In The Matter Of:

Barra v.

MTA

April 8, 2016

Monica A. Martinez . Senior Court Reporter

60 Centre Street

Rm. 420

New York, New York 10007

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x
JOSEPH BARRA,

Index:
102339/11
Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION, CITY OF NEW YORK, NEW YORK CRANE & EQUIPMENT CORPORATION,

Defendants.
----------x

71 Thomas Street
New York, New York 10013
April 8, 2016

B E F O R E:
HONORABLE MANUEL J. MENDEZ, Justice

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

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BY: RONALD E. JOSEPH, ESQ.

Tal R. Hahn,

Senior Court Reporter

Proceedings

(Whereupon, Plaintiff's Exhibits 14 through Plaintiff's Exhibit 19 were marked for I.D. at this time.)

THE COURT: All right. Exhibit 14, this is a place where he treated?

MR. MORGAN: Yes, your Honor.

THE COURT: Who was he seeing there?

MR. MORGAN: Dr. Brown and Dr. Busichio.

THE COURT: And how many visits did he make to them?

MR. MORGAN: About twenty-three visits.

THE COURT: Twenty-three?

MR. MORGAN: Yes.

THE COURT: Okay. Now, you object to this item coming in --

MR. JOSEPH: At least portions of it.

THE COURT: What portions?

MR. JOSEPH: The portions that actually in a report.

THE COURT: Those are the summary from Dr. Brown?

MR. JOSEPH: Yes.

MR. MORGAN: And Busichio. They both signed the reports. It's a -- they give him testing and that is summarizing the testing they gave him. And the

testing results are in there and the treatment is in there.

THE COURT: And the progress notes.

MR. MORGAN: Are in there. Yes. And --

THE COURT: Which reflect their conclusions they reach in the testing and in the reports?

MR. MORGAN: Correct.

THE COURT: All right. Mr. Joseph?

MR. JOSEPH: Okay. I am looking at this because this -- okay. I thought -- no, I mean, here there is a report that was clearly generated on behalf of -- to the plaintiff's attorney.

THE COURT: There is one report?

MR. JOSEPH: Well, there is one where the plaintiff's attorney had him reevaluated for the purposes of this litigation on September 9th, 2015. And it may have the same type of format as the other, but it was -- they didn't go ahead and treat him as a result of this. This was clearly for the purposes of this litigation.

I mean, she could testify as to what she heard the plaintiff say, presumably, to the things that she could -- she is licensed to diagnose, but for this report to go -- that particular report to go in when there is no treatment as a result, it's clearly for the

purposes of this litigation. And let me take a look at the first report.

(Brief pause.)

MR. JOSEPH: I would -- I mean, I think the first report is also an expert report but I will concede that there is -- there are progress notes subsequent to that report. So I see where Mr. Morgan is going on that, but the second one was clearly for the litigation.

THE COURT: September 5th, 2000 --

MR. JOSEPH: Let me just get that date again.

(Brief pause.)

THE COURT: Okay.

MR. JOSEPH: The reevaluation. And I believe it was a bunch of them. I am sorry, your Honor.

September 9, 2015. There is no subsequent treatment. It's clearly for this litigation.

MR. MORGAN: It's not, actually, your Honor. What happened in this case, Mr. Barra was seen initially three weeks -- approximately three weeks post-accident. He was given neuropsychological testing. He began treatment. Worker's Comp subsequently cut-off his benefits. There was an appeal through Worker's Comp. That took a little over a year to resolve.

In order for that treatment to be reestablished, once it did he was allowed to come back

up and get testing to get a baseline from where he was at again. They sent him back -- he was living in Florida at the time. They couldn't do the treatment. They attempted to find treatment down in Florida that would take New York Worker's Comp. They weren't able to do so. This was all attempts to treat his neuropsychological deficits.

THE COURT: All right. I will allow the admission of the record into evidence. Exception is noted. I think it's all part of the treatment of plaintiff by the doctor and psychologist.

What other item do we have a problem with? I mean, other than things that need to be redacted of course.

MR. JOSEPH: I was in the middle of going through them. I am not trying to cut you off.

THE COURT: All right. We will be right with them.

MR. MORGAN: Can I step out and see if she is here?

MR. JOSEPH: I think we will have to redact for another issue. I seem to see mentions of Worker's Compensation.

THE COURT: No, those things will be redacted.

MR. JOSEPH: I just don't want to limit it to

the topic we discussed off the record.

THE COURT: No. The fact that I am admitting the record, those items clearly need to be redacted and they will be redacted before the jury gets to see them.

THE COURT: All right. So we will have 14, 15, 16, 17, 18 and 19 in evidence over objection. Your exception is noted and subject to redaction. Okay?

MR. MORGAN: And the objection is only to 14.

MR. JOSEPH: I didn't keep track. It was the cognition.

MR. MORGAN: Yes.

MR. JOSEPH: All right.

THE COURT: All right. As I stated previously on the record, any -- there may be in the records things that need to be redacted. The fact --

MR. MORGAN: We know there are.

THE COURT: The fact that they are admitted, the jury will not get to see them until those items are redacted.

So we are ready?

MR. JOSEPH: Do you want me to make the record later since it doesn't matter now? We could wait until later.

THE COURT: Okay.

MR. MORGAN: This is my only witness today. We

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expect to go to the afternoon --

THE COURT: We could wait until later on this afternoon.

MR. JOSEPH: Whichever is best for you.

THE COURT: Sure. Let's get the witness on, since it's an expert.

COURT OFFICER: Bathroom, Judge.

(Brief pause.)

(Whereupon, the jury panel entered the courtroom.)

THE COURT: All right. You may have a seat. Welcome back. Good morning.

MR. MORGAN: Good morning.

MR. JOSEPH: Good morning.

THE COURT: We are continuing with the trial. We are still on plaintiff's case.

Mr. Morgan, your next witness please.

MR. MORGAN: Dr. Busichio, your Honor.

THE COURT: Dr. Busichio.

COURT OFFICER: Remain standing. Raise your right hand.

K I M B U S I C H I O, called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

COURT OFFICER: In a loud and clear voice,

Dr. Busichio - Plaintiff - Direct

state your name, and spell your last name for the record please.

THE WITNESS: Kim Busichio, B-U-S-I-C-H-I-O. 952 Fifth Avenue, apartment 5B, New York, New York, 10075.

THE COURT: You may proceed.

MR. MORGAN: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. MORGAN:

Q. Good morning.

A. Good morning.

Q. How are you?

A. Good. Thank you.

Q. Can you state your professional qualifications for the record?

A. Sure. I am a neuropsychologist. I got my clinical psychology degree at Fairleigh Dickinson University. And I then went to N.Y.U. to do my internship and went to JFK to do my post-op.

Q. What year did you finish your educational background?

A. Finished in 2004.

Q. How about your employment history?

A. I have been at the Center for Cognition as the Clinical Director of Neuropsychology for the past nine and a

half years.

Q. Are you licensed?

A. Yes.

Q. And who licensed you and in what field?

A. New York State in clinical psychology.

Q. Can you explain to this jury what neuropsychology is?

A. Sure. It's a profession dealing with concussions from brain injury, and cognitive brain rehabilitation.

Q. What does it mean to be the Director of Neuropsychology at the Center for Cognition?

A. I run the neuropsychology -- our practice is neuropsychology. I run the practice along with Dr. Brown, who is the owner. And I take care of all the assessments and treatment of the patients.

Q. And what type of assessments do you do?

A. Neuropsychology assessments, which is cognitive assessments for attention, memory, problem solving, related to a concussion or brain injury.

Q. Those things you just mentioned, are those deficits?

A. Yes.

Q. And can you just describe for me what that means?

A. Sure. When someone has a brain injury they may have problems with memory, attention, processing speed,

spatial skills, verbal functioning. And what I do, I do the testing to see what areas they do have problems with. And if they do, I set up a treatment plan for them and work with those areas to improve those areas.

Q. And, Doctor, have you been compensated for your time devoted to preparing for your testimony and for coming in here and talking to the jury about your treatment of Mr. Barra?

A. I will be. I will be.

Q. And that fee includes the time you took out to prepare here in court?

A. Yes, correct.

Q. And have you ever testified for any of my clients before?

A. We've had -- I have had clients, yes. Of your firm before, yes.

Q. Have you ever testified in court for any of them?

A. No.

Q. Is the fee that -- what is the fee that you are going to receive for preparing and testifying here today?

A. That includes all the preparation, record review, and then for me to come here and clear my schedule for today for the patients, $6,000 in total.

Q. And is that the same total no matter what the outcome of this case?

A. Yes, correct.

Q. And, now, in the course of your professional practice, did you have occasion to treat Mr. Joseph Barra?

A. Yes.

Q. And is Mr. Barra in the courtroom today?

A. Yes, he is.

Q. And when for the first time did you see Mr. Barra?

A. I first saw him in August 26th, 2010.

Q. Okay. And did you obtain a history from Mr. Barra when you saw him?

A. Yes, I did.

Q. And what was that history?

A. That he was working as a crane operator on 8/5/2010, climbing to the top of the crane on the ladder, fell off the ladder, hit his head, hit his shoulder, lost consciousness at the scene. And remembers waking up in the ambulance. That is what he recalls, the first thing he recalls. And he was taken to New York Presbyterian where they did a CT scan of the brain to ensure there was no internal bleeding.

Q. And did you do any kind of examination before giving any of your tests?

A. We did the -- Dr. Brown and I both do the clinical interview together.

Q. Okay.

A. We see every patient together and I do the neuropsychological evaluation. I do the testing on the patient.

Q. How do you do that?

A. So what it is, it's a standardized battery. It's all norm with his age and education level. I will norm him with a fifty-five year old with the same education. So he's compared against his peers on the testing. And what it is, it's a battery of tests for memory, processing speed, word finding, attention, language, spatial skills. And then I determine, I get percentiles in those scores and I determine if he has deficits in any of those domains.

Q. Those domains, one of them was processing speed?

A. Yes, it's the speed of processing. So things we take for granted on an everyday basis. We will be in conversation with someone and it's your reaction time. It's the way we respond and how quickly we respond to people.

Q. And could you test that?

A. Yes.

Q. And another one you said was spatial skills?

A. Yes. Correct.

Q. What is spatial skills?

A. Your perception. So your ability to perceive what is going on. You might look at a building, your perspective is on the front of the building or on the side of the

building. So you know where you are in orientation to a specific building, or object.

Q. And with the memory, what types of tests do you test to test memory?

A. We do tests of visual and verbal memory. So we give patients words to remember and ask them to remember it over time. And then we have a delayed memory, where we do other things and come back to that later to see if they could -- they've retrieved it, encoded it, consolidated it, and they could retrieve it at that moment, at a delayed reaction. It's more for short term memory.

And then we do visual skills, like targets, like an arrow and a key. They have to remember the orientation of it. Is it going up to the right, the left, and we give them four or five trials of that and ask them to remember that later.

Q. Okay.

A. And those are just examples of what we do. Those are one of the tests I do. I give a number of tests.

Q. I will go through the tests you did on him after we understand exactly what is taking place.

A. Okay.

Q. Do you do any type of test to check and make sure the patients you are treating are being honest or trying?

A. Yes. You use a number of different things to

determine that. You give specific tests to do that. And you also give -- you also look at the profile of the patient. If a patient has areas of strengths and weaknesses, intact, you also look at the clinical interview. You look while they are testing how they are testing. So you have to take all this into consideration when you are looking at effort.

Q. While they are doing the tests, are you present?

A. Yes, we are there.

Q. And how do they take the test?

A. They take the test, part of it is paper and pencil and the other part is on the computer. You put them on the computer and ensure that they understand the instructions. There is a tutorial, to make sure they get through that. That is another test of effort built into the computer right there. If they can't even pass the tutorial, which they don't even know it's the test, if someone was trying to fake it they wouldn't even get to the test. The whole computer would shut down. That is a definite way to -- if they do perfect on the tutorial which they have to do to get on the test, then you know that -- that is one indication that they are trying.

Q. And did you check to make sure Mr. Barra was trying?

A. Yes.

Q. And what did you determine, if anything?

A. He was trying, and then he was putting forth full effort. And I treated him also for three months. So he made significant improvement in treatment. So someone that is not trying will not improve in treatment. So that is just another way -- I just didn't test him. I treated him.

Q. And what is the name of the test that you use for the -- one of the names of the tests that you use for testing effort?

A. The Rey 15, and then the tutorial for the Mindstreams. And then again Dr. Brown and I both do the clinical interview, and then we watch them take the test. So you could -- there is a lot of different variables that you look at in terms of effort testing.

Q. Are those standard tests given by neuropsychologists to determine effort?

A. They are, yes.

Q. How does the type of testing differ from what a neuropsychologist would give as opposed to say a neurologist who doesn't have a neuropsychologist?

A. Yes. In order to determine if someone has cognitive deficits, a patient would need to have a neuropsychological evaluation. A neurologist does a mental status examination, which is determining if a patient is awake, alert, can coherently speak in a conversation. And

we wouldn't even be able to do an evaluation if a patient wouldn't pass a mental status.

So Dr. Brown and I during our interview. Dr. Brown is a neurologist. We do a mental status during the interview based on, you are here, where are you, we ask those questions to make sure the patient knows why they've come to the testing that day. That is a mental status. If a patient can't pass that there is no reason to do a neuropsychological evaluation. That means they are not alert enough to take an examination.

Q. Can a neurologist on his own do these tests that --

A. No.

Q. Can a psychologist on his own do these tests that Mr. Barra had done in your office?

A. No.

Q. How long did the test take?

A. The test --

Q. The first test you took.

A. It's been a while. It's 2010. So it's a long time ago.

Q. Okay.

A. Typically I will give you the range. We saw him over two days. So 8/26 and 8/27. And the clinical interview depends, could vary, could be a half hour, forty-five minutes with me and Dr. Brown, both of us

together. And the testing could take two, three hours depending on the processing speed of the patient, how many breaks the patient needs. Sometimes the patient asks me for breaks in between each test. That might be ten, fifteen minutes. I don't know how long he was actually there for.

Q. On each of those days, but you know he was there for two days?

A. Yes, he was there for two days.

Q. Is it safe to say that the testing was -- the initial testing was longer than two to three hours?

MR. JOSEPH: Objection.

THE COURT: Sustained.

MR. JOSEPH: Leading the witness.

THE COURT: Sustained.

Q. Can you approximate how long it was?

A. Typically it is, yes. Because it went over for two days, so he couldn't finish the one day, so we had to bring him back on another day to finish.

Q. Now, are you able to determine -- were you able to tell if your testing showed cognitive conditions prior to the accident?

A. Yes. So what -- there is a number of ways you do that also as a neuropsychologist. You give a test call a Raven's, which again you are testing a patient after the accident. So the best thing we could do is estimate. We

can't get an exact number of how someone was doing prior but we could estimate, based upon tests we give and also based on what they were doing prior; him being a crane operator, having his own business prior to that. So all the executive skills you need to be able to run your own business, operate a crane, the attention span, all that you need. And then we give a test that also estimates that.

Q. And what is that test called?

A. That is the Raven's. Standard test.

Q. And tell me what that test is please?

A. Again, it's just an estimate. Typically it's one of the most stable tests you could give that will come down less than the other ones, less sensitive in terms of coming down after a brain injury or being reduced after a brain injury. And he performed in the lower average, average range on that test.

However, you take that test and you also look at the other areas like I just talked about. You look to someone's education, profession, what they were doing prior, more than really -- really more than anything. And you put all that together and you come up with an idea in your head, with an estimate, not just an idea, a good estimate of where someone was before.

Q. And is that a standard test that is given by neuropsychologists?

A. Yes. Correct.

Q. And can you tell us what other tests you gave, some of the other tests you gave?

A. Yes. The rest of the tests we give are specifically to determine post-accident, what areas a person is not doing well in anymore. Or having difficulty or deficits now. And that is the computer test which is called the Mindstreams. And the Digit Span, it's the WAIS, and the Rey Complex Figure Test. And within the Mindstreams battery, there is a number of different tests.

