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EXAMINATION BEFORE TRIAL OF SCOTT SILBERMAN

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NO: 07CV701

November 6, 2008

Reporter
2008 Depo. Trans. LEXIS 18582 *

CARLO MELINI, Plaintiff, -against- 71ST LEXINGTON CORPORATION and GARAGE MANAGEMENT CORP. and EAST 71ST STREET GARAGE CORP., Defendants.

Expert Name: Scott Silberman

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Counsel

[*1] GREENBERG & STEIN, P.C., Attorneys for Plaintiff, New York, New York, BY: JOSHUA STEIN, ESQ.

MARGARET G. KLEIN & ASSOCIATES, Attorneys for Defendant, New York, New York, BY: RALPH F. DiSOMMA, ESQ.

FARBER, BROCKS & ZANE, LLP, Attorneys for Defendants, GARAGE MANAGEMENT CORP., Mineola, New York, BY: BRADEN H. FARBER, ESQ.

Proceedings

1

[19]EXAMINATION BEFORE TRIAL of SCOTT

[20]SILBERMAN, an Expert Non-Party Witness on behalf of

[21]the Plaintiff, pursuant to the Federal Practice Law

[22]& Rules of Testimony, held at the above-mentioned

[23]time and place, before Kelly A. Schroder, a Notary

[24]Public of the State of New York.

[25]

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[2]F E D E R A L S **[*2]** T I P U L A T I O N S

[3]IT IS HEREBY STIPULATED AND AGREED by and

[4]between the attorneys for the respective parties

[5]herein, that the sealing, filing and certification

[6]of the within deposition be waived; that such

[7]deposition may be signed and sworn to before any

[8]officer authorized to administer and oath, with the

[9]same force and effect as if signed and sworn to

[10]before the officer before whom said deposition is

[11]taken.

[12]IT IS FURTHER STIPULATED AND AGREED that

[13]all objections, except as to form, are reserved to

[14]the time of trial.

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[2]S C O T T S I L B E R M A N,

[3]After having first been duly sworn by a

[4]Notary Public of the State of New York, was examined

[5]and testified as follows:

[6]EXAMINATION BY

[7]MR. DiSOMMA:

[8]Q State your name and business address for

[9]the record, please.

[10]A Scott Silberman, 386 Park Avenue South,

[11]New York, New York 10016.

[12]Q Mr. Silberman, my name is Ralph DiSomma,

[13]I'll be asking you some questions this morning.

[14]Good morning to you.

[15]A Good morning.

[16]Q What is your date **[*3]** of birth?

[17]A [TEXT REDACTED IN ORIGINAL SOURCE]

[18]Q Now, with regard to this matter involving

[19]Carlo Melini, have you been retained to provide

[20]services?

[21]A Yes.

[22]Q Who have you been retained by?

[23]A By Greenberg & Stein.

[24]Q When were you retained by them?

[25]A I believe back in October, November of

[5]

[1]

[2]2006.

[3]Q Who retained you from the firm?

[4]A Josh Stein.

[5]Q How did Mr. Stein first communicate with

[6]you regarding this matter; was it in person, by

[7]telephone or some other method?

[8]A By telephone.

[9]Q What was the sum and substance of what

[10]Mr. Stein told you during this phone call?

[11]A Mr. Stein indicated that there was an

[12]accident at a certain location. He sort of

[13]described what the accident involved, he gave me the

[14]address of the premises, he asked me to go out, do

[15]my measurements, take some photographs and provide

[16]him with an opinion as to what, if anything, is

[17]wrong with the subject.

[18]Q What was the sum and substance of what he

[19]told you the accident involved?

[20]A I believe he told me that gentleman was

[21] **[*4]** walking into the garage and he slipped on the ramp

[22]and fell.

[23]Q Did he tell you anything else?

[24]A No.

[25]Q Did he tell you the address of the garage?

[6]

[1]

[2]A Yes, he did.

[3]Q Was anyone else a party to this

[4]conversation on the phone?

[5]A Not to my knowledge, no.

[6]Q Did you go down and look at the location?

[7]A Yes, I did.

[8]Q Prior to doing that, did you speak to

[9]Mr. Stein again?

[10]A No, I did not.

[11]Q Prior to doing that, did you speak to any

[12]other attorney in Mr. Stein's law firm?

[13]A Not that I recall, no.

[14]Q Prior to doing that, did you speak to any

[15]other employee in Mr. Stein's law firm?

[16]A With respect to this matter?

[17]Q Yes.

[18]A No, I did not.

[19]Q When did you go to the location for the

[20]first time?

[21]A November 25, 2006.

[22]Q And how do you know that?

[23]A That's the date of my report.

[24]MR. STEIN: Are you using your report to

[25]refresh your recollection as to the events that

[7]

[1]

[2]Mr. DiSomma's questioning you about?

[3]THE WITNESS: That's correct.

[4]Q And you have your **[*5]** file in front of you?

[5]A Yes, I do.

[6]Q And are you intending to refer to your

[7]file to assist you in your testimony?

[8]A Yes, I am.

[9]Q We'll talk more about your file later on.

[10]MR. STEIN: So we have a clear record, can

[11]you indicate for us when you're refreshing your

[12]recollection with your file as opposed to

[13]testifying from your memory?

[14]THE WITNESS: Okay.

[15]Q Prior to going to the accident location,

[16]did you have any other verbal communication with

[17]anyone about this case?

[18]A No, I did not.

[19]Q Prior to going to the accident location,

[20]did you receive any documents relative to this case?

[21]A Yes, I received some photographs.

[22]Q Do you have those photographs with you

[23]today?

[24]A I don't think that I do.

[25]Q I notice that you have photographs in your

[8]

[1]

[2]file, I don't need to see them yet, but those are

[3]not the photographs that were sent to you?

[4]A To be honest, I'm not sure. I don't have

[5]them separated by anything. I know I took some

[6]photographs and they're included in here.

[7]Q So the photographs that are in your **[*6]** file

[8]could be the photographs sent to you by Mr. Stein's

[9]office?

[10]A It's possible, but these do look like the

[11]photographs that I took.

[12]Q Why don't you take a moment and look at

[13]photographs in your file, and if you could just

[14]isolate the photographs sent to you by Mr. Stein's

[15]office.

[16]A I don't know if I could do that at this

[17]time. I'd have to go to my office, see the file,

[18]the actual digital file. I can compare what's on my

[19]computer with what is here, and I could tell you if

[20]those are my photographs or not.

[21]Q The file for this matter is kept on a

[22]computer?

[23]A The photographs, the digital photographs

[24]are kept on the computer, a copy of.

[25]Q May I see the photographs that you have in

[9]

[1]

[2]your file? I won't mix them up with these because

[3]these are marked. I'm going to circulate them to my

[4]colleagues so they can take a look and then I'll

[5]continue.

[6]Other than the photographs being sent

[7]to you before you went to the location for the first

[8]time, were any documents sent to you?

[9]A No.

[10]Q Did you generate any documents sent

[11]forward **[*7]** then to Mr. Stein's office before you went

[12]to the location?

[13]A No, I did not.

[14]Q Did you take any written notes before

[15]going to the location?

[16]A Yes, I did.

[17]Q And where are those notes today?

[18]A Well, I don't have them anymore.

[19]Q What happened to them?

[20]A Well, when I made -- when I made the

[21]actual appointment to go to the job site, I typed in

[22]the address and the location, some of the details in

[23]my Outlook. And then after I did my site visit, I

[24]took that information, I just sort of transferred it

[25]to my report, so there's no reason to have that

[10]

[1]

[2]information anymore.

[3]Q Is any information still in Outlook on

[4]your computer?

[5]A Probably not. I could check to see if it

[6]was archived, but I would assume it wasn't.

[7]Q I request that you do check to see if it

[8]was archived. If it was, I'm going to ask for hard

[9]copies of your computer file on this matter.

[10]MR. STEIN: I ask that all requests be put

[11]in writing so they can be properly addressed

[12]when so requested.

[13]Q Approximately, what time did you arrive at

[14]the location on **[*8]** November 25, 2006?

[15]A As stated in my report, 10:00 a.m.

[16]Q What was the weather like that day?

[17]A I believe it was clear, dry out.

[18]Q Had it rained at all that day?

[19]A I don't recall.

[20]Q Upon your arrival, did you meet with

[21]anyone at the location?

[22]A No, I did not.

[23]Q Did you speak to Mr. Melini, the

[24]plaintiff, in this action before going to the

[25]location?

[11]

[1]

[2]A No, I did not.

[3]Q Was Mr. Melini at the location upon your

[4]arrival on November 25, 2006?

[5]A Can you repeat that?

[6]Q On the day that you went to the location,

[7]November 25, 2006, was Mr. Melini there?

[8]A Not at the time I was there.

[9]Q Was Mr. Stein or any other employee of

[10]Mr. Stein's office present when you went to the

[11]location on November 25, 2006?

[12]A No, I was the only person there.

[13]Q You performed an inspection at that time?

[14]A That's correct.

[15]Q During the inspection, was anyone else

[16]related to this case; in other words, Mr. Melini,

[17]anyone from the office of plaintiff's attorney,

[18]anyone else directly connected to this case present

[19] **[*9]** and part of your inspection?

[20]A As far as I know, no. I was the only

[21]person there.

[22]Q Approximately, how long did you take to

[23]make your inspection on November 25, 2006?

[24]A Half an hour.

[25]Q During the time that you were present for

[12]

[1]

[2]approximately a half hour, did you speak to anyone

[3]via telephone about the case?

[4]A I don't recall.

[5]Q During the time that you were there for

[6]about a half hour, did you speak to anyone in person

[7]about the case?

[8]A No.

[9]Q What did you do during this half hour?

[10]A I took some measurements of the ramp, I

[11]took some photographs of the ramp, I did a -- I

[12]looked around the building of the sidewalk area, I

[13]went down the ramp. That's primarily it.

[14]Q Were you involved in an accident as you

[15]went down the ramp?

[16]MR. STEIN: Note my objection.

[17]You can answer.

[18]A No.

[19]Q When you went down the ramp, can you tell

[20]me whether you held onto any handrails?

[21]A No.

[22]Q What type of footwear did you have on when

[23]you went down the ramp?

[24]A Work boots.

[25]Q Did you sustain any **[*10]** type of injury that

[13]

[1]

[2]day as a result of going up or down the ramp?

[3]A No, I did not.

[4]Q If you could just take me chronologically

[5]through your inspection, you arrived at the

[6]premises, take me from what you did first all the

[7]way until what you did last. I don't expect you to

[8]tell me every single thing that happened, but at

[9]least hit the highlights for me.

[10]A It may be difficult to recollect the exact

[11]thing I did in chronological order.

[12]What I typically do is when I arrive

[13]at a site, I look around, I try and get a feel for

[14]the whole building location, the egress, the

[15]environmental conditions, and I sort of just try to

[16]get a feel for the installation of the system. Once

[17]I have that feel, at that point I start taking ray

[18]measurements, my notes and my, you know, I note down

[19]the readings that I get.

[20]And afterwards, I usually take my

[21]photographs. And if while I'm taking photographs if

[22]I notice something different, I might at that point

[23]take additional measurements or make additional

[24]notes. So it's hard to say exactly what I did at

[25]this specific location.

[14]

[1]

[2] **[*11]** Q Before making this inspection, did you

[3]review the certificate of occupancy for the

[4]building?

[5]A I'm not sure if I looked at it before or

[6]afterwards, but I did look at it.

[7]Q Before making this inspection, did you

[8]look at any plans related to the building or the

[9]ramp?

[10]A No, I did not.

[11]Q Have you ever looked at any plans related

[12]to the building or the ramp?

[13]A No, I did not.

[14]Q Have you ever looked at any filing with

[15]the New York City Department of Buildings relative

[16]to this building or this ramp?

[17]A No, I did not.

[18]Q Have you put in a requisition to obtain

[19]any such records?

[20]A No, I did not.

[21]Q You mentioned that the first thing you

[22]did -- withdrawn.

[23]Granted, you told me that you may not

[24]have given me every single thing in the sequence

[25]because you're testifying from memory, so that's

[15]

[1]

[2]understood. But in the approximate things that you

told me you did, okay, in all fairness to you, you indicated one of the first things you would normally do would be to get a feel for the installation, correct?

A That's **[*12]** correct.

Q How did you go about doing this with regard to this, to this assignment?

A I walked up and down the ramp, I looked around, looked up, I looked on the sidewalk, I looked around the periphery of the building just to get an idea of the use of the space and -- just to get an overall sense of any environmental outside objects or installation that may have contributed to the cause of the accident or to make sure that there were no other code compliant things I might be missing. I make sure when I do my investigation I'm looking at both sides of the picture.

Q When you say you walked up and down the ramp, I assume you walked down the ramp first?

A Yes.

Q Did you walk completely down the ramp --

A Yes, I did.

Q -- into the garage?

A Yes.

Q Did you announce to anyone why you **[*13]** were there?

A Nobody asked me.

Q Did you report to anyone at the building that you were there to look at the ramp?

A No, I did not.

Q Did you have prior written permission from the owner of the building or the operator of the garage to look at the ramp?

A No, I did not.

Q Did you ask for such permission?

A No, I did not.

Q Did you ask anyone from Mr. Stein's office whether any such permission was required?

MR. STEIN: Note my objection.

You can answer.

A No, I did not.

Q When you walked down the ramp, give me an idea of how you walked down the ramp; were you in the middle of the ramp, on one side of the ramp? Give me an idea of what you did.

A I don't recall my exact position in relation to the width of the ramp when I walked down the ramp. Let's just say it was probably -- at one point I was in the middle, and another point I was probably near one of the sides.

Q Before walking down the ramp, did you know

[11]where the accident allegedly happened?

[12]A Yes, I did.

[13]Q How did you know **[*14]** that?

[14]A I believe -- I'm trying to recall, it

[15]might have been in the photographs that I was

[16]presented or I was told the area that generally

[17]where the pavement changed from the asphalt to the

[18]concrete, I believe that's what I was told.

[19]Q If it was in the photographs that you were

[20]given, what was in those photographs to indicate to

[21]you the location of the accident?

[22]A It might have been -- it might have been a

[23]circle or it might have just been a conversation

[24]when I received the photographs from the attorney

[25]telling me, you see where that area is, it's in that

[18]

[1]

[2]vicinity.

[3]Q Do you remember if you were in possession

[4]of a photograph with a circle on it during the date

[5]of your first inspection?

[6]A Like I said, I don't recall and I'm

[7]guessing, but I would believe it was a verbal

[8]communicate that indicated that's the area where a

[9]person fell.

[10]Q And the verbal communication would have

[11]been from whom?

[12]A Mr. Stein.

[13]Q Did you have any problem walking down the

[14]ramp?

[15]A No, because generally when I do a lot of

[16]these cases, I'm already **[*15]** aware of certain

[17]situations. I tend to be a little more cautious.

[18]Q What situation were you aware of when you

[19]first walked down the ramp?

[20]A Well, I noticed visually that it was in my

[21]opinion excessively steep, there were signs posted

[22]everywhere saying, "Caution, use handrails."

[23]Q When you say "signs posted everywhere,"

[24]how many?

[25]A I believe at the top of the ramp there was

[19]

[1]

[2]one sign. Sorry, one sign that was, "Caution, use

[3]handrail."

[4]Q You readily saw those signs as you went

[5]down the ramp?

[6]A As I said before, when I first get there I

[7]look around, I try to observe everything in the

[8]site. One of the things I observed was the signage.

[9]Q Did you see any cars parked on the ramp

[10]while you were there?

[11]A No, I did not.

[12]Q From what you could see, what was the

[13]purpose of the ramp?

[14]A Well, the purpose of the ramp was twofold:

[15]One, it provided a way for the cars to drive into

[16]the garage; and secondly, for people to walk in and

[17]out of the garage.

[18]Q Did you walk up the ramp?

[19]A After I walked down, yes, I walked up **[*16]** the

[20]ramp.

[21]Q Did you have any problem walking up the

[22]ramp?

[23]A No, I did not.

[24]Q You mentioned that the next major thing

[25]you would have done as per your usual procedures was

[20]

[1]

[2]to take measurements; is that correct?

[3]A That's correct.

[4]Q Did you take any measurements?

[5]A Yes, I did.

[6]Q What measurements did you take on that

[7]day, November 25, 2006?

[8]A I basically measured the slope of the ramp

[9]and I measured, I believe, the height of the

[10]handrails.

[11]Q What was the height of the handrails?

[12]A I believe they were within code, so I

[13]didn't note it. It was probably between 30 to

[14]34 inches.

[15]Q When you say, "within code," what do you

[16]mean by that?

[17]A In accordance with the height requirements

[18]stipulated in the building codes.

[19]Q So the handrails were proper?

[20]A Yes, proper height, yes.

[21]Q Was there a handrail on the left side as

[22]one walks down the ramp?

[23]A Yes, there was.

[24]Q Was there a handrail on the right side as

[25]one walks down the ramp?

[21]

[1]

[2]A Yes.

[3]Q The handrail **[*17]** on the left side, was it

[4]continuous or were there any breaks in that

[5]handrail?

[6]A Looking at the photographs, is there a

[7]break midway down the ramp?

[8]Q And the handrail on the right, is it

[9]continuous or are there any breaks in that handrail?

[10]A Yes, there's a break in the handrail when

[11]you get to the gate down at the base of the ramp.

[12]Q The break in the handrail that's on the

[13]left, where is it in relation to the entrance to the

[14]garage as you defined it earlier?

[15]A The break in the handrail to the left is

[16]in the general vicinity where the asphalt surfacing

[17]changed to a concrete surface.

[18]Q How did you take the measurement of the

[19]slope?

[20]A I have a digital level.

[21]Q How many measurements did you take?

[22]A I took several.

[23]Q How many all together?

[24]A I don't know the exact number, anywhere

[25]from seven to ten.

[22]

[1]

[2]Q Does your report reflect the exact number?

[3]A Not the exact number, but my report

[4]reflects what the lowest reading that I got was. Of

[5]all the seven or ten, I indicated the lowest

[6]reading.

[7]Q **[*18]** What was the lowest reading?

[8]A 21.5 percent.

[9]Q What was the highest reading?

[10]A I believe it was around 23 percent.

[11]Q Did you take any photographs of your

[12]digital device as you placed it on the ramp to

[13]measure the slope?

[14]A During this site visit, no. During a

[15]subsequent site visit, yes.

[16]Q Do you have the photographs showing your

[17]device on the ramp during the subsequent site visit?

[18]A I didn't print them out.

[19]MR. DiSOMMA: Off the record.

[20](Discussion was held off the record)

[21]MR. DiSOMMA: On the record.

[22]Q Do you know the exact number of

[23]measurements you took during the first occasion you

[24]were there?

[25]A No, I do not.

[23]

[1]

[2]Q Is the exact number anywhere in your

[3]report?

[4]A No, they're not.

[5]Q Where would the exact number of

[6]measurements have been recorded, if anywhere?

[7]A Well, when you're taking slope readings on

[8]a surface like this, there are sometimes some slight

[9]surface irregularities. I take several measurements

[10]and I take the lowest reading to make sure I'm being

[11]most conservative as possible. **[*19]**

[12]Q The first time you were there, how many

[13]times did you take measurements? In other words,

[14]how many times did you put the device down on the

[15]surface of the ramp and take measurements?

[16]MR. STEIN: Asked and answered.

[17]You can answer it again.

[18]A Somewhere around seven to ten times.

[19]Q And when you took the measurements seven

[20]to ten times, you placed the device down on the

[21]surface seven to ten times, did you place the device

[22]down on the surface at one location or at different

[23]locations?

[24]A At different locations.

[25]Q Did you make any type of diagram to show

[24]

[1]

[2]where you placed the device down on the surface?

[3]A No, I did not.

[4]Q Did you record the relative locations of

[5]where you placed the device down on the surface

[6]seven to ten times?

[7]A I know the general location is the area

[8]where the asphalt and the concrete interface was.

[9]Q Not in terms of general location, did you

[10]record the location in any type of notes giving a

[11]physical description in feet or inches or meters as

[12]to where the device was placed precisely each time

[13]you **[*20]** took the measurement?

[14]A No, I did not.

[15]Q Is there a reason why you did not do that?

[16]A Yeah, I personally didn't think that was

[17]relevant.

[18]Q Do you have any record today that would

[19]reflect exactly where you placed the device during

[20]the seven to ten times that you took the measurement

[21]of the slope?

[22]A Do I have any what, evidence?

[23]Q Any written documentation, whether it be a

[24]chart, a diagram, notes, anything that would

[25]indicate the precise location where you put that

[25]

[1]

[2]device down when you took the measurements seven to

[3]ten times?

[4]A No, I do not.

[5]Q Did you ever have any such documentation?

[6]A No, I did not.

[7]Q Did you ever record the exact location

[8]where you put the slope measuring device on the ramp

[9]say by reference to a photograph by placing Xs on

[10]the photograph at the relative locations or by

[11]placing dots on the photograph on the relative

[12]locations; anything like that?

[13]A During the initial site visit, no, but the

[14]subsequent site visit we took photographs where the

[15]exact location was that the measurements were taken. **[*21]**

[16]Q So that wasn't done on the first visit,

[17]something along those lines was done on the second

[18]visit?

[19]A That's correct.

[20]Q And the way it was done during the second

[21]visit was to take photographs of the device as it

[22]was rested on a portion of the surface of the ramp,

[23]correct?

[24]A That's correct.

[25]Q I just want to make sure at any time

[26]

[1]

[2]during your investigation of this from the day that

[3]you were retained until today, did you ever make

[4]notes as to precisely where on the surface of the

[5]ramp you placed the slope measuring device?

[6]A No, I did not.

[7]Q Did you ever make a schematic diagram of

[8]precisely where you placed the device that measures

[9]the slope on the ramp?

[10]A No.

[11]Q During your first visit to this location,

[12]did you take any photographs of the slope measuring

[13]device as you rested the device on the ramp at about

[14]seven to ten spots on the ramp?

[15]A No, I did not.

[16]Q With regard to your first inspection of

[17]the ramp, did you come up with a figure for the

[18]slope?

[19]A Yes.

[20]Q Was it one figure that you came **[*22]** up with?

[21]MR. STEIN: Note my objection. Asked and

[22]answered.

[23]You can answer it again.

[24]A Yeah. What I said was I took several

[25]measurements and I recorded the lowest slope to

27

[1]

[2]insure that if there was any irregularities that

[3]that would have yielded a higher result I would sort

[4]of disregard them. So I took the lowest possible

[5]slope that I found in those seven to eight

[6]measurements.

[7]Q And what is the figure that you entered

[8]for the slope in your report for your first visit to

[9]the premises?

[10]A It was 21.5 percent.

[11]Q Did you enter any other figures for the

[12]slope in your report with regard to your first

[13]visit?

[14]A No.

[15]Q And at the present time, you don't have

[16]notations of any of the other figures; is that

[17]correct?

