

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF SUFFOLK : PART 37

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3 ILDO LOPES,

INDEX No.  
605044/2018

4 Plaintiff,

5 -against-

**CONTINUED**  
**JURY TRIAL**

6 COUNTY OF SUFFOLK and  
7 GIBSON & CUSHMANE CONTRACTING LLC,

8 Defendants.

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9 **Testimony of Adam Bender, M.D.**

10 **Tuesday, November 19, 2024**  
11 Suffolk County Supreme Court  
Riverhead, New York

12 B E F O R E: HONORABLE JOSEPH FARNETI  
Acting Supreme Court Justice

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1 (Time noted: 10:14 A.M.)

2 COURT OFFICER: All rise.

3 THE CLERK: The Supreme Court of Suffolk County,  
4 State of New York, Trial Part 37 is now in session, the  
5 Honorable Joseph Farneti presiding.

6 THE COURT: Case on trial continued.

7 THE CLERK: Lopes against Suffolk.

8 All Counsel present.

9 THE COURT: Are we ready to proceed, Counsel?

10 MR. THOMAS: Yes, Judge.

11 MR. GRILLO: I apologize for not bringing it up  
12 sooner...

13 THE COURT: It's all right, Counsel. Go ahead.

14 MR. GRILLO: Just as we were about to begin, I was  
15 going to have the reports pre-marked for identification  
16 purposes only. Dr. Bender issued three reports.

17 THE COURT: Are they cumulative?

18 MR. GRILLO: They are.

19 THE COURT: Do they build on each other? Is there  
20 one that contains all the information?

21 MR. GRILLO: Yes.

22 THE COURT: Every --

23 MR. GRILLO: I was literally going to do this and  
24 you came out. I apologize.

25 THE COURT: No problem. But as long as we all

1 agree that the most recent iteration encompasses all the  
2 priors, just in case there's any other purpose Counsel wants  
3 to put them to.

4 MR. GRILLO: I just want to show Counsel these two,  
5 but the first report --

6 THE COURT: I fully understand.

7 MR. GRILLO: The initial report was dated, I  
8 believe, May 4th, 2021. I spoke to Mr. Thomas. He says he  
9 doesn't have it. I've got an affidavit of service  
10 from Sacks and Sacks --

11 THE COURT: But is that report the most recent?

12 MR. GRILLO: No, that's the first.

13 THE COURT: So that the most recent would contain  
14 all the information that's in the two priors?

15 MR. GRILLO: Yes, sir.

16 THE COURT: With no other changes, they were just  
17 additions?

18 MR. GRILLO: Correct.

19 THE COURT: And you can make that representation as  
20 an officer of the Court?

21 MR. GRILLO: Yes, I can. And confirmed by  
22 Dr. Bender.

23 THE COURT: Do you need a moment?

24 MR. THOMAS: Judge, I have what purports to be the  
25 most recent exchange from Goldberg Segalla dated October 18,

1 2024. And I have an exchange from predecessor counsel,  
2 Russo Gould, dated October 5, 2021.

3 THE COURT: And which is the one that's missing  
4 from your --

5 MR. GRILLO: The very first one, Your Honor.

6 THE COURT: Which is?

7 MR. GRILLO: May 4th.

8 MR. THOMAS: Well, May 4th, 2021 was the exam date.  
9 That's what it says on this report.

10 THE COURT: Well, compare what you believe to be  
11 the May 4th report with the October 5th report just to make  
12 sure they're not the same document. I've seen that happen  
13 before.

14 Off the record.

15 (Discussion held off the record.)

16 THE COURT: On the record. For purposes of the  
17 record, Mr. Grillo, do you have something you'd like marked  
18 for identification?

19 MR. GRILLO: Yes, Your Honor.

20 THE COURT: Would that be the report of Dr. Bender  
21 dated 18 October of 2024?

22 MR. GRILLO: Yes, sir, Your Honor.

23 THE COURT: You represent on the record that that  
24 report is a compilation of not only the most recent  
25 information, but also contains within it all the content of

1 the May 4th, 2021 report as well as the October 5th, 2021  
2 report. Is that accurate?

3 MR. GRILLO: Yes, sir.

4 THE COURT: Is that sufficient, Mr. Thomas?

5 MR. THOMAS: Yes, it is, Judge. Thank you.

6 THE COURT: All right. For purposes of the record.

7 MR. GRILLO: Thank you, Judge.

8 Can I just step out to let the Doctor know?

9 THE COURT: Absolutely.

10 COURT OFFICER: Defendant's Exhibit T.

11 THE COURT: Defendant's Exhibit T for  
12 identification only.

13 Off the record.

14 (Discussion held off the record.)

15 THE COURT: Let's bring the panel in.

16 (There was a brief pause, and proceedings resumed  
17 as follows:)

18 COURT OFFICER: All rise, jury entering.

19 (Whereupon, the Jury entered the courtroom.)

20 THE COURT: All rise, please.

21 Good morning. All jurors are present. Does  
22 Counsel waive the roll call.

23 MR. THOMAS: So waived.

24 MR. GRILLO: So waived.

25 MR. PUZO: So waived.

1 THE COURT: We'll let the jury settle in. Give us  
2 a moment.

3 Again, welcome back. It's my understanding that  
4 we're going to hear from the defense medical witness, I  
5 believe Dr. Bender?

6 MR. GRILLO: Yes, Your Honor.

7 THE COURT: You may call your witness.

8 MR. GRILLO: With the Court's permission, thank  
9 you, Your Honor. At this time Defendant Cushman calls  
10 Dr. Adam Bender.

11 THE COURT: Dr. Adam Bender, please.

12 (Whereupon, the Witness entered the courtroom.)

13 COURT OFFICER: Just be careful stepping up.  
14 There's two steps. When you get to the top remain standing,  
15 raise your right hand, and face the clerk.

16 **A D A M B E N D E R, M.D., after having been**  
17 **duly sworn by the Clerk of the Court, was examined**  
18 **and testified as follows:**

19 THE CLERK: You can be seated.

20 And then state your name for the record and your  
21 business address, please.

22 THE WITNESS: Adam Bender, 1150 Park Avenue, New  
23 York, New York 10128.

24 THE COURT: Good morning, Dr. Bender.

25 THE WITNESS: Good morning.

1 THE COURT: If you draw that microphone a little  
2 nearer to you, it will do a good job of picking up your  
3 testimony. It's important that everyone hears what you have  
4 to say.

5 Should there be an objection during a question or  
6 during an answer, please stop speaking, I'll make my rulings  
7 on any objections, and I'll instruct you further as  
8 necessary as we go along. Do you understand, sir?

9 THE WITNESS: Yes.

10 THE COURT: Thank you, Doctor.

11 Mr. Grillo?

12 MR. GRILLO: Thank you, Your Honor.

13 THE COURT: Go ahead.

14 DIRECT EXAMINATION BY

15 MR. GRILLO:

16 Q Good morning, Dr. Bender.

17 A Good morning.

18 Q Dr. Bender, are you licensed to practice medicine in  
19 New York State?

20 A Yes.

21 Q And can you tell the Members of the Jury, when did you  
22 receive your medical license?

23 A I graduated medical school in 1968.

24 Q And do you have a particular specialty in the field of  
25 medicine?

1 A Yes.

2 Q Can you tell the Members of the Jury what your field of  
3 specialty is?

4 A I'm a neurologist and I have a subspeciality in  
5 diseases involving nerves and muscles.

6 Q Can you tell us a little bit about the field of  
7 neurology? What does it entail?

8 A Neurology entails the diagnosis and treatment of  
9 conditions involving the brain, the spinal cord, the nerves and  
10 the muscles. We don't operate, but we basically determine what  
11 the medical condition is and then treat it medically. And in  
12 critical care we're called upon to advise surgeons as to whether  
13 or not surgery is necessary.

14 Q Now Dr. Bender, can you briefly describe your  
15 educational background for the jury?

16 A Yes. I graduated medical school from Columbia  
17 University College of Physicians and Surgeons in 1968. I then  
18 did an internship in internal medicine and a residency in  
19 internal medical at the Columbia University Service at Harlem  
20 Hospital. I then did a neurology residency at Columbia  
21 University Neurological Institute. And then did a fellowship in  
22 nerve and muscle diseases at the National Institutes of Health  
23 in Bethesda.

24 Q Thank you, Doctor.

25 And with respect to your educational background, can

1 you tell us a little bit about your medical training?

2 Withdraw. I should have asked something differently.

3 I'll withdraw that.

4 Can you tell us a little bit about, in your medical  
5 training, have you had occasion to teach at all?

6 A Yes.

7 Q Can you tell the Members of the Jury what your teaching  
8 experience is or has been?

9 A Yes. I am on the -- I'm an Associate Clinical  
10 Professor of Neurology at the Mount Sinai School of Medicine.  
11 I'm also on the attending staff at Lenox Hill Hospital where  
12 I've attended conferences and been a consultant.

13 Q And Dr. Bender, have you also published at all in the  
14 area of neurology?

15 A Yes.

16 Q Can you tell the Members of the Jury what types of  
17 publications you've authored?

18 A I've published approximately 50 papers mostly in the  
19 field of nerve and muscle diseases in neurology.

20 Q Thank you, Doctor.

21 Now, can you briefly describe what your current  
22 position is?

23 A I am currently on the staff, as I mentioned, of Mount  
24 Sinai Hospital. I'm an Associate Clinical Professor of  
25 Neurology. I'm also an attending neurologist at the Lenox Hill

1 Hospital in New York. And I also have a private practice.

2 Q That was going to be my next question. Do you  
3 currently maintain a private practice?

4 A Yes, I do.

5 Q Can you tell the Members of the Jury a little bit about  
6 that?

7 A I see private patients who have conditions involving  
8 the nervous system. I also do medicolegal work where I see  
9 patients who are involved in accidents, or in malpractice  
10 situations, and I am called upon to make a judgment whether or  
11 not there's a neurological problem as a result of those  
12 situations.

13 Q And with respect to your current -- well, I'll ask it  
14 this way. Are you currently board certified?

15 A Yes.

16 Q And how long have you been board certified?

17 A Since 1976.

18 Q And Doctor, what does it mean to be board certified?

19 A Means you'd have to complete a training in the  
20 specialty, such as neurology, and then stand for an examination.

21 When I was qualified it required both a written and an  
22 oral examination where we actually had to examine patients in  
23 front of examiners to basically determine whether or not we were  
24 qualified to consider ourselves board certified.

25 For many years I was actually an examiner for the

1 American Board of Psychiatry and Neurology where I would judge  
2 whether candidates would be qualified.

3 Q And Doctor, what is your board certification in? What  
4 specialty or specialties?

5 A In neurology.

6 Q Now, Dr. Bender, have you testified in court before?

7 A Yes.

8 Q And over the course of your career, can you tell the  
9 Members of the Jury approximately how many times have you  
10 testified in court before?

11 A Since 1995, approximately 106 times. I believe 106  
12 times.

13 Q And at present -- well, withdrawn. I'll ask it this  
14 way.

15 You testified earlier about doing legal work?

16 A Yes.

17 Q Representing -- having people come to you who are  
18 involved in litigation. Have you conducted legal work or legal  
19 evaluation, medical evaluations for legal proceedings involving  
20 both plaintiffs and defendants?

21 A Yes.

22 Q And can you explain, is there a percentage of your work  
23 that deals with plaintiffs, where you've been called on behalf  
24 of a plaintiff, versus a percentage of your work where you  
25 worked and been called on behalf of a defendant?

1           A     Yes.  It's over -- in personal injury cases it's over  
2  80 percent for the defense.  And in malpractice cases it's  
3  approximately 50/50.  I testify on both sides.

4           Q     So let's just talk about in this case.  This is not a  
5  medical malpractice case, correct?

6           A     That's correct.

7           Q     And this is the type of case where you obviously are  
8  retained by the defendant in this case, correct?

9           A     Um --

10          Q     You're testifying on behalf of one of the defendants.

11          A     Yes, I am.

12          Q     Now, Doctor, how do you distinguish that from your work  
13  in medical malpractice cases where it's 50/50 percent?  Can you  
14  explain?

15          A     How do I distinguish it, what --

16          Q     These types of case that you're testifying on today.

17          A     Oh.  In malpractice cases it would be involving a  
18  patient who is suing a doctor for something that they feel was  
19  inappropriate, where in this case, in personal injury cases,  
20  it's a case where a claimant or a patient is injured and is  
21  claiming neurological problems, and I'm there to determine  
22  whether or not I feel there was a neurological problem as a  
23  result of that injury.

24          Q     Thank you, Doctor.

25                   And so, now, Doctor, in the 106 times that you

1 testified in court, which courts have you testified in? Courts  
2 in New York?

3 A New York. I think Florida. I believe once in  
4 Connecticut, I'm not sure, but mostly in New York.

5 Q And of the 106 times you testified in court, have you  
6 been qualified an as expert?

7 A Yes.

8 Q And in what specialty have you been qualified as an  
9 expert?

10 A Neurology.

11 Q In all the times that you testified since 1995 to the  
12 present, have you ever been denied expertise in a court of law?

13 A No.

14 MR. GRILLO: At this time I proffer the testimony  
15 of Dr. Bender as an expert in the field of neurology.

16 MR. THOMAS: No objection.

17 MR. PUZO: No objection.

18 THE COURT: Without objection.

19 MR. GRILLO: Thank you.

20 Q Now, Dr. Bender, in connection with your appearance  
21 here today, are you being compensated for your time?

22 A I'm being compensated for appearing today, not for my  
23 time.

24 Q How much are you being compensated for appearing today?

25 A \$10,000.

1 Q In addition to your retention in this case, in addition  
2 to coming to court and providing testimony, did you also  
3 generate reports relative to your retention in this case?

4 A Yes.

5 Q How many reports did you generate?

6 A Three.

7 Q And when you generated those reports, were you  
8 compensated for the time that it took you to generate those  
9 reports?

10 A Yes.

11 Q Can you estimate how much you billed for the three  
12 reports that you generated?

13 THE COURT: Doctor, if you have a file with you  
14 today, you may refer to it at any time.

15 THE WITNESS: Thank you.

16 THE COURT: You're welcome.

17 MR. GRILLO: Thank you, Your Honor.

18 A I initially charged \$1,500 for review of records and  
19 evaluation of the patients and preparation of a report. Then I  
20 charged additionally for review of additional medical records.  
21 And my original rate was \$800 per hour. Now it's \$900 per hour.  
22 I charged for a phone call for \$800. I charged for review of  
23 video surveillance for an hour, et cetera, but basically that's  
24 the total.

25 Q Now, Doctor, did there come a point in time that you

1 and I met relative to the instant litigation involving a  
2 claimant Ildo Lopes?

