In The Matter Of:

Perez v.

LNW

November 19, 2019

New York Supreme Court - Civil Branch

60 Centre Street - Room 420

New York, New York 10007

646-386-3050

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Min-U-Script® with Word Index

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 56
----------X
MARK PEREZ,
Plaintiff,

- against -

LIVE NATION WORLDWIDE, INC.,

Defendant.
----------X
Index No. 158373/2013 November 19, 2019
71 Thomas Street
New York, New York

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

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

For Plaintiff:

MORELLI LAW FIRM PLLC
777 Third Avenue
New York, New York 10017
BY: BENEDICT MORELLI, ESQ.
DAVID T. SIROTKIN, ESQ.
MICHAEL S. SCHLESINGER, ESQ.
ALEXANDER R. MORELLI, ESQ.

(Appearances continued on next page)

APPEARANCES CONTINUED:

For Defendant:

CONNELL FOLEY LLP
1085 RAYMOND BOULEVARD
Newark, New Jersey 07102
BY: JEFFREY L. O'HARA, ESQ.
MATTHEW W. BAUER, ESQ.

- and -

HAWORTH BARBER & GERSTMAN, LLC
505 Main Street
Hackensack, New Jersey 07601
BY: SCOTT HAWORTH, ESQ.

THE COURT OFFICER: All rise, jury entering.

(Jurors entered the courtroom.)

THE COURT: Good morning, everybody.

Mr. Morelli.

MR. MORELLI: Plaintiff would like to call the Plaintiff Mark Perez to the stand.

THE COURT OFFICER: Witness entering.

(Witness enters the witness stand.)

THE COURT OFFICER: Just remain standing and face the clerk.

THE CLERK: Please raise your right hand.

MARK PEREZ, having been first duly sworn, took the witness stand and testified as follows:

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

THE WITNESS: Mark Perez, 91 39th Street, Islip, New York.

THE CLERK: You may be seated.

THE COURT: Mr. Perez, just a couple of instructions. You can have a seat.

I want you to try to speak in a loud, clear voice so everyone on the jury can hear what you have to say. I want you to please listen to the question that's asked of you very carefully and only answer that question. If there's an objection or if you see one of the lawyers stand

up as if they're going to make an objection, don't give an answer, let me rule on the objection first.

If you're asked a yes or no question please, try to answer with a yes or a no. If you can't answer with a yes or a no, let the attorney know, but don't do an explanation unless you are called upon to do that.

If you need a break for any reason, please let me know. That's fine. During any breaks or at any point you can never have any interaction with any of the jurors, okay?

THE WITNESS: Yes, Your Honor.

THE COURT: Thank you very much, Mr. Morelli.

MR. MORELLI: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. MORELLI:

Q Mark, good morning.

A Good morning.

Q I'm going to keep my voice up and you're going to try to do the same, okay --

A Yes.

Q -- so that the jury can hear what you have to say?

You and I have met many, many times, true?

A True.

Q And during those times we chatted about a lot of things and a lot of it had to do with your testimony, true?

A True.

Q And we discussed your testimony on a number of occasions, but we also discussed your testimony again last night; is that true?

A Yes, last night.

Q Right?

A Yes.

Q And for at least a couple of hours last night, true?

A True.

Q So if you don't understand my question or you don't know something, say so and we'll try to do it over, fair?

A Fair.

Q Okay. Now, we discussed last night certain topics that I wanted to cover with you, correct?

A Correct.

Q And one of the topics was your needing to wear a helmet, but you don't wear one.

Do you wear one?

A No.

Q Okay. Would you please tell the jury why you don't?

A I understand if I fall and hit my head I may die and it would be safer if I wore a helmet, but when I put this helmet on, it makes me feel worse about myself.

Q Mark, don't be afraid to tell us a story about when you did wear a helmet because you did wear one at one time, did

you not?

A I did.

Q Please tell the jury about that.

A I remember that I had this helmet on and my family had taken me to a store, a pharmacy, and when I was on line a little kid had asked me what team I had played for and I knew I was wearing the helmet because my skull was damaged.

Q How did that -- when you and I discussed your testimony I had asked you to speak slowly so that the jury could understand you, but you could speak at whatever pace is comfortable for you, okay?

A Okay.

Q Because I want the jury to understand what your feelings are, what your thoughts are, whatever they are. If you don't understand something, just tell me, okay?

A Yes.

Q So tell the jury how you felt that day when they asked you what team you played for.

A It made me feel really disabled and I wanted the kid to look up to me and I had -- I had to look at this kid and tell him that I'm sorry, but I'm disabled buddy and that hurt.

Q Did you discuss your feelings at all after that happened with any members of your family?

A I don't think so.

Q Okay. Why is that? If you felt hurt like that why

wouldn't you tell your family about it? This is your opportunity to let the jury know how you feel, do you understand me?

A I understand.

Q Okay.

A I don't want people to worry about me and I know it's hard to not worry about me, to worry if something may happen, but it's harder for me to admit that to people, my family included.

Q Does your family seem to worry about you?

MR. O'HARA: Objection.

THE COURT: Sustained.

MR. MORELLI: Your Honor, can I be allowed some latitude with this witness?

THE COURT: You want to come up for a second?

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

MR. MORELLI: Thank you.

BY MR. MORELLI:

Q Let's go to another topic.

Tell us about your girlfriend Kristy. And the reason why I'm talking with you about this is because we've already heard some testimony about it, okay, from your mom, from your brother, okay?

A Okay.

Q So how long had you been going out with Kristy at the time that you had the accident?

A It was about eight years.

Q Okay. And how did you feel about her?

A I loved her.

Q Did you guys discuss lifetime plans, like marriage?

A All the time.

Q Had you discussed that?

A All the time, yes. We spoke about getting married and starting a family and our future together.

And we were a really great couple and people always saw that in us.

Q We know that there came a time that Kristy broke up with you; is that a correct statement?

A Correct.

Q And when did that happen, do you remember when it was? You don't have to give me a date, just in terms of what happened and when she broke up with you.

A She broke up with me after I returned from the hospital after this accident.

Q So that was you after your surgery, correct?

A That was after my surgery.

Q And did you -- after that happened, as opposed to the situation with the helmet, did you discuss with any member of

your family how you felt about Kristy breaking up with you?

A I did.

Q Who did you discuss it with?

A I tried to change the subject when they had asked me because it hurt so much to talk about it.

Q So that you did or did not tell any of your family members how you felt, do you remember?

A I don't remember.

Q Okay. They would ask you about it and you would change the topic. Why would you change the topic?

A Because I feel like -- I felt like a failure and I know I shouldn't have felt that way.

Q So since the accident and Kristy breaking up your relationship, have you tried to date anybody to have a relationship with someone new?

A I've tried, yes.

Q And can you give us a for instance -- are you dating anyone now?

A Still trying.

Q Can you give us a for instance of when you tried to date someone for the first time after the accident?

A There was a girl who I was very -- very into and I liked her and I think it took a while for her to understand my reality.

Q When you say "a while," how long a period of time are

we talking about?

A Two months.

Q And then what happened? You said to understand your reality. What happened?

A I had -- she had recommended I should do yoga and I tried and I wound up having a seizure.

Q Where?

A In was in the middle of the class, a yoga class.

(Continued on next page.)

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

Q And after you regained consciousness, after the seizure, what did you feel; what were you thinking? If you remember.

A I do.

Q Tell the jury, if you remember.

A In the ambulance and these workers explaining to me I had a seizure, and bringing me to the hospital, and treating me for a seizure.

Q What did you feel about the incident happening and where it happened?

A I was embarrassed, and scared me.

Q How long ago was this?

A I don't -- I don't remember.

Q The... You've seen a number of --

Are you doing okay?

A Yes.

Q Okay. You've seen a number of doctors, and we're going to talk about that. Do you remember, most recently, seeing Dr. Schwartz, who testi -- I told you, he testified here yesterday?

A Yes.

Q Okay. Do you remember seeing him?

A Yes, I do.

Q Okay. Do you remember having a conversation with him about your seizures?

A Yes.

Q And did he explain to you why you have seizures and the possibility that something might be able to be done about it in the future?

MR. O'HARA: Objection.

THE COURT: Sustained.

Q Did you hear what the doctor had to say about your seizures and about epilepsy, and what they could do about it?

MR. O'HARA: Objection; same objection.

THE COURT: Approach, please.

(Discussion off the record at sidebar.)

THE COURT: We're going to take a short break.

COURT OFFICER: All rise. Jury exiting.

(The jury left the courtroom.)

THE COURT: You can take a break. If you need to use the restroom, you may.

THE WITNESS: Okay.

(The witness stepped down.)

THE COURT: Can I hear the last question back, please?

MR. O'HARA: Can we have the last two back?

THE COURT: The last two. That's fine.

(The reporter read back the requested portion of the record.)

MR. O'HARA: It's the exact same question you

sustained the objection to.

THE COURT: Yeah.

MR. O'HARA: It's the exact same question.

THE COURT: Then I thought about it and I changed my mind. I understand. It has relevance to other areas.

It's not -- I don't want to speak for Mr. Morelli, but I don't believe it was offered for the truth of the statement.

MR. O'HARA: First, the Court has already ruled on the "what they can do about it": He is a candidate for testing with respect to the possibility of being a candidate for surgery. Those two questions, specifically, presume facts that not only are not in evidence but can't be in evidence; "what they can do about it," meaning the underlying surgery that Dr. Schwartz has specifically said he's not even a candidate today.

So the form of that question is objectionable.

If it's clarified that what he's talking about is the progression of further evaluations by Dr. Schwartz that includes the litany of tests that Dr. Schwartz outlined; that upon completion of that -- those -- tests, he might thereafter be a candidate, then the form of the objection changes. But as it's phrased currently, that presumes that, in fact, they can do something about it vis-à-vis Dr. Schwartz and the proposed surgery, and that has been

stricken.

MR. B. MORELLI: I don't know -- I really don't understand the objection, to be honest with you.

Dr. Schwartz testified and his testimony is on the record, based on what he said, that he believes that he is a candidate but he would have to do testing. And if Mr. O'Hara would allow me to ask the next questions, he might hear about that.

THE COURT: Listen, I'm going to allow it subject to an application to strike it pending what comes out. But bear in mind that this has a couple of applications here. Not only may it be relevant in terms of the future medical treatment, but it also may be relevant concerning the issue of emotional damage. So it's not necessarily one or the other.

It may come in for a limited purpose, and if there's an application to limit that purpose, let me know and I'll give the appropriate limiting instruction to the jury.

MR. O'HARA: I need to hear the question that he's going to ask.

THE COURT: I understand. So I said, you know --

MR. O'HARA: Understood.

THE COURT: -- I'll have to hear it.

MR. O'HARA: Understood, your Honor.

THE COURT: All right, thank you.

(Recess.)

(The witness resumed the stand.)

THE COURT: Ready?

MR. B. MORELLI: Yes, your Honor.

He's doing okay now. He's doing better. He's doing better now.

Mark (indicating) is doing better now.

THE COURT: Okay.

(Pause.)

COURT OFFICER: All rise. Jury entering.

(The jury entered the courtroom.)

THE COURT: Okay, thank you.

Let's continue.

DIRECT EXAMINATION CONTINUED

BY MR. B. MORELLI:

Q Are you doing okay?

A Yes.

Q Okay. So, without having the last questions read back, I'm going to -- I was speaking to you about Dr. Schwartz. You remember Dr. Schwartz?

A Yes.

Q Okay. And Dr. Schwartz, you saw not too long ago; correct?

A Correct.

Q And what I was asking is: We've heard -- we heard testimony from Dr. Schwartz yesterday, and he was telling us all about epilepsy and about seizures and things like that. And did he explain to you that if there came a time that he thought that you could and should have an operation for your epilepsy, that you would have to go through a battery of tests first?

A Yes.

Q Okay. And you remember that.

A Yes.

Q Okay. And did he describe those tests to you?

A Yes.

Q And tell the jury what you remember about that.

A Dr. Schwartz had explained to me that he would need to put -- he would need to do tests and scans, and also place electrodes in my brain, and then make me have a seizure at the hospital. And then he wanted me -- after -- after his review, they would perform a surgical procedure which would remove a portion of my brain where he thought that seizures were coming from.

Q And he told you, did he not -- because he told us -- that it's according to how the tests came out as to whether or not he could and would do surgery on you? Is that true?

A That's true, yes.

Q And when he was telling you that, he also talked to you about your seizures and the fact that you're on medication but

you're having seizures, anyway. Did he talk to you about that?

A Yes, he did.

Q And he told us about it.

And when you -- when he -- described the testing to you, what did you think? Did you think, "Hey, I think I'm going to do this," or what was your thought about the testing?

A I don't have much of a choice.

Q What do you mean?

A If my seizures are uncontrolled with medication, it's my only option.

Q Now, did Dr. Schwartz tell you that that's at least one of his specialties, if not his main specialty: epilepsy? Did he tell you that?

A Yes, he did.

Q Do you remember seeing a Dr. Doyle? Dr. Doyle.

A Yes.

Q And Dr. Doyle was somebody who was retained by the defense lawyers in this case to do an examination on you. Did you know that?

A Yes.