So that is the computerized battery. And I will test memory, attention, spatial skills, verbal function, processing speed, motor skills. Not only will I test memory and attention, I will divide those into different domains. For example, verbal, initial acquisition, encoding, retrieval. So I want to know, does he have trouble initially acquiring the information or trouble encoding and consolidating and retrieving the information. Those are all areas, different areas of the brain.

Q. What does encoding mean?

A. Encoding is take the information and being able to store that information and then being able to consolidate that and then retrieve it. So there is a lot of different steps in memory. You see, a lot of these things we don't think about on a daily basis. We will just remember it, not

realizing that we are instantaneously processing that information, storing the information, encoding it and retrieving it for when needed.

Q. And can these tests show if just one of those areas is impaired?

A. Yes, correct.

Q. Are these tests that you just mentioned to the jury, are they standard tests used by neurologists in the field?

A. Yes.

Q. Are they accepted as reliable in your profession?

A. Yes.

Q. And are you -- do you have the results of Mr. Barra's test in front of you?

A. Yes. He had significant impairments in memory, executive functioning, attention, and concentration. Initially he had a lot of problems with spatial skills and verbal functioning, but he made a lot of improvement in those domains over the three month period. And he made some improvement in memory over the three month period. But till this day continues -- in 2015 I tested him again. In September. And he has significant attention problems. Still less than the first percentile.

Q. Can you tell us what executive functioning is?

A. Yes. Executive functioning, again, things we do

just to get ready in the morning. You get up, you get dressed, you plan, breakfast, what am I going to do. We might look at our phone and say I have this appointment, this appointment. It's planning, organizing, it's being able to -- it's all your frontal -- it's really your frontal lobe of the brain. So when you look at any areas of the brain it's right in the front. It's our areas of organization. It keeps us organized.

Q. Okay. Can you describe for us how he tested in executive functioning when you first saw him three weeks after the accident?

A. He was less than the first percentile.

Q. What does that mean?

A. That means that ninety-nine percent of his peers, fifty-five year olds, GED certificate were performing higher than him. So ninety-nine percent of his peers performed better in organizing, planning. So he was unable to do that. Basically that is what that says.

Q. And after that -- how about with his memory, where was he?

A. He was in the less than first percentile with memory also.

Q. And what was his best domain?

A. Verbal functioning, which was in the seventh -- which wasn't very good either at the time. And I had to

work with him in that in therapy and he made a lot of improvement. The two areas I really look at him is the verbal functioning and spatial skills which he did a lot better over the three month period I was with him. The memory, the executive, the attention were all less than first percentile.

Q. And can you take us through -- you keep talking about the treatment. And his improvements.

A. Yes.

Q. What did that consist of?

A. Sure. After I do the initial test I set up a treatment plan for him. And I work with specific areas that he is having trouble with, depending on his level. So in terms of his first testing which was really very, very shortly after the accident, within a month after the accident, he was still having significant cognitive deficits at that point.

So I will to start on the basic level of rehab. What I did is, as he got better his accuracy improved and I increased the complexity of the exercises. So he was in the basic level. You have different levels of rehab, basic, moderate and more complex. He started basic. And I had to keep improving his -- the complexity of the exercises and challenging those areas of the brain so that we could rehab it and make them better.

Q. And how often were you seeing him?

A. Twice a week for those three months, approximately twice a week.

Q. And when you would see him, what was taking place?

A. Yes. He would come in, wanted to get better. I mean, he definitely showed he came to therapy for three months consistently there. And worked hard. And it showed in his scores on the tests, on the exercises that I gave him. He was making a lot of improvement over time in specifically two domains. The brain -- a lot of times what happens is, the brain, one area will start working, and then the other areas -- then the other connections will start. So not the whole area of the brain will get better all at one time. You have different areas improving first.

Q. And what types of tests were giving you the idea that he was improving through this therapy?

A. So like I said, especially in the verbal and visual spatial skills area. But, for example, I will give you an example of some of the percentiles in those domains.

Q. Please.

A. When he first came in our initial month of therapy he was in the eighteenth percentile of accuracy on the exercises I gave him in executive domain. That is organization and planning. And then in November 2010, three months later, he went to thirty-fifth percentile. So he was

Dr. Busichio - Plaintiff - Direct

still impaired and not doing well, but he was making gradual improvement. That is how rehab works. It's not going to change all at one time.

Q. So the first time he was eighteenth percent?

A. Yes, in accuracy.

Q. And in three months it doubled?

A. Correct.

Q. And is the progression of a patient through therapy something you look at to judge effort, and --

MR. JOSEPH: Objection. He is leading the witness.

THE COURT: Sustained.

Q. What do you use those numbers for as you follow him through the treatment?

A. Yes, absolutely. First of all, you only want to treat a patient that is benefiting from treatment. That is one of the things that Dr. Brown always look for. I always constantly look at the treatment, see if the patient is benefiting from the treatment, seeing if I have to adjust the treatment plan accordingly. And you could determine effort based on that, based on how much the patient is improving in certain areas, given different domains. They might not improve in certain areas. But you will see improvement across the domains you are working on, and depending on where you are.

Q. Now, when you say comparing him to his peers, how do you do that?

A. So neuropsychology tests, we get raw scores. So we might get 10, 10 out of 17 or something on one of the tests. That 10 really means nothing by itself. What you have to do, you take that 10 and then there is books, manuals that neuropsychology uses, and you take that and standardize that score. What that means, you get a standardized score that you could turn into a percentile. So when people say someone is in the fiftieth percentile, we know they are in the average range. You have fifty above them, fifty below them. But you could only say fiftieth percentile if you have normed that score, if you have done percentiles and transferred the raw scores to the percentiles.

And you could -- what you are doing in neuropsychology, you don't want to compare an eighteen-year-old to a fifty-five-year-old, or, twenty-year-old to a thirty-six-year-old. You want to compare them to the same age and education level.

Q. And can you tell us what a standard deviation is?

A. Sure. So when you have scores, typically all of us have strengths and weaknesses. So a lot of people say, well, I was never good verbally or never good in math. You might not be good in those subjects, but your score is not going to fall below a standard deviation. What I mean by

that, say the mean is fifty, average range, you are not going to go way above -- your strength is not going to go above a standard deviation in, say, spatial skills and below in verbal skills. You might have a curve like that (indicating), it will not spike like this, but when you have an injury it will spike. You have a spike that goes below and a spike that goes higher. Or the spike that is higher was already the preserved strength, but the weaknesses are going way low down now. So you have a big V-shape. You will not have your normal curve.

Q. Did you see any evidence of that in Mr. Barra's testing?

A. Significant.

Q. Can you point that out to us?

A. Sure. So, for example, I tested him in September of 2015. And if you take a look at that evaluation, and I also tested him in January 2012. So in 2010, 2012 and 2015. So I tested him those three times and I treated him in 2010 for three months. So where I am at now, in 2015 which is where he is most recently now, that is why I will talk about that.

Q. Okay.

A. He was in the first percentile in executive functioning. So his ability to organize, plan his day, is still in the first percentile. That means ninety-nine

percent of his peers are still doing better than him in that area. He is in the less than first percentile in attention and concentration. And he is in the tenth percentile in memory, which is, again, he went from the first to the tenth because of our treatment. But he is still significantly impaired.

That means ninety percent of his peers are doing better than him at the tenth percentile. Overall, if you take all the domains, and I will get a global cognitive score, he is in the fifth percentile. That means ninety-five percent of his peers, same age, same education, are performing better than him.

Q. Are there areas of his brain where there aren't deficits?

A. Well, there were initially, and rehab did work in those areas. To the point where I was very happy to see his recovery and -- in spatial skills and verbal functioning. He started out in the seventh and fifth percentile and he ended those -- in 2015 he was in the fifty-third and fifty-fifth percentile. That was an unbelievable improvement in those areas. The areas that he has significant deficits in and continuing to have is the memory, the executive functioning, and the attention.

And just to note, another thing I want to add, now that I look at my two evaluations, you asked me about effort

before.

Q. Yes.

A. He has almost identical scores in the same domains from 2012 to 2015. Meaning he doesn't remember three years prior taking that test, especially with the memory he has, he wouldn't remember which tests he took, what the spatial test is, what the verbal test is, what they were testing. And that is an indication of effort because he is doing well in the areas that he always did well in for the last three years and poorly in the same areas that he did poorly in. So that is valid areas of preservation, now, and impairments.

Q. Do your tests tell the patient what it's testing for?

A. Not at all.

Q. What do you call that?

A. So we wouldn't -- we wouldn't -- basically the instructions are, you are going to see words on the screen, try to remember these words. That is what it is. Or you will see a word, name that object. You might see a cow, or, a house. What is that? And, now, he doesn't know that that test is testing what we call word finding. So he is just thinking I am asking him to name something. I am asking him to tell me what a cow is or is that a house or tell me that is a hat. He doesn't know I am testing his ability to find

words, because it doesn't say we will test your ability to find words. Just says what is the picture.

Q. And you talked before about some tests with pencil and paper.

Can you tell us what those are?

A. Sure. So we give what we call the Rey Complex Figure, which is a test of -- there is two components of that test. There is a copy component. So we give a complex figure and ask him to copy it with a lot of lines in it. It looks like a square with lines, circles, a lot of different internal figures, internal details. And he's asked to draw that, copy that, and you could tell based upon his drawing if he had lack of attention, lack of organization, planning ability. And he was in the first percentile in that, which is also consistent with his testing on the computer test, which is in the first percentile.

So his testing is very consistent, not only across testings, but across different tests. Testing the same domain. Which he wouldn't know what I am asking to test. He doesn't know I am looking for organization and planning ability, he just knows I am asking him to copy something. So that is the Rey Complex Figure.

And then the other one is the Digit Span. So he is asked to repeat numbers forwards and backwards. So say 9, 5, 6, say 9, 5, 6, and repeat it after me. And I keep

increasing the span of numbers I give him. He was in the third percentile on that. So that is a basic auditory attention. So his ability to focus on what I am saying and repeat what I say. And then to do that backwards, which is hard also, yes.

Q. And so his testing after your therapy in 2012 compared with your testing to 2015, how would you compare the results of those two tests?

A. Pretty similar. I mean, not -- well, exactly the same in memory. He was tenth and tenth. Exactly the same in executive functioning. Exactly the same in attention. And in spatial and verbal functioning was all within the average and high average ranges. So they were consistently good after therapy. And then his overall score, sixth to the fifth. So it was relatively the same across the board.

Q. So if you were finding a patient who you believed not to be showing effort, what would you expect to see in the comparison between those two tests?

A. Completely different scores. So a patient would come three years later and take the test and I might see them do the tenth percentile in memory and then the first percentile in memory two years later. The first, in executive, they might do well next time. Especially he didn't have treatment in those three years there.

So it's -- I am not expecting to see a lot of

improvement. He wasn't able to get the treatment during those three years there. And so he showed that he made the improvement from the three months of treatment. And that is where he was at from 2012 to 2015.

Q. With regards to getting better, compared to maintaining the current state, can you describe how that works with therapy and timelines and anything like that?

A. So typically within your first -- he got therapy in the very critical time which is really good. We were able to see him within that first six months. He really came early. He came earlier than that. Anywhere within that first year is really when rehab could facilitate the most healing process. And then I would say after that eighteenth mark, after the year, after the eighteenth mark you start -- it starts becoming a little more gradual, the improvement and then eventually it will plateau. After the brain is done with its spontaneous process, the brain could no longer say rehab the brain, but what it could do it teach it strategies to get around the deficits the patient has.

Q. What stops the patient from being able to continue to improve?

A. Again, the brain went through its healing process in that first eighteen months, and then if a patient doesn't receive anymore treatment the brain will not continue healing. It's done at that point. What happens, it

plateaus. What rehab does, we teach strategies to get around some of those residual deficits to help someone function better. We teach them strategies. You know, you put things on your phone, you have alarms, we teach them ways to get around that to help them function better in everyday life.

Q. What happens if you don't get therapy after the brain plateaus?

A. You will not -- in terms of employing those strategies, you wouldn't be able to learn the compensation strategies to employ those independently. Our goal, we don't want to have to see someone forever. We want them to independently employ those strategies. We want to give them the tools they need and live their every day life without relying on us. We will see someone as long as we feel someone is employing those strategies to improve their everyday function.

Q. And did you teach any of those to Mr. Barra while you were treating him in the three months after the accident?

A. Well, what we do, the initial stage of treatment is a lot of rehab. Because we really want to exercise those areas of the brain. So the -- you want -- at that point that is rehab part of therapy. That is the rehab part of therapy. The maintenance part of therapy comes in after

those eighteen months when the brain starts plateauing and the rehab will not work as much at that point. We want the patient to benefit from every day life. So we switched the therapy from the rehab to the maintenance mode.

Q. And, Doctor, as a result of the testing you did, the three different times, once at the very beginning, once in the middle and once now at the end, were you able to determine within a reasonable degree of neuropsychological certainty the diagnosis of this patient?

A. Traumatic brain injury and post-concussion syndrome, and, neuropsychological deficits related to the neuropsychological impairment or cognitive impairment related to the traumatic brain injury and post-concussion syndrome.

Q. What is cerebral dysfunction?

A. It is a disruption in the brain's ability to cognitively perform optimally.

Q. And what types of things cause that?

A. Brain injury.

Q. And what is post-concussion syndrome?

A. Post-concussion syndrome is a sequelae of a brain injury. So when you have brain injury your brain is damaged or traumatized. There is an umbrella of what we call post-concussion syndrome. Patients experience these after the brain injury. There are physical symptoms, behavioral,

emotional, cognitive symptoms -- which is what I treat for, the cognitive. And those are all the areas. So he had all of them. He had the physical, he had the cognitive. He had the emotional. All those areas are related to the brain injury.

Q. And do you have an opinion within a reasonable degree of neuropsychological certainty as to whether or not those conditions that you just talked to the jury about, that you diagnosed, were caused by the head trauma --

MR. JOSEPH: Objection.

Q. -- that Mr. Barra sustained on the job?

MR. JOSEPH: Objection.

THE COURT: Overruled.

MR. JOSEPH: I would like to voir dire on this, on her qualifications to make that determination, Judge.

THE COURT: Overruled.

MR. JOSEPH: I have an exception to that, your Honor.

THE COURT: So noted.

Q. You need me to reask the question?

A. It is casually related to the traumatic brain injury, yes.

Q. And when you most recently reassessed your testing to Mr. Barra, did you recommend anything for him after that test?

A. Yes.

Q. Okay.

A. So I did recommend the maintenance part of the program that I had initially spoken about. He wasn't able to ever have that. So I believe he would benefit from that so he could employ some of those strategies in his everyday life. What I recommended was biweekly sessions for six months, and then he could be tapered to one session monthly for a minimum of one year to -- up to five years, depending on what he needed after we assessed him.

Q. When you recently assessed him in September 2015, was Mr. Barra within the standard deviation on any of the domains where he used to be impaired?

MR. JOSEPH: Objection.

THE COURT: Rephrase it.

Q. Considering the standard deviation that we talked about before, and the domains that you told this jury about, can you tell us which of those he was impaired, which of the ones he was not impaired by?

A. Right. So in 2015 nonverbal learning and memory, he is impaired. In basic auditory attention, sustained visual attention and concentration, attention to visual details, executive functioning, which is response inhibition and organization and planning, like I spoke about before, in terms of organizing your day and information processing

speed.

Q. Doctor, do you have an opinion within a reasonable degree of neurological certainty as to whether or not those impairments would affect his ability to perform his tasks in the work place?

A. Yes, they would affect him.

Q. And how so?

A. He's -- he remains at this point in 2015 in less than the first percentile in attention and focus. Any crane operator on a job has a lot of safety issues to deal with, not only their own but people around them. He would not be able to operate from an executive standpoint. A crane operator wouldn't be able to do any of that in terms of planning, and could effect other people's safety around him.

Q. Now, in terms of learning another type of job, if he couldn't continue working as a crane operator, do any of the results of your testing show how he could perform in retraining for a new profession?

A. Again, the word you use was retraining. He doesn't have that ability anymore to learn new information. Like I said before, he is in the tenth percentile now. And his -- what -- that is short term memory. So if you are on the job and you have to learn new material, you're asked to do this task, this task, this task. He wouldn't be able to do that accurately. If he is on this task he will forget what he

had to do two steps ago. He would have difficulty performing anything accurately.