[18]MR. STEIN: Asked and answered.

[19]You can answer again.

[20]A That's correct.

[21]Q How did you arrive at the 22.5 figure, is

[22]it that you averaged --

[23]MR. STEIN: 21.5.

[24]Q I stand corrected, is it 21.5?

[25]A 21.5.

28

[1]

[2]Q How did you arrive at that figure; did you

[3]average it out, **[*23]** do something else? What is the

[4]mathematical process?

[5]A There was no mathematical process, that

[6]was the reading on the digital level. I disregarded

[7]the other six to nine readings. If I would have

[8]averaged out all the readings, it would have yielded

[9]a higher result. What I tried to do was took the

[10]lowest reading in the spectrum of those seven to ten

[11]readings, that's what I recorded in my report.

[12]Q Do you know what any of the other readings

[13]were?

[14]A I don't recall. I know they were all

[15]higher than 21.5.

[16]Q Were there any lower than 21.5?

[17]A Well, since that was the lowest reading

[18]that I obtained, the answer would be no.

[19]Q Did you place the device down on the

[20]surface to see if there were any figures lower than

[21]21.5?

[22]A That was the purpose of taking seven to

[23]ten readings, to see if there was a varying degree

[24]of slope on that ramp, and that's why I took the

[25]lowest so there wouldn't be any question as to

29

[1]

[2]whether some areas might be lower or higher. That

[3]was the lowest. So if you averaged it, it would be

[4]higher than 21.5.

[5]Q And you **[*24]** mentioned that the next major

[6]thing usually you would do is take notes; is that

[7]correct?

[8]A I think I said pictures, I believe. I

[9]would take my measurements, take photographs. Did I

[10]say notes last time?

[11]Q Well, I made a note that you said notes.

[12]You tell me.

[13]A I'm saying in a general inspection if

[14]there was a need to take notes, I would take certain

[15]notes or observations that I made on the site.

[16]Q But at this inspection, do you remember

[17]taking notes?

[18]A I believe the only note that I took was I

[19]wrote down the slope of the ramp and I made a note

[20]that there was a sign at the head of the ramp to

[21]make sure that I included that in my report.

[22]Q What was the note you made about the sign

[23]at the head of the ramp?

[24]A Just said, "Caution," you know, "Use

[25]handrail," sign at the top of the ramp.

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[1]

[2]Q Then you took photographs?

[3]A I took photographs.

[4]Q How many photographs did you take?

[5]A If I assume that these are the ones that I

[6]took, it would be seven at that time.

[7]Q You're going through the photos that are

[8]in your **[*25]** file, correct?

[9]A That's correct.

[10]Q Those are laser color copies?

[11]A That's correct.

[12]Q But you're not sure sitting here today

[13]whether those laser color copies in your file folder

[14]are in fact the photos you took on the date of your

[15]first visit; is that correct?

[16]A I believe they are.

[17]Q Now, the surface of the ramp on the day of

[18]your first inspection, what did it consist of, what

[19]was it made of?

[20]A It was asphalt and the remaining portion

[21]was concrete.

[22]Q So which part was asphalt and which part

[23]was concrete?

[24]A The upper portion of the ramp was a

[25]surface of asphalt, and the lower portion of the

[31]

[1]

[2]ramp was surfaced with concrete.

[3]Q When you say "the upper portion of the

[4]ramp," how would you define the upper portion of the

[5]ramp?

[6]A The portion of the ramp that's nearest the

[7]exit door.

[8]Q I'll show you what has been marked on

[9]April 28, 2008 as Defendant's Exhibit C. Please

[10]take a look at that. In looking at Exhibit C, can

[11]you tell me whether that is one of the photographs

[12]you took on the date of your first inspection? **[*26]**

[13]A I don't believe this is my photograph.

[14]Q Does Exhibit C fairly and accurately show

[15]the ramp as it appeared on the date of your

[16]inspection, even though it's not one of your

[17]photographs?

[18]A No, it looks like the pavement was older

[19]and there was additional coating on the concrete at

[20]the lower level.

[21]Q When you say "it looks like the pavement

[22]was older" in Exhibit C, it looks like the pavement

[23]was older?

[24]A In the photograph that I'm looking at, the

[25]upper portion of the ramp, which is this, I know you

[32]

[1]

[2]can't see it, the top portion closest to the street

[3]there's some discoloration in the surfacing which

[4]indicates it's more of an older coating. And based

[5]on the photographs I took, that upper portion of the

[6]ramp was recently paved.

[7]Q Since we have the photographs that were

[8]previously marked, I'm going to ask you, sir, to

[9]please look at the photographs marked as Exhibits A

[10]to O, and they were marked on April 28, 2008.

[11]I'm going to show you what has been

[12]marked as B to O, and I'm going to ask you if there

[13]are any photographs that fairly and accurately **[*27]** show

[14]what the ramp looked like on the date of your first

[15]inspection?

[16]MR. STEIN: I want to note my objection

[17]and ask you to be more specific, because he's

[18]already testified that the surface of the ramp

[19]looks different. So if you want to know --

[20]MR. DiSOMMA: He testified about that with

[21]regard to one photograph I showed him, that's

[22]why I'm showing him a lot.

[23]MR. STEIN: You want to know whether the

[24]surface looks different or whether the

[25]surrounding area looks different? I'm just

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[1]

[2]asking you to be more specific in your

[3]question.

[4]Q Let's talk about the surface then, whether

[5]any of those fairly and accurately show what the

[6]surface appeared like on the date of your first

[7]inspection.

[8]A With respect to the surfacing, it did not

[9]look the same as the date of my inspection.

[10]Q So none of those photographs show it

[11]appearing the same as the date of your inspection?

[12]MR. STEIN: Talking about the top portion

[13]versus the bottom portion?

[14]Q I'm talking about the entire ramp as shown

[15]in Photographs B through O.

[16]A Doesn't apply, doesn't apply, **[*28]** this doesn't

[17]apply, doesn't apply.

[18]MR. STEIN: When --

[19]MR. DiSOMMA: I'll get to it. Let me

[20]conduct the deposition.

[21]MR. STEIN: Referring to the number of the

[22]picture.

[23]MR. DiSOMMA: I'm going to do some

[24]housekeeping. I got it.

[25]MR. STEIN: Just for a clear record.

[34]

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[2]MR. DiSOMMA: I will.

[3]A Obviously we'll clarify which exhibit I'm

[4]referring to, but the surfacing of the ramp does not

[5]appear to be the same as it was on the date of my

[6]inspection, although it appears that it was raining

[7]this day, so there is a lot of water staining on the

[8]lower portion. So it's kind of hard to see the

[9]concrete surface. But I know that the asphalt

[10]surface was an older asphalted coating. At the time

[11]of my site inspection it was a newly laid surface.

[12]Q Let me do some housekeeping first.

[13]The photographs that you indicated do

[14]not apply are Defendant's Exhibit G, H, I and J,

[15]because simply stated, they're not showing the

[16]surface of the ramp; is that correct?

[17]A That's correct.

[18]Q Do you have photographs with you that show

[19]the surface of the ramp as **[*29]** it appeared on the day of

[20]your inspection?

[21]A Yes, I do.

[22]MR. DiSOMMA: So then we'll have those

[23]marked. On the record, I'll return these to

[24]you, I'll ask that copies be made and we

[25]eventually be provided with color copies.

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[1]

[2]Q Sir, I am going to ask you to retain these

[3]and to retain your file until this case is disposed

[4]of.

[5](Whereupon at this time

[6]photographs were marked as

[7]Defendant's Exhibits A-D for

[8]identification, as of this

[9]date.)

[10]Q I'm going to ask you to look at

[11]photographs marked as B to O again. I'm sorry, I

[12]have them a little bit out of order. If you could

[13]just look through all of them again and tell me

[14]whether any of those are the photographs that were

[15]provided to you by Mr. Stein's office, and if there

[16]are any such photographs, just put them to the side.

[17]A I don't recall. I'd have to check.

[18]Q You would have to check what?

[19]A I'd have to check somewhere in my office

[20]because I'm really surprised they're not in the

[21]file. So I don't have an answer for you right now.

[22]Q Just to check, you have them all and you

[23] **[*30]** looked through them all?

[24]A Yeah.

[25]Q Okay.

36

[1]

[2]All right. Let me show you what has

[3]been marked as Defendant's Exhibit A today, it's a

[4]laser color copy of the photograph. Do you

[5]recognize the location shown in the photograph?

[6]A Yes.

[7]Q What location is that?

[8]A That's the entrance ramp into the garage.

[9]Q Who took that photographs?

[10]A I did.

[11]Q When did you take that photograph?

[12]A On the date of my inspection.

[13]MR. STEIN: So we have a clear record, we

[14]know there's been more than one inspection,

[15]we're talking about the first inspection right

[16]now?

[17]Q You understand we're talking about the

[18]first inspection, sir?

[19]A Yes, I do.

[20]Q And you took this Photograph A during the

[21]first inspection?

[22]A That's correct.

[23]Q How about the rest of the

[24]photographs B, C, D, can you tell me whether you

[25]took all of them during the first inspection?

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[1]

[2]A Yes, I did.

[3]Q Do you need to see them again before you

[4]answer?

[5]A No.

[6]Q In terms of the area of the ramp at the

[7]bottom of **[*31]** the photograph, do you see that, sir?

[8]A Yes.

[9]Q Does Exhibit A fairly and accurately show

[10]what the area of the ramp at the bottom of the

[11]photograph looked like on the date that you examined

[12]it?

[13]A This portion you're referring to?

[14]Q Yes, on the date that you first examined

[15]the location?

[16]A You're asking me does this accurately look

[17]like the condition of the ramp when --

[18]Q During your first visit?

[19]A Yes.

[20]Q Now, there appears to be in this

[21]photograph in terms of the ramp surface an area that

[22]appears blue; am I accurate?

[23]A. (No response.)

[24]Q Question withdrawn.

[25]There's an area between the area of
38

[1]

[2]the ramp that is at the bottom of the photograph, do

[3]you see that?

[4]A I'm not sure exactly which portion you're

[5]looking at.

[6]Q When you're looking at Exhibit A, what are

[7]you looking at, what is shown in Exhibit A?

[8]A The entrance ramp to the garage.

[9]Q And which portions of the entrance ramp to

[10]the garage is shown in Exhibit A?

[11]A The upper portion, and you could see the

[12]lower portion of the **[*32]** ramp.

[13]Q What do you define as the upper portion,

[14]can you point to it for me?

[15]A This would be the upper portion.

[16]Q It would be more to the bottom of the

[17]photograph, correct?

[18]A Correct.

[19]Q And how about the lower portion of the

[20]ramp, can you point to that?

[21]A That would be right here (indicating).

[22]Q The lower portion of the ramp would be

[23]more to the top of the photograph; is that correct?

[24]A That's correct.

[25]Q And there seems to be some type of color
39

[1]

[2]difference between the upper portion and the lower

[3]portion as shown in the photograph; is that correct?

[4]A That's correct.

[5]Q Was there a color difference on the day of

[6]your first inspection?

[7]A Yes.

[8]Q So the upper portion of the ramp was what

[9]color on the day of your first inspection?

[10]A Blackish color.

[11]Q And the lower portion of the ramp on the

[12]day of your first inspection was what color?

[13]A Grayish.

[14]Q And on the day of your first inspection,

[15]what did the surface of the upper portion of the

[16]ramp consist of?

[17]A Asphalt.

[18] **[*33]** Q On the day of your first inspection, what

[19]did the surface of the lower portion of the ramp

[20]consist of?

[21]A Concrete.

[22]Q On the day of your second inspection, and

[23]we'll talk more about that later, what did the upper

[24]portion of the ramp consist of?

[25]A Same asphalt.
40

[1]

[2]Q On the day of your second inspection of

[3]the ramp, what did the lower portion of the ramp

[4]consist of?

[5]A I believe the same, concrete. May I just

[6]check the photographs?

[7]MR. STEIN: He's asking your memory. If

[8]you remember it to be concrete, that's fine.

[9]Q We'll talk about the photographs a little

[10]bit later.

[11]Referencing Exhibit A, during your

[12]first visit to the premises, did you have an

[13]understanding of where Mr. Melini's accident

[14]allegedly happened?

[15]A Yes.

[16]Q Can you point in Exhibit A to the area

[17]where it allegedly happened? Don't mark it, just

[18]point to it.

[19]A Yeah, the pen is closed.

[20]I believe this general vicinity right

[21]here (indicating).

[22]Q Describe for me, as best you can, what

[23]that general vicinity is.

[24]A It's the area where **[*34]** the asphalt surface

[25]meets the concrete surface.

[41]

[1]

[2]Q Have you ever spoken to Mr. Melini about

[3]how this accident happened?

[4]A No.

[5]Q Did you ever review his transcript of

[6]deposition?

[7]A No, I did not.

[8]Q Did you ever ask to review his transcript

[9]of deposition?

[10]A I generally do. At the time when I first

[11]did my inspection, I believe -- I don't believe

[12]depositions were taken yet.

[13]Q I'm talking about from the day of your

[14]retention until today, have you ever spoken to

[15]Mr. Melini about how this accident happened?

[16]A No, I did not.

[17]Q From the day that you were retained for

[18]this matter until today, have you ever reviewed the

[19]transcript of his deposition?

[20]A No, I did not.

[21]Q In providing your report, do you think it

[22]would have been important to speak to Mr. Melini

[23]personally?

[24]A In this instance, I don't think it was

[25]necessary.

[42]

[1]

[2]Q In preparing your report, do you think it

[3]would have been important to review the transcript

[4]of Mr. Melini's deposition testimony?

[5]A Well, I always feel it's beneficial **[*35]** to

[6]review someone's testimony. In this specific matter

[7]for the purposes of my report, it was not necessary.

[8]Q During the day of your first inspection

[9]when you used the slope measurement machine, in

[10]terms of the upper portion of the ramp and the lower

[11]portion of the ramp, can you tell me which portions

[12]of the ramp do you place that machine down onto?

[13]A Yeah. I believe I placed a few

[14]measurements on the concrete portion, the lower

[15]portion, and remaining measurements on the asphaltic

[16]area.

[17]Q I'm going to ask you to just look at the

[18]photographs that were marked today as

[19]Exhibits A, B, C, and D. Can you please tell me

[20]whether all of these are the photographs you took

[21]during your first inspection?

[22]MR. STEIN: Note my objection. Are you

[23]asking him whether these are the only pictures

[24]or if every one are the pictures he took?

[25]MR. DiSOMMA: No, I'm asking if those
43

[1]

[2]exhibits are the photographs that he took on

[3]the day of the accident. I'm not excluding any

[4]others he may have taken, I'll ask him a

[5]follow-up question on that.

[6]MR. STEIN: I'm sorry. I just **[*36]** didn't

[7]understand what you were looking for.

[8]A Yes, these are the photographs that I took

[9]on the day of my first inspection.

[10]Q Are there any photographs in addition to

[11]those that you took?

[12]MR. STEIN: On that day?

[13]Q That day.

[14]A No.

[15]Q During the day of your first inspection,

[16]did you make any observations as to whether any

[17]portion of the ramp was slippery?

[18]A Did I make any observations is what you

[19]said?

[20]Q Question withdrawn.

[21]Did you take any measurements to

[22]determine whether the ramp was slippery on the day

[23]of your first inspection?

[24]A No, I did not.

[25]Q Other than the measurements that you took
44

[1]

[2]to measure the slope of the ramp, did you take any

[3]other measurements that day?

[4]A I measured the height of the handrails.

[5]Q But you didn't record that?

[6]A No, they were -- I didn't find a problem

[7]with the ones that were installed.

[8]Q Were there any other things that you

[9]measured that you didn't find a problem with and

[10]didn't make a recording of the measurements?

[11]A Well, I didn't record **[*37]** the static

[12]coefficient of friction, I didn't do a slip test

[13]because based on what I felt, it wasn't slippery.

[14]Usually the asphalt and concrete are pretty rough

[15]materials, so I didn't take those measurements.

[16]Q When you initially spoke to Mr. Stein, did

[17]he indicate to you that the allegation was that the

[18]ramp was slippery?

[19]A I don't remember.

[20]Q What, if anything, did he indicate to you

[21]the allegation was about the ramp?

[22]A I basically was instructed that as the

[23]gentleman was walking down the ramp, he fell, and

[24]that was basically what was conveyed to me.

[25]Q Do you have a copy of your report dated

[45]

[1]

[2]March 15, 2008 with you, sir?

[3]A Yes.

[4]Q Can you turn to Page 1 of the report,

[5]please.

[6]A Yes. I know it says he slipped and fell.

[7]Q If I may just ask the question.

[8]There's a section of description of

[9]accident, do you see that?

[10]A That's correct.

[11]Q "It is my understanding that on

[12]September 27, 2006 at approximately 8:45 p.m.,

[13]Carlo Melini [Plaintiff] was entering the

[14]after aforementioned parking garage through the **[*38]** main

[15]entrance which also serves as the driveway into said

[16]establishment. As he walked down the sloped ramp,

[17]Mr. Melini slipped and fell due to the severe

[18]slope."

[19]Did I read that correctly?

[20]A Yes, you did.

[21]MR. DiSOMMA: Could we mark this, please.

[22](Whereupon at this time

[23]Mr. Scott Silberman's report was

[24]marked as Defendant's Exhibit E

[25]for identification, as of this

46

[1]

[2]date.)

[3]Q Exhibit E, is that a copy of the text of

[4]your report dated March 15, 2008?

[5]A Yes, it is.

[6]Q In my reading of that section of the

[7]report regarding description of accident, has your

[8]memory been refreshed as to whether Mr. Stein told

[9]you that Mr. Melini slipped as he walked down the

[10]ramp?

[11]A Well, I don't recall the exact

[12]conversation if he did say slip. I know he didn't

[13]tell me the ramp was slippery, you know, but if it

[14]said it in here, at some point I must have had a

[15]discussion prior to my site visit or after my site

[16]visit that he slipped.

[17]Q Have you ever measured the coefficient of

[18]friction of this ramp?

[19]A No, I did not.

[20]Q I'm **[*39]** talking about from the day of your

[21]retention all the way until today, have you ever

[22]measured it?

[23]A No, I did not.

[24]Q Have you ever taken any other measurements

[25]of this ramp from the date of your retention all the

47

[1]

[2]way until today, other than of the slope of the ramp

[3]using the electronic device that you told me about?

[4]A Could you repeat that back?

[5]Q Have you taken any other measurements of

[6]the ramp, other than slope?

[7]A No, I did not.

[8]Q When was the building constructed?

[9]A It is my understanding, as I refer to my

[10]report, that it was 1959.

[11]Q How did you get that information?

[12]A Various documents available online.

[13]Q What documents were they?

[14]A C of Os that I had seen on the website

[15]Property Shark, which lists estimated construction

[16]dates of properties.

[17]Q Of several properties or just of this

[18]property?

[19]A The website itself has data on every

[20]building in New York City, so it provides you an

[21]estimated construction date which seems to coincide

[22]with the C of O which we obtain on the website.

[23]Q Did you print **[*40]** out any of those documents?

[24]A Yes.

[25]Q Or are any of those documents in your
48

[1]

[2]file?

[3]A Yes.

[4]Q Now, in your report, you mentioned the

[5]applicability of several code provisions; is that

[6]correct?

[7]A That's correct.

[8]Q Which code are you referring to; the

[9]building code, the administrative code, some other

[10]code?

[11]A The building code is part of the

[12]administrative code, it's Title 27 of the New York

[13]City administrative code.

[14]Q Is there a particular year and version of

[15]the code that you have opined is applicable to this

[16]case?

[17]A Yes. Since the building was constructed

[18]in the late 1950s, the 1938 code would have applied

[19]to the original construction of this property.

[20]Q Is there a 1915 version of the code?

[21]A There is -- yeah, there is a 1915/1916

[22]version of the code.

[23]Q Could that particular version of the code

[24]be applicable to this building?

[25]A Not if it's newly constructed in the late
49

[1]

[2]1950s.

[3]Q Is there any other version of the code

[4]that you have opined is applicable to this building

[5]and **[*41]** to this ramp?

[6]A Well, right now we only know that this

[7]structure was built in the 1950s, so the 1938 code

[8]would apply. If it was determined there was an

[9]alteration or a change in the use of the building

[10]after 1968, then the current code at that time would

[11]apply. You do have provisions to go back to the

[12]prior code in effect, provided the health and

[13]welfare of the occupants are not in danger.

[14]Q Well, were there any changes made that

[15]would make the later code applicable?

[16]A Unfortunately, I don't have the history of

[17]this building. A building of this age, there's not

[18]a lot of documents. We have some C of Os that show

[19]some parts of the buildings, the use was changed or

[20]room counts were changed. Or if, for instance, any

[21]aspect of the egress was changed, then that would be

[22]required to be brought into compliance of the codes.

[23]Q Is it fair to say that you don't know if

[24]any such changes were made?

[25]A I do not know personally of any such

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[1]

[2]changes.

[3]Q If you wanted to find out if any such

[4]changes were made, how would you go about finding

[5]out?

[6]A You **[*42]** could go down to the building

[7]department and see if something was put on file. If

[8]it was, more times than not you usually can't find

[9]it at Department of Buildings, that's also assuming

[10]if they did file the work.

[11]Q Did you do any of that?

[12]A No, I did not.

[13]Q As a general matter, would you agree that

[14]building plans are filed with the Department of

[15]Buildings and they have to be certified by a

[16]professional engineer?

[17]A Or a registered architect, yes.

[18]Q That's the general procedure?

[19]A Generally, if a set of plans is filed with

[20]the Department of Buildings, either an engineer or

[21]architect must sign and seal the plans, and they

[22]take responsibility for the plans.

[23]Q And in the case of this building, would

[24]plans include such structures as the ramp that we

[25]have been talking about?

[51]

[1]

[2]MR. STEIN: Note my objection.

[3]MR. DiSOMMA: He has to answer. You can't

[4]tell him not to answer.

[5]MR. STEIN: I'm noting an objection. A

[6]demand was made for plans in this building,

[7]apparently there are no plans available for

[8]this building, so I'm allowing **[*43]** him to answer,

[9]making an objection. I'm not withdrawing the

[10]objection to it.

[11]MR. DiSOMMA: We're in federal court. I

[12]don't think you're supposed to be speaking your

[13]objection because we're not supposed to be

[14]influencing --

[15]MR. STEIN: I'm not speaking the

[16]objection, I'm laying the basis for the

[17]objection on the record.