3 A Lopes (pronouncing), yes.

4 Q And do you recall, when you and I met, did we ever meet  
5 in person or did we talk over the phone?

6 A We originally talked over the phone.

7 Q And when did we meet in person?

8 A For the first time?

9 Q Yes.

10 A Today.

11 Q Now, Doctor, in conjunction with your retention, prior  
12 to conducting your examination of Mr. Lopes, did you conduct a  
13 review of his medical records?

14 A I did.

15 Q And if you have to refer anything --

16 MR. GRILLO: Your Honor, I think we have  
17 Dr. Bender's report that's been pre-marked for  
18 identification purposes only?

19 THE COURT: I.D.

20 COURT OFFICER: Defendant's T.

21 THE COURT: T, as in Thomas.

22 COURT OFFICER: T, as in Thomas, I.D. only  
23 presented to the Doctor.

24 Q Dr. Bender, I'm going to have you take a look at what's  
25 been previously marked for identification purposes only as

1 Defendant's T, as in Thomas, and ask you to take a look at that  
2 document.

3 A Okay. I have the identical copy of the document.

4 Q Okay. Well, to the extent -- do you have it there? I  
5 just want to make it for the record that's what you're going to  
6 be referring to if you need to, as Your Honor had said.

7 A Yes.

8 Q Can you briefly explain, prior to examining Mr. Lopes,  
9 what did you do with respect to -- which records did you review?

10 A Prior to examining him, initially I reviewed 12 medical  
11 records. Would you like me to list them all?

12 Q Sure.

13 THE COURT: If you're reading, Doctor, I'm just  
14 going to ask you to read slowly.

15 THE WITNESS: I'm reading from my report.

16 THE COURT: And I'd ask you to read slowly, sir.

17 THE WITNESS: Okay.

18 A A Verified Bill of Particulars, which is a list of all  
19 the claims that the claimant is making.

20 A Supplemental Verified Bill of Particulars, which is  
21 additional complaints.

22 A 50(h) hearing of Ildo Lopes dated April 2, 2018.

23 An examination before trial of Ildo Lopes dated  
24 September 25, 2020.

25 Records from the Fifth Avenue Surgical Center.

1 Records from the New York Presbyterian Hospital.  
2 Records from SurgiCore Surgical Center.  
3 Records from Health East Ambulatory Surgical Center.  
4 Reports from Alpha T MRI and Diagnostic Imaging.  
5 Report from Complete Medical Care Services of Dr. Aric  
6 Hausknecht.

7 Reports from Rehabilitation Center of New York from  
8 Dr. Jose Colon, and Dr. Abraham Vincanseri (phonetics), David  
9 Gutierrez, and Ashley Simela. And reports from Dr. Andrew  
10 Merola. That was what I initially reviewed.

11 Q Okay.

12 A And then I reviewed, subsequently, more records. Would  
13 you like me to mention those, too?

14 Q Sure. To the extent that they -- we'll talk about the  
15 subsequent records. I want to focus on primarily your meeting  
16 with Mr. Lopes.

17 A Yes.

18 Q When did that take place?

19 A On May 4th, 2021.

20 Q What was the purpose of your meeting with Mr. Lopes on  
21 that day?

22 A Basically to evaluate him to see if there was any  
23 neurological problem as a result of an accident that he said  
24 occurred on October 10, 2017.

25 Q And Doctor, can you take us through -- well, withdrawn.

1           Where did the examination of Mr. Lopes take place?

2           A     In my office, at 1150 Park Avenue in New York.

3           Q     Was there anyone else besides yourself and Mr. Lopes  
4 present when you conducted your examination?

5           A     Yes.

6           Q     Who else?

7           A     There was a Portuguese interpreter, and my -- an  
8 assistant from my office, Miss Jewel Mills.

9           Q     When you encountered Mr. Lopes in your office, how did  
10 you communicate with him?

11          A     Mr. Lopes, although we had the interpreter present,  
12 preferred to conduct the evaluation in English, for the most  
13 part. There was only one occasion where he needed to use the  
14 interpreter, but he understood English, and spoke it fairly  
15 well.

16          Q     Thank you.

17                Sir, can you tell us, after you met him -- take us  
18 through the examination; what he did, what you asked him, how he  
19 responded, et cetera?

20          A     Well, first I asked him about a prior accident that he  
21 had. He recalled that in that accident he was driving a  
22 truck -- driving when a truck struck him. And he didn't recall  
23 injuring his shoulder, but he did recall going to a hospital and  
24 having back pain.

25                He said he involved litigation of a lawsuit at that

1 time as well. I didn't have records available about that  
2 incident. I just had what he was telling me.

3 Q Okay. And then after you took that history from him,  
4 can you tell us a little bit about the examination; how it was  
5 conducted, the manner in which you went about it?

6 A The neurological exam?

7 Q Yes, sir.

8 A Okay. Initially I looked at his general appearance, in  
9 other words how he appeared, whether or not there was any scars  
10 or bruises or anything of that nature. And that was normal. I  
11 did his vital signs. His blood pressure was normal, 130/85.  
12 His pulse was 91. He appeared to be well-nourished, and his  
13 general appearance and skin were normal.

14 Q And Doctor, before we go any further, just for the  
15 Jury's edification, and the Court as well, you're reading from  
16 your report, correct? You're referring to it?

17 A Correct.

18 Q Can you tell the Members of the Jury, in conjunction  
19 with your examination, your physical examination of Mr. Lopes,  
20 when is this report prepared? When was it prepared?

21 A I basically -- at the day, the day that I saw him, at  
22 the time that I saw him, I basically immediately went back to my  
23 typewriter -- my computer, and put in all the information.  
24 Basically his examination was normal, so I basically did not  
25 record any abnormalities, but basically it was all recorded at

1 the time of the evaluation.

2 Q Did you record your findings and your report  
3 contemporaneously while you were doing the examination,  
4 immediately thereafter or something else?

5 A During the history-taking part of the exam where I ask  
6 him questions, which is also part of the neurological  
7 examination, I recorded it or put it into the computer as he was  
8 talking to me, yes.

9 Q And did you prepare any handwritten notes?

10 A No.

11 Q And you just said that as part of taking the history as  
12 part of his neurological examination, can you explain to the  
13 Members of the Jury why taking his history was part of the  
14 neurological examination?

15 A When you take a history, you ask details about what  
16 happened and you listen to the patient talking so you can tell  
17 whether his speech is normal, whether he understands your  
18 questions, and whether he's able to comprehensively give a  
19 history. This all reflects a lot on how his brain is  
20 functioning. If he's able to do that, then usually you have to  
21 be pretty normal to give an adequate history, to test your  
22 memory and test your speech, test your ability to name things.

23 Q Thank you, Doctor.

24 And based on your interaction and your taking a history  
25 of Mr. Lopes, did anything he say to you exhibit any type of

1 neurological abnormality?

2 A Not that -- no.

3 Q Okay. If you can continue with respect to after taking  
4 his vital signs, did you conduct a mental status test?

5 A I did.

6 Q Can you explain that?

7 A Basically it was a very crude mental status test where  
8 I had just asked him orientation, if he knew where he was. I  
9 tested his memory basically by asking him a few simple memory  
10 questions and basically by taking the history to see what he  
11 remembered.

12 And his cognitive function, again, in taking the  
13 history, I did not determine there was any cognitive dysfunction  
14 whatsoever. His speech was fluent. He put together sentences  
15 normally. There was no evidence of aphasia in that he  
16 understood everything I said, and he was able to speak normally  
17 without any difficulty.

18 Q And then I just want you to assume, during the course  
19 of this trial, Dr. Aric Hausknecht had testified that, when he  
20 spoke with Mr. Lopes, Mr. Lopes exhibited receptive aphasia.  
21 Would you agree with Dr. Hausknecht's assessment to a reasonable  
22 degree of neurological certainty as to whether or not Mr. Lopes  
23 exhibited any type of aphasia to you when you were speaking with  
24 him?

25 A I did not find any evidence of aphasia. As I said, the

1 only one situation was was there was one question that he  
2 required it translated into Portuguese because he didn't quite  
3 understand what I was asking him, but other than that -- and  
4 that's not really aphasia. That's just required a translator.

5 Q I want you to also assume, Doctor, that Dr. Hausknecht  
6 also testified that he communicated with Mr. Lopes either in  
7 English or in Spanish. Would you be able to testify to a  
8 reasonable degree of neurological and medical certainty as to  
9 whether or not not speaking to him in Portuguese could have  
10 contributed to a finding of receptive aphasia?

11 MR. THOMAS: Objection.

12 THE COURT: Overruled. I'll allow it.

13 You may answer, Doctor.

14 A It would be very difficult to make a judgment about  
15 aphasia in somebody who you're not sure if he's understanding  
16 your language.

17 Aphasia means -- implies that you understand the  
18 language, but you still don't understand what's being said at  
19 the time. So you really can't make a distinction.

20 If someone doesn't understand your language, you can't  
21 tell if there is receptive aphasia or not.

22 Q Thank you, Doctor.

23 At the time you spoke to Mr. Lopes, did he exhibit any  
24 signs of aphasia?

25 A No. As I mentioned, the only thing he did was ask me

1 to translate one sentence.

2 Q Thank you.

3 Now, following up after the mental status testing, what  
4 was the next thing you did, or next item that you tested?

5 A Next thing I tested was his gait and his station.

6 Q Now, why do you test that, Doctor?

7 A Gait and station, which means walking and standing, is  
8 a very, very sensitive test of neurological dysfunction. In  
9 order to walk normally, you have to have a lot of things intact.  
10 You have to be able to -- you have to have normal sensation, you  
11 have to have very good balance, you have to have normal  
12 strength, normal coordination.

13 So gait testing, as I said, is a very sensitive test.  
14 And the way we test it is, we first have him walk normally.

15 We then have him walk like on a tightrope, putting one  
16 foot in front of the other, to test his balance. And that's  
17 called tandem walking.

18 I had him walk on his heels and his toes to see if he  
19 has normal strength in his feet.

20 I have them march in place with his eyes closed, his  
21 hands out in front to see if there's any deviation, if he drops  
22 one hand or the other. These are very, very sensitive tests of  
23 weakness on one side. And that was normal.

24 I did a Romberg test which is closing your eyes and  
25 putting your hands up in front of you and seeing if you sway

1 from one side to the other, and this is a test of normal  
2 posture.

3 All of these tests were normal. As I mentioned, these  
4 are very sensitive tests of neurological dysfunction, and  
5 they're quite objective because they're something you see rather  
6 than something that the patient tells you about.

7 Q Thank you, Doctor. And following the gait/station  
8 testing, did you conduct any other testing?

9 A Yes.

10 Q Can you please tell us what you did next?

11 A Next I tested the cranial nerves.

12 Q Why do you do that, Doctor?

13 A The cranial nerves are the nerves that involve all the  
14 structures around the head: Vision, hearing, moving of the  
15 tongue, moving of the face, sensation, et cetera.

16 The reason cranial nerve testing is important is all of  
17 these testings are quite objective. These are things you can  
18 see that are abnormal. If the one side of the face is weak, for  
19 instance, you can see that. If you test vision, you can see if  
20 there's a certain pattern to it, et cetera. So cranial nerve  
21 testing is important in looking to see if there's any  
22 abnormality involving these structures.

23 In Mr. Lopes' case, these were all normal.

24 Q And with respect to -- you checked his vision, correct?

25 A I did.

1 Q And with respect to his face, did you check his face as  
2 well?

3 A Yes. His face was symmetric.

4 Q And why is that significant?

5 A Even the slightest abnormality in the face, you can  
6 notice it. One of the ways that you frequently can tell if  
7 someone's had a stroke or not is if one side of the face is  
8 lower than the other.

9 In this case it was symmetric.

10 Q And with respect to his hearing, did you check that?

11 A I did.

12 Q And what was your finding with respect to his hearing?

13 A He was able to hear my finger rub in both of his ears.  
14 And I did a Weber test where I put a tuning fork on his nose and  
15 you see if he heard it in the center or not. And he did.

16 Q And what is the significance of that, the Weber test?

17 A If you hear -- if you have a clogged ear, let's say you  
18 had wax in your ear, you may not have -- you may not hear as  
19 well in that ear. But if you do the Weber test you hear better  
20 in that ear. It reflects to that side. Whereas if you have a  
21 nerve problem, if your hearing nerve is abnormal, you would hear  
22 it worse in that ear with the Weber test. So it's just a way of  
23 telling, if somebody has trouble hearing in a ear, whether or  
24 not the nerve is involved, or whether or not there's something  
25 in the ear, like wax, obstructing the ear.

1 Q And Doctor, what was your ultimate conclusion regarding  
2 his cranial nerve testing?

3 A His cranial nerves were normal.

4 Q Following a testing of his cranial nerves, what did you  
5 do next?

6 A I tested his head, spine and neck. Basically the range  
7 of motion in the head and the neck usually is not a neurological  
8 test, because, you know, it's usually a test to see whether or  
9 not your joints are functioning properly. And basically you  
10 have him move his neck and his back in various directions to see  
11 if he can do it.

12 In Mr. Lopes' case, I found no limitation of motion of  
13 his head or his neck.

14 I also did something called a straight-leg raising test  
15 which is you raise -- you keep the knee straight, you raise up  
16 the leg to see if there's resistance to doing so, which  
17 sometimes can be a positive test if there's a pinched nerve in  
18 the back. If you put a stretch on that nerve by this test, you  
19 can -- the positive test is resistance to upward motion.

20 In Mr. Lopes' case, there was no resistance to upward  
21 motion.

22 Q What is the significance of that?

23 A It's just another way of telling whether or not there's  
24 a problem with a pinched nerve in the back.

25 In this case, there was no evidence of it.

1 Q Thank you, Doctor.

2 Now, following the head, spine and neck testing that  
3 you did, did you check Mr. Lopes' motor functioning?

4 A Yes.

5 Q Can you explain what that is, Doctor?

6 A Well, functioning testing is basically testing for  
7 strength and also looking at the patient's muscles to see if  
8 they looked normal. And what you do is, you have the person,  
9 the patient, push or pull against you to see if they can  
10 generate normal strength.

11 There are ways to see if the patient is making effort  
12 or not. If the patient is not making effort, frequently there  
13 will be a sudden give way due to either pain or not voluntarily  
14 making the effort. So you can tell if -- neurologists have ways  
15 of telling if the weakness is real or not by these tests.

16 The other thing is, you look at the muscles to see if  
17 they're normal size and shape. Any disuse of muscle for any  
18 reason will result in something called atrophy, which is a loss  
19 of muscle mass.

20 And in this case, Mr. Lopes' muscles were normal. His  
21 strength was normal. There was no give-way weakness and was  
22 completely normal.