Q. Does Mr. Barra understand these deficits?

A. Does he understand them?

Q. Yes.

A. I explained them to him when he was there, yes.

Q. Can you describe how head trauma could cause cerebral dysfunction?

A. Sure. What happens --

MR. JOSEPH: Same objection, your Honor.

THE COURT: Overruled.

A. So what happens when -- I will talk -- you could have a lot of different ways you could have head trauma. In his case he fell and struck his head. So what happens, the brain sits inside the skull. Mechanically what happens is the brain hits -- it hits the ground, and the brain gets tossed around inside the skull. There could be sheering and tearing of fibers and axons in the brain. Just like a computer. I look at it like wires in the computer. You can't look inside the brain unless you're taking a scan. Just like you are not -- you drop a computer on the floor, it could look fine, but the wires could be sheered.

So it's not turning on properly. So then you have to, oh, I will open up the computer and try to find out. It looks okay, but there is small microscopic sheering that

could happen that might not be able to be seen on a scan.

Q. That is why my i-Phone doesn't work.

A. It could be.

Q. You mentioned axons. Can you tell me what those are?

A. Sure. So you have cells. We have -- our brain has to communicate in itself with each other from different sides of the brain. So what we do, we have neurons that do that. Then we have axons like wires in the computer that connect to the neurons in the brain. And for whatever reason, if those neurons are sheered, teared, damaged, that conduction is not going to take place and it will be slow. It might not even get to that neuron at all which is why is it effects the attention, memory, processing speed. The brain is not working as a whole anymore. It's compartments. And the brain can't work like that. It works as a whole and that is the way we were developed.

Q. Are you familiar with the area, diffuse brain injury versus focal brain injury?

A. Yes.

Q. Can you tell us what that is?

MR. JOSEPH: Objection, your Honor. She is not qualified as a medical expert.

THE COURT: Overruled.

MR. JOSEPH: We have not established that she

Dr. Busichio - Plaintiff - Direct

has any training in this -- to answer this question. She is not qualified.

THE COURT: Overruled.

A. So in the brain -- they call it diffuse axonal injury, and what that is, like I said before, the brain will move inside the skull. Especially when it gets hit. On the one side, that doesn't mean just that one side will be effected. Because the brain will bounce back onto the other side of the skull when it gets hit. In that -- in that process there could be sheering and tearing on the other side of the brain. It could be diffuse. They call it diffuse axonal injury, or a location of the injury that is effected like you asked before.

Q. What is an example of a location where one location is injured?

A. So if the brain is hit and, say you have damage to that one area of the brain, that could be. But a lot of times with a brain injury not only will you have damage to that side of the brain, if you fall on the right side, you hit your right side there but you might have diffuse damage on the other side because of the mechanism of how the brain hits.

Q. So if a CAT scan picks up a fracture skull --

MR. JOSEPH: Objection, your Honor.

THE COURT: Sustained.

Dr. Busichio - Plaintiff - Direct

Q. Are you familiar with PET scans?

A. Yes.

Q. Can you tell us what they are and what they show?

A. Yes. A PET scan is a -- what you use is a tracer. So it's a functional scan. A lot of the scans we talk about are structural. So the CT scans, the CT is looking for bleeding. And the reason the emergency room did that scan was because they were concerned about bleeding. If they could rule that out that is a good thing. For that moment it's not a life threatening situation. So what happens is, you get MRI scans and PET scans. The PET scan is a functional scan. What it is, it shows how your brain is functioning. Just like I talked about the computer dropping before and not turning on properly, that is a functioning. So the conduction is not going through.

What happens is, the PET scan, they put a tracer in, they trace different areas of the brain and look to see what areas are functioning properly and what areas are not functioning properly anymore. And if this area is not functioning as well

Q. Do you know if Mr. Barra had PET scans?

A. Yes.

Q. And do you know the results of that PET scan?

MR. JOSEPH: Objection, your Honor. She is not a qualified radiologist.

Dr. Busichio - Plaintiff - Direct

MR. MORGAN: I am asking if she reviewed the report.

MR. JOSEPH: Your Honor, she is not a medical doctor. She is not a doctor of osteopathy.

MR. MORGAN: It's in evidence.

THE COURT: Overruled.

A. So, yes, the evidence, the conclusive evidence of the PET scan was it was consistent with traumatic brain injury, post-concussion syndrome and cognitive deficits, all the areas I was talking about before.

Q. So do the results of the PET scan corollate your findings or do they --

A. They corollate.

Q. Are the tests that you give, are those objective findings or subjective findings?

A. All objective. What we do on tests, that is why I said they were standardized before. Everything is normed. The computer scores the test, that part of the test, and then the other tests are also normed. It's all by a manual. So nothing has the examiner's subjectivity, and nothing -- I could tell based on an evaluation, I take a raw score and transfer it into the manual. That is the computer doing it. That has nothing to do with a subjective examiner and -- or examinee.

Q. Do you treat patients who don't have skull

Dr. Busichio - Plaintiff - Direct

fractures or brain bleeds or losses of consciousness?

A. Yes.

Q. Can you have similar symptoms Mr. Barra had if you don't have a skull fracture?

A. Yes.

Q. Can you have symptoms similar to Mr. Barra if you don't have a brain injury?

A. Yes.

Q. Can you have symptoms similar to Mr. Barra if you don't even lose consciousness?

A. Yes.

Q. And can you have more severe symptoms than Mr. Barra if you don't have a concussion?

A. You could have more severe symptoms.

Q. Than Mr. Barra if you don't lose consciousness?

A. If you don't have a concussion --

Q. I mean --

MR. JOSEPH: Could we get a new question, Judge?

MR. MORGAN: No problem. I will ask it again.

THE COURT: Go ahead. Ask it.

Q. In the patients that you treat who you know for a fact there was no loss of consciousness, have you seen patients with more severe impairments than Mr. Barra as a result?

A. Again, it varies depending on the head injury. You could have significant cognitive sequelae without loss of consciousness, you could have it with loss of consciousness. The loss of consciousness will not determine the level of cognitive. What it will do, the nature of the injury plus the change in mental state. So when we talk about loss of consciousness, the important thing to talk about is change in mental state at the time of the accident.

The patient doesn't have to be completely blacked-out. They could be confused, dazed. The patient doesn't even know what loss of consciousness is sometimes. Personnel could ask someone who is dazed and confused did you lose consciousness and the patient may not even know what that means at the time they are asking. Especially at a scene they might not know and especially within that first day they just might be confused at what just happened. So the thing that we do now is know that there is an altered mental state at the time of the accident. And that is the important part of the brain injury and concussion.

Q. And part of your practice, do you treat any athletes?

A. Yes.

Q. Are you familiar with any of your patients --

MR. JOSEPH: Objection.

THE COURT: Sustained.

Dr. Busichio - Plaintiff - Cross

MR. MORGAN: Okay.

Q. Is it uncommon -- are you familiar with football players --

MR. JOSEPH: Objection.

THE COURT: Sustained.

MR. JOSEPH: I ask to approach.

THE COURT: Come up.

(Whereupon, an off-the-record side-bar conference was held.)

Q. Doctor, do you have an opinion as to whether or not Mr. Barra will ever return to his pre-accident functioning level?

A. He will not.

THE COURT: Okay. Stop it here for a moment. Let's take a break at this point. We will reconvene in five minutes. Take a five minute break. Do not discuss this case among yourselves or with anyone else.

(Recess taken.)

THE COURT: All right. You may continue.

MR. MORGAN: I am good.

MR. JOSEPH: Thank you, your Honor.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. JOSEPH:

Q. Doctor, my name is Ron Joseph. I am an attorney

and I represent the defendants in this case.

A. How are you?

Q. Good morning. You are not a medical doctor; is that correct?

A. No.

Q. You are not licensed to make a medical diagnosis in the State of New York; is that correct?

A. Correct.

Q. You are not qualified to interpret medical diagnostic tests such as MRIs, CAT scans and X rays; isn't that correct? Yes or no.

A. Correct.

Q. You are not qualified to interpret PET scans; isn't that correct? Yes or no.

A. Yes, correct.

Q. You are not qualified to interpret the results of blood tests; isn't that correct? Yes or no.

A. Correct.

Q. You are familiar with what a differential diagnosis is, aren't you, Doctor? Yes or no.

A. Correct.

Q. In medicine a differential diagnosis is distinguishing of a particular disease or condition from others that present similar symptoms; isn't that correct? Yes or no.

A. Yes, correct.

Q. And as a psychologist you are not qualified to make a differential diagnosis; isn't that correct? Yes or no.

A. I do make a differential --

Q. Even though you are -- so you are making determinations about medicine; is that correct?

A. No, neuropsychology.

Q. Okay. If a patient presents to you with symptoms that could be caused not only by a traumatic brain injury, but by at least one other medical condition, you are not qualified to make a differential diagnosis of the cause of those symptoms; isn't that correct? Yes or no.

A. Dr. Brown is.

Q. But you are not?

A. I am personally not but Dr. Brown is.

Q. But you are not?

A. I am personally not.

Q. I just want to get that clear. But there is a -- there is a difference between a clinical psychologist and a clinical neuropsychologist; isn't that correct? Yes or no.

A. Yes, a neuropsychologist is someone who's gotten trained in neuropsychology, correct.

Q. Your degree in Fairleigh Dickinson University was in clinical psychology; is that correct? Yes or no.

A. Correct.

Q. And are you a member of the International Neuropsychological Society? Yes or no.

A. No.

Q. And that particular society has minimal standards for doctoral internship, post-doctoral training and experience; is that correct?

A. Their own set of standards, yes.

Q. Have you met those minimal standards?

A. I have done all the training, yes.

Q. And have you taken any examination to qualify you as a neuropsychologist?

A. No, there is a difference between a neuropsychologist and Board neuropsychologist. I am a neuropsychologist. You could take an additional test to become a Board -- that is what you are referring to now.

Q. So you are not board-certified?

A. I am not, but I am a neuropsychologist.

Q. So there is a separate exam out called board-certification or being a Diplomate of the Board of Neuropsychologist saying here, this neuropsychologist is qualified; is that correct?

A. It's just giving you a board-certification. You could be qualified --

Q. But this independent body qualifies you as a neuropsychologist -- board-certified --

Dr. Busichio - Plaintiff - Cross

A. You just have a different test for that.

Q. Did you take the test?

A. No.

Q. But you are not board-certified?

A. You don't have to be.

Q. But you are not?

A. I am not.

Q. And I just want to make sure, what constitutes a full neurological examination?

A. Neurological or neuropsychological?

Q. No, neurological.

MR. MORGAN: Objection, your Honor.

MR. JOSEPH: I want to see what she knows, Judge.

MR. MORGAN: May we approach?

THE COURT: Sure.

(Whereupon, an off-the-record side-bar conference was held.)

THE COURT: You want to rephrase?

Q. Are you familiar with what constitutes a full neurological examination? Yes or no.

A. I believe I know what a neurological evaluation is, yes.

Q. But you are not licensed to perform that examination?

Dr. Busichio - Plaintiff - Cross

A. I don't perform that, no.

Q. And you could not order or interpret neurological radiological tests such as CAT scans, MRIs --

MR. MORGAN: Objection.

MR. JOSEPH: I am in the middle of the question, by the way.

MR. MORGAN: Sorry.

Q. You are not licensed -- I am sorry. Withdrawn.

You could not order or interpret neurological and radiological tests such as EEGs, MRIs or cerebral blood flow studies, are you?

A. No.

Q. And those are considered objective medical diagnostic tests, aren't they?

A. Neurological and radiologic, yes.

Q. Are you familiar with what a CAT scan measures?

A. Yes, computerized axial tomography. It looks at the structures of the brain and looks for internal bleeding of the brain.

Q. And are you aware of any CAT scans of Mr. Barra which were indicative of a brain injury?

A. The one that he had at New York Presbyterian was negative.

Q. Right. Did he have a subsequent one that was any different?

A. No, MRIs and PET scans.

Q. Okay. And are you familiar with what an MRI measures?

A. Yes. MRI is magnetic resonance imaging, and it takes a look at again structural imaging of the brain. And that is what a radiologist impresses.

Q. And how many MRIs of the brain did he have?

A. I thought I saw one MRI of the brain. And then a PET scan.

Q. Right. And the MRI didn't show any brain injury, did it?

A. It was nonspecific.

Q. And are you familiar with what an EEG is, Doctor?

A. EEG, yes. It looks at the electrical activity of the brain.

Q. Did you order any EEG?

A. No, I can't do that.

Q. Did your practice order any EEG?

A. We don't do that at our center.

Q. I didn't ask if you did it. Did you recommend that it be done?

A. We don't do that at --

Q. You don't make referrals for other testing?

A. His neurologist will do that.

Q. Have you seen any EEGs?

A. I don't believe I saw one.

Q. And --

A. I don't know if he had one, but I don't remember reviewing one.

Q. Can an EEG show brain injury?

A. It looks for cerebral disfunction and seizure activity.

Q. And that could be relevant when deciding whether somebody suffered a traumatic brain injury, right, Doctor?

A. It could be.

Q. And are you familiar with the term cerebral blood flow study?

A. Yes.

Q. What does that measure, Doctor?

A. The blood flow in the brain.

Q. Did anybody perform one of those examinations?

A. I don't remember seeing that, they could have. I don't know.

Q. And what does blood flow in the brain -- withdrawn.

How is blood flow in the brain relevant to whether there is a -- I withdraw that. I just used a phrase -- I used a phrase that the jury might not have heard. All they heard was the full term. TBI is an abbreviation, right?

A. Traumatic brain injury, yes.

Q. And why would somebody want to do a blood flow

study, cerebral blood flow study?

A. To look at blood flow of the brain and see if there is there any abnormalities.

Q. So that could be important to look at?

A. It could be.

Q. And you haven't seen that?

A. I haven't.

Q. And would it be fair to say you never examined a traumatic victim in an emergency room?

A. No, I have been in-patient before. I am not a medical doctor so I don't treat the patient when they first come into the emergency room. But I did the in-patient neuropsychological aspect.

Q. You can't admit a patient to the hospital, can you?

A. No, the physician on site does that. The medical doctor.

Q. You never ordered a medical test or procedure to be done on a patient?

A. I wouldn't do that. That is not my profession.

Q. And where did you practice before you went into this practice with Dr. Brown?

A. So I did a year at Rusk Rehabilitation Institute, N.Y.U.. I did six months of inpatient rehabilitation. So bedside evaluations like we were just talking about in the hospital. And then I did outpatient evaluations like I did

for Mr. Barra. That is outpatient. And then I went on to do a two-year post-doctoral residency in Edison, New Jersey. I did one year of inpatient rehabilitation bedside testing like we just talked about. One year of that with traumatic brain injury concussions and then I did a year of outpatient rehabilitation assessment and rehabilitation for patients with brain injury at the head injury center at JFK.

Q. So this is your first job in private practice, correct?

A. This is where I started after residency.

Q. With Dr. Brown?

A. Yes, been there for nine and a half years.

Q. And, Doctor, approximately what percentage of Dr. Brown's patients are involved in litigation?

A. I don't know. I wouldn't know that.

Q. Well, how many -- what percentage of your reports are forwarded to attorneys?

A. I don't deal with medical -- I am just clinical. I just deal with the clinical side of rehabilitation.

Q. Well, when you are making your evaluations, right, and you are trying to determine -- you talked about the credibility and the honesty of the patient, right?

A. Sure.

Q. And one of the things that you as a psychologist have to be concerned about is whether the patient has

motivation for secondary gain, correct?

A. Which I always look at, yes.

Q. And what that means is, are they trying to build a case for litigation, correct?

A. Well, it could be for that reason. There could be other reasons.

Q. And so since you are assessing the patient's credibility to see if they have motivations for secondary gain, don't you ask them if they are involved in litigation or whether they have a lawyer?

A. It's not just for secondary gain. When you look at motivation there is a lot of different reasons. Some people are crying for help. No one has listened to them. They went to a doctor, they told them they were fine, and so a lot of times I look at a patient reporting more for the cry for help. It's not just for litigation. It's for other reasons and motivation.