[18]MR. DiSOMMA: If you're going to do that

[19]from time to time, what I'm going to do is ask
[20]the witness to step out and not hear it so that
[21]his testimony is not affected by it.
[22]MR. STEIN: I don't know how that would
[23]affect his testimony, but fair enough.
[24]Read back the last question.
[25](Requested testimony read)
[52]
[1]
[2]A Yes, it should.
[3]Q Is the general procedure that a plan
[4]examiner would review the plans?
[5]A No, not always.
[6]Q Is there any type of review process of the
[7]plans at the department of building?
[8]A A lot of times an architecture engineer
[9]certifies the jobs, and when you professionally
[10]certify the jobs, it almost foregoes a review
[11]because the building department doesn't have the
[12]time to review **[*44]** every single detail of every plan
[13]that's submitted to them.
[14]Q But are there instances where a plan
[15]examiner working at and for the Department of
[16]Buildings would actually review the plans?
[17]MR. STEIN: I'm going to make an
[18]objection. If you want him to step outside,
[19]he'll step outside.
[20]MR. DiSOMMA: No, go ahead.
[21]MR. STEIN: It's a patently improper
[22]question. You're asking the procedure of the
[23]building department, which he's never been an
[24]employee.
[25]MR. DiSOMMA: He's a professional
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[1]
[2]engineer, I'm asking something definitely
[3]within the scope of his knowledge.
[4]MR. STEIN: You're asking with his
[5]experience has that ever happened to him?
[6]MR. DiSOMMA: I'll ask him --
[7]MR. STEIN: Asking him the practice and
[8]procedure of the building department is
[9]improper.
[10]MR. DiSOMMA: I'll ask it that way.
[11]Q In the scope of your experience in the
[12]realm of your experience, you're doing this for
[13]18 years plus; am I correct?
[14]A That's correct.
[15]Q Do plan examiners at the buildings
[16]department review plans from time to time?
[17] **[*45]** MR. STEIN: If they've been certified by
[18]an engineer?
[19]MR. DiSOMMA: Just review plans from time
[20]to time.
[21]A Yes, plans examiners review more times
[22]than not it's more of a checklist type of review.
[23]If certain information is provided, they usually do
[24]not do a full depth review of the plans unless an
[25]audit is specifically requested.
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[1]

[2]MR. STEIN: I'm also going to note for the
[3]record, talking about plans submitted in the
[4]late 1950s, and I don't know whether he has any
[5]experience with those, that's also an objection
[6]to those questions.
[7]Q Have you ever been involved in
[8]construction of a building itself such as the
[9]building where this parking garage is located?
[10]A No.
[11]Q Have you ever been involved as a project
[12]manager or as a professional engineer on
[13]construction of a building itself such as the
[14]parking garage where this building is located?
[15]A On new construction of a garage, is that
[16]what you're asking me?
[17]Q I'm talking about a building such as this
[18]building where the parking garage is located.
[19]A No, I have not.
[20]Q You were **[*46]** making a distinction about new
[21]construction, can you just explain that?
[22]A Well, you said part of a project or it
[23]could be a new construction, it could be rehab, it
[24]could be a bunch of things, could be repairs.
[25]Q Well, with regard to a parking garage such
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[1]
[2]as the one at this building, have you ever been
[3]involved in a professional capacity with building
[4]it, renovating it, doing any work relative to it as
[5]an engineer?
[6]A Yes.
[7]Q How many occasions?
[8]A Ten to 15 times.
[9]Q When was the last time?
[10]A Doing one right now.
[11]Q Where?
[12]A In Queens.
[13]Q And is it an underground parking garage or
[14]something else?
[15]A It's below the legally established curb
[16]line.
[17]Q So it's under a building?
[18]A Yes.
[19]Q How many of those types of garages have
[20]you been involved with as a professional engineer in
[21]terms of actually doing part of the building process
[22]or renovating process?
[23]A I don't know the exact number. As I said
[24]before, probably around 10 to 15 times.
[25]Q When was the last time before the one that
[56]
[1]
[2] **[*47]** you're involved with now?
[3]A Last summer.
[4]Q Where was that?
[5]A In Queens.
[6]Q What type of garage was that?
[7]A That was a combination above ground/below
[8]ground.
[9]Q Was it a stand-alone garage or was it part

of a residential or commercial building?

A Both.

Q At the present time, approximately what percentage of your practice is devoted to matters such as this, consulting with an attorney with regard to a personal injury case?

A I'd probably say 25 to 30 percent.

Q And what are the other percentages of your practice right now?

A We do a lot of engineering for construction companies on bridges, temporary structures, containment designs, big projects such as Queensborough Bridge, Verrazano, Triboro, Whitestone. Then the other portion of my business deals with real estate owners, managing agents that own garages, they own buildings, commercial and both

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residential.

Q Approximately, how many times have you testified in the last five years?

A I'd have to guess, around maybe 20 times.

Q How many **[*48]** of those for the plaintiffs, how many of those for defense, approximately?

A I don't know the exact number, I'm sure it's less than five for defense.

Q When you say less than five, less than five in number or five percent?

A Less than five in number. I'd have to check --

Q So how many --

A -- the history.

Q I'm sorry to interrupt you.

So I'm asking approximately, approximately how many times have you testified for plaintiffs in the last five years?

A I'd have to check my file, but if it's around 20, I would say it would be around 15 to 16 times.

Q Have you ever testified on behalf of this law firm prior to this case?

A This law firm being Greenberg and Stein?

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Q Yes.

A Yes.

Q About how many times?

A I'd have to check. I don't know the number.

Q Can you give me an approximation?

A Not really.

Q Is it more than two times?

A I don't know.

Q Is it more than three times?

A I don't know.

Q What records would you need to check in order to determine **[*49]** that?

A I keep a listing of all my testimony.

Q Have you testified for any other law firms handling matters on behalf of claimants or

[18]plaintiffs other than this law firm?

[19]A Of course, yes.

[20]Q How many others?

[21]A I don't know. I'd have to tabulate them.

[22]Q Have you testified on behalf of this firm

[23]on more than ten occasions?

[24]A On that I'd have to say probably not less

[25]than ten.

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[2]Q Between five and ten?

[3]A You keep asking me to guess, I tell you I

[4]don't know. I don't know the answer.

[5]Q I just want to make it clear, I do not

[6]want you to guess about anything. I'm just trying

[7]to refresh your recollection by discussing it for a

[8]while and by just throwing out some estimated

[9]numerical parameters so maybe you can formulate an

[10]estimate. I'm not asking you to guess.

[11]A I said I do not know the answer. If you

[12]like, I could look at my records and get back to you

[13]with that answer.

[14]MR. STEIN: If you like, we can leave a

[15]blank in the transcript and we'll provide the

[16]answer to those questions.

[17]MR. DiSOMMA: I think that **[*50]** would be a good

[18]way to do that. Just the answer to how many

[19]times has the witness testified on behalf of

[20]plaintiffs, and how many times the witness has

[21]testified on behalf of this firm, a space for

[22]those two questions.

[23]MR. STEIN: In the last five years or

[24]ever?

[25]MR. DiSOMMA: Well, in the last five

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[2]years. Let's be reasonable about it.

[3](INSERT):

[4](INSERT):

[5]Q Have you ever testified in a case such as

[6]this involving a driveway to a parking garage for a

[7]ramp that leads to a parking garage?

[8]A Testified in court?

[9]Q Yes.

[10]A No.

[11]Q Have you ever provided expert opinion or

[12]engineering investigation with regard to your case

[13]similar to this involving a driveway that leads down

[14]into a parking garage or a ramp that leads down into

[15]a parking garage?

[16]A As it relates to a personal injury matter?

[17]Q Yes.

[18]A I'd have to check. There may have been

[19]one or two. I don't recall.

[20]Q You are a professional engineer; is that

[21]correct?

[22]A That's correct.

[23]Q And you're licensed in New York and in

[24]some other states; is **[*51]** that correct?

[25]A That's correct.

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[2]Q Have you ever been sued for any of your

[3]professional work as an engineer, anything relating

[4]to your professional work?

[5]A No.

[6]Q Has your firm ever been sued for anything

[7]relating to its professional work?

[8]A No.

[9]Q Have you read Mr. Fein's report with

[10]regard to this matter?

[11]A Yes, I did.

[12]Q Do you agree with it?

[13]A Not entirely, no.

[14]Q When you say "not entirely," what parts of

[15]the report do you agree with?

[16]MR. STEIN: Could we have the report in

[17]front of him so he can look at it?

[18]MR. DiSOMMA: Sure, he's welcome to look

[19]at it.

[20]Q It's in your file, sir?

[21]A Yes.

[22]MR. DiSOMMA: We'll have it marked.

[23]MR. STEIN: I'm going to take a quick

[24]break.

[25](A brief recess was taken)

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[2](Whereupon at this time

[3]Mr. Stanley Fein's report was

[4]marked as Defendant's Exhibit F

[5]for identification, as of this

[6]date.)

[7]MR. DiSOMMA: Back on the record.

[8]Q Sir, when you say that you do not entirely

[9]agree with Mr. Fein's report, which **[*52]** parts of the

[10]report do you agree with?

[11]A I agree with the report about the

[12]coefficient of friction of the new surfacing that's

[13]on the garage ramp. And the slope readings that he

[14]took are actually higher than my readings, so I

[15]agree with that as well.

[16]Q Anything else?

[17]A As far as to what I agree with?

[18]Q Yes.

[19]A He made basically three statements; one

[20]with the friction, one about the slope, and one

[21]about the inapplicability of the building codes.

[22]Q And just going back to your report for a

[23]moment, I think we marked it individually.

[24]What letter is that, sir?

[25]A E.

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[1]

[2]Q That report is E, that report is dated

[3]when?

[4]A March 15, 2008.

[5]Q Is that the first report that you ever

[6]prepared relative to your inspection?

[7]A Yes.

[8]Q Is there a reason why a report regarding

[9]your inspection of November 2006 was not prepared

[10]sooner?

[11]A Yes, I was asked -- I didn't need to

[12]prepare the report at this time.

[13]Q At the time of preparation of your report

[14]on or about March 15, 2008, what documents did you

[15]have **[*53]** from your original inspection at that time?

[16]A Just had those few little notes that

[17]indicated the slope of the ramp and the observation

[18]I made regarding the sign.

[19]Q At the time that you wrote your report

[20]dated March 15, 2008, had you already performed your

[21]second inspection of the ramp?

[22]A No, I did not.

[23]Q How many inspections of the ramp in total

[24]have you performed?

[25]A Two.

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[1]

[2]Q First one was in November of 2006 that we

[3]discussed before, correct?

[4]A Correct.

[5]Q And the second one was when?

[6]A I don't recall the exact date. It was, I

[7]believe, a few weeks ago. I don't know the exact

[8]date. I can get that for you.

[9]Q In looking at Exhibit A marked today, when

[10]you placed the device down to take the measurements

[11]of the slope, can you give me an idea of the

[12]approximate area where you placed the devices in

[13]terms of length of the area in which these devices

[14]were placed, and width of the area?

[15]A I guess I'd explain it probably within

[16]2 feet of that joint between the concrete and the

[17]asphalt down and upward, downward side and upward

[18] **[*54]** side of the ramp and, you know, across the entire

[19]width of the ramp.

[20]Q When you said the second inspection was

[21]done a few weeks ago, do you have the exact date

[22]indicated anywhere in your report?

[23]A No, because the inspection was done after

[24]the report.

[25]Q Did you do a supplemental report?

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[2]A Not following that second inspection, no.

[3]Q So the supplemental report was done when,

[4]before your second inspection or after your second

[5]inspection?

[6]A Repeat the question.

[7]Q When was your supplemental report done,

[8]before your second inspection or after your second

[9]inspection?

[10]A I'm trying -- I believe it was the day of

[11]my report. It says it in my report that I revisited

[12]the site on October 15th, that morning, and then I

[13]issued the opinion later that day.

[14]Q So your second inspection was October 15,

[15]2008?

[16]A That's correct.

[17]Q At approximately what time did you arrive

[18]on the day of your second inspection?

[19]A I'm not sure of the exact time, but it was

[20]sometime in the morning.

[21]Q What was the weather like that day?

[22] **[*55]** A I don't remember.

[23]Q Was anyone else present during the date of

[24]your second inspection?

[25]A No.

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[1]

[2]Q Were you in telephone communication with

[3]anyone as you performed your second inspection?

[4]A No.

[5]Q On October 15, 2008, what is the first

[6]thing that you did relative to your second

[7]inspection?

[8]A I believe I went down the ramp, I put my

[9]level down on the ramp to verify my prior readings

[10]and I took photographs of those readings.

[11]Q Did you take any other measurements on the

[12]date of your second inspection?

[13]A No.

[14]Q Did you speak to Mr. Melini prior to your

[15]second inspection?

[16]A No, I did not.

[17]Q And you haven't reviewed his transcript of

[18]deposition; is that correct?

[19]A That's correct.

[20]Q On the date of your second inspection

[21]referencing Exhibit A marked today, did you observe

[22]whether there was any change in the surface of the

[23]ramp as compared to the date of your first

[24]inspection?

[25]A May I see the photographs?

[67]

[1]

[2]Q Sure. And we'll have those marked.

[3]A Can you repeat the question.

[4] **[*56]** Q On the date of your second inspection, did

[5]you observe any change in the surface of the ramp

[6]between the date of your first inspection and the

[7]date of your second inspection?

[8]A The only thing I really noticed, maybe the

[9]surface of the asphalt is slightly worn, slightly

[10]faded.

[11]Q You mentioned earlier that there was some

[12]type of change in the surface of the ramp since the

[13]date of the accident; am I correct in stating that?

[14]A That's correct.

[15]Q How do you know that?

[16]A Based on the photographs that I was

[17]provided.

[18]Q Based on which photographs?

[19]A The photographs that you presented that

[20]showed the condition of the ramp as it appeared on

[21]the day of the accident and versus the photographs

[22]that I took.

[23]Q Well, I don't know if I represented to you

[24]that any of the photographs I showed you indicate

[25]the appearance on the date of the accident, I simply

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[1]

[2]showed you photographs. Do you know if the surface

[3]of the ramp was changed between the day of the

[4]accident and the day of your second inspection?

[5]A Let's say this, I was not there on the

[6] **[*57]** date of the accident, so without any photographic

[7]documentation showing me what the condition was, I

[8]have no way of knowing what the surface condition

[9]was on the date of the accident.

[10]Q Do you know if the surface of the ramp was

[11]changed between the date of your first inspection

[12]and the date of your second inspection?

[13]A No, that appears like it was not.

[14]Q When I say "changed," I mean, you know,

[15]resurfaced, redone, renovated, do you understand

[16]what I'm saying?

[17]A Yes.

[18]Q Did that occur, from your observations, on

[19]the second time, second visit, did anything like

[20]that occur between your first visit and your second

[21]visit?

[22]A It doesn't appear so. I mean, given the

[23]fact that on my first visit the asphalt was in a

[24]pretty pristine condition, is it possible they

[25]replaced, sure, it's possible.

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[1]

[2]Q I'm just asking about your observations as

[3]an engineer and making a comparison between the two.

[4]A Obviously if I inspect something and it's

[5]pristine, there's no way of knowing how far it's

[6]degraded over a two or three-year period. So it

[7]doesn't appear **[*58]** that the wearing surface was redone,

[8]but it's always possible.

[9]Q Putting aside what's possible, from your

[10]observations, does it appear that the ramp was

[11]resurfaced between your first visit and your second

[12]visit?

[13]MR. STEIN: Asked and answered.

[14]You could answer again.

[15]A As I said before, is it possible the

[16]garage wasn't happy with the way the work was done

[17]and the gentleman came two weeks later and

[18]resurfaced it, it's possible.

[19]Q I'm not asking you to speculate. I'm

[20]asking you, because you're a professional engineer,

[21]I'm asking you about observations. From your

[22]observations, did it appear to you as a professional

[23]engineer, experienced professional engineer, between

[24]that on the date of your second visit the surface of

[25]the ramp was resurfaced between the date of your

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[1]

[2]first visit and the date of your second visit?

[3]That's what I'm asking you, sir, please.

[4]A I understand. And what I'm telling you is

[5]it doesn't appear that it had been resurfaced, but

[6]there's always the possibility that someone may have

[7]resurfaced it.

[8]MR. DiSOMMA: Could you **[*59]** mark these,

[9]please.

[10](Whereupon at this time

[11]photographs were marked as

[12]Defendant's Exhibits G-L for

[13]identification, as of this

[14]date.)

[15]Q During the second inspection, did you

[16]measure the coefficient of friction of the ramp

[17]surface?

[18]A No, I did not.

[19]Q Showing you what has been marked as

[20]Defendant's Exhibit G, it's a photograph, do you

[21]recognize the location shown in the photograph?

[22]A Yes.

[23]Q What location is that?

[24]A Can I see the other photographs for a

[25]second?

[71]

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[2]Q Sure, you can look at all of them, if you

[3]like.

[4]A Yes, I do.

[5]Q What location is shown in Exhibit G?

[6]A It's the area of the ramp, the dark area

[7]that's above the joint in that location.

[8]Q What does that surface consist of that's

[9]shown in Exhibit G, is it asphalt or concrete?

[10]A That's asphalt.

[11]Q So would that be the lower part of the

[12]ramp or the upper part of the ramp?

[13]A The upper part of the ramp.

[14]Q In Exhibit G, there seems to be some sort

[15]of device in the photograph; is that correct?

[16]A That's correct. **[*60]**

[17]Q The device, it's resting on part of the

[18]ramp?

[19]A That's correct.

[20]Q What surface of the ramp is the device

[21]resting on?

[22]A That's on the asphalt surface of the ramp.

[23]Q So just using Exhibit A marked today for

[24]comparison, which surface of the ramp is the device

[25]resting on in Exhibit G, on the bottom portion of

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[1]

[2]the ramp or the top portion of the ramp?

[3]A The bottom -- well, the upper portion of

[4]the ramp, which is the bottom of the photograph.

[5]Q The upper portion of the ramp would be

[6]closer to the street?

[7]A That's correct.

[8]Q The bottom portion of the ramp would be

[9]closer to the garage?

[10]A Correct.

[11]Q So in Exhibit G, which part of the ramp is

[12]the device resting on? I'm just trying to get this

[13]straight in my mind.

[14]A It's on the upper portion of the garage

[15]closer to the street.

[16]Q And the device that's shown in Exhibit G,

[17]what is it called?

[18]A It's called a digital level.

[19]Q Who is it manufactured by?

[20]A Smart Tool.

[21]Q And when you used the digital level on

[22]October 15, 2008, how **[*61]** old was it?

[23]A Year, two years.

[24]Q Where did you buy it?

[25]A Professional Equipment.

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[1]

[2]Q Is that the name of a store or an online

[3]store?

[4]A Both.

[5]Q How did you get it, online, at an actual

[6]store, somewhere else?

[7]A I purchased it online.

[8]Q Have you ever used that particular device

[9]before October 15, 2008?

[10]A Many times.

[11]Q That particular one?

[12]A Yes.

[13]Q How does that device work, as best you

[14]could tell me?

[15]A How does the device work?

[16]Q Well, withdrawn.

[17]It measures slope; is that correct?

[18]A That's correct.

[19]Q So then as a professional engineer, what

[20]do you do in order to measure slopes using that

[21]device? Walk me through it a bit.

[22]A Well, the electric device, it's a pretty

[23]simple use. You place it on the ground, you hit

[24]power, and it gives you the reading.

[25]Q And what is at the bottom of that device

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[1]

[2]that measures the slope, if you know?

[3]A I didn't design the tool, so I don't know

[4]how it works intrinsically, but you put it on a

[5]surface and it measures **[*62]** slope of the surface.

[6]Q But what does the bottom of the device,

[7]the part of the device that rests on the surface,

[8]what is it, is it a flat surface, is it a sloped

[9]surface itself or something else?

[10]A It's flat.

[11]Q Is it movable?

[12]A No.

[13]Q Do you have any idea how the device

[14]measures slope, does it use lasers or any type of

[15]technology of that sort?

[16]A Does not use lasers.

[17]Q So do you have any understanding of how

[18]the device measures slope?

[19]A No, I do not know how the device measures

[20]slope.

[21]Q Do you have any knowledge as to whether

[22]this device needs to be calibrated from time to

[23]time?

[24]A I do have -- yeah, it does, we

[25]calibrate it, there's a calibration on it.

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[1]

[2]Q How does that calibration mechanism work?

[3]A How does it work? I send it to a lab and

[4]they do it for me.

[5]Q So you don't actually calibrate it; is

[6]that correct?

[7]A That's correct. I have someone calibrate

[8]it for me.

[9]Q And which lab does that device go to in

[10]order to be calibrated?

[11]A I'd have to ask the person in my office. **[*63]**

[12]I don't know. They take care of it for me.

[13]Q How frequently does that device need to be

[14]calibrated?

[15]A Not very often. The tolerances are so

[16]small. It's not that important.

[17]Q Is there a fixed time table that is

[18]recommended for calibration of the device?

[19]A Not that I'm aware of.

[20]Q The device that you used to measure on

[21]October 15, 2008, was it ever calibrated before

[22]October 15, 2008?

[23]A October 15th, yes, it was.

[24]Q When was it last calibrated?

[25]A I don't recall.

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[1]

[2]Q Did you use a similar device to measure

[3]the slope during your first inspection of the ramp?

[4]A Yes, I did.

[5]Q Was it the same exact device?

[6]A It was a similar device.

[7]Q What happened to that other device?

[8]A I still have it.

[9]Q Do you still use it?

[10]A The other one, sure.

[11]Q What is the other one called?

[12]A It's the same type of device except it's

[13]longer.

[14]Q What is the name of it?

[15]A Smart Tool.

[16]Q Same manufacturer?

[17]A Yes.

[18]Q And when you say it's the same type of

[19]device only longer, **[*64]** what are the dimensions of the

[20]Smart Tool that you used during the first

[21]inspection?

[22]A I don't know the dimensions, it's

[23]approximately a couple feet long.

[24]Q Does it have a digital read-out as it

[25]appears on the one in Photo G?
77

[1]

[2]A Yes, it does.

[3]Q The Smart Tool that you used during your

[4]first visit, did it have to be calibrated from time

[5]to time?

[6]A Sometimes it does, yes.

[7]Q Was there a set time table on which it had

[8]to be calibrated?

[9]A Not that I'm aware of, no.

[10]Q The first tool that you used on the first

[11]inspection, did it have an owner or operator's

[12]manual that came with it?

[13]A I believe so.

[14]Q Did the manual describe any dates for

[15]calibration of the first tool?

[16]A I don't recall.

[17]Q Do you know if the first tool that you

[18]used during your first inspection was ever

[19]calibrated, other than at the factory presumably,

[20]before the day of your inspection?

[21]A I do not know.

[22]Q Would your office have any records that

[23]would indicate calibration of the first tool, the

[24]one that you used on the first inspection? **[*65]**

[25]A No.

[78]

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[2]Q You mentioned there was a lab that these

[3]tools would be sent to for calibration; is that

[4]correct?

[5]A Sometimes there's a lab. There's people I

[6]work with in the industry that people do things for

[7]me as a courtesy, as a favor.