23 Q And that's as of your exam on May 4th of 2021, correct?

24 A Correct.

25 Q Now, you also made mention of a heading here of

1 *abnormal movements.* What does that mean, Doctor?

2 A Abnormal movements would be like tremors as you would  
3 see in Parkinson's disease, jerking movements, writhing  
4 movements; anything which is not voluntarily on the part of the  
5 patient, that he's moving abnormally, would be qualified as an  
6 abnormal movement.

7 In his case, there were no abnormal movements.

8 Q Thank you, Doctor.

9 What did you do next or evaluate next with Mr. Lopes?

10 A I tested his reflexes.

11 Q Why did you do that?

12 A Reflexes -- we're all familiar with the knee-jerk,  
13 where the doctor taps your knee and it goes up like that  
14 (indicating).

15 There are also reflexes involving the ankle, at the  
16 elbow and fingers.

17 Reflexes are very useful because they're an objective  
18 way of telling if there's something wrong. What we do is, we  
19 look to see, first of all, is the reflex present or not.

20 If the reflex is present, then we look to see if it's  
21 increased or decreased in its function. If the reflex is  
22 present, then its normal.

23 If the reflex is absent, usually we compare -- not  
24 *usually*, but typically you compare one side to the other to see  
25 if there's a focal absence of reflex. Let's say the right

1 knee-jerk is absent, but the left knee-jerk is present. That's  
2 much more significant than if both of them were absent or  
3 present. So if the reflex is absent, usually that's a problem  
4 involving a nerve to the -- to that extremity.

5           If the reflex is increased, that may be a problem in  
6 the central nervous system involving the brain or the spinal  
7 cord. So it's important to look not only whether there's a  
8 reflex there, but is it increased or decreased.

9           And as I mentioned, this is very objective because the  
10 patient has no control over the reflex; you're just tapping the  
11 reflex and you're looking to see if it goes up or not.

12           In Mr. Lopes' case, there were normal reflexes. They  
13 were not increased or decreased, and they were symmetric.

14           The other thing you test is something called the  
15 Babinski sign where you scratch the bottom of the foot and you  
16 look to see if the big toe goes up. That's a sign that was  
17 described by a Polish neurologist, Dr. Babinski, many years ago,  
18 and it's an indication that the central nervous system is  
19 abnormal; the problem is either the brain or the spinal cord,  
20 especially if one goes up and the other doesn't. So that's the  
21 Babinski sign.

22           Q       With respect to Mr. Lopes, the Babinski sign was  
23 positive or negative?

24           A       Negative. Mr. Lopes had normal reflexes, negative  
25 Babinski signs, totally normal.

1 Q And with respect to your terminology that you tested it  
2 bilaterally, you compared the right side to the left side?

3 A Correct. It's always important to compare. In  
4 neurology, we have an advantage of having two sides because it's  
5 easier to tell if there's an abnormality if you have another  
6 side to compare it to.

7 Q Thank you, Doctor.

8 And then ultimately, did you wind up performing a  
9 sensory exam?

10 A Yes.

11 Q Can you tell the Members of the Jury why you performed  
12 the sensory exam on Mr. Lopes?

13 A Sensory exam is important because there are different  
14 modalities in sensation. We test pin modality, if the patient  
15 can feel sharp or dull. We test touch. We test temperature.  
16 We test vibration sense and position sense.

17 And the reason we test all of these things is different  
18 parts of the nervous system conduct these different sensations.

19 The problem, unfortunately, with sensory testing is  
20 that it's all subjective. You always have to depend upon what  
21 the patient is telling you as opposed to what you see. So if  
22 the patient says he doesn't feel something, you know, that's  
23 what the patient feels. You can't tell whether he feels it or  
24 not.

25 So how do we tell whether it's significant or not? The

1 way we tell is if we look at the pattern of loss of sensation.  
2 If the patient, for instance, has loss of sensation and it's  
3 only in the distribution of one single nerve, like the radial  
4 nerve, the ulnar nerve, that's significant. Or if it's like on  
5 one side of the body, which would happen if you have a stroke,  
6 that's significant.

7           So we look for the pattern of sensory loss, and if the  
8 pattern fits an anatomical physiological distribution, then we  
9 pay more credence to it. If it doesn't, then, as I mentioned,  
10 sensory examination is subjective and not necessarily  
11 significant.

12           Q     Did you make any findings regarding whether or not  
13 there were any sensory deficits exhibited by Mr. Lopes when you  
14 examined him?

15           A     I did. I found normal examination. There were no  
16 abnormalities.

17           Q     And then, Doctor, with respect to his coordination, did  
18 you test that as well?

19           A     Yes.

20           Q     Can you explain to the Members of the Jury why you test  
21 coordination?

22           A     Coordination, again, is a multifactorial situation in  
23 neurology. You need to have sensation, you need to have  
24 strength, you need to have what we call cerebellar function to  
25 coordinate.

1           And the way we test it is first by watching the patient  
2 walk. And then we have him touch his nose, and our finger --  
3 finger-to-nose testing, to see if there's any kind of shaking or  
4 incoordination in that matter.

5           We have them tap their hands on their thighs  
6 alternately up and down like this in order to see if there's any  
7 incoordination there.

8           We have them put their heel on their knee and slide it  
9 down the shin to see if there's any swaying.

10           All of these are tests of coordination. And again,  
11 coordination is an objective test because it's something we  
12 observe.

13           Q     Thank you, Doctor. Did that conclude all of your  
14 physical examinations?

15           A     It did, yes.

16           Q     Did you, as a result of performing this physical  
17 examination, did you reach a summary and render certain opinions  
18 regarding your findings?

19           A     Yes.

20           Q     Before we get into that, one thing I neglected to cover  
21 right at the outset. When you met Mr. Lopes for the first time  
22 and you took his history, did he tell you how his accident took  
23 place?

24           A     Yes.

25           Q     And can you tell the Members of the Jury what Mr. Lopes

1 told you on May 4th, 2021 when you asked him about the accident;  
2 what did he say to you?

3 A He recalled falling and hitting the ground with the  
4 back of his head and then falling on his back. Again, I'm  
5 reading from my report. He told me that someone helped him get  
6 up. He then tried to continue working for approximately two  
7 hours and then drove himself home.

8 Q Okay. So did he -- when he told you this -- withdrawn.  
9 This was Mr. Lopes telling you directly --

10 A Correct.

11 Q -- his recitation of how the incident took place,  
12 correct?

13 A Yes.

14 Q When he told you this, did he make any mention to you  
15 that he hit his head on a beam when he relayed his first  
16 thoughts of the accident to you?

17 MR. THOMAS: Objection to the form of the question.

18 THE COURT: Sustained as to form only.

19 Q When Mr. Lopes first told you about his accident, did  
20 he make any mention of hitting his head on a beam?

21 A Not when he talked to me, no, he did not.

22 Q Did Mr. Lopes ever tell you anything about landing in  
23 the water when he first described his accident to you?

24 A Not when he talked to me, no.

25 Q Did Mr. Lopes ever tell you about landing in sand on a

1 tarp that felt like concrete when he first met you?

2 A Not when he talked to me, no.

3 Q Did you subsequently learn a different version of  
4 Mr. Lopes' accident?

5 MR. THOMAS: Objection.

6 THE COURT: Sustained as to *different*.

7 Q Dr. Bender, in conjunction with your retention here  
8 today, in this matter, rather, did you have occasion to review  
9 Mr. Lopes' 50(h) hearing?

10 A Yes, I did.

11 Q And did you have occasion to review Mr. Lopes'  
12 deposition testimony?

13 A Yes, I did.

14 Q Did what Mr. Lopes' -- did your review of the  
15 deposition testimony, 50(h) hearing, and your interview of  
16 Mr. Lopes in your office on May 4th, 2021 factor into your  
17 ultimate conclusions in this case?

18 A Yes.

19 Q As you sit here today, did Mr. Lopes testify to  
20 something different than what he told you in your office on May  
21 4th of 2021?

22 MR. THOMAS: Same objection.

23 THE COURT: Sustained.

24 Q As you sit here today, do you recall reading Mr. Lopes'  
25 testimony from his 50(h) hearing?

1 A Yes.

2 Q Do you recall what he said at his 50(h) hearing?

3 A I have notes as to what he said in his 50(h) hearing.

4 THE COURT: You may refer to them, Doctor.

5 Q What do your notes reflect that he said in his 50(h)  
6 hearing?

7 A He said, quote, I was working on the scaffold and I  
8 fell on my back. I hit my head on a beam that was in the back  
9 -- there's some ellipsis here I didn't include. I left out a  
10 few words. I hit my head on the beam that was in the back, and  
11 then I was thrown to the water, ellipsis.

12 I landed inside of the water, but inside the tarp. I  
13 was inside the tarp. The tarp was on top of the water.

14 An apprentice picked up my hand and then around my body  
15 and helped me get up on the barge. He helped me to walk outside  
16 of the containment and I sat down to rest. I felt pain to my  
17 head, neck and lower back.

18 I stayed there doing vacuuming because I could not go  
19 up to continue my work. For about 40 minutes or one hour I said  
20 I had pain, but I could try to go back to work because I did not  
21 want to lose my job. I tried to do vacuuming for about an hour,  
22 and then the foreman told me to go home. The next day I  
23 couldn't get up from my bed.

24 Now, by the way --

25 MR. THOMAS: Objection, Your Honor. He answered

1 the question.

2 THE COURT: There's no question pending.

3 Next question.

4 Q Now, in addition to -- that testimony you just read was  
5 from his 50(h) hearing that you noted in your report, correct?

6 A Yes.

7 Q Did you also have a occasion, in connection with your  
8 retention in this case, to note Mr. Lopes' testimony from his  
9 deposition?

10 A Yes.

11 Q And do you have that reflected in your report as well?

12 A I do.

13 Q Can you tell us what he said in his deposition?

14 A He said, quote, after I fell downward, approximately 20  
15 feet, and made contact with the bridge, when I lost my balance,  
16 I fell. I hit the bridge and then I fell on the floor. I fell  
17 in between the barge and the tarp. My back hit the sand and a  
18 piece of iron that was there. I stayed on top of the barge  
19 doing vacuuming and was not able to get on top of the  
20 scaffolding. He testified that he first sought medical  
21 treatment the next day.

22 Now, I have no medical --

23 MR. THOMAS: Objection, Your Honor.

24 THE COURT: You've responded to Mr. Grillo's  
25 questioning. There's no question pending.

1 Q Now, in conjunction with your review of Mr. Lopes'  
2 deposition testimony, did he make reference to treatment the  
3 following day?

4 A Yes.

5 Q And did he identify a doctor or a healthcare provider  
6 who he purportedly treated with the next day?

7 A Yes. He told me that he saw a Dr. Chang the next day,  
8 but I note that he was very vague as to what was done on that  
9 day and couldn't give me any details about what happened.

10 Q As of today, have you ever seen a report from a  
11 Dr. Chang?

12 A I have not.

13 Q Dr. Bender, what's the first medical report that you  
14 reviewed relative to Mr. Lopes' medical treatment following the  
15 accident?

16 A The first report I have was a week later on October  
17 17th by an orthopedic doctor, Dr. David Shein.

18 Q And is that October 17th date the first report you've  
19 ever seen from Dr. Shein?

20 A Yes.

21 MR. GRILLO: Your Honor, with the Court's  
22 permission, may I have Defendant's Exhibit A, which is in  
23 evidence, I believe.

24 THE COURT: Defendant's A, Dr. Shein's records.

25 MR. GRILLO: May I see them first, Judge?

1 THE COURT: Certainly.

2 COURT OFFICER: (Handing to Counsel.)

3 Q Now, Dr. Bender, I'm going to show you what's been put  
4 into evidence as Defendant's Exhibit A, and I'd like you to  
5 disregard the beginning portion of it and just start -- simply  
6 because it deals with another body part. I'd like you to just  
7 look at the last four pages, pages 9, 10, 11, 12. Once you've  
8 had a chance to review them, let me know.

9 COURT OFFICER: Defendant's A in evidence presented  
10 to the Witness.

11 THE COURT: Just review those to yourself,  
12 Dr. Bender. Do not volunteer any additional information.  
13 Once you've completed that task, please let us know and  
14 Mr. Grillo will pose another question.

15 (Witness complying.)

16 A Okay.

17 Q Doctor, have you had occasion to review the two  
18 additional records from Dr. Shein?

19 A Yes.

20 Q And what do those records reflect?

21 A They reflect that Mr. Lopes had a preexisting condition  
22 which he called spondylolisthesis. And one second. I'm sorry.  
23 Anterolisthesis of L5 and S1 with questionable L5-S1  
24 spondylolysis.

25 Q When is that report dated?

1           A       That's dated October 7, 2015. The claimant at that  
2 time, or Mr. Lopes was complaining of low back pain radiating  
3 down his left lower extremity with associated paraesthesia. And  
4 he said that had been going on for the past 34 years, so this  
5 was a long-standing problem.

6                   THE COURT: All right, Doctor.

7                   You want to correct the record?

8                   MR. GRILLO: Judge, thank you.

9           Q       We've got a stipulation that that's a typographical  
10 error. It's three to four years.

11           A       Oh, I'm sorry.

12                   THE COURT: Not your fault.

13           Q       It's the first time you're seeing this report, correct,  
14 Doctor?

15           A       Yes.

16           Q       And is there another report from March 1st of 2017?

17           A       Yes.

18           Q       And what's reflected in that report?

19           A       At that time he was assessed as having impingement  
20 syndrome with spondylolysis, lumbar spine. And also right  
21 shoulder symptoms, complaining of right shoulder problem with  
22 tendinopathy.

23           Q       And did it say anything about his ability -- or any  
24 entry in there about his ability not to work?

25                   MR. THOMAS: Objection.

1 THE COURT: If it's in that record in evidence, he  
2 can refer to it.

3 A It says the patient is not working. The reason is he  
4 is not working is because of his low back and his shoulder  
5 problem.

6 Q And what's the date of that?

7 A March 1, 2017.

8 Q And Dr. Bender, you've never seen these reports up  
9 until today, is that correct?

10 A That's correct.

11 Q And Doctor, ultimately, following your examination of  
12 Mr. Lopes in March -- May 4th of 2021, did you reach certain  
13 conclusions and render certain opinions?

14 A Yes.

15 Q Let's go over those now. Are you able to testify, to a  
16 reasonable degree of medical certainty, based on your review of  
17 his medical records that you had in your possession as of May  
18 4th, 2021, coupled with your examination of him, as to whether  
19 or not Mr. Lopes sustained any type of neurological injury as a  
20 result of this accident of October 10, 2017?

21 MR. THOMAS: Objection.

22 THE COURT: Overruled.

23 You may answer.

24 A I concluded that if there were any neurological  
25 examination -- injuries, and that I didn't think there were any,

1 but if there were any, they were relatively minor since there  
2 was no alteration of consciousness at the time of the subject  
3 incident. He attempted to continue working that day and did not  
4 seek medical attention until either a day later or a week later.

