

In The Matter Of:

Perez v.

LNW

November 19, 2019

New York Supreme Court - Civil Branch

60 Centre Street - Room 420

New York, New York 10007

646-386-3050

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Min-U-Script® with Word Index

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1 SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 56
 2 -----X
 3 MARK PEREZ,
 Plaintiff,
 4 - against -
 5 LIVE NATION WORLDWIDE, INC.,
 6 Defendant.
 -----X
 7 Index No. 158373/2013 November 19, 2019
 71 Thomas Street
 New York, New York
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 9
 10
 11 B E F O R E: HONORABLE JOHN J. KELLEY, JSC, and a Jury
 12
 13
 14 A P P E A R A N C E S:
 15
 16 For Plaintiff:
 17
 MORELLI LAW FIRM PLLC
 18 777 Third Avenue
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 19 BY: BENEDICT MORELLI, ESQ.
 DAVID T. SIROTKIN, ESQ.
 20 MICHAEL S. SCHLESINGER, ESQ.
 ALEXANDER R. MORELLI, ESQ.
 21
 22 (Appearances continued on next page)
 23
 24
 25

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1 APPEARANCES CONTINUED:
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 Hackensack, New Jersey 07601
 10 BY: SCOTT HAWORTH, ESQ.
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 23
 24 Laura L. Ludovico
 Alan F. Bowin
 Senior Court Reporters
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M. Perez - by Plaintiff - Direct/B. Morelli

1 THE COURT OFFICER: All rise, jury entering.
 2 (Jurors entered the courtroom.)
 3 THE COURT: Good morning, everybody.
 4 Mr. Morelli.
 5 MR. MORELLI: Plaintiff would like to call the
 6 Plaintiff Mark Perez to the stand.
 7 THE COURT OFFICER: Witness entering.
 8 (Witness enters the witness stand.)
 9 THE COURT OFFICER: Just remain standing and face
 10 the clerk.
 11 THE CLERK: Please raise your right hand.
 12 MARK PEREZ, having been first duly sworn, took the witness
 13 stand and testified as follows:
 14 THE CLERK: Please, in a loud, clear voice state
 15 your name and address for the record.
 16 THE WITNESS: Mark Perez, 91 39th Street, Islip,
 17 New York.
 18 THE CLERK: You may be seated.
 19 THE COURT: Mr. Perez, just a couple of
 20 instructions. You can have a seat.
 21 I want you to try to speak in a loud, clear voice
 22 so everyone on the jury can hear what you have to say. I
 23 want you to please listen to the question that's asked of
 24 you very carefully and only answer that question. If
 25 there's an objection or if you see one of the lawyers stand

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M. Perez - by Plaintiff - Direct/B. Morelli

1 up as if they're going to make an objection, don't give an
 2 answer, let me rule on the objection first.
 3 If you're asked a yes or no question please, try
 4 to answer with a yes or a no. If you can't answer with a
 5 yes or a no, let the attorney know, but don't do an
 6 explanation unless you are called upon to do that.
 7 If you need a break for any reason, please let me
 8 know. That's fine. During any breaks or at any point you
 9 can never have any interaction with any of the jurors,
 10 okay?
 11 THE WITNESS: Yes, Your Honor.
 12 THE COURT: Thank you very much, Mr. Morelli.
 13 MR. MORELLI: Thank you, Your Honor.
 14 DIRECT EXAMINATION
 15 BY MR. MORELLI:
 16 Q Mark, good morning.
 17 A Good morning.
 18 Q I'm going to keep my voice up and you're going to try
 19 to do the same, okay --
 20 A Yes.
 21 Q -- so that the jury can hear what you have to say?
 22 You and I have met many, many times, true?
 23 A True.
 24 Q And during those times we chatted about a lot of
 25 things and a lot of it had to do with your testimony, true?

M. Perez - by Plaintiff - Direct/B. Morelli Page 753

1 A True.
 2 Q And we discussed your testimony on a number of
 3 occasions, but we also discussed your testimony again last
 4 night; is that true?
 5 A Yes, last night.
 6 Q Right?
 7 A Yes.
 8 Q And for at least a couple of hours last night, true?
 9 A True.
 10 Q So if you don't understand my question or you don't
 11 know something, say so and we'll try to do it over, fair?
 12 A Fair.
 13 Q Okay. Now, we discussed last night certain topics
 14 that I wanted to cover with you, correct?
 15 A Correct.
 16 Q And one of the topics was your needing to wear a
 17 helmet, but you don't wear one.
 18 Do you wear one?
 19 A No.
 20 Q Okay. Would you please tell the jury why you don't?
 21 A I understand if I fall and hit my head I may die and
 22 it would be safer if I wore a helmet, but when I put this
 23 helmet on, it makes me feel worse about myself.
 24 Q Mark, don't be afraid to tell us a story about when
 25 you did wear a helmet because you did wear one at one time, did

M. Perez - by Plaintiff - Direct/B. Morelli Page 754

1 you not?
 2 A I did.
 3 Q Please tell the jury about that.
 4 A I remember that I had this helmet on and my family had
 5 taken me to a store, a pharmacy, and when I was on line a
 6 little kid had asked me what team I had played for and I knew I
 7 was wearing the helmet because my skull was damaged.
 8 Q How did that -- when you and I discussed your
 9 testimony I had asked you to speak slowly so that the jury
 10 could understand you, but you could speak at whatever pace is
 11 comfortable for you, okay?
 12 A Okay.
 13 Q Because I want the jury to understand what your
 14 feelings are, what your thoughts are, whatever they are. If
 15 you don't understand something, just tell me, okay?
 16 A Yes.
 17 Q So tell the jury how you felt that day when they asked
 18 you what team you played for.
 19 A It made me feel really disabled and I wanted the kid
 20 to look up to me and I had -- I had to look at this kid and
 21 tell him that I'm sorry, but I'm disabled buddy and that hurt.
 22 Q Did you discuss your feelings at all after that
 23 happened with any members of your family?
 24 A I don't think so.
 25 Q Okay. Why is that? If you felt hurt like that why

M. Perez - by Plaintiff - Direct/B. Morelli Page 755

1 wouldn't you tell your family about it? This is your
 2 opportunity to let the jury know how you feel, do you
 3 understand me?
 4 A I understand.
 5 Q Okay.
 6 A I don't want people to worry about me and I know it's
 7 hard to not worry about me, to worry if something may happen,
 8 but it's harder for me to admit that to people, my family
 9 included.
 10 Q Does your family seem to worry about you?
 11 MR. O'HARA: Objection.
 12 THE COURT: Sustained.
 13 MR. MORELLI: Your Honor, can I be allowed some
 14 latitude with this witness?
 15 THE COURT: You want to come up for a second?
 16 (WHEREUPON, a discussion was held off the record,
 17 at the side bar, in the presence of the Court and
 18 counsel and out of the hearing of the jury.)
 19 MR. MORELLI: Thank you.
 20 BY MR. MORELLI:
 21 Q Let's go to another topic.
 22 Tell us about your girlfriend Kristy. And the reason
 23 why I'm talking with you about this is because we've already
 24 heard some testimony about it, okay, from your mom, from your
 25 brother, okay?

M. Perez - by Plaintiff - Direct/B. Morelli Page 756

1 A Okay.
 2 Q So how long had you been going out with Kristy at the
 3 time that you had the accident?
 4 A It was about eight years.
 5 Q Okay. And how did you feel about her?
 6 A I loved her.
 7 Q Did you guys discuss lifetime plans, like marriage?
 8 A All the time.
 9 Q Had you discussed that?
 10 A All the time, yes. We spoke about getting married and
 11 starting a family and our future together.
 12 And we were a really great couple and people always
 13 saw that in us.
 14 Q We know that there came a time that Kristy broke up
 15 with you; is that a correct statement?
 16 A Correct.
 17 Q And when did that happen, do you remember when it was?
 18 You don't have to give me a date, just in terms of what
 19 happened and when she broke up with you.
 20 A She broke up with me after I returned from the
 21 hospital after this accident.
 22 Q So that was you after your surgery, correct?
 23 A That was after my surgery.
 24 Q And did you -- after that happened, as opposed to the
 25 situation with the helmet, did you discuss with any member of

M. Perez - by Plaintiff - Direct/B. Morelli Page 757

1 your family how you felt about Kristy breaking up with you?
 2 A I did.
 3 Q Who did you discuss it with?
 4 A I tried to change the subject when they had asked me
 5 because it hurt so much to talk about it.
 6 Q So that you did or did not tell any of your family
 7 members how you felt, do you remember?
 8 A I don't remember.
 9 Q Okay. They would ask you about it and you would
 10 change the topic. Why would you change the topic?
 11 A Because I feel like -- I felt like a failure and I
 12 know I shouldn't have felt that way.
 13 Q So since the accident and Kristy breaking up your
 14 relationship, have you tried to date anybody to have a
 15 relationship with someone new?
 16 A I've tried, yes.
 17 Q And can you give us a for instance -- are you dating
 18 anyone now?
 19 A Still trying.
 20 Q Can you give us a for instance of when you tried to
 21 date someone for the first time after the accident?
 22 A There was a girl who I was very -- very into and I
 23 liked her and I think it took a while for her to understand my
 24 reality.
 25 Q When you say "a while," how long a period of time are

M. Perez - by Plaintiff - Direct/B. Morelli Page 758

1 we talking about?
 2 A Two months.
 3 Q And then what happened? You said to understand your
 4 reality. What happened?
 5 A I had -- she had recommended I should do yoga and I
 6 tried and I wound up having a seizure.
 7 Q Where?
 8 A In was in the middle of the class, a yoga class.
 9 (Continued on next page.)
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Perez - Plaintiff - Direct/B. Morelli Page 759

1 Q Who was in attendance? Do you remember that?
 2 A I do.
 3 Q Tell the jury. Who was there?
 4 A It was mainly women in the class, full room of yoga
 5 class.
 6 Q And this girl that you were trying to date had
 7 recommended you go to this class?
 8 A Yes.
 9 Q And what happened during the class?
 10 A I thought I was -- I thought I was doing good, and
 11 after about 15 minutes I had an epileptic seizure, a bad one,
 12 the one that I shake and I -- I spit (indicating) and I lose
 13 control of -- I go to the bathroom on myself.
 14 Q And then what happened? What do you remember after
 15 that?
 16 A This poor group of women had helped get me on the
 17 ambulance, covered with sweat and everything I went to the
 18 bathroom on, on myself.
 19 Q So how did that affect your dating this person? Did
 20 it?
 21 A I think it's -- I think it scared her away from me.
 22 Q And how did you -- tell us how you felt, you know, at
 23 that time. Did you -- you know, you lost consciousness for a
 24 while, or not?
 25 A Yes.

Perez - Plaintiff - Direct/B. Morelli Page 760

1 Q And after you regained consciousness, after the
 2 seizure, what did you feel; what were you thinking? If you
 3 remember.
 4 A I do.
 5 Q Tell the jury, if you remember.
 6 A In the ambulance and these workers explaining to me I
 7 had a seizure, and bringing me to the hospital, and treating me
 8 for a seizure.
 9 Q What did you feel about the incident happening and
 10 where it happened?
 11 A I was embarrassed, and scared me.
 12 Q How long ago was this?
 13 A I don't -- I don't remember.
 14 Q The... You've seen a number of --
 15 Are you doing okay?
 16 A Yes.
 17 Q Okay. You've seen a number of doctors, and we're going
 18 to talk about that. Do you remember, most recently, seeing
 19 Dr. Schwartz, who testi -- I told you, he testified here
 20 yesterday?
 21 A Yes.
 22 Q Okay. Do you remember seeing him?
 23 A Yes, I do.
 24 Q Okay. Do you remember having a conversation with him
 25 about your seizures?

Perez - Plaintiff - Direct/B. Morelli Page 761

1 A Yes.
 2 Q And did he explain to you why you have seizures and the
 3 possibility that something might be able to be done about it in
 4 the future?
 5 MR. O'HARA: Objection.
 6 THE COURT: Sustained.
 7 Q Did you hear what the doctor had to say about your
 8 seizures and about epilepsy, and what they could do about it?
 9 MR. O'HARA: Objection; same objection.
 10 THE COURT: Approach, please.
 11 (Discussion off the record at sidebar.)
 12 THE COURT: We're going to take a short break.
 13 COURT OFFICER: All rise. Jury exiting.
 14 (The jury left the courtroom.)
 15 THE COURT: You can take a break. If you need to
 16 use the restroom, you may.
 17 THE WITNESS: Okay.
 18 (The witness stepped down.)
 19 THE COURT: Can I hear the last question back,
 20 please?
 21 MR. O'HARA: Can we have the last two back?
 22 THE COURT: The last two. That's fine.
 23 (The reporter read back the requested portion of
 24 the record.)
 25 MR. O'HARA: It's the exact same question you

Perez - Plaintiff - Direct/B. Morelli Page 762

1 sustained the objection to.
 2 THE COURT: Yeah.
 3 MR. O'HARA: It's the exact same question.
 4 THE COURT: Then I thought about it and I changed
 5 my mind. I understand. It has relevance to other areas.
 6 It's not -- I don't want to speak for Mr. Morelli,
 7 but I don't believe it was offered for the truth of the
 8 statement.
 9 MR. O'HARA: First, the Court has already ruled on
 10 the "what they can do about it": He is a candidate for
 11 testing with respect to the possibility of being a candidate
 12 for surgery. Those two questions, specifically, presume
 13 facts that not only are not in evidence but can't be in
 14 evidence; "what they can do about it," meaning the
 15 underlying surgery that Dr. Schwartz has specifically said
 16 he's not even a candidate today.
 17 So the form of that question is objectionable.
 18 If it's clarified that what he's talking about is
 19 the progression of further evaluations by Dr. Schwartz that
 20 includes the litany of tests that Dr. Schwartz outlined;
 21 that upon completion of that -- those -- tests, he might
 22 thereafter be a candidate, then the form of the objection
 23 changes. But as it's phrased currently, that presumes that,
 24 in fact, they can do something about it vis-à-vis
 25 Dr. Schwartz and the proposed surgery, and that has been

Perez - Plaintiff - Direct/B. Morelli Page 763

1 stricken.
 2 MR. B. MORELLI: I don't know -- I really don't
 3 understand the objection, to be honest with you.
 4 Dr. Schwartz testified and his testimony is on the
 5 record, based on what he said, that he believes that he is a
 6 candidate but he would have to do testing. And if
 7 Mr. O'Hara would allow me to ask the next questions, he
 8 might hear about that.
 9 THE COURT: Listen, I'm going to allow it subject
 10 to an application to strike it pending what comes out. But
 11 bear in mind that this has a couple of applications here.
 12 Not only may it be relevant in terms of the future medical
 13 treatment, but it also may be relevant concerning the issue
 14 of emotional damage. So it's not necessarily one or the
 15 other.
 16 It may come in for a limited purpose, and if
 17 there's an application to limit that purpose, let me know
 18 and I'll give the appropriate limiting instruction to the
 19 jury.
 20 MR. O'HARA: I need to hear the question that he's
 21 going to ask.
 22 THE COURT: I understand. So I said, you know --
 23 MR. O'HARA: Understood.
 24 THE COURT: -- I'll have to hear it.
 25 MR. O'HARA: Understood, your Honor.

Perez - Plaintiff - Direct/B. Morelli Page 764

1 THE COURT: All right, thank you.
 2 (Recess.)
 3 (The witness resumed the stand.)
 4 THE COURT: Ready?
 5 MR. B. MORELLI: Yes, your Honor.
 6 He's doing okay now. He's doing better. He's
 7 doing better now.
 8 Mark (indicating) is doing better now.
 9 THE COURT: Okay.
 10 (Pause.)
 11 COURT OFFICER: All rise. Jury entering.
 12 (The jury entered the courtroom.)
 13 THE COURT: Okay, thank you.
 14 Let's continue.
 15 DIRECT EXAMINATION CONTINUED
 16 BY MR. B. MORELLI:
 17 Q Are you doing okay?
 18 A Yes.
 19 Q Okay. So, without having the last questions read back,
 20 I'm going to -- I was speaking to you about Dr. Schwartz. You
 21 remember Dr. Schwartz?
 22 A Yes.
 23 Q Okay. And Dr. Schwartz, you saw not too long ago;
 24 correct?
 25 A Correct.

Perez - Plaintiff - Direct/B. Morelli Page 765

1 Q And what I was asking is: We've heard -- we heard
2 testimony from Dr. Schwartz yesterday, and he was telling us all
3 about epilepsy and about seizures and things like that. And did
4 he explain to you that if there came a time that he thought that
5 you could and should have an operation for your epilepsy, that
6 you would have to go through a battery of tests first?
7 A Yes.
8 Q Okay. And you remember that.
9 A Yes.
10 Q Okay. And did he describe those tests to you?
11 A Yes.
12 Q And tell the jury what you remember about that.
13 A Dr. Schwartz had explained to me that he would need to
14 put -- he would need to do tests and scans, and also place
15 electrodes in my brain, and then make me have a seizure at the
16 hospital. And then he wanted me -- after -- after his review,
17 they would perform a surgical procedure which would remove a
18 portion of my brain where he thought that seizures were coming
19 from.
20 Q And he told you, did he not -- because he told us --
21 that it's according to how the tests came out as to whether or
22 not he could and would do surgery on you? Is that true?
23 A That's true, yes.
24 Q And when he was telling you that, he also talked to you
25 about your seizures and the fact that you're on medication but

Perez - Plaintiff - Direct/B. Morelli Page 766

1 you're having seizures, anyway. Did he talk to you about that?
2 A Yes, he did.
3 Q And he told us about it.
4 And when you -- when he -- described the testing to
5 you, what did you think? Did you think, "Hey, I think I'm going
6 to do this," or what was your thought about the testing?
7 A I don't have much of a choice.
8 Q What do you mean?
9 A If my seizures are uncontrolled with medication, it's
10 my only option.
11 Q Now, did Dr. Schwartz tell you that that's at least one
12 of his specialties, if not his main specialty: epilepsy? Did he
13 tell you that?
14 A Yes, he did.
15 Q Do you remember seeing a Dr. Doyle? Dr. Doyle.
16 A Yes.
17 Q And Dr. Doyle was somebody who was retained by the
18 defense lawyers in this case to do an examination on you. Did
19 you know that?
20 A Yes.
21 Q And when you saw Dr. Doyle, who was there with you?
22 A My brother, Justin; and David (indicating).
23 Q My associate David (indicating)?
24 A Yes.
25 Q Okay. And did Dr. Doyle agree to have all of you there

Perez - Plaintiff - Direct/B. Morelli Page 767

1 during the entire time that he examined and spoke to you?
2 A Yes; he said it would be better.
3 Q It would be better.
4 A It would be better.
5 Q Okay. And when Dr. Doyle was telling you about your
6 condition, did he tell you that you -- that he -- thought you
7 had epilepsy?
8 A Yes.
9 Q Did he tell you that your seizures were from the
10 accident?
11 A Yes.
12 Q What else did he tell you about your seizures; do you
13 remember? Wasn't that long ago.
14 A Yes.
15 Q What did he tell you?
16 A He explained to me about how, as I get older, because
17 of my accident, I'll get worse but my seizures will get worse by
18 themselves.
19 Q What did he tell you about your seizures? Did he say
20 they were controlled or uncontrolled by medication?
21 A He thought my seizures were uncontrolled.
22 Q He told you that?
23 A Yes.
24 Q Is that the same thing that Dr. Schwartz told you?
25 A Yes.

Perez - Plaintiff - Direct/B. Morelli Page 768

1 Q Was there anything that Dr. Doyle told you that was
2 different from what Dr. Schwartz told you?
3 A Yes.
4 Q What was that?
5 A He said, it's not what he normally does, but he was
6 going to act as my doctor and give me his doctor opinion; and he
7 thought he could, someday, actually be my doctor.
8 Q He told you that.
9 A He told me that.
10 Q What did you think about that?
11 MR. O'HARA: Objection; relevance.
12 THE COURT: Approach, please.
13 (Discussion off the record at sidebar.)
14 THE COURT: The question is withdrawn?
15 MR. B. MORELLI: Yes.
16 THE COURT: Thank you.
17 MR. B. MORELLI: Can I have some photos, the photos
18 that are in evidence from before? David?
19 MR. SIROTKIN: Sure.
20 (Pause.)
21 (Mr. Sirotkin retrieved photographs.)
22 MR. B. MORELLI: Yeah, that's (indicating) what I
23 want.
24 MR. SIROTKIN: Okay.
25 MR. B. MORELLI: That's what I want.

1 SUPREME COURT OF THE STATE OF NEW YORK
 2 COUNTY OF NEW YORK : PART 56
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 4 MARK PEREZ,
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 11 71 Thomas Street
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 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 :
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 25 ALEXANDER R. MORELLI, ESQ.
 (Appearances continued on next page)

1 Proceedings
 2 THE COURT: Good morning. Please be seated.
 3 Thank you.
 4 MR. MORELLI: I have something for the record,
 5 Your Honor --
 6 THE COURT: Yes, sir.
 7 MR. MORELLI: -- before we start.
 8 THE COURT: Okay.
 9 MR. MORELLI: This morning -- I get up at 4 --
 10 00, I read the transcript from yesterday and I feel
 11 compelled to make a record.
 12 THE COURT: Okay.
 13 MR. MORELLI: On page 815 of the record ,
 14 Mr. O'Hara started his cross-examination.
 15 THE COURT: 815?
 16 MR. MORELLI: 815, yes.
 17 And Mr. O'Hara, on the record yesterday, made
 18 representations to Your Honor that he's allowed to use
 19 anything to refresh someone's recollection . And that was
 20 probably the first accurate thing that was said , maybe the
 21 only one, because there's a way to refresh someone's
 22 recollection and there's a way not to and the rules are
 23 very clear about it. So let's see how he did it because
 24 what he did was he sandbagged us and brought something out
 25 in front of the jury that he couldn't do normally.
 Now, we've been -- the plaintiffs in this case
 Laura L. Ludovico, SCR

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 25

1 Proceedings
 2 have been following a path that I don't usually follow , and
 3 that is showing the defendants every single thing I'm doing
 4 before I do it, and I don't have to do that. I can
 5 actually show photographs to a witness and ask questions
 6 and then Your Honor would rule whether or not they are
 7 admissible if there's an objection, but I don't do that. I
 8 get stipulations of everything, I show them, these are the
 9 e-mails that I'm going to use, it's almost like I have two
 10 judges ruling on what I'm doing and I have continued to do
 11 it to be a good guy.
 12 So what happened yesterday? Yesterday there was
 13 a question of Mr. Perez, and the question is about -- it
 14 was about this entry in a medical record after asking
 15 Mr. Perez:
 16 "QUESTION: You have, throughout the last six
 17 years, been to see a number of medical providers that have
 18 interviewed you and provided care to you, correct?
 19 "ANSWER: Yes.
 20 "QUESTION: And as a general matter , each time
 21 you went to see a doctor they asked you questions about how
 22 things were going and why you were there, right?
 23 "ANSWER: Yes."
 24 Setting up the plaintiff in this case.
 25 "QUESTION: And you would answer those questions
 truthfully to tell them how you were feeling and what was
 Laura L. Ludovico, SCR

Proceedings

1 going on in your life because the reason why you were going
2 to those doctors was you wanted to get better, right?

3 "ANSWER: Yes.

4 "QUESTION: And each time you went to the doctor
5 you raised things that were on your mind or of concern to
6 you in connection with whoever that particular doctor was,
7 correct?

8 "ANSWER: Yes."

9 And then the question comes.

10 "QUESTION: And you remember seeing a doctor on
11 November 20, 2017 and being asked a question about how you
12 were doing with moving forward with your life, correct ?

13 "ANSWER: I don't remember.

14 "QUESTION: Sure. Do you remember seeing a
15 doctor, a neurologist or a neuropsychiatrist, on
16 November 20, 2017, and in response to describing the
17 frustrations that you were experiencing, you said that you
18 were awaiting settlement from your accident so you could
19 move forward with your plans, you remember that?"

20 Totally improper. Never did he ask this witness
21 he didn't remember and whether he could refresh his
22 recollection. The proper way to do it, and I'm not here to
23 teach anybody, okay, is to show him the document, not
24 describe what it is, not say it's a medical record, show
25 him and say does this refresh your recollection as to

Laura L. Ludovico, SCR

Proceedings

1 this case.

2 Now either he doesn't know how to do it or he
3 knows how to do it and he sandbagged me. I think it's the
4 latter. That's what I think it is. And I would ask --
5 now, plaintiffs are in a very tough position always when
6 they try cases. First of all, we have the burden of proof
7 and second of all, when something like this happens, what's
8 our choice? Well, we could ask for a mistrial. Well, that
9 would be great after spending \$100,000 on this case and
10 Mark Perez and his family waiting six and a half years
11 while the defendant in this case kept appealing and
12 appealing and appealing, so it wasted another four years.

13 So I don't have the choice to do that, but I do
14 have the choice to make this record and to ask Your Honor,
15 unlike other lawyers, who you might meet, I want to
16 highlight it, I want to highlight it, and I'm asking Your
17 Honor to admonish this jury once again, because admonishing
18 me in front of this jury, in my opinion, after I read this
19 record I was livid at 5:00 in the morning, livid that it
20 looks like I did something wrong when Mr. O'Hara -- I don't
21 know why he did it, okay? I don't know why he did it, but
22 I'm going to tell you this, if he's so desperate that
23 that's the kind of stuff that he has to do to try to keep
24 this verdict down, I understand that, but I'm not going to
25 stand for it and I'm not going to stand for being

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1 seeing this doctor? And if he says no, that's the end of
2 it.

3 Now, nowhere in the document does it say patient
4 states, nowhere is it for care and treatment of this
5 patient so it would be redacted. When we Bates stamped
6 these records we said that at the end before it goes to the
7 jury, we will redact it because the defendants were so
8 concerned about, God forbid, this jury hears that he fell
9 from 20 feet or 30 feet. This is the most important thing
10 in the trial, is how many feet he fell from. So we have to
11 redact, redact, redact. This was absolutely improper.

12 So let's hear what happened. So now, after he
13 does that and he says no and he says I don't remember, he
14 then puts it in, okay, and I make a statement, okay? And
15 again, "awaiting settlement from the accident so you could
16 move forward with your plans." And after I make a
17 statement about, hey, I guess you're going to bring in this
18 witness now because that's what you have to do, I get
19 stopped because the Court is very restrictive in what
20 lawyers can say, but you see, it's like a football game;
21 somebody punches someone in the face and the person who
22 reacts to it gets thrown out of the game. That's about
23 what happened yesterday because Your Honor admonished me in
24 front of this jury as if I did something wrong when
25 Mr. O'Hara never tried to refresh anyone's recollection in

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1 admonished in front of this jury when I did the right thing
2 to protect my client.

3 And so I'm going to ask Your Honor to once again
4 highlight it for this jury that that was wrong, that he
5 should have never done it, that they have to put it out of
6 their mind and they can't use it because I can't unring the
7 bell. I can't unring the bell, okay? So now, what's going
8 to happen here? The jury comes in with a verdict that's
9 not good enough, you know, would have been very different
10 had that not happened because that's the only garbage in
11 this game so far, the only garbage, and it's total garbage,
12 and I really would like Your Honor to solve this problem
13 for me, even though it's not totally solvable.

14 Thank you.

15 THE COURT: You want to respond?

16 MR. O'HARA: Sure. So I'm not going to
17 dignify --

18 MR. MORELLI: Yeah, right. Why don't you just
19 answer it instead of starting off you're not going to
20 dignify it?

21 THE COURT: Mr. Morelli, please.

22 MR. O'HARA: Judge, I'm not going to dignify any
23 of the comments, other than respond to the substance of the
24 issue. The question specifically posed to the plaintiff
25 immediately prior -- strike that -- immediately before the

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1 Court asking counsel to come sidebar , page 817, line one:

2 "QUESTION: I'm going to show you a document
3 that's been marked in evidence and show you down here the
4 Bates No. 2120."

5 And then I attempted to approach the witness to
6 show the witness, to allow the witness to see the reference
7 and refresh the witness's recollection. The Court directed
8 that we could not do so and the Court directed that it was
9 not a line of questioning that would be permitted. We
10 moved on. The prior questions all are phrased, do you
11 remember, do you remember, do you remember?

12 And two things; the medical records are, in fact,
13 in evidence and the comments by Mr. Morelli that the
14 plaintiff has suggested that there's going to be redactions
15 relating to the issue specific to anything concerning these
16 records and the plaintiff's frustration with the lawsuit,
17 which is not only in this doctor's records, but it was
18 brought out during the cross-examination of Dr. Fayer and
19 it's also replete in the records of Dr. Saphir-Kusnetz.
20 There has never been either a question or a suggestion from
21 the plaintiff that that information would be redacted,
22 quite the contrary. It's central to one of the issues
23 directly before this jury relating to the
24 neuropsychological testing and the plaintiff's scores being
25 below a particular level and in particular, what the

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1 the transcript, there's a specific comment by Mr. Morelli
2 regarding his unwillingness to follow those rules.

3 All we asked for and all the Court did was tell
4 both lawyers in the admonishment, hey, guys, enough, but
5 Mr. Morelli has on repeated occasions made comments, which
6 the Court specifically said he should not do.

7 Independent of any of that, no different than any
8 other time where information has come from a witness that's
9 either been unresponsive to a question, information that's
10 been proffered in a question that the Court has sustained
11 the objection, on each occasion, including taking my name
12 on multiple occasions in vain, has been sustained and the
13 Court has been -- and the jury has been directed, much like
14 in this instance, to disregard whatever the position is.

15 So to the extent the Court is inclined to accept
16 that further comment about this should be forthcoming, then
17 it's the defense's position, further comments should be
18 forthcoming about every single time that there's been
19 something that has been said in a question, that has been
20 sustained and stricken or there's been testimony from a
21 witness that has been sustained and stricken so that it
22 doesn't unnecessarily highlight this issue as compared to
23 the multiple prior times when the transgressions have n't
24 been answered against the defense.