[8]Q With regard to the first device, you

[9]indicated you don't know whether it was calibrated,

[10]correct?

[11]A Correct.

[12]Q So let's talk about the second device.

[13]You believe it was calibrated before October 15,

[14]2008?

[15]A I believe so. I'd have to check my

[16]records.

[17]Q Where was it sent for calibration?

[18]A As I said before, I don't know. I'd have

[19]to ask the people in my office, they took care of

[20]it.

[21]Q Would any records be kept of the

[22]calibration?

[23]A Probably not. It's a very simple process.

[24]Q During your first visit, did you use one

[25]device placed at multiple spots in order to take
79

[1]

[2]your measurements?

[3]A Yes.

[4]Q In other words, you didn't have seven to

[5]ten that you placed simultaneously, you used one,

[6]you moved it around, correct?

[7]A That's correct. **[*66]**

[8]Q Is that what you did pretty much during

[9]the second visit?

[10]A Yeah, pretty much.

[11]Q Using the device shown in G; is that

[12]correct?

[13]A That's correct.

[14]Q Is the device shown in G still in use by

[15]your office?

[16]A Yes, it is.

[17]Q During your second visit, did you take any

[18]other measurements, other than using the device

[19]shown in G?

[20]A No, I did not.

[21]Q As of today, do you intend to do any other

[22]work on this file?

[23]MR. STEIN: Note my objection. Want him

[24]to go out so I can clarify the question?

[25]MR. DiSOMMA: State your objection.

80

[1]

[2]MR. STEIN: Other than testifying a case

[3]later?

[4]Q Other than potentially testifying in the

[5]event of a trial, sir.

[6]A As of now, I don't expect to, but it's

[7]always possible if additional information is

[8]presented to me that I review and may change my

[9]opinion, I reserve that right to.

[10]Q I'm just asking you because there are

[11]certain rules that govern, you know, how all of us

[12]do things under the federal rules of civil

[13]procedure. I'm asking if you're scheduled at the

[14] **[*67]** present time do any other work on this file?

[15]A At this time, no.

[16]Q I'm going to ask you to please look at

[17]your report, I forgot which exhibit, the one dated

[18]March 15, 2008. Do you have that in front you, sir?

[19]A Yes.

[20]Q Is that E?

[21]A That's E.

[22]Q I'm just going to ask you a question that

[23]I'm not specifically referring to anything in your

[24]report at the moment.

[25]Is there any distinction between a

[81]

[1]

[2]ramp such as the one at this building that leads to

[3]a garage, and a ramp that leads to a place where

[4]people live?

[5]MR. STEIN: I'm going to object. Do you

[6]want him to step out?

[7]MR. DiSOMMA: I'm going to withdraw that

[8]question. I'll ask it in a different way.

[9]Let's see if we could navigate plaintiff's

[10]objections.

[11]Q This particular ramp, would you agree it

[12]leads into a parking garage?

[13]A Yes.

[14]Q People don't live downstairs in the

[15]parking garage presumably; is that correct?

[16]A That's correct.

[17]Q Under the building code that you have

[18]talked about, the 1938 code, is there any

[19]distinction between a ramp that **[*68]** leads into a parking

[20]garage where people don't live and ramps that lead

[21]into premises where people either live or work?

[22]A Buildings are classified differently, is

[23]that what you're asking me? As far as is there

[24]different classification of what ramps --

[25]Q I'm asking if there's a different
82

[1]

[2]classification regarding applicable code provisions

[3]for ramps depending upon whether the ramp leads into

[4]a place where cars are parked as contrasted with a

[5]space where people live or work?

[6]A The sections in the code deal with ramps,

[7]which are used by people. I'm not sure I understand

[8]what your question is.

[9]Q I'm trying to find out if there's any

[10]distinction between the two.

[11]A If the ramp is used as a means of an

[12]egress into and out of a space, then the code

[13]applies to that ramp.

[14]Q Would you agree there are certain code

[15]provisions that talk about ramps and then

[16]intervening landings?

[17]A Yes.

[18]Q This type of ramp, does it have any

[19]intervening landings?

[20]MR. STEIN: This type of ramp or this

[21]particular ramp?

[22]Q This particular ramp, does **[*69]** it have any

[23]intervening landings?

[24]A No, it does not.

[25]Q If you could take a look, sir, at Page 4
83

[1]

[2]of your report, there's a subheading for

[3]Section 27-357(D), "building access".

[4]A Uh-huh.

[5]Q The ramp that you inspected at this

[6]building, is this a ramp intended for wheelchair

[7]access?

[8]A This is not original -- this was not

[9]constructed originally for wheelchair access. When

[10]the building was constructed, there were no

[11]provisions for that.

[12]MR. FARBER: There were no provisions for

[13]that in the code or in the building?

[14]THE WITNESS: The section of the code the

[15]attorney is referring to is a 1968 code, we're

[16]saying that the 1938 code applies. The

[17]accessibility requirements weren't enacted

[18]until Local Law 58 of 87 was passed. So if

[19]this was the original construction, it was

[20]never modified. Subsequent to 1987 then, you

[21]know, the '88 requirements weren't mandatory in

[22]New York City at the time.

[23]Q I call your attention to Page 5 at the

[24]bottom, second sentence, I'll read it out to you,

[25]"The owners of this building wanted a parking garage

84

[1]

[2] **[*70]** installed at this location to provide parking for

[3]the tenants of the adjacent building and to generate

[4]additional revenue."

[5]Did you speak to the owners of the

[6]building?

[7]A No, I did not.

[8]MR. FARBER: What page is that?

[9]MR. STEIN: Five at the bottom.

[10]Q How do you know that the owners wanted to

[11]do that?

[12]A Well, it's implied by the fact that it's a

[13]parking garage that generates revenue. It's not

[14]used exclusively by the tenants, they charge a fee.

[15]Q Is there anything in the paragraph that

[16]indicate that that's implied?

[17]A No.

[18]Q Are you being compensated by the

[19]plaintiff's attorney in this action?

[20]MR. STEIN: Note my objection.

[21]A Yes.

[22]Q What is the rate of your compensation

[23]relative to this case?

[24]A I was billing at, I believe, 225 an hour.

[25]Q Have you previously billed this law firm?

85

[1]

[2]A Yes.

[3]Q At 225 an hour?

[4]A Yes.

[5]Q Is there a different rate that you charge

[6]in the event of trial testimony?

[7]A Yes.

[8]Q What is that?

[9]A At trial it's 1,750 for a half **[*71]** day and

[10]2,750 for a full day, and that's for this calendar

[11]year.

[12]Q I have no other questions subject to

[13]follow up possibly after my colleagues question you.

[14]Thank you, sir.

[15]EXAMINATION BY

[16]MR. FARBER:

[17]Q Good afternoon, Mr. Silberman. My name is

[18]Braden Farber, I'll ask you some follow-up questions

[19]and some additional questions today.

[20]Can you tell me what your educational

[21]history is?

[22]A Yes. I graduated from Syracuse University

[23]in 1990, bachelor of science and civil engineering.

[24]And then I started taking master's classes at

[25]Stevens Institute of Technology, and I stopped

86

[1]

[2]midway through the program.

[3]Q What was the program at Stevens Institute?

[4]A It was going towards my master's of

[5]science and engineering.

[6]Q In the master's in science in engineering

[7]or civil engineering or --

[8]A I think it's probably master's of science

[9]in civil engineering. I don't think they have it by

[10]subdivision, but it was an emphasis in structural

[11]engineering as my core classes.

[12]Q How many classes did you take?

[13]A I don't remember exactly, **[*72]** three or four.

[14]Q Why did you stop?

[15]A I switched careers and didn't see the need

[16]to take additional technical courses.

[17]Q What career did you have when you started

[18]at Stevens?

[19]A Well, when I worked for my old engineering

[20]firm, I was told that every partner has a master's

[21]of science in engineering, it would be my benefit to

[22]obtain one. I started to. Once I changed

[23]companies, I decided at that time I no longer needed

[24]it.

[25]Q You changed companies or careers?

87

[1]

[2]A No, changed companies.

[3]Q Any other educational courses that you've

[4]taken?

[5]A No.

[6]Q What about continuing education courses

[7]since you've been licensed in the State of New York?

[8]A Yes, as the new law states, you have to

[9]take 36 hours of continuing education every three

[10]years. When I renewed my license, I believe last

[11]year, I had to demonstrate 36 hours.

[12]Q Was last year the first year that you had

[13]to demonstrate 36 hours of continuing education?

[14]A I think so.

[15]Q What courses did you take in order to

[16]satisfy that requirement?

[17]A I don't recall **[*73]** all of them, but they all

[18]had to be within my field such as concrete repair,

[19]strengthening of structures, taking several courses

[20]on masonry inspection and evaluation, taking

[21]applying wind loads to structures. I just don't

[22]remember them all.

[23]Q Would it be fair to characterize those as

[24]sort of classic engineering discipline areas that

[25]you had to take classes in?

88

[1]

[2]A Yeah, they have to be design type of

[3]classes; otherwise, they won't count them towards

[4]your continuing education.

[5]Q When you say "design type," what do you

[6]mean by that?

[7]A They don't want you to take a continuing

[8]education class on human resources, they want to

[9]make sure it's technical, that it's not just

[10]management or business type of classes. They should

[11]be technical classes related to your field.

[12]Q Did you take any safety type courses?

[13]A No, not as part of my continuing

[14]education, no.

[15]Q Over than your continuing education, have

[16]you taken any safety type courses?

[17]A I've taken classes over the years; OSHA

[18]classes, nighttime work safety classes, traffic

[19]engineering **[*74]** classes. I don't know the exact number

[20]or when.

[21]Q The classes that you've taken with respect

[22]to safety, are they generally in those three

[23]categories, though; nighttime work, OSHA, and

[24]traffic safety?

[25]A Yeah, construction safety.

[89]

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[2]Q Would it be fair to say that those classes

[3]relate generally to your inspecting, supervising or

[4]overseeing construction work?

[5]A Yes.

[6]Q And the nighttime work classes, do you

[7]know when you took those courses?

[8]A No, I don't recall the dates.

[9]Q Were these classes taken in connection

[10]with any of your employments that you graduated as

[11]an engineer?

[12]A Yeah, certain jobs required me to take

[13]certain classes to be trained because we had to

[14]submit certain documents at the time. So that's why

[15]I took those classes.

[16]Q Did any of those classes have to do with

[17]safety, pedestrian safety on ramps?

[18]A No.

[19]Q Have you taken any courses with regard to

[20]pedestrian safety on ramps at all?

[21]A No.

[22]Q In your curriculum vitae that was provided

[23]by plaintiff's counsel, there's a listing of

[24]certifications. **[*75]** Do you have a copy of your CV?

[25]A Not in front of me.

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[2]MR. STEIN: Off the record.

[3](Discussion was held off the record)

[4]MR. DiSOMMA: On the record.

[5]Could I have this marked, please.

[6](Whereupon at this time

[7]Mr. Scott Silberman's curriculum

[8]vitae was marked as Defendant's

[9]Exhibit M for identification, as

[10]of this date.)

[11]Q Let me show you what's been marked as

[12]Defendant's Exhibit M and ask if you can identify

[13]that document?

[14]A That is my curriculum vitae from back in

[15]2002.

[16]Q This is your CV from 2002. Does it not

[17]currently reflect any type of work that you did from

[18]2002 to 2008?

[19]A No, it reflects generally what I've done,
[20]but I have updated since that time.
[21]Q Do you have an updated copy of your CV
[22]with you?
[23]A Not on me. I could get one.
[24]MR. STEIN: I mean, the address is
[25]different, but anything behind SMS Engineering
[91]
[1]
[2]hasn't changed; is that correct?
[3]THE WITNESS: The scope of what my company
[4]provides hasn't changed. Maybe additional
[5]licenses I've obtained or certifications I've
[6] **[*76]** obtained.
[7]Q Do you have any additional certification
[8]you may have obtained above and beyond --
[9]MR. STEIN: I apologize, I wasn't aware it
[10]was different.
[11]Q -- what is shown in Defendant's Exhibit M?
[12]A I think my certifications are up to date.
[13]Q Do you have any certifications in analysis
[14]or evaluation of walk surfaces with regard for
[15]pedestrian, anything along that line?
[16]A I'm a member of the ASTM Committee that
[17]deals with safe walkway surfaces that's under
[18]professional organizations and committees. Under
[19]the last section, Committee F13 Safety and Traction
[20]of Footwear, one of the standards that they publish
[21]is safe walk surfaces.
[22]Does that make sense?
[23]Q Is that with regard to construction only
[24]or is it with regard to walking surface in a
[25]residential building, commercial building, something
[92]
[1]
[2]else?
[3]A It's generally a standard that ASTM
[4]publishes good and accepted practices for walkway
[5]surfaces, that includes walks, ramps, stairs,
[6]everything.
[7]Q Does it include standards with regard to
[8]slopes of ramps?
[9]A I believe **[*77]** it does.
[10]Q Are the ASTM standards applicable to
[11]buildings in the City of New York?
[12]A This specific standard has not been
[13]enacted in the City of New York, the ASTM standard
[14]I'm referring to, others have got this one. It's
[15]not a mandatory requirement, but a lot of the
[16]information contained in that specific section is
[17]addressed in the code.
[18]Q And you're referring to which code?
[19]A The New York City Building Code.
[20]Q Of what year?
[21]A 1968.
[22]Q Is it addressed in the 1938 code?
[23]A I would say it's not exactly the same.
[24]There's some similarities, but there are some
[25]differences because the safe walkway surfaces does
93

[1]

[2]incorporate accessible facilities for the disabled.

[3]Back in 1938, they didn't have those provisions,

[4]it's a little more strict than the 1938 code.

[5]Q What are the similarities between the ASTM

[6]and the 1938 code?

[7]A I don't know, I haven't done a comparison

[8]between the two.

[9]Q Did you review the ASTM standard when

[10]preparing your report or conducting your

[11]investigation?

[12]A No.

[13]Q Did you review the **[*78]** ASTM standard prior to

[14]forming the opinions that you set forth in your

[15]report?

[16]A No.

[17]Q Do the opinions that you set forth in your

[18]report rely in any way on the ASTM standards?

[19]A No, they do not.

[20]Q You worked for the New York State

[21]Department of Transportation; is that correct?

[22]A That's correct.

[23]Q Could you just generally tell me what your

[24]job was for the New York State DOT?

[25]A I was a construction inspector. Basically

94

[1]

[2]I made sure that they put the right number of rebar

[3]in the wall, I checked the air and entrenchment in

[4]the slump in the concrete, I did soil density

[5]testing. I basically made sure that the contractor

[6]was building things in accordance to the plans.

[7]Q Did you have any certifications to do that

[8]work such as a NICET certification?

[9]A No, I did not.

[10]Q How long did you work for the department;

[11]for six months, five months?

[12]A Yeah, it was basically a summer job.

[13]Q Had you graduated college at that time?

[14]A No, I did not.

[15]Q When did you graduate college?

[16]A 1990.

[17]Q What was your **[*79]** first job after college?

[18]A I worked for Vollmer Associates.

[19]Q Can you tell me when you worked for

[20]Vollmer Associates from when you started, how long

[21]did you work for Vollmer Associates?

[22]A I believe I started work for them in the

[23]summer of '89, and I think I worked up until '96,

[24]January of '96.

[25]Q Can you tell me what your job duties and

95

[1]

[2]responsibilities were when you worked for

[3]Vollmer Associates, and if it changed from when you

[4]started until you ended, let's get into that as

[5]well?

[6]A Sure. When I started there, I primarily

[7]did a lot of bridge inspections, biannual bridge

[8]inspections, a lot of the overpasses you see over

[9]the highways. And then I came in the office. I got

[10]involved with design of a lot of transit facilities,

[11]Botanical Garden Train Station, Gun Hill Road Train

[12]Station. I've done a few overpasses over the LIE.

[13]We've done a lot of the high-level platforms for New

[14]Jersey Transit, done some work for New York City

[15]Transit. And during the course of my employment, I

[16]was doing design, I was doing some project

[17]management, I was doing estimating, **[*80]** I was doing shop

[18]drawings making sure whatever the contractors

[19]submitted did conform to our plans.

[20]That's primarily what did I.

[21]Q The design, was that primarily related to

[22]roadway and bridge work?

[23]A Roadway, bridge work, sometimes there were

[24]buildings involved, sidewalk projects. We had to do

[25]little buildings sometimes, we did inspections on

96

[1]

[2]buildings, building facades. There was an

[3]architectural department there too, we had to

[4]provide structural engineering assistance to the

[5]architectural department.

[6]Q Did you ever do any design work with

[7]regard to garage ramps beneath residential

[8]buildings?

[9]A No, I did not at that time.

[10]Q Nothing for Vollmer?

[11]A Nothing.

[12]Q Did you ever do any safety inspections

[13]when you were working for Vollmer?

[14]A We did not do any field safety

[15]inspections, but we were responsible to make sure

[16]that the contractor means and methods were performed

[17]safely. So a lot of times we would have to submit

[18]plan procedures we'd have to review, we'd have to

[19]review shoring, bracing details, that's all related

[20]to **[*81]** job site safety.

[21]So we did a little bit of everything.

[22]But I, personally, never had to go out and oversee a

[23]contractors operations when I worked for Vollmer.

[24]Q That involved reviewing drawings or shop

[25]drawings?

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[1]

[2]A Correct.

[3]Q Why did you leave Vollmer?

[4]A To go onto another chapter of my life,

[5]different career choice.

[6]Q Did you leave voluntarily; were you asked

[7]to leave?

[8]A I left voluntarily.

[9]Q Where were you employed next?

[10]A I went to L & L Painting Company.

[11]Q Is that located in Hicksville?

[12]A Yes, it is.

[13]Q Do you know who the owners of

[14]L & L Painting Company were at that time?

[15]A Alvin Levine.

[16]Q Did the son also work there?

[17]A Both his sons worked there.

[18]Q Do you know his sons?

[19]A Yes, I do.

[20]Q What sons do you know?

[21]A I know both of them.

[22]Q Are you still friendly with them?

[23]A Yes, I am.

[24]Q What are the names of the two sons that

[25]you know?

98

[1]

[2]A Michael and Ross.

[3]Q Can you briefly describe what you did at

[4]L & L?

[5] **[*82]** A I was an engineer for L & L Painting. I

[6]was involved in estimating of projects, I did all

[7]the engineering for them, whether it was platforms,

[8]temporary structures, containments. I also did

[9]project management, I ran the projects, I attended

[10]the meetings, I prepared all the projects

[11]correspondence, assisted with claims, if any. I was

[12]project superintendent, I was in charge of the jobs,

[13]have to go to the jobsites, make sure the workers

[14]were doing what they were supposed to do, keep track

[15]of job costs.

[16]Basically I had control over the

[17]entire project.

[18]Q Did any of the work that you did for

[19]L & L Painting involve safety on ramps?

[20]A No.

[21]Q Did the work that you did for

[22]L & L Painting involve designing any type of

[23]scaffolding or walk surfaces?

[24]A Yes.

[25]Q In the time that you were working for

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[1]

[2]L & L Painting, are you aware of any accidents that

[3]ever occurred in any of the working platforms or

[4]scaffolding that you designed?

[5]A None that I'm aware of.

[6]Q Are you aware of any accidents or claims

[7]that may have occurred on any platforms or

[8] **[*83]** scaffolding that you designed since you left

[9]L & L Painting?

[10]A No, I have not been notified of any such

[11]complaints.

[12]Q How long did you work for L & L Painting?

[13]I apologize if I asked that before.

[14]A I believe '96 to -- I know it says 2000,

[15]yeah, that's right, 2000. December of 2000 -- no,

[16]sorry, it's 2001.

[17]Q So that's not correct?

[18]A No, I left after 9/11, that was in 2001

[19]so…

[20]Q Why did you leave?

[21]A To go onto bigger and better things.

[22]Q Being what?

[23]A To start my own company.

[24]Q On the resume or your CV, which is

[25]Defendant's Exhibit M, it indicates SMS Engineering,
100

[1]

[2]PC, is that the company that you started?

[3]A That's correct.

[4]Q Had you started that company before or --

[5]before leaving L & L Painting?

[6]A Yes, I did.

[7]Q And were you working for that company

[8]simultaneously while working for L & L Painting?

[9]A Yes, I was.

[10]Q Were you working for L & L full time?

[11]A Yes, I was.

[12]Q What were you doing for SMS Engineering in

[13]the period of time that you were also working at

[14] **[*84]** L & L Painting?

[15]A It was primarily legal consulting or

[16]expert witness work.

[17]Q No original design work or anything like

[18]that?

[19]A No, I wasn't doing any -- my company was

[20]fully aware that I had this other company, so I did

[21]not do anything that would be considered a conflict

[22]with them.

[23]Q And at the time that you were working

[24]for L & L Painting and doing this expert witness

[25]work --
101

[1]

[2]A Actually, I'd like to backtrack. There

[3]was one design project I did do. It wasn't in

[4]relation to a painting contract. We were involved

[5]down at Ground Zero, we jacked, we did the

[6]engineering for the jacking of 140 West Street.

[7]Q SMS Engineering, PC?

[8]A Yes.

[9]Q Did SMS have any employees at the same

[10]time that you were working for L & L Painting?

[11]A No.

[12]Q Were you the only employee?

[13]A Just me.

[14]Q With regard to the expert witness

[15]testimony or consulting that you did at that period

[16]of time when you were working for L & L Painting,

[17]can you tell me what case you worked on, what types

[18]of cases?

[19]A Yeah, premises work. It was **[*85]** very

[20]little -- it was only three or four a year, so it

[21]wasn't a big practice back then.

[22]Q Did it involve any engineering evaluations

[23]or testimony with regard to ramps?

[24]A I'd have to check. It might have. I'd

[25]have to check.
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[1]

[2]Q Since you started acting as a consultant

[3]doing this expert witness testimony or evaluations,

[4]have any of your -- any of the projects that you

[5]worked on, did those involve the evaluation of the

[6]slope of the ramp or something else?

[7]A Yes.

[8]Q Did it involve the evaluation of the slope

[9]of the ramp?

[10]A The slope of the ramp, the construction of

[11]the ramp, the placement of the ramp, handrails, all

[12]aspects of the ramp.

[13]Q Now, when you talk about ramps, any of

[14]these ramps that are used for automobile traffic?

[15]A For the sole use of automobile traffic?

[16]Q Sole or combined.

[17]A Yeah.

[18]Q Excluding this one, this case.

[19]A I believe, and I'd have to check, there

[20]was one or two that I was involved with. I can't

[21]remember the exact buildings.

[22]Q Do you know where the buildings were?

[23]A They **[*86]** were in the outer boroughs, I'm not

[24]sure of the exact place.

[25]Q Outer boroughs being?

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[1]

[2]A Queens, Bronx, Brooklyn. It was in those

[3]three, not in Manhattan and it wasn't in

[4]Staten Island.

