q And by the way, Mr. Perez is right-hand dominant,
14 correct?
15 A I believe so, yes.
16 Q Okay. In terms of his medications, when you saw him
17 he was taking 100 milligrams, three pills BID of Tegretol,
18 correct?
19 A Is this on the first visit?
20 Q I believe it was the first visit. It may be the
21 second visit or it may have been the same in both, but at some
22 point he was taking Tegretol when you saw him, true?
23 A Tegretol?
24 Q And you can refer to your report.
25 A Thank you.

Dr. Greenwald - by Plaintiff - Cross/Haworth Page 164

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

Dr. Greenwald - by Plaintiff - Cross/Haworth Page 165

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

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

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1 records?
2 A Yes.
3 Q Okay. Now, when he saw Dr. Xian more recently, July
4 of 2018, would it be fair to say that Dr. Xian reported that
5 Mr. Perez reported no recurrent seizures? It's in his report:
6 Denies any recurrent seizures, any reason to doubt that?
7 A I have no reason to doubt that.
8 Q March 7, 2018, any reason to doubt that Mr. Perez
9 reported less headaches in frequency and severity, frequency
10 was approximately one time a week, any reason to doubt that?
11 A No.
12 Q November 8, 2017, any reason to doubt that Mr. Perez
13 reported to his treating neurologist Dr. Xian that he was
14 having no recurrent seizure activity since he went on Tegretol?
15 A I have no reason to doubt that.
16 Q Any reason to doubt that Mr. Perez was exercising
17 daily? Daily is what he told his treating doctor, any reason
18 to doubt that?
19 A No.
20 Q And that his mood was stable, any reason to doubt
21 that?
22 A No.
23 Q His headaches were stable, any reason to doubt that?
24 A No.
25 Q No recurrent seizure activity, any reason to doubt

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

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1 So we'll be seeing you back after this segment on
2 Tuesday at 9:15 a.m.
3 REDIRECT EXAMINATION
4 BY MR. MORELLI:
5 Q Dr. Greenwald, let's take one topic at a time, okay?
6 Let's talk about the seizures because there was questions about
7 seizures in 2013 and 2014, correct?
8 A Yes.
9 Q Counsel asked you.
10 And actually, when I was questioning you earlier, we
11 agreed that the first time that he exhibited seizures,
12 certainly in a grand mal way, was in 2015; is that correct?
13 A That's correct.
14 Q Okay. And there's nothing about your opinion about
15 him having traumatic epilepsy that has changed after the
16 questions that you were just asked; am I correct?
17 A That's correct.
18 Q Okay.
19 MR. HAWORTH: Your Honor, I'd like to know what
20 record he's trying to --
21 MR. MORELLI: I can show it to you. I didn't use
22 it yet.
23 Give him the date and the Bates stamp.
24 BY MR. MORELLI:
25 Q Now, I'm going to ask you, Doctor, the questions by

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1 counsel with reference to there not being any objective testing
2 that showed epilepsy, okay? I'm going to refer you to a test
3 that was done between August 18, 2014 and August 19, 2014. It
4 was an EEG recorded digitally during that period of time?
5 MR. MORELLI: And what's the Bates stamp number?
6 MR. SIROTKIN: We don't have a Bates stamp.
7 MR. MORELLI: Okay.
8 BY MR. MORELLI:
9 Q I'm going to ask you to read, if you would, Doctor,
10 the impression that was given from that test, what was the
11 impression?
12 THE COURT: Sustained to reading it. I don't
13 think this is in evidence.
14 MR. MORELLI: Well --
15 THE COURT: Is that going to be your objection?
16 MR. HAWORTH: Also, I want to see it because I
17 think he may be going beyond the scope of cross.
18 MR. MORELLI: What?
19 THE COURT: Why don't you show it to him, please,
20 and do it right over here?
21 (WHEREUPON, a discussion was held off the record,
22 at the side bar, in the presence of the Court and
23 counsel and out of the hearing of the jury.)
24 BY MR. MORELLI:
25 Q So, Doctor, I would ask you to read the EEG

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1 impression, and, once again, between August 18, 2014 and
2 August 19, 2014, as to whether or not there was an objective
3 test.
4 THE COURT: I just want to clarify. Is there an
5 objection to this because it's not in evidence being read
6 or are you asking him to read it to himself? I'm just not
7 clear where we are.
8 MR. HAWORTH: It's form over substance. It's
9 fine, he can read it.
10 THE COURT: Very good.
11 MR. MORELLI: Thank you.
12 BY MR. MORELLI:
13 Q Read it out loud.
14 A The EEG impression was that this is an abnormal
15 24-hour EEG due to mild disorganization and intermittent
16 slowing in the right frontotemporal area, which signifies focal
17 cerebral dysfunction. In addition, there are rare right
18 temporal and right frontotemporal sharp waves that are
19 epileptiform, meaning seizures. The three-lead EKG analyzed by
20 the computer software does not show any significant arrhythmias.
21 Clinical correlation is suggested.
22 Q So can you tell us, what is this? Does this mean --
23 is this suggestive that there was no objective test that showed
24 that there was seizures?
25 A This shows evidence of seizures even back in 2014.