25 MR. MORELLI: Your Honor, I don't think

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1 independent outside factors may be that affect a person's
2 performance on those tests.

3 So it is absolutely appropriate, as difficult as
4 it may be for any witness to be confronted with information
5 that they don't remember. And the opportunity to ask the
6 witness whether it refreshed the witness's recollection was
7 objected to, barred by the Court and we moved on.

8 MR. MORELLI: That's not what he did.

9 THE COURT: Well --

10 MR. O'HARA: The second thing --

11 THE COURT: Okay.

12 MR. O'HARA: -- the admonishment was specific to
13 just what happened right there. There have been multiple
14 times where there have been objections that have been the
15 subject of sidebar discussions and plaintiff's counsel,
16 contrary to the specific rules that you gave us, that we
17 have adhered to to the letter, and I've actually said that
18 on the record earlier, the plaintiff's counsel has made
19 statements before we have gone sidebar in front of this
20 jury. And you will recall, and the record will absolutely
21 reflect, there is a section on this transcript four, five
22 days ago where in response to this particular concern, I
23 specifically say the defense is following Your Honor's
24 rules to the letter. And Mr. Morelli's response was I am
25 not, I do not. I promise you, if you go back and you read

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1 deflecting is the way Mr. O'Hara should be responding to
2 this. If you read page 816 --

3 THE COURT: I did, Mr. Morelli.

4 MR. MORELLI: -- his question, he never asked him
5 to refresh his recollection, he never asked him to look at
6 it and refresh his recollection, he read it specifically
7 first.

8 THE COURT: May I?

9 Okay. From an evidentiary standpoint,
10 Mr. Morelli is correct. The Mosqueda decision in the First
11 Department, which was our department's most recent
12 pronouncement as to what you can and cannot do in terms of
13 statements in the medical records clearly indicates that
14 what was being done was not appropriate. I did not take
15 that as an underhanded effort on Mr. O'Hara's part to try
16 to circumvent the rules. It is a peculiar rule, that's
17 very counterintuitive and I know all of you gentlemen try
18 cases in multiple jurisdictions and the rules are different
19 in different areas.

20 I also agree that the manner in which the
21 refreshed recollection was attempted to be refreshed was
22 not textbook, to say the least, but I sustained the
23 objection, I instructed the jury to disregard the
24 statements. I think appropriate corrective measures were
25 taken.

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1 And yes, I did and will continue to, if I have
2 to, warn both of you to adhere to the rules, which is not
3 to make legal arguments in front of the jury. I am very
4 liberal, as you both know, about granting sidebars. I'm
5 also very liberal about giving you the opportunity to make
6 whatever record you want to make because again, like I told
7 you in the beginning of the trial, this is important for
8 everybody in this room except for me. I don't have a stake
9 in this litigation, but if I do something that is going to
10 affect your day in court, then I should be appealed and I
11 should be reversed. I have no problem with that.

12 I am going to do everything in my power to get it
13 right. I'm sure I'm not going to get everything right, as
14 nobody does, but you need to adhere to the rules. And my
15 warning was, as I said, a warning to both benches, cut it
16 out, let's stop the attacks back and forth between each
17 other, the comments back and forth between each other.
18 Make the legal arguments that you want to make on the
19 record outside of the presence of the jury, I have no
20 problem with that. And if you want to ever talk about
21 something on sidebar without excusing the jury, the answer
22 never will be no.

23 Now, Mr. Morelli, a corrective statement was
24 given to the jury in terms of the evidentiary issue. I
25 don't know how much more that's really going to be helpful

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1 Okay. Now, you know, I've been doing that, all
2 right? And it's interesting that, you know, not only have
3 I been on my best behavior, I've been so restricted of
4 myself. This is not the way I normally try a case, okay?
5 This is much more restricted because I'm giving everything
6 to the defendants. It's exhausting already.

7 Now, if this is the way we're going to play -- if
8 this is the way we're going to play, then we will change
9 the rules a little bit about what I'm going to do, too, but
10 I really -- I don't ascribe any ill intention at all. I
11 know that it was improper. He never used the word refresh
12 your recollection, even though yesterday he put on the
13 record, well, you could use anything to refresh your
14 recollection.

15 That's true. That's a true statement, all right?
16 But he didn't do that, he read the statement in evidence,
17 he read it into the record before -- and he said I don't
18 remember. He asked him again, he said no. He didn't say
19 does this refresh your -- okay. First of all, you have to
20 find out if he has a recollection to refresh, okay? But he
21 didn't do any of that, didn't ask him the question and
22 that's the proper way to do it.

23 Now, do I know? You know, I'm not clairvoyant,
24 so I don't know whether or not highlighting it again for
25 the jury is a good thing for the plaintiff, but I know one

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1 at this point in time. I understand, I agree with you,
2 you're not like most lawyers. I appreciate that very much,
3 but I'm struggling in my mind to see how bringing this out
4 again is going to do anything other than call attention to
5 something that I've already ruled in your favor on and
6 instructed the jury -- given an instruction to the jury to
7 strike that testimony and disregard it.

8 What do you have in mind or do you want to
9 reconsider that?

10 MR. MORELLI: No, I've been reconsidering it for
11 hours already today. I know it's a dilemma when this
12 happens. I'm not even interested in whether or not
13 Mr. O'Hara did it on purpose or he did it because he didn't
14 know the rule, but, you know, you and I both know that when
15 you're admitted pro hac, you're supposed to know the rules.
16 That's the whole point of having different rules in
17 different courts. If you're going to all of these courts,
18 you have to know what the rules are, right?

19 So this is one instance where Mr. O'Hara did not
20 show me, hey, this is what I'm going to show the witness,
21 you know, whatever. That's what we've been doing.

22 THE COURT: I can't make you guys do that.

23 MR. MORELLI: No, I'm not saying you should. I'm
24 not saying you should. I'm making a statement that this is
25 the one time we didn't.

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1 thing. Right now I'm not a happy camper, okay? And so,
2 yes, I would like you to say yesterday I sustained an
3 objection because what he did was improper and they
4 absolutely can't use it in any way, shape or form to decide
5 this case. Yes, that's what I want and I stand by that.
6 That's what I want because I think it was so egregious,
7 especially in light of his opening statement in this case,
8 which I have never heard an opening like that in my life
9 and I've heard some really crazy openings, all right?

10 But in light of that and then reading this into
11 the record improperly was very, very prejudicial. Now, I
12 understand that everything that I do and everything the
13 defense does in this case should be prejudicial, but not
14 when it is way, way beyond what we normally should be doing
15 in a case and this was way beyond. I read it very
16 carefully. Nowhere does it say refresh your recollection
17 and that's what I'm asking for and obviously, Your Honor
18 will use his discretion and do what he thinks is right and
19 I have no issue with the Court making a decision that the
20 Court thinks is fair. I have no issue with that.

21 THE COURT: I want to explore something that
22 you've said a couple of times now about being restricted.
23 As far as I'm concerned, whatever --

24 MR. MORELLI: Not with you.

25 THE COURT: -- whatever restriction you're

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 1 talking about is between the parties.
 2 MR. MORELLI: Yes.
 3 THE COURT: Because if there's something about
 4 the way I'm handling this case, please say so.
 5 MR. MORELLI: It isn't.
 6 THE COURT: Okay.
 7 MR. MORELLI: No. It has nothing to do with the
 8 Court at all.
 9 THE COURT: Can I take five minutes and think
 10 about this?
 11 MR. O'HARA: Yes, sir.
 12 THE COURT: Thank you.
 13 (Brief recess taken.)
 14 THE COURT: If I were to give the jury any
 15 further charges, which I'm still frankly, thinking about, I
 16 would say something like this:
 17 I told you at the beginning of the case that I
 18 favor no party to this suit and also, that if I exclude
 19 evidence from your consideration, it will be because it is
 20 not legally admissible. We had an issue yesterday
 21 concerning statements in medical records. Not everything
 22 in medical records is admissible. The rules of evidence
 23 are place to ensure that all statements or any such
 24 statements are accurate and without a proper foundation for
 25 those statements, their accuracy is suspect and cannot be

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 1 MR. O'HARA: I appreciate that. I just want to
 2 make sure that the record reflects what is in his medical
 3 records and that there is a foundation for the proffer as
 4 to why it is germane to the office presentations throughout
 5 his care. Starting with July 2, 2014, there is a reference
 6 with Mr. Perez and his father discussing concerns about
 7 their Court case; July 16, 2014, discussions with the
 8 father and the son focused on his son's Court case;
 9 July 31, 2014, father and son interested in discussing
 10 concerns about his legal case; April 13, 2015, Mr. Perez
 11 continues to express frustration with --
 12 MR. MORELLI: Excuse me. Is the jury up here?
 13 THE COURT: Yes.
 14 MR. MORELLI: Only because they heard us
 15 yesterday.
 16 THE COURT: Okay. I think yesterday was a little
 17 bit more heated.
 18 MR. MORELLI: Okay.
 19 THE COURT: But they buzzed yesterday, so I'm
 20 assuming we don't have any issues. It doesn't seem very
 21 loud to me.
 22 MR. O'HARA: I'll be lower.
 23 April 13, 2015: "Mr. Perez continues to express
 24 frustration with his ongoing legal situation."
 25 The substance of the question yesterday with

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 1 considered by you.
 2 MR. O'HARA: Judge, to the extent the Court is
 3 going to consider how to respond and whether or not to give
 4 any instruction, it's important to note a number of
 5 references, all of which that were subject of questioning
 6 with other experts and all of which we intend to have as
 7 the subject of questioning with defense experts. And I
 8 will read to you so that the Court is clear, there is a
 9 reference in Mark Perez's July 2, 2014 record of Dr.
 10 Dr. Kusnetz --
 11 THE COURT: I'm sorry, I don't have the
 12 disciplines all committed to memory.
 13 MR. O'HARA: Sure. These are all neurologists or
 14 neuropsychologists or neuropsychiatrists evaluating, among
 15 other things, the emotional distress claim and --
 16 THE COURT: Who was the one on November 20, 2017?
 17 MR. O'HARA: I don't have the full name on
 18 this --
 19 MR. MORELLI: It doesn't even say it in the
 20 record.
 21 MR. O'HARA: It does say. Dr. Rudansky.
 22 THE COURT: And what is Dr. Rudansky?
 23 MR. O'HARA: He is a neurologist and/or
 24 neuropsychiatrist.
 25 THE COURT: It's the and/or part that bothers me.

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 1 respect to the medical record on November 20, 2017:
 2 "Awaiting settlement from accident so he can move forward
 3 with his plans."
 4 And then subject to cross-examination that came
 5 out during the testimony of Dr. Fayer, on April 9, 2018:
 6 "Very frustrated about the case."
 7 All of these are statements by Mr. Perez from
 8 April 14th through April 18th, during the time that he's
 9 being every evaluated by doctors for which
 10 neuropsychological test results, the TOMM® testing and the
 11 Rey --
 12 MR. HAWORTH: Rey 15-Item test.
 13 MR. O'HARA: -- the Rey 15-Item test all shows
 14 signs of a diagnosable DSM-5™ recognized condition called
 15 malingering, all of which include the testimony of
 16 Dr. Greenwald and Dr. Gordon, as well as the anticipated
 17 testimony of Dr. Ambrose and Dr. Barr that one of the
 18 concerns when a patient performs below the expected level
 19 on those tests that outside factors are influencing their
 20 effort and/or their responses are lawsuits.
 21 And so it is specifically germane to the test --
 22 to the care and treatment that's being provided by these
 23 doctors and contemporaneously when they're making notations
 24 and we believe it is properly before this jury. It has
 25 been before this jury with Dr. Greenwald, Dr. Gordon and

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1 will be before this jury with Dr. Ambrose and Dr. Barr .

2 And so I say that, if for no other reason, to
3 suggest, this is central to issues that have been evaluated
4 by the defense and Mr. Morelli has attempted to cast
5 aspersions on multiple occasions about whether we're
6 calling him a faker or a liar and the reality is, what we
7 are saying is these are medically recognized factors that
8 the providers are trying to evaluate specifically
9 associated with poor performance or substandard performance
10 on the TOMM® testing and the Rey 15 test.

11 MR. MORELLI: Your Honor, the problem is that we
12 can't conflate two different things. If, in fact, the
13 defense is going to be calling doctors to testify about
14 test results, about what their opinion is, about why the
15 results were what they are, that's a very different issue
16 from what we're talking about now. And Mr. O'Hara is
17 reading into the record that the father and the son were
18 talking about this. That's neither here, nor there. The
19 father and the son, the father and the son, the father and
20 the son. All of this has to meet the same test that it had
21 to meet here.

22 There are no statements in this record where it
23 says that the patient states this and that. First of all,
24 it's not for care and treatment. It isn't for care and
25 treatment. Now, I know they would like to conflate it to

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1 record, not with reference to bringing doctors in who are
2 going to state opinions. That's a different story, totally
3 different, and I'm not addressing that, not addressing
4 that. And if Your Honor would like, we will put papers in
5 with reference to this, but I don't think it's necessary
6 because I think it's so clear that this --

7 THE COURT: Well, I think you should put papers
8 in with regard to this before the defense witnesses start
9 testifying.

10 MR. MORELLI: But they're starting tomorrow.

11 THE COURT: I understand that. I understand
12 that, but I think this is an important issue.

13 Off the record.

14 (WHEREUPON, a discussion was held off the
15 record.)

16 THE COURT: Part of the problem, Mr. Morelli, is
17 that, you know, I read the transcript --

18 MR. MORELLI: From yesterday?

19 THE COURT: From yesterday and I considered it
20 very carefully. I appreciate the fact, and at risk of
21 suffering your ire, I appreciate the fact that you didn't
22 see the note before your client was questioned on it, but
23 nonetheless, it was quite well into the testimony before
24 you said anything about it.

25 MR. MORELLI: Actually, Your Honor, we asked for

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1 make it for care and treatment, but it isn't for care and
2 treatment. So I understand what the defense is in this
3 case. I've been addressing it during the entire -- you
4 know, the entire testimony that I've put into evidence.
5 And so that's not the issue, so let's stay on point.

6 The issue with reference to this particular
7 record, that was read to the jury improperly, something
8 that's inadmissible. Anything else that falls into that
9 category has to meet the same exact standards, okay? And
10 so that's what we're dealing with here. We're not dealing
11 with the Rey test or the TOMM® test. We understand all of
12 that. We know every expert and what they're going to say
13 and they're going to have to be able to be cross-examined
14 by me, okay? But I can't cross-examine that piece of
15 paper and Mr. O'Hara knows that.

16 So that was the reason, probably, seeing that
17 he's, you know, energized about this defense that he has,
18 was probably the reason that he read it like that, because
19 he wouldn't be able to have read it. Had he done it the
20 appropriate way, was to refresh his recollection because it
21 would have been over because he would say, no, which he
22 said twice, and that would be the end of it. So let's not
23 get involved in different things and trying to make them
24 all the same. They're not the same.

25 This is with reference to statements in the

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1 the Bates stamp number.

2 THE COURT: I know.

3 MR. MORELLI: Okay. And when we were looking for
4 it, he asked the question and read from it.

5 THE COURT: You didn't ask him to -- listen, it
6 just happened the way it happened and you didn't -- I'm not
7 criticizing, I'm just saying, you know, you asked for the
8 number, you didn't ask him to wait to go forward with it,
9 things just kind of happened and it was already out of the
10 bag by the time you had said something.

11 It's not apparent to me that this is relevant for
12 diagnosis and treatment. I don't know who this doctor was,
13 I don't know what this doctor's specialty was, it's not
14 apparent to me. If this was a podiatrist and he gave this
15 statement to them, it clearly would not be relevant to
16 diagnosis and treatment or anything. I don't know with
17 these other doctors whether this type of statement or
18 whatever it is, is anything more than somebody scribbling
19 notes, nor do I know the source of the statement
20 necessarily.

21 There's a lot about it that makes it problematic
22 and I'm adhering to my original ruling. And in order to
23 have those sort of statements actually introduced, you're
24 going to have to follow the First Department's rule on
25 this, which is very, very restrictive.

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1 MR. O'HARA: We object to any corrective
2 instruction.

3 THE COURT: I don't know that it's going to be
4 helpful. Not only do I not know it's going to be helpful,
5 I've already given the curative instruction, especially in
6 light of the fact that the objection about it came this
7 late as it did before so much had gotten out . I don't know
8 that this is really something that really needs to be
9 brought out any further with this jury, I really don't. I
10 think it's -- I frankly --

11 MR. MORELLI: Your Honor, knows --

12 THE COURT: And obviously, I've been thinking
13 about this now for at least a half an hour and reviewing
14 the transcripts and reviewing exactly what was said by
15 everybody, I just think it's going to create more problems
16 than it's going to solve.

17 MR. MORELLI: Well, create problems for whom?
18 If, in fact, it creates a problem for the plaintiff, that's
19 my problem, that's my responsibility. And like I said, the
20 plaintiff only has limited choices when something like this
21 happens. I can't wipe it from their minds and I can't in
22 good conscience ask for a mistrial, nor would I want one,
23 and so I don't protect the record by asking for a mistrial,
24 okay, because if I ask for a mistrial --

25 THE COURT: I'll tell you what I'm going to do.

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1 December, right? Now, we're down on Tuesday, we're down
2 next Friday. I mean, it's just ludicrous. And the truth
3 is that if you're going to make any kind of a curative
4 instruction to the jury, I'd ask that it be done today
5 while they still remember, because if it isn't and it's
6 done two or two and a half weeks from now --

7 THE COURT: But I did it yesterday when it
8 happened.

9 MR. MORELLI: I understand that and I appreciate
10 that you did that, but reading the record this morning, I
11 didn't think that it was enough because right after you did
12 that, you admonished me, okay? And then when you
13 admonished Mr. O'Hara, you said to a lesser extent I
14 admonish Mr. O'Hara, which, you know, jurors don't know
15 what we know. They're not up to speed on the court system.
16 Every time I pick a jury in a case jurors, most of the
17 time, 80, 90 percent of jurors do not know that they decide
18 the amount of money that goes to the Plaintiff. They don't
19 know that. They know nothing, okay? And so when they hear
20 this and they hear your instruction and they hear it two
21 and a half, three weeks from now, it's of absolutely no
22 value to the plaintiff at that time.

23 THE COURT: Okay. Well, I'm going to consider it
24 in terms of a final instruction. We can talk about it
25 later, but I think I've done everything that I can do at

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1 Let me tell what you I'm going to do. We still are in the
2 midst -- do I have your jury proposed jury instruction s --

3 MR. O'HARA: We have --

4 THE COURT: Because Larry couldn't find them.

5 MR. O'HARA: -- e-mailed --

6 MR. BAUER: We're still working on it.

7 MR. O'HARA: My apologies, Your Honor.

8 THE COURT: I have asked for those a long time
9 ago.

10 All right. I think what I would consider doing
11 perhaps is doing another reiteration in the closing charges
12 basically to say that, you know, you recall in the
13 beginning that I told you about, you know, the rules,
14 things are not legally admissible and something to that
15 effect.

16 MR. MORELLI: Your Honor, the reason that I
17 brought Dr. Gordon back the very next morning, and I
18 explained that to Your Honor, no matter what it cost to do
19 it, is because I knew that I couldn't leave the testimony
20 out there for such a long period of time without me doing
21 my redirect. And I'm likening that to this situation.
22 This happened yesterday. Because the defendants have not
23 followed the plaintiff's lead in this case where they're
24 putting on witness after witness and filling every day, we
25 are not going to go to the jury in this case until

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1 this point in time and I think it was very clear that I
2 told them I'm striking this, but it was very clear also
3 that I told both of you and the reason why I addressed both
4 of you is to reign in the legal arguments. You won the
5 legal argument, but what I had said was keep it out of the
6 presence of the jury. That's what that was about.

7 MR. MORELLI: And, Your Honor, I totally
8 appreciate that and it's not that I'm not trying to follow
9 Your Honor's rules. I think that, you know, that I am
10 trying to do that.

11 THE COURT: Mr. Morelli, I have been there, I
12 understand. I have done --

13 MR. MORELLI: But when it happened --

14 THE COURT: I have done a lot worse in my career,
15 as I'm sure you have, and the reason why --

16 MR. MORELLI: I'm not admitting that on the
17 record.

18 THE COURT: Okay -- and the reason for some of my
19 rules is to keep people from doing some of the stuff that I
20 did as a trial lawyer, the stuff that people try to get
21 away with, which is completely inappropriate. I also
22 understand the heat of the moment, I understand that things
23 happen, but it was getting a bit out of hand because it was
24 escalating as the trial went on, which is why I needed to
25 address it. My regret, and I will put this on the record

Laura L. Ludovico, SCR

1 and I will apologize to both you, is I should have not done
2 it in front of the jury and I sincerely apologize for that.
3 In hindsight I would not do that again . It wasn't the time
4 for it, it was too soon and I'm acknowledging it, but it is
5 what it is.

6 MR. MORELLI: Okay.

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

8 THE COURT: Sorry, do you need time?

9 MR. MORELLI: Two minutes.

10 THE COURT: Let's take two minutes.

11 (Brief recess taken.)

12 THE COURT OFFICER: All rise, jury entering.

13 (Jurors entered the courtroom.)

14 THE COURT: Okay. First things first. Let me
15 apologize to you. We have had a couple of complications in
16 terms of legal issues that have taken some time because
17 they've required some research on my part and I need to
18 make sure that I try to get things right as they're going
19 in. So I apologize for the late start.

20 Now, I can tell you with a great deal of
21 certainty that the same thing is going to happen tomorrow,
22 so what I'm going to do is I'm going to have the witness
23 come in a little later tomorrow and I'm going to have you
24 come in a little bit later tomorrow because I promised you
25 I wasn't going to make you sit around here if I could avoid

1 to finish that question before you start to answer . If you
2 see an attorney get up as if they're going to object or you
3 hear "objection," please stop talking, let me rule on the
4 objection.

5 Please listen very carefully to the question,
6 which is asked. Please only answer that question . Don't
7 expands upon it unless you're asked to do so. If you're
8 asked a question, you can answer with a simple yes or no.
9 Please limit your answer to yes or no. Don't offer a
10 further explanation again, unless the attorney asks you for
11 one. And, of course, if you get asked a question that
12 calls for a yes or no, but you can't answer with a yes or
13 no, let the attorney know that and they will decide how to
14 proceed from there.

15 If you need a break for any reason, please let me
16 know. During any break you may not converse with the
17 attorneys concerning your testimony, nor may you, under any
18 circumstances, interact with any of our jurors, okay?

19 Thank you.

20 THE WITNESS: Thank you.

21 DIRECT EXAMINATION

22 BY MR. MORELLI:

23 Q Dr. Dwyer, good morning.

24 A Good morning.

25 Q Now, you and I had a chance to chat about your

1 it. So report tomorrow morning at 10:30. We're going to
2 be working earlier than that to try to get something
3 resolved before that witness testifies, okay?

4 Thank you.

5 MR. MORELLI: Plaintiff would call to the stand
6 Dr. Debra Dwyer.

7 THE COURT OFFICER: Witness entering.

8 (Witness enters the witness stand.)

9 THE COURT OFFICER: Remain standing and face the
10 clerk.

11 THE CLERK: Please raise your right hand.

12 DEBRA DWYER, Ph.D., having been first duly sworn, took the
13 witness stand and testified as follows:

14 THE CLERK: Please, in a loud, clear voice state
15 your name and address for the record.

16 THE WITNESS: Sure. Debra, D-E-B-R-A, Dwyer,
17 D-W-Y-E-R. The address is 17 Springbriar Lane, Springbriar
18 is one word, B-R-I-A-R, Centereach, C-E-N-T-E-R-E-A-C-H,
19 New York 11720.

20 THE CLERK: You may be seated.

21 THE COURT: Dr. Dwyer, let me just make sure I
22 give you a couple of instructions.

23 First of all, please keep your voice up so that
24 everyone on the jury can hear what you have to say.

25 Please wait for the attorney asking the question

1 testimony, correct?

2 A Correct.

3 Q And if you could start off by giving the jury your
4 educational background.

5 A Sure. I got my bachelor's degree from Queens College
6 in Flushing, New York. That was in English literature and
7 economics. Then I went on to get my masters and my Ph.D. from
8 Cornell University in labor and health economics. And then I
9 did a one-year post-doctoral fellowship at Syracuse
10 University's Center for Policy Research.

11 So that's my educational background.

12 Q Okay. Can you tell us, after you finished your
13 education, what did you do?

14 A I was recruited to Washington, DC to work for the
15 Social Security Administration for a couple of years on
16 research regarding disability policy . And then I came to work
17 for Stonybrook University where I've been employed for the last
18 21 years. I've worked there as a professor of economics,
19 health sciences, health care policy and management, engineering
20 policy.

21 I've spent the last couple of years working in the
22 dean's office as an assistant dean for strategic planning and
23 academic planning and I've worked on the Financing Budget
24 Committee. So basically as a faculty member we're responsible
25 for teaching, research and service, and that's what I've been

1 doing for the last 21 years.

2 Q And you do have occasion, do you not, to give opinions
3 in court cases?

4 A Yes.

5 Q And you have actually given my office opinions on a
6 couple of occasions prior to this case, correct?

7 A Correct.

8 Q And can you tell us, I think basically all of us
9 generally know what economics is, but why don't you tell us
10 what economics is from your point of view?

11 A Sure. So in a nutshell, if I had to give a one-line
12 definition of economics, it's the study of how societies
13 allocate their resources when resources are scarce, which is
14 true most of the time. So economics is very, very broad. It's
15 a way of thinking about how economies function.

16 We have subfields of economics and I mentioned that
17 I'm a health and labor economist. That means I focus in on
18 what's going on in the health sector and the employment labor
19 workforce kind of sector of the economies. I don't always
20 refer to them as a market, but we study markets. Markets have
21 a connotation of capitalism. The United States is a mixed
22 economy.

23 So what we economists do is study how are the
24 capitalist markets working, and when they're not working, how
25 does the government intervene? So I monitor what's going on in

1 Q So does that explain the analysis that you conducted
2 in this particular case to reach your decision?

3 A Yes.

4 Q So now, if you would, can you tell us a little bit
5 about what does the growth rate mean? So that before you tell
6 us all of these things and show us numbers, let's understand,
7 you know, certain terms.

8 A Sure.

9 Q And you're probably going to use a term called growth
10 rate.

11 A That's correct.

12 Q Okay. So why don't you tell the jury and me what that
13 is?

14 A Sure. It would be helpful if I could just back up a
15 little on why I use growth rates.

16 THE WITNESS: Can I do that or is that beyond the
17 scope?

18 THE COURT: His questions, not mine.

19 THE WITNESS: Okay.

20 A So basically the concept of a growth rate, think
21 inflation. I think the cost of a subway ride when I was a kid
22 was like 50 cents, now it's like 2.75. It's the same exact
23 subway ride for the most part. Prices go up over time,
24 earnings go up over time to match that.

25 My job in a case like this is to predict what's going

1 terms of public policy and private sector in those two large
2 sectors of the economy.

3 Q Now, there came a time when my office asked you to
4 assess the losses in the case of Mark Perez, this particular
5 case, correct?

6 A Yes.

7 Q And did you do that?

8 A I did.

9 Q Can you tell us, what, if anything, did you review
10 before you did your analysis?

11 A So the main source for my analysis was a report by
12 Dr. Edmond Provder back in, I believe it was 2018,
13 November 2018. He's a vocational expert and a medical expert,
14 so he provides me with a life care plan and also, work
15 capacity. That's the main thing that I reviewed, but I also
16 requested W-2's so that I could see what the plaintiff was
17 actually earning in the last few years. That's pretty much it.
18 Let me just look.

19 It's hard because as an economist I review a lot of
20 public records, federal statistics, but related to this
21 specific -- I know what I was forgetting. There was some
22 e-mails that I reviewed as well that were particular to this
23 case. So there are things that I review that are not
24 particular to this case and then there are things that are just
25 in general in my research world.

1 to happen in the future when there's uncertainty and because
2 I'm making predictions in the labor and health sector, that's
3 my area of expertise, that is why I am called in. So one of
4 the assumptions I have to make when you're predicting into the
5 future is what's going to happen to Mr. Perez's earnings, and
6 that's going to be based on a growth rate that has to do with
7 how earnings grow over time. So the value of what he was doing
8 three years ago is going to be different than the value of what
9 he would be doing today based on the raises that you get.

10 And we have federal data that gives us averages on
11 what's going to be happening with our earnings over time. Same
12 think with inflation. So I'm going to be predicting, based on
13 Dr. Provder's recommendations --

14 Q By the way, he told us yesterday he's not a doctor.

15 A Okay.

16 Q That's what he said.

17 A Medical expert.

18 Q I'm not a doctor --

19 A Mr. Provder.

20 Q -- I'm a mister?

21 A Okay. Mr. Provder made some recommendations about the
22 medical needs for Mr. Perez. He gives me the frequency, the
23 intensity of the services today and today's prices. I need to
24 look at what's going to happen to medical inflations. Those
25 are the growth rates that I'm looking at. For a doctor's

1 office visit today, that same exact visit is going to cost more
2 ten years from now. It's my job to predict how much more and
3 I'm going to use growth rates to do that.

4 Q Now, before you try to teach us anything, did my
5 office request that you show us in two different ways the
6 losses in this case?

7 A Yes.

8 Q Okay. And one was with a full life expectancy, and
9 that is if Mark Perez lives to, you know, what the federal
10 government says is the life expectancy tables. You know about
11 those, right?

12 A Sure.

13 Q Okay. And we'll hear about that at the end of the
14 case.

15 And I also asked you to show us what it would be if he
16 didn't live his full life expectancy because we do have
17 testimony in the case that his life -- because he has a
18 traumatic brain injury, there is literature that states that he
19 could have a reduced life expectancy of six to seven years, so
20 six and a half, 6.7, whatever. Did you also do that?