Q. I understand. I would like you to now answer my question.

Since you know it's a possibility that the person might be trying to build a case for litigation, don't you ask them whether they have a case or whether they have an attorney?

A. I personally don't, no. Dr. Brown might. I personally don't ask a person if they have an attorney. I

am there to assess and treat. That is it.

Q. And are you licensed to give any treatment other than the behavioral treatments that you described?

A. I am a clinical psychologist and neuropsychologist. So I could do any emotional disturbances related to brain injury; however, that is not what I do right now. I specifically focus, I specialized in cognitive and neuropsychology. That is what I am doing for nine and a half years.

Q. And who referred the plaintiff to you and Dr. Brown?

A. The attorney.

Q. The attorney. So you knew that Mr. Barra had an attorney, is that what you are telling us?

A. When I reviewed the case I knew it.

Q. So your practice maintains a file on Mr. Barra, right?

A. Correct.

Q. Where did the materials for Mr. Barra's file come from?

A. Well, the hospital records. We get the hospital records.

Q. From where? Did you get them from the hospital or did you get them from the attorneys?

A. I don't know. I am not the medical records

department.

Q. Have you reviewed anything with relation to Mr. Barra which is not reflected in your case file?

A. Have I reviewed anything?

Q. Yes.

A. Everything that I reviewed has been -- I documented available for review.

Q. Do you have your file with you?

A. Yes.

Q. May I see it please?

(Brief pause.)

Q. Is it your testimony that you didn't look at the file until you got ready to testify?

A. I did not. I haven't seen him, like I said, since September 2015. I haven't looked at the file -- and, actually, I haven't looked at that file until recently, until just preparing for the testimony. Because that is -- that file sits in our medical records department. I have my clinical file. I review that file but not all of that -- that whole file.

Q. So this green portion of the file is not available to you?

A. It's available, but there would be no reason for me to go if I am not treating someone at the time. And since 2012 I hadn't seen him. I wouldn't for three years be

looking for a file if I am not treating him.

Q. But when you are treating him, this green portion of the file, is it available to you?

A. I could get it.

Q. Well, you could go get it. Okay. This is 2016, right?

A. 2016.

Q. There is a law that says doctors are supposed to be computerized now, right?

A. We have a lot of our documents in the computer and they make a file.

Q. And when you pull Mr. Barra's file on the computer, does it have this first page?

A. I don't know. The administration does that. The only thing I do, I go to the medical records department and pull the file. I wouldn't even know where they save that. We might have that in the computer but I wouldn't know where to look for that.

Q. All right. Now, you first --

MR. JOSEPH: May I return this to the witness?

THE COURT: You may.

(Documents submitted.)

Q. You first met with the plaintiff on August 26th, 2010; is that correct?

A. Yes, correct.

Q. And you relied upon him to be truthful and honest with you; isn't that correct?

A. Yes.

Q. Okay.

A. Correct.

Q. And if he hadn't been truthful and honest with you, that would effect your findings, isn't that correct? Yes or no, Doctor?

A. It would effect my findings after I reviewed the hospital and medical records and if something was completely off. But I expect there to be some errors in the interview as opposed to --

Q. All right. Doctor, how many times have you testified before?

A. I would say in nine and a half years, maybe twenty times.

Q. And so you know if I give you a question that is yes or no, you could answer it yes or no, okay?

A. If I can I will.

Q. You understand that?

A. If I can I will.

Q. Well, the last question could have been answered yes or no. And your attorney will have the opportunity to do Redirect.

A. If I can I will.

Q. Okay. At the time that you met Mr. Barra on August 26th, 2010, he told you that he'd been unconscious as a result of the alleged fall for approximately ten minutes; isn't that correct? Yes or no.

A. Correct.

Q. And at that time you had the ambulance report; is that correct?

A. Correct.

Q. And are you qualified to interpret ambulance reports?

A. To interpret? I always look at ambulance report, yes.

Q. And are you familiar with something called the Glasgow Coma Scale?

A. Sure.

Q. And the Glasgow Coma Scale is something that is performed at least by the ambulance crew, correct?

A. Could be, or, when they first get to the hospital.

Q. And when the ambulance crew does it, typically in the City of New York they do it twice, correct?

A. I don't know how many times they do it. They might do it on-scene and when they get to the hospital. So if that is what you mean --

Q. Well, Doctor, you saw they did a Glasgow Coma Scale for Mr. Barra?

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A. Yes.

Q. And they did it twice, correct?

A. For this case they did, yes.

Q. And the ambulance reports from the City of New York have a spot for them to do it two times by the ambulance crew, correct?

A. Yes.

Q. To make sure they get it accurate, right?

A. I don't know the reason they do it twice. They have two spots for it, yes.

Q. And the Glasgow Coma Scale, for a lack of a better term, is used to measure the level of the patient's consciousness?

A. Awareness, alertness I would say.

MR. JOSEPH: Could we mark this C for I.D.?

THE COURT: Mark it C for I.D..

MR. MORGAN: Is it in evidence?

THE COURT: We are up to C.

(Whereupon, Defendant's Exhibit C was marked for I.D. at this time.)

MR. JOSEPH: May I show this to the witness?

THE COURT: You may.

Q. Doctor, I will show you Exhibit C for I.D..

A. Yes.

Q. Is this a standard Glasgow Coma Scale?

Dr. Busichio - Plaintiff - Cross

A. Yes.

MR. JOSEPH: I move it into evidence as C.

THE COURT: Any objection?

MR. MORGAN: No, your Honor.

THE COURT: In evidence without objection.

(Defendant's Exhibit C so marked in evidence.)

Q. All right.

(Defendant's Exhibit C displayed in open court.)

Q. Doctor, the jury is now looking at Exhibit C, an enlargement.

A. Yes.

Q. Can you see it?

A. I know what it is. I can't see it, no.

Q. You do. Okay. The first test they look at is whether the patient could open his or her eyes; is that correct?

A. Yes.

Q. By the way, is the minimum score a 3?

A. Yes.

Q. And maximum score of 15, correct?

A. Yes.

Q. Maximum is a perfect score, correct?

A. Yes.

Q. And so if the patient can't open their eyes they get a 1; is that correct?

A. Yes.

Q. If they only could open their eyes when it's painful stimuli they get a 2, correct?

A. Yes.

Q. If it's verbal stimuli, hey, wake up, open your eyes, that is 3?

A. Yes.

Q. If they do it spontaneously, in other words they appear to be wide awake, that is a 4, right?

A. Yes.

Q. And then they check their verbal response, correct?

A. Right.

Q. And no response, a 1?

A. Correct.

Q. You are in trouble if it's a 1?

A. Yes.

Q. Incomprehensible sounds, that is a 2, right?

A. Yes.

Q. You're in trouble if it's a 2, right?

A. Yes.

Q. Inappropriate words, that would be a 3, correct?

A. Yes, correct.

Q. Inappropriate words, patient has a problem, right?

A. Yes.

Q. If the patient is disoriented but somehow

converses, that is a 4, right?

A. Yes.

Q. If the patient is oriented and converses, that is a 5, right?

A. Yes.

Q. Mr. Barra was a 5, right?

A. That is what it said, yes.

Q. All right. Best motor response. Now we are talking about they are able to move their limbs and things, right?

A. Yes.

Q. And if they can't, no response, that is a 1, correct?

A. Right.

Q. If they could only do extension, that is a 2, right?

A. Yes.

Q. If they could only do flexion, that is 3, right?

A. Yes.

Q. If they do flexion withdrawal that is a 4?

A. Yes.

Q. In they only could localize pain that is a 5?

A. Yes.

Q. If they could obey the commands, can you move this, can you move this, can you move that, that is a 6, right?

A. Yes.

Q. If you add it all up it's a 15, right?

A. Yes.

Q. And Mr. Barra had 15, right?

A. Yes.

Q. Twice, correct?

A. Yes.

- Proceedings continue on next page -

Q The ambulance personnel also indicated that he was alert and oriented in three spheres; is that correct?

A That's correct.

Q Okay. That means he was alert and oriented. He knew what time it was, what place he was in and who he was; isn't that correct?

A When the ambulance got there, yes.

Q Those are all good signs, right?

A When the ambulance got there, yes.

Of course that's a good sign. Of course.

Q Those are all good signs, right?

A Of course.

Q And I'm only asking you right now about the ambulance, right?

A Correct.

Q Okay. And they checked him twice on being alert and oriented in three spheres; is that right?

A Correct.

Q And he passed both times?

A Correct.

Q And the pupils of his eyes were normal; isn't that right?

A Correct.

Q That's a good sign if you're concerned about somebody having a head injury; isn't that correct?

A Correct.

Q And he was brought to New York Cornell Hospital; isn't that right?

A Correct.

Q And check your records. He told you that he stayed at New York Cornell for about nine hours; isn't that right?

A He didn't tell me that, no.

Q That's nowhere in your file?

A I didn't say that's nowhere. I'm looking at one report right now. So if you want to give me a second, I can look.

Q Please. Didn't he fill out a questionnaire?

A They usually fill out questionnaires, correct, yeah.

Q Clinical intake?

A It would probably be in there if that's where you saw it.

Q All right. Well, why don't you take a look at his clinical intake questionnaire, please. Let me know when you're there. I can guide you once you're there.

(Pause in proceedings.)

A I can't seem to find it right now. Do you want me to take a look at it, what you have? Do you want to bring it up to me and I'll take a look at it?

Q The only thing is, I've got like highlights and stuff. I don't know if the attorney would --

THE COURT: Do you have a page number?

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MR. MORGAN: Can I see it?

MR. JOSEPH: Sure. Give me one second. I didn't want you to think that I'm doing something improper.

MR. MORGAN: I trust you.

MR. JOSEPH: See where I highlighted?

(Exhibiting to Mr. Morgan.)

MR. JOSEPH: Can I just take a look at hers and if I can't find it, I'll show her mine?

(Pause in proceedings.)

A I see what you're saying.

Q So this clinical intake form, that's something that he fills out but before he sees you and Dr. Brown for the first time?

A Yes, that's before he sees us, correct.

Q So he informed your practice that he had been at New York Cornell for nine hours, right?

A That's what he wrote.

Q Well, that means he informed you that that's --

A That's what he put down in the clinical intake.

Q Right. And you've looked at the New York Cornell records; haven't you?

A Yes, I have.

Q And he arrived there at approximately 3 o'clock in the morning; isn't that correct?

A Yes.

Q And by the way, at the hospital he told the physicians that he suffered from hypertension; isn't that correct?

A Correct.

Q Hypertension is high blood pressure?

A Correct.

Q And when they examined him at New York Cornell Hospital, they found that his head was nontender and atraumatic; isn't that correct? Yes or no?

A Correct. That's what they wrote, yes.

Q Well, then that's what they found; isn't it?

A Correct. That's what they wrote, yes.

Q When the doctor indicated that it was nontender, that meant when they touched his head it didn't hurt; isn't that correct?

A That's what that means, correct.

Q When they indicated that it was atraumatic, that means it's not traumatic, correct?

A "Atraumatic" would mean not traumatic, correct.

Q What that means is, that there's no evidence of any trauma to the head; isn't that correct, yes or no?

A No evidence from the outside that there's any trauma to the head, correct.

Q And they did a neurological exam at New York Cornell too; didn't they?

A Correct.

Q They found that he was alert; didn't they?

A A mental status exam they did.

Q Yeah. So is that a yes?

A That's alert and oriented.

Q So is that a yes?

A Correct. I just said yes.

Q They found -- the cranial nerves are the nerves in the head?

A Correct.

Q And they found that his cranial nerves 2 through 12 were intact; is that correct?

A Correct.

Q That's a good sign?

A That's a good sign, sure.

Q And they found that his motor skills, his ability to move his limbs and his toes and his fingers, they were all within normal limits, correct?

A Right.

Q When something is within normal limits, that means that's what a patient who doesn't have trauma would have, correct?

A That means he's within normal limits. That's what that means.

Q I'm trying to put it in layperson's terms.

A Yes.

Q So that's a good sign, right?

A That doesn't mean that the person didn't have an injury. That just means on that motor, whatever they did, he's within normal limits.

Q It's a good sign, right?

A That's a very -- of course. You want to be within normal limits.

Q And it's an excellent sign if you're concerned about somebody possibly having traumatic brain injury; isn't that right, yes or no?

A That doesn't necessarily mean anything.

Q Well, they found that all his sensation was intact; isn't that correct?

A Correct.

Q That's a good sign too; isn't it?

A Very good sign.

Q And they also tested and found that he was alert and oriented in all three spheres; isn't that correct?

A Another mini mental status, yes.

Q And he was released from New York Cornell at 12:15 in the afternoon; isn't that correct, yes or no?

A Correct.

Q In other words, he was released approximately four hours and 15 minutes after he arrived by ambulance; isn't that correct, yes or no?

A Correct.

Q So when he informed your practice that he had been in the hospital for nine hours, that wasn't accurate; was it? Yes or no?

A Well, it wasn't accurate --

Q Yes or no?

A It wasn't accurate based on that.

Q Right. And when he was released from the hospital they indicated, quote, "Steady gait to exit," isn't that correct?

A Correct.

Q That means he was walking just fine; isn't that correct, yes or no?

A He was walking enough to be discharged from the hospital. I don't know if he was walking fine, but he was walking enough to be discharged.

Q Well, that's a very good sign if you're concerned that somebody might have suffered a head injury; isn't it?

A Well, they'll release someone with crutches and that means that they're enough to be discharged from the hospital but they still have problems.

Q You know what? But if the person is ambulating with crutches, it's going to say ambulating with crutches, not walking steady gait?

A I didn't say it was with crutches.

Q Right.

A I just said that they have discharged people from a hospital.

Q But then they would indicate that.

A Sure.

Q That's not what they indicated.

A I didn't say he was on crutches. I just said steady gait means he was enough to --

MR. JOSEPH: Your Honor, I ask for an instruction on the yes-nos.

MR. MORGAN: It wasn't a yes-or-no question.

MR. JOSEPH: It was.

THE COURT: Can you answer the question yes or no?

THE WITNESS: Can you repeat the question?

Q That means that he was walking just fine; doesn't it, yes or no?

A I don't think that's a yes-or-no answer.

Q Okay. They did a CT scan of his head, of his brain, at New York Cornell, correct?

A Correct.

Q They found that he had no intracranial hemorrhage, infarction from mass lesion; isn't that correct, yes or no?

A Correct.

Q By the way, Mr. Barra told the ambulance crew that he had not lost consciousness; isn't that correct, yes or no?

A Correct.

Q The handwritten note in the New York Presbyterian Hospital Emergency Department physician's record and discharge instructions states, quote, "Denies loss of consciousness"; isn't that correct, yes or no?

A There's a part that says that, and there's a part that says, unknown loss of consciousness.

Q The next time Mr. Barra saw a doctor was on August 6, the next day, when he saw Michael Cushner, an orthopedist; isn't that correct, yes or no?

A Correct.

Q Did you review Dr. Cushner's records?

A I will tell you right now if I did.

MR. JOSEPH: Your Honor, I'm just going to step around because I dropped the records.

THE COURT: Sure.

MR. JOSEPH: Thank you.

Q Do you have those records?

A I don't have his records, no. If you want to show them to me, I will take a look at them.

Q No.

Are you aware that he did not complain of any head injuries to Dr. Cushner or his practice the day after the accident?

A I didn't have his records.

Q I understand that. Are you aware that he did not

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complain of any head injury --

A Well, you're telling me that, so...

Q No, I'm asking you, are you aware?

A I didn't review his records, I said. So that means I'm not aware because I never saw his records.

Q Well, I don't know what Mr. Barra told you.

Are you aware that he did not complain of any head injuries to Dr. Cushner or his practice the day after the accident?

A No.

Q When was the first time he complained of a head injury?

A The first time that I knew that he complained of a head injury is when he came to see me.

Q Was that the first time he complained of a head injury?

A Again, I don't know when he complained to another doctor before me. He complained to Dr. Brown and I about a head injury. He was referred by the attorney to us because he was complaining of complaints of symptoms of head injury.

Q So your understanding of the first time he spoke to any physician about a possible head injury is August 26, 2010?