5 Q And when you say there's no mental alteration of  
6 consciousness -- no alteration, rather, of consciousness, what  
7 do you mean by that?

8 A That means that at the time of the incident itself  
9 there was no alteration of consciousness. He did not lose  
10 consciousness. The most he complained of was he may have been  
11 dizzy for a few seconds.

12 Q And Doctor, what about his statement to you that he  
13 went back to work for two hours; does that have any  
14 significance, in your opinion, rendering opinion, that he had no  
15 neurological injury in --

16 MR. THOMAS: Objection.

17 THE COURT: I'll allow it.

18 You may answer, Doctor.

19 A Yes. If there were any significant injury, one would  
20 assume that he would not be able to continue working after that  
21 injury.

22 Q And why do you say that, sir?

23 A The injuries claimed in this case were way beyond what  
24 would have prevented him -- he would not have been -- he would  
25 not have been able to work had he had those injuries.

1 Q When you say *those injuries*, what are you speaking of  
2 specifically?

3 A Injuries to his head and to his spine.

4 Q And I want you to assume there was testimony in this  
5 case by the plaintiff's treating doctors that he sustained a  
6 traumatic herniated disc as a result of the accident. Would you  
7 agree with that assessment, sir?

8 MR. THOMAS: Objection, Your Honor. Beyond the  
9 scope of his expertise.

10 THE COURT: I'll allow it. He's a medical doctor.  
11 He may testify.

12 A A herniated disc is something I frequently see in  
13 neurology. And an acute herniated disc is something that  
14 happens with a tremendous degree of pain. If you suddenly  
15 herniate a disc, it's agonizing. Can I show on the model?

16 Q Do you have a model with you? Yes.

17 A I do.

18 Q With the Court's permission, would it be easier from  
19 the witness stand, or you want to get closer to the jury?  
20 Anyway you can describe it, Doctor.

21 THE COURT: I'll leave that to your discretion with  
22 the Doctor. I just ask the Doctor, if he steps down, be  
23 careful doing so. We'll go from there.

24 MR. THOMAS: Your Honor, I'm going to object.  
25 Beyond the scope of his report and the exchange.

1 THE COURT: In terms of the 3101(d), for a  
2 neurologist with respect to the injuries alleged in the BP?

3 MR. THOMAS: Judge, correct with regard to his  
4 conclusions, summaries and opinions, there's nothing about  
5 herniations and what he's about to testify in any of his  
6 summaries and opinions.

7 THE COURT: Well, with respect to the 3101(d), do  
8 we have that handy?

9 MR. THOMAS: Yes.

10 THE COURT: Ladies and gentlemen, this is one of  
11 those circumstances where I have to review something outside  
12 of the presence of the jury. Please don't speculate about  
13 any activities we are conducting in your absence. Do not  
14 form or express any opinion, do not discuss the case between  
15 and among yourselves.

16 All rise as the Jury exits for the brief recess.

17 COURT OFFICER: All rise.

18 (Whereupon, the Jury exited the courtroom.)

19 THE COURT: Doctor, you can leave everything here.  
20 You can step down. If you step out into the hallway, sir,  
21 I'd appreciate it. Just be careful stepping down.

22 THE WITNESS: Can I take my notes?

23 THE COURT: Yes, you can bring anything you like  
24 with you, sir, as long as you bring it back.

25 THE WITNESS: Okay. Thank you.

1 (Whereupon, the Witness exited the courtroom.)

2 MR. GRILLO: I have a hard copy.

3 THE COURT: If you have a hard copy, wait for my  
4 staff to come back. Don't approach.

5 MR. GRILLO: I won't.

6 THE COURT: Sandra, can you just get a copy of that  
7 document from Mr. Grillo?

8 MR. GRILLO: I have the tab.

9 THE COURT: Is there a single 3101 for this Doctor,  
10 or is there multiple?

11 MR. GRILLO: There's multiple.

12 THE COURT: So there are three, but I would assume  
13 -- well, let me look at all three just to be certain I have  
14 the entire universe. I'm presuming that the 3101(d)  
15 iterations, like the report additions are cumulative and  
16 I'll double check that for myself.

17 And these pertain only to Dr. Bender?

18 MR. GRILLO: Yes.

19 THE COURT: It's going to be a minute.

20 MR. GRILLO: There might be a couple of my notes in  
21 there, Judge.

22 THE COURT: I will ignore them completely.

23 Counsel, I'm going to hand this back to you.

24 Hand those back to Mr. Grillo and have him  
25 segregate for me, please, the 3101(d) notice.

1 MR. GRILLO: I'll try.

2 Do you want the actual reports?

3 THE COURT: No, just the notice itself. We're  
4 talking about notice here.

5 MR. GRILLO: Sorry about that, Judge.

6 THE COURT: No problem. It's all part of the  
7 service.

8 Off the record.

9 (Discussion held off the record.)

10 THE COURT: Mr. Thomas, I just draw your attention  
11 to the 3101(d) from 10/18 of 2024. The difference,  
12 substantially, without a ruling on the sufficiency of the  
13 first two, I'm just wondering which firm provided these.  
14 Double checking that. Ah, yes.

15 In that regard, I find they to be more than  
16 sufficient for 3101(d) in support of his testimony. You  
17 have your exception for the record.

18 Let's bring the Doctor back.

19 You know what? Let's take a ten-minute recess and  
20 we'll be back on the record.

21 And I'll allow you, before we bring the jury in, to  
22 add any additional comments you'd like on the record.

23 Mr. Thomas, as you know, I always make the record available  
24 for any need, procedural or substantive, that any counsel  
25 might have.

1 Ten minutes.

2 (At which time there was a pause in the  
3 proceedings.)

4 COURT OFFICER: All rise.

5 THE CLERK: Case on trial continued. All counsel  
6 present.

7 THE COURT: All right. On the record.

8 Before we bring the panel in, please, Doctor, you  
9 may sit down.

10 Mr. Thomas, as I indicated, I'm prepared to accept  
11 the 3101(d) notice as sufficient to allow the Doctor to  
12 continue to opine in the way he has been with respect to  
13 questions asked before you raised your objection, and I  
14 offer you the record to make whatever record you deem  
15 appropriate.

16 MR. THOMAS: Thank you, Judge.

17 I ask you that you reconsider your decision. Your  
18 Honor, as you're aware, as we spoke about before the Doctor  
19 testified, there were three reports that were exchanged.  
20 The first two were from the predecessor law firm, Russo and  
21 Gould, and clearly those exchanges were deficient when it  
22 comes to this issue.

23 THE COURT: I have not ruled on that one.

24 MR. THOMAS: It's our position that those exchanges  
25 were deficient on this issue.

1           The final report, the final 3101(d) exchange, is  
2           dated October 18, 2024. This trial started October 28,  
3           2024. That is less than 30 days, Judge. And the report  
4           that was exchanged most recently, October 18th of 2024, the  
5           only difference is that there's an indication there were  
6           additional records that were reviewed and the opinion was  
7           that those additional records didn't change the Doctor's  
8           opinion. Otherwise, the representation has been made that  
9           the report is identical to the previous reports that have  
10          been exchanged.

11           It's Plaintiff's position that we should not be  
12          bound by this late 3101(d) exchange, and the statement in  
13          their exchange as to what the Doctor will testify to because  
14          it is, in effect, late, and the report is no different than  
15          the predecessor reports.

16           I'd ask that the Court reconsider its decision in  
17          light of the fact that the expert exchange was made 14 days  
18          before the start of the trial and therefore didn't give us  
19          sufficient time to be able to prepare.

20           THE COURT: And one month before today?

21           MR. THOMAS: Yes, Judge, one month before today.

22           THE COURT: Just so I'm clear. Just so we have the  
23          timeline correct.

24           MR. THOMAS: Sure.

25           THE COURT: You need to be heard, Mr. Grillo?

1 MR. GRILLO: I don't think so, Your Honor. But I  
2 will state for the record that I thought we had an  
3 understanding that there was a delay with the processing of  
4 the updated records from Plaintiff's counsel which were the  
5 treatment in July of 2024.

6 I notified Plaintiff's counsel that there was a  
7 delay in processing them, in that the authorizations were  
8 submitted to us late, and that we were under a tight time  
9 constraint. I believe we received those authorizations  
10 within either 10 to 14 days of our actual disclosure where  
11 we pressed the treater, Dr. Jonathan Abrahams, for a  
12 production of original records which we in turn sent over to  
13 Dr. Bender.

14 I did not realize there would be a late notice  
15 claim, but now that there is, I will just state for the  
16 record, there's never been a rejection --

17 THE COURT: I don't think that's Mr. Thomas' point.  
18 Mr. Thomas' point is, the first two 3101(d) notices provided  
19 by Russo and Gould were not quite as extensive as the  
20 3101(d) which you filed in October.

21 MR. GRILLO: Understood. Sorry.

22 THE COURT: But in that regard, the Court has the  
23 discretion with respect to 3101(d) notice.

24 Given the nature of the case, the types of the  
25 doctors that have been involved both for Plaintiff and

1 Defendant, I do not find that this comes as any surprise.  
2 My ruling stands.

3 You have your exception for the record, Mr. Thomas.

4 MR. THOMAS: Thank you, Judge.

5 MR. GRILLO: Thank you, Your Honor.

6 THE COURT: Let's bring in the panel.

7 MR. GRILLO: Before we bring the panel in, can we  
8 get the last question so I know where we left off  
9 specifically? I think the Doctor was about to come down.

10 THE COURT: With respect to that, we had covered --  
11 we had changed from the subject matters from the acute  
12 herniation of the disc and the type of agonizing pain it  
13 would cause. We then progressed to your questions of the  
14 Doctor with respect to his use of the models to illustrate  
15 some of the points with respect to nerve distribution.

16 MR. GRILLO: Thank you, Your Honor.

17 THE COURT: Let's bring the panel in, please.

18 COURT OFFICER: All rise, jury entering.

19 THE COURT: All rise, please.

20 (Whereupon, the jury entered the courtroom.)

21 THE COURT: All the jurors are present. Does  
22 Counsel waive the roll call?

23 MR. THOMAS: So waived.

24 MR. GRILLO: So waived.

25 MR. PUZO: So waived.

1 THE COURT: Thank you, gentlemen.

2 Let the jury settle in.

3 Welcome back, ladies and gentlemen.

4 You may be seated, Dr. Bender. I'll remind you,  
5 sir, you are still under oath.

6 For the purpose of continued Direct Examination,  
7 you may inquire, Mr. Grillo.

8 MR. GRILLO: Thank you, Your Honor.

9 BY MR. GRILLO:

10 Q Dr. Bender, you were about to testify about an acute  
11 herniation injury.

12 A Yes.

13 Q And you were going to utilize your model?

14 A Yes.

15 Q Do you have a model with you here today?

16 A I do.

17 Q Would you like to dem -- could you demonstrate that to  
18 the jury from the witness box or from the well, whatever you  
19 prefer.

20 A I'll come down to the well, please.

21 THE COURT: That's fine. Just be careful stepping  
22 down. Just keep your voice up, please, because your voice  
23 is no longer magnified by the microphone.

24 A (Indecipherable.)

25 THE COURT: Doctor, I have to ask you to step back

1 a little bit so that the reporter can hear you.

2 THE WITNESS: I'm sorry.

3 THE COURT: That you face both the reporter and the  
4 jury, and I need to hear you, as well as counsel.

5 And counsel is welcome to relocate should they be  
6 so inclined.

7 Let's give counsel a moment to settle in, Doctor.  
8 I'm going to allow them to join in the gallery adjacent to  
9 the jury box, if they're so inclined.

10 And I just ask you to take a half a step back to  
11 make sure that the reporter can hear you.

12 Keep your voice up, sir. You're somewhat  
13 soft-spoken. That's fine when we're using the microphone,  
14 but it presents certain challenges with respect to all  
15 counsel hearing you, and I'd just ask you to make every  
16 effort to keep voice up.

17 Please continue.

18 THE WITNESS: Thank you.

19 A You may have seen a model like this before. It's a  
20 model -- actually, it's not a model, it's a cast of an actual  
21 spine of a patient with a few extra things put in here.

22 What this is, is there are two vertebral bodies, these  
23 two things here. And what you see here is a disc, a  
24 cartilaginous disc, and the red is actually the herniated  
25 portion of the disc. The central portion, so-called nucleus

1 pulposus, is herniated and pushed out. And what happens if --  
2 the way this causes symptoms is if there's pressure of that  
3 herniated disc on a nerve as its coming out of the disc.

4 So basically, once this disc herniates suddenly, that  
5 is an acutely painful phenomenon. A herniated disc hurts a lot.  
6 If you suddenly herniate a disc, it's an agonizing experience  
7 because there are nerves in the disc itself.

8 The other thing that can happen is the disc can pinch a  
9 nerve and that's what causes neurological problems. The disc  
10 itself, the little nerves in the disc do not cause neurological  
11 dysfunction, they just cause pain, but if the disc -- the  
12 herniation is pinching a nerve, that nerve may dysfunction. It  
13 can hurt a lot or it can have difficulty with movement, motion,  
14 strength or sensation. The nerves supplies those things.

15 What you will notice is that there's quite a large hole  
16 out of which the nerve protrudes, so that every herniated disc  
17 does not necessarily cause neurological problems. As a matter  
18 of fact, most herniated discs don't happen acutely. They happen  
19 gradually over time and they're not that painful until they  
20 pinch a nerve.

21 So basically in this case, when Mr. Lopes fell, if he  
22 had a sudden herniated disc, that would be an agonizing  
23 experience that would certainly prevent him from continuing to  
24 work at the time.

25 THE COURT: Is there a question, Mr. Grillo?

1 MR. GRILLO: Thank you.

2 Q Now with respect to, I think you may have incorporated  
3 my question, but I wanted you to -- based on what you've just  
4 described, to a reasonable degree of medical certainty, are you  
5 able to testify, based on all of the documents you reviewed, as  
6 to whether or not Mr. Lopes sustained a traumatic acute  
7 herniated disc on October 10th of 2017?

8 A Yes. From the symptoms described, the answer is no.

9 Q And how can you say that, sir?

10 A Because he was able to get up and work shortly  
11 thereafter. He would not have been able to do that if he had  
12 acute, sudden herniated disc.

13 Q I want you to assume he's also testified that  
14 subsequent to ending work that day, he got in his car and he  
15 drove, under his own power, approximately two hours from  
16 Westhampton Beach to his home in Yonkers.

17 Do you have an opinion, to a reasonable degree of  
18 medical and neurological certainty, as to whether or not  
19 Mr. Lopes could have performed that task of driving those two  
20 hours had he sustained an acute traumatic herniated disc?