Q And when you saw Dr. Doyle, who was there with you?

A My brother, Justin; and David (indicating).

Q My associate David (indicating)?

A Yes.

Q Okay. And did Dr. Doyle agree to have all of you there

during the entire time that he examined and spoke to you?
A Yes; he said it would be better.
Q It would be better.
A It would be better.
Q Okay. And when Dr. Doyle was telling you about your condition, did he tell you that you -- that he -- thought you had epilepsy?
A Yes.
Q Did he tell you that your seizures were from the accident?
A Yes.
Q What else did he tell you about your seizures; do you remember? Wasn't that long ago.
A Yes.
Q What did he tell you?
A He explained to me about how, as I get older, because of my accident, I'll get worse but my seizures will get worse by themselves.
Q What did he tell you about your seizures? Did he say they were controlled or uncontrolled by medication?
A He thought my seizures were uncontrolled.
Q He told you that?
A Yes.
Q Is that the same thing that Dr. Schwartz told you?
A Yes.

Q Was there anything that Dr. Doyle told you that was different from what Dr. Schwartz told you?

A Yes.

Q What was that?

A He said, it's not what he normally does, but he was going to act as my doctor and give me his doctor opinion; and he thought he could, someday, actually be my doctor.

Q He told you that.

A He told me that.

Q What did you think about that?

MR. O'HARA: Objection; relevance.

THE COURT: Approach, please.

(Discussion off the record at sidebar.)

THE COURT: The question is withdrawn?

MR. B. MORELLI: Yes.

THE COURT: Thank you.

MR. B. MORELLI: Can I have some photos, the photos that are in evidence from before? David?

MR. SIROTKIN: Sure.

(Pause.)

(Mr. Sirotkin retrieved photographs.)

MR. B. MORELLI: Yeah, that's (indicating) what I want.

MR. SIROTKIN: Okay.

MR. B. MORELLI: That's what I want.

These (indicating) are stipulated to, but they're really not in evidence yet.

(Discussion among counsel outside the hearing of the reporter.)

MR. O'HARA: Judge, no objection (handing).

THE COURT: Very good. Thank you.

So they're marked?

MR. SIROTKIN: Hmm?

THE COURT: They're marked? Marked?

Just identify them.

MR. B. MORELLI: Yeah, I will.

MR. SIROTKIN: I'll renumber them.

MR. B. MORELLI: Okay.

(Pause.)

MR. O'HARA: Judge, I'm sorry; we're going to have to make a record.

THE COURT: Okay.

Ladies and gentlemen, you will excuse us for a couple of minutes?

COURT OFFICER: All rise. Jury exiting.

(The jury left the courtroom.)

MR. B. MORELLI: Should I have him step down, Judge?

THE COURT: That's fine. Whatever he's more comfortable with.

MR. B. MORELLI: Okay.

THE COURT: I don't think it's critical.

Do you want a break? Do you want to stretch your legs?

(Continued on next page.)

THE WITNESS: No.

MR. O'HARA: It's going to be very short, Judge.

There's been an off-the-record discussion. These are the photographs that have been previously supplied and have been stipulated to. They are in evidence. They have been marked P22 through P29.

THE COURT: Are you ready?

MR. MORELLI: Yes.

THE COURT: Should we bring the jury out?

MR. MORELLI: Yes.

Your Honor, we're not going to put it up on the screen, I'll just ask him to see it, identify it and publish it to the jury as he's on the stand --

THE COURT: Whichever is easier.

MR. MORELLI: -- so I don't have to set up anything.

THE COURT: So you're going to do it in bulk?

MR. MORELLI: Yes.

THE COURT: So you'll have the jury pass one --

MR. MORELLI: Yes, that's better.

THE COURT: Okay.

THE COURT OFFICER: All rise, jury entering.

(Jurors entered the courtroom.)

MR. MORELLI: I'm handing the witness, Your Honor, photographs marked in evidence as No. 22 to 29.

(Photographs were handed to the witness.)

BY MR. MORELLI:

Q And Mark, I would just ask you to look at those photos and ask you whether those are different photos of the way you looked before the accident happened?

A Yes, this is me before the accident.

Q Okay. And there's a young woman in the photos with you, who is that?

A That was my girlfriend Kristy.

Q Okay. And there's a grown up woman in the car with you, who is that?

A This is my grandmother.

Q Okay.

MR. MORELLI: May I publish them to the jury, Your Honor?

THE COURT: Yes.

MR. MORELLI: Thank you.

THE COURT: Mr. Morelli is going to be giving to Juror No. 1 the stack of photos. As you finish looking at them, please pass them around so they will wind up in the back with Juror No. 5.

(Whereupon, the photographs are published to the jury.)

MR. MORELLI: Thank you.

At this time, Your Honor, may I ask Mark to come

up to show the side of his head, the way it looks now, to the jury?

THE COURT: Yes.

MR. MORELLI: Mark.

(Witness exits the witness stand.)

MR. MORELLI: Okay.

(Witness indicating.)

MR. MORELLI: Thank you.

(Witness resumes the witness stand.)

BY MR. MORELLI:

Q Mark, we've heard a lot about, you know, the last six years. I'm asking you about now, you know, these days, what physical complaints do you have, if any, at this time?

A There's a lot.

Q Tell the jury.

A I have epilepsy. There's not a day of the week that goes by where I don't have head pain.

Q And When You talk about head pain, is that different from headaches?

A Yes.

Q Okay. What part of your head pains you?

A I have a constant dull throbbing on the right side of my skull.

Q What other physical complaints, if any?

A I have a lot of bones that hurt. I think it has

something to do with the weather. I have eye pain.

Q Which eye?

A The right eye.

Q What kind of pain?

A It's bad, it feels like somebody is stabbing the back of my eyeball.

Q So the pain is from the inside?

A From the inside.

Q What else?

A I have issues with swallowing.

Q What issues?

A Sometimes it's hard to swallow food or sometimes I feel like I'm choking when I'm not eating.

Q When you're not eating?

A When I'm not eating.

Q Okay. Anything else in terms of physical complaint?

A My ribs and lung on my right side hurt pretty much every day.

Q What else?

A Neck pain, I always have neck pain.

Q It's been described in the medical records that you often have headaches, do you have those any longer?

A I don't need an alarm clock because every morning I wake up with a headache.

Q So it's daily?

A Every day.
Q Any other physical complaints?
A I have coordination problems.
Q Coordination?
A Yes.
Q Okay. Can you explain what that means?
A It feels like I may fall over, like vertigo.
Q Is that always or sometimes?
A Sometimes worse, but a lot of times.
Q I know you have described it as that it's difficult for you to tell your parents or anyone else about you how feel, but can you tell us how you feel emotionally since the accident?

(Brief pause in the record.)

Q If you don't tell the jury what you feel, they don't know.
A I understand.
Q So please do that.
A It's really hard for me. Sometimes I can't express how I feel and it's very frustrating or sometimes control.

My family tries so hard to make sure I'm safe and I make good choices and a lot of times I don't see it that way and they just want me to be safe, but I still feel trapped.

And I know I've lost my independence and I'm still trying to accept this because I feel -- I feel like I want to

be normal and I don't think I can.

Q Do you try?

A Every day.

Q Do you try hard?

A I try harder than anybody I know.

Q You were actually in the Court when I opened to the jury, were you not?

A Yes.

Q And you were in the Court when Mr. O'Hara opened to the jury, were you not?

A Yes.

MR. O'HARA: Sidebar, please.

THE COURT: Approach please, Mr. Morelli.

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

THE COURT: Can you excuse us, please, ladies and gentlemen?

THE COURT OFFICER: All rise, jury exiting.

(Jurors exited the courtroom.)

THE COURT: Can he also step down?

MR. MORELLI: David?

MR. SIROTKIN: I got him.

(Witness exits the witness stand.)

MR. O'HARA: Judge, for this record, I believe

the witness should be outside the courtroom.

THE COURT: Okay. Is that okay?

MR. MORELLI: Sorry?

THE COURT: Can he step out?

MR. SIROTKIN: The judge asked that Mark step out; is that okay?

MR. MORELLI: Sure. Absolutely.

(Witness exits the courtroom.)

THE COURT: Any time you guys are ready.

MR. O'HARA: Yes.

THE COURT: You wanted to make a record.

MR. O'HARA: Mr. Morelli wanted to make a record. I objected.

THE COURT: It's your objection, so I think you go first.

MR. O'HARA: So the basis of the objection is very simple; it is beyond question that what counsel say in a trial is not evidence and what counsel says in connection with an opening statement is an outline of what, in good faith, they believe the evidence will show. No matter what he is about to ask this witness about, were you in the courtroom when Morelli opened and were in the courtroom when O'Hara opened, he's now trying to use that as a factual foundation for whatever the next series of questions are and that's directly contrary to the concept

of what a lawyer is saying in connection with a trial not being evidence, No. 1.

No. 2, depending on where he's going, I'd actually ask for an offer of proof because I'm trying to determine what possible relevance what he's about to ask the witness has on any issue that's in dispute in front of this jury because frankly, all he's done is tee up the fact that he and I opened and the plaintiff was in the courtroom.

MR. MORELLI: And yet you objected.

MR. O'HARA: Of course I objected because I can only envision this not being good and I'm entitled to ask for an offer of proof so it doesn't taint this jury. And my position is, Your Honor, that the plaintiff should be required to make an offer of proof because depending upon what he's about to do is the potential to create a circumstance under which a mistrial is appropriate.

THE COURT: Mr. Morelli, you are the one who wanted to make the record, why don't you tell me what's up?

MR. MORELLI: Well, I am not offering anything that Mr. O'Hara or I said to the jury as proof in the case, so he's not accurate about that. I think that seeing that Mark himself was sitting in the courtroom and he disagrees that he doesn't make a huge effort every time, he's entitled to tell me that. And also, he's entitled to tell

us how he felt about somebody calling him a person who is not making an effort on purpose. I think he's entitled to tell us how he feels about that.

And that's all I'm asking. I'm not asking anything about the opening statement. They're going to bring doctors in, that's what he said, that's a good faith statement. They're going to bring doctors in to say that this man lacked effort during whatever testing that these doctors did and I think I'm entitled, seeing that it's the only time he's going to take the witness stand, to find out how he feels about that and whether he disputes it. And so that was the reason for my question, which was a little different from the way Mr. O'Hara thought it was going to be.

MR. O'HARA: Absolutely not. That's precisely the reason for the objection. He has now indicated what he would like to do is have the plaintiff respond how what defense counsel, in outlining the opening statement of the defense, how that made him feel. How is that evidential? How is that something that is appropriately presented as evidence in this case when, as counsel, we have an obligation to, on behalf of our clients, to outline what the evidence will show?

He's trying to include Jeff O'Hara in the equation for how this young man felt as a way to have this

jury come to some sort of conclusion with respect to Mr. O'Hara. That's not the first time that he's used my name in trying to raise this and every single time the objection has been sustained. And every single time it's been sustained is because the fundamental truth is, it is not evidential, lawyers don't create evidence, No. 1.; and No. 2, what is the possible relevance that outweighs the undue prejudice to a defendant if the plaintiff is going to be permitted to say when O'Hara outlined what the evidence was going to show, it made me angry, I was furious, he was lying?

It makes me a witness No. 1; and No. 2, what's the probative value of that with respect to the undue prejudice to the defendant? I have no choice as the lawyer representing Live Nation to outline what, in good faith, we believe the evidence will show.

He attended these evaluations. He's free to be asked questions about when he went to see whatever the medical providers were, what the interaction was. He's already covered the interaction with Dr. Doyle. And with respect to one question about how did it make you feel when there was an attempt to elicit Dr. Doyle's comments about becoming his future treating doctor, the Court sustained that objection.

So frankly, in 28 years, I don't have the 42

years of Mr. Morelli, but --

THE COURT: That was a different issue.

MR. O'HARA: But it's the fundamental -- it's the same attempt to bring something before this jury that is inflammatory, that is non-evidential, that is not probative of any issue in dispute. And how do we respond to that?

THE COURT: Well, I kind of agree with both of you, to be honest with you. I don't think it's appropriate to address Mr. O'Hara and Mr. O'Hara's statement in the question, but I also don't see what's wrong with him saying in this context, how does it -- how does it make you feel, you know, when people are saying that you're not giving full efforts?

MR. O'HARA: But first of all, there's no evidence that anybody has said that. He has attempted --

THE COURT: No, that's where I disagree with you.

MR. O'HARA: The evidence is that he took tests. Those test results, which are medically recognized tests on a defined scale, result in a medical conclusion. They have given the medical conclusion and it's been the subject of medical testimony. Mr. Morelli has attempted to suggest, and you sustained the objection almost immediately, earlier on in the trial when he tried to suggest that in my opening statement I called him a faker and a liar.

THE COURT: I agree with you.

MR. O'HARA: And you specifically said quite the contrary, I did not.

THE COURT: You didn't use those words.

MR. O'HARA: No, sir, I used exactly what the medical providers used and the medical providers talked about findings on tests.

THE COURT: But those findings on tests, at least in my mind, are basically coming to the conclusion that he's voluntarily lacking efforts in these tests so that the tests are actually skewed, and I think he can address that.