MR. MORGAN: Objection, your Honor.

THE COURT: Overruled.

A That's my first awareness that he had a head injury or that he complained of head injury, but he was coming to our center because of complaints of head injury. So not the day

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of -- not on August 26th is the first day he complained of head symptoms. He was complaining before that. That's why he came to us.

Q He complained --

A But I don't know what doctor he told before me.

Q If any.

A I don't know, I just said.

Q All you know is he complained to his attorney of a head injury and he was sent to you?

A I just know he was referred to us from his attorney with complaints of head injury. That's what I said.

Q Okay. Are you familiar with what abnormal red blood cell volume is?

A Yes.

Q Is that measured by a blood test called MCV?

A Yes.

Q And can elevated MCV be caused by deficiency of Vitamin B12?

MR. MORGAN: Objection, your Honor.

A It could, but it also could not be.

THE COURT: Overruled.

Q On December 2nd, 2010 is it true that -- let me withdraw that.

And you're aware that the normal range for MCV is between 80 and 94; is that right?

A Again, that's for a medical doctor to ask those questions to. So when you were asking me before do I analyze blood tests, I said I don't do that. So I don't feel comfortable answering questions about a test that I'm non-expertise in.

Q Would you agree that cognitive changes could be caused by a deficiency Vitamin B12?

A It could.

Q And what, if anything, did you or your practice do -- let me withdraw that.

What, if anything, did you do to ascertain that Mr. Barra's purported cognitive difficulties were not being caused by a deficiency in Vitamin B12, if anything?

MR. MORGAN: Objection, your Honor. Can we approach for a second?

THE COURT: Approach.

(Sidebar conference off the record.)

THE COURT: You may continue.

MR. JOSEPH: Thank you.

Can I have the last question and answer so I don't have to repeat it?

THE COURT: Please read it back.

Objection overruled.

(Record read.)

Q Can you answer that question, please?

A So what did we do to determine if the cognitive deficits were not -- I'm rephrasing it to make sure I understand the question.

THE COURT: Sure.

A So to make sure that the cognitive deficits were not related to that; is that what you're asking?

Q Related or caused by Vitamin B12 deficiency.

A Because this is a TBI profile that he had. This is all related to TBI.

Q So you determined that it was all related to TBI and did not rule out other possible causes; is that what you're telling us?

A We did. Dr. Brown is a neurologist. He always rules out everything.

Q What did Dr. Brown do to rule out the possibility that Vitamin B12 deficiency was the cause or a cause of his alleged cognitive deficit?

A You'd have to ask Dr. Brown that.

Q So you don't know?

A I don't know personally what he did, but he's a medical doctor and he's a neurologist and he signed off on a report that I did.

Q Well, did he even consider the Vitamin B12 issue?

A Again, it's 2010 when he first came in. So you'd have to ask Dr. Brown that question.

Q Is it reflected anywhere in Dr. Brown's records?

A I'd have to take a look.

Q Would you, please?

A Sure.

MR. MORGAN: While she's looking, may we approach?

THE COURT: Sure.

(Sidebar conference off the record.)

(Pause in proceedings.)

A I'm trying to read Dr. Brown's handwritten notes right now so that's what's taking me a little long. It's Dr. Brown's notes.

Q Sure.

(Pause in proceedings.)

THE COURT: Are you ready?

THE WITNESS: Yes.

THE COURT: Okay, Mr. Joseph.

BY MR. JOSEPH:

Q So what, if anything, did Dr. Brown do to rule out the possibility that Vitamin B deficiency was the cause of his alleged cognitive difficulties?

A I just read his hand notes and I can't tell based on his hand notes what he wrote here.

Q Okay. And you would agree that when Mr. Barra appeared to see you, he also complained of numbness and tingling; is that right?

A Headaches, dizziness, difficulty walking, balance, hearing, blurred vision, sleep, anxiety, depression, attention and memory.

Q And didn't he also complain of numbness and tingling?

A Maybe on the intake he wrote that. Is that what you're looking at again?

Q Yes.

A All right.

Q And can't numbness and tingling also be caused by Vitamin B12 deficiency?

A Again, yes, but in terms of the Vitamin B deficiency, I would ask a medical doctor questions about that.

Q Right. And Mr. Barra had a history of depression; isn't that right?

A Correct.

Q And have you reviewed the records of Dr. Hewlett, H-e-w-l-e-t-t?

A Dr. Dunn, I reviewed.

Q But not Dr. Hewlett?

A Hewlett, no. Dr. Dunn, his psychologist.

Q Okay. But I'm talking about his primary care physician, Dr. Hewlett. Did you --

A Let me see.

Q Did you look at any primary care physician records?

A I'll take a look right now. If you want to just bring

them up and show them to me while I look.

Q No. I'm asking you whether you looked at them. I don't know that --

A I don't have them written down here.

Q Okay.

A I may have seen them, I may not have.

Q Well, if there were a prior report of depression prior to this accident, wouldn't that be relevant?

A Relevant to what?

Q To potential -- possible cognitive problems?

A No. Not in this situation, no.

Q Can depression cause or lead to cognitive issues; yes or no?

A Of course, but it wouldn't be this profile.

Q Okay. And prior to this incident Mr. Barra had a history of migraine headaches; isn't that right?

A Correct.

Q And migraine headaches can affect someone's performance on a cognitive test too; can't they?

A Of course.

Q All right. And if somebody is depressed while they're taking a cognitive test, that can affect the results too; can't it?

A Yeah, we assess for that, though. We determine if someone is depressed. If someone is too depressed to take an

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evaluation, I won't do it.

Q And do you also assess to make sure that the person's medications are not affecting his or her ability to properly take one of your cognitive tests?

A Sure. Dr. Brown's a neurologist. That's what he -- he's an MD.

Q Well, what medications was Mr. Brown -- excuse me -- was Mr. Barra on when he took your cognitive exam?

A He was on --

MR. MORGAN: Judge, can we approach for one second?

Q Don't answer that yet.

A Okay.

(Sidebar conference off the record.)

THE COURT: Let's take a quick five-minute break.

Do not discuss this case among yourselves or with anyone else.

COURT OFFICER: All rise.

(Jury exits the courtroom.)

THE COURT: Let's put it on the record.

There's been a ruling by the Court that his HIV condition is not part of this trial.

THE WITNESS: Okay.

THE COURT: That's not to be mentioned.

THE WITNESS: Okay.

THE COURT: Now, he's taking medications and I'm pretty sure he told you what kind of medications he was taking.

THE WITNESS: Yes, the antivirals, yes.

THE COURT: Is there a name for that without having to say antiviral?

MR. JOSEPH: It was like trivisceral, or something.

THE WITNESS: He had a number of medications.

THE COURT: The thing is, you see, because Mr. Joseph has a point. As long as we don't mention that it's related to HIV, okay, and I don't know. I mean, Dr. Busichio would know, how, and the question is, how would that affect his cognitive deficit.

THE WITNESS: Right.

THE COURT: How would that affect the testing that you've done to determine whether or not he has cognitive deficits?

MR. MORGAN: Should he first have to ask if any medication did affect? If he just uses medication and she says no --

THE COURT: The first question is what medication was he on, right? That's the question he asked.

MR. MORGAN: I know.

THE COURT: And the reason why we broke and took

the jury out is so that we don't have a mentioning of his HIV status, his HIV condition.

Now, the answer to the question is, you know, what medication is he on, whatever medication, by the name of the medication, and then the question, the follow-up question is, how would that affect his results in whatever cognitive test he's being given.

MR. MORGAN: Why don't we ask the second question first and then he can get into the list if it does.

THE COURT: I'm not going to tell him how to go about his examination, and I think -- here's the thing. You know, I don't know what his argument is. I understand what you're saying. If none of them affect according -- if the answer is none of whatever medications he's on do not affect him, I don't know who he's going to be producing to counter that answer later on, and I don't know -- you know, he may want this doctor to say this is what he's on and I know that he's on that, and then he can bring another doctor in to say, well, of course that's going to have an affect on whatever testing he's given.

MR. MORGAN: But we already have his expert reports and we know that they don't opine as to that.

THE COURT: Oh, we do? I don't know that. You guys do.

MR. MORGAN: When we argued this motion before we

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looked at Dr. Dickoff's report.

THE COURT: We're talking about the medication, not --

MR. MORGAN: He gives a cause for my client's symptoms and he doesn't mention that the medications are a cause. So if he didn't state to a reasonable degree of medical certainty that the medications Mr. Barra was on --

MR. JOSEPH: I don't really think we should be doing this in front of this witness because I want to say some things.

THE COURT: You want to say something additionally or --

MR. JOSEPH: Yeah, without the witness being present. I want to be able to address what he's saying outside the presence of this witness.

THE COURT: Okay. We'll have the doctor step out, but for now, okay, if there's anything in there, just give the name of the medication without having to say what the medication is for.

THE WITNESS: The only thing is, is that the exact names, he gave the antivirals. So there's a number -- there's a lot of different medications for antivirals and that's what I could say, antivirals.

THE COURT: Oh.

THE WITNESS: That's what I'm saying. Like, in

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terms of the exact medication --

THE COURT: Right.

THE WITNESS: -- the names I wouldn't be able to tell you, but I know the effect that antivirals have and they wouldn't have this profile on cognition.

MR. JOSEPH: Can I ask a question?

THE COURT: Go ahead.

Q They could affect cognition?

A It wouldn't be this profile, yes. Just like the answer for depression, yes, I said yes to that, but it wouldn't affect this.

MR. JOSEPH: So it's relevant, Judge.

THE COURT: But what if, because now you're saying it could affect cognition.

THE WITNESS: Just like depression can, yeah.

THE COURT: But that's the answer he wants, you see. So without having to mention medication would the question be, whatever medications that he's taking, or was taking at the time, could those medications have affected his cognition --

MR. MORGAN: His cognition?

THE COURT: -- without having to mention --

MR. MORGAN: His cognition or anyone's cognition?

THE WITNESS: Right. That's --

THE COURT: It's a general thing. We're talking

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about this patient, okay. And we're talking about the testing that was done on him, right?

MR. MORGAN: So she says no.

THE WITNESS: So the answer is no to that question.

THE COURT: To him?

THE WITNESS: Yeah. It did not have an effect on his cognition.

Q But it can affect someone's cognition when they're taking the test?

THE COURT: Now that's a general question.

Q And the answer is yes?

A Medications can. Dr. Brown and I determine if that is. In his case it did not.

Q But these medications can?

MR. MORGAN: But someone not on trial. Someone whose case is not before this Court.

THE COURT: It's a human being is what he's talking about.

MR. JOSEPH: It's possible that it can --

THE COURT: It can affect a person's cognition.

MR. JOSEPH: -- and they're making a determination that it didn't in this case, but these medications can. I'm entitled to know that. The jury is entitled to know that.

THE COURT: Your redirect would be: Have the medications he's taken, your client, affected his cognition. That would be for your redirect.

MR. MORGAN: I know.

THE WITNESS: Do you have to say antivirals? So you might want to just say medications he was on. You know what I mean?

Q There's no other way to say it other than antivirals? Because I would object to that.

A A medical doctor might be able to tell you that, but that's the only thing that I would be able to say.

Q So you don't know the names of the medications he was on? He didn't write that --

A The exact names -- there's a number of HIV medications.

Q But the jury is not going to know that ABC medication is an antiviral.

A You take a medication, you state what the cause is, I don't know --

Q They're not allowed to do research on it.

THE COURT: The question is, does your record state the name of the medication?

THE WITNESS: No, it doesn't, and I wouldn't have that. It says antiviral medication in my report. It's right here.

THE COURT: Does it say the name of the

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medication?

MR. JOSEPH: I think we should be able to note that it's antiviral. I think you need to revisit that, Judge, with all due respect.

THE COURT: No, I don't think so. So ask a general question regarding the medications he's on --

THE WITNESS: Okay.

THE COURT: -- and how, you know, they could affect the cognition. You want to keep the antiviral stuff out.

THE WITNESS: Okay.

THE COURT: Do you still need for the witness to step out?

MR. JOSEPH: No, I think we addressed it, but I think we have two notes from the jury though, Judge.

Am I being too longwinded?

THE COURT: Okay. Yes to both.

Basically, what has happened is, that they noticed that either you, Mr. Joseph, or you, Mr. Morgan, went to the side and spoke to some of the parties that are sitting on the side of the courtroom and they want to know if that's permissible.

MR. JOSEPH: Oh.

THE COURT: Okay? And somebody needs a letter just indicating that they're on jury duty, so... all right?

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So it's no big deal.

Are we ready for them?

MR. MORGAN: Actually, real quick, can you just give an instruction that I was just talking to opposing counsel? I don't want them to think that I was like --

MR. JOSEPH: No, I don't want that. I don't want that.

THE COURT: You can talk to anybody. You can talk to your client. You can just go out and --

MR. MORGAN: I agree with you.

THE COURT: So it's yes as to both. It can be done. You just can't talk to them.

MR. JOSEPH: Can we just get where we are on the record because I don't want to mess this up.

THE COURT: In terms of the last question?

MR. JOSEPH: Yeah.

THE COURT: She was looking for the medication.

MR. JOSEPH: Right, okay.

THE COURT: You don't need the name anymore. You just want to know if the medications that he was on --

MR. JOSEPH: Well, I do want to know and she can't, so we're going to have to --

THE COURT: Right. Bring them in.

COURT OFFICER: All rise. The jury's entering.

(Whereupon, the jury enters the courtroom.)

Dr. Busichio - for Plaintiff - Cross/Joseph

THE COURT: You may have a seat.

Let's continue with the cross-examination of the witness by Mr. Joseph.

You may continue.

MR. JOSEPH: Thank you, your Honor.

CONT'D CROSS-EXAMINATION

BY MR. JOSEPH:

Q At the time that he first presented to you for cognitive testing, Mr. Barra was on medication; is that correct?

A Sure.

Q All right. One of the medications he was on was for diabetes mellitus; is that correct?

A Correct.

Q One of the medications he was on was for hypertension; is that correct?

A Correct.

Q Was he taking Cymbalta at the time?

A I believe so, yes.

Q All right. And Cymbalta is a pain medication?

A Actually, I don't have that he was taking Cymbalta at that time.

Q Would it surprise you if he was taking Cymbalta at that time and he didn't tell you about it?

A No, it wouldn't surprise me.

Q Can Cymbalta affect your ability to perform on

cognitive tests?

A It can.

Q Okay. And he was taking other medications as well; is that correct?

A He was taking other medications, correct.

Q And the medications that you do know about, they can affect somebody's performance on these cognitive tests; isn't that correct, yes or no?

A They can.

Q Okay. And if someone is supposed to be taking these medications and doesn't, isn't being fully compliant with the prescription, can that also affect the performance on the cognitive tests that you gave, yes or no?

A It can.

Q Okay. And are you familiar with what is called a serum blood level?

A Familiar, but I'm not a medical doctor so I would leave that to a medical doctor to ask questions on that.

Q Well, serum blood level, in laypersons' terms, means it's a blood test taken and they measure the level of various medications in the patient's bloodstream; is that correct?

A Correct, but I would leave that to a medical doctor.

Q I'm just asking --

A Correct.

Q -- a general question.

A Yeah.

Q Did Dr. Brown have serum blood levels performed before, immediately before Mr. Barra took these cognitive tests?

A Did Dr. Brown do it?

Q Did he have it done?

A We don't do that.

Q Whether he did it or whether he referred him to Quest Diagnostics or to wherever?

A I don't know what Dr. Brown did, but we don't do that at our center.

Q Right. Is there a reflection in your records as to whether Dr. Brown ascertained serum blood levels at or about the time that Mr. Barra took these cognitive exams?

A I don't see any in the notes right here.

Q Is that part of his normal procedure with somebody taking these medications or is supposed to be taking these medications; yes or no?

A Not that I'm aware of. I don't know that.

Q Now, you saw him in 2010?

A Correct.

Q For what period of time?

A For three months.

Q And then you saw him again in 2012?

A Correct.

Q So there was about a 14-month gap; is that right?

A Correct.

Q And when you saw him again in 2012, neither you nor Dr. Brown took an interim history at that time; isn't that correct, yes or no?