[5]Q Do you recall what of the three that you

[6]did, what the claims were about, why you were doing

[7]the evaluation?

[8]A One instance, they had issue of people

[9]slipping and falling due to accumulation of ice, so

[10]we evaluated the ramp to determine the drainage, was

[11]it proper. The slope was, in that case, adequate,

[12]but we tried to come up with another way to divert

[13]the drainage to prevent the water from accumulating

[14]in certain areas.

[15]Q You did that on behalf of the owner as a

[16]remedial type work?

[17]A Yes.

[18]Q What about the other two?

[19]A Boy, I'm going back on this one. It might

[20]have been just in the capacity of a consultant. A

[21]lot of my clients ask me to give my opinions,

[22]whether they feel certain things are done properly

[23]or not. He might have asked in my opinion if this

[24]ramp was constructed properly, and it was probably

[25]during a big walk through. Sometimes **[*87]** building 104

[1]

[2]owners ask me to evaluate the buildings before they

[3]buy the building. I tell them where I see the

[4]potential problems so they have them addressed

[5]before they purchase the buildings.

[6]Q The two other projects or issues regarding

[7]the ramps, do you know whether or not those involved

[8]an evaluation of newly constructed ramp or

[9]evaluations of existing ramp for a potential

[10]purchaser?

[11]A It was in both cases existing ramps, it

[12]wasn't new construction.

[13]Q Do you know the age of the buildings that

[14]you were evaluating?

[15]A No, not offhand.

[16]Q Do you know whether or not those buildings
[17]were, for lack of a better term, governed by the
[18]1938 code opposed to the 1968 code or something
[19]else?
[20]A Yeah, whatever -- whatever recommendations
[21]I made are based on the codes that I felt were
[22]appropriate at that time. The owner may have given
[23]me some information as to when the buildings were
[24]constructed, but I didn't verify that information,
[25]they might have told me it was built -- I would say
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[1]
[2]to them, was it built in the last 40 years, and they
[3]would **[*88]** say yes. I say okay, I know this code
[4]applies. I never ascertained the exact date.
[5]Q In either one of those two days did you
[6]make a determination as to whether or not that slope
[7]was in compliance with whatever applicable building
[8]code was applicable?
[9]MR. STEIN: Are you asking what he found
[10]or whether he found that determination?
[11]Q Whether and if you did, what --
[12]A Yeah, I don't exactly remember. A lot of
[13]times my clients, they just walk around the building
[14]with me and they just want things presented to them
[15]verbally. They don't want to -- they don't want
[16]reports sometimes, either they don't want to have a
[17]written document of what I'm saying or they just
[18]don't want to pay me to generate a report. They
[19]just want for their own knowledge, they just like to
[20]know what my opinion is.
[21]Q Do you have any records of what your
[22]opinions were with regard to those two projects?
[23]A I'd have to check. I mean, they're pretty
[24]old buildings. Sometimes we keep files. If there's
[25]design files, we have to keep under law. If there's
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[1]
[2]certain opinions my clients tell me the **[*89]** case is
[3]closed, I don't need to retain them anymore, I
[4]discard them.
[5]Q As you're sitting here today, do you have
[6]a recollection of who those clients were or owners
[7]of the buildings were?
[8]A No, because it was a while ago. So I
[9]don't.
[10]Q Do you have a recollection as to where the
[11]buildings are located other than the outer boroughs?
[12]A No. That's all I have right now.
[13]Q Do you have any background or training in
[14]medicine?
[15]A Medicine?
[16]Q Yeah, medicine.
[17]A No.
[18]Q How about biomechanical engineering?
[19]A No, I have a very basic understanding of
[20]it, but no real background.
[21]Q When you say you have a basic
[22]understanding of it, what is your basic
[23]understanding of it?

[24]A I've read books on the biomechanics of

[25]walking and moving to understand human movement,

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[1]

[2]particularly how it applies to, you know, stairways,

[3]ramps, slips and falls, trips and falls.

[4]Q How many books have you read?

[5]A I believe two.

[6]Q What books?

[7]A I really don't have an -- I don't know the

[8]title. I could send you, **[*90]** if you like, give you

[9]copies of the book jackets.

[10]MR. FARBER: Leave a space in the record.

[11](INSERT):

[12]Q Have you ever published any articles with

[13]regard to biomechanics of walking and human

[14]movement?

[15]A No.

[16]Q Other than reading these two books, have

[17]you ever read any articles with regard to

[18]biomechanics of walking and movement?

[19]A I don't believe so.

[20]Q What about any studies with regard to

[21]walking and movement?

[22]A I might have. I might have went to a

[23]reference source in the books, found it online and

[24]may have perused it, but I don't recall the exact

[25]ones that I have done.

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[1]

[2]Q Do you recall any of the substance of what

[3]those studies may have been?

[4]A Well, yeah, just the biomechanics of

[5]walking and, you know, why slips happen and

[6]mechanics of a fall.

[7]Q Why do slips happen?

[8]MR. STEIN: Based on the books he read or

[9]his own opinion?

[10]MR. FARBER: Based upon the books that

[11]he's read.

[12]A Well, it all has to do with the center of

[13]gravity of the body in position with its base, your

[14]feet.

[15]Q **[*91]** Then why do slips happen?

[16]A Oh, well, it depends on the type of slip.

[17]I mean, the thing is if for some reason your center

[18]of gravity of your core body is shifted outside of

[19]your support base, which is your feet, that's what

[20]causes you to fall. In a slip/fall, depending on

[21]the type of slip/fall, if there is a slippery

[22]object, your foot would slide out in front of you,

[23]no support base, your body would fall down.

[24]On other surfaces, such as an

[25]inclined surface, when you step, your foot might

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[1]

[2]slide forward. When you lose your foundation,

[3]there's nothing to support that center of gravity,

[4]that's when you would fall.

[5]Q Any other reasons why slips happen?

[6]A Why slips happen or how -- how people fall

[7]as a result of slipping? Slips happen for many

[8]reasons. Why people slip -- in order to fall, like

[9]I said, one's center of gravity must leave. We've

[10]all slipped. I've slipped but I haven't fallen

[11]because I was able to regain my balance, I was able

[12]to control my center of gravity. If you are not

[13]able to control your center of gravity and you move

[14]outside that foundation, **[*92]** that's when you fall.

[15]Q Do you consider yourself an expert in

[16]biomechanical engineering?

[17]A No.

[18]Q Can you, just generally, define what

[19]biomechanical engineering is?

[20]A Actually I can't. I can't define the

[21]field, I could tell you that biomechanics of

[22]walking, you know, that part I understand is that

[23]how the body physically moves and how it behaves,

[24]but biomechanical engineering I really don't know.

[25]Q That understanding comes from reading

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[1]

[2]these two books, generally?

[3]A Yeah, it's a very basic understanding.

[4]Q Do you have any background or training in

[5]accident reconstruction?

[6]A Some.

[7]Q Can you tell me what that is?

[8]A Well, depending on the case, I try to

[9]evaluate the scene, whether it's a construction

[10]accident or premises accident. I try to understand

[11]if the accident could happen the way that it was

[12]reported to have happened.

[13]Q Do you have any formal training in

[14]accident reconstruction?

[15]A No.

[16]Q Have you ever formally evaluated an

[17]accident and conducted an accident reconstruction?

[18]A There might **[*93]** have been a couple

[19]circumstances where I told my client that based on

[20]my basic knowledge of it, if didn't appear that the

[21]accident could occur in the state -- in the matter

[22]of which they described. Both these cases I was

[23]working for a defense firm at this point. I did

[24]recommend they should retain someone who specializes

[25]in biomechanics to reevaluate the manner of which

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[1]

[2]the fall occurred and whether the injury is

[3]sustained.

[4]Q At any point in time since you were

[5]retained up to today, did you ever interview

[6]Mr. Melini?

[7]A No.

[8]Q Did you ever speak to him at all?

[9]A No.

[10]Q Do you know what his age is?

[11]A No.

[12]Q Do you know what his height is?

[13]A No.

[14]Q Do you know what his weight is?

[15]A No.

[16]Q Do you know what his weight was in

[17]September of 2006?

[18]A No.

[19]Q Do you know whether or not at the time of

[20]the accident he was taking any medications?

[21]A No.

[22]Q Do you know whether at the time of the

[23]accident he had consumed any alcohol?

[24]A No.

[25]Q Did you ever come to learn whether at the
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[1]

[2] **[*94]** time of the accident he was taking any medication or

[3]consumed any alcohol?

[4]A No.

[5]Q Did you know at the time you did your

[6]evaluation and conducted your reports up to today,

[7]whether or not Mr. Melini ever suffered from any

[8]type of medical condition that would cause him to be

[9]dizzy?

[10]A No.

[11]Q You don't know that one way or the other?

[12]A The question was, was I aware that he had

[13]any condition to make him dizzy, so no.

[14]Q Do you know whether or not at the time of

[15]the accident Mr. Melini had any type of difficulty

[16]walking prior to the time of the accident?

[17]A No.

[18]Q Do you know whether Melini wears

[19]eyeglasses?

[20]A No.

[21]Q Do you know if he was wearing eyeglasses

[22]at the time of the accident?

[23]A No.

[24]Q Did you know or ever come to learn whether

[25]or not Mr. Melini suffered any prior injuries to his
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[1]

[2]legs or feet before the accident?

[3]A No.

[4]Q Prior to conducting your inspection and

[5]preparing your report, did you ever come to learn

[6]what type of shoes Mr. Melini was wearing at the

[7]time of the accident? **[*95]**

[8]A No.

[9]Q Did you ever ask?

[10]A No.

[11]Q Did you ever find out what the lighting

[12]conditions were of that ramp or around that ramp at

[13]the time of the accident?

[14]A No.

[15]Q Did you ever ask?

[16]A No.

[17]Q Do you know whether or not at the time of

[18]the accident or immediately prior to the time of the

[19]accident Mr. Melini had anything in his hands?

[20]A No.

[21]Q Do you know at the time of the accident or

[22]just immediately prior to the time of the accident

[23]the speed with which Mr. Melini was traversing over

[24]the ramp?

[25]A No.

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[1]

[2]Q In your report of March 15, 2008,

[3]Defendants Exhibit E, it states that all pertinent

[4]measurements were made.

[5]Do you see where I'm referring to?

[6]A Uh-huh.

[7]Q In November of 2006, how did you determine

[8]what measurements were pertinent?

[9]A Well, I took measurements on the rails. I

[10]did what I usually do, took measurements of the

[11]rails, took measurements of the ramp to determine my

[12]opinion as to what's wrong, if anything, was wrong

[13]with the ramp.

[14]Q How did you know that those **[*96]** measurements

[15]were pertinent to the claims that Mr. Melini was

[16]making?

[17]A Well, I take measurements because I am

[18]familiar with what the design requirements are for

[19]the ramp. So I took certain measurements.

[20]MR. STEIN: Note my objection to the form

[21]of that question because we haven't determined

[22]what "pertinent" meant.

[23]Q What did you mean by "pertinent"?

[24]A Pertinent means those measurements that

[25]were necessary to form an opinion.

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[1]

[2]Q And what opinion, not necessarily the

[3]content, on what subject were you asked to form an

[4]opinion about?

[5]A On the compliancy of the ramp, code

[6]compliancy.

[7]Q Whether or not the ramp was

[8]code-compliant?

[9]A Yes.

[10]Q The measurements you took were to

[11]determine whether or not the ramp was

[12]code compliant?

[13]A That's correct.

[14]Q Or the handrails for that matter?

[15]A Any portion of the ramp.

[16]Q In your report, I know this was asked to

[17]you before and I just want to kind of clarify this a

[18]little bit. Under the description of accident it

[19]says, "Mr. Melini slipped."

[20]Do you see **[*97]** that?

[21]A Yes.

[22]Q How did you make that determination?

[23]A I don't recall. I might have -- I might

[24]have been informed of that by plaintiff's counsel at

[25]the time.

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[1]

[2]Q When you wrote "slipped," what is it that

[3]you meant by slipped?

[4]A That his feet went out from under him.

[5]Q And when you wrote "slipped," can you tell

[6]us what it is? You said, "his feet went out from

[7]under him." Can you tell me what the manner is or

[8]describing how his feet went out from under him?

[9]A Well, as you walk down a severe incline,

[10]sometimes when your foot goes down, it hits the

[11]incline surface and it comes out from under you.

[12]Q And would you have expected that it would

[13]go - - the foot would go forward in the direction

[14]that you're walking?

[15]MR. STEIN: Note my objection. He's not

[16]exchanged as a biomechanical engineer. You're

[17]asking him questions outside the scope of his

[18]experience, Number One; and Number Two, outside

[19]the four corners of his experts report.

[20]Listen, I'm making an objection, you want to

[21]ask him the questions, over objection. I'm

[22]going to continue **[*98]** these objections.

[23]A I was going to say that I did not -- I'm

[24]not a biomechanic expert, I'm not aware of the exact

[25]manner in which Mr. Melini fell. All I know is I'm
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[1]

[2]aware that he slipped on the ramp.

[3]MR. STEIN: If you want to ask him a

[4]hypothetical --

[5]Q Based upon what you were told by

[6]plaintiff's counsel?

[7]A Yes.

[8]Q Based upon your experience and knowledge,

[9]based on what you testified to, if someone was

[10]walking down the ramp and says their foot slipped,

[11]in what direction would you expect their foot to go

[12]relative to their body?

[13]A If they're walking down a ramp -- well,

[14]once again, not being an expert in the subjects.

[15]But I would expect the foot to go down in the

[16]direction if they're walking down the ramp, the feet

[17]should slide in the direction they're walking.

[18]Q Would that be relative to their body in

[19]front of them?

[20]A Yes.

[21]Q Then you go onto say, "and fell due to the

[22]severe slope," how did you determine that he fell

[23]due to the severe slope?

[24]A That's my understanding of the case, that

[25]the driveway ramp was so slippery, **[*99]** it was so
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[1]

[2]excessively sloped, that's what caused his foot to

[3]slide out from under him.

[4]Q And who told you that?

[5]A Once again, I'm going back two and a half

[6]years, but I believe it was a conversation I would

[7]have had with plaintiff's counsel.

[8]Q Your report goes on to say that, "as a

[9]result of his fall" -- I'm assuming you mean

[10]Mr. Melini; is that correct?

[11]A Correct.

[12]Q -- "he sustained severe physical
[13]injuries." Can you tell me at the time that you
[14]either conducted the investigation or prepared this
[15]report on March 15, 20 08, what it is that you
[16]understood were his, quote, "severe physical
[17]injuries"?
[18]A No, I don't know the exact injuries he
[19]sustained, but I was just told he fell. He got hurt
[20]pretty badly.
[21]Q Now, the beginning of the sentence says,
[22]"as a result of his fall," do you have any knowledge
[23]that he sustained the injuries as a result of the
[24]fall as opposed to something else?
[25]A Well, that's my understanding, is that his
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[1]
[2]injuries that he received were a result of his fall.
[3]Q Based upon what?
[4] **[*100]** A My conversations.
[5]Q With?
[6]A With the attorney and general -- that's
[7]generally what is assumed by me. If that fact is
[8]incorrect, then someone usually brings that to my
[9]attention. That's generally why we're sitting here
[10]today. If someone falls, they get hurt and here we
[11]are.
[12]Q As you sit here today, do you know what
[13]his injuries are?
[14]A No, I do not.
[15]Q If someone claims they slipped on a
[16]surface, what would your opinion be, the pertinent
[17]measurements that should be taken?
[18]A On a flat surface or inclined surface?
[19]Q Any surface.
[20]A Generally, I will measure the slope of the
[21]surface, that always contributes greatly to someone
[22]slipping. And then I will also do a test of the
[23]surface characteristics of the material.
[24]Q How would the slope of the surface
[25]contribute to someone slipping?
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[1]
[2]A It's hard to explain. There's a physics
[3]behind it. When you step down on a surface, okay,
[4]your force effector is divided into two components;
[5]vertical component and horizontal component. When
[6]you step forward, if you have an inclined surface, **[*101]**
[7]that striking point is then resolved into a
[8]horizontal component force that now your body has to
[9]withstand.
[10]If the slope of the surface were also
[11]reduced, the coefficient of friction, because the
[12]incline will allow the gravity to move on its own,
[13]it doesn't solely rely on a force that's pushing you
[14]from the side, the weight of the object can
[15]contribute to the actual force required to overcome
[16]the slip resistivity of the surface.
[17]Q Would it be fair to say that any slope
[18]could contribute to a fall?
[19]MR. STEIN: Note my objection.

[20]You can answer.

[21]A Well, any slope will increase or decrease

[22]the slip resistance of the surface because now you

[23]have to take into consideration the actual pitch of

[24]the surface.

[25]Q Does the slope always contribute to a
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[1]

[2]fall?

[3]A Always absolutely, no.

[4]Q So is there a certain limit or measurement

[5]of a slope that, in your opinion, contributes to a

[6]fall?

[7]A Generally speaking, you want to keep the

[8]slope within permissible ranges, that's why the

[9]building code specifies certain ranges. If it

[10]wasn't **[*102]** beneficial to keep it within certain pitches,

[11]then there wouldn't be no regulations cited.

[12]Q Can the slope that's within a permissible

[13]range in the building code contribute to a fall?

[14]A Could contribute to a fall, sure.

[15]Q How would that contribute to a fall?

[16]MR. STEIN: Note my objection to the last

[17]question.

[18]Q How would it contribute?

[19]A If there was something on the surface or

[20]if the -- if the surface itself was improperly

[21]constructed or not surfaced with a nonslip material,

[22]that extra slope could make it therefore more

[23]slippery than if it was flat. So it's possible.

[24]Not saying it's absolute, but it's

[25]possible.
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[1]

[2]Q In order to determine whether or not

[3]someone slipped on the surface, would you need to

[4]know the coefficient of friction of that surface?

[5]A Yes. If there was a question as whether

[6]the surface was considered to be slippery, I would

[7]obtain that information.

[8]Q In this case, is there any question as to

[9]whether or not the surface was slippery or not?

[10]A No. My opinion, I didn't believe that the

[11]surface itself **[*103]** was slippery.

[12]Q Your report, going back to the notes from

[13]the date of the site visit, "According to the

[14]photographs received from your offices, the general

[15]condition of the garage entrance ramp has not

[16]significantly changed since the day."

[17]Do you see where I'm referring to

[18]under date of site visit?

[19]A It was the day of the accident.

[20]Q You're referring to the day of the

[21]accident?

[22]A Yes.

[23]Q At the time that you made your initial

[24]site visit on November 25, 2006, the condition of

[25]the ramp, in your opinion, was the same as it was on
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[1]

[2]the day of the accident?

[3]A Well, the general condition, the

[4]configuration of the ramp was, in my opinion, the

[5]same; the slope, the arrangement of the handrails,

[6]the manner in which you enter the facility.

[7]Q Do you know, one way or another, whether

[8]or not the surface was the same?

[9]A Once again, I have to go back to the

[10]photographs that I received. It is possible that

[11]if -- because this is two years ago, that if the

[12]photographs I received did show the condition that

[13]was shown to me earlier, then I **[*104]** would have noticed

[14]that the condition of the surfacing may have

[15]changed. That might have been also another reason

[16]why maybe the coefficient wasn't measured because

[17]the conditions may have changed.

[18]Q Did the condition of the concrete surface

[19]change?

[20]A I don't know. I mean, that's the problem

[21]when you do static coefficient friction testing.

[22]You never know actual conditions from the date of

[23]the accident. Things could have been done to the

[24]surface subsequent to the accident that could alter

[25]the characteristics of the surface.

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[1]

[2]Q Do you know if anything was done to the

[3]concrete portion of the ramp subsequent to the

[4]accident?

[5]A Don't know.

[6]Q If the condition of the surface, in your

[7]opinion, had changed from the date of the accident,

[8]would that have been something that you would have

[9]noted in your report from the date of the accident

[10]until the time of your inspection in November of

[11]2006?

[12]MR. STEIN: Going to object to the form of

[13]the question. You mean if he had noticed or

[14]had some way of telling?

[15]Q Based upon the pictures that you were

[16] **[*105]** provided and your observations at the time of your

[17]inspection, if the condition of the surface of the

[18]ramp had changed significantly, would that have been

[19]something you would have noted in your report?

[20]A If the condition of the ramp had changed

[21]and it was relevant to the formulation of my

[22]opinion, yes, I would have noted it.

[23]Q So is it fair, the condition of the

[24]surface, of the ramp surface of the ramp was not

[25]relevant to the formulation of your opinion in this

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[1]

[2]case?

[3]A Well, at the time of my inspection, the

[4]surface characteristics of the ramp seemed adequate

[5]to me. It didn't appear slippery at all, so I

[6]didn't take measurements of it. If it did change,

[7]there would be no reason to take the measurement

[8]because then the measurements wouldn't accurately

reflect the condition of the ramp at the time. So I may not have noted it in that respect from the slip coefficient of friction. If I noticed anything else, as far as the handrails or maybe they did some work, effected the geometry of the ramp maybe, I would have noted that.

Q In your report, Defendant's **[*106]** Exhibit E, you note that you did not investigate the accessibility of stairs because that was not available to Mr. Melini; is that correct?

A Yes. From the sidewalk, that was the only way I saw getting into the garage.

Q What sidewalk were you referring to?

A The sidewalk in front of the garage.

Q Do you know what street that is on?

A It's on East 71st Street.

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Q Did you go down into the garage where the cars are parked and observe the parking area and whether or not there was any entrances or exits from that level?

A No.

Q Are you aware of whether or not there was any entrances or exits that were on 72nd Street?

A I did not see one.

Q Did you look on 72nd Street, not 71st Street, 72nd Street?

A No, I did not.

Q You did not look?

A I did not look on 72nd Street.

Q At the time that you did your inspection in November of 2006, and up to today, do you know where Mr. Melini claims he fell?

A I was informed that it was in the vicinity of where the asphalt surfacing meets the concrete surfacing. **[*107]**

Q Do you know whether it was on the concrete surface or on the asphalt surface?

A I'm not sure if I know the exact location where he fell, I just know the general vicinity.

Q So you don't know whether or not it was on

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the concrete surface or the asphalt surface?

A I don't recall.

Q You don't recall whether you know?

A I don't recall -- if you're asking me if I know, I don't know for sure if it was the concrete or the asphalt.

Q Other than being told that Mr. Melini slipped on this ramp, did you ever form any independent opinion as to whether or not he slipped on the ramp?

MR. STEIN: Note my objection to the question. I don't even understand what you mean.

Q Did you ever form an opinion as to whether or not Mr. Melini slipped on this ramp?

[17]A No.

[18]Q So you don't know one way or the other

[19]whether he slipped on the ramp?

[20]A That's correct.

[21]MR. STEIN: Note my objection to that

[22]question.

[23]MR. FARBER: I didn't even ask the

[24]question yet.

[25]MR. STEIN: The last question.