MR. O'HARA: Judge, I've made the record. It's hard --

THE COURT: I understand.

MR. O'HARA: It's hard to say anything other than what he is attempting to do is founded on what I said as a lawyer. It makes the fundamental answer based on what I said as a lawyer in the opening statement. How is that appropriate?

THE COURT: Because I'm telling him not to do that. I'm telling him not to address the opening statement.

MR. O'HARA: Then how does he lay the foundation? Then how does he lay the foundation for that question?

THE COURT: He lays the foundation for other witnesses who have testified or have -- or who I would

expect to testify that are basically going to come in here and give the insinuation that he -- that his test results are what they are because he's not giving full efforts, that's how.

MR. O'HARA: That is first. Now, I don't know if this is the right saying, the horse is out of the barn, right? The way that this has been teed up --

MR. MORELLI: That's the saying.

MR. O'HARA: It is?

MR. MORELLI: Yes.

MR. O'HARA: -- No. 1, he's going to lead this witness; No. 2, we have no obligation to call a witness in our defense.

THE COURT: I understand that.

MR. O'HARA: Okay. If this witness is going to testify that I felt a certain way based upon the testing that was done by Dr. Smith, Jones or Thompson, he has the opportunity to do that now. He can do that without inculpating or including in the discussion --

THE COURT: I've agreed with you on that.

MR. O'HARA: So now how do we undo this? How do we allow him to lay a foundation without this being front and center in front of this jury, which the Court has sustained on multiple occasions? It's not an appropriate line of questioning. And like I said, I don't have 42

years of experience, but I do have 28 and I don't have the same number of trials, but I have my fair share and never in any trial have I ever seen someone try and use what a lawyer says in an opening statement and then elicit from a witness, hey, how did it make you feel?

How can we do our job if that is something that's probative and properly presented to a jury. That's argumentative by definition. He's going to have to say -- do I have to take the stand and say why it is that I said what I said?

THE COURT: No, that would come through your witnesses.

MR. O'HARA: If that's the case, then my objection is proper because he can ask -- he can ask questions about how he felt with respect to what he learned during the course of different evaluations by different doctors at different times, assuming he can establish that this witness remembers any of it.

THE COURT: How about this, maybe we can come to some sort of agreement on this because really, the proper question, I think, is -- well, I just lost it. I'm sorry.

MR. MORELLI: That's okay, you're getting older.

THE COURT: Yes, thank you, Mr. Morelli, for reminding me.

Basically what is your reaction to the

insinuation that you were not giving your best effort during these tests that you were given?

MR. MORELLI: Well, first of all, I know that Mr. O'Hara is making an objection in advance of any question that I asked that he thought was objectionable.

THE COURT: Right.

MR. MORELLI: So let's be clear on the record that right now there is no question to this witness that was objectionable, none. All I asked him is whether he heard the opening statements and was in the courtroom. That's all I asked him. I didn't ask him a question about it.

THE COURT: And I think by the time the jury comes out, that they're going to have forgotten what we did.

MR. O'HARA: He represented why he was asking the question. He just said why he was asking the question.

MR. MORELLI: No, no, no, no.

THE COURT: No, he didn't. And I'm sorry for interrupting.

Continue, Mr. Morelli.

MR. MORELLI: What I'm saying is there was no question to the witness, that's what I said, about anything like that.

So there's been a lot already in the trial and as

we lawyers know, that evidence comes in a lot of ways. It also comes in that Mr. Haworth has cross-examined every witness, putting all sorts of things in the case without bringing witnesses in, all sorts of things and I let it go, okay? Cross-examined; you know, he was malingering, he was this and that. All of his cross-examination was like that, of Dr. Gordon, of everybody. So we already know and the plaintiff knows --

THE COURT: I'm sorry to interrupt, but I want to focus this. You can still ask about that in terms of what his effort was without bringing in the opening statements. But, you know, in terms of opening statements, I mean, you know, it's not that it's totally out of bounds. I mean, we hear in closing arguments all the time, hey, remember when so and so promised you or told you this in the opening statement, did it ever happen? No.

I understand it's a little bit of a different context, but --

MR. O'HARA: Judge, I would submit it's a lot of a bit of a different context because the witness -- the representation was the reason why he teed this up that way was he was going to ask the witness how being in the courtroom when O'Hara said X, Y and Z make him feel. How does the defense, No. 1, meet that testimony and how does the defense present the fundamental reason why it was

appropriate? The implication of the question is somehow that we've done something wrong.

THE COURT: I understand that. Like I said, I kind of agree with both of you, but not entirely and so that's why I think that the line of questioning ought to go in the direction that I've suggested as opposed to trying to bring out how you feel about the opening statements because --

MR. MORELLI: Sure, sure, sure.

And look, Mr. O'Hara, you know, made a decision to open to this jury and he's absolutely a hundred percent correct that he has no obligation to bring witnesses in, but he actually told the jury in jury selection the names of all of the doctors that he was bringing. He opened to the jury and told them that he's going to bring them. I will stipulate if he doesn't want to bring them now, that's okay, but he has already told the jury he's bringing all of these people.

THE COURT: Well, not only that, but then it opens doors for missing witness issues and --

MR. MORELLI: No, that doesn't --

MR. O'HARA: Judge, we're starting to mix apples and oranges. I specifically said in jury selection that the defense may call the following witnesses as part of the --

THE COURT: I'm just going to stop you there.

MR. O'HARA: Judge, I can't allow a record where there's a representation like that that's inaccurate.

(Continued on next page.)

THE COURT: Well, I --

MR. B. MORELLI: Your Honor, I'll do it a different way.

THE COURT: Let me just -- let me just -- let me just cut this short:

He's going to follow my direction in terms of where he's going on this, as I understand it. Your objection is preserved for the record. If -- I don't think it's necessary, personally, but if you think that there is a curative instruction that you want me to consider giving to the jury, if the two of you want to talk about it for a couple of minutes, that's fine; I'm happy to consider it. I don't think it's necessary, but if you do, like I said, I'll consider it.

Okay?

MR. O'HARA: If you can give us five minutes on that question...?

THE COURT: I'll give you five minutes, sure.

MR. O'HARA: Thank you.

THE COURT: How much more do you have on direct?

MR. B. MORELLI: It's going slow --

THE COURT: I know.

MR. B. MORELLI: -- so probably until lunch. And then I'm going to ask to take a witness out of turn --

THE COURT: All right.

MR. B. MORELLI: -- because I have the --

THE COURT: You have the economist, I know.

MR. B. MORELLI: Yeah. And I could bring Mark back tomorrow, if we think that it's going to take all afternoon for the -- the life-care planner, because the economist is a very brief witness.

THE COURT: Okay.

(Recess.)

MR. O'HARA: My only request is that -- no curative instruction -- just that there be an indication that Mr. Morelli is going to move on.

MR. B. MORELLI: "Move on"? I don't know what that means.

THE COURT: I'm not sure --

MR. O'HARA: From the question about "Jeff O'Hara" and the opening statement.

MR. B. MORELLI: Yeah, I'm not -- I'm not talking about the opening statement.

THE COURT: I'm sure that they've forgotten, at this point, what he was talking about.

MR. O'HARA: It's something that I'll remember for a long time.

THE COURT: I don't know what you want me to say.

MR. O'HARA: As long as he's moving on, you don't have to say anything.

THE COURT: Are we good?

MR. B. MORELLI: I'm good. I'm feeling okay. I've been feeling okay for weeks.

THE COURT: Okay.

(The witness resumed the stand.)

COURT OFFICER: All rise. Jury entering.

(The jury entered the courtroom.)

DIRECT EXAMINATION CONTINUED

BY MR. B. MORELLI:

Q So, Mark, you, I think, told us that you always make a very strong effort; is that correct?

A Yes.

Q Now, I'm going to ask you if you remember seeing certain doctors that were retained/hired by the defendant's lawyers in this case and whether you remember going to see them, because it wasn't that long ago.

Dr. Jordan? Do you remember him?

A Yes.

Q Okay. Dr. Ambrose?

A Yes.

Q Dr. Barr?

A Yes.

Q And if, in fact, these doctors, some or all, would come into court and tell this jury (indicating) that you're a malingerer --

Do you know what that word means, by the way; a "malingerer"? It means that it's somebody whose purposefully --

MR. O'HARA: Objection; leading.

THE COURT: Sustained.

Sustained; form.

Q Do you know what a malingerer is?

A Yes.

Q Okay. Tell the jury what you think it is.

A It's something that somebody may do to make it look worse than it is or that they're not trying, which is something Mr. O'Hara had said --

MR. O'HARA: Judge, objection.

THE COURT: Sustained.

Q Let's not talk about Mr. O'Hara and what he said. Let's talk about these doctors -- okay? -- and the fact of malingering. If those doctors, one or all, would come into court and say that that's you, that you're a malingerer, would they be right?

A They would be 100 percent wrong.

Q Specifically, Dr. Jordan says that about you.

MR. O'HARA: Judge, objection.

This is not --

THE COURT: Sus --

Sustained. Excuse me.

Q What kind of effort do you make, on a daily basis, to

try to do things right and to get better? Tell the jury.

A Every day of the week, I do the best of my ability and try as hard as I can, without ever giving up.

Q What kind of things did you do, before this accident, that you enjoyed doing? Because we heard that you were trying to get your pilot license to fly planes. Is that true?

A That's true.

Q What else did you do?

A I did a lot. I was very active. I was -- flying planes was one of my dreams; and I know I worked very hard, I was physically fit, and I enjoyed building things from nothing.

Q What kind of things did you build?

A I built a lot of photographic sets and I created, in my mind, presentations and signs and booths for expos and concerts that I visualized in my mind and put on paper. I think I could see things before others could see them, how it would wind up looking after it was done, and people loved that about me; about --

Q That's what they told you.

A This is what they -- they told me a lot, this, yes.

Q And when you were thinking about these things, these concepts and everything, were you doing those things for work, at some point?

A Yes.

Q And could you tell the jury about that, what kind of

work you did, and whatever comes to mind?

A I was a creative director and I was able to build and program websites, which I really liked; and I -- I was able to design fliers and shop graphics that would be installed on stores and for advertisement, that looked beautiful.

Q That looked what?

A Beautiful.

And people always told me how great it looked, and how impressed they were of [sic] my work; and I loved it.

Q You loved what?

A I loved working and doing what I did.

Q Besides building websites, what else did you do?

A It was a lot. I managed many companies, my father's business, and talked with clients and sold jobs.

Q What kind of business was your father in, or was he at the time that you're talking about?

A He was in home-fashion photography, along with other type of photography, for products and catalogues, which -- I also was able to lay out catalogues and design graphics, and build the sets and take the pictures, and deliver them -- deliver them to the clients, and go back and forth deciding what needed to change, and meet deadlines to get their graphics published; and I was great at it.

Q What about now?

A Now, it's -- it's very hard for me.

Q Why?

A I'm -- I don't have a problem trying or applying myself, but I often get confused and frustrated with myself because I can't stick with something long enough to finish it, so I get up and I walk away and come back and keep on trying, refusing to give up. But I know that it's not -- it's not as good as it used to be, and it makes me hate myself because I know I could do better, but I can't; my brain's been damaged.

Q When did you start accepting that?

You didn't always, did you?

A Oh, no. It took a long time.

Q How long?

A I think, at first, I refused to admit I had problems. And I always told my family that I was doing great; and sometimes, when doctors had asked me how I was doing, I'd say, maybe, better than I was, because all they did was put me on more -- more medication, which caused more problems. And I was just trying to be normal, and it's exhausting.

Q Do you still try?

A I promise you, until the day I die, I will always try my hardest, at anything I do.

Q That's who you always were, right?

A That's what I've always been. My father taught me this.

Q What?

A How to never give up.

(Pause.)

Q When you -- when you were first injured back on June 26th, 2013 -- you and I have discussed that day; have we not?

A Yes.

Q And you've said that you don't know a lot about that day; true?

A Yes.

Q Can you tell the jury now if you remember anything about that day, however little?

A I was at Jones Beach, where they have concerts, and I was there with -- working with -- their -- their crew, trying to put together a trussing system, which I created on paper; and it was for a company, Best Buy; and we were assembling it, because the various parts needed to be put together, and somehow I wound up on top of it.

Q Let me -- let me ask you this, okay? You know that there are parts of this case that we're not trying and parts that we are, so I'm going to ask you: What do you remember about the accident itself?

A I was on top of the trussing, and a forklift --

Q Not -- not how it happened, just what happened to you.

A I was knocked off of the truss and I fell down, after being forced off (simulating); I hit the ground head first; and I remember blood and things coming out of my nose and mouth and

ears, and I tried to put the -- my hands in it and put it back in my head; and I knew this was how I was going to die.

Q Is that what you were thinking at the time?

A That's what I thought.

Q It's true, is it not, that there was a period of time that you didn't remember much about the accident? Correct?

A Yes.

Q Do you remember being in the hospital at all?

A Yes.

Q Okay. Any thoughts that you were having then? Without being specific to the treatment, because we know about it.

A I was in a lot of pain. And I think, if it wasn't for my family being there, I wouldn't be here, and I -- I thank God for them, because I couldn't speak and tell people how I felt, at all.