21 A Within a reasonable degree of medical certainty, using  
22 logic, the answer is no. An acute herniated disc would have  
23 prevented him from doing those things.

24 Q Okay. Thank you, Doctor. I appreciate it. You can  
25 resume the stand.

1 THE COURT: Resume the stand, please, Doctor. Step  
2 up. Just be careful stepping up.

3 Are we going to need the model again?

4 MR. GRILLO: I don't think so. Unless the Doctor  
5 needs it.

6 THE COURT: Get that squared away. Thank you.

7 (Whereupon, the Witness resumed the stand.)

8 THE COURT: Next question, Counsel.

9 MR. GRILLO: Thank you, Your Honor.

10 Q Now, Doctor, you just testified about neurological  
11 dysfunction. At any point during your examination of Mr. Lopes  
12 on May 4th of 2021, did he, at any point, demonstrate any  
13 neurological dysfunction in any part of his body?

14 A The answer's no.

15 MR. THOMAS: Objection.

16 THE COURT: Overruled. General question. I'll  
17 allow it.

18 You may answer, Doctor.

19 A Sorry. He did not.

20 Q How can you say that, sir?

21 A His neurological examination was normal. The  
22 neurological examination is fairly thorough in that if there  
23 were any neurological deficit, it would have been picked up in  
24 one of the evaluations that I described.

25 Q And in reviewing all of the medical records that you've

1 looked at in this case, have you ever seen any record of  
2 Mr. Lopes going to the hospital via ambulance following his  
3 accident?

4 A Immediately following the accident, no.

5 Q Would somebody, in your experience, who sustained an  
6 acute back injury -- withdrawn. I'll ask it a different way.

7 As you sit here today, have you ever seen a record from  
8 Dr. Chang?

9 A No.

10 Q Do you know who Dr. Chang is?

11 A He's a doctor that Mr. Lopes told me he saw, but I have  
12 no record from him.

13 THE COURT: We've covered this already, Counsel.

14 MR. GRILLO: I'm going to move on.

15 THE COURT: Thank you.

16 Q Now, in conjunction with your retention, did you have  
17 occasion to review additional medical records after you saw  
18 Mr. Lopes the first time on May 4th of 2021?

19 A Yes.

20 Q And can you tell the Members of the Jury, when did you  
21 see additional medical records?

22 A On September 20, 2021.

23 Q And what additional records medical records did you  
24 review on September 20 of 2021?

25 THE COURT: Again, if you're reading, Doctor, I'm

1 just going to ask you to read slowly.

2 A Records from Dr. David Shein, records from Alpha T  
3 Diagnostic Imaging.

4 Q Doctor, can you just hold on one second? Let me just  
5 catch up. I'm sorry. I just want to follow along.

6 THE COURT: September 20, 2021.

7 Please continue, Doctor. We have David Shein, we  
8 have Alpha T Diagnostic Imaging. Next.

9 MR. GRILLO: Judge, I think, Your Honor, before he  
10 goes any further --

11 THE COURT: Go ahead. I picked up on it. Go  
12 ahead.

13 MR. GRILLO: Okay.

14 Q To the extent that, Doctor, I'd only like you, based on  
15 discussions we had with the Court, as well as Plaintiff's  
16 Counsel, I'd only like you to speak of the first nine records  
17 you reviewed.

18 A The first nine?

19 THE COURT: Let's explain the reason why. I don't  
20 want to confuse the Jury. There are certain records that  
21 were originally presented and that we are looking at  
22 cumulative additional records rather than restating the  
23 records that we've already discussed.

24 Is that your purpose?

25 MR. GRILLO: There is another purpose, Your Honor.

1 THE COURT: Okay. Go ahead, Counsel, I'll let you  
2 conduct your examination.

3 MR. GRILLO: Thank you.

4 Q Just the first nine records that you reviewed, okay?

5 A Okay. The third record is Andrew Merola, M.D.

6 The fourth record is Edwin Perez, M.D.

7 Q Is he affiliated with Rehabilitation Medical --

8 A Rehabilitation Medical Center, correct.

9 Q Okay.

10 A The fifth record is Center of Cognition and  
11 Communications, Dr. Jason Brown.

12 The sixth record is Kim Busichio.

13 The seventh record is Harris Psychiatric Services, a  
14 Dr. Joel King.

15 The eighth record is JM Da Silva Psychological  
16 Services, Juraci Da Silva, Ph.D.

17 And the ninth record is Absolute Care Physical Therapy.

18 THE COURT: Stop there, Doctor.

19 Q Thank you, Doctor.

20 And then following your review of those records, did  
21 you prepare a report regarding the summary of your review of  
22 those records?

23 A I did.

24 Q What is the date of that report, doctor?

25 A September 20, 2021.

1 Q Based on your review of those records, did that change  
2 your opinion at all relative to your additional conclusions that  
3 you reached in your March 4th, 2021 report?

4 A It did not.

5 Q Then subsequent to those records, did there come a  
6 point in time in October of 2024 when you received additional  
7 medical records?

8 A Yes.

9 Q And can you tell the Members of the Jury which  
10 additional medical records did you review in and around October  
11 of 2024?

12 A I reviewed the records of Dr. John Abrahams, additional  
13 records from Dr. Aric Hausknecht and some additional imaging  
14 studies.

15 Q And based on your review of those additional records in  
16 October of 2024, did you issue another report?

17 A I did.

18 Q And what was the date of that report?

19 A October 16, 2024.

20 Q And did you draw certain conclusions in that report?

21 A Yes.

22 Q And did your conclusions or opinions change at all from  
23 your original report of May 4th of 2021?

24 A No.

25 Q Thank you.

1 I want you to assume -- well, withdrawn.

2 In addition to reviewing medical records, did you also  
3 have occasion to review various surveillance footage taken of  
4 Mr. Ildo Lopes in 2023 and 2024?

5 A Yes.

6 Q And doctor, what do you recall seeing in those videos?

7 A I recall seeing him functioning normally, drive a car,  
8 carrying things. Basically doing normal daily activities  
9 without any difficulty.

10 Q Did what you see in those videos in any way change your  
11 opinion as to whether or not Mr. Lopes has sustained any  
12 neurological injury as a result of the accident of October 10 of  
13 2017?

14 A It reinforced my opinion that there was no neurological  
15 problem.

16 Q Thank you, Doctor.

17 I want you to assume that Dr. Rothman testified, and  
18 he's obviously -- well, withdrawn.

19 Doctor, I want you to assume that will Dr. Lewis  
20 Rothman, a board certified radiologist, testified on behalf of  
21 the defense here in this case, okay?

22 I want you to assume that based on his review of all  
23 the diagnostic films, typically MRIs, brain scans, X rays, that  
24 he found that there was no evidence of any trauma depicted in  
25 any of the studies. Would Dr. Rothman's opinions of finding no

1 trauma on any films correlate with your neurological findings?

2 A I did not find any evidence of trauma on my  
3 neurological examination.

4 Q So the question --

5 A The answer is yes, it correlates with it.

6 Q His review of those films correlates with your  
7 neurological exam of the Plaintiff, correct?

8 A Yes. He did not describe anything that would cause any  
9 neurological deficit and I did not find any neurological  
10 deficit.

11 Q In addition, I want you to assume that Dr. Brandoff, an  
12 orthopedic surgeon, testified at trial here, and he testified  
13 regarding the Plaintiff's lumbar spine and specifically a  
14 condition identified as longstanding spondylolisthesis, and that  
15 he testified that the subject surgery that was performed by  
16 Dr. Merola was not related to the subject accident.

17 Would Dr. Brandoff's opinions correlate with your  
18 neurological findings?

19 A Yes.

20 Q How so?

21 A Basically the changes that were seen were degenerative  
22 in nature. They were not acute in nature. There was no acute  
23 injury, number one. Number two, I didn't see any mention of any  
24 compression of any neural structures which would cause  
25 neurological damage.

1 Q Thank you.

2 Now, just a couple more questions. I want you to  
3 assume, Doctor, that Dr. Aric Hausknecht, the Plaintiff's  
4 neurologist, testified before this jury that as of today, the  
5 Plaintiff, Ildo Lopes, continues to suffer from mild traumatic  
6 brain injury as a result of the accident of October 10 of 2017.

7 Doctor, would you agree with Dr. Hausknecht's opinion  
8 in that regard?

9 MR. THOMAS: Objection.

10 THE COURT: Overruled. You may answer.

11 A No.

12 Q Can you tell the Members of the Jury why you don't  
13 agree with that?

14 A Traumatic brain injury is a very complicated subject.  
15 It depends upon the severity of the injury itself and what  
16 happens thereafter. Most of the time a small head injury  
17 results in no permanent neurological deficit, and symptoms may  
18 happen or occur such as dizziness or headache which will last a  
19 few days to maybe a month and then completely clear up, but does  
20 not imply that there's any organic damage to the brain.

21 In this case, there was no recorded loss of  
22 consciousness. The most he complained about was a little  
23 dizziness which is common after a minor head injury which could  
24 indicate that there was -- that he did hit his head, but there  
25 was no brain damage as a result of that injury and the fact that

1 he was able to get up and work thereafter would be incompatible  
2 with a significant brain injury.

3 Q And you also mentioned that there was no loss of  
4 consciousness. Why is that significant in whether or not -- in  
5 diagnosing whether or not someone sustained a significant head  
6 trauma?

7 A The severity of head trauma can be measured by two  
8 things, by whether or not there was a loss of consciousness and  
9 how long and whether or not there was a disturbance of memory,  
10 so called retrograde amnesia where you don't remember what  
11 happened before the accident, and anterograde amnesia when you  
12 don't remember what happened after the accident, so loss of  
13 memory and loss of consciousness are essential components to  
14 determine the degree of head injury.

15 In this case, there was no significant head injury,  
16 there was no significant loss of consciousness or loss of  
17 memory.

18 Q Thank you, Doctor.

19 And Doctor, based on your neurological examination,  
20 based on your review of the totality of all the medical records  
21 as well as the surveillance video, are you able to testify to a  
22 reasonable degree of neurological and medical certainty as to  
23 whether or not neurologically Mr. Lopes is able to return to the  
24 work force?

25 A Yes.

1 Q And what is your opinion, sir?

2 A Neurologically there is no neurological reason that he  
3 can't return to the work force.

4 Q Thank you, Doctor.

5 And then lastly, Doctor, as a result of your  
6 examination of Mr. Lopes, as a result of your review of  
7 Plaintiff's medical records, the surveillance, are you able to  
8 testify to a reasonable degree of medical certainty if the  
9 Plaintiff's accident of October 10, 2017 resulted in any  
10 neurological injury to the Plaintiff?

11 A Yes.

12 Q What is your opinion?

13 A That the accident of October 10, 2017 did not result in  
14 any neurological damage to Mr. Lopes.

15 Q And by extension, did the accident, to a reasonable  
16 degree of medical and neurological certainty, did the accident  
17 of October 10 of 2017 result in any type of brain injury to the  
18 Plaintiff, Mr. Lopes?

19 A It did not.

20 Q Why do you say that, sir?

21 A Because of the fact of his symptoms immediately  
22 thereafter. These things are not absolute. These things  
23 basically depend upon degrees and basically the degree of head  
24 injury here was so minor that it did not cause any significant  
25 alteration of consciousness or memory loss.

1 Q Thank you. Doctor, I have no further questions for  
2 you.

3 MR. GRILLO: Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Grillo. I'll give you a  
5 moment to relocate.

6 MR. GRILLO: Thank you.

7 MR. THOMAS: Can I see the Doctor's file?

8 THE COURT: Yes, sir. Doctor, if you can just  
9 assemble -- I have your folder here -- your file maintained  
10 by your office. Counsel would like to take a look at it  
11 before he commences his questions as is his prerogative.

12 Take your time, Mr. Thomas. Let me know when  
13 you're ready.

14 COURT OFFICER: (Handing to Counsel.)

15 MR. THOMAS: Thank you, Judge.

16 THE COURT: You're welcome, sir. Do you need that  
17 or can it be returned back to the Doctor?

18 MR. THOMAS: You can return this to the Doctor.  
19 I'd just like to hold onto one document.

20 THE COURT: Just tell us what you're holding onto.

21 MR. THOMAS: It's a bill from the Doctor to I-Med  
22 View.

23 THE COURT: Okay. Leave that. Just so we know  
24 what you have there.

25 MR. THOMAS: Thank you.

1 THE COURT: Whenever you're ready, Counsel.

2 MR. THOMAS: Thank you.

3 CROSS EXAMINATION BY

4 MR. THOMAS:

5 Q Good afternoon, Dr. Binder (pronouncing).

6 A Good afternoon.

7 Q Your name is Dr. Binder [sic]?

8 A Yes.

9 THE COURT: Bender? Binder or Bender?

10 THE WITNESS: Bender.

11 THE COURT: B-E-N is my understanding.

12 Q Did you evaluate Mr. Lopes or Mr. Lopes (pronouncing);  
13 do you know?

14 A I believe it's pronounced Lopes (pronouncing).

15 Q Did you speak with Mr. Lopes and ask him how to  
16 pronounce his name?

17 A No, but I know that Lopes (pronouncing) is pronounced  
18 Lopes (pronouncing).

19 Q Do you know where he's from?

20 A I believe he's from Brazil.

21 Q Where did you get that information?

22 A He told me he was -- he spoke Portuguese, so I assumed  
23 he was from Brazil.

24 Q But Doctor, you understand how dangerous it is to make  
25 assumptions, don't you?

1           A     If he spoke Portuguese, I -- my assumption is he was  
2 either from Brazil or Portugal. I may have been wrong.

3           Q     Well, what other assumptions did you make during the  
4 course of your rendering your opinions and conclusions in this  
5 case?

6                     MR. GRILLO: Objection.

7                     THE COURT: I'll allow it. The Doctor can fend for  
8 himself.

9           A     I'm not sure what you mean by assumption.

10                    THE COURT: Next question.

11           Q     Doctor, you said you reviewed the world of information  
12 that was provided to you, correct?

13           A     I mentioned the records I reviewed, that's correct.

14           Q     I didn't hear what you said.

15           A     I mentioned the records I reviewed, that's correct.

16           Q     And throughout the records that you reviewed, including  
17 his deposition testimony and the legal documents called bills of  
18 particulars, you understand that Mr. Lopes is from a small  
19 island nation called Cape Verde?

20           A     I'm sorry. I stand corrected. I did record that he  
21 was from Cape Verde in my report.

22           Q     And the way he pronounces his name is Lopes  
23 (pronouncing) not Lopes (pronouncing). Are you aware of that?

24           A     No.

25           Q     And you agree it's important to get somebody's name

1 right, would you agree?