A I always sit with a patient before the testing and ask them if they're still having the same complaints, anything additional, anything got better. I always do that, yes.

Q Well, under New York State law, when you interview a patient aren't you supposed to write anything down that they say is significant, yes or no?

A I have it in my report.

Q Did you indicate that you actually did an interim history in your report?

A Did I indicate that I did an interim history?

Q Yeah, that's what I'm asking. Because you just said you always talk -- when I asked you about the interim history, you said, well, I always ask him.

A Yes. Well, let's see here.

(Pause in proceedings.)

A I have a functional assessment of all his complaints, if that's what you're asking.

Q Did you do an interview and take an interim history? That's what I'm asking.

A I have a history right here. You want me to tell you all his complaints that he complained about?

Q No. Is an interim history the stuff that happened since the last time you saw him?

A Correct.

Q Okay. What did he tell you?

A So he reported forgetting routes; leaving piles of bills for long periods of time without following up because he forgets and his sister has to help him; he has episodic memory problems; forgets conversations; names of familiar people; he forgot to turn his sprinkler system off due to memory problems; he forgot to turn off the stove and the alarm went off; he forgot that he just read a paper and he read it again; he forgot to turn the air-conditioning off which cost him money; he has to write everything down; he often loses trains of thought while talking to people; he has to double-check multiple times before he leaves the house because he often forgets something; he cannot sustain his attention while watching television; he finds himself spacing out; he has difficulty focusing while reading; he has difficulty following up instructions, like when in therapy he heard directions, he couldn't follow repetitions for simple procedures; he gets frustrated because, again, he used to have a construction crane and now he makes mistakes with elementary math problems; he used to cook, now he can't because he forgets the ingredients, he has to buy prepared foods; his sister has to help him with basic household chores, example laundry; he can no longer multi-task; he reported constant tip

of the tongue problems; he says I try to say something and it doesn't come out right; he speaks and then loses his train of thought at the time; he has difficulty focusing when attempting to read the newspaper; problems pronouncing, recognizing, recalling words; difficulty expressing his thoughts verbally, cannot find the right words; difficulty connecting the ideas while reading the newspaper; often finds himself taking the wrong train; often finds himself confusing directions, and forgets familiar routes.

Q All right. But he was driving, right?

A That's when he said forgets familiar routes, correct.

Q And when you did your evaluation of Mr. Barra and you determined that he had decreased brain function, you had to make a determination of what his brain function was before the alleged accident; isn't that correct, yes or no?

A Correct.

Q And do you know what kind of student he was back in school, yes or no?

A I know his educational level. I don't have his academic transcripts, if that's what you're asking.

Q Right. You didn't ask his schools for academic transcripts. You didn't ask his schools to provide the results of his standardized test scores and things like that, did you?

A We --

Q Yes or no?

A In 2010 -- again, this is a long time ago -- I always try to get as many records as I can. I'm not always provided the records. So I don't know what I asked for and what I don't, but I didn't have them.

Q You've never had them, correct?

A I don't know if we requested them. Our office -- I always try to get as many records as I can.

Q That's not the question.

A I didn't have them is the answer.

Q Well, you have your office records there. Did you request them?

A Again, I have no documentation that I requested them, but we don't have documentation that we request. We only see what we have in our file. So when I open up the file I see what I have.

Q Well, you just said -- well, did you personally say, "I want these records"?

A I don't remember that. It's 2010.

Q What do you have in the file that reflects what records you need?

A I ask for the hospital records, I ask for ambulance call report records.

Q And who did you ask them from?

A The Medical Records Department does that. I don't do that. I tell --

Q And did you tell them that you wanted his school records, yes or no?

A I don't remember. It's 2010. It's six years ago.

Q But where is the list of the records that you requested?

A I don't have -- the Medical Records Department requests the list. So I ask them to -- if you're asking me what I asked them for --

Q Yes.

A -- I don't know. I don't have it here.

Q Where is that list, the list that you gave them? Where is it?

A I don't have that in my file.

Q Why not?

A I don't know. I don't typically write down what I request.

Q So how is it you request? Do you do it orally? By computer?

A I'd go over to them and say, get the hospital record, get this, get that. Yeah, they might write it down. It might be in the computer somewhere, but I don't sit and write in handwriting or on the computer what I want. I just go over to the Medical Records Department and ask them to get it for me.

Q So as you sit here today you have no idea whether he had any cognitive issues while he was attending school; is that

Dr. Busichio - for Plaintiff - Cross/Joseph

correct, yes or no?

A Cognitive issues?

Q Yes.

A It's different. Cognitive is different than from -- academia is different from achievement, so we're going to separate the two.

Q Well, Doctor, you said he had difficulty with keeping his attention, right?

A Right, but he had a GED.

Q Did he have that problem in school?

A He has a GED. You can't have a GED with less than first percentile attention.

Q Where do you see he has a GED?

A In my records somewhere I saw that.

Q In your records you indicated he's a high school graduate. In his intake he said that he finished 11th grade.

A Correct.

Q So where is it that he has a GED?

A He finished 11th grade and got a GED certificate.

Q That's not what it says in his intake.

A Okay. I read that. I treated him for three months for whatever -- I read this somewhere. If you want me to find it I can.

Q I'd like to because, you know, you say at one point he's a high school graduate and --

A I didn't say he's a high school graduate. I have that in my report. And remember, I treated him for three months. I saw him in 2012. I saw him again in 2015. I always clarify everything I initially write in my initial report. If I said he graduated high school I ask him again. If he told me 11th grade, I ask him if he had a GED. That would be the normal progression of what I do.

Q All right. So let's back up.

A Yeah.

Q Before he sees you and Dr. Brown he fills out a questionnaire and he says he's got an 11th grade education?

A Correct.

Q Then you interview him and you write down -- you write a report that says he's a high school graduate.

A Correct.

Q Now you're telling us, well, he's neither of those; he's actually got a GED, so...

A No. He finished 11th grade and he has a GED.

Q And did you write that in your report?

A Which is equivalent to the high school education.

Q I understand what a GED is.

A It's all equivalent.

Q Is it in your report?

A In which report?

Q Any report.

A I know --

MR. MORGAN: That he's a high school graduate?

MR. JOSEPH: No. She wrote down high school graduate.

A In my --

Q In your initial report.

A I'm looking to see where I wrote it, again. Because I do know that that was clarified.

Q Okay.

(Pause in proceedings.)

THE WITNESS: Do you want me to keep looking? I can't seem to find it yet.

MR. JOSEPH: I can't hear the witness.

THE WITNESS: I asked him if he wanted me to keep looking; I can't seem to find it yet.

MR. JOSEPH: May I move on, Judge?

THE COURT: You may move on.

Q Let me ask it this way.

The reason I'm asking this question -- couple of reasons why I'm asking this question, but one is, what you did is you said, okay, Mr. Barra was a high school graduate and therefore I am extrapolating and thinking these were his capabilities before, right?

A I'm using a lot of different -- I'm estimating.

Q You're estimating?

A I'm estimating.

Q Would that change if he didn't graduate high school?

A No.

Q Okay. But still, let's get back to the school scores. Don't you want to know -- wouldn't it be important to know whether he had trouble with attention in school, whether he had trouble focusing on reading in school, all these things that you're talking about here in the courtroom, right? Wouldn't you want to know -- wouldn't a good place to start be, look at his school records to see if he had the same issues back when he was going to school? Wouldn't that be relevant to you, yes or no?

A Of course the more information you have the better, but with a less than first percentile in attention and executive function you can't own your own business and you can't do the profession he was doing. So that itself is inconsistent with what you're saying.

He, obviously, had a good attention span and good executive functioning to own his own business 15 years prior and operate a crane without hurting people.

Q What was the business he was in?

A He had his own business.

Q What was it?

A I believe it was in construction --

Q Really?

A -- type of business. But he owned his own business.

Q No.

A I actually don't know the details of the business, but I did know he was a business owner.

Q Well, you know, there's differences in running businesses; aren't there?

A Well, you can't run a successful business without -- with a less than first percentile attention. I don't care what it is, no.

Q You can't --

A No.

Q Back when I was growing up you could be a paperboy. In fact, I delivered bagels. You mean to tell me --

A I don't think he was a paperboy.

Q Well, but I'm asking, what was the business?

A He ran and did finances on the business, budgeting, all of that, to run his own business. You can't do that with less than a first --

Q What was the business?

A Again, I just told you I don't know the specifics. It was 15 years ago. This was way before I met him.

Q And was it before he was a crane operator in the City of New York?

A Before.

Q Before. So maybe 30 or 40 years ago?

A I just said 15 years ago.

Q Yeah. But could it have been longer than that, then?

A Fifteen years ago is what I just said. Could it have been longer when he started it? Sure. But 15 years ago is when he was still doing it.

Q And did the business fail?

A I don't believe so.

Q And where was this business?

A I don't know the specifics of the business, I told you.

Q What state was the business in?

A I don't know. I know he lives in Florida now. It could have been there. It could have been in Florida. I'm not sure. I'm not really exactly sure of that business. I know he was a business owner and he successfully owned his own business.

Q When you say successfully, how can you tell us it was successful if you don't know why he was no longer in that business? How can you sit here and tell us that he was successful?

A Because he didn't tell me he failed at the business.

Q You don't know what the business --

A You can ask him about it.

Q I'm asking you since you made determinations based upon this alleged successful business.

A What are you asking me? I told you, you can't run a business with a less than a first percentile in attention and executive function. It doesn't matter what business it is. You

wouldn't be able to do finances and run a business.

Q I'm asking you what businesses he ran before this?

A And I told you three or four times that I didn't know the specifics of the business.

Q And is it your testimony here today that neuropsychological testing cannot be affected by motivation; yes or no?

A Cannot be affected?

Q Right.

A It can, but not in his case.

Q And you actually attempted to treat Mr. Barra, right, you said?

A I didn't attempt. I did.

Q Okay. By the way, we were talking about B12 deficiency before. Can that cause changes in short-term memory, disorientation, decreased attention, numbness and tingling in the limbs?

A It can.

Q Yeah, okay. And at times Mr. Barra was prescribed antidepressants; is that right?

A Correct.

Q And are you familiar with the antidepressants that he was prescribed?

A The names of them? Prior to his injury or after the injury?

Q Either one.

A Do I know the names of them? I'll take a look and see if I have them.

Q Let me ask you this: do you know what the doses were of the medication?

A I'm not a medical doctor. I'm not going to talk about medications.

Q I'm asking if you know the doses.

A I don't know the doses, but Dr. Brown probably asked because he's the medical doctor.

Q Well, they're reflected in his records. Since you have them there...

A I'll have to look again.

Q Please.

(Pause in proceedings.)

MR. MORGAN: Can you give a timeframe?

MR. JOSEPH: I just said anything she's got.

(Pause in proceedings.)

A He was on pain meds. He was on Cymbalta.

Q That's a pain medication, right, Cymbalta?

A Correct.

Q Is that a yes?

A It's used for that, but there's a number of uses for Cymbalta. But again, you would ask a medical doctor --

Q Fine.

A -- about the actual use for that. But it could be used for more than just pain, though.

Q All right.

(Pause in proceedings.)

THE WITNESS: I can't find any yet. Do you want me to keep looking?

THE COURT: You have to let them know.

A Do you want me to keep looking?

Q You can't find anything?

A I can't find anything yet. It might be here, it may not. Do you want me to continue looking?

Q Well, these -- if he's taking antidepressants it could affect his ability, his cognitive ability, correct?

A It could.

Q And if he's not compliant with taking antidepressants, that could also affect his cognitive abilities; is that correct?

A It could.

Q And if he is taking doses of antidepressants that are so low that they're not therapeutic, that could also affect his ability, his cognitive abilities; is that correct, yes or no?

A What do you mean so low that they're not therapeutic?

Q In other words, the recommended doses of them, 30 milligrams and he's taking two-and-a-half?

A So you're saying he's not taking the prescribed medication; is that what you're asking?

Q Or the prescribed medication is not being prescribed properly.

A Well, I'm not going to talk about someone else's prescriptions.

Q Okay. But somebody taking or not taking antidepressants can affect their cognitive abilities; is that correct?

A Yeah, I said it could.

Q And would you agree that when someone's mood improves their cognition can improve as well, yes or no?

A It can.

Q Okay. And are you aware that he saw a neurologist in Florida named Dr. Salvati? S-a-l-v-a-t-i, I believe.

A I do think I remember that. Let me just double-check.

(Pause in proceedings.)

A Salvati, yes, I do.

Q And Dr. Salvati did an EEG; is that right?

A I don't have that right in front of me, but if you're telling me they did, you could show it to me to look at it.

Q So you're not aware whether he did or not?

A I don't know. I reviewed Dr. Salvati's records, but I don't have here about anything with an EEG.

Q And did you review the records of Dr. Carcione? C-a-r-c-i-o-n-e.

A Correct. Yes, I did.

Q And he's in Westchester?

A Correct.

Q And did you review an EEG that he interpreted on October 23, 2010?

A I must have because I reviewed his records. I just don't have it in my report here, but I must have reviewed it when I was reviewing it, yes.

Q So you reviewed it, but you didn't put it in your report?

A I would put it in my report if I had seen it, so -- but I was given Dr. Carcione's records. So I can't remember what I saw and what I didn't. And an EEG I would put in a report, typically. So maybe I didn't see that.

Q You would?

A I would put an EEG in the report if I had seen it because it's brain related.

Q Right. So you have Dr. Carcione's records, but you didn't comment on it; is that what you're telling us, yes or no?

A I might not have had the actual EEG report. I might have had his initial history and his impressions, but not the actual documentations of the EEG. That's a separate -- that's typically separate.

Q So if he put in his report his impression of the EEG, you wouldn't put that in your report; is that what you're

saying?

A It depends. If he put it in and I reviewed that, I would. That's what I just said.

Q Okay.

A If I see something with the brain and it's from another neurologist, I would put that in the report.

Q Okay.

A But you could just tell me what he said and I can answer.

Q Well, if he said that it was a normal EEG, would that surprise you?

A No.

Q Okay. And the last time you treated the plaintiff was when?

A September -- I'll give you the exact date. September 9th of 2015.

Q Okay. You evaluated him. Did you treat him?

A I evaluated him.

Q Did you treat him on that date?

A In 2010 for three months I treated him.

Q That the last time you treated him was 2010?

A Correct.

Q And the last time you saw him was September 2015?

A I evaluated him, correct.

Q And in 2015 was he driving?

A I believe so. I'm not a hundred percent sure of that though, but I believe so.

Q Did you ever tell him, you know, Joe, it's too dangerous; you really shouldn't drive?

A We always -- every time someone has any deficits Dr. Brown and I, if they do tell us they're driving, we always tell them that. But our center -- there's actually centers, there's driving centers that you go to for that. So we would have recommended that.

Q You would recommend -- I'm not sure what this means, a driving center.

A At NYU they have an actual driving center. It's a simulated driving center where you put someone in the car and they actually see his abilities to drive. They give him all the different scenarios.

Q And what's the purpose?

A It's a driving center.

Q Are they evaluating him or treating him?

A They're evaluating him. Again, that's not my specialty. It's a driving center.

Q I'm asking what they do there. I'm not trying to give you a hard time.

A It's not something I do, so I'm telling you what I believe they do there. They evaluate for his ability to drive.

Q All right. Did you or Dr. Brown refer Mr. Barra to

this NYU driving center, yes or no?

A In 2015 or 2012?

Q In any year.

A Give me a second.

If someone was driving and they had significant cognitive deficits, we would have recommended -- not that we refer. You don't recommend to one place. You give a referral and you give a number of different places.

Q All right. So tell me what you did, if anything.

A I think in 2012, which is three years -- which is four years ago now, I believe we -- again, I don't have the exact, if he drives, how much he drives; but if he did tell us, I would have given some names and NYU would have been one of them.

Q Show me in your records, please.

A Show in my records what?

Q Where you made a referral.

A We don't put that -- referrals in my records.

Q Wait a second. You mean to tell me that you're concerned that it's too dangerous for a person to drive, hypothetically, not necessarily Mr. Barra, all right, and you think that they need to go to either this NYU center or another center because they've got cognition problems, and that's not significant enough for you to write down?