Q You had a tube in your throat (indicating), at that point; correct?

A A breathing tube.

Q Yeah.

Now, where do you -- where do you live, at the present time? We've heard that you live with your mom; we've heard that you live with your brother. What's the story?

A I live with my parents and I stay with my brother often. He's my best friend, and I don't feel like I'm a little boy when I'm with my brother.

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

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

something like this (indicating) was caused by me and something could have done -- been done -- to prevent it.

Q To someone else, you mean.

A To somebody else.

Q So when did you come to this realization that you shouldn't be driving? Because you've driven since the accident.

A Yes; I tried.

Q So when did you come to this realization that it was too dangerous to do?

A After the last seizure that I -- after the last surgery that I had, where I started getting more seizures, and my family spent a lot of time telling me I couldn't drive.

Q The doctor told you that, too; didn't he?

A Yes.

Q The neurologist.

A Yes.

Q And you finally listened to him; didn't you?

A Yes.

Q Did you get angry when you were told that? What were your feelings?

A I felt -- I felt hopeless and I got angry because I -- I felt like this was part of my independence -- a big part of my independence -- and going somewhere when I want to go, by myself, or even with my brother, but he would let me drive and -- and make sure I wasn't getting lost or confused. But he

would let me be the driver, and that made me feel a lot better about myself; it gave me hope about my life and my future. But that was taken away, like many other things.

Q Do you think -- when you are sitting alone, do you think about the future?

A Yes.

Q You used to think that you wanted to marry Kristy and have children; is that correct?

A Correct.

Q So what, if any, thoughts do you have about the future now, when you -- when you're alone, by yourself, thinking?

A It gets me upset.

Q Well, what do you think?

A I think about how much harder it is for me than most people and how hard life is already; and how I know, in a family, I should be the one to take care of them, and like this, with my head, I'm a liability; and every day is hard for me to do things and -- and plan things, which is very hard for me, and I'm still working on it.

Q So what do you think about the future?

A I think about this next surgery a lot, first; and, to be completely honest, I don't know how many more brain surgeries I'm going to live through. It's -- it's hard.

Q Is that what you think about?

A Every day.

Q What about getting married and having a family?

A I love kids and I -- I love the idea of having a family, but I also -- I know that there's a lot of hard things about having a family, and I know it's going to be a lot harder for me with everything throughout the rest of my life.

MR. B. MORELLI: Can we approach, your Honor?

THE COURT: Yes.

(Discussion off the record at sidebar.)

THE COURT: Ladies and gentlemen, I'm going to let you go to lunch at this point in time.

Please be downstairs around two o'clock. We're going to shoot for a 2:15 start, please.

Okay?

COURT OFFICER: All rise. Jury exiting.

(The jury left the courtroom.)

THE COURT: You can step down, Mr. Perez.

(The witness stepped down.)

(Luncheon recess.)

(Continued on next page.)

MR. O'HARA: Judge, just before we were coming back after the lunch break Mr. Morelli raised a series of e-mails that, as I understand it from Mr. Morelli, were exchanged early on in the case with whomever Live Nation's counsel was at the time. They're dated October 25, 2013, June 14, 2013, there's two on June 14, 2013 and then there are others; June 24 -- June 24, 2013. It appears they are exchanges between Mr. Perez and somebody at Best Buy® regarding a follow-up dialogue to discuss some project relating to a booth that was going to be designed and/or built. And so I'm not sure what counsel intends to do with these.

Obviously, the first would be -- our objection would be that this is hearsay. So if it's being offered for the truth of the matter asserted, then we'd ask for an offer of proof before being this is done in front of the jury, No. 1.

No. 2, to the extent it's information that isn't somehow related to any of the damages claims that are being advanced, none of this has been identified by any of the experts on the plaintiff's side or on the defense's side. So same thing, before these come out, these are not in the Bates stamped documents that the parties sat down and discussed. I don't ascribe anything to that. Apparently, these were provided to the original Live Nation counsel,

but since this is something that is not referenced in any expert disclosures, not incorporated by any experts in any opinions that they're going to offer, and my presumption is he's going to identify them and then speak about them, it's going to be for the truth of the matter asserted and so it's going to be hearsay, but I give it to Mr. Morelli because I'm not sure exactly what he's intending to do with them.

THE COURT: Okay. Let's find out.

MR. MORELLI: The e-mails are between --

THE COURT: Just to be clear, they were exchanged?

MR. SIROTKIN: Yes.

MR. FEEHAN: I got those e-mails during discovery.

MR. O'HARA: I will represent that there was a comment by counsel sitting in the gallery. He has not appeared at trial. That's Dave Feehan. And he has confirmed for the Court and my benefit that they were, in fact, exchanged during discovery.

THE COURT: Okay.

MR. MORELLI: They were also exchanged in 2016 when Mr. O'Hara was with LeClairRyan.

THE COURT: They're exchanged. Now, what are they and what are you using them for?

MR. MORELLI: There's a few e-mails between the plaintiff and one of the executives at Best Buy® that they had made a deal for Mark to be able to do this project for Best Buy® and I am not giving this to Mr. Provder, I'm not adding anything to the life care plan, okay. So to be clear --

THE COURT: Okay.

MR. MORELLI: -- the reason that I'm offering it is to show that Mark had looked at the future and he wanted to be more than what counsel thought he was, 13,000 a year or 30,000, that he had aspirations to do better, that he actually had the ability to be able to get a deal with Best Buy® as a very young man and this is actually only days before the accident. These e-mails are like within ten days, within two days.

That is what it's being offered for. It's not being offered to expand the life care plan or the economist's statement or anything like that. I think that the evidence that Mark was not just this lowly guy, you know, who was a DJ and all of the things that I have been listening to for weeks now, I think that he's entitled to show with more evidence than just his testimony that he actually was able to make a deal with Best Buy®.

Now, the deal didn't go through, okay, because he got hurt before it was effectuated, but it certainly is

evidence to show that they really liked the kind of work that he was doing, that they would have possibly done something with him in the future and I think it's -- I think that certainly that's probative.

MR. O'HARA: So a couple of things. First, he's now represented that it is being produced for the truth f the matter asserted based upon the description, No. 1.

No. 2, there's already been testimony by both -- by, if I recall correctly, Mr. Perez's brother about the relationship and his efforts with, among others, Best Buy®.

Can I see that, please?

MR. MORELLI: Sure.

(Document was handed to counsel.)

MR. O'HARA: This is exchanges about a proposal for future work, this is not a contract. This simply --

THE COURT: Would you mind if I read it?

MR. O'HARA: Sure.

MR. MORELLI: But they did, in fact, hire him.

(Document was handed to the Court.)

MR. MORELLI: But he didn't finish the job because he got hurt.

(Brief pause in the record.)

THE COURT: Well, what I'm noticing about this in the first instance, with the exception of what's on the last page, the bottom third of the last page, and I'm

referring to a June 24, 2013 e-mail from Joshua Arnold at Best Buy®, that's the only statement that's not his. Everything else is Mr. Perez's words.

MR. O'HARA: Okay. So how is that not hearsay? Mr. Perez cannot put his own statement into evidence in his case in chief. That's classic hearsay. There's nothing that's been put at issue that would make a prior consistent statement admissible. If we challenge something about Mr. Perez's testimony and in undermining the veracity of something that -- something that he said, he would have the ability to bring in a prior consistent statement to reinforce his credibility. It doesn't make a statement that he's made out of court admissible as an affirmative proof. If just doesn't. That's not the rules of evidence.

THE COURT: Tell me now again what you're offering it for.

MR. MORELLI: Well, it's been put at issue that Mr. Perez is nothing more than a DJ. And don't forget, they have a life care planner, they have an economist. We've looked at those documents. And I want to show that he was more than that. And, you know, just in his description of what he was going to do for Best Buy®, which is in one of the e-mails of his, he can't write an e-mail like this now, he can't say those things that he wrote in that e-mail. So I think the jury is entitled to know that

this is the way he as able to write and talk and think at the time and he can't do that now. So how am I supposed to get this into evidence? How could he testify to that?

THE COURT: I'm going to allow it. I'm going to allow it.

MR. O'HARA: Judge, for purposes of the record can you identify the -- if it is -- if it's hearsay, the exception or rule under which you're admitting it so we have a sense of what the ruling is?

THE COURT: Well, a couple of things. It's not necessarily offered for the purpose of the truth. As Mr. Morelli indicated it's an exemplar, at least of the difference between Mark Perez before and after the accident, what he could do, what he couldn't do.

I guess the only thing that I'm kind of kicking around in my mind is sort of a limiting charge given to the jury that it's only offered for that purpose whatsoever.

You know, even -- I guess I don't really follow what the objection is in terms of this actually being offered for the truth in any scenario because they're not trying to prove the contract, the scope of the work or anything else, but it's the type -- just to show the type of work that he was actually doing.

MR. O'HARA: And there has been testimony from multiple sources about the type of work that he was doing.

The sole basis for the proffer by Mr. Morelli is the substance of what's in that document.

THE COURT: But the challenge that you folks have made to me over the course of this, and I don't know how much has been on the record and how much has been off the record, is that there's no evidence that he was a, quote/unquote, web designer and had the potential of earning this much money. Now, I'm not sure how relevant that is anymore at this point in time because the developments with Tattoo Lou and what's been taken off the table with that.

MR. O'HARA: It's important, the record should reflect, these e-mails have nothing to do with web design, they have to do with the construction of a display for Best Buy® and banners associated with that display.

THE COURT: I know, but, you know, the scope of the type of the work that he was doing, whether web design or otherwise.

MR. O'HARA: Understood. I mean, I just wanted to make sure the record reflected it.

THE COURT: I'll do a limiting instruction. I'll give the jury a limiting instruction on it for what it's considered for.

MR. MORELLI: But I'll offer it first and then you can do that.

THE COURT: Sure.

MR. O'HARA: Can we get Mark?

THE COURT: Yes, let's try to get this finished.

MR. MORELLI: Could we just mark these for identification? Do you want me to mark it all as one or each page?

THE COURT: I think all as one, right?

MR. MORELLI: Okay. Plaintiff's 30 for ID.

(WHEREUPON, document was marked Plaintiff's Exhibit 30 for identification.)

THE COURT OFFICER: All rise, jury entering.

(Jurors entered the courtroom.)

THE COURT: Ladies and gentlemen, just so that you are aware, we are going to finish the direct testimony of the plaintiff this afternoon. He's going to be coming back, I believe, tomorrow for his cross-examination, but we do have another witness that we're going to be taking out of turn this afternoon, okay?

MR. MORELLI: Can we approach?

THE COURT: Yes.

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

THE COURT: Forget what I just said, okay?

MR. MORELLI: Sorry, Judge, for confusing that

issue.

BY MR. MORELLI:

Q Mark, just a couple of more questions.

What I would like you to do is just describe for the jury, not your entire day, but your typical day. Because you do get yourself dressed right, you could dress yourself?

A Yes.

Q And get washed up, true?

A Yes.

Q Okay. So tell the jury, when you wake up in the morning, because your were telling us before, what do you do and how long does it take you?

A I wake up in the morning early, between five and six, usually with a headache, but I get myself out of the bed and I usually walk over to the nightstand. I need to take my time in the morning, especially in the morning. My left leg is not that -- I'm still trying to figure this out with my left leg, some problems with that and my left hand, but I take my medication for seizures, which is in my medication daily container.

Q Now, you take that medication all the time, don't you?

A Every day.

Q Okay. And the medication itself -- not to interrupt you, but the medication itself, how does that make you feel?

A I hate it. It makes me feel foggy and tired. I'm

tired all day and --

Q So finish that. You know, you go to nightstand, you take your medication and then what?

A I eat breakfast, I start to get myself ready for the day.

Q How long does this whole thing take?

A It takes me about four hours to get ready. I'm always forgetting where I put things; my phone, my toothbrush. Getting ready takes me a while, you know and --

Q Now, I'm going to show you Plaintiff's 30 and ask you whether or not these documents -- it's four pages.

(Document was handed to the witness.)

Q Take your time at and look at it -- whether these documents look familiar to you?

A Yes.

Q Okay. And can you tell us what the documents are without telling us the content yet?

A Can you repeat the question, please?

Q Sure. Tell us what the documents are.

A These are documents of e-mails between myself and two workers of Best Buy®.

Q Best Buy®, the company?

A The company.

Q Okay. And what were the e-mails concerning?

A This is regarding the booth, the trussing booth, that

they contracted me to design that they were going to use at Jones Beach.

MR. MORELLI: Your Honor, I would like to offer this into evidence and I think you wanted to speak to the jury.

THE COURT: Ladies and gentlemen, this is going to be put in evidence for a very limited purpose and that purpose is just to basically show a before and after picture before and after the accident, for no other purpose whatsoever, okay?

(WHEREUPON, Plaintiff's Exhibit 30 was received in evidence.)

MR. MORELLI: So, Your Honor, I would like to read to the jury instead of asking Mark to read to the jury the e-mail from Mark Perez dated Friday, June 14, 2013 at 6:41 p.m. to Joshua Arnold of Best Buy®, and the e-mail concerns two options written by Mark Perez.

THE COURT: Okay.