2 A In this particular case I'm not sure of the importance.

3 Q Speaking of importance, tell the Jury, do you feel  
4 differently about the claimants that you review for medicolegal  
5 reviews versus your own treating patients? Yes or no.

6 A This is a different purpose, yes.

7 Q I didn't ask you what the purpose was. My question  
8 was: Do you feel differently about those individuals that you  
9 examine for a medicolegal review versus your own patients that  
10 you treat?

11 A Feel differently is a very vague concept. Obviously  
12 there are a differences and I feel that there are differences.

13 Q Doctor, you advertise your services, correct?

14 A No.

15 Q You work with I-Med View, don't you?

16 A Yes.

17 Q And that's a third-party company that puts doctors like  
18 yourself in touch with lawyers like Goldberg Segalla, correct?

19 A Yes.

20 MR. GRILLO: Objection, Your Honor.

21 THE COURT: I'll allow it. The answer's yes.

22 Q And you're aware that every single physician that's  
23 testified on behalf of the Defendant comes from I-Med View, the  
24 third-party company; are you aware of that?

25 MR. GRILLO: Objection, Your Honor.

1 THE COURT: I'll allow it unless it's not factually  
2 correct.

3 A I'm sorry?

4 THE COURT: With respect to that, is there an  
5 indication of any medical professional that didn't come from  
6 I-Med View?

7 MR. GRILLO: I believe it was Dr. Rothman.

8 THE COURT: Okay. Sustained.

9 MR. THOMAS: Okay.

10 Q Are you aware that Dr. Jared Brandoff was a defense  
11 expert in this case retained by the Defendants Goldberg and  
12 Segalla, Defendant's attorney; are you aware of that?

13 A No.

14 MR. GRILLO: Objection, Your Honor.

15 THE COURT: Well, it may have been predecessor  
16 counsel.

17 MR. GRILLO: It was.

18 Q Are you aware that Dr. Jared Brandoff has offered  
19 testimony in this case on behalf of the defense?

20 A No.

21 Q Are you aware that Mark Ramnauth, vocational  
22 rehabilitation counselor, offered testimony in this case on  
23 behalf of the defense?

24 A No.

25 Q And now you're rendering testimony on behalf of the

1 defense, correct?

2 MR. GRILLO: Objection, Your Honor.

3 THE COURT: I'll allow it.

4 A (No response.)

5 THE COURT: Are you appearing today for the  
6 defense, sir?

7 THE WITNESS: Yes.

8 THE COURT: Thank you. Next question.

9 Q If I told you that all three, you and Dr. Brandoff and  
10 Mark Ramnauth all come from I-Med View, this third-party company  
11 that links up expert witnesses to firms like Goldberg and  
12 Segalla or their predecessor counsel Russo and Gould, is that  
13 the first time that you're learning that?

14 A Yes.

15 MR. GRILLO: Objection.

16 THE COURT: I'll allow it if he knows. First time  
17 that he learned. His answer was yes. Next question.

18 Q And you make yourself available to these third-party  
19 companies; you're on their list, correct?

20 A I'm not sure what you mean by list. I don't know how  
21 they got my name, honestly.

22 Q Is that the only third-party IME company that you work  
23 with?

24 A No.

25 Q How many other third-party IME companies do you work

1 with?

2 A I haven't counted. Perhaps two or three.

3 Q And you get referrals by these companies consistently,  
4 correct?

5 A I get referrals. I'm not sure what you mean by  
6 consistent.

7 Q Well, you've testified in court 160 times, correct?

8 A No.

9 THE COURT: Sustained.

10 MR. GRILLO: Objection.

11 THE COURT: That wasn't his testimony.

12 Q 106 times. Excuse me, 106 times, correct?

13 A Yes.

14 Q And you've written more than 106 reports for defendants  
15 when they're referred to you by a third-party IME company,  
16 correct?

17 A Yes.

18 Q And your name appears in Google, correct?

19 A (No response.)

20 Q If we were to Google your name --

21 A Yes.

22 Q -- your information comes up, correct?

23 A Yes.

24 MR. GRILLO: Objection, Your Honor.

25 THE COURT: I'll allow it. I've got to give him

1           some leeway.

2           Q     And you monitor those reviews that people write on your  
3 Google page, correct?

4           A     No, not usually.

5           Q     Doctor, tell this jury, have you ever responded on the  
6 Google page to comments that people make after being evaluated  
7 by you?

8                         MR. PUZO:  Objection.

9                         THE COURT:  Sustained.  Collateral.

10                        MR. GRILLO:  Objection.

11                        THE COURT:  I said it was collateral, Counsel.  Be  
12 careful.

13           Q     Doctor, do you know the name Aziz, A-Z-I-Z, Obidov,  
14 O-B-I-D-O-V; do you know that name?

15           A     No.

16           Q     If I told you that was a --

17                         MR. PUZO:  Objection.

18                         THE COURT:  Sustained.  Don't answer.  Don't even  
19 finish that question.  You heard me the first time.  Move  
20 on.

21                         You're not getting in third-party statements from  
22 Google, Counsel.  I can't make it any clearer.

23                         MR. THOMAS:  Judge --

24                         THE COURT:  I don't care.

25                         MR. THOMAS:  -- may I show this to the Witness?

1 THE COURT: No. You may move on. That's my  
2 ruling. You have your exception for the record.

3 Q Now, Doctor, you said you now testify 85 percent for  
4 the defense, correct?

5 A Approximately.

6 Q But how many of those evaluations that you do are for  
7 the defense?

8 MR. GRILLO: Objection to form, Your Honor.

9 THE COURT: If you understand the question, you may  
10 answer, Doctor.

11 A I never calculated the answer to that question.

12 Q Well, if you testified 80 percent for defense, can you  
13 in anyway calculate how many reports you do on behalf of defense  
14 attorneys in cases where claimants are being evaluated?

15 MR. GRILLO: Objection to form.

16 THE COURT: Form only. Get apples to apples.  
17 Percentages to percentages. I'll allow the question.

18 Form your question, Counsel.

19 A I have not calculated that. I don't know.

20 Q More than 80 percent of your reports are for the  
21 defendant?

22 MR. GRILLO: Objection, Your Honor.

23 THE COURT: I'll allow it if he knows.

24 A Yes.

25 Q And you said you testified 50/50 in medical malpractice

1 cases?

2 A Correct.

3 Q So you testify against doctors, correct?

4 A I don't testify against doctors. I testify on the part  
5 of the -- the part of the plaintiff. Not necessarily against  
6 the doctor.

7 Q When you say 50/50, tell the jury, what do you mean?

8 A Half the time it's for the defense, half the time it's  
9 for the plaintiff.

10 Q So half the time you're supporting the doctor and half  
11 the time you're going against the doctor?

12 MR. GRILLO: Objection, Your Honor.

13 THE COURT: Sustained as to that characterization.

14 Why don't you ask him if he's retained 50 percent  
15 of the time by plaintiff's counsel and 50 percent of the  
16 time by defendant's counsel. I think that would be an  
17 appropriate question.

18 MR. THOMAS: Sure. I'll adopt the Judge's  
19 question.

20 THE COURT: Would that be a fair statement, sir?

21 THE WITNESS: I'm sorry?

22 THE COURT: Could you be retained 50 percent of the  
23 time in medical malpractice cases by plaintiff's counsel and  
24 50 percent of the medical malpractice cases by defense  
25 counsel?

1 THE WITNESS: That's correct.

2 THE COURT: Thank you. Next question.

3 Q And when counsel asked if you were being paid for your  
4 time here today, do you remember what your answer was?

5 A I'm not paid for my time. I'm paid for my fee for  
6 being here for a day.

7 Q So you're paid for your opinion, correct?

8 A No, I'm paid --

9 MR. GRILLO: Objection.

10 THE COURT: Sustained.

11 Q Well, if you're not paid for your time, tell the jury  
12 what you believe that payment is for.

13 A It's for being here for a day in court.

14 Q No matter how much time you spend?

15 A Correct.

16 Q So if you were in and out in an hour, \$10,000, correct?

17 A Correct.

18 Q If you were here until 4:30, the same \$10,000?

19 A Correct.

20 Q Does that include travel time to and from, for example,  
21 in this case, Manhattan to Riverhead?

22 A It's all inclusive. \$10,000 for the day of testimony.

23 Q Doctor, you spend more time doing medicolegal reviews  
24 than you do actually seeing patients, isn't that true?

25 A Yes.

1 Q And how old are you?

2 A 82.

3 Q And how long has the bulk of your practice been  
4 medicolegal reviews versus actually seeing and treating  
5 patients?

6 A I can't calculate the exact figure on that. I don't  
7 know. It's more than ten years.

8 Q So pre-COVID you were primarily doing medicolegal  
9 reviews, not seeing patients, correct?

10 MR. GRILLO: Objection to form, Your Honor.

11 THE COURT: No. Just to fix us in time.

12 Overruled. You may answer.

13 A Pre-COVID I was seeing -- I was seeing more patients  
14 than I am seeing now.

15 Q Well, you just told us ten years, more than ten years.  
16 I just went back five years for argument's sake. Four or five  
17 years.

18 Doctor, can you tell the jury, in the last ten years,  
19 how much money you've made doing medicolegal reviews for firms  
20 like Goldberg and Segalla, Russo and Gould?

21 A I have never calculated it.

22 Q You've been asked that question before, haven't you,  
23 Doctor?

24 A No.

25 Q This is the first time that you're being asked that

1 question?

2 A In that form, yes.

3 Q Can you estimate or approximate what your income has  
4 been for over the last ten years from doing medicolegal work?

5 A No.

6 Q More or less than a million dollars?

7 A Can't calculate it honestly.

8 Q More or less than two million dollars?

9 MR. GRILLO: Objection, Your Honor.

10 THE COURT: It's Cross. Maybe it makes a  
11 difference. I'll give him a couple of questions.

12 Same answer, Doctor?

13 THE WITNESS: Yes.

14 THE COURT: Can't calculate it?

15 THE WITNESS: Yes.

16 THE COURT: Thank you. Next question.

17 Q You raised your rate from \$800 an hour to \$900 an hour,  
18 is that true?

19 A Correct.

20 Q When did you do that?

21 A I believe a year ago.

22 Q And you said that you reviewed video surveillance,  
23 correct?

24 A Yes.

25 Q When did you review the video surveillance?

1 A Last week.

2 Q So your testimony about review of the video  
3 surveillance reinforcing your opinions, that was not in any of  
4 your reports, correct?

5 A Correct.

6 Q And how many videos did you watch?

7 A I don't remember exactly. I imagine about ten of them.  
8 I'm not sure exactly how many.

9 Q If I told you there were 15 days of video surveillance  
10 conducted on Mr. Lopes --

11 THE COURT: Is that a question?

12 Q -- do you remember seeing --

13 MR. THOMAS: I'll withdraw the question, Judge.

14 THE COURT: Yes. You know where Mr. Grillo's  
15 going.

16 Q I want you to assume there have been 15 separate videos  
17 shown to this jury of surveillance of Mr. Lopes. Did you see as  
18 many as 15 individual videos of surveillance? Yes or no.

19 A Again, I don't remember counting them, but they're may  
20 have been that many, yes.

21 Q Do you have any issue with your memory, Doctor?

22 MR. GRILLO: Objection.

23 THE COURT: I'll allow it.

24 A I don't remember exactly how many. I believe there  
25 were at least ten, but I don't remember exactly how many there

1 were.

2 THE COURT: Thank you. Next question.

3 Q Did you see in any of those videos Mr. Lopes doing  
4 anything that he claims he can't do?

5 A I believe him doing normal activities. I'm not sure  
6 what he claims he can't do.

7 MR. THOMAS: Your Honor, if can we have an  
8 instruction to the Doctor, if I ask a yes or no question, he  
9 can limit answers to yes or no?

10 THE COURT: Doctor, this the first time that  
11 Mr. Thomas is asking the Court to instruct you that from  
12 this point forward, he only wants you to answer any question  
13 he may pose to you in a yes or no fashion. If you are  
14 unable to answer yes or no, please so state and Mr. Thomas  
15 will phrase a new question.

16 Go ahead, Mr. Thomas.

17 MR. THOMAS: Thank you.

18 Q Yes or no. Did you see Mr. Lopes doing anything in  
19 those surveillance videos that he claimed he cannot do?

20 MR. PUZO: Objection.

21 THE COURT: Sustained based on his prior answer.

22 He says he doesn't know what he claims he can and cannot do.

23 Q Did you see Mr. Lopes working in any of those videos?

24 A I don't recall if what he was doing was working or not,  
25 honestly.

1 Q What about those videos allows you to tell this jury  
2 that nothing you see changes your opinions?

3 THE COURT: That doesn't sound like a yes or no,  
4 Counsel.

5 MR. THOMAS: It's not a yes or no.

6 THE COURT: Okay. Just want to make sure the  
7 Doctor's clear on that.

8 A I saw Mr. Lopes doing normal daily activities and in my  
9 opinion, he's capable of doing normal daily activities.

10 Q Did you notice what time he left his house in those  
11 videos?

12 A No.

13 Q Did you notice if it was 4:00 A.M. or if it was 10:00  
14 A.M.?

15 A No.

16 Q Did you notice what he was doing when he left his house  
17 in the morning?

18 A I don't recall all those details.

19 Q Driving to a bagel shop for a bagel and coffee, does  
20 that refresh your recollection? Yes or no.

21 A I don't recall.

22 Q And then driving home from the bagel shop, do you  
23 remember seeing that? Yes or no.

24 A I don't recall.

25 Q And that was pretty much the bulk of the videos that

1 you saw, correct?

2 A Yes.

3 MR. GRILLO: Objection, Your Honor.

4 THE COURT: I'll allow it. It's Cross. The answer  
5 was yes. Next question.

6 Q Now, Doctor, you made some mistakes in your reports,  
7 correct?

8 A Yes.

9 Q Mistakes on dates, correct?

10 A Yes.

11 Q And did you fix those mistakes before you took the  
12 witness stand?

13 A No. Actually, yes. In this report.

14 THE COURT: Clear that up a little.

15 MR. THOMAS: Sure.

16 Q You didn't make any corrections that you then provided  
17 to Counsel so that those corrections can be served on us before  
18 you take the witness stand, correct?

19 A Correct.

20 Q So when you wrote in your report that he had a motor  
21 vehicle accident 2003, that was not true, correct?

22 A I actually found out that was not true, that's correct,  
23 it was --

24 Q But you got that information --

25 THE COURT: Wait. Let him finish his answer.

1 A It was a --

2 THE COURT: Excuse me, Doctor. There's an  
3 expression I use, but I'm not going to use it today.

4 Let's wait until the answer is finished,  
5 Mr. Thomas, let's wait until the question is finished,  
6 Doctor, so you're only speaking one at a time. It's very  
7 important. I have an obligation to make sure there's a  
8 clear record in these proceedings.