A No, I probably do have it somewhere. If you want me to find it, I can.

Q Show me, please.

A If I wrote it, I did. If not, then that means I told the administration.

Q You told the administration what?

A Just like I do with medical records. A lot of times Dr. Brown and I go up to administration and they do the referrals. We don't write the prescriptions, the referrals to go out. Our center does that. So there's a different department for everything we do.

Q This administration --

A Yeah.

Q -- are they doctors?

A No, no. They're administration. They do billing, they do referrals, they do all that.

Q They're your staff?

A Yeah. So I'll tell them, listen, make a referral out to this person. They'll have it in the computer and they'll print it out and then Dr. Brown will sign it or I'll sign it, depending on what the referral is for. But we're instructing them what to do. They're just administratively putting it in the computer and writing it down. I might not write it in my folder in a paper and pencil. I might instruct them to write it down. They print it out.

Q So if a person goes -- we're going to take it out of context of your practice. If I go to my internist and he does a

full workup on me and he says: Okay, Ron, see you next year. Go pay my receptionist. I go out there, write the check, give her whatever -- hear me out?

A I know where you're going.

Q And the receptionist says: Oh, yeah, Dr. Rodman wants you to go to this specialist, or a specialist in this field, and he hasn't told me that; is that what you're telling me you do?

A No. I just said I know where you're going with it.

No, that's not -- of course that's not what we do. What we do is, we talk to the patient. We let them know of our concern about them driving. Again, we're not with them 24/7 so I don't know if someone is getting behind the wheel. I'm not with the person.

I let them know the concern. I let them know the dangers of it. And then Dr. Brown or myself will walk up. We'll talk to the patient. We'll say, there are driving centers; we can refer you out. We can walk up to the administration. Tell them. They put it in the computer. They print it out. They'll walk back to me and Dr. Brown. We'll sign something and we give it to the patient.

Q So where is that?

A I just said to you, I don't see it in here. I can look for it. It might be, it might not.

Q Please look for it.

A Or it might be in the computer.

Q Please look for where you may have told Mr. Barra that you shouldn't drive without going to the driving center.

(Pause in proceedings.)

A Okay. I have a note right here from Dr. Brown.

Q What date?

A 9/9/15, actually. And he writes -- now this is Dr. Brown.

Q So not until 2015?

A Well, I can look back to see if I did it in 2012 also, but I do see a handwritten note from Dr. Brown here that says: Driver stopped because increased problem.

Now, I don't know --

Q What does that mean?

A This is not my note. It's Dr. Brown's note. So you'll have to ask Dr. Brown.

Q So in that note -- so in September 2015 it says stop because of problem. Doesn't say --

A I don't know if it says "stop" or "stopped." I can't really read it.

Q Can I look at it?

A Yeah, you can definitely look at it. It's right there. Whatever you can make out of it.

(Pause in proceedings.)

Q "Driver" or "Driving stopped because of problem. Alone. Driven by sister."

A No, "Alone. Driven by sister" is how he got to our center that day. That's what he meant by that. This is a separate line on top of that.

Q Okay. So on any day that he was at your center --

A We obviously spoke about driving to him, is what I'm saying.

Q I understand that.

A Yeah.

Q On any day was he referred to a driving center for evaluation or driving training?

A That I can't find here, but I do see our note that we had.

Q So you're telling me that there's nothing reflected in your notes from 2010, 2012, 2014, 2015 referring Mr. Barra for evaluation for driving or to get driver training; is that your testimony?

A There's nothing in my notes. That doesn't mean we didn't do it.

Q Well, aren't you supposed to put down in your notes anything that's significant; yes or no?

A We did. Dr. Brown wrote it, stopped --

Q Yes or no?

A Yeah.

Q And if you make a significant recommendation to the patient you're supposed to write it down, yes or no?

A We do that referrals with administration. That's completely separate.

Q I'm not asking about referrals. I'm talking about it's up to you, the practitioner, either you or Dr. Brown to tell the patient, not administration, to tell the patient, look --

A We did. That's what this interview is.

Q Let me finish.

A That's what this interview is.

Q -- I don't think you should be driving until you get evaluated, or I don't think you should be driving until you get some sort of further training, right?

A It was addressed right here. I just said that.

Q That's not what that says. And so -- forgive me.

So tell me where before September 2015, or any day, that you tell Mr. Barra that, any day?

A What do you mean?

MR. MORGAN: Objection, your Honor.

THE COURT: Sustained. This has been asked and answered.

A I found where you wanted me to find it.

THE COURT: Sustained. Next question.

Q Okay. Do you have - "you" meaning you and/or Dr. Brown - have a legal responsibility to report to the Department of Motor Vehicles when your patient has a head injury which prevents them from driving safely; yes or no?

A A legal responsibility?

Q Yes. Yes.

A Well, we send the report over to their treating neurologist, whoever the neurologist is. We're a treatment center for cognitive deficits. Driving is related to cognition, physical, motor skills. So we sent this report over to the neurologist. We, as a team -- it's not just one of us has a responsibility. The whole team works together. So if a team -- you can't say Dr. Brown's responsible or I'm responsible or the neurologist is responsible. The team together works together.

So if one of us referred them, maybe the neurologist did. Maybe we spoke to the neurologist. That's why we have that here.

Q Did anybody on your team notify Department of Motor Vehicles Joe Barra shouldn't be driving because he suffered a head injury and has cognitive problems?

A I don't know. Again, I don't have that information right here.

Q But it's Dr. Brown's legal responsibility to do that. He's a treating neurologist; isn't he?

A It's not just Dr. Brown. It's a whole team that works with him. We have a neurologist, we have an orthopedist, we have me, we have Dr. Brown the neurologist.

Q The orthopedist, you're talking about Michael Cushner?

A Whoever he's seeing. He's seeing orthopedic, he's in

Dr. Busichio - for Plaintiff - Cross/Joseph

physical therapy, he's seeing -- so all these doctors together, you have to take the person as a totality, not just one specific incident.

Q So you're the neuropsychologist. Dr. Brown is his?

A Behavioral neurologist.

Q Behavioral neurologist.

A Correct.

Q And you're saying it's Michael Cushner who did arthroscopic surgery on his shoulder, it's his responsibility to notify --

A I never mentioned his name at all.

Q Well, you said he's a member of the team.

A You mentioned Dr. Cushner. I didn't mention Dr. Cushner.

Q It's the orthopedist's responsibility to notify DMV about a head injury?

A I did not say it's the orthopedist's. You said that. I said that as a team it's a multi-disciplinary approach; we always take it. We work with the treating neurologist, we would the orthopedist, the physiatrist, we work all together, and as a team we make appropriate suggestions to a patient.

MR. MORGAN: Can we move this along?

Q As a team, did you get together --

MR. MORGAN: Objection.

THE COURT: Sustained.

Q As a team, did you get together --

MR. MORGAN: Objection.

THE COURT: Sustained.

Q Did he report to you that he had any problems with his balance?

A Yes.

Q Did he ever report to you that those problems resolved?

A I can take a look.

Q Sure.

(Pause in proceedings.)

A I don't have any note of resolving, but he wouldn't have mentioned that to us because that would be for the orthopedist or the physiatrist.

(Continued on next page.)

Q. But not the neurologist?

A. Or his neurologist. Not Dr. Brown though. Dr. Brown is a behavioral neurologist. It's a separate expertise that Dr. Brown does. He works specifically in brain injury, concussion and rehabilitation.

Q. Well, concussion, I mean, balance could be effected by concussion, right?

A. Yes, sure.

Q. But that wouldn't be relevant to Dr. Brown?

A. It would. The patient wouldn't have mentioned it to us. The patient would mention it to another doctor that is treating his balance.

Q. If someone is late in paying bills or makes a mistake and pays a bill more than once, that doesn't mean that they have a traumatic brain injury, yes or no?

A. No, it doesn't.

Q. If someone let's a sink or tub overflow, that doesn't mean they have traumatic brain injury, does it?

A. That doesn't mean they have one.

Q. And if someone tunes out a spouse or other relatives so they are not paying careful attention to that person while speaking, that doesn't mean that they have traumatic brain injury, does it?

A. That doesn't mean they have it.

Q. Okay.

Dr. Busichio - Plaintiff - Cross

(Brief pause.)

Q. All right. Today you talked about spatial skills.

A. Spatial skills.

Q. And if you have difficulty with spatial skills you are not going to be able to drive very well, are you?

A. Correct. Spatial skills is one of his good areas.

Q. It's one of his good --

A. Yes, he made significant improvement in spatial skills and he is in the fifty-third percentile in spatial skills.

Q. Okay.

A. So I wouldn't be treating him for spatial skills anymore.

Q. When did he improve to fifty-three percent?

A. In September 2015 when I retested him.

Q. You hadn't seen him in over a year?

A. In 2012 he was in the average range also. So he was pretty much the same.

Q. So by 2012 he was normal?

A. No. No. I didn't say that.

Q. In spatial skills?

A. Spatial skills were back to normal again, yes.

Q. So spatial skills wouldn't effect his ability to operate a car back in 2012?

A. Not his spatial skills.

Q. Right. Okay.

A. You are asking just about that domain. There are a lot of other things --

Q. And spatial skills wouldn't effect his ability to operate a crane in 2012?

A. Spatial skills itself, no.

Q. Okay.

(Brief pause.)

Q. All right. So you can have problems with attention and memory without a traumatic brain injury; is that correct?

A. You can.

Q. And you could have headaches without a traumatic brain injury, correct?

A. You can.

Q. You could have dizziness without a traumatic brain injury, correct?

A. Correct, you can.

Q. You could have difficulty walking without --

A. You can.

Q. You could have balance problems without a traumatic brain injury; is that correct?

A. You can.

Q. And you could have blurred vision without a traumatic --

A. You can.

Q. You can have hearing difficulty without a traumatic brain injury?

A. You can.

Q. You could have sleep disturbance without having a traumatic brain injury; is that correct?

A. You can.

Q. And some of those -- and you are aware that he -- that Mr. Barra suffers from a variety of symptoms including hypertension and diabetes; is that correct?

A. Yes, correct.

Q. And some of those could be effected by those two conditions, correct?

A. Some of them but you wouldn't have the constellation that he has.

Q. You are aware that he has migraines; is that right?

A. Yes.

Q. Some of those, if not all of those could be caused by migraines; is that correct?

A. Not all of them.

Q. Okay.

A. Some of them.

Q. Attention memory could be caused -- problems with attention memory could be caused by migraines?

A. Attention and memory, sure, it could be effected at

the time the migraine is going on. Not when you are not having the migraine though.

Q. Well, you could have a migraine and not actually have a headache; is that correct? You could have symptoms of --

A. Correct, but when you are not having a migraine you will not have trouble with attention.

Q. And headaches, clearly those are effected by migraines; is that correct?

A. Yes.

MR. MORGAN: Headaches are effected by --

MR. JOSEPH: Yes, because a headache doesn't have to be a migraine.

Q. Dizziness could be effected by a migraine, right?

A. Could be, yes.

Q. Difficulty walking could be caused or effected by having --

A. At the moment of the migraine.

Q. Yes?

A. Not when you are not having the migraine.

Q. Can be, right?

A. You wouldn't always have it.

Q. Balance problems wouldn't be caused by a migraine?

A. When you are having it.

Q. Blurred vision?

A. When you are having the migraine.

Q. Sleep disturbances could be caused by migraines?

A. When you are having the migraine.

MR. JOSEPH: Thank you. I have no further questions, your Honor.

THE COURT: All right.

MR. MORGAN: Your Honor, could I just do a couple questions before we break for lunch? I want to clear up one thing that defense counsel said. I will be very short and then we will continue Redirect.

THE COURT: Redirect.

MR. MORGAN: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. MORGAN:

Q. I have this blown up that I will show you after lunch. I don't have time to grab it now.

But on Cross-examination Mr. Joseph attempted to suggest to the jury and to yourself that the first time Mr. Barra complained of head pain was, I believe he may have said to me or to you when he went through weeks after the accident. Do you remember when he said that?

A. Yes. I remember when he said that, yes.

Q. And I am just going to point to a part of the hospital records from immediately after the accident?

A. Okay.

Dr. Busichio - Plaintiff - Redirect

Q. Give me a second to find it.

MR. JOSEPH: I am going to object to that question. That is not the question that was asked.

THE COURT: Overruled.

MR. JOSEPH: Judge, may we approach?

MR. MORGAN: Maybe I will do this after lunch, Judge.

(Whereupon, an off-the-record side-bar conference was held.)

Q. Do you have the hospital report in front of you?

A. I don't have it in front of me. I did review it though.

Q. I will bring it up for you. It's out of order.

(Brief pause.)

THE COURT: We will break at this point for lunch. Do not discuss this case among yourselves or anyone else. Do not do any internet search about this case, the attorneys, the parties or the Court. Enjoy your lunch. See you back 2:15. 2:15.

COURT OFFICER: All rise.

(Whereupon, the jury panel exited the courtroom.)

MR. JOSEPH: Could we get an instruction that he could not speak to the witness?

THE COURT: You can't talk to the witness.

MR. MORGAN: I won't.

(Whereupon, a luncheon recess was taken at this time.)

(Whereupon, Plaintiff's Exhibits 15A through 15D were marked for I.D. at this time.)

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury panel entered the courtroom.)

THE COURT: You may have a seat. Good afternoon everyone. Welcome back. I hope you had a good lunch. We will continue with the trial. We are now on Redirect Examination of the witness by the plaintiff.

MR. MORGAN: May I inquire, Judge?

THE COURT: You may.

MR. MORGAN: Can I use the demonstratives?

THE COURT: Sure.

Q. Good afternoon, Ms. Busichio.

A. Good afternoon. How are you?

Q. Before we broke for lunch I was preparing to talk to you about the hospital records from the day of the accident.

A. Yes.

Q. And I believe the questions that Mr. Joseph asked you on Cross-examination suggesting that the first time that

Mr. Barra ever complained of any type of head pain was when he either talked to me or talked to you in your office three weeks after the accident. I just want to go through that hospital record. Because he talked about some of the pages, like the Glasgow Coma Scale, and the neurological exam.

A. Right.

Q. I want to start with that ambulance call report. If you look at the first page of the ambulance call report, which is -- and you don't have a copy in front of you, correct?

A. No, but I did review it so I remember it from recent.

Q. And I will just give you a copy of the form that is in evidence. And I will ask you some questions. And I will use the demonstrative.

A. Okay.

(Document submitted.)

MR. JOSEPH: May I ask counsel a question?

THE COURT: Counsel?

MR. JOSEPH: Administratively.

MR. MORGAN: Yes.

MR. JOSEPH: Is the one that you have displayed to the jury, are you calling that the first or second page?

MR. MORGAN: I am calling it the first page.

MR. JOSEPH: Okay. All right. I have it the other way.

MR. MORGAN: That is the way it was in the --

MR. JOSEPH: Fine.

Q. All right. So are you looking at the page that looks like this?

A. Yes.

Q. And, now, looking at that ambulance call report, does it say what time the call was placed?

A. What time the call was placed?

Q. Upper left-hand corner.

A. Oh, is that 8:05? I can't really --

Q. Here.

A. Oh. Oh.

MR. JOSEPH: He can't coach --

Q. I am pointing to the --

A. I couldn't see the little writing. 7:10.

Q. And if you move over two boxes do you see what time it says as on-scene?

A. 7:19.

Q. And if you look at the next page of the ambulance call report?

A. Yes.

Q. Which is where they actually do the Glasgow Coma test?

A. Yes.
Q. That Mr. Joseph was talking about.
A. Yes.
Q. Do you see what time they first take -- he said they did two.
You see what time they did the first one?
A. Are we talking about up in the left-hand? 7:26.
Q. The second one they did was what time?
A. 7:50.
Q. And so they received the call to leave at 7:10?
A. Correct.
Q. They arrived at the scene at 7:19?
A. Yes.
Q. And does the first test at 7:26?
A. Yes.
Q. That is the test that you told Mr. Joseph was a 15 on the Glasgow Coma?
A. Yes.
Q. And how long did Mr. Barra report to you in your history that he lost consciousness?
A. Ten minutes.
Q. Ten minutes.
A. Yes.
Q. And based on the timing of the ambulance call when they received the call, arrived at the scene and actually

did the test, do you have an opinion as to whether or not what his -- what he would be like by the time they did the test?