MR. MORELLI: "Option 1: Nikon style booth. We will need to submit architectural drawings to the state for approval, which typically takes a few days. Unfortunately, there is no way around this. The majority of construction will be done in our facility and trucked in for final assembly and installation. The frame will be constructed of one inch square aluminum with steel supports and tie

downs. Top material will be blue vinyl (matched to your PMS color) with your logo printed in the center. If you decide on the wedge or apex style it will not affect the price. Rake will be four feet at the center or four feet at the right if you prefer the wedge. Uprights will be constructed of the white plastic composite and printed with the Best Buy® blue and whatever graphics you want. Additionally, we will need to have some assistance from the union for insurance purposes."

Did you write that?

A I did.

Q And then you wrote:

"Option 2: We could do what we did for Tattoo Lou's. Please refer to the attached pictures (disregard the booth that surrounds the structure.) Basically we can add an additional level to the existing structure that is five feet tall all the way around. We can print three large banners for you guys and have them hung all the way around. As far as signage, this will really look great, but it will not offer protection from the rain. You will also be able to change out the banners without too much of an investment. This is obviously my recommendation for the beach. I photoshopped a picture for you and included some pics of Lou's booth to give you a better idea."

And so you were writing e-mails to the Best Buy®

person and giving them two options of the job is that correct?

A That's correct.

Q Okay. And the answer is: "Debbie will be back shortly and she will provide final feedback, but I believe suggestion one is what we will move forward with doing to branding guidelines.

"If you receive final approvals today, when do you think we could be done by?"

And that was the response you got; am I correct?

A Correct.

Q And these were the kind of things that you were doing right before your accident happened; is that true?

A That's true.

MR. MORELLI: Your Honor, I have nothing further of this witness.

THE COURT: Thank you.

MR. O'HARA: Thank you, Your Honor. Just very briefly.

CROSS-EXAMINATION

BY MR. O'HARA:

Q Mr. Perez, you have, throughout the last six years, been to see a number of medical providers that have interviewed you and provided care to you, correct?

A Yes.

Q And as a general matter, each time you went to see a

doctor they asked you questions about how things were going and why you were there, right?

A Yes.

Q And you would answer those questions truthfully to tell them how you were feeling and what was going on in your life because the reason why you were going to those doctors was you wanted to get better, right?

A Yes.

Q And each time that you went to the doctor you raised things that were on your mind or of concern to you in connection with whoever that particular doctor was, correct?

A Yes.

Q And you remember seeing a doctor on November 20, 2017 and being asked a question about how you were doing with moving forward with your life, correct?

A I don't remember.

Q Sure. Do you remember seeing a doctor, a neurologist or a neuropsychiatrist on November 20, 2017, and in response to describing the frustrations that you were experiencing you said that you were awaiting settlement from the accident so you can move forward with your plans, do you remember that?

A No.

MR. O'HARA: May I approach, Your Honor?

THE COURT: Yes.

BY MR. O'HARA:

Q I'm going to show you a document that's been marked in evidence and you'll see down here there's a Bates number, 2120 --

(Document was handed to the witness.)

Q -- and I'm going to read to you the entry on November 20, 2017:

"Awaiting settlement from accident so he can move forward with his plans."

Did I read that right?

A I believe so, yes.

(Continued on next page.)

MR. B. MORELLI: Your Honor, I'm --

What's the Bates number on that (indicating)?

MR. O'HARA: 2120.

MR. B. MORELLI: Let's pull it up.

Also, I expect that he's going to bring the person who states that he said that to them, because that's the way it's admissible.

MR. O'HARA: Judge, that first -- that's improper.

THE COURT: Can we approach?

MR. B. MORELLI: So I await that person.

(Discussion off the record at sidebar.)

THE COURT: Two things, ladies and gentlemen:

First of all, I am striking the questions and answers concerning that medical record; it's not admissible in court.

Secondly, I'm admonishing Mr. Morelli and, to some extent, Mr. O'Hara, because I don't want argument in front of the jury, and we've talked about that before. So I'm telling both counsel. This is kind of like warning both benches.

So --

MR. O'HARA: Yes.

THE COURT: -- let's proceed.

MR. O'HARA: Sure.

CROSS-EXAMINATION CONTINUED

BY MR. O'HARA:

Q There was testimony in this case by your brother, Justin, that in 2016 and into 2017, you lived alone in an apartment for a period of time; correct?

A We tried that, yes.

Q And the lease that you signed for that apartment, that was a one-year lease; right?

A I believe so, yes.

Q And when you lived in that apartment by yourself, when you were alone and you had errands that needed to be run, whatever they were; go to CVS, go to the store for a particular item, you would -- you would perform those errands yourself; correct?

A Usually, with my --

Q Do you understand what I'm asking?

Do you understand what I'm asking?

A Usually with my brother. He was there most of the time.

Q Yes, I understand that. But there were times when you were alone --

A Yes.

Q -- and you would perform those errands, like going to CVS to pick up your medication, things like going to the store every once in a while to buy those; correct?

A I could walk there; yes.
Q Say again?
A I could walk there.
Q Isn't it true that you were driving, periodically, to run errands, as of the time that you were deposed in May of 2016, when you were living alone in that apartment? Isn't that true?
A I think I stopped driving before that, sir.
Q I'm going to try and refresh your memory with testimony.

You remember, during the course of the case, like today, you've been asked questions under oath and answered questions posed by lawyers?
A Yes.
Q And one of the times that you were deposed was on May 5, 2016, in the case; correct?
A Yes.

THE COURT: Which one am I looking at?

MR. O'HARA: The 5th one, your Honor.

THE COURT: Thank you.

Q And on May 5th, 2016, that fell during the time that you were living in the apartment alone; correct?
A Correct.
Q And do you remember being asked the following questions and giving the following answers, on page 15:

"Question: Tell me: How many days a week, on average, do you drive?

"Answer: I rarely drive.

"Question: Rarely? Rarely, yes."

COURT REPORTER: Was that the answer, counselor?

MR. O'HARA: I'll try it again. That was poorly --

THE COURT: Okay, thank you.

MR. O'HARA: Starting at line -- page 15, line 2 through line 12:

"Question: Tell me: How many days a week, on average, do you drive?

"Answer: I rarely drive.

"Question: Rarely?

"Answer: Rarely, yes.

"Question: When is the last time you drove?

"Answer: Let's see... Two days ago.

"Question: What was that for?

"Answer: I had to get -- it was raining; I had to get some food."

Q Do you remember giving those answers to those questions at the time that you were deposed back in May of 2016?

A I don't remember it, but you're telling me that's what I said.

Q And when you said it back in May of 2016, it was the truth; right?

A Yes.

MR. O'HARA: Thank you, sir.

I have nothing further.

THE COURT: Wait a minute. Before you finish, can you come up again? I was thinking about something.

MR. O'HARA: Sure.

THE COURT: I'm sorry; I may have misapprehended something.

Would you grab that thing you were questioning about?

MR. O'HARA: Yes.

(Discussion off the record at sidebar.)

MR. O'HARA: With that, your Honor, I have no further questions.

THE COURT: Okay, thank you.

Anything, Mr. Morelli?

MR. B. MORELLI: Nothing, your Honor.

THE COURT: Okay, thank you. You're excused.

(Witness excused.)

THE COURT: Ladies and gentlemen, I'm going to give you a very short break; we have a little business to conduct on the record. Okay?

COURT OFFICER: All rise. Jury exiting.

(The jury left the courtroom.)

THE COURT: You want to make a record?

MR. O'HARA: Yes.

MR. B. MORELLI: Your Honor, while he's doing that: We're going to have Provder; can we premark the exhibits?

MR. O'HARA: I want to do one thing at a time.

Judge, outside the presence of the jury, we discussed the intent of the defense to use a prior statement contained in a medical record and, in particular, present page 2120 -- Bates stamped -- from the -- the... Rudansky Winter Neurologic Group as to whether or not Mr. Perez remembered talking with the doctor about why he was not moving forward with his plans and, in particular, whether he remembered saying that he was "awaiting settlement from accident so he can move forward with his plans."

I questioned the witness whether or not he remembered seeing a doctor on that date; I questioned the witness whether or not he remembered the doctor's names; and I questioned the witness specifically whether he -- whether he recalled --

(Buzzer sound heard in courtroom.)

THE COURT: The officer had to step out.

THE CLERK: Yes.

THE COURT: They may be able to hear us, so...

You can continue.

(Whereupon, the clerk of the court entered the jury room.)

MR. O'HARA: I questioned the witness whether, specifically, he remembered saying to the doctor that he -- that, in response to questions about why he wasn't moving forward with his plans --

(Whereupon, the court clerk re-entered the courtroom.)

THE CLERK: They could hear.

THE COURT: I'm sorry?

THE CLERK: It was, they could hear out here.

MR. B. MORELLI: Yeah. That's very good, very good.

MR. O'HARA: -- whether, quote -- for the reason for him not moving forward with his plans, whether he told the doctor, "I am awaiting settlement from accident so I can move forward with my plans."

When the witness said, "I don't remember what I said," I then approached him to show him a document, to use it to refresh his memory as to whether -- on November 20th, 2017, in response to this doctor's question, when being asked about how he's doing -- whether he said what's contained in the medical record, and the objection was raised.

I believe it's appropriate to use anything to refresh a witness' recollection; any document, any -- any -- any tangible item; and that witness is then given the

opportunity to admit or deny whether their recollection has been refreshed.

THE COURT: Um-hmm. Well, it's not so much the --

I agree with you; you can use pretty much anything to refresh a witness' recollection. It's the subject matter and what you're going to be doing with it. The statement itself is not going to be problematic.

But, Mr. Morelli, please make your record.

MR. B. MORELLI: Well, your Honor, I think that Mr. O'Hara, by -- by reading the statement -- Mr. O'Hara knows better; he knows how to ask somebody if it refreshes their recollection.

THE COURT: Let's keep it -- let's keep it between us and not disparage Mr. O'Hara.

MR. B. MORELLI: I'm not disparaging him. I just said that he knows better.

THE COURT: Well, let's -- okay.

MR. B. MORELLI: Maybe I'll say he doesn't know better. But -- but the truth is that --

THE COURT: Let's keep it between us.

MR. B. MORELLI: -- that he wanted to get this statement in evidence, which, obviously, is not admissible and is not for the care and treatment of the patient. Okay? Not even close.

And he's already prejudiced the jury, because it's

already in front of the jury, no matter what your Honor has said. Okay? So we've done this whole trial, for three or four weeks, and now he puts this (indicating) in evidence.

And, actually, it's been very interesting, because every time I have anything that I think might, in any way, be controversial, I show it to Mr. O'Hara in advance, like I did today with reference to the e-mails before I did anything with it, okay?

This (indicating) is only used for this wonderful defense that this kid is a faker, okay? And that's what this (indicating) is all about. And, in my opinion, if anything goes wrong in this case, this (indicating) will reverse it.

THE COURT: Okay.

MR. O'HARA: Do you need me to respond?

THE COURT: I think -- I don't think it's necessary. I have made the ruling and I'm giving you the opportunity to make the record.

I think that I have rectified any issues for the jury. If you want something else done about it, please let me know.

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

THE COURT: Other than that, my court officer said that they needed five minutes, so let's take five minutes.

MR. B. MORELLI: Yeah. And we just want to premark

some exhibits, in the meantime.

THE COURT: That will be fine.

MR. B. MORELLI: Okay.

(Recess.)

(Whereupon, at the request of counsel and with the consent of the Court, Plaintiff's Exhibits 31 through 39, respectively, were marked for identification.)

COURT OFFICER: All rise. Jury entering.

(The jury entered the courtroom.)

THE COURT: Mr. Morelli --

MR. B. MORELLI: Yes.

THE COURT: -- what do you have next for us?

MR. B. MORELLI: Yes. I would like to call to the stand Ed Provder.

THE COURT: Okay.

COURT OFFICER: You can step up, sir.

Witness entering.

Right this (indicating) way.

Just remain standing and face the clerk, on your right there (indicating).

E D M O N D A L A N P R O V D E R, called as a witness by the plaintiff, having been first duly sworn/affirmed, was examined and testified as follows:

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

THE WITNESS: Edmond, E-d-m-o-n-d; Alan, A-l-a-n; Provder, P-r-o-v-d-e-r, 575 Madison Avenue, New York, New York.

THE CLERK: All right, you may be seated.

(Witness complied.)

THE COURT: Mr. Provder, before we get started, I want to make sure I give you a couple of instructions:

Please answer in a loud, clear voice so everyone on the jury can hear what you have to say.

Listen very carefully to the question which is asked of you. Please only answer that question; don't go beyond it with any further explanations unless you're asked.

If you see an attorney standing up to make an objection or hear the word "objection," please stop talking or don't talk, so I can rule on the objection.

If there is a question that you can answer with a simple yes or no, limit your answer to just yes or no. Of course, if the -- if you feel you cannot, in fairness, answer a question with a yes or no, then let the attorney know; but by no means do I want you to expand on any answers unless you're asked.

THE WITNESS: Okay.

THE COURT: If you need a break for any reason, let me know.

During any breaks, you may not speak with the

attorneys concerning your testimony, including if you don't finish your testimony today.