21 A I did.

22 Q So that the jury could understand that we're taking
23 both of those situations into consideration right at the
24 beginning.

25 A Yes.

1 Q Let's try to make it bigger and then we can move it.

2 A Okay.

3 Q That's better.

4 Now, could you tell us, Dr. Dwyer, first, we're going
5 to deal with the full life expectancy, correct?

6 A Yes.

7 Q Okay. And then you'll explain to us how it affects
8 the medical going forward when the life expectancy is
9 shortened, but not the wages?

10 A Yes.

11 Q Okay, so you can show us.

12 A Let me just start with the life expectancy issue,
13 given we're doing these two scenarios. A lot of the times I
14 wait until the end to talk about that. I'm going to go over to
15 the next page just to make that point.

16 So as Mr. Morelli said, we're considering two life
17 expectancies. We get our life expectancy data from the
18 National Center for Health Statistics. So we get it from the
19 federal government, National Center for Health Statistics.
20 They produce what's called the life tables. They're based on
21 survival probabilities. They use in those probabilities to
22 calculate those probabilities the general population. So it a
23 random sample that includes healthy people, sick people, men
24 women, every -- representative of the United States population.

25 If you look at the year that Mr. Perez was born, for

1 Q Okay. So now, at this point could you walk us through
2 the numbers and explain them to us?

3 A Sure. Can I step down?

4 MR. MORELLI: Your Honor, could she step up.

5 THE COURT: Of course.

6 MR. MORELLI: Do you have your famous pointing
7 pen?

8 THE COURT: My famous pointing pen. Yes, I do.
9 I didn't realize it was famous.

10 MR. O'HARA: Judge, can I have one minute to
11 speak to Mr. Morelli?

12 THE COURT: Yes.

13 (witness exits the witness stand.)

14 (Brief pause in the record.)

15 BY MR. MORELLI:

16 Q Dr. Dwyer, while we're waiting for this presentation,
17 can you understand that any question that I ask you, I'm asking
18 you with a reasonable degree of economic certainty in your
19 field, do you understand that?

20 A Yes, absolutely.

21 Q So any answers that you give to this jury has to be
22 with that understanding, okay?

23 A Correct.

24 Q Okay. Now --

25 A Can you guys see that?

1 males the life expectancy, according to the 2016 tables, was
2 79.

3 THE COURT: I'm sorry to interrupt you for a
4 second. Could I see counsel quickly?

5 MR. MORELLI: Sure.

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

9 THE COURT: Sorry about that.

10 THE WITNESS: That's okay.

11 THE COURT: Do you remember where you were?

12 THE WITNESS: Yes.

13 THE COURT: Okay.

14 A So I can proceed?

15 Q Yes, continue, please.

16 A So I came to the bottom of this chart. There's going
17 to be two charts that I show you; one is going to be the losses
18 associated with no longer being able to work for Mark Perez.
19 That's this first table. I did two versions of this table, one
20 if he lived to the age of 79, which brings us to the year 2061.
21 He was born very early in January, so he would turn 79 in 2062,
22 January 5th, so I just took it to the end of 2061.

23 If he does not survive to 2061, but rather experiences
24 this expected reduction based on the traumatic brain injury of
25 6.7 years, then the other chart that I produced ends all of the

1 losses at 2055.

2 Q Let me just ask one question.

3 There is such a thing as what we call work life
4 expectancy, right?

5 A Yes.

6 Q And his work life expectancy actually will not be
7 reduced; is that correct?

8 A That's correct.

9 Q Okay. So that even if he lives six years less or
10 fewer or seven, he still would make it past 67 and so the wages
11 will not be affected, but the health care will?

12 A That's correct. Well, right the wages will not be
13 affected, but Social Security benefits will be affected.

14 Q Right. So that's what I wanted to clear up.

15 A Yes. So if he only survives to 2055, that brings him
16 to age 72. So at age 72 it's past his expected retirement age.
17 So there is no difference in the earnings loss.

18 I'm going to only show you the one set of charts that
19 have the full life expectancy and just tell you how it will be
20 different if we shorten it, otherwise you'll watch me fumbling
21 changing charts over and over. They're exactly the same
22 numbers, except we cut it short at 2055. So I'll explain that
23 as I go.

24 So let me go back to the top and explain my starting
25 point. Each step of the way, what I'm going to tell you is

1 average earnings of a web developer in the New York City area
2 was 84 910.

3 So what I did was I used that as earnings capacity at
4 the time and estimated what those earnings would have been
5 backtracking to the first year of loss of 2014. So that's why
6 you see \$75,441 here. That is the equivalent in terms of
7 growth rates. If I discount backwards from 84,910, the
8 equivalent salary in 2014 would be that \$75,000.

9 So the next assumption -- the first assumption, what
10 was his earnings capacity were in the \$80,000 range. The
11 second assumption was what would happen to those earnings over
12 time? And in this case I would say I went conservative with
13 the growth rate because I used the average growth rate over the
14 last 20 years for the general population, all workers, so
15 three percent. The web development world and the world -- the
16 tech world that he was operating in, in the graphic design was
17 actually doing quite well and probably had higher growth rates,
18 but I used three percent. Three percent is actually higher
19 than what it was in the past because we're coming out of a
20 recession, but what we tend to do is we take that 20-year
21 average to capture a business cycle and it turns out to be
22 equivalent in that we're smoothing when we take an average.
23 Instead of one year .5 percent, the next year four percent, we
24 just use the three percent. So I used a three percent growth
25 rate, is my point, to determine these numbers. So all of this

1 what my assumptions are. We know economists make assumptions.
2 We're teased about it all the time. That's why you bring me
3 in, though, because I am an expert in making these assumption s.

4 We're predicting over uncertainty. We have a young
5 man who was working as a web developer and then some. So he
6 was a creative self-employed guy. I have his W-2's prior to
7 2014. I have 2010 through 2013, but that was during young
8 years of his life that may not be very representative of his
9 actual earnings capacity.

10 So the first assumption I'm making is what was
11 Mr. Perez's earnings capacity. I benefit from the fact that
12 Mr. Provder is a vocational expert. So we overlap in some ways
13 in our expertise in that we both study the labor market. He's
14 the vocational expert. We both went to the sources of federal
15 data. We go to the same sources of federal data and look up
16 what a web developer would make on average nationally and what
17 they would make on average for the New York City area. That's
18 what Mr. Provder did. When I looked and checked on his
19 numbers, they were the same.

20 He did not -- Mr. Perez did not fit into a box of web
21 development based on what I've read. He was a little bit
22 broader than that, but within a reasonable degree of economic
23 certainty, we could conclude that his earnings capacity was
24 that of a web developer. So the most recent data that
25 Mr. Provder and I had at the time of the report was 2018. The

1 comes from federal data, the earnings capacity of a web
2 developer and the growth rate.

3 So starting in the first year of loss in 2014 and
4 growing and keeping him at that rate for the rest of his
5 career, the next assumption I have to make is how long would he
6 work, as Mr. Morelli already pointed out, work life expectancy.

7 I jumped too soon, I'm sorry. It was at the bottom of
8 this chart.

9 So you see I have -- I'm sorry. I have him working
10 until the year 2049. You probably can't see that. In 2049 --
11 at the end of 2049, so in January of 2050 he turns the age of
12 67. That's the age that he can collect his full Social
13 Security pension. I include no other fringe benefits in this.
14 So he's relying on Social Security in the analysis that I did.
15 So his full age where he can retire without penalty is 67.
16 Given the year he was born, I have him retiring at the end of
17 2049, given it's only five days in January.

18 So with those assumptions, now I'll tell you what the
19 total loss in earnings for the rest of Mr. Perez's life would
20 be. And again, that's under both scenarios because he would
21 reach the age of 67 in both; \$4,773,628; 400,000 and 529 of
22 which was the past and the rest is the future. So \$4.8 million
23 would be the value of his future earnings -- past and future
24 earnings.

25 Now, let's talk about Social Security. I said that he

1 would retire in the year 2049. I'm not going to go back
2 because it's too disruptive to keep going back and forth. It's
3 a couple of years ahead of this on the page before. Roughly,
4 it's in the 69, \$70,000 range for loss and Social Security
5 pension. What that represents is the difference between what
6 he will get for the few years that he did work and what he
7 would have gotten. So that would be the value of his Social
8 Security loss.

9 We use a two percent growth rate here to grow those
10 benefits because that's what the Social Security Administration
11 has used on average for the last decade. So that's a
12 two percent growth rate. That's why these are going up over
13 time. And then the life expectancy, as I said already, we used
14 was 2061, age 79. So that the total loss if he survives to his
15 full life expectancy in Social Security benefits would be
16 916,260. And let me just give you what that total would be.

17 Do we have the white board?

18 (Brief pause in the record.)

19 A So what I figured I would do since there's a lot of
20 numbers here, is just summarize the totals for you.

21 Q Let me bring it up for you, this way they can see and
22 she can hear.

23 A So the total loss if he -- under the scenario with
24 full life expectancy. So let me just write that, total
25 economic loss, full life expectancy of 79 is \$5,689,888. If I

1 baseline -- and he will tell me -- so in medical evaluations,
2 for example, he will give me categories of services that he
3 will need and he will tell me for how long, the duration, that
4 he will need them. In some cases he will say two years, in
5 some cases five years and some cases -- most cases it was life
6 expectancy all the way to the end. So that's why in the first
7 column you'll see in 2019 and 2020 we have higher numbers
8 because in the first two years Mr. Provder said he was going to
9 need a little bit more than he -- more like evaluative type of
10 things and then it would be routine beyond that. So I just
11 took exactly what he told me and my job was to say how much
12 will those services cost in the future.

13 So what you need to know from me is what was the
14 growth rate I used. All of those top numbers come from
15 Mr. Provder. So in the case of medical evaluations, which
16 includes things like psychological analysis or physical
17 therapy kind of evaluation, the growth rate that I used there
18 is three percent. Now what we're doing for health care, the
19 Bureau of Labor Statistics collect data on prices and they
20 break them down by categories. So I'm going to be using the
21 subcategories in medical care that are provided by the Bureau
22 of Labor Statistics and for that I go back 25 years. So how
23 far back I go is part of my expertise and part of the
24 decision-making.

25 So I go back 25 years and I take the subcategories of

1 cut it short at 2055, the total loss under a life expectancy of
2 72.6 -- I'm sorry, 72.3 is \$5,154,038. So that's the
3 earnings -- that's the loss associated with no longer being
4 able to work.

5 Now I'm going to move to the next category of loss,
6 which would be the health care services that he requires based
7 on his condition according to Mr. Provder's report.

8 MR. O'HARA: Judge, just for purpose of the
9 record, can we have a question before the witness just
10 rolls into the next topic.

11 THE COURT: Sure.

12 BY MR. MORELLI:

13 Q So now I'm going to ask you to give us the total loss,
14 okay?

15 A Including future health care?

16 Q For the health care, exactly.

17 A Okay.

18 Q Full life expectancy.

19 A So there's a lot of numbers here and I will go through
20 each one of them in painstaking detail. I'm kidding. What I'm
21 going to do is start with the first column and go through that
22 one in detail and then the rest will be the same procedure all
23 the way through.

24 So what I need to tell you is Mr. Provder made
25 recommendations for the first year, 2019. I take that

1 medicine according to the Bureau of Labor Statistics. Medical
2 prices, as you probably have heard, have been increasing faster
3 than the general rate of inflation, but the good news is not as
4 much as it was historically. So three percent is in line with
5 the general rate of inflation and a lot of these categories are
6 now at three percent. So medical evaluations, three percent.
7 And just for each category I'll tell you the total over the
8 remainder of his life under both scenarios. So I'm going to
9 have to flip some pages.

10 Under the full life expectancy, the lifetime cost of
11 those medical evaluations is \$63,436. If he has the reduced
12 life expectancy, then that same category, medical evaluations,
13 would be \$47,173. So that's how I'm going to do every column;
14 I'm going to read to you what the full cost would be, what the
15 growth rate would be and then what it would be under the
16 reduced life expectancy.

17 So for therapeutic modalities, based on Mr. Provder's
18 recommendation, the growth rate that I use there is
19 2.5 percent, so that's lower than the general rate of inflation
20 for things like physical therapy, therapies, in general. So
21 the lifetime cost to age 79 is \$307,707. The reduced cost
22 would be \$251,070. The category of medical care is office
23 visits, general office visits, to specialists or primary care.
24 The lifetime cost of the -- the growth rate is three percent
25 over the last 25 years. The lifetime cost of office visits to

1 age 79 is \$3,721,040. Under the reduced life expectancy it's
2 \$2,672,671.

3 Medications. You've probably heard pharmaceutical
4 prices do continue to rise faster than the general rate of
5 inflation. Still not as bad as it was 30 years ago. We're at
6 3.8 percent now, growth rate. So above the general rate of
7 inflation, but not as bad as it used to be. The total cost for
8 medications for Mr. Perez if he lives to age 79, based on
9 Mr. Provder's recommendation, \$305,386 and in the reduced life
10 expectancy it's \$210,326.

11 Transportation. Since he can't drive himself anymore,
12 he will require transportation to these appointments or for
13 whatever he has to do. Again, that's recommended by
14 Mr. Provder. The lifetime cost of transportation using a
15 growth rate of 2.5 percent is \$1,122,201 and in the reduced
16 life expectancy it's \$826,311.

17 Home care. 24 hours a day, seven days a week is what
18 is recommended by Mr. Provder at a lifetime value of
19 \$8,961,492. In the reduction it's \$6,598,621. And a growth
20 rate of 2.5 percent is implemented there.

21 And then there's one-time procedures, surgical
22 procedure. That's the same under both scenarios, \$98,598 at
23 some point over the course of his life. I don't use any growth
24 rate there. So \$98,589 is a one-time surgical procedure that
25 he will need over the course of his life.

1 A Right.

(witness resumes the witness stand.)

2 Q So now, just so that we understand that, you have now
3 covered three different items in two different ways, right?

4 A Yes.

5 Q One is lost wages?

6 A Yes.

7 Q For his full life expectancy, right?

8 A Yes.

9 Q And one is the Social Security wages for benefits for
10 his full life expectancy?

11 A Yes.

12 Q And his reduced life expectancy, right?

13 A Yes.

14 Q And medical costs and treatment and home care for his
15 full life expectancy and for his reduced life expectancy?

16 A Yes.

17 Q And that's summing up everything that you told us?

18 A Correct.

19 Q And anything else that you want to add or are we good?

20 A We're good.

21 Q Good.

22 MR. MORELLI: I have no more questions.

23 THE COURT: Thank you. Let's have the jury take
24 a break and we'll come back for cross.
25

1 So the total future health -- so let me do the same
2 thing here. The total future health care costs under full life
3 expectancy is \$14,579,852 and the reduced is 10,704,762.

4 So the last thing I'm going to give you is the grand
5 total of all categories under the two scenarios.

6 Is it okay if I turn it over?

7 Q Yes, we're going to get you a black Sharpie in case
8 you want to make it more --

9 MR. O'HARA: Sorry, I couldn't hear what
10 Mr. Morelli was saying.

11 MR. MORELLI: No, I just said that I have a black
12 Sharpie, which might be able to be seen better.

13 A Okay. So let me just give you the totals. I'll start
14 with the full total. I'm going to try to fit it on here and
15 hopefully, you could see it.

16 So the full life expectancy total in all categories is
17 \$20,269,740 and under the reduced, the total is \$15,858,800.
18 And that is all within a reasonable degree of economic
19 certainty. That's something I say often and it's because
20 that's my way of saying these are reasonable numbers based on
21 the assumptions that I had to make in my expertise.

22 Q And yes, you could turn it over.

23 A Well, I'm done.

24 Q Good. You're done, so you don't have to worry about
25 that.

1 THE COURT OFFICER: All rise, jury exiting.
2 (Jurors exited the courtroom.)

3 THE COURT: I just want to address -- you can
4 step down.

(witness exits the witness stand.)

5 THE COURT: In fact, step out for just a second.
6 I don't think it's going to matter, but step out
7 nonetheless.

8 THE WITNESS: Sure.

(witness exits the courtroom.)

9 THE COURT: So I do want to -- we got a little
10 bit sidetracked this morning and there was something that I
11 did want to address, which was the argument yesterday
12 concerning permitting the expert to testify concerning life
13 expectancy, the issue that was raised yesterday. We have
14 independently done some research. We gave counsel the
15 opportunity to submit any authority, which I don't believe
16 that we have received any. My ruling is as follows:

17 The life expectancy is an issue of fact for the
18 jury to decide. Ultimately, the jury is going to have to
19 decide if the life expectancy -- will have to decide life
20 expectancy based upon the considerations that are more
21 fully set out in the PJI and I don't need to reiterate
22 here.

23 Now, we don't know how long anybody is going to
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live, which is the reason why we have these statistical averages that are set forth life tables. To the extent that Dr. Greenbaum[sic] testified that people with injuries similar to --

MR. MORELLI: Excuse me, Greenwald.

THE COURT: Greenwald, thank you -- will testify -- excuse me -- people with injuries similar to Mr. Perez's will suffer a six to seven year life expectancy reduction on average. Well, not to the extent, but that Dr. Greenwald did testify that people will suffer that reduction in average. Nonetheless, the jury must consider an expert's opinion, but they don't have to accept it.

Defendants, in effect, want the Court to charge the jury as a matter of law with how long Mr. Perez will live, or stated another way, how old he'll be when he dies and then only allow the expert to testify to damages based upon that reduced number.

I think that's completely inappropriate and I reject that. I think that it would invade the province of the jury and usurp its role as the finder of fact. And I think that the appropriate way to deal with the issue, which I think we've started to do and I think we'll continue to do, is to have the expert testify to a variety of options, which is subject to examination and cross-examination based upon the facts and then ultimately,

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demonstrate, more likely than not, that there's a reduced life expectancy.

So it's for that reason, without going into great detail, that the defense is of the view that there is no longer a question of fact in front of this jury, quite the contrary. The only evidence that's been presented from the plaintiff's medical experts and now the plaintiff's economic expert is that there is an expected reduction in his life expectancy of 6.7 years and therefore, anything above that requires jury speculation.

THE COURT: Okay. Thank you for clarifying that, but again, it's of my opinion that in order for me to get to that point, I would have to be accepting whatever the number in the life expectancy tables as my starting point as a matter of law and then offer that reduction to the jury and take away those whole factual issues away from the jury, which I don't think is appropriate.

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

THE COURT: Okay.

MR. O'HARA: Five minutes?

THE COURT: Yes.

(Brief recess taken.)

(witness resumed the witness stand.)

THE COURT OFFICER: All rise, jury entering.

(Jurors entered the courtroom.)

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the jury is going to have to determine what they believe Mr. Perez's life expectancy or work life expectancy is and apply the numbers accordingly.

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

Just so that there's a record because my recollection is that the entire dialogue on this issue either arose sidebar or in chambers. So I just want to put a general overview on what our position was, but I understand the Court's ruling.

THE COURT: Of course. I'm sorry. Yes.

MR. O'HARA: So our position is that the evidence is uncontroverted in this case and Mr. Perez, more likely than not, has a 6.7 year or greater decrease in his life expectancy. Assuming the defense accepts that and does not put on testimony, the only evidence before this jury is that, more likely than not, Mr. Perez will expire based on the medical conditions, and I believe the phrase that the doctor just used is the expected reduction in his life expectancy.

The life expectancy tables are charged as a matter of rule and we would ordinarily agree that it is customarily a question of fact when the plaintiff suggests with appropriate medical care the plaintiff will likely live a full life expectancy, but in this case the plaintiff has actually presented evidence in its case in chief to

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THE COURT: Counsel.

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

CROSS-EXAMINATION

BY MR. O'HARA:

Q Doctor, we met in the hallway. I just have some follow-up questions for you relating to the economic opinions that you advanced.

First, you talked about the concept of assumptions. Those are things that you accept as true and then base your opinion, presuming that those items will at some point be true, correct?

A Correct.

Q And to the extent that you have offered opinions that are based on facts that are assumptions that ultimately are untrue, you would agree with me that they affect the ultimate opinions that you would hold, correct?

A Sure.

Q So if you rely upon something that is inaccurate, it allows for you to revise your opinion because you're not independently testing the accuracy of any of those facts when you assume them, correct?

A Correct.

Q If I ask you to assume certain facts in this case relating to, for example, the job that Mr. Perez is qualified to do in the future and I ask you to accept that as true and

1 you do so, it will affect the economic loss depending on the
 2 wage for that job, whether it be higher or lower; is that a
 3 fair statement?
 4 A Yes.
 5 Q And in this case one of the things that you made
 6 reference to was, and it's quoted in your December 30, 2018
 7 report, that Mr. Perez had been working as a web developer and
 8 a graphic designer, do you remember that?
 9 A Yes.
 10 Q And that's in both of your reports, both the 2018
 11 report and the 2019 report, correct?
 12 A Correct.
 13 Q Now, part of the materials that you had the
 14 opportunity to review in this case included the actual tax
 15 returns from 2009 through 2013 for Mr. Perez, correct?
 16 A I thought it was 2010, but, yes, I have W-2's and tax
 17 returns.
 18 Q If I represent to you that the record in the case
 19 contains tax returns from 2009 through 2013, for purposes of my
 20 question will you accept that as true?
 21 A Yes.
 22 Q And you would agree with me that there are no income
 23 sources in which Mr. Perez ever earned any monies from any
 24 companies that were paying him for web development and graphic
 25 design; isn't that true?

1 THE COURT: Was it contained in any of the
 2 disclosures?
 3 MR. O'HARA: To my knowledge, no.
 4 MR. MORELLI: No.
 5 THE COURT: Okay.
 6 BY MR. O'HARA:
 7 Q So if it's not referenced in your file, is it fair for
 8 us to presume that you would not have reviewed that?
 9 A Correct.
 10 Q Are you aware of any record in this case that
 11 demonstrates that Mr. Perez actually earned money that was
 12 reported as income for website development or design, yes or
 13 no?
 14 A Yes.
 15 Q What record are you aware that shows that he earned
 16 monies for website design as opposed to the types of tasks that
 17 he has testified to doing relating to the development of booths
 18 and banners?
 19 A So I have an e-mail exchange. From the W-2's --
 20 MR. MORELLI: Judge, could we approach?
 21 THE COURT: Yes.
 22 MR. MORELLI: I think that would be a good idea.
 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.)

1 A So --
 2 Q Is what I said true?
 3 A I guess I'm not sure so.
 4 Q If you're not sure, I'll ask you another question?
 5 A Okay. So basically -- yeah, I'm not clear on the
 6 question.
 7 Q Sure. In looking at the records in this case, you
 8 reviewed the discovery that was generated, correct?
 9 A Yes.
 10 Q You included the deposition testimony of the
 11 plaintiff, correct?
 12 A I don't think I had the deposition of the plaintiff.
 13 Q None of them?
 14 A I have the brother's testimony.
 15 Q But to the best of your recollection, you haven't
 16 actually reviewed the testimony of the plaintiff in this case?
 17 A I don't believe so. I can check.
 18 Q Is there something in your file that would refresh
 19 your memory as to whether or not you actually looked at the
 20 plaintiff's testimony in the case?
 21 A I can look. It might be on my computer.
 22 Q If you can look in your file, by all means, please do
 23 so.
 24 (Brief pause in the record.)
 25 A It's not in here.

1 MR. O'HARA: May I approach the witness, Your
 2 Honor?
 3 THE COURT: Of course.
 4 (WHEREUPON, counsel approaches the witness.)
 5 BY MR. O'HARA:
 6 Q Doctor, before I ask you this question I want to be
 7 careful.
 8 The documents that you're referring to that are e-mail
 9 exchanges, are these the items that have been marked into
 10 evidence as Plaintiff's 30?
 11 A Yes.
 12 Q My question is very specific. With respect to monies
 13 that he actually earned for website development, are there any
 14 records that showed anybody paid him any monies for those
 15 services?
 16 A So the reason I'm hesitant is I saw that the companies
 17 he worked for could be consistent with that, but it doesn't
 18 list his occupation on the W-2.
 19 Q And these documents are in evidence.
 20 What these e-mail exchanges concern is a Best Buy@
 21 contract relating to the building of the booth and the trusses
 22 for the booth that's involved in the incident in this case,
 23 correct?
 24 A Correct.
 25 Q And you understand from the records, without going

1 into details, that the booth that we're talking about building
2 was a physical structure at Jones Beach for Best Buy® , correct?

3 A Correct.

4 Q And a website developer -- you understand a website
5 developer is something that 's online that people use for social
6 and computer access, correct?

7 A Sure.

8 Q And that's something separate and distinct from a
9 physical structure at a particular location, correct?

10 A Absolutely, yes.

11 Q So then let's go back to my question.

12 Are you aware of any source of income at any point in
13 Mr. Perez's life from anyone paying him for, quote, web
14 development, yes or no?

15 MR. MORELLI: Objection, Your Honor, because that
16 question was asked before this --

17 THE COURT: I'll allow it.

18 MR. MORELLI: -- and she answered it.

19 THE COURT: I'll allow it. It's

20 cross-examination, a little latitude.

21 A So the W-2's are for companies that would employ web
22 developers, but I have no evidence from those W-2's that that
23 was his occupational title. I have the vocational report of
24 Mr. Provder.

25 Q And if I were to tell you that Mr. Provder testified

1 hear that, correctly?

2 A Correct.

3 Q What medical degree, to your knowledge, does
4 Mr. Provder have from any medical institution?

5 A I just know him as a certified life care planner . I'm
6 not really sure.

7 Q Doctor, if I represented to you that Mr. Provder
8 testified that he has no medical training, he's not a doctor,
9 he has no nursing training, he's not a nurse, would you have
10 any information to call that into question or challenge that?

11 A Not necessarily because there 's something that goes
12 into becoming a certified life care planner and the allied
13 health sciences are so broad that doctor and nurse wouldn't be
14 sufficient. So if you only asked those two questions, that
15 wouldn't be sufficient to say he's not a medical provider.

16 Q Thank you?

17 MR. O'HARA: Judge, would you ask the witness to
18 answer the question yes or no?

19 THE COURT: Would you please, if you can. If you
20 can't, simply let Mr. O'Hara know that, okay?

21 THE WITNESS: Sure.

22 BY MR. O'HARA:

23 Q You can answer the question.

24 Are you aware of any information from any source to
25 suggest that Mr. Provder is a medical doctor, a licensed nurse

1 in this case yesterday that he was unaware of any records that
2 showed actual payment for website development , would you have
3 any information that was available to you in your file to
4 challenge that testimony?

5 A No.

6 Q And if Dr. Provder used the phrase aspirational with
7 respect to Mr. Perez's future in web development, you would
8 agree with me, that is recognition that at the time of the
9 incident and prior to the incident he had not actually
10 performed that task; fair statement?

11 A That's where I think the e-mail is relevant.

12 Q Is what I said a fair statement, that in actuality,
13 prior to this incident, from any source in this record, there
14 is no information to indicate that Mr. Perez worked in the
15 field of website development and design; isn't that a fair
16 statement?

17 A Yes.

18 Q Thank you.

19 Now, one of the things when you were talking about
20 Mr. Provder, you indicated, and I want to make sure I wrote
21 this down correctly, that you rely on Mr. Provder as a main
22 source of information from which you're basing your economic
23 opinions, correct?

24 A Correct.

25 Q And you described him as a medical experted , did I

1 in any respect, yes or no?

2 A No. It's probably in my file if you want me to look .

3 Q Sure. If it helps you, I want your answer that you're
4 comfortable and that it's fair and based on a proper
5 foundation.

6 A So can I read what his degrees are.

7 Q You can read it to yourself and then you can answer my
8 question yes or no as the judge has instructed, please.

9 THE COURT: Or if you can't answer yes or no , you
10 should tell counsel that as well.

11 A So I see him in a medical profession, but not --

12 MR. O'HARA: Judge, she's reading out loud after
13 the direction given to her.

14 THE COURT: Yes, no, can't answer with a yes or
15 no?

16 A I can't answer that.

17 Q Thank you.

18 Now, speaking about the assumptions. If I asked you
19 to assume that Mr. Perez would remain in the same general field
20 that he had been working in and earning the same wages that he
21 had earned on the three or four years leading up to this
22 incident, you agree with me that the economic loss for the
23 future would be different, correct?

24 A Correct, under that scenario.

25 Q And if you accepted that as true and you relied upon

1 that information, the economic loss that you alleged for his
2 lifetime would be less, correct?

3 A Correct.

4 Q Now, in addition to the assumption about what he might
5 aspirationally do in the future, you also mentioned assumptions
6 related to retirement age, do you remember that line of
7 questioning?

8 A Yes.

9 Q And one of the things in advancing your opinion that
10 you indicated was that you presume that Mr. Perez will retire
11 at or about 67 years of age, correct?

12 A Correct.

13 Q And that's a presumption that's not specific to
14 Mr. Perez in anything unique about him, you just made that
15 presumption in this case. There's facts on which you're basing
16 that, correct?

17 A That's not correct.

18 Q Doctor, isn't it true that in order to come to the
19 assumption that he would work until the age of 67, you have to
20 accept as true, without any independent evaluation, that he
21 wouldn't retire early?

22 A I'm not following the question.

23 Q Sure. You have to accept as true that he wouldn't
24 have any illness?

25 A That would cause him to retire earlier? Yes, I'm

1 (Brief pause in the record.)

2 A I wouldn't say multiple millions, but in the million
3 range, yes.

4 Q Well, if he -- if you used your three percent growth
5 rate and based it on the highest wages that he earned for any
6 year prior to this accident, and I want you to presume for this
7 question that it is \$34,000 for his work life expectancy, if
8 you assume that as being true and add your three percent growth
9 rate as compared to when you used the base salary of almost
10 \$85,000, it should be about half of it, shouldn't it?

11 A So with a three percent growth rate, yes.

12 Q Thank you.

13 Now, I'm going to need some help with this. I want to
14 make sure I understand it. The growth rate is something that
15 you base today and forecast for the future as part of your
16 expert evaluation in this case, correct?