A. I would expect it to be 15.

Q. Why is that?

A. Because a Glasgow Coma Scale is to make sure you are alert and awake. Really, that is what the test is. It's a test to make sure you are alert and awake. And it uses those three scales to do it. And any patient that is really up has their eyes open and awake and alert could get a 15.

Q. All right. So if he would have scored a bad score on the Glasgow Coma Scale, I believe Mr. Joseph used it as he would be in trouble. How much time would he have needed to be unconscious for him to be in trouble, as Mr. Joseph said?

A. Well, the Glasgow -- his question was is he in trouble with a low score on the Glasgow Coma. Yes, of course. Of course someone with a low score is not as alert and of course the lower you get the worse it is in terms of coma. But because you are alert and oriented it doesn't mean you don't have a concussion and a brain injury.

Q. Okay. Do you have the emergency department nurse's record? It will say 1 out of 4 on the bottom.

A. Yes.

Q. Do you see what time is marked there on the upper left?

A. Is that 8:00? Triage time, am I right?

Q. And do you see the name next to that?

A. Yes.

Q. And when it says right about in the middle, do you see where it says pain level? It's actually about -- mine is so big. It's about the fourth box down on the left.

A. Yes. 7 and 8.

Q. If you move over to the right, can you tell me what that says?

A. "Severe body pain. Patient hit head. Unknown loss of consciousness."

Q. "Unknown loss of consciousness and pain, patient hit head. "

A. Correct.

Q. And if you go to the -- this page of the document, which is the physician's record and discharge?

MR. JOSEPH: May I see?

MR. MORGAN: Yes.

A. I am not sure if that says patient hit head or pain hit head. I am not sure what that indication is.

Q. But it says "hit head?"

A. Yes.

Q. Okay.

A. Or P hit head.
Q. If you go to this page, do you see what the --
A. The emergency room department?
Q. Yes. The physician's record and discharge.
A. This one?
Q. Yes.
A. Physician's discharge?
Q. No. It looks like this (indicating).
MR. JOSEPH: Can you identify it for the record, counsel?
MR. MORGAN: Plaintiff's Exhibit 15D.
Q. But you are not going to see that.
(Brief pause.)
A. Okay. This is it. Yes.
Q. You have it?
A. Yes.
Q. And what injuries do they diagnose him with on discharge?
A. Head injury and shoulder pain.
Q. So do you have an opinion as to whether the first time he told anyone that he hurt his head was either to myself or to you, three weeks after the accident?
A. He told them in the hospital, but not only that, a hospital wouldn't do a CT scan of the brain to begin with.
MR. JOSEPH: Objection; beyond the scope.

THE COURT: Sustained. Strike that. Disregard it and dismiss it from your minds.

Q. Now, he talked to you a lot about medications.

A. Yes.

Q. And do you have an opinion as to whether or not any medications Mr. Barra may have or may not have been on, how that would effect your diagnosis?

A. It wouldn't effect it.

Q. Can you explain why?

A. So when a patient comes in, Dr. Brown and I, I always assess for anything that could interfere with their cognitive functioning at the time. We always look at the medication. Dr. Brown is a neurologist, so he looks at the medications. And we look for emotional factors that might interfere with the ability. And if we feel someone is not able to do the test, we wouldn't even do the testing that day. At any -- so at any point during the testing if I feel it's interfering I will stop the testing. So we completed the testing and the profile shows a traumatic brain injury profile, not a depressed profile.

Q. When you ran one symptom at a time and he asked you could that be a cause of cognitive deficits, would you like to elaborate on those answers? I remember you said correct, correct, correct. Would you like to elaborate on that?

MR. JOSEPH: Objection as to form.

THE COURT: Overruled.

Q. Go ahead.

A. With a brain injury I said there was an umbrella of symptoms. You could have emotional, behavioral and physical and cognitive. When a patient has brain injury and concussion, they have all of those symptoms together. When we were talking about this could cause cognitive, sure, something could effect cognitive, sure. That is why I said, yes, it could. But it wouldn't be the constellation of symptoms that he has. The traumatic brain injury and the post-concussion is the only diagnosis that could account for all of that going on.

Q. Can you explain specifically when he continued to talk about migraine headaches, could you explain to the jury what -- I heard you saying something about while the headache was going on. Can you explain that?

A. Right. You wouldn't give a test if someone was having a migraine headache. Migraine incapacitates someone. You can't even get out of bed with a migraine. You can't give a neuropsychological test to someone who has severe migraines or headaches. You wouldn't give the test. So during the test they wouldn't be able to attend. I mean, during the migraine they wouldn't be able to. But migraines are not constant throughout the whole day. They come and go.

Dr. Busichio - Plaintiff - Recross

Q. All right.

MR. MORGAN: Nothing further.

THE COURT: Recross.

MR. JOSEPH: Thank you.

RECROSS-EXAMINATION

BY MR. JOSEPH:

Q. Do you have the hospital records in front of you?

A. Yes, I do.

Q. That is Exhibit 15?

A. Yes. You want to see them?

Q. Yes. If I --

A. Let me get you all of them.

Q. No. No. Not your records. I am sorry. I meant the actual hospital records in evidence.

MR. MORGAN: That is.

THE COURT: That is. 15.

MR. JOSEPH: No, I saw it in her folder.

(Documents submitted.)

MR. JOSEPH: Your Honor, I thought she was looking at her own records. Not trying to be difficult.

(Brief pause.)

Q. So looking at Exhibit 15A in evidence, you with me?

A. Yes.

Q. So the fire department, or, whomever gets the call at 7:10, right?

A. Yes.

Q. They arrive on the scene at 7:19?

A. Correct.

Q. So they are within nine minutes of the call, correct?

A. Correct.

Q. And nowhere on 15A or 15B does the fire department or EMS personnel indicate that he was unconscious, do they, when they arrive there?

A. Correct.

Q. He is conscious when they get there, am I correct?

A. Yes.

Q. And so, I mean, they may have done the Glasgow Coma Scale for the first time at 7:26, but if he had been unconscious when they got there, that would be significant, right?

A. In terms of loss of consciousness, but not significant in terms of the injury.

Q. It would have been significant enough for them to have written it down?

A. If he was still unconscious, they would have wrote it down, correct.

Q. Okay. And they indicate that he denies loss of consciousness, correct? "Denies LOC" means --

A. Yes, that's correct.

Q. So to the ambulance people he said he never lost consciousness, correct?

A. Correct.

Q. All right. And he said that he was alert -- they tested him and he was alert and oriented in all three spheres; is that correct?

A. Yes.

Q. His pupils were fine; is that correct?

A. Yes, correct.

Q. Okay. And then they say physical examination revealed swelling, right?

A. Yes.

Q. Tenderness to the shoulder?

A. I see -- okay. Let me see where you are now.

MR. JOSEPH: May I approach the witness?

THE COURT: You may.

A. Swelling here?

Q. Yes.

A. So "swelling, tenderness to shoulder, elbow, pain, and pain to the left ankle." Swelling.

Q. "Without deformity related to ankle."

A. Correct, I see that.

Q. All right. Nothing about a head injury there, right?

A. Not -- um, give me a second.

Q. Sure.

(Brief pause.)

A. He said he's "complained of right side of his face, neck and shoulder." He did say he hit his face at that point.

Q. Nothing about any head injury, just that he hit his face; is that correct?

A. He hit his face and then -- yes, on this page. But it does say head injury after this.

Q. On the ambulance?

A. No, in the hospital.

Q. We are looking at ambulance --

A. He said he hit his face on the ambulance, yes.

Q. But nothing about a head injury?

A. Yes.

Q. That is what we are talking about now, the ambulance report?

A. Yes.

Q. The ambulance report also reflects the same -- the top of the ambulance report, and we are looking at 15B. It has the same Glasgow Coma Scale that I showed you on Defendant's Exhibit C, right?

A. Yes, correct.

Q. Because it's got -- it's got all this right here, right? "Eyes spontaneous?"

A. Yes.
Q. "Verbally orientated?"
A. Yes.
Q. Gets the 15's, correct?
A. Yes.
Q. And it also gives a trauma score, right?
A. Yes.
Q. That he is not in any danger when he gets that 12, right?
A. Any danger?
Q. He is not a real emergency, correct?
A. Correct.
Q. He doesn't need oxygen?
A. Right. Right. In terms of the ambulance.
Q. Right. And they check his pupils and they are normal?
A. Yes.
Q. Mental status, normal, right?
A. Yes.
Q. And skin condition is normal, skin temperature is normal?
A. Yes.
Q. And on the --
MR. JOSEPH: May I approach the witness to show her a page?

Dr. Busichio - Plaintiff - Recross

THE COURT: You may.

(Brief pause.)

Q. Okay. I will point to that page. I will make a record so the record is clear as to what page we are talking about.

MR. JOSEPH: There is a page in the New York Presbyterian New York Cornell records, okay, and it's approximately eight and a half by ten inches, your Honor.

THE COURT: Yes.

Q. And in the top left-hand corner it says New York-Presbyterian University Hospital and then there is a bar code that says 49125. And on the right top corner it's got, it looks like some sort of label with a bar -- Mr. Barra's name. And it's in evidence, the bottom right-hand corner it says in handwriting under residence/PA, fall. That is -- I am only doing that so we know what document we are talking about in case the pages get mixed up.

You with me?

A. Yes.

- Proceedings continue on next page -

Dr. Busichio - by Plaintiff - Recross/Joseph

Q On that page it indicates that Mr. Barra denied loss of consciousness, correct?

A Correct.

Q Do you want me to show it to you?

A I said correct.

Q I didn't hear you. I'm sorry, forgive me.

And if you go down, I think, two pages, actually in mine it's one page but I think in yours it's two pages, there's a handwritten page that says, "New York Presbyterian" on the top left, and under the barcode it says, "Emergency Department Physician's Record and Discharge Instructions."

A I have it.

Q Are you with me?

A Yeah, I have it.

Q On the bottom left-hand portion of the page there's a box that says, "Final Diagnosis"?

A Yes, I see it.

Q Okay. "Final Diagnosis," in handwriting, says, "Fall, shoulder and facial pain, foot pain." Do you see that?

A Correct.

Q It says nothing about a concussion; does it?

A Not here, no.

Q It says nothing about a head injury; does it?

A Not here.

Q Not here. Well, this is the final diagnosis, correct?

Dr. Busichio - by Plaintiff - Recross/Joseph

A Right. And then you switch to the next page and there's head injury there.

Q Okay. And I'm going to ask you the question again.

Between August 5, 2010 when Mr. Barra left the hospital and the day he got to you on August 26th, between those two dates, do your records reflect that he presented to any physician for head injury?

A I said that before.

Q After August 5 and before August 26th. That's what I asked you before and now we're going through all this. So let's get it good.

A I said from the time he was discharged from the hospital until the time he came to me, which was very soon, from 8/5 to 8/26, I don't have any documentation of head injury. That's what we do at our center. That's why he was sent to us.

Q Right. By his lawyer?

A He was sent by his lawyer. I said that before.

Q Okay. Thank you.

MR. JOSEPH: Your Honor, I have no further questions.

MR. MORGAN: Can I just ask one quick question, your Honor?

THE COURT: No, we're done. We're done.

MR. MORGAN: Okay.

THE COURT: Thank you very much. Thank you for

Dr. Busichio - by Plaintiff - Recross/Joseph

coming in.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Can I see the attorneys, please?

(Sidebar conference off the record.)

THE COURT: We don't have any other witnesses for you today, so we will break at this point. We will reconvene on Monday at 9:30 in the morning when we will continue with the trial.

Before I discharge you, I want to let you know that on Thursday, April 21st, you can write it down, Thursday, April 21st, we will only be working in the morning that day. We will not have an afternoon session. So Thursday, April 21st, make a note of it so you can plan accordingly, we will only be working in the morning.

As I say to you every day before I discharge you, do not discuss this case among yourselves or with anyone else; do not do any internet search about this case, about the parties, the attorneys or the Court.

Enjoy your weekend and I'll see you Monday at 9:30 in the morning.

COURT OFFICER: All rise.

MR. JOSEPH: Judge, there's a question.

THE COURT: He'll speak to the officer.

(Jury exits the courtroom.)

Proceedings

THE COURT: Take five minutes and then we'll put your motions on the record.

(Recess taken.)

THE COURT: On the record.

MR. MORGAN: Was there a note from the jury, Judge?

THE COURT: They just wanted to know if we were going to be working on Wednesdays or not.

MR. MORGAN: Oh, okay.

MR. JOSEPH: Your Honor, if you remember, during openings Mr. Morgan stated that we had not permitted his expert to take all the photographs he needed of the logbook inside the crane, and I objected and you said overruled. And then the expert testified yesterday during cross-examination. I asked him specifically and, I think, quite thoroughly whether anybody had prevented him from taking these pictures and whether he had full access, and he indicated he had unfettered access to these books. And, you know, I hate to use the word, but plaintiff's counsel lied to the jury, and I think it's inappropriate. And on top of what he did with the king of cranes, it's not appropriate, he's making improper comments and this case should be ended in a mistrial.

THE COURT: Okay.

MR. MORGAN: I would like an opportunity -- do you

have the pages of the opening?

MR. JOSEPH: No, I don't.

MR. MORGAN: I don't remember saying it, Judge. I'll review it over the weekend and have a response when we come back on Monday, but I object. If I said it, I apologize. I wasn't lying to anyone. I didn't mean to be lying to anyone. But I would like to at least see what it says before I respond to it.

THE COURT: I think I have them here. Here. You want to take a look at it?

MR. MORGAN: Yes, please.

THE COURT: Go ahead.

(Handing to Mr. Morgan.)

MR. JOSEPH: While he's doing that, is it okay to put the evidence back in the box?

THE COURT: Yeah, put everything away. Let me know when you're done with that, all right?

MR. MORGAN: Yes.

(Pause in proceedings.)

THE COURT: Mr. Morgan.

MR. MORGAN: Yes, your Honor. In my opening I said absolutely nothing about the defendants or any representatives of the defendants forcing my expert out of the crane or forcing my partner, who was there with him, away from the inspection. I simply said that the only

pages we were able to salvage were the ones we took pictures of because the book was never exchanged. I didn't say the book was never exchanged. I just said the only ones we were able to salvage were the ones we took pictures of.

MR. JOSEPH: That's not what he said.

THE COURT: What did he say?

MR. JOSEPH: I'm going to start on page 92. I'll start at line 3, so I'm not starting in the middle of a sentence.

"And we know that the step was missing because when we did our inspection with Engineer Scott Silverman years after the accident we found sitting in the cab two logbooks. And what these logbooks have, and the only pages we were allowed to salvage --

"MR. JOSEPH: Objection.

"MR. MORGAN: -- because my expert --

"MR. JOSEPH: Objection.

"THE COURT: Overruled.

"MR. MORGAN: -- because my expert snapped photographs while he was there, were two pages of that entire book."

As if we stopped him from taking those photographs.

THE COURT: You're putting things into his mouth.

Proceedings

MR. MORGAN: Thank you, your Honor.

THE COURT: That's what you're doing, Mr. Joseph. He didn't say that.

MR. JOSEPH: He said that "we were allowed to salvage."

THE COURT: That's it.

MR. JOSEPH: We didn't stop him from saying that, from doing anything.

THE COURT: Plain and simple. That's it. That's an argument. It's an opening statement. Whatever he says is not evidence. What you got out of the witness when you cross-examined him with respect to what he was able to do with the logs, that's evidence because that was testimony from the witness. No one stopped him from doing anything. He went in there; he looked at the books; he took pictures, and that's the evidence that they can rely on when they evaluate this case. So, your motion for a mistrial on that ground is denied.

MR. MORGAN: Thank you, your Honor.

THE COURT: Do you have anything else?

MR. JOSEPH: Not at this time, your Honor.

THE COURT: All right. Thank you. Enjoy your weekend and I'll see you Monday at 9:30.

(Whereupon, the trial was adjourned and continued to Monday, April 11, 2016, at 9:30 a.m.)

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