You also may not interact, in any way, shape or form, with any of our jurors.

THE WITNESS: Okay.

THE COURT: Okay?

THE WITNESS: Thank you, your Honor.

THE COURT: Mr. Morelli.

DIRECT EXAMINATION

BY MR. B. MORELLI:

Q Mr. Provder, good afternoon.

A Good afternoon.

Q You have done at least one other assignment for my office before this one; correct?

A Yes, one other one.

Q Yes. And you've actually worked, also, for defendants in cases to figure out a life-care plan; true?

A Yes.

Q Now, could you tell us what your profession is and explain to the jury what that means?

A Okay.

I'm what is known as a "rehabilitation counselor." That's an individual who's been educated and trained to work with people that have a variety of different disabilities or handicaps. These could be physical disabilities, mental

disabilities, cognitive disabilities or sensory disabilities.

And what we do is, we look at how these disabilities or handicaps impact on the person's ability to work and their ability to earn money; and if we believe they're employable, we will try to assist them in locating jobs they can do, given their capabilities.

In addition, we also provide what's called "life-care planning," or "case-management services," looking at the type of care and the cost of care somebody's going to require due to their impairments, particularly in a case where there are serious injuries.

Q Now, tell us about your educational background.

A I have a bachelor's degree in rehabilitation counseling from the Pennsylvania State University, master's degree in rehabilitation counseling from the Pennsylvania State University. After receiving my master's degree, I continued with my education at New York University, in the Department of Rehabilitation Counseling, completing the 42 credits required towards a doctorate and leaving the university with my dissertation to be completed.

Q Could you tell the jury about your work history?

A Okay. I'm going to try to keep it brief, since it's my 46th year of doing this work.

I started out, in 1973, working at -- right here in New York City -- at The Federation of Handicapped in New York City.

I was involved in a program called the Higher Horizons For the Homebound, which was a program geared to working with people that had severe disabilities.

I performed the four basic functions of a rehabilitation counselor at the Federation: individual and group counseling, working with the clients to assist them in adjusting to their disabilities; vocational testing and evaluation, evaluating the clients to find out what they could or could not do, given their various capabilities; thirdly, I was involved in work-adjustment services, which meant that I prepared people for employment; and, lastly, I was involved in job-placement services, which meant that I located jobs the clients could do, given their various capabilities.

Because it was a program geared to people that were homebound, I provided case-management services to about 250 individuals and provided case-management and life-care planning services. I did that for about a year and a half and then became employed at Mount Sinai Hospital, Department of Rehabilitation Medicine, here in New York City.

At Mount Sinai, I supervised the vocational facilities, which consisted of a sheltered workshop, vocational-testing and evaluation unit. In addition, I worked with five -- I supervised -- five professional staff members, worked with -- doing basically the same functions: counseling, vocational testing and evaluation, work-adjustment, job-placement services.

Because I was in the Department of Rehabilitation Medicine, I worked with people that had physical disabilities, and I also worked with in- and outpatient psychiatric individuals. I was at Mount Sinai from mid-1974 through '78, again from '79 to 1981.

Since -- in 1976, I became employed as a rehabilitation counselor/vocational expert, as an independent contractor, for the Social Security Administration; i.e., the federal government; and I was called by the federal -- U.S. -- administrative law judges to render opinions as to the employability of people that were seeking disability benefits, and in that capacity, I served as an expert for the Government on over 2500 occasions.

Since 1981, in August, I started my own company, called Occupational Assessment Services, which provides direct rehabilitation services and life-care planning services to people that become injured. I work with all types of disabilities, people that injured their necks, their backs, people that have sustained traumatic brain injuries, people in wheelchairs, providing vocational counseling, testing and evaluation, as well as life-care planning services.

That brings us up to date.

Q Can you tell us any certifications or professional affiliations you have?

A Yes.

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

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

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

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

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

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

Q Is that statewide, nationwide?

A Nationwide. All these are nationwide.

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

A Yes.

Q And did you do that?

A I did.

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

A Okay.

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

Secondly, I conducted an interview with Mark and his father and his brother; I saw them on two different occasions.

Based on that information, I then formulated a

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

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

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

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

Q Now, you say you met with Mark and his -- a few -- family members on two different occasions.

A I did.

Q Can you tell the jury when that was?

A Yes. Initially, I saw him on April 28th, 2015 and then, most recently, September 26th, 2018.

Q Now, the purpose of your evaluation was to decide what, if anything, Mark needed in the future --

A Yes.

Q -- is that true? His future needs.

A Yes.

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

A Yes.

Q -- or be able to get a job --

A Yes.

Q -- correct?

And did you do both of those things?

A I did.

Q Okay. Can you tell us, basically, what records you reviewed in this case?

A Well, I had numerous records. I had hospital records; I had treating- and consultative-physician reports; I had income tax records; I had high school records; I had reports from various examining doctors. That's it.

Q Can you describe --

You had the meeting in 2015 with Mark and two family members?

A Yes.

Q Was it the same two family members in 2018?

A It was.

Q Okay. And during those two meetings --

How long were those meetings, by the way?

A The initial meeting was three hours; the second meeting was two and a half hours.

Q Okay. And what, if anything, did you learn from those meetings?

A Okay. Well, he indicated to me that he had been injured on June 26th, 2013, resulting in an injury to his head, his neck, his right shoulder, fractured ribs; and he sustained a traumatic brain injury, resulting in cognitive limitations.

He also reported --

MR. O'HARA: I don't mean to interrupt the witness, but he's reading from something. Can we ask what he's reading from, for the record?

THE COURT: Would you please, sir?

THE WITNESS: These (indicating) are just notes taken from my report, and I'm not reading them.

MR. O'HARA: Okay. If the witness is going to use something to assist with his testimony, it needs to be marked. That's just my request.

THE COURT: Okay, but he said he's not. Okay?

(Continued on next page.)

BY MR. MORELLI:

Q Mr. Provder, also, if you would, be a little bit more specific with reference to what records you reviewed.

A Okay.

Q And that you could refer to your notes.

A Okay. I have -- I have the Nassau University Medical Center records.

Q Okay.

A I have two admissions, I have reports neuropsychologists, several neuropsychologists, I have his, as I indicated, his high school grade transcript and the transcript from Nassau Community College, income tax returns, supplemental reports from Southside Hospital, South Nassau Community Hospital Emergency Room, report from North Shore University Hospital, reports from Dr. Greenwald, who's a physical medicine and rehab specialist, a report from Dr. Gordon, a neuropsychologist, a report from -- a diagnostic report from Montefiore Medical Center, I have depositions, one, two, three, four, five depositions for Mr. Perez, Mark. That's it.

Q Okay. Now, can you tell us briefly what you specifically learned during your two visits with the family of approximately five and a half hours combined?

A Yes, as I indicated, both his brother and his father were present in both evaluations. His brother was responsible

for providing information about 25 percent of the time because Mark couldn't provide that information. Mark indicated that he was 35 years of age, gave his date of birth as January the 5th, 1983. He stated he was single.

At the time that I saw him he was residing with his parents in Islip, New York. He graduated high school in 2001 from Islip High School and he indicated he attended Nassau Community College from 2002 to 2004. He also indicated that he had taken courses or learned web development and was familiar with various programs required for developing websites. These are HTML, PHP and CSS. He most frequently used HTML.

I then inquired as to his work history and he reported that he had been self-employed at the time of the incident and he was employed in designing signage and planning structures. He also reported that he had done this work for quite a number of years, approximately ten years. He also stated that he was involved in working out of his father's studio where he did web development and he also did DJ -- worked as a DJ at weddings and corporate events and so on. And so basically his main focus, from what I understand, was web development.

I then went into his complaints. We started with his cognitive complaints. He reported that he had impaired memory, both short and long-term memory, he had diminished concentration, difficulty reading and remembering what he read, he had a shortened attention span and was easily distracted

when he tried to do tasks. He had difficulty thinking of a proper word to say and had difficulty multitasking, doing more than one thing at one time. He had difficulty processing words. He felt that his thinking was slower than before the accident and he had some difficulty performing tests that involved sequencing. He also noted for the records that he had been involved in cognitive rehabilitation to help remediate some of these problems.

Then I went into any emotional complaints that he had. He stated he that was nervous, depressed, had difficulty getting along with other people and also had difficulty with stressful situations. He reported feeling angry and frustrated over his cognitive limitations and the restrictions that he placed on him. And he was receiving individual counseling when I saw him from a neuropsychiatrist once a month.

Regarding his physical complaints, he reported he had constant headaches, head pain, extreme fatigue, difficulty sleeping at night and that he when the weather was cold and damp, his pain was worse, pressure on his head. He also felt that the bright lights affected his headaches, caused his headaches. And he noted that he also had a seizure disorder. At the time I had seen him he reported that his last seizure had been in September 2017 where he had sought emergency room treatment. He was taking Tegretol for the seizures, 800 milligrams, and his seizures lasted up to about five minutes

and he described his seizures.

And that was history that was taken.

Q Okay. And based on all of this information that you obtained, not only from the meetings, but also from the medical records, did you formulate a life care plan for Mark Perez?

A I did.

Q And would you be able to explain to the jury --

MR. MORELLI: And, Judge, if he could use illustrations to explain to the jury the life care plan that he formulated for Mark Perez.

THE COURT: You've already reviewed them, correct?

MR. O'HARA: Yes, Your Honor.

THE COURT: So we're good?

MR. O'HARA: Just when he's reviewing a particular chart, just please identify it by the exhibit sticker.

THE COURT: Would you, please? Thank you.

Can you step down?

(Witness exits the witness stand.)

A Okay. This is Mark's --

MR. MORELLI: You Honor, can you ask the jury if they can see it?

THE COURT: I'm sure they can, Mr. Morelli, so we're good.

MR. MORELLI: Okay.

THE WITNESS: This is 31 for ID.

A Okay. What we have is the first part of the life care plan. The life care plan is a preventative plan that could happen in the future. So we have certain evaluations that are built into the plan. The first is called the Rehabilitation Plan Development, which means that we look at Mark's progress every five years. We'll go and talk to the rehabilitation counselor or life planer will come and talk to the family, talk to his treating doctors, see how he's doing and redo the plan because his condition may change. He may need certain things now that he doesn't need in the future or he may need additional things that he may not have now. So we built into the life care plan, Rehabilitation Plan Development, we review it once every five years. The cost is $3,000 for the five-year period.

Next we have physical therapy, evaluate what his physical capability is once a year through its life, 50 to $100. And why I use a range on everything that I do is because some people charge more for some services, some people charge less for a service, so I provide the range of services from our research as to the cost and we don't know if the low end will be available or the high end will be available, so that's why I provide both. And we usually contact anywhere from three to five people that do each service, so I've contacted three to

five people that do each service. So I contacted three to five physical therapy programs in the New York City or Central Islip -- or the Islip, Long Island are.

Next we have neuropsychological evaluations. One should be done at the beginning of his cognitive rehabilitation and one at the end to see what his progress is. So it should be done twice only. The cost is 2,400 to 3,250 each evaluation.

And that's on 31 for ID.

Q What number are we at?

A This is 32 for ID.

Q Okay.

A Mark needs some assistance in making sure he receives the necessary services. It's been shown that a rehabilitation counselor or a rehabilitation nurse are very important in working with an individual who has a significant or severe impairment to assist them in their case management. So a case manager is provided. It's two to four hours six times a year. The cost is $1,500 to $4,300 at a rate of $125 to $180 per hour.

The next is cognitive rehabilitation to assist him in the various cognitive limitations. We talked about memory problems and various exercises they can go through and counseling three times a week. The cost is 150 to 250 per session. It comes out to $21,600 to $36,000 per year.

And the last, psychological therapy, which he undergoes now -- at the time I saw him. Once a week for 48 weeks, the cost is 140 to $170 per session. That's a total amount of $6,720 to $8,160 per year.

And that's 32 for ID.

Q Okay.

A So we're at 33 ID.

And the first thing is a physiatrist. That's a doctor of physical medicine and rehabilitation, somebody who specializes in working with people that have sustained brain injury and also have cognitive and seizure disorders. Twice a year; the cost year one is 250 to $725, year two, 150 to $550. Neurologist, once a month, 12 times a year. The cost is $1,400 to $2,300, then $1,200 to $2,100 per year. That would be somebody who would work with him regarding his seizure disorder, monitor his medication and so on.

Next we have a neurosurgeon and this is changed, I understand. At the time I saw him he reported to me that he was seeing somebody once a week and so we have it down here, but I understand this has changed, so I'm going to skip over this one.

We have craniofacial plastic surgery -- surgeon four times a year. The cost is $728 to $2,000 per year; neuropsychiatrist, that's who he sees now on a monthly basis. Cost is $2,000 to $5,425 per year for year one, year two is

1,800 to $5,100; hematologist, he was seeing somebody at the time I saw him two times a year. The cost is 290 to $1,236 a per year. Then it goes to 180 to 972; ophthalmologist because of his vision problem, twice a year. Year one, $245 to $450, year two, 140 to 400. He was also seeing a neuro ophthalmologist, that would probably be somebody, a low vision person twice a year.

Q An optometrist.