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1 Q And that's is objective test, not a subjective test,
2 correct?
3 A That's correct.
4 Q And now, when we were talking earlier about -- let's
5 deal with -- we were talking earlier about this effort, you
6 know, when you're doing a test and you're not putting forth
7 effort, right?
8 A Yes.
9 Q And in a normal person that doesn't have any brain
10 damage or anything, then if they're not putting forth effort,
11 then you could understand about that; am I correct?
12 A Correct.
13 Q But what about in Mark Perez's case, you were telling
14 us earlier about this concept of putting forth effort when, in
15 fact, we now know that he had seizure activity even back in
16 2014 objectively, correct?
17 A Yes.
18 Q So tell us about these tests and how accurate they are
19 with reference to putting forth effort?
20 MR. HAWORTH: Objection.
21 THE COURT: I need you to approach on this. I'm
22 a little confused.
23 (WHEREUPON, a discussion was held off the record,
24 at the side bar, in the presence of the Court and
25 counsel and out of the hearing of the jury.)

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

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

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1 Q Would there be a reason for a practitioner to give
2 less than the highest dose of Tegretol to control epileptic
3 seizures, would there be a reason to do that?
4 A Yes.
5 Q Okay. Can you tell the jury what that reason would
6 be?
7 A The goal is not to give the highest dose that you can
8 give, it's to give a dose that will both help with the problem
9 that you're trying to treat and minimize the risk of side
10 effects.
11 Q And so is that what you would normally do in your
12 practice if you were treating people?
13 A Yes.
14 Q Okay. And when you examined Mark Perez and you
15 reviewed all of the records, you formulated opinions about this
16 case, correct?
17 A Yes, I did.
18 Q And your opinions were to a reasonable degree of
19 medical certainty; is that correct?
20 A Yes.
21 Q Okay. And were you telling the truth about what your
22 opinion was about this case?
23 A Absolutely.
24 Q And have you changed any of your opinions because of
25 the questions by counsel?

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1 A Not at all.
2 Q Thank you, Doctor.
3 THE COURT: Okay, Doctor.
4 MR. MORELLI: One other thing?
5 MR. SIROTKIN: Just one thing.
6 (Brief pause in the record.)
7 BY MR. MORELLI:
8 MR. MORELLI: Your Honor, I'm going to -- let me
9 just show counsel this. There's just one more thing.
10 THE COURT: Okay.
11 BY MR. MORELLI:
12 Q Just, Doctor, I'm going to refer you to a record from
13 South Shore Neurologic and this is Dr. Xian. You heard counsel
14 reference Dr. Xian?
15 A Yes.
16 Q And I highlighted some portions of this dated May 29,
17 2019. This was an office visit and he writes down: History
18 his present illness. And then he talks about an EEG that was
19 done November 2018, okay? And I just ask you to read the
20 highlighted portions to the jury, please.
21 (Document was handed to the witness.)
22 Q That's Dr. Xian, treating doctor.
23 A This is the interval history from May 29, 2019. The
24 patient developed an episode of a witnessed seizure two days
25 ago. The patient has compliance to the AED, which stands for

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1 antiepileptic drug. The patient denies alcohol intake, sleep
2 deprivation, fever. The patient reported seizure occurred
3 about two hours after taking decongestants. The last seizure
4 prior to this episode was November 2018.
5 Then November 15, 2018: The patient has a history of
6 seizure disorder, history of traumatic brain injury and
7 headaches. The patient developed multiple recurrent partial
8 seizures recently related to missing Tegretol or missing a
9 meal. The patient did not lose consciousness, left arm tight,
10 unable to talk for a few minutes. EEG from November 2018
11 reported persistent right frontotemporal slowing, indicative of
12 right frontotemporal structure abnormality and infrequent
13 paroxysmal right frontotemporal sharp waves that are
14 potentially epileptogenic.
15 Q So is that an objective test?
16 A Yes, it is.
17 Q And tell the jury what that means.
18 A It's just showing objective evidence of the seizures
19 that he's suffering from.
20 MR. MORELLI: Thank you? I have nothing further,
21 Your Honor.
22 THE COURT: Very good. Doctor, you can step
23 down.
24 THE WITNESS: Thank you.
25 (Witness exits the witness stand.)

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1 THE COURT: Ladies and gentlemen, I've already
2 given you instructions for the weekend. I've told you what
3 time to be back. My only other instruction is to enjoy
4 your three-day weakened. Thank you very much.
5 THE COURT OFFICER: All rise, jury exiting.
6 (Jurors exited the courtroom.)
7 THE COURT: Anything before we close the record?
8 MR. HAWORTH: Just a quick record.
9 THE COURT: Yes, go ahead.
10 MR. HAWORTH: I had requested that the Court
11 permit me to recross the witness. There were two areas
12 where I would have, if I were permitted to, but Your Honor
13 denied that request, I would have asked him on the
14 efforts/malingering questions that Mr. Morelli asked and
15 also, on the last question where the witness read an EEG
16 report that talked about something being intentionally
17 epileptic and then Mr. Morelli followed up and the witness
18 said it's objective evidence of epilepsy, not potential.
19 And that's what the document said, it said potential, but I
20 was denied that opportunity by, Your Honor.
21 THE COURT: Very good. You read my part rules.
22 My part rules clearly indicate that except for exceptional
23 circumstances, recross-examination is not permitted. I
24 didn't hear anything that Mr. Morelli did that exceeded
25 what was anything more than rehabilitation of what was

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1 going on during direct -- during cross-examination and
2 there was no basis, in my opinion for recross.
3 MR. HAWORTH: Thank you, Your Honor.
4 THE COURT: Thank you. Anything else?
5 MR. HAWORTH: Nothing that we need to do today,
6 Judge.
7 THE COURT: Okay. So let me go off the record.
8 We will close the record for today.
9 (WHEREUPON, court is recessed and the case
10 adjourned to Tuesday, November 12, 2019 at 9:30 a.m.)
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