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[2] **[*108]** Q If Mr. Melini testified in connection with

[3]this action that he was walking down the ramp and he

[4]stepped and he felt like his foot was on ice, in

[5]what direction would you expect his foot to have

[6]gone relative to his body?

[7]A Just to clarify, without being an expert

[8]in biomechanics, it would be my opinion that he

[9]would slip down in the direction he traveled in

[10]front of him.

[11]MR. STEIN: I'm going to object to the

[12]question again.

[13]You can answer over objection.

[14]Q Would you expect under such circumstances

[15]that I described that his foot would go back towards

[16]his body and up the ramp, would that be something

[17]that you would anticipate?

[18]MR. STEIN: Which foot, which direction

[19]was he walking? There's not enough facts there

[20]to form an opinion.

[21]Q If Mr. Melini testified that he was

[22]walking down the ramp and his left foot stepped on

[23]the ramp and it felt like ice, would you expect that

[24]his left foot would have gone back relative to his

[25]body, towards his body and up the ramp towards the

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[2]street?

[3]A No, I did not.

[4]Q If that is what Mr. Melini **[*109]** testified to,

[5]do you have any opinion as to the mechanism of what

[6]may or may not have caused that to occur?

[7]MR. STEIN: Objection. Don't answer.

[8]It's beyond the expertise of this witness.

[9]Q Prior to your inspection or prior to you

[10]preparing your March 20 08 report, did you ever come

[11]to learn what Mr. Melini was claiming the conditions

[12]on the ramp were immediately prior to his accident?

[13]A No.

[14]Q Would that have been something important

[15]for you to know in forming the opinions that you

[16]formed in your March 2008 report?

[17]A No, not -- no, not based on what I was

[18]asked to perform.

[19]Q Do you know what the weather conditions

[20]were on the evening of Mr. Melini's accident?

[21]A No.

[22]Q Did you, prior to forming your opinion,

[23]know whether or not the ramp was wet or dry?

[24]A No.

[25]Q Prior to forming your opinion, do you know
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[2]whether or not there was any ice or slippery

[3]substance on the ramp?

[4]A No.

[5]Q In forming your opinions set forth in your

[6]March 2008 report, did you ever consider that

[7]Mr. Melini's injury could have occurred **[*110]** prior to the

[8]fall on the ramp?

[9]MR. STEIN: Objection. Beyond the scope.

[10]That's a medical opinion. It has nothing to do

[11]with engineering.

[12]MR. FARBER: I'm asking if he ever

[13]considered it.

[14]MR. STEIN: I'm objecting. It's a medical

[15]opinion. You're asking if he ever considered a

[16]medical opinion in considering his opinion as

[17]to the fall, there's no evidence that it

[18]happened. It's a patently improper question.

[19]MR. FARBER: Are you directing him not to

[20]answer?

[21]MR. STEIN: Yes, it's a patently improper

[22]question.

[23]MR. FARBER: On what --

[24]MR. STEIN: It's beyond his area of

[25]expertise.
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[2]MR. FARBER: He's not just saying the ramp

[3]violated the building code, it caused the fall.

[4]MR. STEIN: Contributed to the fall.

[5]MR. FARBER: He's saying it caused the

[6]fall.

[7]MR. STEIN: He didn't say caused the fall,

[8]he said contributed to the fall.

[9]Q In your report of March of 2008, you

[10]indicated that you didn't investigate whether or not

[11]there was any entrances from the attached building

[12]into the parking lot because the plaintiff **[*111]** is not a

[13]tenant of the building; therefore, this alternate

[14]entrance would not have been available to him.

[15]Do you see that?

[16]A Yes.

[17]Q Did you know in November of 2 006 when you

[18]did your site inspection, November of 2006 site

[19]inspection, did you know that there was an entrance

[20]inside the building that lead to the garage?

[21]A At that time, no.

[22]Q When did you learn that information?

[23]A I believe recently we had discussions

[24]about that and I received portions of transcripts

[25]from other people discussing the stairway that
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[2]provides access from your building.

[3]Q And you make mention to that in your

[4]March 15, 2008 report. How did you know that

[5]information in March of 2008 when you prepared this

[6]report?

[7]A How did I know what information?

[8]Q That there was an entrance from the

[9]attached building into the parking lot that

[10]plaintiff could not use because he wasn't a tenant

[11]of the building?

[12]MR. STEIN: Somehow that knowledge

[13]imparted to him?

[14]Q How did you come to learn that and include

[15]that in the March 2008, March 15, 2008 report? **[*112]**

[16]A Well, I said in my report that I am not

[17]aware that there is a stairway. If there was, it

[18]would not be available to him because I saw no signs

[19]or anything that gave me any information regarding

[20]the presence of the stairway. To my knowledge, this

[21]was the only way for us to get in and out of the

[22]garage.

[23]Q Your report says you didn't investigate

[24]whether there was an entrance to the attached

[25]building, then you go on to say you didn't

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[2]investigate that because even if there was one he

[3]couldn't use it, plaintiff, because he's not a

[4]tenant of the building, correct?

[5]A Uh-huh.

[6]Q Based upon what did you form your opinion

[7]or conclusion that if there was an entrance he

[8]couldn't use it because he wasn't a tenant?

[9]A I based that on my past experiences of

[10]living in buildings with garages, and every building

[11]that has a garage attached to it, there is a

[12]stairway that provides you exclusive access for the

[13]tenants that people from the general public can't

[14]use from that garage. At this building I looked, I

[15]didn't see any indication that there was a stairway

[16]inside, **[*113]** and I was just opining, saying if there was

[17]a stairway inside, it must be for the exclusive use

[18]of tenants because there's no notice to anyone

[19]outside that it is available to them.

[20]Q That's based upon your general opinion

[21]living in buildings?

[22]A Living in buildings in Manhattan that are

[23]similar to this construction.

[24]Q Not based upon this specific building,

[25]though, correct?

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[2]A Right, I did not live in this building.

[3]Q But your opinion is not based upon any

[4]specific knowledge you have of the operations of

[5]this building?

[6]A At the time I would not -- I was not aware

[7]of any operations of the building.

[8]Q At the time, meaning?

[9]A At the time --

[10]Q March 2008?

[11]A I did not -- my inspection, right, when

[12]the report was prepared, I was not aware of it.

[13]Q In November of 2006, the manner in which

[14]you measured the slope of the ramp, was that the

[15]only way that the slope of the ramp could be

[16]measured?

[17]A No.

[18]Q Can you tell me what other ways the slope

[19]of the ramp could be measured?

[20]A You could measure the rise **[*114]** and the run of

[21]the ramp.

[22]Q How would you do that?

[23]A Well, you'd have to use two rulers and

[24]another level to establish the horizontal plane,

[25]have a unit width, a unit length of run, and then

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[2]figure out what the rise is and that's how you could

[3]compute it.

[4]Q And how many locations would you have to

[5]do that measurement?

[6]A Well, it depends. If you want to

[7]determine the rise and run of the entire ramp as a

[8]whole, you would have to do it from the beginning of

[9]the end. If you wanted it within a portion, you

[10]could do it in a portion, usually ramps are uniform.

[11]If you wanted to figure out the exact slope of the

[12]entire ramp, you would have to do every little inch

[13]of it to figure out if that is indeed the slope on

[14]the entire ramp.

[15]Q You didn't do that in your measurements?

[16]A No.

[17]Q Is there any other way that you can

[18]measure a slope, other than what you just testified

[19]to?

[20]A Are there other ways? You can use survey

[21]equipment, you know, where you can take a shot of an

[22]elevation of one point and shot of elevation in

[23]another point and **[*115]** you can plot those two points

[24]in XYZ and figure out the coordinates of those two

[25]points.

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[2]Q Is the elevation of the top of the ramp

[3]relative to the bottom of the ramp?

[4]A No.

[5]Q Can you describe this ramp -- generally

[6]speaking, can you describe what the ramp looked like

[7]from when you enter at the building line to the

[8]bottom where the parking car parking is?

[9]A Well, you enter at the sidewalk at the

[10]building line, and then you walk down the slope

[11]surface until you reach the bottom and I leave. And

[12]it's my recollection that I believe your car turns

[13]right in the garage; if I remember correct.

[14]Q Do you know at what point on the ramp a

[15]car would turn to the right in order to get into the

[16]parking garage area?

[17]A It would be at the base of the ramp.

[18]Q And does the slope at the base of the

[19]ramp, after the right-hand turn, is that slope

[20]different than the slope of the ramp from the

[21]sidewalk level to the point of the turn?

[22]A Well, I didn't measure all the slopes

[23]within the garage because the accident occurred in a

[24]certain area, so I limited **[*116]** my inspection to those

[25]areas.

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[2]Q Would it be fair to say that the planes of

[3]those two slopes are in differ -- the surface of

[4]those two ramps, the ramp from the sidewalk to the

[5]point of the turn, and point of the turn down to the

[6]parking area are in different planes?

[7]A I don't understand the question.

[8]Q Do they run in different directions?

[9]A I didn't measure it, so I can't answer

[10]that.

[11]Q Did the digital level that you used in

[12]November of 2006 to measure -- to perform the

[13]measurements, how long had you had that digital

[14]level?

[15]A I don't know.

[16]Q Was it years, months?

[17]A I don't know.

[18]Q When you did the measurements in November

[19]of 2006, how did you know that those measurements

[20]were accurate based upon the readings of the digital

[21]level?

[22]A How did I know they're accurate? It's --

[23]well, first of all, I just know by standing on the

[24]surface when something is really sloped, this wasn't

[25]just barely sloped, this was really sloped. So I

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[2]know the slope was really high. The readings that I

[3]obtained seem fairly consistent **[*117]** with what I expected

[4]it to be, so I had no reason to question it.

[5]Q So standing on a ramp you're able to tell

[6]what percentage of slope the ramp is?

[7]A No, but I could tell when something is way

[8]above what's required. I could tell.

[9]Q And do you know whether or not the digital

[10]level that you used in November of 2006 was ever

[11]calibrated since you owned it?

[12]A I believe it was asked before, I believe

[13]that has been calibrated. I don't know the exact

[14]date or the number of times.

[15]Q But most of the tools that you have either

[16]you, yourself, calibrated or you have someone

[17]calibrate it for you?

[18]A But all of my tools are always calibrated.

[19]Q And you don't know who it was calibrated

[20]by?

[21]A No.

[22]Q And you don't have any records?

[23]A No.

[24]Q Do you know the tool that you used in

[25]November of 2 006, do you know what, if any,

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[2]percentage of error exists in that tool?

[3]A No, but it's small.

[4]Q When you say "small," what's small?

[5]A I don't know. I'd be guessing.

[6]Q What's your definition of small?

[7]A I don't **[*118]** know by definition, minimal,

[8]nothing that would affect the readings that I

[9]obtained. Talking less than maybe .1 or

[10]0.1 percent. I have to check the manual.

[11]Q Do you have the manual?

[12]A No.

[13]Q If you had to check the manual, how would

[14]you go about doing that?

[15]A I don't have the manual on me.

[16]Q Not with you, do you have it back in the

[17]office?

[18]A Yes.

[19]Q Do you have the manual for the digital

[20]level that you used in 2006?

[21]A I should have it somewhere. I'm not

[22]positive, but I should have it somewhere.

[23]Q In the March of 2008 report, you indicate

[24]that the slope of the driveway entrance was measured

[25]using a digital level and found it to be
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[2]21.5 percent. Was your measurement in November of

[3]2006 of the entrance to the driveway or am I not

[4]reading this correctly?

[5]A As I indicated before, when I took the

[6]measurements, the entrance to the ramp of the

[7]garage, the measurements were taken near that

[8]concrete or interface within the limits I stated

[9]earlier.

[10]Q Did you take any pictures of the digital

[11]readout showing 21.5 **[*119]** percent?

[12]A At the time I did not and that's part of

[13]the reason I had performed the follow-up inspection

[14]to take readings with the level in place, which

[15]yielded higher results.

[16]Q In your report on March 15, 2 008, it says

[17]"Opinion" and it indicates you conducted a

[18]preliminary search of the New York City Department

[19]of Buildings, Buildings Information System, BIS.

[20]Was it conducted?

[21]Do you see where I'm referring to?

[22]A Yes.

[23]Q Is that a computer search?

[24]A Yes.

[25]Q Did you ever conduct a search of or
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[2]requisition of physical building file?

[3]A No.

[4]Q In your experience working as an engineer,

[5]have you ever had occasion to file plans or work a

[6]project where plans were filed with the New York

[7]City Department of Buildings?

[8]A Yes.

[9]Q Based upon your experience, are there ever

[10]any documents contained in the physical file that

[11]may not necessarily be reflected in the BIS file?

[12]A Sometimes.

[13]Q And with regard to older buildings, would

[14]your opinion change from sometimes to more often or

[15]something else?

[16] **[*120]** A No, it depends on the age of the building.

[17]Buildings that are built in 1900s you find nothing,

[18]so how do you define older?

[19]Q Let's say a building built in the 1950s,

[20]would it be fair to say that you could expect to

[21]have some physical papers in the physical file that

[22]may not necessarily be reflected in the BIS file?

[23]A Sometimes.

[24]Q The BIS computer file, does that reflect

[25]handwritten notes that may exist on the documents in

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[2]the physical file, if any exist?

[3]A No.

[4]Q Are you aware of a practice where local

[5]borough commissioners may issue directives or orders

[6]with regard to certain conditions at a building in

[7]order to waive or modify building code requirements?

[8]A Yes.

[9]Q Can you tell me what your familiarity with

[10]that is?

[11]A If for some reason that you can't build

[12]something in accordance with the code, you request

[13]an appointment with the commissioner and he'll make

[14]a determination, and if his determination is not

[15]favorable, you can always appeal to the board,

[16]standard of appeals, that's the way the process is

[17]today. As far as 1955, I'm **[*121]** not aware of what it was

[18]back then.

[19]Q Do you know whether or not there are any

[20]exemptions or exceptions that may have been issued

[21]by the building department borough commissioners

[22]with regard to the condition of this ramp?

[23]A Am I aware of any?

[24]Q Yeah.

[25]A No.

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[2]Q Prior to conducting your inspection and

[3]preparing your report, did you conduct any

[4]investigations, make a determination of whether or

[5]not there were any exceptions or exemptions that may

[6]exist regarding this ramp?

[7]A No, I did not.

[8]Q Is there any reason you did not?

[9]A No.

[10]Q Would that have been something important

[11]to know before forming an opinion, whether or not

[12]that ramp was or was not in compliance with the

[13]code?

[14]A Well, if I had a document that did

[15]indicate that, it could be relevant. But there's no

[16]way of knowing that information based on what's

[17]presented on the website. So I did not do the

[18]research if there was a variance or permission

[19]granted by the commissioner.

[20]Q If there was a variance or permission

[21]granted by the commissioner, that would **[*122]** be something

[22]important to know before forming an opinion?

[23]A Yes, it would be important.

[24]Q In your report, it appears you come to a

[25]conclusion that the 1938 building code applies; is
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[2]that correct?

[3]A That's correct.

[4]Q Can you tell me what it is that you based

[5]your conclusion on that the 1938 building code

[6]applied?

[7]A Well, based on my search of certain

[8]documents and Property Shark website, I had reason

[9]to believe the building was built in the late 1950s.

[10]The code in place, at that time, was the 1938

[11]building code.

[12]Q Do you know or have any information as to

[13]where Property Shark obtains its information from?

[14]A No, sometimes it obtains it from building

[15]department records. I don't know who is in charge

[16]of Property Shark or where they obtain information,

[17]but they found historically it's been pretty

[18]accurate.

[19]Q As you sit here today, you don't know

[20]where their information is generated from?

[21]A No. Generally, you know, when I look at

[22]a C of O dated around the same time the building was

[23]estimated to be constructed, it sort of gives **[*123]** me a

[24]good feeling it was built at that time.

[25]Q When you did your second site visit, how
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[2]long were you there for?

[3]A Ten, 15 minutes.

[4]MR. STEIN: Can I take a quick break.

[5](A brief recess was taken)

[6]MR. FARBER: Back on.

[7]Q You previously testified about some

[8]analysis of the center of gravity and the force and

[9]effectors with regard to falls, do you recall that

[10]testimony generally?

[11]A Yes.

[12]Q What information would you need to know in

[13]order to determine the center of gravity of a

[14]person?

[15]A Oh boy, well, assuming a person is not

[16]disproportionate, it's most likely the center of his

[17]body both in the front face and the side. If you

[18]take the cross section of both in both directions,

[19]that would be considered the center of gravity.

[20]Q What information would you need to know in

[21]order to determine the center of gravity?

[22]A I'm never computed a person's center of

[23]gravity.

[24]Q What information would you need to know to

[25]determine any forces or directions of vectors,

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[2]directions of those forces if you were trying **[*124]** to

[3]determine whether or not someone's center of gravity

[4]was changed or caused to fall?

[5]A Well, I don't -- basically, you know --

[6]let me say this, without being an expert in the

[7]biomechanics of walking, the center of gravity is

[8]generally assumed to be the middle, the trunk of the

[9]body, that's where the weight of the body is. It's

[10]just a relation of that center trunk with the base

[11]foundation of the person which would be the feet, so

[12]if your center of gravity within the feet, that's

[13]how we stand.

[14]If you were to stand and to lean

[15]backwards, at some point when that center of gravity

[16]overcomes, goes outside that base of the feet, at

[17]some point your body is just going to want to fall

[18]backwards because it can't withstand that rotational

[19]force.

[20]Q Do you know what, if any, relationship the

[21]level of the ground or the walking surface would

[22]have on the center of gravity and those force

[23]effectors?

[24]A It wouldn't have any relation on the

[25]center of gravity because the center of gravity of a

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[2]mass is the same regardless, but when a -- the

[3]ground surface would be relevant **[*125]** when someone places

[4]their weight on the surface and that weight,

[5]depending on the direction of which the weight is

[6]applied, can be resolved in forces both vertical and

[7]horizontal forces.

[8]Q What would you need to know in order to

[9]resolve those forces into vertical and horizontal?

[10]A I'd need to know the magnitude of the

[11]force, the angle in which the force was applied, and

[12]then the angle of the surface.

[13]Q What would you need to know in order to

[14]determine those forces, how would you determine the

[15]force?

[16]A I can't determine that force because it's

[17]all about the way the -- in a walking instance, the

[18]velocity of which the foot strikes, it could be

[19]computed that the mass -- there's a force equal to

[20]the mass times acceleration, the mass of the foot,

[21]how fast it actually strikes the surface, you could

[22]compute the actual force.

[23]Q In this case with respect to Mr. Melini,

[24]do you know any of that information in order to

[25]calculate those forces?

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[2]A No, I do not.

[3]Q So you couldn't do that calculation?

[4]A No. In this matter, no.

[5]Q In this **[*126]** matter?

[6]A Correct.

[7]Q In your opinion on Page 2 of your report,

[8]Defendant's Exhibit E --

[9]MR. STEIN: The first report.

[10]Q The first report, Defendant's Exhibit E,

[11]in the second paragraph, the second sentence you say

[12]this is considered to be the main entrance into the

[13]indoor private garage facility and the mandatory

[14]requirements for ramp construction stipulated in the

[15]building code must be complied with as well as the

[16]building code requirements for egress.

[17]Do you see where I'm referring to?

[18]A Yes.

[19]Q How did you determine that this was a

[20]private garage facility?

[21]A Well, I meant it was privately owned. It

[22]may not be a private garage, it has to be a public

[23]garage because the public could park in it.

[24]Q Is there any distinction in the building

[25]code with respect to private garage versus public
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[2]garage?

[3]MR. STEIN: The '38 code?

[4]A In the '38 code there is no distinction.

[5]Q In the 1968 code is there a distinction?

[6]A Yes.

[7]Q What's the distinction?

[8]A Well, the distinction is in the '68 code,

[9] **[*127]** a private garage is really a garage for, you know,

[10]single-family homes that have exclusive use of the

[11]tenant. Public garage is something, transient park,

[12]pay, come in, leave their cars, that type of thing.

[13]Q Is it your opinion or conclusion that this

[14]is a commercial building, the building?

[15]MR. STEIN: 135 East 71st Street, the

[16]entire building?

[17]MR. FARBER: Yes, the entire building.

[18]A Well, the entire building primarily is a

[19]multiple dwelling.

[20]Q And does that fall under those category of

[21]commercial buildings.

[22]A No, multiple dwelling is not a commercial

[23]building.

[24]Q It appears to me, based upon what you said

[25]here or written on Page 2 that goes onto Page 3,
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[1]

[2]that you indicate that one thing that could be

[3]considered a commercial building is a garage?

[4]A Uh-huh.

[5]Q What kind of garage are you referring to

[6]as being a commercial building?

[7]A Well, a garage such as this one would be

[8]considered commercial structure. There are garages

[9]that are part of residential buildings that would be

[10]required to comply with the codes for residential

[11] **[*128]** structures which are far more restrictive.

[12]Q I guess I'm a little confused as this is a

[13]residential building, correct?

[14]A Correct.

[15]Q And is this garage part of this

[16]residential building?

[17]A Well, it has -- it does have two uses, a

[18]garage, and it has tenants living in it. There's

[19]two separate uses just like I believe based upon the

[20]certificate of occupancy there's stores or offices

[21]located on the ground floors, so there are different

[22]uses, dental, within the space.

[23]Q Would the garage that we're talking about

[24]that's at issue here, is that considered a

[25]commercial building?

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[2]A In my opinion, yes.

[3]Q If it wasn't considered a commercial

[4]building, what other classification or category

[5]would it have under the 1938 code?

[6]A If this was considered part of a

[7]commercial structure, it would then be part of a

[8]residential structure and then comply with all the

[9]requirements for the residential structure which

[10]happened to be similar to the commercial

[11]requirements.

[12]Q Before doing your initial inspection in

[13]November 2006, did you review any **[*129]** codes?

[14]A Before I did my inspection?

[15]Q Yes.

[16]A No.

[17]Q When did you review --

[18]A I'm sorry, before March 15th.

[19]Q Before November 2006?

[20]MR. STEIN: Before you inspected the

[21]building.

[22]A Let's narrow that because I review codes

[23]all the time.

[24]Q With regard to prior to doing your

[25]inspection on November 25, 2006, did you review any

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[2]codes in connection with the evaluation that you

[3]were doing at this building or with regard to this

[4]ramp?

[5]A No.

[6]Q When did you first review codes?

[7]A After my inspection.

[8]Q How long after your inspection?

[9]A That afternoon.

[10]Q And the 1938 building code, do you

[11]maintain a copy of that in your office?

[12]A Yes, I do.

[13]Q Based upon the 1938 code provisions that

[14]you've set forth here in your report, is it true

[15]that this garage would need a means of egress?

[16]MR. STEIN: I'm not sure I understand the

[17]question.

[18]Do you understand the question?

[19]THE WITNESS: Not really.