17 A Correct.

18 Q And in doing so you look back on the growth rates
19 leading up to present to be comfortable in offering that
20 opinion, correct?

21 A Correct.

22 Q You would agree with me that the growth rate from 2009
23 to 2016 was not three percent, was it?

24 A Of course not, no.

25 Q And the growth rate in 2016 to 2017 was not

1 making that assumption.

2 Q And you make the assumption that he would not have any
3 later incident or injury that would prevent his ability to work
4 to 67?

5 A Yes, that's correct.

6 Q And that he didn't make a personal decision, for
7 whatever reason, to retire earlier than 67, correct?

8 A Correct.

9 Q And you would agree, would you not, that in other
10 cases you have authored reports and offered the opinion that
11 retirement age can be with Social Security benefits as early as
12 62, correct?

13 A Correct.

14 Q And if you presumed that Mr. Perez retired prior to
15 67, so using 62 as an example, the wage loss for the claim in
16 this case would be less by approximately \$1 million, true
17 statement?

18 A Yes, like 8000,000.

19 Q Okay. And if you accepted as true that he worked in
20 the same capacity for the future that he had worked in for the
21 three years leading up to this incident and made about the same
22 money, the future income loss would be millions of dollars
23 less, wouldn't it?

24 A I would adjust the growth rates, but, yes, it would
25 be -- let me see.

1 three percent, was it?

2 A Correct.

3 Q And the growth rate in 2017 to 2018 was not
4 three percent, was it?

5 A Getting closer, but, no.

6 Q From 2009 until 2018 the growth rate was between 1.5
7 and 2.8 percent, correct?

8 A Correct.

9 Q And it fluctuates, correct?

10 A Correct.

11 Q If you accepted as true for purposes of my question a
12 2.5 percent growth rate based upon the average from 2009 until
13 2018 and you used that to forecast the future economic loss for
14 Mr. Perez, what would happen to the numbers?

15 A It would go down.

16 Q Now, I put something up --

17 MR. O'HARA: May I approach the witness, Your
18 Honor?

19 THE COURT: Of course.

20 BY MR. O'HARA:

21 Q I put something up that the jury saw yesterday, and I
22 don't have the computer skills of everybody else, which has
23 been marked Plaintiff's 33 for identification, which is the
24 chart A3 in Dr. Provder's report, do you have that in front of
25 you?

- 1 A I do have it. I will get it.
 2 MR. O'HARA: May I show her what I'm going to
 3 talk about, Judge?
 4 THE COURT: Sure.
 5 (WHEREUPON, counsel approaches the witness.)
 6 BY MR. O'HARA:
 7 Q And I'll point to the section that I'm going to ask
 8 you questions about. Right here.
 9 A Okay.
 10 Q And when I point out for you on table A3 where you see
 11 the phrase "neurosurgeon," do you see that?
 12 A Yes.
 13 Q And it says: "Frequency of visits, 40 times per
 14 year," correct?
 15 A Correct.
 16 Q And it gives an estimated cost of \$16,800 up to
 17 \$17,200, correct?
 18 A Correct.
 19 Q Now, you accepted, for purposes of your economic
 20 analysis, that in valuing the future life care needs and what
 21 it would cost for those needs, that Mr. Provder's chart and
 22 what was likely to be required in the future was accurate,
 23 correct?
 24 A Was accurate?
 25 Q Yes.

Laura L. Ludovico, SCR

- 1 Q It's an almost \$725,000 mistake, yes?
 2 A Yes.
 3 Q Now, I want to talk just very briefly about the
 4 assumptions that you made relating to the decrease in
 5 Mr. Perez's life expectancy, and I think you used the phrase
 6 expected reduction, do you recall that?
 7 A Yes.
 8 Q And just so the jury understands what you mean by that
 9 is based upon all of the statistical information, coupled with
 10 what you understand to be the medical opinions relating to
 11 Mr. Perez, he has an expected -- meaning more likely than
 12 not -- reduction in his future life, you agree with that
 13 statement?
 14 A Yes.
 15 Q Have you had a chance to review any of the defense
 16 evaluations on that particular topic?
 17 A No.
 18 Q I want you to assume for purposes of the question
 19 that, whether it be six years or seven years or even eight or
 20 nine years, if you accept that as true, that second category of
 21 life -- future life care expenses, the more years of the
 22 deduction, the greater the reduction in that number, correct?
 23 A Correct.
 24 Q But if we accept what obviously you accepted, the 6.7
 25 year expected life reduction, the total reduction in the life

Laura L. Ludovico, SCR

- 1 A Yes.
 2 Q And you didn't do an independent evaluation to
 3 determine whether it was accurate, you just presumed, much like
 4 other facts, that it was true for purposes of offering an
 5 opinion, correct?
 6 I'll ask it differently. Whenever I see that look, I
 7 say, okay, I'll ask a different question.
 8 You accepted as true the suggestion that Mr. Perez
 9 would need 48 times per year neurosurgical medical care for the
 10 rest of his life that would cost somewhere between \$16,800 a
 11 year and \$17,900 a year, correct?
 12 A Yes.
 13 Q And if Mr. Provder testified in front of this jury
 14 yesterday, that was not accurate, that's not what this
 15 gentleman will require for the future, you would agree that
 16 amount of money needs to be reduced from the life care plan
 17 that you proposed, correct?
 18 A If it was overestimated, yes.
 19 Q Or if it was not founded on the medical opinions that
 20 have been offered in the case and Mr. Provder said I made a
 21 mistake, I withdraw it, it's not -- it shouldn't be in there.
 22 A Okay. So then it would be deducted.
 23 Q Okay. And if you deduct just that expense, it's a
 24 substantial amount of money during his life time; isn't it?
 25 A Sure, yes.

Laura L. Ludovico, SCR

- 1 care plan is almost 33 percent, correct?
 2 A I have to look at it.
 3 Q Sure. That's okay. If I can help you.
 4 A So what am I calculating.
 5 Q Sure. If you base your number on a decreased life
 6 expectancy of 6.7 years, which is what you've done in this
 7 case --
 8 A Right.
 9 Q -- the total reduction is approximately 33 percent?
 10 A Yes. Oh, I thought you were asking me something else,
 11 yes.
 12 Q So I think you've answered it, but so what I've said
 13 is true, correct?
 14 A Correct.
 15 Q Now, the last part that I wanted to talk with you
 16 about relates to the home care costs that are set forth in your
 17 report, do you see that?
 18 A Yes.
 19 MR. O'HARA: One minute, Your Honor, please.
 20 THE COURT: Sure.
 21 (Brief pause in the record.)
 22 BY MR. O'HARA:
 23 Q In the first report that you wrote, you suggested home
 24 care expenses for 2019, correct?
 25 A Correct.

Laura L. Ludovico, SCR

1 Q And then you forecast that based upon the expectation
2 that Mr. Perez needs and will have 24 -hour a day, seven day a
3 week care, correct?

4 A Correct.

5 Q And would agree with me that with respect to the life
6 care plan, that you have offered an economic opinion about, by
7 a long shot, that's the largest piece of that plan, correct?

8 A Yes.

9 Q The most expensive without question?

10 A Yes.

11 Q If you presume that he doesn't need it tomorrow, next
12 week, next month, 24-hour a day, seven day a week care, but
13 that it is medically appropriate for it to be less than every
14 day, all day for the rest of his life, your expectation is that
15 the cost for that would drop, correct?

16 A Yes.

17 Q And so, for example, if he only needed care four or
18 five hours a day as compared to 24-hours a day, your
19 expectation is there would be a dramatic decrease, correct?

20 A Yes.

21 Q Have you had a chance to look at any of the medical
22 opinions that have been generated by any of the experts on
23 behalf of the defense in this case?

24 A No.

25 Q Have you had a chance to evaluate whether there are

1 looked at the companies that he worked for on the W-2's. It
2 didn't state his occupation, but the nature of the work, and
3 the e-mail to me from Best Buy® was pretty significant also in
4 terms of what he was going to be able to earn.

5 Q Right. But it had nothing to do with medical records
6 or depositions, correct?

7 A Correct, I didn't need that.

8 Q That's not your job?

9 A Right.

10 MR. O'HARA: Objection. Argumentative.

11 THE COURT: Sustained.

12 BY MR. MORELLI:

13 Q And you also talked to us about assumptions right from
14 the beginning; is that correct?

15 A Yes.

16 Q And what did you tell us about assumptions?

17 A That they're necessary when you're predicting into the
18 future when there's uncertainty, which is why you require
19 expertise of someone who knows the distribution of the data
20 around that uncertainty. That would be an economist.

21 Q And actually, in Mr. O'Hara's questioning of you, all
22 he asked you to do was to make assumptions actually, didn't he?

23 A There were a bunch, yes.

24 Q Yeah, a bunch, a group.

25 MR. O'HARA: Judge, I'm going to object to that.

1 opinions that have been provided by the defense relating to his
2 need for a 24-hour a day, seven day a week care?

3 A I wouldn't be qualified to, so, no.

4 Q I accept that, but if you had those opinions and if I
5 asked you to accept them as true and the recommendations did
6 not suggest 24-hour a day, seven day a week care, that largest
7 piece of the life care plan that you've identified economically
8 would drop significantly, wouldn't it?

9 A Yes.

10 Q Thank you, ma'am. I have nothing further.

11 REDIRECT EXAMINATION

12 BY MR. MORELLI:

13 Q Dr. Dwyer, first of all, your task in this case is not
14 medical, correct?

15 A Correct.

16 Q And your task in this case is not reading depositions
17 and deciding whether or not the plaintiff has one malady or
18 another, correct?

19 A Correct.

20 Q And as a matter of fact, you testified on direct that
21 your evaluation in this case, coming to amounts of money was
22 based on Mr. Provder, correct?

23 A Among other things, yes.

24 Q What are the other things?

25 A So I read Mr. Provder and that's the basis for it. I

1 I'm not sure -- it's not a question, it's just and
2 editorial.

3 THE COURT: Overruled.

4 But keep it to a minimum, please.

5 BY MR. MORELLI:

6 Q You stated to me on direct examination -- you made the
7 statement that Mr. Perez is not in a box, did you say that?

8 A His occupation.

9 Q Yes. I don't mean him personally.

10 A Right. You can't put him into a category very neatly
11 from what I've read.

12 Q Right. So why don't you explain in a little bit more
13 detail why you made that statement, that you can't put him
14 neatly into a box in terms of his profession or his earning
15 capacity in the future?

16 A So when you do research on case s like this, you read
17 lots of things that are substance in the case and around that
18 profession and we're in an age of rapid innovation. We need
19 people who are able to adapt quickly. What I got from reading
20 the brother's testimony and from what it -- from Mr. Provder
21 mostly, was that he was part of this rapid innovation world,
22 that it's hard -- we have workforce issues at the national
23 level in terms of trying to address occupational workforce
24 issues because of rapid innovation.

25 That's what I meant. He's part of this growing field

1 that is hard to place in a box.

2 Q And actually, when you state that you reviewed the
3 testimony of his brother Justin Perez, you mean it's testimony
4 in this case, not a deposition, the testimony in this case?

5 A Yes, in this case.

6 Q Yes. Now, there was a question of you with reference
7 to Mr. Provder and the fact that he's not a medical doctor.

8 And he told us that when he testified, that he wasn't a medical
9 doctor. And then you were questioned about whether or not he
10 was a nurse, okay? And you were making a statement to clarify,
11 I believe, your reliance on Mr. Provder and his being certified
12 in his field. Can you tell us what you meant by that?

13 A Sure. I have seen his resume and he is trained as a
14 life care planning expert, which means he has graduate degrees
15 in medical counseling. So, yes, I made an assumption that he's
16 a medical expert and I'm relying on that assumption. It did
17 look like he had the qualifications to be able to be a
18 certified life care planner, therefore, I have no reason to
19 doubt some of his recommendation s, but he's also making the
20 decisions under uncertainty, so if he changes something along
21 the way, it affects my numbers.

22 Q Now, the presumption of the term that I asked you
23 about earlier was work life expectancy . There is such a term,
24 correct?

25 A Yes.

Laura L. Ludovico, SCR

1 A No.

2 MR. O'HARA: Objection.

3 THE COURT: Sustained.

4 BY MR. MORELLI:

5 Q When you decided to make it 67, you did it based on
6 all the things you just told us, correct?

7 A Correct.

8 Q It wasn't just a number that you picked?

9 A Of course not.

10 Q Right. Now, just like when someone's life expectancy
11 may be reduced from literature, right, or tables, that doesn't
12 mean that Mark Perez couldn't work to 70 or 72 or 75, correct?

13 A Correct.

14 Q You assumed that he's going to retire at 67. Maybe he
15 can, true? So that's also an assumption. So when you were
16 asked, hey, he could work less, my question is couldn't he work
17 more?

18 A Yes, up until --

19 Q To an older age, right?

20 A Yes.

21 Q And am I correct, in this world people are working
22 longer; isn't that true?

23 A Yes, especially in professional occupations.

24 Q Yes. And this -- you know, when you talked about him
25 being a web designer/graphic artist, that's a profession; isn't

Laura L. Ludovico, SCR

1 Q Okay. And that's different from life expectancy?

2 A Correct.

3 Q Explain to the jury why we have work life expectancy
4 and life expectancy as two different categories?

5 A Well, they measure two completely different things
6 even though they might be relate d, but work life expectancy --
7 there's a lot of research done on work life expectancy and
8 that's how long people are expected to work. So it relates to
9 how long people are expected to retire.

10 This was actually my area of research for my
11 dissertation and I worked for Social Security. So this is --
12 there's a distribution over retirement age in the general
13 population. What I used was not part of that distribution or
14 based on research that can be kind of noisy, but just the
15 normal age of retirement under Social Security. And, yes, I
16 use different ages and different cases depending on the
17 specifics of the case.

18 In this case I felt comfortable using age 67 for a
19 number of reasons, one of which was he's self-employed and did
20 not have a private pension and the statistics for work life
21 expectancy for self-employed is a little longer . So I gave him
22 the full work life expectancy , as opposed to the reduced age of
23 62, which is the earliest age you can collect under Social
24 Security.

25 Q So you didn't pull it out of the air?

Laura L. Ludovico, SCR

1 it?

2 A Yes.

3 Q And so when you're asked to project lower wages and
4 you state that that would affect your numbers if you project
5 the wages lower, if you project them higher, if he worked
6 longer or he made more than \$84,000, the numbers could be much
7 higher, too, correct?

8 A Yes.

9 Q We don't know because he got hurt at 30, correct?

10 MR. O'HARA: Objection.

11 THE COURT: Sustained.

12 BY MR. MORELLI:

13 Q Would you think that it -- am I correct that it's
14 difficult to project what someone is going to do in the future
15 when they've only had up to 30-years old of history?

16 MR. O'HARA: Objection.

17 THE COURT: Sustained.

18 BY MR. MORELLI:

19 Q Tell us about projecting somebody's future when you
20 start when you're only 30-years old.

21 MR. O'HARA: Objection. Sidebar, please.

22 THE COURT: Sure.

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.)

Laura L. Ludovico, SCR

1 BY MR. MORELLI:

2 Q So Dr. Dwyer --

3 THE COURT: Sustained, by the way.

4 BY MR. MORELLI:

5 Q You told us earlier about the growth rate. Actually,
6 that was, I think, one of the first questions I asked you was
7 about the growth rate, correct?

8 A Correct.

9 Q And so you were just questioned about the growth rate,
10 if you use a lower growth rate, would it lower the numbers.
11 Well, that's pretty obvious, correct?

12 MR. O'HARA: Objection. Argumentative.

13 THE COURT: Sustained.

14 BY MR. MORELLI:

15 Q But the growth rate that you used, you had a reason
16 for using, correct?

17 A Absolutely.

18 Q So why don't you tell us again why use that particular
19 growth rate?

20 A Well, I use many growth rates, but I think we're
21 referring to the wage growth rate here.

22 Q Yes.

23 A I used the 20-year average. If I only went back to
24 2009, which was the midst of a deep recession, one of worst
25 recessions we've had a while, it would have completely

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1 MR. MORELLI: You don't know where I'm going.
2 You don't know where I'm going.

3 THE COURT: That's fine, but come on up anyway
4 because I have something I want to ask anyway.

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: I don't know that there was an
9 objection to rule on, but at this point he has his --

10 MR. MORELLI: No, he just asked for a sidebar.
11 There was no objection.

12 BY MR. MORELLI:

13 Q So when you talk about there -- we use 6.7 years
14 reduction in life expectancy, correct --

15 A Correct.

16 Q -- in your second scenario?

17 A Correct.

18 Q And you were asked, isn't that about 33 percent? In
19 your opinion, does that have any relevance to the numbers that
20 you showed us, the fact that it's 33 percent or 20 percent or
21 40 percent?

22 MR. O'HARA: Objection.

23 BY MR. MORELLI:

24 Q Does it change your numbers at all?

25 THE COURT: Overruled.

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1 underestimated the growth rates. So we are on an upward trend
2 again, we are projecting over the next 30 to 35 years and going
3 back 20 years is much for representative of a business cycle
4 where you have your traditional peaks and troughs.

5 As Mr. O'Hara said, it's not flat, but we smooth it
6 out by taking an average. Going back the last ten years where
7 you don't want an outlier year, you don't want a period of time
8 where you're in deep recession, nor do you want when you're in
9 a bubble or a period where we're really high in prices, which
10 is why wouldn't go back 30 years in health care when we had
11 double digits inflation.

12 So I said when I was speaking, part of the reason why
13 you recruit someone like me is to know far back will capture
14 the appropriate business cycle for projecting into the future.
15 2009, no economist would -- no economist, that I know of, would
16 say that that would be a valid decade to choose from.

17 Q And also, am I correct that when you gave your direct
18 testimony and you talked about surgery, you stated to the jury
19 that you were only considering one surgery?

20 A Correct.

21 Q And that's correct; is it not?

22 A Yes.

23 Q Okay. And if, in fact, the --

24 MR. O'HARA: Objection. Sidebar, please. I know
25 where he's going.

Laura L. Ludovico, SCR

1 BY MR. MORELLI:

2 Q Do you understand my question?

3 A I'm not clear.

4 Q Okay. He made a point to say to you that the
5 reduction is about 33 percent, does that --

6 THE COURT: Reduction of what, Mr. Morelli?

7 MR. MORELLI: What?

8 THE COURT: Reduction of what?

9 MR. MORELLI: Reduction for his reduced life
10 expectancy.

11 THE COURT: Thank you.

12 BY MR. MORELLI:

13 Q And he said it was 33 percent. That number,
14 33 percent, does it have any value with reference to what you
15 told this jury the numbers would be on the assumptions that you
16 made?

17 A No, it's just a fact that -- and I think it's more
18 like 25 percent, but it's a fact that if we cut his life
19 expectancy from 79 to 72.3, we go from 20 million to 15 million
20 as a total. So I think that's what I'm being asked, so about
21 5 million out of 20 million.

22 Q And that's not 33 percent, first of all, is it?

23 A No.

24 Q And second of all, it doesn't change your numbers, the
25 numbers are the numbers, no matter what percentage it's

Laura L. Ludovico, SCR

1 reduced; isn't that correct?
 2 A Correct. It doesn't make anything wrong, it's just
 3 different assumption, different numbers.
 4 Q Exactly.
 5 Now, you were asked about your reduction for his
 6 reduced life expectancy could be 6.7 years, right?
 7 A Yes.
 8 Q And I asked you to do that calculation for the jury
 9 because that was the testimony in the case, right?
 10 A Correct.
 11 Q And now, Mr. O'Hara says it could be eight years, it
 12 could be nine years, but I didn't ask you to do that because
 13 there's no testimony in the case about that, okay? So I didn't
 14 ask you to do that, did I?
 15 A Correct, you didn't.
 16 Q Right. And when we're talking about doing math,
 17 right, when you're figuring out how much the bottom line is,
 18 anything that you reduce changes the bottom line and makes it
 19 less, correct?
 20 A Yes.
 21 Q And anything that you add changes the bottom line and
 22 makes it more, correct?
 23 A Yes.
 24 Q This ain't rocket science, right?
 25 MR. O'HARA: Objection. Argumentative.

1 (WHEREUPON, a discussion was held off the record,
 2 at the side bar, in the presence of the Court and
 3 counsel and out of the hearing of the jury.)
 4 THE COURT: Let me give you a five-minute break.
 5 Thank you.
 6 THE COURT OFFICER: All rise, jury exiting.
 7 (Jurors exited the courtroom.)
 8 THE COURT: Step out for a second.
 9 (Witness exits the courtroom.)
 10 MR. MORELLI: Well, we should have my question
 11 read back anyway.
 12 (The record is read by the reporter.)
 13 THE COURT: Well, there's no evidence of that,
 14 2013.
 15 MR. MORELLI: Well, I think you need his
 16 question. Now, his question, from what I remember, and I
 17 might not get it exactly right, I didn't even understand
 18 the point of the question, but what I do understand about
 19 it is that he was saying -- implying that, not only does he
 20 not need 24/7 care, but he certainly doesn't need it to
 21 start right away, maybe it could start ten years from now
 22 because he his parents are taking care of him and
 23 everything. That's the implication.
 24 THE COURT: I took the question, and I'll let you
 25 chime in, but I took the question that was being asked on

1 THE COURT: Sustained.
 2 BY MR. MORELLI:
 3 Q Now, you were asked a question about presuming that
 4 Mr. Perez doesn't need home care 24/7 starting now, right?
 5 A Yes.
 6 Q And I believe the question was starting now or a week
 7 from now or a month from now, that was the question that you
 8 were asked, correct?
 9 A Yes.
 10 Q And then that would change your numbers?
 11 A Yes.
 12 Q And that's true, right?
 13 A Yes.
 14 Q And it's also true, is it not, that if, in fact, he
 15 was not being taken care of by his parents and his brother and
 16 started having home care back in 2013 up until today, that
 17 would drastically change the numbers, too, would it not?
 18 MR. O'HARA: Objection.
 19 THE COURT: Sustained.
 20 BY MR. MORELLI:
 21 Q If he had home care starting in 2013, what, if any,
 22 way would it change the numbers?
 23 MR. O'HARA: Judge, I'm going to object and ask
 24 to go sidebar, please.
 25 THE COURT: Come on up.

1 cross-examination basically as a continuation or a
 2 questioning of the assumptions that were made initially in
 3 terms of Mr. Provder had testified that there would be
 4 certain aspects of medical costs that actually never came
 5 to fruition. And I took his question basically as a setup
 6 for -- not for that period of time with this particular
 7 witness because I'm not sure she actually gave any
 8 testimony about that period.
 9 MR. O'HARA: She didn't. There were no questions
 10 asked about 2013.
 11 THE COURT: So I considered it more as not a
 12 setup for that, but basically if, in fact, he doesn't need
 13 this right away, isn't it true that your numbers would
 14 change?
 15 MR. MORELLI: Yes, but why would that question be
 16 appropriate and my redirect be inappropriate is my
 17 question?
 18 THE COURT: Well, your redirect -- well --
 19 MR. MORELLI: Because why --
 20 THE COURT: I'm not sure why when there's no
 21 issue in the case and when the witness did not give an
 22 opinion or even address that period of time in terms of her
 23 testimony, why it's -- what exactly are we asking for?
 24 MR. MORELLI: I think we need his
 25 cross-examination question in order for you to understand

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what I'm saying.
THE COURT: Okay. If you can find it, sure.
MR. MORELLI: Okay.
(Brief pause in the record.)
MR. MORELLI: We're going to forget about that and then I'll have one question that's not the same question. I won't ask this question, all right?
THE COURT: Okay. Do you have one more question and then you're done or one more question and then your moving onto something else?
MR. MORELLI: No, no, then I'm done.
THE COURT: Okay.
(witness resumes the witness stand.)
THE COURT OFFICER: All rise, jury entering.
(Jurors entered the courtroom.)
THE COURT: Okay, Mr. Morelli.
MR. MORELLI: Yes.
BY MR. MORELLI:
Q Dr. Dwyer, one more question. I'm sure you're happy about that. One more question and that is that we've obviously looked at this, and I've have said this so many times, about 17 times, we've looked at this two different ways; reduced life expectancy and life expectancy tables, correct?
A Correct.
Q If, in fact, Mr. Perez lives longer, that would change

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do it a little bit out of turn and hold off on the resting aspect of it and the defense will start their case tomorrow.
So that's what's going on with the trial at this point in time. Enjoy the rest of your day and we'll see you back tomorrow morning at 10:30.
THE CLERK: All rise, jury exiting.
(Jurors exited the courtroom.)
THE COURT: Anything for the record?
MR. O'HARA: Nothing for the record.
MR. MORELLI: Nothing for the record.
THE COURT: Okay. Close the record.
(Brief pause in the record.)
MR. O'HARA: One of the items that we needed to put on the record related to collateral sources. There is -- and we'll accept a stipulation from the plaintiff, as I understand it, starting in 2013 there came a point in time when Mr. Perez began to receive \$1,100 per month based upon his Social Security disability determination. That has since changed and he is presently receiving \$900 a month.
MR. MORELLI: Yes, it went down.
MR. O'HARA: But what I would ask is, so that the record is clear, because we haven't asked any questions and we frankly, didn't want to ask the family members outside

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your numbers, too and could change them fairly significantly in the higher range, correct?
A Yes.
MR. MORELLI: Nothing further.
THE COURT: Thank you, Doctor. You're excused.
(witness exits the witness stand.)
THE COURT: Ladies and gentlemen, just very quickly. That does conclude the testimony for today. Again, I'm having you report tomorrow --
MR. O'HARA: Before they're released, can we be seen sidebar?
THE COURT: Yes.
MR. O'HARA: The one question.
(WHEREUPON, a discussion was held off the record, at the side bar, in the presence of the Court and counsel and out of the hearing of the jury.)
THE COURT: Yes, so I forgot where I was, but 10:30 tomorrow and we're not working Friday.
Now, the plaintiff still does have potentially at least one more witness, but that witness is out of town, he's not going to be available at the earliest until sometime next week. We're not sure if it's going to happen or not happen at all. So normally at this stage in the game, the plaintiff would be resting and then it would be the defense's turn to start their case, but we're going to

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the presence of the jury, we'll accept whatever the representation is from the start date up to the time that it changed and then from the change date up to the present, as well as the understanding of what the forecast is in the future.
THE COURT: Okay. So stipulated?
MR. MORELLI: Yes. And also, we're going to -- we'll look at all of the past medical costs and everything. And that's another reason why I didn't want to rest, because we're going to look into that today and tomorrow.
MR. O'HARA: I opened on that topic, Your Honor. Without making the representation now, my recollection of the total medical expenses that are in the medical records room is about \$313,000 so I may be off, but we can certainly work on stipulating as to that amount.
THE COURT: Is there some aspect of that that I need to address with the jury in terms of letting them know there's been a stipulation on an issue that was brought up in opening?
MR. MORELLI: Yes, but not yet --
THE COURT: Let me know.
MR. MORELLI: -- because we just want to look into it and make sure that we're doing what we have to do.
THE COURT: Let me know.
MR. O'HARA: Sure.

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THE COURT: When can I expect your instruction, this afternoon?

MR. MORELLI: Request for charge, you've got five guys there.

THE COURT: I just need to hear when.

MR. O'HARA: When can the can judge expect --

MR. BAUER: Tonight.

MR. O'HARA: This evening?

MR. MORELLI: After nine.

THE COURT: Can we go offer the record now ?

MR. O'HARA: Yes, sir.

THE COURT: Okay.

(WHEREUPON, court is recessed and the case adjourned to Thursday, November 21, 2019 at 10:30 a.m.)