9 Go ahead, Mr. Thomas.

10 Q You wrote in your report that Mr. Lopes told you he had  
11 a motor vehicle accident in 2003, correct?

12 A Yes.

13 Q And was that his mistake or was that your mistake?

14 A I'm not sure whose mistake it was.

15 Q And you didn't correct it in advance of your testifying  
16 today, only when you reviewed your report for testimony today,  
17 correct?

18 A Correct. Mr. Grillo pointed it out to me and I  
19 corrected it. Today.

20 Q Did Mr. Grillo or any of the other attorneys on the  
21 defense tell you anything about the testimony that's been  
22 offered so far in this trial before you took the witness stand?

23 A Yes.

24 Q And what did they tell you and who told you?

25 A I actually reviewed the testimony. I saw the

1 transcripts.

2 Q Which transcripts did you review?

3 A Dr. Hausknecht, Dr. Merola and Dr. Rothman.

4 Q Anybody else?

5 A No.

6 Q Did you read the entire transcript?

7 THE COURT: Of those witnesses?

8 MR. THOMAS: Of those witnesses.

9 A I read what I assumed was the entire transcript, yes.  
10 I'm not sure if it was the entire transcript.

11 Q When I say the entire transcript, you read both Direct  
12 Examination and Cross Examination, correct?

13 A Yes.

14 Q Did you read the examination of Dr. Da Silva?

15 A No.

16 Q Do you know who Dr. Da Silva is?

17 A I believe he's a psychologist.

18 Q Did you say *he* is a psychologist?

19 A I'm sorry. She. Juraci.

20 Q And did you see any of her records from her office?

21 A Yes.

22 Q Did the information that you learned from reading the  
23 records from Dr. Da Silva's office inform you of the complaint  
24 and symptoms that Mr. Lopes was making from a psychological  
25 standpoint?

1 A Yes.

2 Q And you dismissed all those complaints that Mr. Lopes  
3 made to his psychologist and the treating psychologist from  
4 Dr. Da Silva's office, correct?

5 MR. GRILLO: Objection.

6 THE COURT: Overruled. You may answer.

7 A I did not find any of those problems.

8 Q You didn't find any of those problems?

9 A I did not -- actually I'm not a psychologist. I did  
10 not go into the psychological aspects of the case.

11 Q My question was: Did you see the complaints and  
12 symptoms that Mr. Lopes had expressed to his treating  
13 psychologists?

14 MR. GRILLO: Objection.

15 THE COURT: I'll allow it. As it impacts cross  
16 examination of a neurologist, I'll allow it.

17 You may answer, Doctor.

18 A Dr. Da Silva mentioned that the claimant had problems  
19 with depression, anxiety, sleeping difficulty and chronic pain.

20 Q Memory issues as well?

21 A Attention, concentration and memory function all seem  
22 to be slightly affected.

23 Q Those are all symptoms, signs of somebody with a  
24 traumatic brain injury of some sort, right?

25 MR. GRILLO: Objection.

1 THE COURT: Sustained as to the phraseology. You  
2 can get there.

3 Q Those are all signs and symptoms of somebody with a  
4 head injury, correct?

5 (Court reporter interrupts due to cross-talk.)

6 THE COURT: Counsel, one at a time. I don't want  
7 to go red light/green light.

8 MR. THOMAS: I appreciate it.

9 THE COURT: I hate doing that. I've done it. I  
10 don't like it.

11 What's the last thing we have?

12 (Whereupon, the record was read as requested.)

13 THE COURT: Your answer, Doctor?

14 A Subjective symptoms of a head injury, yes.

15 THE COURT: Thank you. Next question.

16 Q When you say *subjective*, that's what Mr. Lopes says his  
17 signs and symptoms are. Yes or no.

18 A Yes.

19 Q And it's important to listen to the person who's making  
20 those complaints. Yes or no.

21 A Yes.

22 Q And when you listen to the person that's making the  
23 complaints, you can address those complaints. Yes or no.

24 A Yes.

25 Q You didn't listen to Mr. Lopes' signs and symptoms and

1 complaints in rendering your final opinions. Yes or no.

2 MR. GRILLO: Objection, Your Honor.

3 THE COURT: Sustained as to form only. Be specific  
4 as to source.

5 Q When Mr. Lopes told you about his signs and symptoms,  
6 his complaints, you didn't accept them as true, is that correct?

7 MR. GRILLO: Objection, Your Honor.

8 THE COURT: Can you be more specific in the record,  
9 sir, as to what was conveyed by Mr. Lopes to Dr. Bender?

10 I'll sustain the objection, but I'll allow you some  
11 questions.

12 Q Tell the jury what complaints Mr. Lopes made to you  
13 when you did your examination, evaluation in 2021 that were  
14 similar to the complaints he made to his treating psychologist?

15 MR. PUZO: Objection as to the comparison, Judge.

16 THE COURT: No. He's asking based on the records  
17 he's reviewed. He's already indicated he reviewed  
18 Dr. Da Silva's record and he personally conducted the  
19 examination, so I'll allow it.

20 If you want to direct it more specifically,  
21 Mr. Thomas, I'll give you some leeway.

22 MR. THOMAS: Sure.

23 Q Tell us the complaints that you documented that  
24 Mr. Lopes told you that are similar or identical to the  
25 complaints he made to his treating psychologist.

1 THE COURT: If any.

2 MR. THOMAS: If any.

3 A Mr. Lopes complained of pain in his low back and neck  
4 and head. That's what he complained of to me.

5 Q He didn't tell you that he had memory problems?

6 A He did not.

7 Q He didn't tell you he had troubling sleeping?

8 A He did not.

9 Q He didn't tell you he was depressed?

10 A He did not.

11 Q He didn't tell you he had anxiety?

12 A He did not.

13 Q He didn't tell you he missed going to work?

14 A He did not.

15 Q He didn't tell you he missed his friends at work?

16 A He did not.

17 Q He didn't tell that you that he doesn't like taking  
18 pain medications?

19 A He did not.

20 Q Did you ask him any of those questions? Yes or no.

21 A As a neurologist, those would not be questions I would  
22 usually ask.

23 MR. THOMAS: Your Honor, if we can instruct the  
24 witness again. I asked a yes or no question. If he can  
25 limit his response.

1 THE COURT: Sometimes you vacillate between yes or  
2 no or longer versions, so please be clear.

3 And Doctor, if Mr. Thomas prefaces any question  
4 that he would like a yes or no answer, if you're unable to  
5 answer yes or no, please so indicate and Mr. Thomas will  
6 form another question. Do you understand, Doctor?

7 THE WITNESS: Yes.

8 THE COURT: Thank you, sir.

9 Whenever you're ready, Mr. Thomas.

10 MR. THOMAS: Thank you, Judge.

11 Q Now, you did an examination during COVID, correct?

12 A Yes.

13 Q And you followed COVID protocol, correct?

14 A Yes.

15 Q Was Mr. Lopes wearing a mask?

16 Doctor, you're looking at a report?

17 A Yes. When I said full precautions were taken, the  
18 assumption is he was wearing a mask.

19 Q Doctor, without looking at your reports, do you have an  
20 independent recollection of the evaluation that you performed of  
21 Ildo Lopes back on May 4th, 2021? Yes or no.

22 A I'm sorry, do I have an opinion on what?

23 Q I will repeat the question.

24 Do you have an independent recollection of your  
25 examination/evaluation of Ildo Lopes on May 4th, 2021?

1 THE COURT: As you sit here today, Doctor.

2 A Without looking at the report, do I remember exactly  
3 what I saw in 1917 -- 2017 -- I'm sorry, 2021, the answer is no.

4 Q So anything that you're testifying to about today is  
5 based on your notes and records, not your own independent  
6 memory, correct?

7 A It reinforces -- some of it reinforces my independent  
8 memory, yes.

9 Q Yes or no. Everything that you're testifying to today  
10 is based on notes and records, not on your own independent  
11 memory of evaluating Mr. Lopes on May 4th, 2021?

12 THE COURT: Can you answer that yes or no, doctor?

13 THE WITNESS: No.

14 THE COURT: You cannot answer it yes or no or your  
15 answer is no?

16 THE WITNESS: No. The answer is no, there are --  
17 basically this reinforces my memory.

18 THE COURT: Thank you. Next question.

19 Q Do you remember what Mr. Lopes was wearing at the time  
20 of your evaluation on May 4th, 2021?

21 A No.

22 Q Do you remember if he was wearing glasses?

23 A No.

24 Q Do you remember if he was wearing a hat?

25 A No.

1 Q Do you remember what kind of shoes he was wearing?  
2 Without looking at your records.

3 A No.

4 Q And you were provided with what was listed in your  
5 report as approximately 12 items of records for your initial  
6 evaluation, correct?

7 A Yes.

8 Q And then you wrote your opinions and then some time  
9 later, I believe it was, just so we're clear -- you were  
10 provided with records on May 4th, 2021, your original report,  
11 correct?

12 A Yes.

13 Q And then on September 20, 2021 you were provided with a  
14 whole list of other records that you had not been provided with  
15 before, correct?

16 A Yes.

17 Q And the records that you were provided on September 20,  
18 2021 after you did your evaluation, wrote your report, were  
19 records that were generated before you did your evaluation and  
20 wrote your report the first time?

21 A I'm sorry. Could you repeat that?

22 Q Sure. The records that were given to you to supplement  
23 your first evaluation were not records that were generated after  
24 your report, but were records that included notes and records  
25 prior to your evaluation, correct?

1 A I'm not -- I'm not --

2 THE COURT: Do you understand the question, Doctor?

3 A I understand the question, but I'm not sure what you  
4 mean. I'm not sure if these things were prior or what.

5 Q You don't have those records with you?

6 A No, I don't have the records with me. I have a list of  
7 the records and these are these are things -- yes, these are  
8 things that happened before I saw the claimant, yes.

9 Q And the point I'm trying to make is that the defense  
10 firm that hired you didn't provide those records to you for your  
11 first evaluation, correct?

12 A Correct.

13 Q Now, you said in your report that Mr. Lopes spoke  
14 fluent English, is that what you said?

15 A Correct.

16 Q Did he have an accent?

17 A As I -- actually, I don't recall.

18 Q You said you only needed the Portuguese translator to  
19 translate one question, is that what you said?

20 A Yes.

21 Q Tell the jury, what was that one question that needed  
22 translation?

23 A I did not record that.

24 Q Do you remember what the subject matter was that needed  
25 translation?

1 A No.

2 Q Do you remember what part of your examination it was  
3 that you needed translation?

4 A No.

5 Q You didn't make a notation of it anywhere, correct?

6 A Correct.

7 Q How long was your examination of Mr. Lopes in total?

8 A I didn't record the exact time, but usually when the  
9 examination is normal it takes less than half an hour.

10 Q So from October 10, 2017 until today, the total amount  
11 of time that you spent in Mr. Lopes' presence was less than 30  
12 minutes, true?

13 A True.

14 Q And are you telling this jury that you're in the best  
15 position to tell this jury what's going on with his neurological  
16 situation based on a 30-minute evaluation during all that time  
17 and review of the records that you were provided?

18 MR. GRILLO: Objection.

19 THE COURT: Overruled. I'll allow it. You can  
20 answer, Doctor.

21 Q Yes or no.

22 A I am -- I'm saying yes, I'm in a better position.

23 Q Better position than his treating neurologist?

24 A Yes.

25 Q Dr. Hausknecht?

1 A Yes.

2 Q Better position than his treating orthopedist  
3 Dr. Merola?

4 A Yes.

5 Q Better position than his treating physical therapists?

6 A Yes.

7 Q Better position than his treating psychologist?

8 A Yes.

9 Q Better position than any other treater that Mr. Lopes  
10 has consulted and been examined by?

11 A I don't have --

12 Q Yes or no.

13 A What other treaters are you --

14 THE COURT: Need more specifics on that question,  
15 Doctor? You need to know specifically who Mr. Thomas is  
16 referring to?

17 THE WITNESS: Yes.

18 THE COURT: Thank you. Next question.

19 Q Dr. Joel King, the psychiatrist --

20 A Yes.

21 Q -- you're in a better position?

22 A Yes.

23 Q So this jury should follow your opinions and disregard  
24 the opinions --

25 MR. GRILLO: Objection.

1 MR. PUZO: Objection.

2 Q -- of the treating physician, is that your position?

3 MR. GRILLO: Objection.

4 THE COURT: Sustained. Don't answer.

5 And gentlemen, if you can wait until the end of the  
6 question just for my reporter's sanity because when there  
7 are three people, four people speaking at the same time,  
8 it's difficult. Not impossible, but I prefer not to put her  
9 through that.

10 Q Going back to the translator for one second.

11 There was a Portuguese translator present during your  
12 evaluation, correct?

13 A Yes.

14 Q Can you tell the jury who hired that Portuguese  
15 translator?

16 THE COURT: Yes or no, Doctor.

17 A I don't know.

18 Q If I told you I-Med View, does that refresh your  
19 recollection?

20 A No.

21 Q Do you know if the defense firm that hired you provided  
22 a translator?

23 A No.

24 Q Do you know if Mr. Lopes came to the evaluation with a  
25 friend or a family member that was acting as a translator?

1           A       There was an interpreter named Mr. Luiz Simas. He was  
2 not a friend.

3           Q       He was hired to be there as a translator for the  
4 evaluation, correct?

5           A       I assume so, yes.

6           Q       And again, that was by I-Med View, correct?

7                   MR. GRILLO: Objection.

8                   MR. PUZO: Objection.

9                   THE COURT: Sustained, Counsel.

10                   I'll give you a little leeway, Counsel. He's not  
11 sure how he got there, who hired him, who provided him, who  
12 arranged the appearance or any other facts concerning the  
13 translator's appearance at the exam.

14           Q       Doctor, did you pay I-Med View any sums of money for  
15 the referral to the law firm of Russo and Gould?

16           A       No.

17           Q       Do you know who pays I-Med View?

18           A       No.

19           Q       Do they work for free?

20                   THE COURT: Sustained. I've had enough. Move on.

21           Q       In your report, you summarized portions of the records  
22 that you were provided, correct?

23           A       Yes.

24           Q       And in part of your record you summarized Mr. Lopes'  
25 50(h) hearing, the testimony that he gave about the accident,

1 correct?

2 A Yes.

3 Q And then I think you said you put some -- when you were  
4 reading it, you said something about parentheses?

5 THE COURT: Ellipsis.

6 A Ellipsis.

7 Q Ellipsis. Excuse me. I apologize.

8 So when you were reading in your summary, what's  
9 contained within these ellipsis that you talked about?

10 THE COURT: What do mean by the ellipsis that  
11 you --

12 THE WITNESS: Ellipsis. Basically there were parts  
13 that did not add to the meaning of what he was saying, so I  
14 would put dot, dot, dot. That means ellipsis. Basically  
15 just to save space.