[20]Q You indicate on Page 3 in the middle

[21]paragraph, "Based upon the above, **[*130]** a garage is

[22]considered to be a commercial structure and every

[23]structure must have a means of egress." Then you

[24]have parenthesis, and it says, "that comply with the

[25]building code"?

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[2]A Yeah, every structure in New York City has

[3]to have a proper means of egress to and from the

[4]establishment, the facility. People need to be able

[5]to get inside or outside of the building safely.

[6]Q What are the different types of means of

[7]egress that let's just say, for instance, this

[8]garage could possibly have?

[9]A Could have stairs, ramps, elevators, put

[10]escalators, those are the most common ways of egress

[11]in and out of a facility.

[12]Q And going to this facility, this garage

[13]facility, how many stairways would be necessary?

[14]MR. STEIN: How many egress?

[15]Q How many stairway egresses would be

[16]necessary?

[17]A Well, there's no requirement that it has

[18]to be a stairway egress, they're usually required to

[19]have two means of egress, in case the one means of

[20]egress is blocked, people do have an alternate way

[21]to get out. Because if there was a fire in the

[22]middle of this ramp **[*131]** and they had no way to get out,

[23]everyone would die, that's why you generally would

[24]need a second means of egress.

[25]Q Do you know one way or another whether or

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[2]not there's another means of egress or ingress from

[3]the garage?

[4]MR. STEIN: As he sits here today?

[5]MR. FARBER: Yeah.

[6]A Yes, I've been informed through what

[7]you've recently received that there's a stairway

[8]that leads to the garage to the interior of the

[9]building.

[10]Q Are you aware of any other means of

[11]ingress or egress?

[12]A No, I am not.

[13]Q If there was another means of ingress and

[14]egress from the garage, would the ramp have to

[15]comply with any standards in the code, 1938 code?

[16]A If there were two means of egress that

[17]were available to everybody, then the ramp would not

[18]have to…

[19]Q When you say if there are two means of

[20]egress?

[21]A Generally, as I said before, you need two

[22]means of egress in case there's an emergency. One

[23]means is blocked people need a secondary way to get

[24]out. If there are two compliant means of egress

[25]from the facility, then you wouldn't require **[*132]** to have

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[2]an additional one provided those means of egress

[3]were made available properly marked and were

[4]available to everybody in public.

[5]Q Where in the 1938 code does it say there

[6]needs to be two means of egress?

[7]A I have to check the code. But generally

[8]speaking, they do have two means of egress. For the

[9]garage at that time, I'd have to go back and see --

[10]let me backtrack.

[11]The C of O had this thing -- has this

[12]garage on the C of O back in 1959. There was a

[13]stairway that provides access to this garage. As

[14]it's commonly done in a lot of garages, the garage

[15]is usually for the sole use of the tenants, and

[16]that's why a lot of these garages have a stairway

[17]because people are not meant to walk up and down

[18]driveway ramps.

[19]At some point if it was changed from

[20]a solely tenant used space to a space where the

[21]public can use it and they'd have to access it, that

[22]means entering and exiting the ramp was -- needs to

[23]be changed because someone can't use the stairs

[24]within the building, they have to use the entrance

[25]that's from the sidewalk.

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[2]Q If there **[*133]** is another stairway that exits

[3]from the garage onto 72nd Street, would the ramp

[4]need to comply with the 1938 code?

[5]A In my opinion, yes, this ramp is the main

[6]entrance to the building.

[7]Q That's not what I asked you. If there was

[8]another stairway that leads from the garage out to

[9]72nd Street?

[10]MR. STEIN: When you say another stairway,

[11]meaning this ramp, the stairway that's being

[12]spoken about, another stairway, a third egress?

[13]MR. FARBER: Yeah.

[14]A If there was --

[15]Q And it was accessible to --

[16]A If there was a second stairway that was

[17]accessible to everybody and that's the way they

[18]could have gone in and out of garage, this ramp

[19]would not be required to comply with that.

[20]Q With the section you've cited --

[21]A Yes.

[22]Q -- on the fifth page, I'm sorry, the last

[23]paragraph it says, "Unfortunately due to the limited

[24]amount of space, the only access into the private

[25]garage is provided by the vehicular driveway."

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[2]Do you see where I'm referring to?

[3]A Yes.

[4]Q If there was another door and stairway

[5]that lead from **[*134]** the garage to 72nd Street, that

[6]statement would not be accurate, correct?

[7]A Yes, if there was another means of egress

[8]and all the users were directed to enter and exit

[9]through those stairs and those were in conformance

[10]with codes and this ramp was meant to be used

[11]exclusively by the vehicles, that statement would be

[12]correct.

[13]Q On the next page you say, "Based on the

[14]foregoing, it is my professional opinion with a

[15]reasonable degree of engineering certainty that the

[16]above condition definitely contributed to the unsafe

[17]condition present at this location."

[18]Do you see where I'm referring to?

[20]Q Can you tell me what above condition

[21]you're referring to?

[22]A The accessibly of the slope.

[23]Q What is the unsafe condition you are

[24]referring to?

[25]A The excessively sloped ramp.

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[2]Q How did you determine that the excessively

[3]sloped ramp was unsafe?

[4]A Well, because the slope of the ramp was

[5]more than two times what the building codes mandate,

[6]as well as good and accepted engineering practice,

[7]and there's a reason why there's maximum permissible

[8] **[*135]** slopes because if something is too steep, it does

[9]pose a hazard; otherwise, there would not be a need

[10]for such a provision.

[11]Q When you say excessively sloped --

[12]A Excessively sloped, when something is more

[13]than twice the permissible limits, to me that's

[14]excessive.

[15]Q What are the parameters what you consider

[16]excessive, 1.5 to 3.5 --

[17]A I don't have any set parameters. There is

[18]no certain coefficient that triggers my use of the

[19]word "excessive." When I see something that is two

[20]and a half times what something should be, I don't

[21]think there should be a threshold where that's

[22]triggered.

[23]Q Does the building code requirements

[24]contain, to your knowledge, any factors of safety?

[25]A In what respect?

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[1]

[2]Q Does the requirement that you set forth in

[3]the building code with regard to this ramp about the

[4]slope of the ramp, to your knowledge, does it have

[5]any factors of safety built into it?

[6]A Well, how they derive the number I'm not

[7]sure. But to my knowledge, you know, I'm not sure I

[8]quite understand the question with the factor of

[9]safety with regard **[*136]** to ramp slope, I don't

[10]understand.

[11]Q Do you know how the provisions that you

[12]cited that the 1938 code percentage of slope, how

[13]that percentage was derived?

[14]A You mean how I came up with the number?

[15]Q No, the 12.5 percent?

[16]MR. STEIN: How did the building code come

[17]up with the number?

[18]Q What's that based upon?

[19]A I have no idea.

[20]Q You indicated that the ramp wasn't

[21]constructed with good and accepted engineering

[22]practices?

[23]A That's correct.

[24]Q What do you mean by that?

[25]A Well, the building codes, as we know,
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[2]represent good and accepted engineering practices.

[3]I believe the preempt to the code specifically

[4]states that -- and these codes represent the

[5]minimum, the minimum requirements that one must

[6]achieve when designing and constructing a building.

[7]So if these codes don't represent good and accepted

[8]practice, I really don't know what would.

[9]Q Is there anywhere in your report where you

[10]mention the good and accepted report of engineering

[11]practices?

[12]A I'm not sure. I'd have to look. Doesn't

[13]appear that I **[*137]** specifically said that in the report.

[14]Q Is your conclusion that the condition of

[15]the ramp was unsafe, that solely based upon your

[16]opinion that the slope of the ramp is two times or

[17]plus more than what you're claiming to be the code

[18]requirement?

[19]A Yes.

[20]Q That's the only factor that you're using

[21]to make the determination that something's unsafe?

[22]A It's a pretty major factor, but yes.

[23]Q You go on to state that the, "Defective

[24]conditions described above was a significant

[25]contributing factor in Mr. Melini's accident."
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[1]

[2]Do you see where I'm referring to?

[3]A Yes.

[4]Q How did you make that determination?

[5]A Well, severely sloped surface does

[6]facilitate a slip type of fall.

[7]Q And how did you come to that conclusion?

[8]A Based on my experience in doing this type

[9]of work.

[10]Q To make sure I understand, severely sloped

[11]surface will contribute to a slip type fall?

[12]A A severely sloped surface will definitely

[13]facilitate a slip type of fall.

[14]Q When you say a slip type of fall, what do

[15]you mean by that?

[16]A Somebody **[*138]** slipping. I don't know how much

[17]more I can explain it.

[18]Q When you say someone slipping, is that in

[19]the manner that you described before or testified to

[20]before if they were walking down a ramp and their

[21]foot would go out in front of them?

[22]A I'm saying in general there are provisions

[23]contained in building codes that mandate the maximum

[24]pitch of a ramp, and the reason being it promotes a

[25]safer walking surface. If there was no evidence

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[2]historically of any kind of any reasoning why it

[3]wouldn't be required, then the building codes would

[4]be silent and there wouldn't be a need to address it

[5]in the codes or there wouldn't be a need to install

[6]handrails down the side of it and put signs up that

[7]says, "Caution, Use Handrails."

[8]It's apparent that the owner

[9]recognized that caution should be had walking down

[10]the slope; otherwise, the sign wouldn't be put

[11]there. I've never seen a sign put up, caution, flat

[12]surface, be careful.

[13]Q In this case, how did you determine that

[14]the slope contributed to Mr. Melini's accident?

[15]A Any time somebody slips, as I said

[16]earlier, **[*139]** the slope of the surface will contribute to

[17]the facilitation of that slip. If the surface is

[18]flat, it's going to be less likely they're going to

[19]slip and the steeper the grade goes, the more likely

[20]it is that one's going to slip because you have that

[21]excessive striking angle that the foot hits and it

[22]makes it more difficult to regain one's balance and

[23]to walk.

[24]I've fallen down steep escarpments

[25]climbing down trenches because sometimes things are

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[1]

[2]too steep. It's hard to maintain your balance

[3]because the angle which your foot is placed on the

[4]surface, the way your foot strikes the surface it

[5]makes it difficult.

[6]Q Can a slope that is less than the building

[7]code permissible limit, in this case 12.5 percent,

[8]be considered a contributing factor in a slip fall

[9]type accident?

[10]MR. STEIN: Asked and answered.

[11]You can answer it again.

[12]A Yes, yeah. As I said, when you don't have

[13]a perfectly flat surface, any type of incline could

[14]contribute to a slip depending on the surface

[15]characteristics and the manner in which the person

[16]steps.

[17]Q So slope in general **[*140]** is a factor?

[18]MR. STEIN: Asked and answered.

[19]A Yeah, as I said before, it's a factor.

[20]That's why every building code addresses it. If it

[21]wasn't a factor, there wouldn't be an upper

[22]threshold to what you could do.

[23]Q You measured the slope of this ramp and

[24]you're claiming the slope of this ramp is

[25]21 percent, 22 percent, is that fair to characterize

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[2]it that way?

[3]A Yes, the same as Stanley Fein, yes.

[4]Q Is it your opinion, to a reasonable degree

[5]of engineering certainty, that the increase of the

[6]slope from what was permitted by the 1938 code to

[7]22 percent, that differential was a substantial

[8]contributing factor to Mr. Melini's accident?

[9]A Yes, that's my opinion, yes.

[10]Q How did you determine that roughly

[11]additional 9 percent of the slope was a substantial

[12]contributing factor to Mr. Melini's accident?

[13]A How did I come to that conclusion?

[14]Q Yes.

[15]A Based on my experience and history in

[16]doing these types of accidents that people have a

[17]tendency to fall when things are excessively sloped.

[18]Q Did you rely on any data?

[19] **[*141]** A No, I did not.

[20]Q Did you rely upon any test results or

[21]surveys of any sort in forming this opinion?

[22]A No, I just relied upon the codes.

[23]Q Did you rely upon anything else?

[24]A No.

[25]Q Did you rely upon anything else in forming
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[2]your opinion that the roughly 9 percent increase in

[3]slope was a substantial contributing factor to

[4]Mr. Melini's accident?

[5]A Repeat that.

[6]Q What did you rely upon in determining or

[7]forming your opinion that the roughly 9 percent

[8]increase in slope from what was permissible by code

[9]to what you claim exists in this ramp?

[10]MR. STEIN: Other than what he set forth

[11]in his reports?

[12]Q What else did you rely upon, if anything,

[13]in forming your opinion that that 9 percent increase

[14]was a substantial contributing factor?

[15]A If you read the codes, why the codes are

[16]in place, the codes are there to provide a minimum

[17]level of protection to the safety and health and

[18]welfare of the occupants. So if you go above and

[19]beyond what's required, I mean, if you violate those

[20]sections, then it's not just me, the building code

[21] **[*142]** is saying you're not providing this safe means and

[22]methods to permit safe egress.

[23]Q So other than the building code, in your

[24]experience, is that your answer? I'm just trying to

[25]figure out.
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[2]A Yeah. Other than the building code which

[3]is mandated in New York City, which most of us rely

[4]upon as good and accepted standards of practice for

[5]building construction, yeah, that's basically it.

[6]Q Do you know whether it's possible to test

[7]the conclusions, in your opinion, that the increase

[8]in slope from 12.5 to 22 degrees was a substantial

[9]or significant contributing factor to Mr. Melini's?

[10]A Do I know of ways to test it, no.

[11]Q Did you perform any tests at all to

[12]determine the validity of your opinion?

[13]A No.

[14]Q Why not?

[15]A Because, as I stated before, the building

[16]code mandates what the minimum requirements are. I

[17]cannot go down to the building department and tell

[18]them, oh, I did all these tests and you guys are

[19]wrong and the physics of this, I'm going to do it my

[20]way. The codes are the codes. The codes are

[21]provided for that very reason. You must **[*143]** conform to

[22]them; otherwise, what's the point in following

[23]anything within the code, just do anything you feel

[24]you need to do and do some tests on the side and say

[25]I'm not going to follow the code.

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[2]Q Can you state within a reasonable degree

[3]of engineering certainty that Mr. Melini's accident

[4]would not have happened if the ramp was

[5]12.5 degrees?

[6]MR. STEIN: Objection.

[7]Q Or percent actually.

[8]MR. STEIN: Objection. You can answer.

[9]A I didn't say 12.5 percent. I said 21.5.

[10]Q Can you state within a reasonable degree

[11]of engineering certainty that Mr. Melini's accident

[12]would not have occurred if the ramp was in

[13]compliance with the 1938 code?

[14]MR. STEIN: Objection.

[15]You can answer.

[16]A It would have been less likely.

[17]Q So you're saying it would be less likely

[18]but you don't know one way or the other it would

[19]have occurred or not?

[20]MR. STEIN: Objection.

[21]You can answer.

[22]A That's correct.

[23]Q How much less likely?

[24]A I don't have a percentage.

[25]Q Would you consider this ramp under the

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[2]same **[*144]** conditions that you've formed in your opinion

[3]to be unsafe if the slope of the ramp was, say,

[4]13 degrees?

[5]A Degrees or percent?

[6]Q Thirteen percent.

[7]A If the ramp was 13 percent, yes, it would

[8]still -- it would be in violation of the codes.

[9]Q If the ramp was 14 percent, would you

[10]consider the ramp to be unsafe?

[11]A Yes. Anything that violates the codes in

[12]my opinion is above what's necessary and should not

[13]be constructed, yes.

[14]Q Can you state with a reasonable degree of

[15]engineering certainty that this accident would not

[16]have occurred if the ramp was 13 percent?

[17]MR. STEIN: Objection.

[18]You can answer.

[19]A Would the accident not have happened if

[20]the ramp was 13 percent? I don't know that it's

[21]possible, it would have happened if it was 13

[22]percent.

[23]Q Same question, what happens if the ramp

[24]was 14 percent?

[25]MR. STEIN: Objection.

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[2]MR. FARBER: I'm allowed to ask a

[3]hypothetical.

[4]MR. STEIN: You're asking for a

[5]hypothetical answer could this accident have

[6]happened. Anything could happen. It's a

[7]patently improper **[*145]** question.

[8]MR. FARBER: I don't think it is.

[9]MR. STEIN: We can call the judge. You're

[10]asking him --

[11]Q Can you say within a reasonable degree of

[12]engineering certainty that the accident would not

[13]have happened if the slope of this ramp was

[14]14 percent?

[15]MR. STEIN: We can call the Court and ask

[16]for direction. Objection and I direct him not

[17]to answer. These questions call for

[18]hypothetical answers. They are not

[19]hypothetical questions. Anything could happen,

[20]anybody could fall on any surface at any time

[21]regardless of whether the ramp is sloped or

[22]not. It has nothing -- how you can answer the

[23]question?

[24]MR. McCORMACK: Experience questions

[25]for --

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[2]MR. STEIN: He's asking for a hypothetical

[3]answer.

[4]MR. FARBER: It's a hypothetical question.

[5]MR. STEIN: You're asking is it possible,

[6]is it -- the question you're asking is, do you

[7]have an opinion within a reasonable degree of

[8]engineering certainty as to whether or not it's

[9]possible that somebody falls.

[10]Q Assuming this ramp was 14 degrees, could

[11]you state within a reasonable degree **[*146]** of engineering

[12]certainty whether or not the slope of the ramp would

[13]have been a contributing factor to -- a significant

[14]contributing factor to Mr. Melini's accident?

[15]MR. STEIN: Objection. Direct him not to

[16]answer. Could it have caused somebody to fall?

[17]I guess it could have.

[18]MR. DiSOMMA: I need to make a statement.

[19]Any hypothetical question, by its definition,

[20]is going to result in an answer that is

[21]hypothetical. Just think it through,

[22]Counselor, your objection I think is misplaced

[23]here.

[24]MR. STEIN: My objection may be misstated

[25]but is not misplaced. You cannot ask an expert
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[2]if something is possible. Anything is

[3]possible.

[4]Are you saying within a reasonable degree

[5]of engineering certainty is it possible that

[6]Mr. Melini could still have fallen, of course,

[7]that's possible. And the ramp could have --

[8]it's an improper question. It's an improper

[9]question. That objection is sustained all the

[10]time.

[11]If you want to call the Court and ask for

[12]direction -- I understand you may be getting to

[13]a certain point, I'm saying this question as

[14]asked is improper. **[*147]** What do you want to know?

[15]Could somebody fall on a ramp? Dr. Melini fell

[16]on a 21-degree ramp, is it possible that he

[17]could have fallen on a 14-degree --

[18]MR. DiSOMMA: That's no longer the

[19]question. He now put it in correct form.

[20]Assume whatever it is that the attorney wants

[21]the expert to assume, then the expert can

[22]answer the question.

[23]MR. STEIN: That's not the question I

[24]heard.

[25]MR. DiSOMMA: The attorney could postulate
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[2]any set of circumstances.

[3]Q Let me ask you a question: You see in

[4]your report of Page 6, last sentence it says, "If

[5]this ramp was properly constructed in accordance

[6]with the above-mentioned building codes, this

[7]accident would not have occurred."

[8]How do you know that if the ramp was

[9]12.5 percent this accident would not have occurred?

[10]A Well, given the extensive nature of the

[11]slope of the ramp, it creates an unstable walking

[12]surface. I believe if the ramp was pitched

[13]properly, it's my opinion he wouldn't have fallen.

[14]Just my opinion.

[15]Q What do you base your opinion on if the

[16]ramp was 12.5 percent that the accident **[*148]** would not

[17]have happened?

[18]MR. STEIN: Asked and answered.

[19]You can answer it again.

[20]A Well, my response is if this ramp was

[21]built according to codes, which the codes represent

[22]safe means of egress, that a safe means of egress

[23]would have been provided to the plaintiff and it's

[24]my opinion I don't feel the accident would have

[25]happened.
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[2]Q In your experience, are you aware of

[3]accidents that occur or slips and falls that occur

[4]on ramps and/or stairs that are in compliance with

[5]code?

[6]A There may be. I've never been contacted

[7]on one.

[8]Q Are you saying that every slip and fall or

[9]trip and fall or a stair or ramp could only occur if

[10]the ramp or stair is not in compliance with the

[11]code?

[12]A No. I'm just saying to you that in my

[13]history of doing these things on ramps, I have never

[14]encountered an accident where someone slipped on a

[15]ramp that was within the code requirements.

[16]Q Do you know one way or another whether

[17]that exists, people slip on a ramp that is in

[18]compliance with the code?

[19]MR. STEIN: It asks him to speculate as to

[20]whether **[*149]** something exists.

[21]MR. FARBER: Well, he speculates that the

[22]accident would not have happened if it was --

[23]MR. STEIN: You're asking him to speculate

[24]whether it exists, if somebody ever fell on a

[25]ramp.

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[2]Read the question back.

[3](Requested testimony read)

[4]Q What is your opinion that the accident

[5]would not have happened if this ramp was

[6]12.5 percent based upon?

[7]MR. STEIN: Asked and answered.

[8]You can answer.

[9]MR. McCORMACK: Other than the code.

[10]A Other than the code, the code that we all

[11]refer to, other than our code which all engineers

[12]and architects refer to?

[13]MR. STEIN: You're not participating in

[14]this deposition. I'll make a statement, we'll

[15]call the Court.

[16]MR. FARBER: First of all, I represent two

[17]clients. He can represent the other client.

[18]I'm not going to get into it.

[19]Q In any event, are you saying that an

[20]accident cannot -- a condition on a stair or a ramp

[21]that is in compliance with the code cannot be a

[22]contributing factor or significant contributing

[23]factor to a slip and fall?

[24]MR. STEIN: Note my objection. **[*150]**

[25]You can answer.

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[1]

[2]A I don't understand the question.

[3]Q Are you saying that if a ramp is in

[4]compliance with the code, that it could not be a

[5]contributing factor or significant contributing

[6]factor to a slip and fall accident that occurs on

[7]that ramp?

[8]A Sure it could be.

[9]Q So then is it your opinion based that if

[10]this ramp was in compliance with the code the

[11]accident would have not happened, how do you know

[12]that?

[13]A Well, do I know that for a fact? No, I

[14]don't know that for a hundred percent fact that he

[15]wouldn't have fallen. But given the severity of the

[16]ramp, it is my opinion that that ramp was so steep,

[17]if it was not as steep and within the provisions of

[18]the code, it is my opinion he would not have fallen.

[19]Q Can you state to a reasonable degree of

[20]engineering certainty that if that ramp was in

[21]compliance with the code that you say that this

[22]accident would not have happened?

[23]MR. STEIN: Objection. Asked and

[24]answered.

[25]Q I'm asking if you can state with a
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[1]

[2]reasonable degree of engineering certainty.

[3]A Yeah, **[*151]** I find that in ramps that are

[4]constructed properly, people do not fall just

[5]randomly than in ramps that are constructed

[6]properly.

[7]Q Do you have any data or tests or surveys

[8]to substantiate that opinion?

[9]A No, I do not.