"ANSWER: [5] 878/18 878/22
879/3 879/8 879/13
"QUESTION: [7] 878/15 878/19
878/24 879/4 879/10 879/14
883/2
MR. BAUER: [2] 900/6 967/7
MR. HAWORTH: [1] 894/12
MR. MORELLI: [66] 877/3 877/6
877/8 877/12 877/15 882/18
884/8 885/25 886/4 888/10
888/23 890/24 891/2 891/5 891/7
892/19 893/12 893/14 893/18
895/11 897/10 897/18 897/25
898/3 899/11 899/17 900/16
901/9 902/7 902/13 902/16 903/6
903/9 904/5 912/4 912/6 914/5
924/11 925/23 927/5 933/4
933/20 933/22 935/15 935/18
957/1 957/10 958/7 958/9 961/10
961/15 962/15 962/19 962/24
963/3 963/5 963/11 963/17 964/4
965/11 965/22 966/7 966/20
966/22 967/3 967/9
MR. O'HARA: [56] 882/16 882/22
884/10 884/12 891/11 892/2
892/13 892/17 892/21 892/23
893/1 893/22 894/13 899/1 900/3
900/5 900/7 903/7 912/10 920/8
924/9 928/4 928/11 929/18
929/20 930/2 933/3 934/1 937/17
938/12 942/17 943/2 946/19
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962/9 964/10 964/13 965/10
965/14 965/23 966/11 966/25
967/6 967/8 967/11
THE CLERK: [4] 904/11 904/14
904/20 965/7
THE COURT OFFICER: [7] 903/12
904/7 904/9 926/1 929/24 961/6
963/14
THE COURT: [119]
THE WITNESS: [8] 904/16 905/20
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\$15,858,800 [1] 924/17
\$16,800 [2] 943/16 944/10
\$17,200 [1] 943/17
\$17,900 [1] 944/11
\$2,672,671 [1] 923/2
\$20,269,740 [1] 924/17
\$210,326 [1] 923/10
\$251,070 [1] 922/22
\$3,721,040 [1] 923/1
\$305,386 [1] 923/9
\$307,707 [1] 922/21
\$313,000 [1] 966/14
\$34,000 [1] 941/7
\$4,773,628 [1] 918/21
\$4.8 [1] 918/22
\$4.8 million [1] 918/22
\$47,173 [1] 922/13
\$5,154,038 [1] 920/2
\$5,689,888 [1] 919/25

\$6,598,621 [1] 923/19
\$63,436 [1] 922/11
\$70,000 [1] 919/4
\$725,000 [1] 945/1
\$75,000 [1] 917/8
\$75,441 [1] 917/6
\$8,961,492 [1] 923/19
\$80,000 [1] 917/10
\$826,311 [1] 923/16
\$84,000 [1] 954/6
\$85,000 [1] 941/10
\$900 [1] 965/20
\$98,589 [1] 923/24
\$98,598 [1] 923/22

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10:30 [4] 904/1 964/18 965/6
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14th [1] 894/8
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15 million [1] 958/19
15-Item [2] 894/12 894/13
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2's [7] 908/16 916/6 931/16
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2.8 percent [1] 942/7
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20 feet [1] 880/9
20 million [1] 958/19
20 percent [1] 957/20
20-year [2] 917/20 955/23
2009 [7] 931/15 931/19 941/22
942/6 942/12 955/24 956/15
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893/9 916/7 917/5 917/8 918/3
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2017 [6] 879/11 879/16 892/16
894/1 941/25 942/3

2018 [9] 894/5 908/12 908/13
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2019 [6] 875/7 920/25 921/7
931/11 946/24 967/14
2020 [1] 921/7
2049 [5] 918/10 918/10 918/11
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2061 [4] 914/20 914/22 914/23
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2120 [1] 883/4
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24-hour [4] 947/2 947/12 948/2
948/6
24-hours [1] 947/18
24/7 [2] 960/4 961/20
25 [3] 921/22 921/25 922/25
25 percent [1] 958/18

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3.8 percent [1] 923/6
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529 [1] 918/21
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1 These (indicating) are stipulated to, but they're
 2 really not in evidence yet.
 3 (Discussion among counsel outside the hearing of
 4 the reporter.)
 5 MR. O'HARA: Judge, no objection (handing).
 6 THE COURT: Very good. Thank you.
 7 So they're marked?
 8 MR. SIROTKIN: Hmm?
 9 THE COURT: They're marked? Marked?
 10 Just identify them.
 11 MR. B. MORELLI: Yeah, I will.
 12 MR. SIROTKIN: I'll renumber them.
 13 MR. B. MORELLI: Okay.
 14 (Pause.)
 15 MR. O'HARA: Judge, I'm sorry; we're going to have
 16 to make a record.
 17 THE COURT: Okay.
 18 Ladies and gentlemen, you will excuse us for a
 19 couple of minutes?
 20 COURT OFFICER: All rise. Jury exiting.
 21 (The jury left the courtroom.)
 22 MR. B. MORELLI: Should I have him step down,
 23 Judge?
 24 THE COURT: That's fine. Whatever he's more
 25 comfortable with.

Perez - Plaintiff - Direct/B. Morelli Page 770

1 MR. B. MORELLI: Okay.
 2 THE COURT: I don't think it's critical.
 3 Do you want a break? Do you want to stretch your
 4 legs?
 5 (Continued on next page.)
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M. Perez - by Plaintiff - Direct/B. Morelli Page 771

1 THE WITNESS: No.
 2 MR. O'HARA: It's going to be very short, Judge.
 3 There's been an off-the-record discussion. These
 4 are the photographs that have been previously supplied and
 5 have been stipulated to. They are in evidence. They have
 6 been marked P22 through P29.
 7 THE COURT: Are you ready?
 8 MR. MORELLI: Yes.
 9 THE COURT: Should we bring the jury out?
 10 MR. MORELLI: Yes.
 11 Your Honor, we're not going to put it up on the
 12 screen, I'll just ask him to see it, identify it and
 13 publish it to the jury as he's on the stand --
 14 THE COURT: Whichever is easier.
 15 MR. MORELLI: -- so I don't have to set up
 16 anything.
 17 THE COURT: So you're going to do it in bulk?
 18 MR. MORELLI: Yes.
 19 THE COURT: So you'll have the jury pass one --
 20 MR. MORELLI: Yes, that's better.
 21 THE COURT: Okay.
 22 THE COURT OFFICER: All rise, jury entering.
 23 (Jurors entered the courtroom.)
 24 MR. MORELLI: I'm handing the witness, Your
 25 Honor, photographs marked in evidence as No. 22 to 29.

M. Perez - by Plaintiff - Direct/B. Morelli Page 772

1 (Photographs were handed to the witness.)
 2 BY MR. MORELLI:
 3 Q And Mark, I would just ask you to look at those photos
 4 and ask you whether those are different photos of the way you
 5 looked before the accident happened?
 6 A Yes, this is me before the accident.
 7 Q Okay. And there's a young woman in the photos with
 8 you, who is that?
 9 A That was my girlfriend Kristy.
 10 Q Okay. And there's a grown up woman in the car with
 11 you, who is that?
 12 A This is my grandmother.
 13 Q Okay.
 14 MR. MORELLI: May I publish them to the jury,
 15 Your Honor?
 16 THE COURT: Yes.
 17 MR. MORELLI: Thank you.
 18 THE COURT: Mr. Morelli is going to be giving to
 19 Juror No. 1 the stack of photos. As you finish looking at
 20 them, please pass them around so they will wind up in the
 21 back with Juror No. 5.
 22 (Whereupon, the photographs are published to the
 23 jury.)
 24 MR. MORELLI: Thank you.
 25 At this time, Your Honor, may I ask Mark to come

M. Perez - by Plaintiff - Direct/B. Morelli Page 773

1 up to show the side of his head, the way it looks now, to
 2 the jury?
 3 THE COURT: Yes.
 4 MR. MORELLI: Mark.
 5 (Witness exits the witness stand.)
 6 MR. MORELLI: Okay.
 7 (Witness indicating.)
 8 MR. MORELLI: Thank you.
 9 (Witness resumes the witness stand.)
 10 BY MR. MORELLI:
 11 Q Mark, we've heard a lot about, you know, the last six
 12 years. I'm asking you about now, you know, these days, what
 13 physical complaints do you have, if any, at this time?
 14 A There's a lot.
 15 Q Tell the jury.
 16 A I have epilepsy. There's not a day of the week that
 17 goes by where I don't have head pain.
 18 Q And When You talk about head pain, is that different
 19 from headaches?
 20 A Yes.
 21 Q Okay. What part of your head pains you?
 22 A I have a constant dull throbbing on the right side of
 23 my skull.
 24 Q What other physical complaints, if any?
 25 A I have a lot of bones that hurt. I think it has

M. Perez - by Plaintiff - Direct/B. Morelli Page 774

1 something to do with the weather. I have eye pain.
 2 Q Which eye?
 3 A The right eye.
 4 Q What kind of pain?
 5 A It's bad, it feels like somebody is stabbing the back
 6 of my eyeball.
 7 Q So the pain is from the inside?
 8 A From the inside.
 9 Q What else?
 10 A I have issues with swallowing.
 11 Q What issues?
 12 A Sometimes it's hard to swallow food or sometimes I
 13 feel like I'm choking when I'm not eating.
 14 Q When you're not eating?
 15 A When I'm not eating.
 16 Q Okay. Anything else in terms of physical complaint?
 17 A My ribs and lung on my right side hurt pretty much
 18 every day.
 19 Q What else?
 20 A Neck pain, I always have neck pain.
 21 Q It's been described in the medical records that you
 22 often have headaches, do you have those any longer?
 23 A I don't need an alarm clock because every morning I
 24 wake up with a headache.
 25 Q So it's daily?

M. Perez - by Plaintiff - Direct/B. Morelli Page 775

1 A Every day.
 2 Q Any other physical complaints?
 3 A I have coordination problems.
 4 Q Coordination?
 5 A Yes.
 6 Q Okay. Can you explain what that means?
 7 A It feels like I may fall over, like vertigo.
 8 Q Is that always or sometimes?
 9 A Sometimes worse, but a lot of times.
 10 Q I know you have described it as that it's difficult
 11 for you to tell your parents or anyone else about you how feel,
 12 but can you tell us how you feel emotionally since the
 13 accident?
 14 (Brief pause in the record.)
 15 Q If you don't tell the jury what you feel, they don't
 16 know.
 17 A I understand.
 18 Q So please do that.
 19 A It's really hard for me. Sometimes I can't express
 20 how I feel and it's very frustrating or sometimes control.
 21 My family tries so hard to make sure I'm safe and I
 22 make good choices and a lot of times I don't see it that way
 23 and they just want me to be safe, but I still feel trapped.
 24 And I know I've lost my independence and I'm still
 25 trying to accept this because I feel -- I feel like I want to

M. Perez - by Plaintiff - Direct/B. Morelli Page 776

1 be normal and I don't think I can.
 2 Q Do you try?
 3 A Every day.
 4 Q Do you try hard?
 5 A I try harder than anybody I know.
 6 Q You were actually in the Court when I opened to the
 7 jury, were you not?
 8 A Yes.
 9 Q And you were in the Court when Mr. O'Hara opened to
 10 the jury, were you not?
 11 A Yes.
 12 MR. O'HARA: Sidebar, please.
 13 THE COURT: Approach please, Mr. Morelli.
 14 (WHEREUPON, a discussion was held off the record,
 15 at the side bar, in the presence of the Court and
 16 counsel and out of the hearing of the jury.)
 17 THE COURT: Can you excuse us, please, ladies and
 18 gentlemen?
 19 THE COURT OFFICER: All rise, jury exiting.
 20 (Jurors exited the courtroom.)
 21 THE COURT: Can he also step down?
 22 MR. MORELLI: David?
 23 MR. SIROTKIN: I got him.
 24 (Witness exits the witness stand.)
 25 MR. O'HARA: Judge, for this record, I believe

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1 the witness should be outside the courtroom.
 2 THE COURT: Okay. Is that okay?
 3 MR. MORELLI: Sorry?
 4 THE COURT: Can he step out?
 5 MR. SIROTKIN: The judge asked that Mark step
 6 out; is that okay?
 7 MR. MORELLI: Sure. Absolutely.
 8 (Witness exits the courtroom.)
 9 THE COURT: Any time you guys are ready.
 10 MR. O'HARA: Yes.
 11 THE COURT: You wanted to make a record.
 12 MR. O'HARA: Mr. Morelli wanted to make a record.
 13 I objected.
 14 THE COURT: It's your objection, so I think you
 15 go first.
 16 MR. O'HARA: So the basis of the objection is
 17 very simple; it is beyond question that what counsel say in
 18 a trial is not evidence and what counsel says in connection
 19 with an opening statement is an outline of what, in good
 20 faith, they believe the evidence will show. No matter what
 21 he is about to ask this witness about, were you in the
 22 courtroom when Morelli opened and were in the courtroom
 23 when O'Hara opened, he's now trying to use that as a
 24 factual foundation for whatever the next series of
 25 questions are and that's directly contrary to the concept

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1 of what a lawyer is saying in connection with a trial not
 2 being evidence, No. 1.
 3 No. 2, depending on where he's going, I'd
 4 actually ask for an offer of proof because I'm trying to
 5 determine what possible relevance what he's about to ask
 6 the witness has on any issue that's in dispute in front of
 7 this jury because frankly, all he's done is tee up the fact
 8 that he and I opened and the plaintiff was in the
 9 courtroom.
 10 MR. MORELLI: And yet you objected.
 11 MR. O'HARA: Of course I objected because I can
 12 only envision this not being good and I'm entitled to ask
 13 for an offer of proof so it doesn't taint this jury. And
 14 my position is, Your Honor, that the plaintiff should be
 15 required to make an offer of proof because depending upon
 16 what he's about to do is the potential to create a
 17 circumstance under which a mistrial is appropriate.
 18 THE COURT: Mr. Morelli, you are the one who
 19 wanted to make the record, why don't you tell me what's up?
 20 MR. MORELLI: Well, I am not offering anything
 21 that Mr. O'Hara or I said to the jury as proof in the case,
 22 so he's not accurate about that. I think that seeing that
 23 Mark himself was sitting in the courtroom and he disagrees
 24 that he doesn't make a huge effort every time, he's
 25 entitled to tell me that. And also, he's entitled to tell

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1 us how he felt about somebody calling him a person who is
 2 not making an effort on purpose. I think he's entitled to
 3 tell us how he feels about that.
 4 And that's all I'm asking. I'm not asking
 5 anything about the opening statement. They're going to
 6 bring doctors in, that's what he said, that's a good faith
 7 statement. They're going to bring doctors in to say that
 8 this man lacked effort during whatever testing that these
 9 doctors did and I think I'm entitled, seeing that it's the
 10 only time he's going to take the witness stand, to find out
 11 how he feels about that and whether he disputes it. And so
 12 that was the reason for my question, which was a little
 13 different from the way Mr. O'Hara thought it was going to
 14 be.
 15 MR. O'HARA: Absolutely not. That's precisely
 16 the reason for the objection. He has now indicated what he
 17 would like to do is have the plaintiff respond how what
 18 defense counsel, in outlining the opening statement of the
 19 defense, how that made him feel. How is that evidential?
 20 How is that something that is appropriately presented as
 21 evidence in this case when, as counsel, we have an
 22 obligation to, on behalf of our clients, to outline what
 23 the evidence will show?
 24 He's trying to include Jeff O'Hara in the
 25 equation for how this young man felt as a way to have this

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1 jury come to some sort of conclusion with respect to
 2 Mr. O'Hara. That's not the first time that he's used my
 3 name in trying to raise this and every single time the
 4 objection has been sustained. And every single time it's
 5 been sustained is because the fundamental truth is, it is
 6 not evidential, lawyers don't create evidence, No. 1.; and
 7 No. 2, what is the possible relevance that outweighs the
 8 undue prejudice to a defendant if the plaintiff is going to
 9 be permitted to say when O'Hara outlined what the evidence
 10 was going to show, it made me angry, I was furious, he was
 11 lying?
 12 It makes me a witness No. 1; and No. 2, what's
 13 the probative value of that with respect to the undue
 14 prejudice to the defendant? I have no choice as the lawyer
 15 representing Live Nation to outline what, in good faith, we
 16 believe the evidence will show.
 17 He attended these evaluations. He's free to be
 18 asked questions about when he went to see whatever the
 19 medical providers were, what the interaction was. He's
 20 already covered the interaction with Dr. Doyle. And with
 21 respect to one question about how did it make you feel when
 22 there was an attempt to elicit Dr. Doyle's comments about
 23 becoming his future treating doctor, the Court sustained
 24 that objection.
 25 So frankly, in 28 years, I don't have the 42

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1 years of Mr. Morelli, but --
 2 THE COURT: That was a different issue.
 3 MR. O'HARA: But it's the fundamental -- it's the
 4 same attempt to bring something before this jury that is
 5 inflammatory, that is non-evidential, that is not probative
 6 of any issue in dispute. And how do we respond to that?
 7 THE COURT: Well, I kind of agree with both of
 8 you, to be honest with you. I don't think it's appropriate
 9 to address Mr. O'Hara and Mr. O'Hara's statement in the
 10 question, but I also don't see what's wrong with him saying
 11 in this context, how does it -- how does it make you feel,
 12 you know, when people are saying that you're not giving
 13 full efforts?
 14 MR. O'HARA: But first of all, there's no
 15 evidence that anybody has said that. He has attempted --
 16 THE COURT: No, that's where I disagree with you.
 17 MR. O'HARA: The evidence is that he took tests.
 18 Those test results, which are medically recognized tests on
 19 a defined scale, result in a medical conclusion. They have
 20 given the medical conclusion and it's been the subject of
 21 medical testimony. Mr. Morelli has attempted to suggest,
 22 and you sustained the objection almost immediately, earlier
 23 on in the trial when he tried to suggest that in my opening
 24 statement I called him a faker and a liar.
 25 THE COURT: I agree with you.

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1 MR. O'HARA: And you specifically said quite the
 2 contrary, I did not.
 3 THE COURT: You didn't use those words.
 4 MR. O'HARA: No, sir, I used exactly what the
 5 medical providers used and the medical providers talked
 6 about findings on tests.
 7 THE COURT: But those findings on tests, at least
 8 in my mind, are basically coming to the conclusion that
 9 he's voluntarily lacking efforts in these tests so that the
 10 tests are actually skewed, and I think he can address that.
 11 MR. O'HARA: Judge, I've made the record. It's
 12 hard --
 13 THE COURT: I understand.
 14 MR. O'HARA: It's hard to say anything other than
 15 what he is attempting to do is founded on what I said as a
 16 lawyer. It makes the fundamental answer based on what I
 17 said as a lawyer in the opening statement. How is that
 18 appropriate?
 19 THE COURT: Because I'm telling him not to do
 20 that. I'm telling him not to address the opening
 21 statement.
 22 MR. O'HARA: Then how does he lay the foundation?
 23 Then how does he lay the foundation for that question?
 24 THE COURT: He lays the foundation for other
 25 witnesses who have testified or have -- or who I would

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1 expect to testify that are basically going to come in here
 2 and give the insinuation that he -- that his test results
 3 are what they are because he's not giving full efforts,
 4 that's how.
 5 MR. O'HARA: That is first. Now, I don't know if
 6 this is the right saying, the horse is out of the barn,
 7 right? The way that this has been teed up --
 8 MR. MORELLI: That's the saying.
 9 MR. O'HARA: It is?
 10 MR. MORELLI: Yes.
 11 MR. O'HARA: -- No. 1, he's going to lead this
 12 witness; No. 2, we have no obligation to call a witness in
 13 our defense.
 14 THE COURT: I understand that.
 15 MR. O'HARA: Okay. If this witness is going to
 16 testify that I felt a certain way based upon the testing
 17 that was done by Dr. Smith, Jones or Thompson, he has the
 18 opportunity to do that now. He can do that without
 19 inculcating or including in the discussion --
 20 THE COURT: I've agreed with you on that.
 21 MR. O'HARA: So now how do we undo this? How do
 22 we allow him to lay a foundation without this being front
 23 and center in front of this jury, which the Court has
 24 sustained on multiple occasions? It's not an appropriate
 25 line of questioning. And like I said, I don't have 42

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1 years of experience, but I do have 28 and I don't have the
 2 same number of trials, but I have my fair share and never
 3 in any trial have I ever seen someone try and use what a
 4 lawyer says in an opening statement and then elicit from a
 5 witness, hey, how did it make you feel?
 6 How can we do our job if that is something that's
 7 probative and properly presented to a jury. That's
 8 argumentative by definition. He's going to have to say --
 9 do I have to take the stand and say why it is that I said
 10 what I said?
 11 THE COURT: No, that would come through your
 12 witnesses.
 13 MR. O'HARA: If that's the case, then my
 14 objection is proper because he can ask -- he can ask
 15 questions about how he felt with respect to what he learned
 16 during the course of different evaluations by different
 17 doctors at different times, assuming he can establish that
 18 this witness remembers any of it.
 19 THE COURT: How about this, maybe we can come to
 20 some sort of agreement on this because really, the proper
 21 question, I think, is -- well, I just lost it. I'm sorry.
 22 MR. MORELLI: That's okay, you're getting older.
 23 THE COURT: Yes, thank you, Mr. Morelli, for
 24 reminding me.
 25 Basically what is your reaction to the

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1 insinuation that you were not giving your best effort
 2 during these tests that you were given?
 3 MR. MORELLI: Well, first of all, I know that
 4 Mr. O'Hara is making an objection in advance of any
 5 question that I asked that he thought was objectionable.
 6 THE COURT: Right.
 7 MR. MORELLI: So let's be clear on the record
 8 that right now there is no question to this witness that
 9 was objectionable, none. All I asked him is whether he
 10 heard the opening statements and was in the courtroom.
 11 That's all I asked him. I didn't ask him a question about
 12 it.
 13 THE COURT: And I think by the time the jury
 14 comes out, that they're going to have forgotten what we
 15 did.
 16 MR. O'HARA: He represented why he was asking the
 17 question. He just said why he was asking the question.
 18 MR. MORELLI: No, no, no, no.
 19 THE COURT: No, he didn't. And I'm sorry for
 20 interrupting.
 21 Continue, Mr. Morelli.
 22 MR. MORELLI: What I'm saying is there was no
 23 question to the witness, that's what I said, about anything
 24 like that.
 25 So there's been a lot already in the trial and as

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1 we lawyers know, that evidence comes in a lot of ways. It
 2 also comes in that Mr. Haworth has cross-examined every
 3 witness, putting all sorts of things in the case without
 4 bringing witnesses in, all sorts of things and I let it go,
 5 okay? Cross-examined; you know, he was malingering, he was
 6 this and that. All of his cross-examination was like that,
 7 of Dr. Gordon, of everybody. So we already know and the
 8 plaintiff knows --
 9 THE COURT: I'm sorry to interrupt, but I want to
 10 focus this. You can still ask about that in terms of what
 11 his effort was without bringing in the opening statements.
 12 But, you know, in terms of opening statements, I mean, you
 13 know, it's not that it's totally out of bounds. I mean, we
 14 hear in closing arguments all the time, hey, remember when
 15 so and so promised you or told you this in the opening
 16 statement, did it ever happen? No.
 17 I understand it's a little bit of a different
 18 context, but --
 19 MR. O'HARA: Judge, I would submit it's a lot of
 20 a bit of a different context because the witness -- the
 21 representation was the reason why he teed this up that way
 22 was he was going to ask the witness how being in the
 23 courtroom when O'Hara said X, Y and Z make him feel. How
 24 does the defense, No. 1, meet that testimony and how does
 25 the defense present the fundamental reason why it was

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1 appropriate? The implication of the question is somehow
 2 that we've done something wrong.
 3 THE COURT: I understand that. Like I said, I
 4 kind of agree with both of you, but not entirely and so
 5 that's why I think that the line of questioning ought to go
 6 in the direction that I've suggested as opposed to trying
 7 to bring out how you feel about the opening statements
 8 because --
 9 MR. MORELLI: Sure, sure, sure.
 10 And look, Mr. O'Hara, you know, made a decision
 11 to open to this jury and he's absolutely a hundred percent
 12 correct that he has no obligation to bring witnesses in,
 13 but he actually told the jury in jury selection the names
 14 of all of the doctors that he was bringing. He opened to
 15 the jury and told them that he's going to bring them. I
 16 will stipulate if he doesn't want to bring them now, that's
 17 okay, but he has already told the jury he's bringing all of
 18 these people.
 19 THE COURT: Well, not only that, but then it
 20 opens doors for missing witness issues and --
 21 MR. MORELLI: No, that doesn't --
 22 MR. O'HARA: Judge, we're starting to mix apples
 23 and oranges. I specifically said in jury selection that
 24 the defense may call the following witnesses as part of
 25 the --

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1 THE COURT: I'm just going to stop you there.
 2 MR. O'HARA: Judge, I can't allow a record where
 3 there's a representation like that that's inaccurate.
 4 (Continued on next page.)
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1 THE COURT: Well, I --
 2 MR. B. MORELLI: Your Honor, I'll do it a different
 3 way.
 4 THE COURT: Let me just -- let me just -- let me
 5 just cut this short:
 6 He's going to follow my direction in terms of where
 7 he's going on this, as I understand it. Your objection is
 8 preserved for the record. If -- I don't think it's
 9 necessary, personally, but if you think that there is a
 10 curative instruction that you want me to consider giving to
 11 the jury, if the two of you want to talk about it for a
 12 couple of minutes, that's fine; I'm happy to consider it. I
 13 don't think it's necessary, but if you do, like I said, I'll
 14 consider it.
 15 Okay?
 16 MR. O'HARA: If you can give us five minutes on
 17 that question...?
 18 THE COURT: I'll give you five minutes, sure.
 19 MR. O'HARA: Thank you.
 20 THE COURT: How much more do you have on direct?
 21 MR. B. MORELLI: It's going slow --
 22 THE COURT: I know.
 23 MR. B. MORELLI: -- so probably until lunch. And
 24 then I'm going to ask to take a witness out of turn --
 25 THE COURT: All right.

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1 MR. B. MORELLI: -- because I have the --
 2 THE COURT: You have the economist, I know.
 3 MR. B. MORELLI: Yeah. And I could bring Mark back
 4 tomorrow, if we think that it's going to take all afternoon
 5 for the -- the life-care planner, because the economist is a
 6 very brief witness.
 7 THE COURT: Okay.
 8 (Recess.)
 9 MR. O'HARA: My only request is that -- no curative
 10 instruction -- just that there be an indication that
 11 Mr. Morelli is going to move on.
 12 MR. B. MORELLI: "Move on"? I don't know what that
 13 means.
 14 THE COURT: I'm not sure --
 15 MR. O'HARA: From the question about "Jeff O'Hara"
 16 and the opening statement.
 17 MR. B. MORELLI: Yeah, I'm not -- I'm not talking
 18 about the opening statement.
 19 THE COURT: I'm sure that they've forgotten, at
 20 this point, what he was talking about.
 21 MR. O'HARA: It's something that I'll remember for
 22 a long time.
 23 THE COURT: I don't know what you want me to say.
 24 MR. O'HARA: As long as he's moving on, you don't
 25 have to say anything.

Perez - Plaintiff - Direct/B. Morelli Page 791

1 THE COURT: Are we good?
 2 MR. B. MORELLI: I'm good. I'm feeling okay. I've
 3 been feeling okay for weeks.
 4 THE COURT: Okay.
 5 (The witness resumed the stand.)
 6 COURT OFFICER: All rise. Jury entering.
 7 (The jury entered the courtroom.)
 8 DIRECT EXAMINATION CONTINUED
 9 BY MR. B. MORELLI:
 10 Q So, Mark, you, I think, told us that you always make a
 11 very strong effort; is that correct?
 12 A Yes.
 13 Q Now, I'm going to ask you if you remember seeing
 14 certain doctors that were retained/hired by the defendant's
 15 lawyers in this case and whether you remember going to see them,
 16 because it wasn't that long ago.
 17 Dr. Jordan? Do you remember him?
 18 A Yes.
 19 Q Okay. Dr. Ambrose?
 20 A Yes.
 21 Q Dr. Barr?
 22 A Yes.
 23 Q And if, in fact, these doctors, some or all, would come
 24 into court and tell this jury (indicating) that you're a
 25 malingerer --

Perez - Plaintiff - Direct/B. Morelli Page 792

1 Do you know what that word means, by the way; a
 2 "malingerer"? It means that it's somebody whose purposefully --
 3 MR. O'HARA: Objection; leading.
 4 THE COURT: Sustained.
 5 Sustained; form.
 6 Q Do you know what a malingerer is?
 7 A Yes.
 8 Q Okay. Tell the jury what you think it is.
 9 A It's something that somebody may do to make it look
 10 worse than it is or that they're not trying, which is something
 11 Mr. O'Hara had said --
 12 MR. O'HARA: Judge, objection.
 13 THE COURT: Sustained.
 14 Q Let's not talk about Mr. O'Hara and what he said.
 15 Let's talk about these doctors -- okay? -- and the fact of
 16 malingering. If those doctors, one or all, would come into
 17 court and say that that's you, that you're a malingerer, would
 18 they be right?
 19 A They would be 100 percent wrong.
 20 Q Specifically, Dr. Jordan says that about you.
 21 MR. O'HARA: Judge, objection.
 22 This is not --
 23 THE COURT: Sus --
 24 Sustained. Excuse me.
 25 Q What kind of effort do you make, on a daily basis, to

Perez - Plaintiff - Direct/B. Morelli Page 793

1 try to do things right and to get better? Tell the jury.
 2 A Every day of the week, I do the best of my ability and
 3 try as hard as I can, without ever giving up.
 4 Q What kind of things did you do, before this accident,
 5 that you enjoyed doing? Because we heard that you were trying
 6 to get your pilot license to fly planes. Is that true?
 7 A That's true.
 8 Q What else did you do?
 9 A I did a lot. I was very active. I was -- flying
 10 planes was one of my dreams; and I know I worked very hard, I
 11 was physically fit, and I enjoyed building things from nothing.
 12 Q What kind of things did you build?
 13 A I built a lot of photographic sets and I created, in my
 14 mind, presentations and signs and booths for expos and concerts
 15 that I visualized in my mind and put on paper. I think I could
 16 see things before others could see them, how it would wind up
 17 looking after it was done, and people loved that about me;
 18 about --
 19 Q That's what they told you.
 20 A This is what they -- they told me a lot, this, yes.
 21 Q And when you were thinking about these things, these
 22 concepts and everything, were you doing those things for work,
 23 at some point?
 24 A Yes.
 25 Q And could you tell the jury about that, what kind of

Perez - Plaintiff - Direct/B. Morelli Page 794

1 work you did, and whatever comes to mind?
 2 A I was a creative director and I was able to build and
 3 program websites, which I really liked; and I -- I was able to
 4 design fliers and shop graphics that would be installed on
 5 stores and for advertisement, that looked beautiful.
 6 Q That looked what?
 7 A Beautiful.
 8 And people always told me how great it looked, and how
 9 impressed they were of [sic] my work; and I loved it.
 10 Q You loved what?
 11 A I loved working and doing what I did.
 12 Q Besides building websites, what else did you do?
 13 A It was a lot. I managed many companies, my father's
 14 business, and talked with clients and sold jobs.
 15 Q What kind of business was your father in, or was he at
 16 the time that you're talking about?
 17 A He was in home-fashion photography, along with other
 18 type of photography, for products and catalogues, which -- I
 19 also was able to lay out catalogues and design graphics, and
 20 build the sets and take the pictures, and deliver them --
 21 deliver them to the clients, and go back and forth deciding what
 22 needed to change, and meet deadlines to get their graphics
 23 published; and I was great at it.
 24 Q What about now?
 25 A Now, it's -- it's very hard for me.