16 Q So you didn't transcribe it verbatim from the record,  
17 you --

18 A Verbatim with -- I marked the parts that were not  
19 included by dot, dot, dot.

20 Q When you read the summary accounts I asked you to read,  
21 it wasn't in the order in which he said, correct?

22 MR. GRILLO: Objection, Your Honor.

23 MR. PUZO: Objection.

24 THE COURT: Sustained. Order?

25 Q The order, you didn't --

1 MR. GRILLO: Objection.

2 THE COURT: Sustained. There may be omissions,  
3 Counsel.

4 MR. THOMAS: Right.

5 Q There were omissions from what he said, correct?

6 A Yes, and I mentioned that there were.

7 Q And then you picked those portions to put the summary  
8 together that you put in your report, correct?

9 A Yes.

10 Q And you read in his testimony that he had pain after he  
11 fell, correct?

12 A Correct.

13 Q And that he didn't want to lose his job so he continued  
14 to try and do some work, correct?

15 A Yes.

16 Q Do you know what kind of work he was doing after the  
17 accident?

18 A I believe he was a bridge painter.

19 Q If you don't understand my question, let me know.

20 MR. PUZO: Objection to the comment.

21 THE COURT: Sustained. No editorials, Counsel.  
22 Just ask your questions.

23 Q After the accident you testified that you learned that  
24 he went back to work, correct?

25 A Yes.

1 Q When he went back to work, what did you understand he  
2 was doing after the accident?

3 A I don't, I don't -- I did not record exactly what he  
4 was doing.

5 Q You wrote in the paragraph on page three of 13, *I tried*  
6 *to do vacuuming*; do you remember that?

7 A Yes.

8 Q That's what it says, right?

9 A Yes.

10 Q And you got that from his 50(h) hearing, correct?

11 A Yes.

12 Q Do you know what he was doing before he was vacuuming?

13 THE COURT: Sustained. In terms of immediately  
14 before, work-related?

15 Q That day. That day that the accident happened, do you  
16 know what he was doing just before the accident happened?

17 A I only have what I record he said he was doing. That's  
18 all I have.

19 Q Please tell the jury, as you're sitting here right now,  
20 what you believe Mr. Lopes was doing just before his accident.

21 A I don't know.

22 Q Do you know if he was on the ground or if he was in the  
23 air?

24 A I don't know.

25 Q Do you know if he was standing on a scaffold or on a

1 ladder or in a scissor lift or anything like that?

2 A I don't know.

3 Q Would it be important for you in making your final  
4 opinions and conclusions to know how the accident happened?

5 A Yes.

6 Q Would it be important for you to know if he fell from a  
7 height?

8 A Yes.

9 Q Would it be important to know how high he fell if he  
10 fell from a height?

11 A Yes.

12 Q Would it be important to you to know whether he hit his  
13 head at any time from the time the accident happened until the  
14 time he landed on the ground?

15 A Yes.

16 Q Would it be important to you to know if he was wearing  
17 any sort of protective hard hat at the time he hit his head?

18 A Yes.

19 Q Do you know any of the answers to any of those  
20 questions?

21 MR. PUZO: Objection.

22 MR. GRILLO: Objection.

23 THE COURT: I'll allow it. I'm assuming the  
24 questions concerning those just posed by Mr. Thomas.

25 If you know Doctor, you know. If you don't, let us

1 know.

2 A I believe there are answers to the questions, but I  
3 don't know them.

4 THE COURT: Mr. Thomas, I'm assuming you've got  
5 more to go?

6 MR. THOMAS: Judge, I think I can finish before  
7 lunch.

8 THE COURT: Well, we might not be able to get the  
9 Redirect in before lunch.

10 MR. GRILLO: I don't have much.

11 THE COURT: All right. We'll see where you are.  
12 I'll give you guys some leeway, but keep in mind I have to  
13 call the District Administrative Judge if I go passed 1:00,  
14 so it's up to you. I'm on friendly terms, so it's not that  
15 big a deal.

16 Q I want you to assume there's been testimony in the case  
17 by another retained expert by the defendant that was also hired  
18 by I-Med View to do an evaluation of Mr. Lopes by the name of  
19 Dr. Erlanger. Do you know that name?

20 A Yes.

21 Q And I want you to assume that Dr. Erlanger testified  
22 that he submitted his report to I-Med View for proofreading.  
23 Can you assume that?

24 A Yes.

25 Q Tell the jury, do you submit your reports when you do

1 these medicolegal reviews to the IME company that retains you?

2 A Do I submit reports to them, yes.

3 Q Do you submit your final report to I-Med View for any  
4 type of proofreading or editing?

5 A I submit it to them and sometimes they come back with  
6 edited proofreadings, but I don't submit it specifically for  
7 proofreading.

8 Q When you submit your reports and they send them back  
9 for some edit, do you know if they provide those reports to the  
10 defense firms that hire them between the time that you submit it  
11 to I-Med View and the time I-Med View submits it back to you for  
12 some correction?

13 A I don't understand the question.

14 Q Sure. Do you know if I-Med View has staff that reads  
15 your reports and suggests edits, changes or modifications?

16 A Sometimes I get it back proofread, cut versions of my  
17 report.

18 Q My question is --

19 A They do correct it and then they send it back to me. I  
20 correct it -- I put in the corrections and send it back to them  
21 and that's the last I hear of it.

22 Q Listen to my question. Do you know if I-Med View has  
23 people on staff that do those written requests for edits or that  
24 the reports are sent to the defense firms that hire them and the  
25 defense attorneys do the edits; do you know?

1 MR. GRILLO: Objection.

2 MR. PUZO: Objection.

3 THE COURT: If you know, Doctor.

4 A I don't know.

5 THE COURT: He does not know.

6 MR. GRILLO: Calls for speculation.

7 THE COURT: He does not know.

8 Next question, Mr. Thomas.

9 Q You testified that the Plaintiff told you that he saw a  
10 Dr. Chang, C-H-A-N-G, correct?

11 A Yes.

12 Q Did you learn any other information about why he went  
13 to Dr. Chang?

14 A All I note is that he said he saw this doctor and he  
15 was very vague as to what was done that day.

16 Q Did you read Mr. Lopes' trial testimony in this case?

17 A No.

18 Q Did anybody on the side of defense -- withdrawn.

19 Did anybody tell what you Mr. Lopes testified to, to  
20 this jury, about Dr. Chang?

21 A All I know is that they were unable to identify this  
22 Dr. Chang and that nobody really knows if he saw him or, if he  
23 did, what happened there.

24 Q I want you to assume that Mr. Lopes testified that he,  
25 the next day, went to see Dr. Chang, but Dr. Chang needed an

1 accident report to open a claim. Is this the first time that  
2 you're hearing that?

3 A Yes.

4 Q And that would be consistent, wouldn't it, with a  
5 doctor -- with somebody seeing a doctor and the doctor saying he  
6 needs more information to be able to start treatment?

7 MR. GRILLO: Objection.

8 MR. PUZO: Objection as to the word *consistent*.

9 THE COURT: I'm going to sustain the objection.

10 I understand what you're trying to do Mr. Thomas,  
11 but sustained.

12 Q You understand that Mr. Lopes was injured while he was  
13 on-the-job, correct?

14 A Yes.

15 Q And if I told you that he went to Dr. Chang and  
16 Dr. Chang required an accident report, did you read any of that?

17 MR. PUZO: Objection.

18 THE COURT: Sustained.

19 Mr. Thomas, I understand what you're trying to do,  
20 sir, but I can't get you there.

21 Q Okay. Did you see the accident report in this case,  
22 Doctor?

23 THE COURT: Is there a specific document generated  
24 by a specific source?

25 MR. THOMAS: Sure. Plaintiff's Exhibit 19 for

1 identification.

2 A I don't have a record of having seen the accident  
3 report.

4 Q Do you know who he was working for at the time of the  
5 accident?

6 A No.

7 Q That was never provided to you, correct?

8 A Whether it was provided to me or not, I don't recall  
9 seeing that information.

10 Q If it was provided to you, you would have listed it in  
11 any of the materials that you reviewed, correct?

12 A Incorrect. I don't put who he was working for in my  
13 report.

14 Q My question is: If I-Med View provided you with the  
15 records that were provided by the defense firm that hired them  
16 that included the accident report, you would have listed that in  
17 the documents that you were provided and reviewed?

18 A If I saw the accident report I would have listed it in  
19 the documents I reviewed, correct.

20 Q And in your report, you've seen multiple records that  
21 indicate that Mr. Lopes says, he was dizzy and thinks he lost  
22 consciousness for a few seconds, correct?

23 MR. PUZO: Objection.

24 THE COURT: I'll allow that. He can answer.

25 Q Correct?

1 A Correct.

2 Q And that he had difficulty getting out of bed the next  
3 day, correct? Do you understand that?

4 A Yes.

5 Q And he said that he had intractable lower back pain and  
6 pain going down his legs after this accident, correct?

7 A Yes.

8 Q And that would be consistent with somebody who suffers  
9 a fall from a height, maybe 20 feet, correct?

10 A Not necessarily.

11 Q You also read in Dr. Hausknecht's report, and you put  
12 it into your report, that Mr. Lopes was clearly having  
13 difficulty with comprehension during his interview with  
14 Dr. Hausknecht, correct?

15 A Yes.

16 Q And that he had shooting pain down the left buttock and  
17 thigh, correct?

18 A Yes.

19 Q And he indicated he had numbness, tingling and  
20 cramping, correct?

21 A Yes.

22 Q You also indicated in your report that you reviewed  
23 Dr. Hausknecht's records where he indicates that the EEG was  
24 interpreted as abnormal, correct?

25 A Yes.

1 Q And that there was diffuse cerebral dysfunction,  
2 correct?

3 A Yes.

4 Q But you disagree with that.

5 Do you disagree with that finding?

6 A I disagree with the interpretation of it, yes.

7 Q Did you see the EEG?

8 A No.

9 Q So how can you disagree with the interpretation of the  
10 EEG if you never saw it?

11 A Interpretation implies that there was a brain injury  
12 and it is my opinion there was no significant brain injury that  
13 occurred in this incident.

14 Q Doctor, you've testified before that the radiologist is  
15 more qualified than you, correct?

16 A Radiologist is qualified for radiology. I am qualified  
17 for neurology, correct.

18 Q Did you ever say that radiologists know their work  
19 better than surgeons and better than you; did you ever say that?

20 A Radiologists are capable of making reports. Surgeons  
21 and I are not.

22 Q Can you answer my question?

23 A That's my answer.

24 THE COURT: That's his answer, counselor.

25 Next question.

1 Q Doctor, do you remember being questioned in the case of  
2 Christina Toussaint, T-O-U-S-S-A-I-N-T, against Ocean Avenue  
3 Apartments Associate Coltown, C-O-L-T-O-W-N, Properties and EIMJ  
4 Management Company; do you remember offering testimony in that  
5 case?

6 A No.

7 Q It was in Brooklyn.

8 MR. GRILLO: Objection, Your Honor.

9 THE COURT: I'll allow it. Kings County.

10 Q Kings County, April 14, 2016, before the Honorable  
11 Justice Mark I. Partnow. Do you remember that?

12 A No.

13 Q The attorney that hired you was Rafter and Associates  
14 and the attorney for the Plaintiff was Nicholas Tzaneteas.  
15 T-Z-A-N-E-T-E-A-S. Does any of that refresh your recollection?

16 A No.

17 Q And during the course of that trial you were asked  
18 these questions and gave these responses.

19 MR. GRILLO: Objection.

20 THE COURT: What was the name of the Plaintiff?

21 MR. THOMAS: Plaintiff is Christina Toussaint  
22 T-O-U-S-S-A-I-N-T.

23 Do you want the index number, Judge?

24 THE COURT: I'm good for now.

25 Q Do you remember being asked these questions and giving

1 these answers, page 530 of the trial testimony. Line 15.

2 (As read.)

3 "Question: Now, do these reports -- and the one  
4 thing that you have consistently done in your reports over  
5 the years is say that Plaintiff is exaggerating, isn't that  
6 true?

7 "Answer: That is not only true, it's extremely  
8 common, unfortunately.

9 "Question: So it's safe to say, out of the  
10 thousands of exams, let's just say 500 exams, is that a  
11 reasonable number that you have done over your career?

12 "Answer:" --

13 MR. PUZO: Objection, Your Honor.

14 THE COURT: I'm going to allow it at this point.  
15 I got Q and A, under oath, with the appropriate venue  
16 representation, so I'm going to give it some leeway.

17 Q (As read.)

18 "Answer: I don't know.

19 "Question: Would it be safe to say more than half  
20 of your exams you have put in your reports that the  
21 Plaintiff was exaggerating their symptoms?

22 "Answer: That's correct."

23 Do you remember being asked those questions and giving  
24 those answers?

25 A I don't remember those questions, but the answers are

1 correct.

2 Q And you stand by those answers, correct?

3 A I do.

4 MR. GRILLO: Before the next question, I'm little  
5 concerned.

6 THE COURT: It's ten to 1:00 now. I don't see us  
7 finishing anytime soon. I don't want to give short shrift  
8 to the examination, it's our last witness, so we're going to  
9 do it right the first time as they say.

10 Ladies and gentlemen, I'm going to break for lunch  
11 now. I'll ask you to be back by 2:00, we'll finish up  
12 Dr. Bender's testimony. At that point we'll see what the  
13 defense and plaintiff's intentions are with respect to the  
14 record, if they're going to present any other witnesses or  
15 documentary evidence. I don't anticipate that happening.  
16 Once that happens and the record is closed, you'll be  
17 excused and I'll ask you to be back here tomorrow morning  
18 around 10:15 for purposes of Counsel's summations and my  
19 final instructions to you on the law.

20 That's our anticipated schedule at this point. I  
21 do that so that you can plan your day this afternoon and  
22 tomorrow. If there's any change, as you well know, the day  
23 that I plan on having is not always the day that I have.

24 Thank you for your patience. Do not form or  
25 express any opinion about the case. Do not discuss between

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and amongst yourselves. Back here at 2:00.

COURT OFFICER: All rise.

(Whereupon, the Jury exited the courtroom.)

THE WITNESS: Should I leave this here?

THE COURT: Leave whatever you want. It's up to you. Be careful stepping down, Doctor. Be back at 2:00, I'm sure Counsel will remind you, for continued Cross.

We're off the record.

(At which time there was a luncheon recess.)

(Time noted: 12:55 P.M.)

(Whereupon the following was reported by Maria Tamburrino, Senior Court Reporter.)

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