[10]Q Have you ever published any articles with

[11]regard to the conditions of ramps or slope of ramps

[12]and how they relate to slip and fall accidents?

[13]A No, I have not.

[14]Q Are you aware of any such articles?

[15]A Not off the top of my head, no.

[16]Q At any point in time since you were

[17]retained until today, did you ever attempt to

[18]recreate the accident?

[19]A No.

[20]Q Are you aware of whether there was any

[21]biomechanical or has been any biomechanical testing

[22]done with regard to any opinions that you may have

[23]set forth in your report?

[24]A No.

[25]Q You testified earlier that there are many
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[1]

[2]factors that can contribute to a fall, do you recall

[3]testifying to that?

[4]A Yes.

[5]Q Can you tell me what factors contribute to

[6]a fall?

[7]A Could be improper lighting -- what type of

[8]fall?

[9]Q A fall on **[*152]** a sloped surface.

[10]A Could be improper lighting, could be a

[11]foreign substance on the subsurface, could be a

[12]coating that's applied, could be slip resistivity of

[13]the surface, the slope of the grade, as we've been

[14]berating here.

[15]Q Anything else?

[16]A There may be a few other things, I just

[17]can't recall them right now.

[18]Q What about the physical condition of the

[19]person who falls?

[20]A That could contribute, but the building

[21]codes don't say this is only for able-bodied people

[22]or people who can see the -- the codes are meant to

[23]be general for everybody.

[24]Q What about the type of footwear?

[25]A Codes don't stipulate that either.

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[1]

[2]Q Is the type of footwear something that can

[3]contribute to a slip and fall?

[4]A Sure. The type of footwear can contribute

[5]to a slip type of fall, sure.

[6]Q What about a person's physical condition

[7]of their muscles?

[8]MR. STEIN: Asked and answered.

[9]You can answer it again.

[10]A Yeah, I mean, there are a whole bunch of

[11]factors dealing with the person themselves that can

[12]contribute to the fall. The **[*153]** building code, which is

[13]what I was retained to cite, doesn't break down

[14]which codes apply to people who are wearing flip

[15]flops or which sections of the codes apply to people

[16]who walk on one leg and they have crutches. It's

[17]based on general accepted practices, it's minimal

[18]practices.

[19]Q Were you retained to give an opinion as to

[20]whether or not the condition of the ramp caused

[21]Mr. Melini's fall?

[22]A Well, I was originally retained to

[23]determine what was wrong with this ramp, and then I

[24]opined from what I found that this ramp would be a

[25]contributing factor due to the excessive sloping.

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[1]

[2]I'm not saying it's the sole factor, I'm saying it's

[3]a contributing factor.

[4]Q Before forming your opinion, did you

[5]review any legal documents in this action, the

[6]summons and complaint?

[7]A No.

[8]Q Did you review any interrogatory

[9]responses?

[10]A No.

[11]Q Did you review Mr. Melini's deposition

[12]testimony?

[13]A No.

[14]Q Did you review any medical records?

[15]A No.

[16]Q I want you to assume that the ramp has

[17]been used by people going up and down the **[*154]** ramp on

[18]thousands of occasions and there's been, no instances

[19]of anyone falling on that ramp. Will that change

[20]your opinion in any way as to whether or not this

[21]ramp is unsafe?

[22]A No reported instances, right?

[23]Q I'm asking you to assume what I just asked

[24]you to assume.

[25]A Well, in the history of the ramp, zero

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[1]

[2]people fell on the ramp, you're saying the ramp

[3]would be safe? I'd say no, that's why the codes

[4]exist. All it takes is one person to fall.

[5]Q Is the slope of the ramp, in your opinion,

[6]something that's a structural component of that

[7]garage?

[8]A The slope of the ramp?

[9]Q The -- yeah, the slope of the ramp.

[10]A I don't know if a measurement is

[11]considered to be anything except just a number of --

[12]Q Well, is the physical condition of the

[13]ramp in how it's constructed considered something

[14]structural?

[15]A Well, I would say the ramp itself would be

[16]a structural component in the building.

[17]Q I thought you earlier testified that you

[18]had acted as an expert in other cases with regard to

[19]evaluation of slopes and ramps; am I correct? **[*155]**

[20]A Yes.

[21]Q Personal injury actions?

[22]A Yes.

[23]Q In those, were you ever qualified by any

[24]court as an expert witness?

[25]A Yes, I believe I have.

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[2]Q In what actions, in what courts?

[3]A I don't know, I'd have to look that up.

[4]Q Do you know if it was state court or from

[5]a --

[6]A Pretty sure the state.

[7]Q In New York?

[8]A Yes.

[9]Q Do you know if it was in New York City

[10]or --

[11]A I don't know, I'd have to look that up.

[12]Q What would you have to look at?

[13]A My file of cases, which I believe was

[14]exchanged.

[15]Q I may have those.

[16]Do you have any knowledge of any

[17]other accidents that occurred on the ramp?

[18]A No.

[19]Q In your opinion as an engineer, would it

[20]be possible to change the slope of this ramp within

[21]the confines of its present existing condition?

[22]A Well, I didn't evaluate it for those

[23]purposes.

[24]Q You don't have an opinion one way or the

[25]other?

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[2]A Not at this time, no.

[3]Q Based upon what you know in the conditions

[4]that exist, do you have any **[*156]** opinion as to whether or

[5]not the slope of the ramp could be changed if it had

[6]to remain in its existing confines?

[7]A I did not measure it for those purposes to

[8]evaluate it, but there's, you know, you don't

[9]necessarily have to change the slope, you could

[10]provide other means of egress.

[11]Q You could provide other means of egress

[12]and that would not make the slope of the ramp in

[13]violation of any building codes, in your opinion?

[14]A No, I've been in many garages where they

[15]don't want you on the ramp because of the liability

[16]of vehicles driving up and down the ramp. So they

[17]have a separate stairwell or elevator or something

[18]else that allows you to get from the below grade

[19]level to the street level.

[20]Q You said this building is -- the 1938

[21]building code is applicable to the conditions of

[22]this garage; is that correct?

[23]A That's correct.

[24]Q And after 1938, a new revision to the code

[25]came out in 1968; is that correct?

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[2]A That's correct.

[3]Q Assuming there were no changes to the

[4]garage after 1968 and assuming that there were more

[5]stringent requirements **[*157]** for, let's say, the slope of

[6]the ramp? Or, let's say, less stringent

[7]requirements for the slope of the ramp, less

[8]stringent requirements, what would your opinion --

[9]would your opinion change if the new code had less

[10]stringent requirements than the old code under which

[11]the building was constructed?

[12]MR. STEIN: Which opinion?

[13]Q That this ramp violated the code.

[14]A If they had less stringent --

[15]MR. STEIN: Just note my objection. Can

[16]you specify what the new requirement would be?

[17]Q Say it was 22 degrees or percent.

[18]A Well, if there was some change in the

[19]building code that permitted a slope of 21, 22, 23

[20]percent, then yeah, I think my opinion would change,

[21]but it hasn't. It's -- it's stayed essentially the

[22]same, as far as I know.

[23]Q What happens if a condition exists in a

[24]building and the -- it's in compliance with the

[25]then-existing code when it's built and then a new

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[2]code comes out and the requirements become more

[3]stringent, and now if you evaluated that building or

[4]that condition in reference to the new code it would

[5]be a violation.

[6] **[*158]** Do you understand?

[7]A Yeah.

[8]Q Let me ask you the question. Would it be

[9]your opinion that that condition now that it

[10]violates the new code is unsafe?

[11]A It depends on what condition you're

[12]talking about.

[13]Q Well, if it's a condition with regard to

[14]stairs.

[15]A Okay, and what part of that condition?

[16]Q Of maybe the maximum riser height.

[17]A Okay.

[18]Q And if a stairway existed was built in

[19]compliance with an old code and then the new code

[20]said you have to have riser heights, you know, no

[21]more than X-inches, which happens to be smaller than

[22]the requirement of the old code, would you consider

[23]that condition now unsafe?

[24]A No. If there were some reasoning behind

[25]them changing the code, they're going to change the

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[2]code most likely to the side of caution where it's

[3]going to yield in a safer product. They rarely

[4]change the code to result in something that's less

[5]safe.

[6]Q No. My question is that now that the

[7]building which complied with the old code no longer

[8]complies with the new code, do you consider that

[9]condition in this case? **[*159]** In my hypothetical of that

[10]stair condition, do you consider -- would you

[11]consider that stair condition unsafe because it

[12]doesn't comply with the new code requirements?

[13]A It's not what I consider, it's also what

[14]the building code -- they're the ones that determine

[15]the safety requirements, so if they're changing the

[16]codes, they're saying that now this is what future

[17]buildings comply with. Times change, people change,

[18]we learn more about building construction.

[19]Q But I'm asking, would your opinion be that

[20]that condition is now, which was once considered

[21]safe because it complied with the code, now

[22]considered unsafe because it doesn't comply with

[23]that new code?

[24]A I'm not sure how to answer that question.

[25]Q What is it about that you can't answer?

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[2]A Well, the determination of the rules and

[3]regulations are not made by me, so I don't know if

[4]the changing of the code is going to make something

[5]less safe now than it was previously or vice versa.

[6]That's not for me to say. What I'm here to say is

[7]I'm here to look at a ramp, I'm here to measure the

[8]ramp, I'm here to **[*160]** determine that the ramp is within

[9]a certain code, whether it is or isn't.

[10]That's what I determined.

[11]Q In your report you said that the ramp is

[12]unsafe, and I asked you based upon what did you form

[13]that conclusion, and you said because it doesn't

[14]comply with the code.

[15]Do you remember that testimony

[16]generally?

[17]A Yes.

[18]Q Now, what I'm asking, in my hypothetical,

[19]if the stairway complied with the, let me just say

[20]1938 code, and then the requirements of new

[21]stairways was changed in the 1968 code, would you

[22]consider that stairway built under the 1938 code

[23]unsafe?

[24]A I would say it would be unsafe by today's

[25]standards. When it was constructed it was permitted
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[2]to be constructed in accordance with the codes at

[3]that time. There are a lot of codes, older codes,

[4]they're silent on a lot of issues or less stringent

[5]on a lot of issues. So if something changed that

[6]changed the requirements, say the riser height of

[7]the stair, my response would be it was less

[8]restrictive now -- how could I say this -- I lost

[9]track of the question.

[10]Q If it was more **[*161]** restrictive now --

[11]A If it was more restrictive now, I would

[12]say given that it probably -- the current code

[13]probably would be a better barometer of good and

[14]safe practices.

[15]Q You would consider that stairway to be

[16]unsafe?

[17]A No, if -- I don't know if I'd consider it

[18]to be unsafe, it's not in compliance with the codes.

[19]It depends on what you're talking about. If they

[20]changed so drastically, it might be my opinion that

[21]it might be the wrong decision upon the

[22]municipality. I've never seen that case. I've

[23]never seen a change so drastically to yield in a

[24]condition which is going to make conditions less

[25]safe. I've never been across that, I don't know how
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[2]to answer that.

[3]Q I'm asking if the requirement was being

[4]more stringent so if it said the riser height in

[5]1938 could be 7 inches, now it says the maximum

[6]riser height could be 6 inches, presumably they

[7]determine 6 inches would be more safe if that's what

[8]the code --

[9]A If the new codes have changed something,

[10]then I would defer to the codes by saying if that's

[11]what they're implying is a safe condition, **[*162]** then I

[12]would say, yes, that the older codes probably

[13]wouldn't represent a safe condition. But it's not

[14]the obligation of the building owner to go through

[15]and rebuild their whole building because a whole new

[16]code was developed.

[17]That's why you had provisions that

[18]allow for the lawful existence for the buildings to

[19]exist; otherwise, all these buildings from 1915, who

[20]don't have any sizement requirements, they're not

[21]going in there and redoing their whole buildings and

[22]ripping them down and rebuilding, it's not

[23]structurally practical. It is safer for buildings

[24]to be designed for sizement --

[25]Q I'm not asking you if it's safer. I'm
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[1]

[2]asking now do you consider those buildings unsafe?

[3]A Well, as I just was trying to explain, if

[4]they're more restrictive codes, I would say those

[5]buildings would not be as safe as the newer

[6]buildings that were designed if there were more

[7]restrictive codes.

[8]Q I'm asking do you consider them to be

[9]unsafe?

[10]MR. STEIN: Asked and answered.

[11]Give it one more shot, if you can answer

[12]the way he's asking it.

[13]A It depends **[*163]** on what specific -- like I

[14]said, the sizement retrofit, these buildings that

[15]are not designed unsafe. If there's an earthquake,

[16]they would be. They're not going to go back and

[17]change them, you know, if there -- if the hand rail

[18]requirements were 22 inches and now they're

[19]34 inches, they'd be unsafe for a little person. I

[20]mean, there's a whole bunch of different scenarios

[21]that wouldn't make something more unsafe possibly.

[22]Just because the requirements change doesn't mean

[23]they're making it more unsafe. The riser heights

[24]doesn't make one different than the other.

[25]Q I asked you a question before about which

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[2]case you were qualified as an expert witness in with

[3]regard to the slope of a ramp, do you know which

[4]case?

[5]A Yes. It was David Pokotilow,

[6]P-O-K-O-T-I-L-O-W, it was a sidewalk ramp, but I

[7]don't know if that really applies, curb ramp.

[8]Q A curb ramp, is that at a corner?

[9]A Not necessarily at a corner, but yes, that

[10]type of ramp.

[11]Q Like a handicapped curb ramp?

[12]A Yes.

[13]Q And did that case involve excessively --

[14]A I don't know. I have **[*164]** to look at the facts

[15]of the case.

[16]Q I think on that piece of paper it

[17]indicates some things --

[18]A It said, "Trip and fall on edge of

[19]concrete ramp of sidewalk."

[20]Q Based upon that, do you think it had

[21]anything to do with the slope of the ramp?

[22]A I don't want to answer on speculation. It

[23]may have been a portion of the testimony. I'm not

[24]quite sure.

[25]Q To your knowledge, did the surface of the

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[1]

[2]ramp play any role in Mr. Melini's accident?

[3]A You mean the surface characteristics?

[4]Q Yeah.

[5]A No.

[6]Q Just subject to follow-up, I'm finished.

[7]FURTHER EXAMINATION BY

[8]MR. DiSOMMA:

[9]Q Can you tell me whether this particular

[10]ramp is considered part of the structure of the

[11]building or not?

[12]A Well, the slab, concrete slab is

[13]considered a structural element of the building,

[14]it's a load-bearing member.

[15]Q And how about the surface of the ramp,

[16]that which is above the concrete slab?

[17]A The surfacing of the ramp?

[18]Q Is that part of the structure of the

[19]building?

[20]A You mean the asphalt?

[21]Q **[*165]** The asphalt or the -- let's talk about the

[22]asphalt. Let's talk about that first. Is that part

[23]of the structure of the building?

[24]A As I define structure of the building, the

[25]asphalt itself, that would not be considered a
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[2]structure, just the surfacing on top of the

[3]structure.

[4]Q And then in looking at Defendant's

[5]Exhibit D marked today, the bottom photograph, the

[6]lower part of the ramp in that photograph, it has a

[7]concrete surface?

[8]A Correct.

[9]Q Would the concrete surface of the ramp be

[10]considered part of the structure of the building?

[11]A Yeah. I would consider if that's the

[12]surface on top of the ramp, that would be considered

[13]part of the structural ramp.

[14]Q But the asphalt shown in D would not be

[15]part of the structure of the building; is that

[16]correct?

[17]A In my opinion, the structural member is

[18]when it takes load, and the main load, the

[19]load-bearing member of the ramp is the concrete slab

[20]below. If you put a coating on it or any kind of

[21]covering on, the covering of the coating wouldn't be

[22]structural, it's just the coating. That doesn't

[23] **[*166]** serve for the structural purpose.

[24]Q You don't know if Mr. Melini fell on the

[25]asphalt surface or on the concrete surface; is that
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[1]

[2]correct?

[3]A I wasn't there, but I believe, from what I

[4]was told, was the asphalt portion. I'm not

[5]positive. I believe that's what I was told. I

[6]wasn't there, so…

[7]Q Did you do any type of check to see if any

[8]violations were issued to the property relative to

[9]the ramp?

[10]A Yes.

[11]Q Were any violations issued?

[12]A No.

[13]Q Where did you do that check?

[14]A We did it online in the BIS. Usually

[15]complaint -- the building department does not walk

[16]around and randomly make checks. If a complaint is

[17]made, they may come out and do a check.

[18]Q What is the BIS website?

[19]A Building Information System.

[20]Q Now, remember before we talked about the

[21]1915 building code?

[22]A Yes.

[23]Q There is such a code; am I correct?

[24]A Yeah.

[25]Q And then there's a 1938 building code that

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[2]we have been discussing, correct?

[3]A Correct.

[4]Q Now, if the 1938 building code is not

[5]applicable **[*167]** to this ramp, do any of your opinions

[6]about this ramp change?

[7]A If it was determined that this ramp was

[8]built prior to 1938 or if it was altered before

[9]1968, I'd have to evaluate the codes in place at

[10]that time and tell you where they would violate, if

[11]they do violate.

[12]But I know that the '38 code and the

[13]'68 code are violated with the construction of this

[14]ramp.

[15]Q But in terms of your short answer, if the

[16]193 8 code is not applicable to this ramp, do your

[17]opinions change?

[18]MR. STEIN: Hold on. Do you want to ask

[19]him if the 1915 building code applies?

[20]MR. DiSOMMA: I'm not asking him that.

[21]MR. STEIN: Because he answered that

[22]question by saying, if you want to read it

[23]right back, that it violates both --

[24]MR. DiSOMMA: I'm not asking him that.

[25]What I'm asking him is -- I'll just ask it.

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[2]Q If you could just answer my question, just

[3]please try to do it with a yes or no.

[4]If the 1938 building code does not

[5]apply, just tell me yes or no, do any of the

[6]opinions rendered in your reports change?

[7]A Yes.

[8]Q During your **[*168]** career, have you ever

[9]participated in any type of committee that revised,

[10]amended or supplemented the New York City Building

[11]Code?

[12]A No.

[13]Q In rendering the opinions that are

[14]contained in your reports, did you assume that

[15]Mr. Melini was walking up or down the ramp at the

[16]time of his accident?

[17]A I believe, I assumed he was walking into

[18]the garage, down the ramp.

[19]Q I'm going to ask you to look at a

[20]photograph marked as Exhibit D, the bottom

[21]photograph, because there's one exhibit tab for both

[22]photographs, the bottom one that shows the ramp.

[23]Do you see that, sir?

[24]A Yes.

[25]Q Assume at the time of Mr. Melini's

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[1]SGOTT SILBERMAN

[2]accident that he was walking from left to right, do

any of your opinions change?

A No.

Q In looking at Defendant's Exhibit G, it shows the Smart Tool, correct?

A Yes.

Q The Smart Tool is rectangular?

A Yes.

Q In order to use the Smart Tool to measure the slope, did you need to place it parallel to what appears to be a yellow curb?

A Yes, if it's placed in the direction **[*169]** that I want to measure the slope, correct.

Q In looking at that photograph, what if you place the Smart Tool perpendicular to the yellow curb, would that result in any change in the reading on the Smart Tool?

A Yes, it would.

Q In what way?

A It would measure the slope in which the direction was orientated.

Q In this instance, based upon your experience, would it be a number greater than shown on the digital read out likely or a grade less than 197

the number shown on the digital read out? If you don't know, tell me you don't know.

A I don't know. But because you're going perpendicular, it would probably be close. I don't -- I don't want to speculate, it's only meant to be put on a flat surface in the direction of the pitch that you want to measure. Normally you don't place it opposite the direction of the slope. It's just you don't take readings that way.

Q Have you ever done that?

A When I measure ramps, there's no perimeter for the ramps in the transverse, which is down the middle.

Q In looking at Exhibit G, would you **[*170]** agree that this is a close-up photograph?

A Yes.

Q In terms of Exhibit G, if you could compare it to the bottom photograph of Exhibit D, can you tell me which surface the Smart Tool is resting on, the concrete part of the ramp or the asphalt part of the ramp?

A The asphalt.

Q With regard to the photograph marked as Exhibit G, you have this photograph stored digitally 198

somewhere?

A Yes.

Q Does that digital file have some type of label or identification?

A There's a file name attributing to it, the camera gives it a file name.

Q What file name has it been given?

A I have to look it up. I don't know.

Q In any of your other investigations, have

[11]you taken photographs such as Exhibit G of any other

[12]ramps? In other words, in your work, how do we know

[13]that -- withdrawn.

[14]These photographs, Exhibit G,

[15]Exhibit I, Exhibit K, if you could just look at

[16]those three, how do you know that they were taken at

[17]the location that is involved in this lawsuit?

[18]A Because I took them.

[19]Q Is there any other information **[*171]** in your

[20]possession that confirms that those three

[21]photographs were actually taken at the location?

[22]And the reason why I'm asking is because obviously

[23]they're close-up photographs.

[24]A Well, there are certain site elements of

[25]the yellow curb and the white walls and the

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[2]cinderblock that have the same characteristics of

[3]the wide angle shots that were taken.

[4]Q Are there any other similar site elements

[5]from any of your other investigations at different

[6]locations?

[7]A No.

[8]Q Thank you. I have no other questions.

[9]MR. FARBER: I'm good.

[10]

[11](TIME NOTED: 3:30 p.m.)

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200

[2]A C K N O W L E D G M E N T

[3]UNITED STATES DISTRICT COURT)

[4]SOUTHERN DISTRICT OF NEW YORK)

[5]

[6]I, SCOTT SILBERMAN, hereby

[7]certify that I have read, the transcript of my testimony

[8]taken under oath in my deposition of November 6, 2008; that

[9]the transcript is a true, complete record of my testimony,

[10]and that the answers on the record as given by me are true

[11]and correct.

[12]

[13]_____

[14]SCOTT SILBERMAN

[15] **[*172]** Signed and subscribed before me this ___ day of _____,

[16]20__.

[17]

[18]_____

[19]Notary Public, State of New York

[20]

[21]

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201

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202

[2]C E R T I F I C A T I O N

[3]

[4]I, Kelly A. Schroder, a Shorthand Reporter

[5]and Notary Public of the State of New York, do

[6]hereby certify:

[7]That the witness whose examination is

[8]hereinbefore set forth, was duly sworn, and that

[9]such examination is a true record of the testimony

[10]given by such witness.

[11]I further certify that I am not related to

[12]any of the parties to this action by blood or

[13]marriage; and that I am in no way interested in the

[14]outcome of this matter.

[15]IN WITNESS WHEREOF, **[*173]** I have hereunto set my

[16]hand this 6th day of November, 2008.

[17]

[18]

[19]

[20]

/s/Kelly A. Schroder

[21]Kelly A. Schroder
Stenographic Reporter

[22]

[23]

[24]

[25]

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