Perez - Plaintiff - Direct/B. Morelli Page 795

1 Q Why?
 2 A I'm -- I don't have a problem trying or applying
 3 myself, but I often get confused and frustrated with myself
 4 because I can't stick with something long enough to finish it,
 5 so I get up and I walk away and come back and keep on trying,
 6 refusing to give up. But I know that it's not -- it's not as
 7 good as it used to be, and it makes me hate myself because I
 8 know I could do better, but I can't; my brain's been damaged.
 9 Q When did you start accepting that?
 10 You didn't always, did you?
 11 A Oh, no. It took a long time.
 12 Q How long?
 13 A I think, at first, I refused to admit I had problems.
 14 And I always told my family that I was doing great; and
 15 sometimes, when doctors had asked me how I was doing, I'd say,
 16 maybe, better than I was, because all they did was put me on
 17 more -- more medication, which caused more problems. And I was
 18 just trying to be normal, and it's exhausting.
 19 Q Do you still try?
 20 A I promise you, until the day I die, I will always try
 21 my hardest, at anything I do.
 22 Q That's who you always were, right?
 23 A That's what I've always been. My father taught me
 24 this.
 25 Q What?

Perez - Plaintiff - Direct/B. Morelli Page 796

1 A How to never give up.
 2 (Pause.)
 3 Q When you -- when you were first injured back on June
 4 26th, 2013 -- you and I have discussed that day; have we not?
 5 A Yes.
 6 Q And you've said that you don't know a lot about that
 7 day; true?
 8 A Yes.
 9 Q Can you tell the jury now if you remember anything
 10 about that day, however little?
 11 A I was at Jones Beach, where they have concerts, and I
 12 was there with -- working with -- their -- their crew, trying to
 13 put together a trussing system, which I created on paper; and it
 14 was for a company, Best Buy; and we were assembling it, because
 15 the various parts needed to be put together, and somehow I wound
 16 up on top of it.
 17 Q Let me -- let me ask you this, okay? You know that
 18 there are parts of this case that we're not trying and parts
 19 that we are, so I'm going to ask you: What do you remember
 20 about the accident itself?
 21 A I was on top of the trussing, and a forklift --
 22 Q Not -- not how it happened, just what happened to you.
 23 A I was knocked off of the truss and I fell down, after
 24 being forced off (simulating); I hit the ground head first; and
 25 I remember blood and things coming out of my nose and mouth and

Perez - Plaintiff - Direct/B. Morelli Page 797

1 ears, and I tried to put the -- my hands in it and put it back
 2 in my head; and I knew this was how I was going to die.
 3 Q Is that what you were thinking at the time?
 4 A That's what I thought.
 5 Q It's true, is it not, that there was a period of time
 6 that you didn't remember much about the accident? Correct?
 7 A Yes.
 8 Q Do you remember being in the hospital at all?
 9 A Yes.
 10 Q Okay. Any thoughts that you were having then? Without
 11 being specific to the treatment, because we know about it.
 12 A I was in a lot of pain. And I think, if it wasn't for
 13 my family being there, I wouldn't be here, and I -- I thank God
 14 for them, because I couldn't speak and tell people how I felt,
 15 at all.
 16 Q You had a tube in your throat (indicating), at that
 17 point; correct?
 18 A A breathing tube.
 19 Q Yeah.
 20 Now, where do you -- where do you live, at the present
 21 time? We've heard that you live with your mom; we've heard that
 22 you live with your brother. What's the story?
 23 A I live with my parents and I stay with my brother
 24 often. He's my best friend, and I don't feel like I'm a little
 25 boy when I'm with my brother.

Perez - Plaintiff - Direct/B. Morelli Page 798

1 Q You don't feel like it.
 2 A I don't.
 3 Q Um-hmm. How do you feel when you're living with your
 4 parents?
 5 A Like a child.
 6 Q How many seizures do you remember having, that you're
 7 aware of? How many seizures have you had that you're aware of?
 8 A I've had a lot; I had ten, maybe twelve, bad ones.
 9 And I get auras a lot. This is a feeling I get right
 10 before I have a seizure; and I feel like, lately, I've been
 11 getting more and more auras, which scare me. And it's hard
 12 enough, but then, when I push myself to try, mentally, I feel an
 13 aura come and I get thrown off from trying to keep working at
 14 what I'm doing. And I'm always afraid of having seizures, even
 15 here.
 16 Q You still -- you used to go to the gym a lot and work
 17 out before the accident; correct?
 18 A Yes.
 19 Q That was something that was very important to you.
 20 A Yes.
 21 Q And you still try to do that; do you not?
 22 A Yes.
 23 Q How often do you, of late, go to the gym?
 24 A I don't understand the question.
 25 Q Lately, have you been going to the gym?

Perez - Plaintiff - Direct/B. Morelli Page 799

1 A I try to go whenever I can.
 2 Q How often would that be?
 3 A Maybe several times a week.
 4 Q And when you go to the gym, do you feel okay; do you
 5 experience anything that you've described to us today? Has that
 6 ever happened?
 7 A Yes.
 8 Q Can you tell the jury?
 9 A There was a time where I had a seizure while exercising
 10 on a -- on the -- on the bike, the stationary bike, and I fell
 11 off the bike and had a seizure on the floor, and it scared the
 12 hell out of me.
 13 Q Do you remember approximately when that was?
 14 A Probably about a year ago.
 15 Q Okay. What gym was that at; do you know?
 16 A It's a gym by my parents' house, Gold's Gym.
 17 Q What gym?
 18 A Gold's Gym.
 19 Q Gold.
 20 Since the accident, you're limited in what you could do
 21 that you've already described. Do you drive a car now?
 22 A No.
 23 Q Why?
 24 A You know, it's just too dangerous; not only to myself
 25 but to other people, and I don't think I could live knowing

Perez - Plaintiff - Direct/B. Morelli Page 800

1 something like this (indicating) was caused by me and something
 2 could have done -- been done -- to prevent it.
 3 Q To someone else, you mean.
 4 A To somebody else.
 5 Q So when did you come to this realization that you
 6 shouldn't be driving? Because you've driven since the accident.
 7 A Yes; I tried.
 8 Q So when did you come to this realization that it was
 9 too dangerous to do?
 10 A After the last seizure that I -- after the last surgery
 11 that I had, where I started getting more seizures, and my family
 12 spent a lot of time telling me I couldn't drive.
 13 Q The doctor told you that, too; didn't he?
 14 A Yes.
 15 Q The neurologist.
 16 A Yes.
 17 Q And you finally listened to him; didn't you?
 18 A Yes.
 19 Q Did you get angry when you were told that? What were
 20 your feelings?
 21 A I felt -- I felt hopeless and I got angry because I --
 22 I felt like this was part of my independence -- a big part of my
 23 independence -- and going somewhere when I want to go, by
 24 myself, or even with my brother, but he would let me drive
 25 and -- and make sure I wasn't getting lost or confused. But he

Perez - Plaintiff - Direct/B. Morelli Page 801

1 would let me be the driver, and that made me feel a lot better
2 about myself; it gave me hope about my life and my future. But
3 that was taken away, like many other things.
4 Q Do you think -- when you are sitting alone, do you
5 think about the future?
6 A Yes.
7 Q You used to think that you wanted to marry Kristy and
8 have children; is that correct?
9 A Correct.
10 Q So what, if any, thoughts do you have about the future
11 now, when you -- when you're alone, by yourself, thinking?
12 A It gets me upset.
13 Q Well, what do you think?
14 A I think about how much harder it is for me than most
15 people and how hard life is already; and how I know, in a
16 family, I should be the one to take care of them, and like this,
17 with my head, I'm a liability; and every day is hard for me to
18 do things and -- and plan things, which is very hard for me, and
19 I'm still working on it.
20 Q So what do you think about the future?
21 A I think about this next surgery a lot, first; and, to
22 be completely honest, I don't know how many more brain surgeries
23 I'm going to live through. It's -- it's hard.
24 Q Is that what you think about?
25 A Every day.

Perez - Plaintiff - Direct/B. Morelli Page 802

1 Q What about getting married and having a family?
2 A I love kids and I -- I love the idea of having a
3 family, but I also -- I know that there's a lot of hard things
4 about having a family, and I know it's going to be a lot harder
5 for me with everything throughout the rest of my life.
6 MR. B. MORELLI: Can we approach, your Honor?
7 THE COURT: Yes.
8 (Discussion off the record at sidebar.)
9 THE COURT: Ladies and gentlemen, I'm going to let
10 you go to lunch at this point in time.
11 Please be downstairs around two o'clock. We're
12 going to shoot for a 2:15 start, please.
13 Okay?
14 COURT OFFICER: All rise. Jury exiting.
15 (The jury left the courtroom.)
16 THE COURT: You can step down, Mr. Perez.
17 (The witness stepped down.)
18 (Luncheon recess.)
19 (Continued on next page.)
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Provder - by Plaintiff - Direct/B. Morelli Page 803

1 MR. O'HARA: Judge, just before we were coming
2 back after the lunch break Mr. Morelli raised a series of
3 e-mails that, as I understand it from Mr. Morelli, were
4 exchanged early on in the case with whomever Live Nation's
5 counsel was at the time. They're dated October 25, 2013,
6 June 14, 2013, there's two on June 14, 2013 and then there
7 are others; June 24 -- June 24, 2013. It appears they are
8 exchanges between Mr. Perez and somebody at Best Buy®
9 regarding a follow-up dialogue to discuss some project
10 relating to a booth that was going to be designed and/or
11 built. And so I'm not sure what counsel intends to do with
12 these.
13 Obviously, the first would be -- our objection
14 would be that this is hearsay. So if it's being offered
15 for the truth of the matter asserted, then we'd ask for an
16 offer of proof before being this is done in front of the
17 jury, No. 1.
18 No. 2, to the extent it's information that isn't
19 somehow related to any of the damages claims that are being
20 advanced, none of this has been identified by any of the
21 experts on the plaintiff's side or on the defense's side.
22 So same thing, before these come out, these are not in the
23 Bates stamped documents that the parties sat down and
24 discussed. I don't ascribe anything to that. Apparently,
25 these were provided to the original Live Nation counsel,

Provder - by Plaintiff - Direct/B. Morelli Page 804

1 but since this is something that is not referenced in any
2 expert disclosures, not incorporated by any experts in any
3 opinions that they're going to offer, and my presumption is
4 he's going to identify them and then speak about them, it's
5 going to be for the truth of the matter asserted and so
6 it's going to be hearsay, but I give it to Mr. Morelli
7 because I'm not sure exactly what he's intending to do with
8 them.
9 THE COURT: Okay. Let's find out.
10 MR. MORELLI: The e-mails are between --
11 THE COURT: Just to be clear, they were
12 exchanged?
13 MR. SIROTKIN: Yes.
14 MR. FEEHAN: I got those e-mails during
15 discovery.
16 MR. O'HARA: I will represent that there was a
17 comment by counsel sitting in the gallery. He has not
18 appeared at trial. That's Dave Feehan. And he has
19 confirmed for the Court and my benefit that they were, in
20 fact, exchanged during discovery.
21 THE COURT: Okay.
22 MR. MORELLI: They were also exchanged in 2016
23 when Mr. O'Hara was with LeClairRyan.
24 THE COURT: They're exchanged. Now, what are
25 they and what are you using them for?

Provder - by Plaintiff - Direct/B. Morelli Page 805

1 MR. MORELLI: There's a few e-mails between the
 2 plaintiff and one of the executives at Best Buy® that they
 3 had made a deal for Mark to be able to do this project for
 4 Best Buy® and I am not giving this to Mr. Provder, I'm not
 5 adding anything to the life care plan, okay. So to be
 6 clear --
 7 THE COURT: Okay.
 8 MR. MORELLI: -- the reason that I'm offering it
 9 is to show that Mark had looked at the future and he wanted
 10 to be more than what counsel thought he was, 13,000 a year
 11 or 30,000, that he had aspirations to do better, that he
 12 actually had the ability to be able to get a deal with Best
 13 Buy® as a very young man and this is actually only days
 14 before the accident. These e-mails are like within ten
 15 days, within two days.
 16 That is what it's being offered for. It's not
 17 being offered to expand the life care plan or the
 18 economist's statement or anything like that. I think that
 19 the evidence that Mark was not just this lowly guy, you
 20 know, who was a DJ and all of the things that I have been
 21 listening to for weeks now, I think that he's entitled to
 22 show with more evidence than just his testimony that he
 23 actually was able to make a deal with Best Buy®.
 24 Now, the deal didn't go through, okay, because he
 25 got hurt before it was effectuated, but it certainly is

Provder - by Plaintiff - Direct/B. Morelli Page 806

1 evidence to show that they really liked the kind of work
 2 that he was doing, that they would have possibly done
 3 something with him in the future and I think it's -- I
 4 think that certainly that's probative.
 5 MR. O'HARA: So a couple of things. First, he's
 6 now represented that it is being produced for the truth f
 7 the matter asserted based upon the description, No. 1.
 8 No. 2, there's already been testimony by both --
 9 by, if I recall correctly, Mr. Perez's brother about the
 10 relationship and his efforts with, among others, Best Buy®.
 11 Can I see that, please?
 12 MR. MORELLI: Sure.
 13 (Document was handed to counsel.)
 14 MR. O'HARA: This is exchanges about a proposal
 15 for future work, this is not a contract. This simply --
 16 THE COURT: Would you mind if I read it?
 17 MR. O'HARA: Sure.
 18 MR. MORELLI: But they did, in fact, hire him.
 19 (Document was handed to the Court.)
 20 MR. MORELLI: But he didn't finish the job
 21 because he got hurt.
 22 (Brief pause in the record.)
 23 THE COURT: Well, what I'm noticing about this in
 24 the first instance, with the exception of what's on the
 25 last page, the bottom third of the last page, and I'm

Provder - by Plaintiff - Direct/B. Morelli Page 807

1 referring to a June 24, 2013 e-mail from Joshua Arnold at
 2 Best Buy®, that's the only statement that's not his.
 3 Everything else is Mr. Perez's words.
 4 MR. O'HARA: Okay. So how is that not hearsay?
 5 Mr. Perez cannot put his own statement into evidence in his
 6 case in chief. That's classic hearsay. There's nothing
 7 that's been put at issue that would make a prior consistent
 8 statement admissible. If we challenge something about
 9 Mr. Perez's testimony and in undermining the veracity of
 10 something that -- something that he said, he would have the
 11 ability to bring in a prior consistent statement to
 12 reinforce his credibility. It doesn't make a statement
 13 that he's made out of court admissible as an affirmative
 14 proof. If just doesn't. That's not the rules of evidence.
 15 THE COURT: Tell me now again what you're
 16 offering it for.
 17 MR. MORELLI: Well, it's been put at issue that
 18 Mr. Perez is nothing more than a DJ. And don't forget,
 19 they have a life care planner, they have an economist.
 20 We've looked at those documents. And I want to show that
 21 he was more than that. And, you know, just in his
 22 description of what he was going to do for Best Buy®, which
 23 is in one of the e-mails of his, he can't write an e-mail
 24 like this now, he can't say those things that he wrote in
 25 that e-mail. So I think the jury is entitled to know that

Provder - by Plaintiff - Direct/B. Morelli Page 808

1 this is the way he as able to write and talk and think at
 2 the time and he can't do that now. So how am I supposed to
 3 get this into evidence? How could he testify to that?
 4 THE COURT: I'm going to allow it. I'm going to
 5 allow it.
 6 MR. O'HARA: Judge, for purposes of the record
 7 can you identify the -- if it is -- if it's hearsay, the
 8 exception or rule under which you're admitting it so we
 9 have a sense of what the ruling is?
 10 THE COURT: Well, a couple of things. It's not
 11 necessarily offered for the purpose of the truth. As
 12 Mr. Morelli indicated it's an exemplar, at least of the
 13 difference between Mark Perez before and after the
 14 accident, what he could do, what he couldn't do.
 15 I guess the only thing that I'm kind of kicking
 16 around in my mind is sort of a limiting charge given to the
 17 jury that it's only offered for that purpose whatsoever.
 18 You know, even -- I guess I don't really follow
 19 what the objection is in terms of this actually being
 20 offered for the truth in any scenario because they're not
 21 trying to prove the contract, the scope of the work or
 22 anything else, but it's the type -- just to show the type
 23 of work that he was actually doing.
 24 MR. O'HARA: And there has been testimony from
 25 multiple sources about the type of work that he was doing.

Provdner - by Plaintiff - Direct/B. Morelli Page 809

1 The sole basis for the proffer by Mr. Morelli is the
 2 substance of what's in that document.
 3 THE COURT: But the challenge that you folks have
 4 made to me over the course of this, and I don't know how
 5 much has been on the record and how much has been off the
 6 record, is that there's no evidence that he was a,
 7 quote/unquote, web designer and had the potential of
 8 earning this much money. Now, I'm not sure how relevant
 9 that is anymore at this point in time because the
 10 developments with Tattoo Lou and what's been taken off the
 11 table with that.
 12 MR. O'HARA: It's important, the record should
 13 reflect, these e-mails have nothing to do with web design,
 14 they have to do with the construction of a display for Best
 15 Buy® and banners associated with that display.
 16 THE COURT: I know, but, you know, the scope of
 17 the type of the work that he was doing, whether web design
 18 or otherwise.
 19 MR. O'HARA: Understood. I mean, I just wanted
 20 to make sure the record reflected it.
 21 THE COURT: I'll do a limiting instruction. I'll
 22 give the jury a limiting instruction on it for what it's
 23 considered for.
 24 MR. MORELLI: But I'll offer it first and then
 25 you can do that.

Provdner - by Plaintiff - Direct/B. Morelli Page 810

1 THE COURT: Sure.
 2 MR. O'HARA: Can we get Mark?
 3 THE COURT: Yes, let's try to get this finished.
 4 MR. MORELLI: Could we just mark these for
 5 identification? Do you want me to mark it all as one or
 6 each page?
 7 THE COURT: I think all as one, right?
 8 MR. MORELLI: Okay. Plaintiff's 30 for ID.
 9 (WHEREUPON, document was marked Plaintiff's
 10 Exhibit 30 for identification.)
 11 THE COURT OFFICER: All rise, jury entering.
 12 (Jurors entered the courtroom.)
 13 THE COURT: Ladies and gentlemen, just so that
 14 you are aware, we are going to finish the direct testimony
 15 of the plaintiff this afternoon. He's going to be coming
 16 back, I believe, tomorrow for his cross-examination, but we
 17 do have another witness that we're going to be taking out
 18 of turn this afternoon, okay?
 19 MR. MORELLI: Can we approach?
 20 THE COURT: Yes.
 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 THE COURT: Forget what I just said, okay?
 25 MR. MORELLI: Sorry, Judge, for confusing that

Provdner - by Plaintiff - Direct/B. Morelli Page 811

1 issue.
 2 BY MR. MORELLI:
 3 Q Mark, just a couple of more questions.
 4 What I would like you to do is just describe for the
 5 jury, not your entire day, but your typical day. Because you
 6 do get yourself dressed right, you could dress yourself?
 7 A Yes.
 8 Q And get washed up, true?
 9 A Yes.
 10 Q Okay. So tell the jury, when you wake up in the
 11 morning, because your were telling us before, what do you do
 12 and how long does it take you?
 13 A I wake up in the morning early, between five and six,
 14 usually with a headache, but I get myself out of the bed and I
 15 usually walk over to the nightstand. I need to take my time in
 16 the morning, especially in the morning. My left leg is not
 17 that -- I'm still trying to figure this out with my left leg,
 18 some problems with that and my left hand, but I take my
 19 medication for seizures, which is in my medication daily
 20 container.
 21 Q Now, you take that medication all the time, don't you?
 22 A Every day.
 23 Q Okay. And the medication itself -- not to interrupt
 24 you, but the medication itself, how does that make you feel?
 25 A I hate it. It makes me feel foggy and tired. I'm

Provdner - by Plaintiff - Direct/B. Morelli Page 812

1 tired all day and --
 2 Q So finish that. You know, you go to nightstand, you
 3 take your medication and then what?
 4 A I eat breakfast, I start to get myself ready for the
 5 day.
 6 Q How long does this whole thing take?
 7 A It takes me about four hours to get ready. I'm always
 8 forgetting where I put things; my phone, my toothbrush.
 9 Getting ready takes me a while, you know and --
 10 Q Now, I'm going to show you Plaintiff's 30 and ask you
 11 whether or not these documents -- it's four pages.
 12 (Document was handed to the witness.)
 13 Q Take your time at and look at it -- whether these
 14 documents look familiar to you?
 15 A Yes.
 16 Q Okay. And can you tell us what the documents are
 17 without telling us the content yet?
 18 A Can you repeat the question, please?
 19 Q Sure. Tell us what the documents are.
 20 A These are documents of e-mails between myself and two
 21 workers of Best Buy®.
 22 Q Best Buy®, the company?
 23 A The company.
 24 Q Okay. And what were the e-mails concerning?
 25 A This is regarding the booth, the trussing booth, that

Provder - by Plaintiff - Direct/B. Morelli Page 813

1 they contracted me to design that they were going to use at
 2 Jones Beach.
 3 MR. MORELLI: Your Honor, I would like to offer
 4 this into evidence and I think you wanted to speak to the
 5 jury.
 6 THE COURT: Ladies and gentlemen, this is going
 7 to be put in evidence for a very limited purpose and that
 8 purpose is just to basically show a before and after
 9 picture before and after the accident, for no other purpose
 10 whatsoever, okay?
 11 (WHEREUPON, Plaintiff's Exhibit 30 was received
 12 in evidence.)
 13 MR. MORELLI: So, Your Honor, I would like to
 14 read to the jury instead of asking Mark to read to the jury
 15 the e-mail from Mark Perez dated Friday, June 14, 2013 at
 16 6:41 p.m. to Joshua Arnold of Best Buy®, and the e-mail
 17 concerns two options written by Mark Perez.
 18 THE COURT: Okay.
 19 MR. MORELLI: "Option 1: Nikon style booth. We
 20 will need to submit architectural drawings to the state for
 21 approval, which typically takes a few days. Unfortunately,
 22 there is no way around this. The majority of construction
 23 will be done in our facility and trucked in for final
 24 assembly and installation. The frame will be constructed
 25 of one inch square aluminum with steel supports and tie

Provder - by Plaintiff - Direct/B. Morelli Page 814

1 downs. Top material will be blue vinyl (matched to your
 2 PMS color) with your logo printed in the center. If you
 3 decide on the wedge or apex style it will not affect the
 4 price. Rake will be four feet at the center or four feet
 5 at the right if you prefer the wedge. Uprights will be
 6 constructed of the white plastic composite and printed with
 7 the Best Buy® blue and whatever graphics you want.
 8 Additionally, we will need to have some assistance from the
 9 union for insurance purposes."
 10 Did you write that?
 11 A I did.
 12 Q And then you wrote:
 13 "Option 2: We could do what we did for Tattoo Lou's.
 14 Please refer to the attached pictures (disregard the booth that
 15 surrounds the structure.) Basically we can add an additional
 16 level to the existing structure that is five feet tall all the
 17 way around. We can print three large banners for you guys and
 18 have them hung all the way around. As far as signage, this
 19 will really look great, but it will not offer protection from
 20 the rain. You will also be able to change out the banners
 21 without too much of an investment. This is obviously my
 22 recommendation for the beach. I photoshopped a picture for you
 23 and included some pics of Lou's booth to give you a better
 24 idea."
 25 And so you were writing e-mails to the Best Buy®

M. Perez - by Plaintiff - Cross/O'Hara Page 815

1 person and giving them two options of the job is that correct?
 2 A That's correct.
 3 Q Okay. And the answer is: "Debbie will be back
 4 shortly and she will provide final feedback, but I believe
 5 suggestion one is what we will move forward with doing to
 6 branding guidelines.
 7 "If you receive final approvals today, when do you
 8 think we could be done by?"
 9 And that was the response you got; am I correct?
 10 A Correct.
 11 Q And these were the kind of things that you were doing
 12 right before your accident happened; is that true?
 13 A That's true.
 14 MR. MORELLI: Your Honor, I have nothing further
 15 of this witness.
 16 THE COURT: Thank you.
 17 MR. O'HARA: Thank you, Your Honor. Just very
 18 briefly.
 19 CROSS-EXAMINATION
 20 BY MR. O'HARA:
 21 Q Mr. Perez, you have, throughout the last six years,
 22 been to see a number of medical providers that have interviewed
 23 you and provided care to you, correct?
 24 A Yes.
 25 Q And as a general matter, each time you went to see a

M. Perez - by Plaintiff - Cross/O'Hara Page 816

1 doctor they asked you questions about how things were going and
 2 why you were there, right?
 3 A Yes.
 4 Q And you would answer those questions truthfully to
 5 tell them how you were feeling and what was going on in your
 6 life because the reason why you were going to those doctors was
 7 you wanted to get better, right?
 8 A Yes.
 9 Q And each time that you went to the doctor you raised
 10 things that were on your mind or of concern to you in
 11 connection with whoever that particular doctor was, correct?
 12 A Yes.
 13 Q And you remember seeing a doctor on November 20, 2017
 14 and being asked a question about how you were doing with moving
 15 forward with your life, correct?
 16 A I don't remember.
 17 Q Sure. Do you remember seeing a doctor, a neurologist
 18 or a neuropsychiatrist on November 20, 2017, and in response to
 19 describing the frustrations that you were experiencing you said
 20 that you were awaiting settlement from the accident so you can
 21 move forward with your plans, do you remember that?
 22 A No.
 23 MR. O'HARA: May I approach, Your Honor?
 24 THE COURT: Yes.
 25 BY MR. O'HARA:

M. Perez - by Plaintiff - Cross/O'Hara Page 817

1 Q I'm going to show you a document that's been marked in
 2 evidence and you'll see down here there's a Bates number,
 3 2120 --
 4 (Document was handed to the witness.)
 5 Q -- and I'm going to read to you the entry on November
 6 20, 2017:
 7 "Awaiting settlement from accident so he can move
 8 forward with his plans."
 9 Did I read that right?
 10 A I believe so, yes.
 11 (Continued on next page.)
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Perez - Plaintiff - Cross/O'Hara Page 818

1 MR. B. MORELLI: Your Honor, I'm --
 2 What's the Bates number on that (indicating)?
 3 MR. O'HARA: 2120.
 4 MR. B. MORELLI: Let's pull it up.
 5 Also, I expect that he's going to bring the person
 6 who states that he said that to them, because that's the way
 7 it's admissible.
 8 MR. O'HARA: Judge, that first -- that's improper.
 9 THE COURT: Can we approach?
 10 MR. B. MORELLI: So I await that person.
 11 (Discussion off the record at sidebar.)
 12 THE COURT: Two things, ladies and gentlemen:
 13 First of all, I am striking the questions and
 14 answers concerning that medical record; it's not admissible
 15 in court.
 16 Secondly, I'm admonishing Mr. Morelli and, to some
 17 extent, Mr. O'Hara, because I don't want argument in front
 18 of the jury, and we've talked about that before. So I'm
 19 telling both counsel. This is kind of like warning both
 20 benches.
 21 So --
 22 MR. O'HARA: Yes.
 23 THE COURT: -- let's proceed.
 24 MR. O'HARA: Sure.
 25

Perez - Plaintiff - Cross/O'Hara Page 819

1 CROSS-EXAMINATION CONTINUED
 2 BY MR. O'HARA:
 3 Q There was testimony in this case by your brother,
 4 Justin, that in 2016 and into 2017, you lived alone in an
 5 apartment for a period of time; correct?
 6 A We tried that, yes.
 7 Q And the lease that you signed for that apartment, that
 8 was a one-year lease; right?
 9 A I believe so, yes.
 10 Q And when you lived in that apartment by yourself, when
 11 you were alone and you had errands that needed to be run,
 12 whatever they were; go to CVS, go to the store for a particular
 13 item, you would -- you would perform those errands yourself;
 14 correct?
 15 A Usually, with my --
 16 Q Do you understand what I'm asking?
 17 Do you understand what I'm asking?
 18 A Usually with my brother. He was there most of the
 19 time.
 20 Q Yes, I understand that. But there were times when you
 21 were alone --
 22 A Yes.
 23 Q -- and you would perform those errands, like going to
 24 CVS to pick up your medication, things like going to the store
 25 every once in a while to buy those; correct?

Perez - Plaintiff - Cross/O'Hara Page 820

1 A I could walk there; yes.
 2 Q Say again?
 3 A I could walk there.
 4 Q Isn't it true that you were driving, periodically, to
 5 run errands, as of the time that you were deposed in May of
 6 2016, when you were living alone in that apartment? Isn't that
 7 true?
 8 A I think I stopped driving before that, sir.
 9 Q I'm going to try and refresh your memory with
 10 testimony.
 11 You remember, during the course of the case, like
 12 today, you've been asked questions under oath and answered
 13 questions posed by lawyers?
 14 A Yes.
 15 Q And one of the times that you were deposed was on May
 16 5, 2016, in the case; correct?
 17 A Yes.
 18 THE COURT: Which one am I looking at?
 19 MR. O'HARA: The 5th one, your Honor.
 20 THE COURT: Thank you.
 21 Q And on May 5th, 2016, that fell during the time that
 22 you were living in the apartment alone; correct?
 23 A Correct.
 24 Q And do you remember being asked the following questions
 25 and giving the following answers, on page 15:

Perez - Plaintiff - Cross/O'Hara Page 821

1 "Question: Tell me: How many days a week, on
2 average, do you drive?
3 "Answer: I rarely drive.
4 "Question: Rarely? Rarely, yes."
5 COURT REPORTER: Was that the answer, counselor?
6 MR. O'HARA: I'll try it again. That was poorly --
7 THE COURT: Okay, thank you.
8 MR. O'HARA: Starting at line -- page 15, line 2
9 through line 12:
10 "Question: Tell me: How many days a week, on
11 average, do you drive?
12 "Answer: I rarely drive.
13 "Question: Rarely?
14 "Answer: Rarely, yes.
15 "Question: When is the last time you drove?
16 "Answer: Let's see... Two days ago.
17 "Question: What was that for?
18 "Answer: I had to get -- it was raining; I had to
19 get some food."
20 Q Do you remember giving those answers to those questions
21 at the time that you were deposed back in May of 2016?
22 A I don't remember it, but you're telling me that's what
23 I said.
24 Q And when you said it back in May of 2016, it was the
25 truth; right?