A Optometrist, $640 to $1,010 and it goes down to 400 to $720 blood tests because of his taking the seizure medication. His blood must be monitored on a regular basis, once a month. The cost is $17,340 to $18,912; and then the EEG to measure his brain waves because of his seizures on a yearly basis. The cost is once a year, $200 to $534.

And that's 33 for ID.

Q Okay.

A We're at 34 for ID. And on this chart we have future surgeries. At the time I saw him they had recommended a cranioplasty. There was no date when this was going to happen. We researched the cost. Dr. Dobransky had made that recommendation. The cost ranged from $57,734 to $121,860 and this was a price quote from New York-Presbyterian Hospital.

Q Okay.

A 35 for ID.

And these were the medications he was taking at the

time I saw him. The first medication is Adderall for attention deficit disorder, 25 milligrams. The cost is $1,188 to $1,296. Tegretol, 800 milligrams. That's for seizure disorder. The cost is $1,488 to $1,500. And then we have Xanax, .5 milligrams for anxiety. The cost is $156 to $216.

And that's on 35 for ID.

Q I think the Xanax was -- it says five milligrams, doesn't it?

MR. O'HARA: Judge, we'll correct the numbering on the break. He's got the numbers transposed.

MR. MORELLI: The ID numbers.

A At the time I saw him he had indicated that he was not driving. So I built in an Uber three times a week for 48 weeks. We use 48 weeks because it's a clinical year. The cost is $2,592 to $27,072. We did a local range, which is a lower amount, $9 per local. Going into New York City one way would be $94.

And that's 36 for ID.

Q Okay.

A The last chart is 37 for ID.

At the time I saw him initially, he was living with his family. His parents were taking care of him and monitoring his situation, but, of course, when you grow older you want to live by yourself. Because of his seizure disorder and his cognitive limitations, it's been recommended that he have a

live-in home attendant to be with him. He's had two seizures recently. So we have a live-in attendant, not awake, somebody living with him. The cost is $299 to $350 per day, a total amount of $109,135 to $127,750.

And that's all of the components of the life care plan.

Q Okay. Now, Mr. Provder, you said that after you completed your life care plan the other part of your job was to decide the employability of Mark Perez.

A Yes.

Q Correct?

A Yes.

Q Did you do that?

A I did.

Q And can you explain to the jury what you did, what information you used, what testing you did, if any, and what you came up with?

A Okay.

MR. O'HARA: Judge, that's my objection. That's classic compound. Can we have him break it down?

THE COURT: Thank you. I think he's just asking for a foundational aspect of it, though.

But go ahead, break it down.

MR. MORELLI: Okay.

BY MR. MORELLI:

Q So, Mr. Provder, tell us what -- when you embarked on this task of finding out his employability, what did you do?

A Okay. Well, it's four parts. The first part involved reviewing the medical records, which I had done for the life care plan. The second part investigated conducting an interview, which I conducted both times. The interview from the vocational standpoint. I focused in on his educational background and his work history that he gave me.

Thirdly, I did administer some vocational tests to figure out what he could and could not do given his capabilities, whether he had any difficulty performing the tests. And lastly, I reviewed all that data and formulated an opinion as to his pre-injury earning capacity and what he could have earned if he had not been hurt and secondly, if he's employable, what he could earn, if he's employable at all.

Q Okay. So tell us see what you came up with.

A Okay. I have some charts here that would help the jury understand. Can I come up?

MR. MORELLI: Can we ask him to come up for that, Your Honor?

THE COURT: Of course.

A This is 38 for ID.

What we have here is the 5-Point Physical Demand Scale used by physical rehabilitation counselors and labor market analysts. It been created by the US Department of Labor, so

every one of our jobs fits into one of these categories. What the government did is they researched all the jobs in the economy and there are approximately 13,000 that they looked at. They looked at the physical requirements of those jobs.

What they did is they sent anywhere from ten to 20 people out looking for a job, looking at the job, and then doing what we call a job analysis. And what they've done is created five categories and the categories were broken down into two areas. The first area is the physical position that a person performs the job and secondly, is the weight involved in lifting or carrying. The government uses a fancy word called exertion. So when you see that word exertion, they really mean weight.

So the first thing that we do is we interview the person and we find out what kind of work they did in the past and the physical requirements of those jobs. So his past work that he indicated when he did the side work, that could be medium work, when he was doing web work, was sedentary, sitting down work. So let's discuss the categories.

The first level of work is sedentary work. That's the least physical exertional level of work. And sedentary work is one that's done basically in a seated position. A person has to be able to sit at least six hours out of an eight-hour workday to do a sedentary job. And it involves lifting and carrying of no more that ten pounds. Usually somebody who does

sedentary work-type job lifts and carries small tools and buckets. Maybe they'll lift up to ten pounds.

The next level of work is what we call light work. That's work that's done usually in a standing and walking position. The person has to be able to stand and walk for at least six hours out of an eight-hour workday and they have to be able to lift anywhere from ten to 20 pounds while they're performing the job.

The next level of work is medium work. That's work that's done again, standing and walking. It involves lifting anywhere from 20 to 50 pounds.

Next work is heavy work. It involves lifting anywhere from 50 to 100 pounds. Of course, that's standing and walking.

And the last and most arduous work is very heavy work that involves lifting and carrying in excess of 100 pounds occasionally or up to in excess of 50 pounds.

So what we do is first we look at his prior work; sedentary work. And then what I then did is administered some testing. I actually administered four different tests to him to find out what his capability was. We have it depicted here.

The first test I gave him is a test called The Purdue Pegboard Test developed by the Industrial Psychology Department at Purdue University. And what that allows us to do is measure his dexterity and coordination. So the first part involves using his right hand to work quickly and accurately, taking

pegs and putting them into the pegboard. The second part involves using the left hand to place the pegs in the pegboard as quickly as they can. Thirdly, involves, using both hands to perform the same motions with the right and left hand. And then the less last one is completing a four-part assembly to see whether he could follow directions.

On this test he reported experiencing a headache and difficulty grasping and holding the objects and he had trouble remembering what he had to do in the four-part assembly and he was very frustrated and confused while he did this test.

Next test is the Employee Aptitude Survey, Visual Speed and Accuracy Test, which is basically a test of clerical and inspection ability. What he has to do is he's given pairs of numbers such as one, two, three, four, the seconds pair of numbers such as on, two, four three. He would have to mark those as different. And this is what we call a power test, meaning his score is the amount of items he completes in a set period of time.

He scored below average, as you can see, on this particular test. Again, he reported having a headache, difficulty concentrating, memory problems, frustration and was distracted. And let me point out that the testing is done in a quiet room. There's nothing to distract somebody.

The next test is the Employee Aptitude Survey Word Fluency Test. That's a test of his ability to produce words.

It's a memory type of a test. His score was below average compared to the general productive male population norm group, another sitting down type of a test. On this test, again, he had similar problems; frustration, difficulty concentrating, distractibility, headaches, difficulty with his memory.

And the last test is a test called the Employee Aptitude Survey, Manual Speed and Accuracy Test. He scored below average on this test. This is a very simple test. He sits in a seated position and he has to make marks on the test paper, making the marks as quickly as possible. Again, he scored below average compared to the norm group. He reported being fatigued, experiencing a headache, difficulty with memory, frustration, easily distracted and he did not feel well when he did this test.

So we did all four different tests, all four of his scores are below average. Those were the four tests I administered to him.

Q Now, Mr. Provder, did you formulate an opinion about Mark Perez's employability?

A I did.

Q And can you tell us what your opinion is and please explain it in detail?

A Yes. Based on my evaluation of him, his educational background, his medical conditions, his functional capacity or vocational capability, it's my opinion that, No. 1, that he was

unable to perform any of the past work that he discussed with us. Disc jockey, web developer or sign designer, he could not do those jobs.

Two, his pre-injury earning capacity, what he could have earned if he would not have been hurt I established as the average earnings of a web developer in the New York City/Long Island area. That amount is $84,910 per year. That represents his earning capacity over his work life. He was a relatively young individual at the time of this accident, approximately 30-years of age. So we look at what somebody's earning capability would be as they progress and get older. So I established it as $84,910 per year.

Three; it was my opinion that he didn't have any particular skills or knowledge that he could use to transfer and perform other types of work activity.

Four; it was my opinion he could not perform any of those physical demand requirements, jobs that we talked about; sedentary work, light work, medium work, heavy work or very heavy work. He could not do any of those jobs on a sustained regular competitive basis. That means eight hours per day, five days per week performing and producing at a level acceptable to an employer. It's my opinion he could not do that.

Five; it was my opinion that he's unemployable for any job in the competitive labor market and that he had sustained a

total loss of earning capacity over his work life due to his injuries.

Q Now, when you made that determination you took into consideration, did you not, also, his medical conditions, true?

A Yes, of course. We have a number of documents that detail limitations that he has. We have actually several neuropsychological evaluations that talk about his limitations given him his IQ has been reduced significantly. So we have a lot of data that I based my opinion on, as well as my testing and my own observations.

Q Would about the fact that he suffers from traumatic epilepsy?

A Well, that's a major problem because if he's in a work setting and he has an epileptic seizure, that certainly would affect his ability to work.

MR. MORELLI: I have nothing further, Your Honor.

MR. O'HARA: Short break?

THE COURT: Yes. Short break, ladies and gentlemen.

THE COURT OFFICER: All rise, jury exiting.

(Jurors exited the courtroom.)

COURT OFFICER: All rise. Jury entering.

(The jury entered the courtroom.)

THE COURT: Mr. O'Hara.

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

CROSS-EXAMINATION

BY MR. O'HARA:

Q Mr. Provder, you wrote two reports in this case with respect to the life-care plan; correct?

A Yes, sir.

Q You wrote a report on June 26th, 2015, addressing all of the items (indicating) that are in the appendices to your report that have been marked A-1 through A-7; correct?

A Yes, sir.

Q And then you wrote a second report, on September 26th, 2018, about those very same topics; correct?

A I'm not sure we have the dates correctly. Hold on a minute.

Q Sure. November 15th, 2018. My apologies.

A November 5.

Q So you wrote two reports: one in 2015 and one in 2018.

A Yes, sir.

Q And in terms of the life-care plan, you cover all of the same items that are in the exhibits, A-1 through A-7; correct?

A Yes, sir.

Q And you mentioned to the jury that one of the things that you had the benefit of in coming before them today to offer the opinions was the review of all of the medical records in the case --

Correct?

A Yes.

Q -- and a certain number of reports that were generated, and you identified Dr. Greenwald and Dr. Gordon; correct?

A Yes.

Q You have not seen the report of Dr. Anne Ambrose, have you?

A I have not; just secondhand information.

Q I'm -- just listen to my question.

You've done this many times. You testify frequently; correct?

A Yes, I have.

Q So I'm just trying to have your answers be yes or no, and if you can't answer, just tell me; I'll ask you a different question. Okay?

A The answer's no, I haven't reviewed her report.

Q And you haven't reviewed the report of Dr. William Barr; correct?

A No.

Q You haven't reviewed the report of Dr. Jordan?

A No.

Q You haven't reviewed the report of Dr. Doyle --
A No.
Q -- correct?
A No.
Q And you haven't reviewed the defense proposal for a life-care plan in connection with this case; correct?
A I have. That I have.
Q So, when discussing the items that you reviewed before testifying today, when you talked in response to Mr. Morelli's questions, you just overlooked that item?
A I overlooked the item because I'm not sure whether you're -- she's going to be presented as a witness. So --
Q You didn't say it on direct, right?
A I did not.
Q Okay. So let's talk, first, about your comparison of what you suggested were proper life-care needs in 2015 versus 2018 and what actually happened in the care and treatment for Mr. Perez.

You understand what I'm asking you?
A Yes.
Q So, for example, with respect to therapies, in 2015 you suggested that he needed physical therapy three times a week for six months; correct?
A Yes.
Q You've reviewed the medical records in this case. Did

that, in fact, occur?

A After my review, it did not, I don't believe.

Q You suggested that he required cognitive rehabilitation three times a week for two years, back in 2015?

A Yes.

Q In fact, in the care and treatment provided to Mr. Perez, did that occur?

A He had received cog --

Are you asking a yes-or-no question?

Q The answer is no; isn't it?

A To the best of my knowledge, no.

Q You suggested that he needed psychotherapy once a week for three years, and then once a week for two years; and you know, from a review of the records, that didn't occur, either. Did it?

A True.

Q Now, with respect to medical care, you mentioned that he should see a physiatrist twice a year. You said the same thing back in 2015, as compared to 2018; correct?

A Yes.

Q The physiatrist that was seen in connection with this matter was a forensic evaluation scheduled with Dr. Greenwald; correct?

A True.

Q That is something separate and distinct, as you review

records, from treatment records by someone that's actually providing physiatry care; correct?

A True.

Q You mentioned that he should have been seen three times per week -- excuse me -- every three weeks by a neurologist; correct?

A Yes.

Q And based upon your review of the records, that didn't occur, did it?

A No.

Q So what I've said is correct?

A Yes.

Q You mentioned -- and I want to make sure I understand this: You mentioned, in 2015, that Mr. Perez should see -- be seen by -- a neurosurgeon 48 times during the course of the year; correct?