Perez - Plaintiff - Cross/O'Hara Page 822

1 A Yes.
2 MR. O'HARA: Thank you, sir.
3 I have nothing further.
4 THE COURT: Wait a minute. Before you finish, can
5 you come up again? I was thinking about something.
6 MR. O'HARA: Sure.
7 THE COURT: I'm sorry; I may have misapprehended
8 something.
9 Would you grab that thing you were questioning
10 about?
11 MR. O'HARA: Yes.
12 (Discussion off the record at sidebar.)
13 MR. O'HARA: With that, your Honor, I have no
14 further questions.
15 THE COURT: Okay, thank you.
16 Anything, Mr. Morelli?
17 MR. B. MORELLI: Nothing, your Honor.
18 THE COURT: Okay, thank you. You're excused.
19 (Witness excused.)
20 THE COURT: Ladies and gentlemen, I'm going to give
21 you a very short break; we have a little business to conduct
22 on the record. Okay?
23 COURT OFFICER: All rise. Jury exiting.
24 (The jury left the courtroom.)
25 THE COURT: You want to make a record?

Proceedings Page 823

1 MR. O'HARA: Yes.
2 MR. B. MORELLI: Your Honor, while he's doing that:
3 We're going to have Provder; can we premark the exhibits?
4 MR. O'HARA: I want to do one thing at a time.
5 Judge, outside the presence of the jury, we
6 discussed the intent of the defense to use a prior statement
7 contained in a medical record and, in particular, present
8 page 2120 -- Bates stamped -- from the -- the... Rudansky
9 Winter Neurologic Group as to whether or not Mr. Perez
10 remembered talking with the doctor about why he was not
11 moving forward with his plans and, in particular, whether he
12 remembered saying that he was "awaiting settlement from
13 accident so he can move forward with his plans."
14 I questioned the witness whether or not he
15 remembered seeing a doctor on that date; I questioned the
16 witness whether or not he remembered the doctor's names; and
17 I questioned the witness specifically whether he -- whether
18 he recalled --
19 (Buzzer sound heard in courtroom.)
20 THE COURT: The officer had to step out.
21 THE CLERK: Yes.
22 THE COURT: They may be able to hear us, so...
23 You can continue.
24 (Whereupon, the clerk of the court entered the jury
25 room.)

Proceedings Page 824

1 MR. O'HARA: I questioned the witness whether,
2 specifically, he remembered saying to the doctor that he --
3 that, in response to questions about why he wasn't moving
4 forward with his plans --
5 (Whereupon, the court clerk re-entered the
6 courtroom.)
7 THE CLERK: They could hear.
8 THE COURT: I'm sorry?
9 THE CLERK: It was, they could hear out here.
10 MR. B. MORELLI: Yeah. That's very good, very
11 good.
12 MR. O'HARA: -- whether, quote -- for the reason
13 for him not moving forward with his plans, whether he told
14 the doctor, "I am awaiting settlement from accident so I can
15 move forward with my plans."
16 When the witness said, "I don't remember what I
17 said," I then approached him to show him a document, to use
18 it to refresh his memory as to whether -- on November 20th,
19 2017, in response to this doctor's question, when being
20 asked about how he's doing -- whether he said what's
21 contained in the medical record, and the objection was
22 raised.
23 I believe it's appropriate to use anything to
24 refresh a witness' recollection; any document, any -- any --
25 any tangible item; and that witness is then given the

Proceedings Page 825

1 opportunity to admit or deny whether their recollection has
 2 been refreshed.
 3 THE COURT: Um-hmm. Well, it's not so much the --
 4 I agree with you; you can use pretty much anything
 5 to refresh a witness' recollection. It's the subject matter
 6 and what you're going to be doing with it. The statement
 7 itself is not going to be problematic.
 8 But, Mr. Morelli, please make your record.
 9 MR. B. MORELLI: Well, your Honor, I think that
 10 Mr. O'Hara, by -- by reading the statement -- Mr. O'Hara
 11 knows better; he knows how to ask somebody if it refreshes
 12 their recollection.
 13 THE COURT: Let's keep it -- let's keep it between
 14 us and not disparage Mr. O'Hara.
 15 MR. B. MORELLI: I'm not disparaging him. I just
 16 said that he knows better.
 17 THE COURT: Well, let's -- okay.
 18 MR. B. MORELLI: Maybe I'll say he doesn't know
 19 better. But -- but the truth is that --
 20 THE COURT: Let's keep it between us.
 21 MR. B. MORELLI: -- that he wanted to get this
 22 statement in evidence, which, obviously, is not admissible
 23 and is not for the care and treatment of the patient. Okay?
 24 Not even close.
 25 And he's already prejudiced the jury, because it's

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1 already in front of the jury, no matter what your Honor has
 2 said. Okay? So we've done this whole trial, for three or
 3 four weeks, and now he puts this (indicating) in evidence.
 4 And, actually, it's been very interesting, because
 5 every time I have anything that I think might, in any way,
 6 be controversial, I show it to Mr. O'Hara in advance, like I
 7 did today with reference to the e-mails before I did
 8 anything with it, okay?
 9 This (indicating) is only used for this wonderful
 10 defense that this kid is a faker, okay? And that's what
 11 this (indicating) is all about. And, in my opinion, if
 12 anything goes wrong in this case, this (indicating) will
 13 reverse it.
 14 THE COURT: Okay.
 15 MR. O'HARA: Do you need me to respond?
 16 THE COURT: I think -- I don't think it's
 17 necessary. I have made the ruling and I'm giving you the
 18 opportunity to make the record.
 19 I think that I have rectified any issues for the
 20 jury. If you want something else done about it, please let
 21 me know.
 22 MR. O'HARA: Thank you, your Honor.
 23 THE COURT: Other than that, my court officer said
 24 that they needed five minutes, so let's take five minutes.
 25 MR. B. MORELLI: Yeah. And we just want to premark

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1 some exhibits, in the meantime.
 2 THE COURT: That will be fine.
 3 MR. B. MORELLI: Okay.
 4 (Recess.)
 5 (Whereupon, at the request of counsel and with the
 6 consent of the Court, Plaintiff's Exhibits 31 through 39,
 7 respectively, were marked for identification.)
 8 COURT OFFICER: All rise. Jury entering.
 9 (The jury entered the courtroom.)
 10 THE COURT: Mr. Morelli --
 11 MR. B. MORELLI: Yes.
 12 THE COURT: -- what do you have next for us?
 13 MR. B. MORELLI: Yes. I would like to call to the
 14 stand Ed Provder.
 15 THE COURT: Okay.
 16 COURT OFFICER: You can step up, sir.
 17 Witness entering.
 18 Right this (indicating) way.
 19 Just remain standing and face the clerk, on your
 20 right there (indicating).
 21 EDMOND ALAN PROVDER, called as a witness
 22 by the plaintiff, having been first duly sworn/affirmed, was
 23 examined and testified as follows:
 24 THE CLERK: Please, in loud, clear voice, state
 25 your name and address for the record.

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1 THE WITNESS: Edmond, E-d-m-o-n-d; Alan, A-l-a-n;
 2 Provder, P-r-o-v-d-e-r, 575 Madison Avenue, New York, New
 3 York.
 4 THE CLERK: All right, you may be seated.
 5 (Witness complied.)
 6 THE COURT: Mr. Provder, before we get started, I
 7 want to make sure I give you a couple of instructions:
 8 Please answer in a loud, clear voice so everyone on
 9 the jury can hear what you have to say.
 10 Listen very carefully to the question which is
 11 asked of you. Please only answer that question; don't go
 12 beyond it with any further explanations unless you're asked.
 13 If you see an attorney standing up to make an
 14 objection or hear the word "objection," please stop talking
 15 or don't talk, so I can rule on the objection.
 16 If there is a question that you can answer with a
 17 simple yes or no, limit your answer to just yes or no. Of
 18 course, if the -- if you feel you cannot, in fairness,
 19 answer a question with a yes or no, then let the attorney
 20 know; but by no means do I want you to expand on any answers
 21 unless you're asked.
 22 THE WITNESS: Okay.
 23 THE COURT: If you need a break for any reason, let
 24 me know.
 25 During any breaks, you may not speak with the

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1 attorneys concerning your testimony, including if you don't
 2 finish your testimony today.
 3 You also may not interact, in any way, shape or
 4 form, with any of our jurors.
 5 THE WITNESS: Okay.
 6 THE COURT: Okay?
 7 THE WITNESS: Thank you, your Honor.
 8 THE COURT: Mr. Morelli.
 9 DIRECT EXAMINATION
 10 BY MR. B. MORELLI:
 11 Q Mr. Provder, good afternoon.
 12 A Good afternoon.
 13 Q You have done at least one other assignment for my
 14 office before this one; correct?
 15 A Yes, one other one.
 16 Q Yes. And you've actually worked, also, for defendants
 17 in cases to figure out a life-care plan; true?
 18 A Yes.
 19 Q Now, could you tell us what your profession is and
 20 explain to the jury what that means?
 21 A Okay.
 22 I'm what is known as a "rehabilitation counselor."
 23 That's an individual who's been educated and trained to work
 24 with people that have a variety of different disabilities or
 25 handicaps. These could be physical disabilities, mental

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1 disabilities, cognitive disabilities or sensory disabilities.
 2 And what we do is, we look at how these disabilities or
 3 handicaps impact on the person's ability to work and their
 4 ability to earn money; and if we believe they're employable, we
 5 will try to assist them in locating jobs they can do, given
 6 their capabilities.
 7 In addition, we also provide what's called "life-care
 8 planning," or "case-management services," looking at the type of
 9 care and the cost of care somebody's going to require due to
 10 their impairments, particularly in a case where there are
 11 serious injuries.
 12 Q Now, tell us about your educational background.
 13 A I have a bachelor's degree in rehabilitation counseling
 14 from the Pennsylvania State University, master's degree in
 15 rehabilitation counseling from the Pennsylvania State
 16 University. After receiving my master's degree, I continued
 17 with my education at New York University, in the Department of
 18 Rehabilitation Counseling, completing the 42 credits required
 19 towards a doctorate and leaving the university with my
 20 dissertation to be completed.
 21 Q Could you tell the jury about your work history?
 22 A Okay. I'm going to try to keep it brief, since it's my
 23 46th year of doing this work.
 24 I started out, in 1973, working at -- right here in New
 25 York City -- at The Federation of Handicapped in New York City.

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1 I was involved in a program called the Higher Horizons For the
 2 Homebound, which was a program geared to working with people
 3 that had severe disabilities.
 4 I performed the four basic functions of a
 5 rehabilitation counselor at the Federation: individual and group
 6 counseling, working with the clients to assist them in adjusting
 7 to their disabilities; vocational testing and evaluation,
 8 evaluating the clients to find out what they could or could not
 9 do, given their various capabilities; thirdly, I was involved in
 10 work-adjustment services, which meant that I prepared people for
 11 employment; and, lastly, I was involved in job-placement
 12 services, which meant that I located jobs the clients could do,
 13 given their various capabilities.
 14 Because it was a program geared to people that were
 15 homebound, I provided case-management services to about 250
 16 individuals and provided case-management and life-care planning
 17 services. I did that for about a year and a half and then
 18 became employed at Mount Sinai Hospital, Department of
 19 Rehabilitation Medicine, here in New York City.
 20 At Mount Sinai, I supervised the vocational facilities,
 21 which consisted of a sheltered workshop, vocational-testing and
 22 evaluation unit. In addition, I worked with five -- I
 23 supervised -- five professional staff members, worked with --
 24 doing basically the same functions: counseling, vocational
 25 testing and evaluation, work-adjustment, job-placement services.

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1 Because I was in the Department of Rehabilitation
 2 Medicine, I worked with people that had physical disabilities,
 3 and I also worked with in- and outpatient psychiatric
 4 individuals. I was at Mount Sinai from mid-1974 through '78,
 5 again from '79 to 1981.
 6 Since -- in 1976, I became employed as a rehabilitation
 7 counselor/vocational expert, as an independent contractor, for
 8 the Social Security Administration; i.e., the federal
 9 government; and I was called by the federal -- U.S. --
 10 administrative law judges to render opinions as to the
 11 employability of people that were seeking disability benefits,
 12 and in that capacity, I served as an expert for the Government
 13 on over 2500 occasions.
 14 Since 1981, in August, I started my own company, called
 15 Occupational Assessment Services, which provides direct
 16 rehabilitation services and life-care planning services to
 17 people that become injured. I work with all types of
 18 disabilities, people that injured their necks, their backs,
 19 people that have sustained traumatic brain injuries, people in
 20 wheelchairs, providing vocational counseling, testing and
 21 evaluation, as well as life-care planning services.
 22 That brings us up to date.
 23 Q Can you tell us any certifications or professional
 24 affiliations you have?
 25 A Yes.

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1 I'm what is known as a "Certified Rehabilitation
 2 Counselor," which is a national certification of rehabilitation
 3 counselors. In order to be certified, you have to be a graduate
 4 of a master's-level rehabilitation counseling program, which
 5 Penn State is, being one of the oldest programs in the country;
 6 you have to have been supervised by a Certified Rehabilitation
 7 Counselor; you have to have a number of professional references;
 8 and, most importantly, you have to successfully complete an
 9 examination which measures your knowledge in the field of
 10 rehabilitation counseling.

11 As I noted, I've been certified since 1974. In order
 12 to maintain my certification, I have to take 100 course-credit
 13 hours in a five-year period.

14 In addition, I'm also known as a "Diplomat [sic] of the
 15 American Board of Vocational Experts," which is an organization
 16 of individuals that have similar backgrounds working for the
 17 Government, doing what we call "forensic rehabilitation." In
 18 order to receive that certification, you have to be, again, a
 19 master's-level individual in rehab counseling, pass an
 20 examination, have your -- your reports or work product reviewed
 21 by your peers. I've been a Diplomat [sic] since the late '80s.

22 Lastly, I'm a Certified Life Care Planner, which means
 23 that I have had my reports reviewed, taken 128 course-credit
 24 hours in case management and life-care planning, had -- and
 25 successfully completed an examination which measures my

Provdner - by Plaintiff - Direct/B. Morelli Page 834

1 knowledge in the field of life-care planning and case
 2 management.

3 In fact, just the past -- three months ago, I've been
 4 appointed as one of the seven Commissioners of Life Care
 5 Planning, which means that I'm involved in looking at standards
 6 for life-care planning, reviewing people who are applying to be
 7 life-care planners, as well as writing questions for individuals
 8 who are trying to become life-care planners.

9 Q Is that statewide, nationwide?
 10 A Nationwide. All these are nationwide.

11 Q Okay. Now, my office requested that you embark on
 12 doing a life-care plan for Mark Perez; is that correct?
 13 A Yes.

14 Q And did you do that?
 15 A I did.

16 Q Can you tell us what it entails for you to be able to
 17 do a life-care plan that you're going to explain to us today?
 18 A Okay.

19 Well, life-care planning -- in order to do one --
 20 consists of five parts. The first part involves a review of
 21 various records that were forwarded to me, and as you could
 22 tell, I've got two binders of records (indicating).

23 Secondly, I conducted an interview with Mark and his
 24 father and his brother; I saw them on two different occasions.
 25 Based on that information, I then formulated a

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1 life-care plan, looking at the type of care and the cost of care
 2 he would require over his lifetime.

3 When I did the research as to the cost of care, I
 4 actually went out and talked to his treating doctors to find out
 5 what they charge, as well as looking at other doctors of similar
 6 backgrounds, at therapists of similar backgrounds, to finds out
 7 what the actual charges were in the Long Island area where he
 8 resides.

9 Based on all that information, I formulated an opinion
 10 as to his long-term life-care planning needs.

11 And, because I'm also a vocational expert, as part of
 12 my life-care plan, I looked at how his injuries and his
 13 impairments impact on his ability to work and his ability to
 14 earn money.

15 Q Now, you say you met with Mark and his -- a few --
 16 family members on two different occasions.
 17 A I did.

18 Q Can you tell the jury when that was?
 19 A Yes. Initially, I saw him on April 28th, 2015 and
 20 then, most recently, September 26th, 2018.

21 Q Now, the purpose of your evaluation was to decide what,
 22 if anything, Mark needed in the future --
 23 A Yes.

24 Q -- is that true? His future needs.
 25 A Yes.

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1 Q Okay. And while you were doing that, you also were
 2 making a decision as to whether or not Mark was able to be
 3 gainfully employed --
 4 A Yes.

5 Q -- or be able to get a job --
 6 A Yes.

7 Q -- correct?
 8 And did you do both of those things?
 9 A I did.

10 Q Okay. Can you tell us, basically, what records you
 11 reviewed in this case?
 12 A Well, I had numerous records. I had hospital records;
 13 I had treating- and consultative-physician reports; I had income
 14 tax records; I had high school records; I had reports from
 15 various examining doctors. That's it.

16 Q Can you describe --
 17 You had the meeting in 2015 with Mark and two family
 18 members?
 19 A Yes.

20 Q Was it the same two family members in 2018?
 21 A It was.

22 Q Okay. And during those two meetings --
 23 How long were those meetings, by the way?
 24 A The initial meeting was three hours; the second meeting
 25 was two and a half hours.

Provder - by Plaintiff - Direct/B. Morelli Page 837

1 Q Okay. And what, if anything, did you learn from those
2 meetings?
3 A Okay. Well, he indicated to me that he had been
4 injured on June 26th, 2013, resulting in an injury to his head,
5 his neck, his right shoulder, fractured ribs; and he sustained a
6 traumatic brain injury, resulting in cognitive limitations.
7 He also reported --
8 MR. O'HARA: I don't mean to interrupt the witness,
9 but he's reading from something. Can we ask what he's
10 reading from, for the record?
11 THE COURT: Would you please, sir?
12 THE WITNESS: These (indicating) are just notes
13 taken from my report, and I'm not reading them.
14 MR. O'HARA: Okay. If the witness is going to use
15 something to assist with his testimony, it needs to be
16 marked. That's just my request.
17 THE COURT: Okay, but he said he's not. Okay?
18 (Continued on next page.)
19
20
21
22
23
24
25

Provder - by Plaintiff - Direct/B. Morelli Page 838

1 BY MR. MORELLI:
2 Q Mr. Provder, also, if you would, be a little bit more
3 specific with reference to what records you reviewed.
4 A Okay.
5 Q And that you could refer to your notes.
6 A Okay. I have -- I have the Nassau University Medical
7 Center records.
8 Q Okay.
9 A I have two admissions, I have reports
10 neuropsychologists, several neuropsychologists, I have his, as
11 I indicated, his high school grade transcript and the
12 transcript from Nassau Community College, income tax returns,
13 supplemental reports from Southside Hospital, South Nassau
14 Community Hospital Emergency Room, report from North Shore
15 University Hospital, reports from Dr. Greenwald, who's a
16 physical medicine and rehab specialist, a report from
17 Dr. Gordon, a neuropsychologist, a report from -- a diagnostic
18 report from Montefiore Medical Center, I have depositions, one,
19 two, three, four, five depositions for Mr. Perez, Mark. That's
20 it.
21 Q Okay. Now, can you tell us briefly what you
22 specifically learned during your two visits with the family of
23 approximately five and a half hours combined?
24 A Yes, as I indicated, both his brother and his father
25 were present in both evaluations. His brother was responsible

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1 for providing information about 25 percent of the time because
2 Mark couldn't provide that information. Mark indicated that he
3 was 35 years of age, gave his date of birth as January the 5th,
4 1983. He stated he was single.
5 At the time that I saw him he was residing with his
6 parents in Islip, New York. He graduated high school in 2001
7 from Islip High School and he indicated he attended Nassau
8 Community College from 2002 to 2004. He also indicated that he
9 had taken courses or learned web development and was familiar
10 with various programs required for developing websites. These
11 are HTML, PHP and CSS. He most frequently used HTML.
12 I then inquired as to his work history and he reported
13 that he had been self-employed at the time of the incident and
14 he was employed in designing signage and planning structures.
15 He also reported that he had done this work for quite a number
16 of years, approximately ten years. He also stated that he was
17 involved in working out of his father's studio where he did web
18 development and he also did DJ -- worked as a DJ at weddings
19 and corporate events and so on. And so basically his main
20 focus, from what I understand, was web development.
21 I then went into his complaints. We started with his
22 cognitive complaints. He reported that he had impaired memory,
23 both short and long-term memory, he had diminished
24 concentration, difficulty reading and remembering what he read,
25 he had a shortened attention span and was easily distracted

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1 when he tried to do tasks. He had difficulty thinking of a
2 proper word to say and had difficulty multitasking, doing more
3 than one thing at one time. He had difficulty processing
4 words. He felt that his thinking was slower than before the
5 accident and he had some difficulty performing tests that
6 involved sequencing. He also noted for the records that he had
7 been involved in cognitive rehabilitation to help remediate
8 some of these problems.
9 Then I went into any emotional complaints that he had.
10 He stated he that was nervous, depressed, had difficulty
11 getting along with other people and also had difficulty with
12 stressful situations. He reported feeling angry and frustrated
13 over his cognitive limitations and the restrictions that he
14 placed on him. And he was receiving individual counseling when
15 I saw him from a neuropsychiatrist once a month.
16 Regarding his physical complaints, he reported he had
17 constant headaches, head pain, extreme fatigue, difficulty
18 sleeping at night and that he when the weather was cold and
19 damp, his pain was worse, pressure on his head. He also felt
20 that the bright lights affected his headaches, caused his
21 headaches. And he noted that he also had a seizure disorder.
22 At the time I had seen him he reported that his last seizure
23 had been in September 2017 where he had sought emergency room
24 treatment. He was taking Tegretol for the seizures, 800
25 milligrams, and his seizures lasted up to about five minutes

Provdner - by Plaintiff - Direct/B. Morelli Page 841

1 and he described his seizures.
 2 And that was history that was taken.
 3 Q Okay. And based on all of this information that you
 4 obtained, not only from the meetings, but also from the medical
 5 records, did you formulate a life care plan for Mark Perez?
 6 A I did.
 7 Q And would you be able to explain to the jury --
 8 MR. MORELLI: And, Judge, if he could use
 9 illustrations to explain to the jury the life care plan
 10 that he formulated for Mark Perez.
 11 THE COURT: You've already reviewed them,
 12 correct?
 13 MR. O'HARA: Yes, Your Honor.
 14 THE COURT: So we're good?
 15 MR. O'HARA: Just when he's reviewing a
 16 particular chart, just please identify it by the exhibit
 17 sticker.
 18 THE COURT: Would you, please? Thank you.
 19 Can you step down?
 20 (Witness exits the witness stand.)
 21 A Okay. This is Mark's --
 22 MR. MORELLI: You Honor, can you ask the jury if
 23 they can see it?
 24 THE COURT: I'm sure they can, Mr. Morelli, so
 25 we're good.

Provdner - by Plaintiff - Direct/B. Morelli Page 842

1 MR. MORELLI: Okay.
 2 THE WITNESS: This is 31 for ID.
 3 A Okay. What we have is the first part of the life care
 4 plan. The life care plan is a preventative plan that could
 5 happen in the future. So we have certain evaluations that are
 6 built into the plan. The first is called the Rehabilitation
 7 Plan Development, which means that we look at Mark's progress
 8 every five years. We'll go and talk to the rehabilitation
 9 counselor or life planer will come and talk to the family, talk
 10 to his treating doctors, see how he's doing and redo the plan
 11 because his condition may change. He may need certain things
 12 now that he doesn't need in the future or he may need
 13 additional things that he may not have now. So we built into
 14 the life care plan, Rehabilitation Plan Development, we review
 15 it once every five years. The cost is \$3,000 for the five-year
 16 period.
 17 Next we have physical therapy, evaluate what his
 18 physical capability is once a year through its life, 50 to
 19 \$100. And why I use a range on everything that I do is because
 20 some people charge more for some services, some people charge
 21 less for a service, so I provide the range of services from our
 22 research as to the cost and we don't know if the low end will
 23 be available or the high end will be available, so that's why I
 24 provide both. And we usually contact anywhere from three to
 25 five people that do each service, so I've contacted three to

Provdner - by Plaintiff - Direct/B. Morelli Page 843

1 five people that do each service. So I contacted three to five
 2 physical therapy programs in the New York City or Central
 3 Islip -- or the Islip, Long Island are.
 4 Next we have neuropsychological evaluations. One
 5 should be done at the beginning of his cognitive rehabilitation
 6 and one at the end to see what his progress is. So it should
 7 be done twice only. The cost is 2,400 to 3,250 each
 8 evaluation.
 9 And that's on 31 for ID.
 10 Q What number are we at?
 11 A This is 32 for ID.
 12 Q Okay.
 13 A Mark needs some assistance in making sure he receives
 14 the necessary services. It's been shown that a rehabilitation
 15 counselor or a rehabilitation nurse are very important in
 16 working with an individual who has a significant or severe
 17 impairment to assist them in their case management. So a case
 18 manager is provided. It's two to four hours six times a year.
 19 The cost is \$1,500 to \$4,300 at a rate of \$125 to \$180 per
 20 hour.
 21 The next is cognitive rehabilitation to assist him in
 22 the various cognitive limitations. We talked about memory
 23 problems and various exercises they can go through and
 24 counseling three times a week. The cost is 150 to 250 per
 25 session. It comes out to \$21,600 to \$36,000 per year.

Provdner - by Plaintiff - Direct/B. Morelli Page 844

1 And the last, psychological therapy, which he
 2 undergoes now -- at the time I saw him. Once a week for 48
 3 weeks, the cost is 140 to \$170 per session. That's a total
 4 amount of \$6,720 to \$8,160 per year.
 5 And that's 32 for ID.
 6 Q Okay.
 7 A So we're at 33 ID.
 8 And the first thing is a physiatrist. That's a doctor
 9 of physical medicine and rehabilitation, somebody who
 10 specializes in working with people that have sustained brain
 11 injury and also have cognitive and seizure disorders. Twice a
 12 year; the cost year one is 250 to \$725, year two, 150 to \$550.
 13 Neurologist, once a month, 12 times a year. The cost is \$1,400
 14 to \$2,300, then \$1,200 to \$2,100 per year. That would be
 15 somebody who would work with him regarding his seizure
 16 disorder, monitor his medication and so on.
 17 Next we have a neurosurgeon and this is changed, I
 18 understand. At the time I saw him he reported to me that he
 19 was seeing somebody once a week and so we have it down here,
 20 but I understand this has changed, so I'm going to skip over
 21 this one.
 22 We have craniofacial plastic surgery -- surgeon four
 23 times a year. The cost is \$728 to \$2,000 per year;
 24 neuropsychiatrist, that's who he sees now on a monthly basis.
 25 Cost is \$2,000 to \$5,425 per year for year one, year two is

Provder - by Plaintiff - Direct/B. Morelli Page 845

1 1,800 to \$5,100; hematologist, he was seeing somebody at the
 2 time I saw him two times a year. The cost is 290 to \$1,236 a
 3 per year. Then it goes to 180 to 972; ophthalmologist because
 4 of his vision problem, twice a year. Year one, \$245 to \$450,
 5 year two, 140 to 400. He was also seeing a neuro
 6 ophthalmologist, that would probably be somebody, a low vision
 7 person twice a year.
 8 Q An optometrist.
 9 A Optometrist, \$640 to \$1,010 and it goes down to 400 to
 10 \$720 blood tests because of his taking the seizure medication.
 11 His blood must be monitored on a regular basis, once a month.
 12 The cost is \$17,340 to \$18,912; and then the EEG to measure his
 13 brain waves because of his seizures on a yearly basis. The
 14 cost is once a year, \$200 to \$534.
 15 And that's 33 for ID.
 16 Q Okay.
 17 A We're at 34 for ID. And on this chart we have future
 18 surgeries. At the time I saw him they had recommended a
 19 cranioplasty. There was no date when this was going to happen.
 20 We researched the cost. Dr. Dobransky had made that
 21 recommendation. The cost ranged from \$57,734 to \$121,860 and
 22 this was a price quote from New York-Presbyterian Hospital.
 23 Q Okay.
 24 A 35 for ID.
 25 And these were the medications he was taking at the

Provder - by Plaintiff - Direct/B. Morelli Page 846

1 time I saw him. The first medication is Adderall for attention
 2 deficit disorder, 25 milligrams. The cost is \$1,188 to \$1,296.
 3 Tegretol, 800 milligrams. That's for seizure disorder. The
 4 cost is \$1,488 to \$1,500. And then we have Xanax,
 5 .5 milligrams for anxiety. The cost is \$156 to \$216.
 6 And that's on 35 for ID.
 7 Q I think the Xanax was -- it says five milligrams,
 8 doesn't it?
 9 MR. O'HARA: Judge, we'll correct the numbering
 10 on the break. He's got the numbers transposed.
 11 MR. MORELLI: The ID numbers.
 12 A At the time I saw him he had indicated that he was not
 13 driving. So I built in an Uber three times a week for 48
 14 weeks. We use 48 weeks because it's a clinical year. The cost
 15 is \$2,592 to \$27,072. We did a local range, which is a lower
 16 amount, \$9 per local. Going into New York City one way would
 17 be \$94.
 18 And that's 36 for ID.
 19 Q Okay.
 20 A The last chart is 37 for ID.
 21 At the time I saw him initially, he was living with
 22 his family. His parents were taking care of him and monitoring
 23 his situation, but, of course, when you grow older you want to
 24 live by yourself. Because of his seizure disorder and his
 25 cognitive limitations, it's been recommended that he have a

Provder - by Plaintiff - Direct/B. Morelli Page 847

1 live-in home attendant to be with him. He's had two seizures
 2 recently. So we have a live-in attendant, not awake, somebody
 3 living with him. The cost is \$299 to \$350 per day, a total
 4 amount of \$109,135 to \$127,750.
 5 And that's all of the components of the life care
 6 plan.
 7 Q Okay. Now, Mr. Provder, you said that after you
 8 completed your life care plan the other part of your job was to
 9 decide the employability of Mark Perez.
 10 A Yes.
 11 Q Correct?
 12 A Yes.
 13 Q Did you do that?
 14 A I did.
 15 Q And can you explain to the jury what you did, what
 16 information you used, what testing you did, if any, and what
 17 you came up with?
 18 A Okay.
 19 MR. O'HARA: Judge, that's my objection. That's
 20 classic compound. Can we have him break it down?
 21 THE COURT: Thank you. I think he's just asking
 22 for a foundational aspect of it, though.
 23 But go ahead, break it down.
 24 MR. MORELLI: Okay.
 25 BY MR. MORELLI:

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1 Q So, Mr. Provder, tell us what -- when you embarked on
 2 this task of finding out his employability, what did you do?
 3 A Okay. Well, it's four parts. The first part involved
 4 reviewing the medical records, which I had done for the life
 5 care plan. The second part investigated conducting an
 6 interview, which I conducted both times. The interview from
 7 the vocational standpoint. I focused in on his educational
 8 background and his work history that he gave me.
 9 Thirdly, I did administer some vocational tests to
 10 figure out what he could and could not do given his
 11 capabilities, whether he had any difficulty performing the
 12 tests. And lastly, I reviewed all that data and formulated an
 13 opinion as to his pre-injury earning capacity and what he could
 14 have earned if he had not been hurt and secondly, if he's
 15 employable, what he could earn, if he's employable at all.
 16 Q Okay. So tell us see what you came up with.
 17 A Okay. I have some charts here that would help the
 18 jury understand. Can I come up?
 19 MR. MORELLI: Can we ask him to come up for that,
 20 Your Honor?
 21 THE COURT: Of course.
 22 A This is 38 for ID.
 23 What we have here is the 5-Point Physical Demand Scale
 24 used by physical rehabilitation counselors and labor market
 25 analysts. It been created by the US Department of Labor, so

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1 every one of our jobs fits into one of these categories. What
 2 the government did is they researched all the jobs in the
 3 economy and there are approximately 13,000 that they looked at.
 4 They looked at the physical requirements of those jobs.
 5 What they did is they sent anywhere from ten to 20
 6 people out looking for a job, looking at the job, and then
 7 doing what we call a job analysis. And what they've done is
 8 created five categories and the categories were broken down
 9 into two areas. The first area is the physical position that a
 10 person performs the job and secondly, is the weight involved in
 11 lifting or carrying. The government uses a fancy word called
 12 exertion. So when you see that word exertion, they really mean
 13 weight.
 14 So the first thing that we do is we interview the
 15 person and we find out what kind of work they did in the past
 16 and the physical requirements of those jobs. So his past work
 17 that he indicated when he did the side work, that could be
 18 medium work, when he was doing web work, was sedentary, sitting
 19 down work. So let's discuss the categories.
 20 The first level of work is sedentary work. That's the
 21 least physical exertional level of work. And sedentary work is
 22 one that's done basically in a seated position. A person has
 23 to be able to sit at least six hours out of an eight-hour
 24 workday to do a sedentary job. And it involves lifting and
 25 carrying of no more than ten pounds. Usually somebody who does

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1 sedentary work-type job lifts and carries small tools and
 2 buckets. Maybe they'll lift up to ten pounds.
 3 The next level of work is what we call light work.
 4 That's work that's done usually in a standing and walking
 5 position. The person has to be able to stand and walk for at
 6 least six hours out of an eight-hour workday and they have to
 7 be able to lift anywhere from ten to 20 pounds while they're
 8 performing the job.
 9 The next level of work is medium work. That's work
 10 that's done again, standing and walking. It involves lifting
 11 anywhere from 20 to 50 pounds.
 12 Next work is heavy work. It involves lifting anywhere
 13 from 50 to 100 pounds. Of course, that's standing and walking.
 14 And the last and most arduous work is very heavy work
 15 that involves lifting and carrying in excess of 100 pounds
 16 occasionally or up to in excess of 50 pounds.
 17 So what we do is first we look at his prior work;
 18 sedentary work. And then what I then did is administered some
 19 testing. I actually administered four different tests to him
 20 to find out what his capability was. We have it depicted here.
 21 The first test I gave him is a test called The Purdue
 22 Pegboard Test developed by the Industrial Psychology Department
 23 at Purdue University. And what that allows us to do is measure
 24 his dexterity and coordination. So the first part involves
 25 using his right hand to work quickly and accurately, taking

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1 pegs and putting them into the pegboard. The second part
 2 involves using the left hand to place the pegs in the pegboard
 3 as quickly as they can. Thirdly, involves, using both hands to
 4 perform the same motions with the right and left hand. And
 5 then the less last one is completing a four-part assembly to
 6 see whether he could follow directions.
 7 On this test he reported experiencing a headache and
 8 difficulty grasping and holding the objects and he had trouble
 9 remembering what he had to do in the four-part assembly and he
 10 was very frustrated and confused while he did this test.
 11 Next test is the Employee Aptitude Survey, Visual
 12 Speed and Accuracy Test, which is basically a test of clerical
 13 and inspection ability. What he has to do is he's given pairs
 14 of numbers such as one, two, three, four, the second pair of
 15 numbers such as one, two, four three. He would have to mark
 16 those as different. And this is what we call a power test,
 17 meaning his score is the amount of items he completes in a set
 18 period of time.
 19 He scored below average, as you can see, on this
 20 particular test. Again, he reported having a headache,
 21 difficulty concentrating, memory problems, frustration and was
 22 distracted. And let me point out that the testing is done in a
 23 quiet room. There's nothing to distract somebody.
 24 The next test is the Employee Aptitude Survey Word
 25 Fluency Test. That's a test of his ability to produce words.

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1 It's a memory type of a test. His score was below average
 2 compared to the general productive male population norm group,
 3 another sitting down type of a test. On this test, again, he
 4 had similar problems; frustration, difficulty concentrating,
 5 distractibility, headaches, difficulty with his memory.
 6 And the last test is a test called the Employee
 7 Aptitude Survey, Manual Speed and Accuracy Test. He scored
 8 below average on this test. This is a very simple test. He
 9 sits in a seated position and he has to make marks on the test
 10 paper, making the marks as quickly as possible. Again, he
 11 scored below average compared to the norm group. He reported
 12 being fatigued, experiencing a headache, difficulty with
 13 memory, frustration, easily distracted and he did not feel well
 14 when he did this test.
 15 So we did all four different tests, all four of his
 16 scores are below average. Those were the four tests I
 17 administered to him.
 18 Q Now, Mr. Provdner, did you formulate an opinion about
 19 Mark Perez's employability?
 20 A I did.
 21 Q And can you tell us what your opinion is and please
 22 explain it in detail?
 23 A Yes. Based on my evaluation of him, his educational
 24 background, his medical conditions, his functional capacity or
 25 vocational capability, it's my opinion that, No. 1, that he was

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1 unable to perform any of the past work that he discussed with
 2 us. Disc jockey, web developer or sign designer, he could not
 3 do those jobs.
 4 Two, his pre-injury earning capacity, what he could
 5 have earned if he would not have been hurt I established as the
 6 average earnings of a web developer in the New York City/Long
 7 Island area. That amount is \$84,910 per year. That represents
 8 his earning capacity over his work life. He was a relatively
 9 young individual at the time of this accident, approximately
 10 30-years of age. So we look at what somebody's earning
 11 capability would be as they progress and get older. So I
 12 established it as \$84,910 per year.
 13 Three; it was my opinion that he didn't have any
 14 particular skills or knowledge that he could use to transfer
 15 and perform other types of work activity.
 16 Four; it was my opinion he could not perform any of
 17 those physical demand requirements, jobs that we talked about;
 18 sedentary work, light work, medium work, heavy work or very
 19 heavy work. He could not do any of those jobs on a sustained
 20 regular competitive basis. That means eight hours per day,
 21 five days per week performing and producing at a level
 22 acceptable to an employer. It's my opinion he could not do
 23 that.
 24 Five; it was my opinion that he's unemployable for any
 25 job in the competitive labor market and that he had sustained a

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1 total loss of earning capacity over his work life due to his
 2 injuries.
 3 Q Now, when you made that determination you took into
 4 consideration, did you not, also, his medical conditions, true?
 5 A Yes, of course. We have a number of documents that
 6 detail limitations that he has. We have actually several
 7 neuropsychological evaluations that talk about his limitations
 8 given him his IQ has been reduced significantly. So we have a
 9 lot of data that I based my opinion on, as well as my testing
 10 and my own observations.
 11 Q Would about the fact that he suffers from traumatic
 12 epilepsy?
 13 A Well, that's a major problem because if he's in a work
 14 setting and he has an epileptic seizure, that certainly would
 15 affect his ability to work.
 16 MR. MORELLI: I have nothing further, Your Honor.
 17 MR. O'HARA: Short break?
 18 THE COURT: Yes. Short break, ladies and
 19 gentlemen.
 20 THE COURT OFFICER: All rise, jury exiting.
 21 (Jurors exited the courtroom.)
 22
 23
 24
 25

Provder - by Plaintiff - Cross/O'Hara Page 855

1 COURT OFFICER: All rise. Jury entering.
 2 (The jury entered the courtroom.)
 3 THE COURT: Mr. O'Hara.
 4 MR. O'HARA: Thank you, your Honor.
 5 CROSS-EXAMINATION
 6 BY MR. O'HARA:
 7 Q Mr. Provder, you wrote two reports in this case with
 8 respect to the life-care plan; correct?
 9 A Yes, sir.
 10 Q You wrote a report on June 26th, 2015, addressing all
 11 of the items (indicating) that are in the appendices to your
 12 report that have been marked A-1 through A-7; correct?
 13 A Yes, sir.
 14 Q And then you wrote a second report, on September 26th,
 15 2018, about those very same topics; correct?
 16 A I'm not sure we have the dates correctly. Hold on a
 17 minute.
 18 Q Sure. November 15th, 2018. My apologies.
 19 A November 5.
 20 Q So you wrote two reports: one in 2015 and one in 2018.
 21 A Yes, sir.
 22 Q And in terms of the life-care plan, you cover all of
 23 the same items that are in the exhibits, A-1 through A-7;
 24 correct?
 25 A Yes, sir.

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1 Q And you mentioned to the jury that one of the things
 2 that you had the benefit of in coming before them today to offer
 3 the opinions was the review of all of the medical records in the
 4 case --
 5 Correct?
 6 A Yes.
 7 Q -- and a certain number of reports that were generated,
 8 and you identified Dr. Greenwald and Dr. Gordon; correct?
 9 A Yes.
 10 Q You have not seen the report of Dr. Anne Ambrose, have
 11 you?
 12 A I have not; just secondhand information.
 13 Q I'm -- just listen to my question.
 14 You've done this many times. You testify frequently;
 15 correct?
 16 A Yes, I have.
 17 Q So I'm just trying to have your answers be yes or no,
 18 and if you can't answer, just tell me; I'll ask you a different
 19 question. Okay?
 20 A The answer's no, I haven't reviewed her report.
 21 Q And you haven't reviewed the report of Dr. William
 22 Barr; correct?
 23 A No.
 24 Q You haven't reviewed the report of Dr. Jordan?
 25 A No.

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1 Q You haven't reviewed the report of Dr. Doyle --
 2 A No.
 3 Q -- correct?
 4 A No.
 5 Q And you haven't reviewed the defense proposal for a
 6 life-care plan in connection with this case; correct?
 7 A I have. That I have.
 8 Q So, when discussing the items that you reviewed before
 9 testifying today, when you talked in response to Mr. Morelli's
 10 questions, you just overlooked that item?
 11 A I overlooked the item because I'm not sure whether
 12 you're -- she's going to be presented as a witness. So --
 13 Q You didn't say it on direct, right?
 14 A I did not.
 15 Q Okay. So let's talk, first, about your comparison of
 16 what you suggested were proper life-care needs in 2015 versus
 17 2018 and what actually happened in the care and treatment for
 18 Mr. Perez.
 19 You understand what I'm asking you?
 20 A Yes.
 21 Q So, for example, with respect to therapies, in 2015 you
 22 suggested that he needed physical therapy three times a week for
 23 six months; correct?
 24 A Yes.
 25 Q You've reviewed the medical records in this case. Did

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1 that, in fact, occur?
 2 A After my review, it did not, I don't believe.
 3 Q You suggested that he required cognitive rehabilitation
 4 three times a week for two years, back in 2015?
 5 A Yes.
 6 Q In fact, in the care and treatment provided to
 7 Mr. Perez, did that occur?
 8 A He had received cog --
 9 Are you asking a yes-or-no question?
 10 Q The answer is no; isn't it?
 11 A To the best of my knowledge, no.
 12 Q You suggested that he needed psychotherapy once a week
 13 for three years, and then once a week for two years; and you
 14 know, from a review of the records, that didn't occur, either.
 15 Did it?
 16 A True.
 17 Q Now, with respect to medical care, you mentioned that
 18 he should see a psychiatrist twice a year. You said the same
 19 thing back in 2015, as compared to 2018; correct?
 20 A Yes.
 21 Q The psychiatrist that was seen in connection with this
 22 matter was a forensic evaluation scheduled with Dr. Greenwald;
 23 correct?
 24 A True.
 25 Q That is something separate and distinct, as you review

Provder - by Plaintiff - Cross/O'Hara Page 859

1 records, from treatment records by someone that's actually
 2 providing physiatry care; correct?
 3 A True.
 4 Q You mentioned that he should have been seen three times
 5 per week -- excuse me -- every three weeks by a neurologist;
 6 correct?
 7 A Yes.
 8 Q And based upon your review of the records, that didn't
 9 occur, did it?
 10 A No.
 11 Q So what I've said is correct?
 12 A Yes.
 13 Q You mentioned -- and I want to make sure I understand
 14 this: You mentioned, in 2015, that Mr. Perez should see -- be
 15 seen by -- a neurosurgeon 48 times during the course of the
 16 year; correct?
 17 A Correct. That's what it states.
 18 Q And you said the same thing in 2018; correct?
 19 A Correct.
 20 Q But that's a mistake in both reports; correct?
 21 A Yes.
 22 Q You're not suggesting to this jury that there is a
 23 requirement that Mr. Perez see a neurosurgeon weekly, are you?
 24 A No.
 25 Q In fact, there's no testimony or recommendation in any

Provder - by Plaintiff - Cross/O'Hara Page 860

1 of the records that you've seen that has suggested that he needs
 2 to see a neurosurgeon other than as needed for neurosurgical
 3 consulting; correct?
 4 A True.
 5 Q And at least in this case, with respect to a
 6 neurosurgeon and what's necessary, you've opined that he
 7 requires a cranioplasty, and you have put that in the life-care
 8 plan; correct?
 9 A Yes, sir.
 10 Q And that was something that you noted he required back
 11 in 2015; correct?
 12 A Yes.
 13 Q And in your review of the medical records and the
 14 reports from the different providers, there is no medical reason
 15 that you identified for that procedure not being performed;
 16 correct?
 17 A True.
 18 Q Now, just so we're clear, and I mean this with respect,
 19 but you're not a medical doctor; correct?
 20 A I'm not.
 21 Q And you're not a Registered Nurse or a Licensed
 22 Practicing [sic] Nurse; correct?
 23 A No, I'm not.
 24 Q And the reason why --
 25 While you've taken -- you've pursued -- doctoral

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1 credits, you ultimately didn't complete the doctoral process to
 2 allow for you to have the designation of a Ph.D.; correct?
 3 A True.
 4 Q You mention in your 2015 report that Mr. Perez should
 5 be seen by a craniofacial plastic surgeon 24 times per year;
 6 correct?
 7 A Yes.
 8 Q That hasn't happened, has it?
 9 A No.
 10 Q And you would agree with me, that doesn't make --
 11 there -- there's nothing in the record to suggest that he should
 12 see a craniofacial surgeon, essentially, ever two weeks --
 13 A True.
 14 Q -- correct?
 15 Now, you make reference to --
 16 With respect to home care, in 2015 you recommended that
 17 his life-care plan should include a live-in attendant, 24 hours
 18 a day, seven days a week; correct?
 19 A Yes, sir.
 20 Q And you continue with that view in the 2018 report;
 21 correct?
 22 A Yes, sir.
 23 Q And at no point has Mr. Perez obtained 24-hour-a-day,
 24 seven-day-a-week in-home care; correct?
 25 A True.

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1 Q And you're aware from a review of the deposition
 2 testimony that at the time of the last deposition, Mr. Perez was
 3 actually living independently, alone, in his own apartment, from
 4 2016 into 2017; correct?
 5 A That's what I understand.
 6 Q Now, just so the jury understands, and I want to make
 7 sure I do, as well: The reason for 24-hour-a-day,
 8 seven-day-a-week care in a home is to ensure that when a person
 9 is sleeping, if a medical event occurs, that there's someone
 10 that can immediately respond; correct?
 11 A Not only at night, but also during the day.
 12 Q But one of the reasons why it's required 24 hours a day
 13 is because when someone's sleeping, you still want this live-in
 14 attendant to be there.
 15 A True.
 16 Q Do you know what Mrs. Perez, Mark Perez's mother, does
 17 for a living?
 18 A No.
 19 Q Now, in commenting on Mr. Perez's employability and the
 20 future loss associated with his ability to be gainfully
 21 employed, you've used the description of a "Web developer"?
 22 A Yes.
 23 Q Now, one of the things that you talked about in
 24 offering the opinions relating to his present employability and
 25 the job description that you would recommend should be

Provder - by Plaintiff - Cross/O'Hara Page 863

1 considered to evaluate the future loss is the specific
 2 education, training and experience of Mr. Perez; correct?
 3 A Yes. And what he was doing as a job, yes.
 4 Q Yes.
 5 And in this case, one of the things that you identified
 6 for the jury, in your direct examination, that you reviewed
 7 included his high school records and his college records;
 8 correct?
 9 A Yes.
 10 Q And you're aware that Mr. Perez attempted to attend
 11 Nassau County Community College but was unsuccessful in
 12 completing the academics at that school; correct?
 13 A Yes. I have his transcript.
 14 Q And his total credits that were pursued during the time
 15 that he was attending Nassau County Community College -- he
 16 attempted to achieve 68 credit hours; correct?
 17 A Yes.
 18 Q But he only passed 36 credit hours; correct?
 19 A That's what I understand.
 20 Q And the other classes, he either withdrew from or he
 21 failed; correct?
 22 A Yes.
 23 Q And his grade-point average was a 1.85; correct?
 24 A Yes.
 25 Q And the one class, when you reviewed his academic

Provder - by Plaintiff - Cross/O'Hara Page 864

1 records, that related to anything associated with Web design, he
 2 failed; correct?
 3 A That's what I remember, yes, sir.
 4 Q Now, the other point that you made with respect to his
 5 employability and the job selection was, you mentioned, the
 6 average yearly income of someone that is a Web developer is, for
 7 purposes of your opinion, \$84,910 per year; correct?
 8 A Yes.
 9 Q Can you tell the jury where you get that number, how
 10 you go about reviewing the Department of Labor Statistics to
 11 identify what is a fair annual salary for someone that's in that
 12 field?
 13 A Yes.
 14 What happens is, the United States Department of Labor
 15 does wage surveys on a yearly basis. They contact every
 16 employer and they ask them what -- the various jobs they have;
 17 what the average earnings of those people are, doing those
 18 particular jobs; and then they provide us with information, both
 19 from New York City, in the New York City area, so we can see,
 20 per job, what each of the jobs pay, on average. So, if you're a
 21 rehabilitation counselor, you're an attorney, you're a nurse, we
 22 have that average earnings.
 23 Q And there are a number of job classifications that, as
 24 an expert being called to testify in a case like this, you look
 25 at to determine what's the appropriate job classification for

Provder - by Plaintiff - Cross/O'Hara Page 865

1 that future income loss relating to that unemployability;
 2 correct?
 3 A True.
 4 Q And in doing so, one of the things that you look at is
 5 the specific earning history of the individual, and the job that
 6 the individual was doing, in connection with your evaluation of
 7 what job classification to pick; fair statement?
 8 A You're going to have to repeat it.
 9 Q Sure.
 10 A I don't understand.
 11 Q A poorly phrased question. I'm tired of trying to get
 12 it in.
 13 So one of the things that you look at when deciding
 14 which job description that you're going to use to identify the
 15 potential average yearly loss is what that person actually did
 16 for a living before the incident; correct?
 17 A That's only one of the factors.
 18 Q But it is one of the factors that you look at; correct?
 19 A Yes, sir.
 20 Q And you look at his education, his training, his
 21 experience, and his job history; correct?
 22 A His job history, and any aspirations that the person
 23 may have. If they're a younger individual, such as Mark, we
 24 look at what they wanted to do and what their aspirations were.
 25 Q And with respect to aspirations, you would agree with

Provder - by Plaintiff - Cross/O'Hara Page 866

1 me, that's something that they desire to do in the future, as
 2 opposed to what they're doing right now.
 3 A True.
 4 Q And in this case, none of the records that you reviewed
 5 suggested that Mr. Perez ever actually was gainfully employed as
 6 a website developer; isn't that true?
 7 A That's not the history that was given to me; and I
 8 understand from his brother's testimony, that wasn't what the --
 9 was testified to.
 10 Q But you looked at his tax records, right?
 11 A Yes.
 12 Q And his tax records don't show any income from any
 13 employer relating to website development, do they?
 14 A They do not.
 15 Q In fact, they show income in 2010 totaling
 16 approximately \$27,000 a year; correct?
 17 A Gotta wait.
 18 Q Sure. Take your time.
 19 A Two-ten, yes. That's exactly correct.
 20 Q And the work that is being reported as generating
 21 income in 2010, none of which is website development; correct?
 22 (Pause.)
 23 A That appears to be correct; yes, sir.
 24 Q And in 2011, the total reported income for Mr. Perez is
 25 \$31,000, and again there's no reference to any income source

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1 being derived from website development; correct?
 2 A Let me just look.
 3 Q I can give them to you, if you need them, Dr. -- excuse
 4 me -- Mr. Provder.
 5 I call you "Doctor" anyway.
 6 A "Mr. Provder." It's okay.
 7 That would be correct.
 8 Q And in 2012, the year before this incident, his total
 9 reported income was approximately \$34,000, none of which coming
 10 from any employers relating to website development; correct?
 11 A True.
 12 Q And then, in 2013, there were questions raised during
 13 Mr. Perez's testimony about interaction with Best Buy on the
 14 project that he was injured.
 15 A Yes.
 16 Q I'm going to represent that to you.
 17 The tax returns that you've seen, in terms of what he
 18 actually earned in 2013 that was reported, was the total sum of
 19 \$263; correct?
 20 A Yes, sir. That's what I have.
 21 Q And at least for purposes of our discussion, you would
 22 agree with me that the actual income earned for the three full
 23 years, or three and a half years, depending on whether or not
 24 you want to take into consideration that half-year before the
 25 incident, that actual reported income is significantly less than

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1 what you forecast, first in 2015, for website development;
 2 correct?
 3 A Yes, sir.
 4 Q And an even greater difference in terms of being less
 5 than the amount that you forecasted in 2018; correct?
 6 A Yes, sir.
 7 Q And if Mr. Perez's aspirations, you assume, were
 8 successful, you're basing your opinion that it would be fair to
 9 identify this website-developer salary; correct?
 10 A Yes.
 11 Q But if those aspirations were unsuccessful, for a whole
 12 host of reasons, because he changed his mind and decided to
 13 pursue another field; because, for whatever reason, despite
 14 wanting to do something, he just wasn't capable of doing it,
 15 then that foundation that you've advanced would change; correct?
 16 A It's possible, yes.
 17 Q And in this case, if there was information about his
 18 desire to do something else, besides be a website developer,
 19 like relocate and run a restaurant, that information would be
 20 important to you in evaluating the future and the reliability of
 21 the assumption relating to that aspiration; isn't that true?
 22 A Yes, sir.
 23 MR. O'HARA: Thank you. I have nothing further.
 24 REDIRECT EXAMINATION
 25 BY MR. B. MORELLI:

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1 Q Mr. Provder, you were asked about whether or not you
2 knew what Mark's mom does for a living.
3 A Yes.
4 Q And you said you didn't know.
5 A I don't know.
6 Q Because when you met with Mark, you met with his
7 brother and his father; correct?
8 A Yes.
9 Q And, actually, his mom is a Registered Nurse; okay?
10 A Yes.
11 Q And she works part time.
12 And let me tell you, from the evidence in the case,
13 that she's about to turn 70 years old.
14 So what I'm going to ask you is --
15 MR. O'HARA: Objection.
16 This is leading.
17 THE COURT: Sustained.
18 MR. B. MORELLI: It's redirect, your Honor.
19 THE COURT: Okay.
20 MR. B. MORELLI: What would you like me to do?
21 THE COURT: Well, what I would like you to do is
22 ask a nonleading question that doesn't summarize the
23 evidence for the witness.
24 Q I'm going to ask you whether or not -- if you knew that
25 Mark Perez's mom was a Registered Nurse, it would change any of

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1 your opinions.
2 A No.
3 Q Do you, generally, assume that someone's parents are
4 going to take care of him for the rest of the child's life?
5 A No. It's one of the primary concepts of rehabilitation
6 and life-care planning that the person's primary caregiver won't
7 be the family.
8 Q And why is that?
9 A Because you don't know what's going to happen with the
10 family. They may not be there when the person needs them. They
11 could get sick; they could get hurt; they could die, and you
12 can't count on that.
13 Q Does the age of the parents come into question for you?
14 A Yes.
15 Q Now, when your -- when you stated that --
16 You recommended certain care and treatment for Mark;
17 correct?
18 A Yes.
19 Q And when you -- when you do that, do you make
20 determinations as to whether or not the person has certain
21 healthcare -- or whether they can afford the -- the --
22 MR. O'HARA: Objection.
23 Q -- treatment or not?
24 THE COURT: Sustained.
25 Q What come -- what comes into play when you make a

Provder - by Plaintiff - Redirect/B. Morelli Page 871

1 determination as to whether or not someone has care and
2 treatment that you recommend?
3 MR. O'HARA: Objection.
4 Can we go sidebar, just to --
5 THE COURT: Approach.
6 (Discussion off the record at sidebar.)
7 Q Now, Mr. Provder, when you're making a determination
8 for future care that a person needs, in your opinion --
9 A Yes.
10 Q -- okay? -- do you -- is one of the factors that you
11 take into consideration the fact of whether or not the person
12 can afford the care?
13 MR. O'HARA: Objection.
14 THE COURT: Overruled.
15 A No.
16 Q Okay. And so, you didn't do that in this case, did
17 you?
18 A I did not.
19 Q Okay. So -- so what is -- what is your assumption;
20 that it can be afforded?
21 A No. The assumption is that the person needs those
22 particular items and those were the costs of the items.
23 Q So it's actually not relevant to your opinions --
24 MR. O'HARA: Objection.
25 That's a legal determination.

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1 Q -- correct?
2 THE COURT: Overruled.
3 A True.
4 Q Now, when you stated that he would need a 24/7 live-in
5 attendant --
6 And we talked about the daytime and the nighttime;
7 correct?
8 A Yes.
9 Q -- would the fact that Mark Perez is --
10 It's undisputed that he has epileptic seizures that
11 happen in the morning, they sometimes happen in the afternoon,
12 and sometimes they happen at night.
13 Would that come into play with reference to your
14 opinion...
15 (Mr. O'Hara stood.)
16 MR. B. MORELLI: I'm waiting.
17 MR. O'HARA: Objection; assumes facts not in
18 evidence --
19 THE COURT: Sustained.
20 MR. O'HARA: -- and leading.
21 THE COURT: Well, I'm sorry; I hate to do this, but
22 approach, please.
23 (Discussion off the record at sidebar.)
24 Q Now, Mr. Provder, the fact that Mark Perez has --
25 There's been testimony in the case that Mark Perez has

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1 had seizures in the morning, in the afternoon and at night.
2 Would that information be important for you in
3 rendering your opinion that he would need 24/7 care, so that
4 someone's always there in case something happens?
5 A Yes. That's why I recommended live-in home care.
6 MR. B. MORELLI: Nothing further, your Honor.
7 THE COURT: Can you approach, please, before we let
8 the witness go?
9 (Discussion off the record at sidebar.)
10 THE COURT: Okay. Thank you, Doctor. You're
11 excused.
12 THE WITNESS: "Mr. Provder."
13 THE COURT: Excuse me; Mr. Provder.
14 THE WITNESS: Thank you, your Honor.
15 (Witness excused.)
16 THE COURT: Ladies and gentlemen, that does
17 conclude our testimony for today.
18 We have one witness slated for tomorrow that we are
19 fully expecting will be concluded in the morning, if not
20 very early afternoon; but I'm confident to say, in the
21 morning we should be done, at some point. And then we have
22 some things that we have to work on in the afternoon but I
23 don't need you to hang around for that. So please report
24 tomorrow morning, downstairs, at 9:15.
25 We do have, like I said, the one witness for

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1 tomorrow and I think you can expect an early discharge
2 tomorrow.
3 Okay? Thank you.
4 COURT OFFICER: All rise. Jury exiting.
5 (The jury left the courtroom.)
6 MR. B. MORELLI: We just have one stipulation for
7 the record.
8 Mr. O'Hara? I just want you to listen.
9 Mr. O'Hara stipulated, so that I wouldn't have to
10 ask Mr. Provder the question of "reasonable certainty" --
11 THE COURT: Oh, yes.
12 MR. B. MORELLI: Yes.
13 MR. O'HARA: That's agreed.
14 MR. B. MORELLI: Yeah.
15 So we're stipulating that --
16 THE COURT: "With a reasonable degree of life-care
17 planning certainty"?
18 MR. O'HARA: The defense stipulates that the
19 opinions were offered within a reasonable life-care-planning
20 and vocational-rehabilitation certainty.
21 MR. B. MORELLI: Thank you.
22 MR. SIROTKIN: Thank you.
23 THE COURT: Now, we can close the record for today.
24 (Whereupon, the matter was adjourned to Wednesday,
25 November 20, 2019, at 9:30 a.m.)

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