A Correct. That's what it states.

Q And you said the same thing in 2018; correct?

A Correct.

Q But that's a mistake in both reports; correct?

A Yes.

Q You're not suggesting to this jury that there is a requirement that Mr. Perez see a neurosurgeon weekly, are you?

A No.

Q In fact, there's no testimony or recommendation in any

of the records that you've seen that has suggested that he needs to see a neurosurgeon other than as needed for neurosurgical consulting; correct?

A True.

Q And at least in this case, with respect to a neurosurgeon and what's necessary, you've opined that he requires a cranioplasty, and you have put that in the life-care plan; correct?

A Yes, sir.

Q And that was something that you noted he required back in 2015; correct?

A Yes.

Q And in your review of the medical records and the reports from the different providers, there is no medical reason that you identified for that procedure not being performed; correct?

A True.

Q Now, just so we're clear, and I mean this with respect, but you're not a medical doctor; correct?

A I'm not.

Q And you're not a Registered Nurse or a Licensed Practicing [sic] Nurse; correct?

A No, I'm not.

Q And the reason why --

While you've taken -- you've pursued -- doctoral

credits, you ultimately didn't complete the doctoral process to allow for you to have the designation of a Ph.D.; correct?

A True.

Q You mention in your 2015 report that Mr. Perez should be seen by a craniofacial plastic surgeon 24 times per year; correct?

A Yes.

Q That hasn't happened, has it?

A No.

Q And you would agree with me, that doesn't make -- there -- there's nothing in the record to suggest that he should see a craniofacial surgeon, essentially, ever two weeks --

A True.

Q -- correct?

Now, you make reference to --

With respect to home care, in 2015 you recommended that his life-care plan should include a live-in attendant, 24 hours a day, seven days a week; correct?

A Yes, sir.

Q And you continue with that view in the 2018 report; correct?

A Yes, sir.

Q And at no point has Mr. Perez obtained 24-hour-a-day, seven-day-a-week in-home care; correct?

A True.

Q And you're aware from a review of the deposition testimony that at the time of the last deposition, Mr. Perez was actually living independently, alone, in his own apartment, from 2016 into 2017; correct?

A That's what I understand.

Q Now, just so the jury understands, and I want to make sure I do, as well: The reason for 24-hour-a-day, seven-day-a-week care in a home is to ensure that when a person is sleeping, if a medical event occurs, that there's someone that can immediately respond; correct?

A Not only at night, but also during the day.

Q But one of the reasons why it's required 24 hours a day is because when someone's sleeping, you still want this live-in attendant to be there.

A True.

Q Do you know what Mrs. Perez, Mark Perez's mother, does for a living?

A No.

Q Now, in commenting on Mr. Perez's employability and the future loss associated with his ability to be gainfully employed, you've used the description of a "Web developer"?

A Yes.

Q Now, one of the things that you talked about in offering the opinions relating to his present employability and the job description that you would recommend should be

considered to evaluate the future loss is the specific education, training and experience of Mr. Perez; correct?

A Yes. And what he was doing as a job, yes.

Q Yes.

And in this case, one of the things that you identified for the jury, in your direct examination, that you reviewed included his high school records and his college records; correct?

A Yes.

Q And you're aware that Mr. Perez attempted to attend Nassau County Community College but was unsuccessful in completing the academics at that school; correct?

A Yes. I have his transcript.

Q And his total credits that were pursued during the time that he was attending Nassau County Community College -- he attempted to achieve 68 credit hours; correct?

A Yes.

Q But he only passed 36 credit hours; correct?

A That's what I understand.

Q And the other classes, he either withdrew from or he failed; correct?

A Yes.

Q And his grade-point average was a 1.85; correct?

A Yes.

Q And the one class, when you reviewed his academic

records, that related to anything associated with Web design, he failed; correct?

A That's what I remember, yes, sir.

Q Now, the other point that you made with respect to his employability and the job selection was, you mentioned, the average yearly income of someone that is a Web developer is, for purposes of your opinion, $84,910 per year; correct?

A Yes.

Q Can you tell the jury where you get that number, how you go about reviewing the Department of Labor Statistics to identify what is a fair annual salary for someone that's in that field?

A Yes.

What happens is, the United States Department of Labor does wage surveys on a yearly basis. They contact every employer and they ask them what -- the various jobs they have; what the average earnings of those people are, doing those particular jobs; and then they provide us with information, both from New York City, in the New York City area, so we can see, per job, what each of the jobs pay, on average. So, if you're a rehabilitation counselor, you're an attorney, you're a nurse, we have that average earnings.

Q And there are a number of job classifications that, as an expert being called to testify in a case like this, you look at to determine what's the appropriate job classification for

that future income loss relating to that unemployability; correct?

A True.

Q And in doing so, one of the things that you look at is the specific earning history of the individual, and the job that the individual was doing, in connection with your evaluation of what job classification to pick; fair statement?

A You're going to have to repeat it.

Q Sure.

A I don't understand.

Q A poorly phrased question. I'm tired of trying to get it in.

So one of the things that you look at when deciding which job description that you're going to use to identify the potential average yearly loss is what that person actually did for a living before the incident; correct?

A That's only one of the factors.

Q But it is one of the factors that you look at; correct?

A Yes, sir.

Q And you look at his education, his training, his experience, and his job history; correct?

A His job history, and any aspirations that the person may have. If they're a younger individual, such as Mark, we look at what they wanted to do and what their aspirations were.

Q And with respect to aspirations, you would agree with

me, that's something that they desire to do in the future, as opposed to what they're doing right now.

A True.

Q And in this case, none of the records that you reviewed suggested that Mr. Perez ever actually was gainfully employed as a website developer; isn't that true?

A That's not the history that was given to me; and I understand from his brother's testimony, that wasn't what the -- was testified to.

Q But you looked at his tax records, right?

A Yes.

Q And his tax records don't show any income from any employer relating to website development, do they?

A They do not.

Q In fact, they show income in 2010 totaling approximately $27,000 a year; correct?

A Gotta wait.

Q Sure. Take your time.

A Two-ten, yes. That's exactly correct.

Q And the work that is being reported as generating income in 2010, none of which is website development; correct?

(Pause.)

A That appears to be correct; yes, sir.

Q And in 2011, the total reported income for Mr. Perez is $31,000, and again there's no reference to any income source

being derived from website development; correct?

A Let me just look.

Q I can give them to you, if you need them, Dr. -- excuse me -- Mr. Provder.

I call you "Doctor" anyway.

A "Mr. Provder." It's okay.

That would be correct.

Q And in 2012, the year before this incident, his total reported income was approximately $34,000, none of which coming from any employers relating to website development; correct?

A True.

Q And then, in 2013, there were questions raised during Mr. Perez's testimony about interaction with Best Buy on the project that he was injured.

A Yes.

Q I'm going to represent that to you.

The tax returns that you've seen, in terms of what he actually earned in 2013 that was reported, was the total sum of $263; correct?

A Yes, sir. That's what I have.

Q And at least for purposes of our discussion, you would agree with me that the actual income earned for the three full years, or three and a half years, depending on whether or not you want to take into consideration that half-year before the incident, that actual reported income is significantly less than

what you forecast, first in 2015, for website development; correct?

A Yes, sir.

Q And an even greater difference in terms of being less than the amount that you forecasted in 2018; correct?

A Yes, sir.

Q And if Mr. Perez's aspirations, you assume, were successful, you're basing your opinion that it would be fair to identify this website-developer salary; correct?

A Yes.

Q But if those aspirations were unsuccessful, for a whole host of reasons, because he changed his mind and decided to pursue another field; because, for whatever reason, despite wanting to do something, he just wasn't capable of doing it, then that foundation that you've advanced would change; correct?

A It's possible, yes.

Q And in this case, if there was information about his desire to do something else, besides be a website developer, like relocate and run a restaurant, that information would be important to you in evaluating the future and the reliability of the assumption relating to that aspiration; isn't that true?

A Yes, sir.

MR. O'HARA: Thank you. I have nothing further.

REDIRECT EXAMINATION

BY MR. B. MORELLI:

Q Mr. Provder, you were asked about whether or not you knew what Mark's mom does for a living.

A Yes.

Q And you said you didn't know.

A I don't know.

Q Because when you met with Mark, you met with his brother and his father; correct?

A Yes.

Q And, actually, his mom is a Registered Nurse; okay?

A Yes.

Q And she works part time.

And let me tell you, from the evidence in the case, that she's about to turn 70 years old.

So what I'm going to ask you is --

MR. O'HARA: Objection.

This is leading.

THE COURT: Sustained.

MR. B. MORELLI: It's redirect, your Honor.

THE COURT: Okay.

MR. B. MORELLI: What would you like me to do?

THE COURT: Well, what I would like you to do is ask a nonleading question that doesn't summarize the evidence for the witness.

Q I'm going to ask you whether or not -- if you knew that Mark Perez's mom was a Registered Nurse, it would change any of

your opinions.

A No.

Q Do you, generally, assume that someone's parents are going to take care of him for the rest of the child's life?

A No. It's one of the primary concepts of rehabilitation and life-care planning that the person's primary caregiver won't be the family.

Q And why is that?

A Because you don't know what's going to happen with the family. They may not be there when the person needs them. They could get sick; they could get hurt; they could die, and you can't count on that.

Q Does the age of the parents come into question for you?

A Yes.

Q Now, when your -- when you stated that --

You recommended certain care and treatment for Mark; correct?

A Yes.

Q And when you -- when you do that, do you make determinations as to whether or not the person has certain healthcare -- or whether they can afford the -- the --

MR. O'HARA: Objection.

Q -- treatment or not?

THE COURT: Sustained.

Q What come -- what comes into play when you make a

determination as to whether or not someone has care and treatment that you recommend?

MR. O'HARA: Objection.

Can we go sidebar, just to --

THE COURT: Approach.

(Discussion off the record at sidebar.)

Q Now, Mr. Provder, when you're making a determination for future care that a person needs, in your opinion --

A Yes.

Q -- okay? -- do you -- is one of the factors that you take into consideration the fact of whether or not the person can afford the care?

MR. O'HARA: Objection.

THE COURT: Overruled.

A No.

Q Okay. And so, you didn't do that in this case, did you?

A I did not.

Q Okay. So -- so what is -- what is your assumption; that it can be afforded?

A No. The assumption is that the person needs those particular items and those were the costs of the items.

Q So it's actually not relevant to your opinions --

MR. O'HARA: Objection.

That's a legal determination.

Q -- correct?

THE COURT: Overruled.

A True.

Q Now, when you stated that he would need a 24/7 live-in attendant --

And we talked about the daytime and the nighttime; correct?

A Yes.

Q -- would the fact that Mark Perez is --

It's undisputed that he has epileptic seizures that happen in the morning, they sometimes happen in the afternoon, and sometimes they happen at night.

Would that come into play with reference to your opinion...

(Mr. O'Hara stood.)

MR. B. MORELLI: I'm waiting.

MR. O'HARA: Objection; assumes facts not in evidence --

THE COURT: Sustained.

MR. O'HARA: -- and leading.

THE COURT: Well, I'm sorry; I hate to do this, but approach, please.

(Discussion off the record at sidebar.)

Q Now, Mr. Provder, the fact that Mark Perez has --

There's been testimony in the case that Mark Perez has

had seizures in the morning, in the afternoon and at night.

Would that information be important for you in rendering your opinion that he would need 24/7 care, so that someone's always there in case something happens?

A Yes. That's why I recommended live-in home care.

MR. B. MORELLI: Nothing further, your Honor.

THE COURT: Can you approach, please, before we let the witness go?

(Discussion off the record at sidebar.)

THE COURT: Okay. Thank you, Doctor. You're excused.

THE WITNESS: "Mr. Provder."

THE COURT: Excuse me; Mr. Provder.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: Ladies and gentlemen, that does conclude our testimony for today.

We have one witness slated for tomorrow that we are fully expecting will be concluded in the morning, if not very early afternoon; but I'm confident to say, in the morning we should be done, at some point. And then we have some things that we have to work on in the afternoon but I don't need you to hang around for that. So please report tomorrow morning, downstairs, at 9:15.

We do have, like I said, the one witness for

tomorrow and I think you can expect an early discharge tomorrow.

Okay? Thank you.

COURT OFFICER: All rise. Jury exiting.

(The jury left the courtroom.)

MR. B. MORELLI: We just have one stipulation for the record.

Mr. O'Hara? I just want you to listen.

Mr. O'Hara stipulated, so that I wouldn't have to ask Mr. Provder the question of "reasonable certainty" --

THE COURT: Oh, yes.

MR. B. MORELLI: Yes.

MR. O'HARA: That's agreed.

MR. B. MORELLI: Yeah.

So we're stipulating that --

THE COURT: "With a reasonable degree of life-care planning certainty"?

MR. O'HARA: The defense stipulates that the opinions were offered within a reasonable life-care-planning and vocational-rehabilitation certainty.

MR. B. MORELLI: Thank you.

MR. SIROTKIN: Thank you.

THE COURT: Now, we can close the record for today.

(Whereupon, the matter was adjourned to Wednesday, November 20, 2019, at 9:30 a.m.)

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