

In The Matter Of:
Silva v Conti Enterprises, et al.

John A. Desch, P.E.
April 15, 2019

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY
DOCKET NO. MID-L-7167-15

JOAO ABILIO SILVA, MARIA
SILVA (his wife),

Plaintiffs,

DEPOSITION OF:

-vs-

JOHN A. DESCH, P.E.

CONTI ENTERPRISES, INC.,
THE CONTI GROUP, CONTICO
CORP., CONTICO CORPORATION,
MANUEL "MANNY" BARBOSA,
FORD MOTOR COMPANY, JOHN
DOES 1-20, ABC CORPORATIONS
1-20,

Defendants.

* * * * Monday, April 15, 2019 * * * *

R E P O R T E D B Y:

PATRICIA A. TERRACCIANO, Certified Court
Reporter (License No. 1158) and Notary Public of
New Jersey, on the above date, commencing at 10:30
A.M., at the offices of John Desch Associates,
Inc., 28 Newark Pompton Turnpike, Riverdale, New
Jersey.

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I N D E X

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(Retained by counsel)

REQUEST FOR PRODUCTION

1 (WHEREUPON Exhibits pre-marked
2 as Exhibits Desch-1 thru and including
3 Desch-7 for identification.)

4 * * *

5 J O H N A. D E S C H, having been
6 first duly sworn or affirmed, at 10:59 a.m., was
7 examined and testified as follows:

8 * * *

9 EXAMINATION

10 BY MR. CLARK:

11 Q. Good morning, Mr. Desch. How many
12 times have you been deposed approximately?

13 A. I would say approximately 200 plus
14 times.

15 Q. All right. If you don't
16 understand a question, please let us know. Okay?

17 A. Okay.

18 Q. If you answer a question, we're
19 going to assume that you understood it. Okay?

20 A. Understood.

21 MR. SAIA: Pete, you can hear
22 okay?

23 MR. BOUTON: I can.

24 MR. SAIA: Okay.

25 MR. CLARK: Off the record a

1 second.

2 (Pause.)

3 MR. CLARK: All right, we can
4 go back on.

5 Just for the record, it is my
6 understanding that we would expect
7 Mr. Desch to testify at trial, and that
8 Mr. Edmund is on the report for business
9 backup purposes, but it is not expected
10 that Mr. Edmund will testify at trial.
11 That the designated expert for trial is
12 Mr. Desch. So, I am taking the
13 deposition with that understanding. We
14 had a discussion off the record about
15 that.

16 MR. SAIA: Absolutely. Mr.
17 Desch obviously is in good health
18 hopefully, we anticipate he will be
19 testifying.

20 Q. What would you say you are in
21 terms of professional -- I always considered you
22 an accident reconstructionist expert. Would you
23 agree with that, or is that a fair summary or
24 characterization of what you do?

25 MR. SAIA: Objection to form;

1 you can answer.

2 A. I would say that the majority of
3 the assignments that our firm is engaged in, are
4 related to traffic accident reconstruction. So I
5 would say that that is my specialty at this time.

6 MR. CLARK: Off the record for
7 a second.

8 (Pause.)

9 Q. Back on the record.
10 Did you perform any engineering
11 evaluation involving calculations, equations or
12 formulas in connection with this case?

13 A. No.

14 Q. Is your opinion in this case based
15 on any physical engineering evaluation or testing
16 of materials?

17 A. No.

18 Q. Would you agree that the
19 responsibility for injury prevention is the crux
20 of the issue in this case?

21 MR. SAIA: Objection.

22 A. No.

23 Q. What would you say then is the
24 crux of the issue in this case?

25 MR. SAIA: Objection.

1 A. Well, as to the responsibilities
2 of Jacobs Engineering, part of the crux of this
3 case is whether or not they had any responsibility
4 to ensure that a back-up alarm be installed on a
5 Conti Construction Company vehicle. And to that
6 extent, then evaluating the accident itself to
7 determine whether in fact there were other
8 approximate causations or factors that contributed
9 to this accident related to the driver and/or the
10 pedestrian.

11 Q. Do you agree that one the expert's
12 roles in a construction accident case like this,
13 is to clarify issues of who is responsible for
14 injury prevention?

15 MR. SAIA: Objection; you can
16 answer.

17 A. Are you referring to me as the
18 expert when you say one of the expert roles?

19 Q. Yes.

20 MR. SAIA: Objection.

21 A. As to the responsibility of
22 Jacobs, which is my primary focus, yes.

23 Q. So, in that connection is it your
24 understanding that part of your role is to give
25 insight to the roles and responsibilities of the

1 various entities on the job, like the workers,
2 contractors, engineers, so that the judge or jury
3 members can better understand who is supposed to
4 do what to prevent injury?

5 MR. SAIA: Objection.

6 A. Yes, I believe that that is part
7 of my assignment to evaluate any kind of
8 contractual arrangements that may have been
9 established between Jacobs and their employer,
10 which in this case the one that they were
11 contracted with, which is the New Jersey Turnpike
12 Authority.

13 Q. Do you agree that injury
14 prevention and safety are the same thing?

15 MR. SAIA: Objection.

16 A. I don't know whether I would agree
17 that in definition they're the same thing, but I
18 would say that they have the same focus.

19 Q. You're involved in scouting,
20 correct?

21 A. I am.

22 Q. And just tell us, what has your
23 involvement in scouting been over the years?

24 A. Well, it started of course with my
25 son who is now 35, when he was involved in tiger

1 cubs, which is the very first level of scouting.

2 Then when he moved into cub
3 scouting I became a den leader. And I also became
4 an assistant cub master, and then eventually the
5 cub master of the cub scout pack.

6 I then established a boy scout
7 troop, was a scout master for many years, and
8 remained as scout master despite the fact that my
9 son had gone on and become an eagle scout, but I
10 remained in the scouting program.

11 I took positions in the hierarchy
12 if you will of their organization in their
13 district. I became a district chairman. I also
14 worked with the council which is the geographical
15 regional body that oversees scouting in a
16 geographic area, and in my particular case it is
17 the northern New Jersey council which represents
18 units from Bergen County, Hudson County, Passaic
19 County and Essex County.

20 I serve now as a vice president of
21 the northern New Jersey council. I am assumed to
22 be the council commissioner probably next year.

23 Q. And as part of your involvement in
24 scouting, did you approve boy scouts for merit
25 badges?

1 MR. SAIA: Objection.

2 A. I never was a merit badge
3 counselor, no.

4 Q. Would you agree that safety is
5 part of doing your duty for your country?

6 MR. SAIA: Objection.

7 A. It seems like a very broad
8 statement to say that safety is a part of your
9 duty to your country.

10 I served in the military on active
11 duty and in reserves, that was serving my country.
12 But I don't know if I would use the word safety as
13 a duty to my country.

14 Q. Well, thank you for your service
15 to the country in the military.

16 A. Thank you, you are welcome.

17 Q. Would you agree that you practice
18 safety when you actively seek to prevent accidents
19 or ward off danger?

20 MR. SAIA: Objection.

21 A. That sounds like a reasonable
22 definition.

23 Q. Would you agree that safety is
24 about taking precautions, stopping injury or loss
25 before it happens?

1 MR. SAIA: Objection.

2 A. Again, I think that is reasonable.

3 MR. SAIA: And just for the
4 record, Gerry, you are referring, you are
5 reading from a boy scout manual of some
6 sort?

7 MR. CLARK: Yeah, I am reading
8 from the safety merit -- well, I am not
9 reading from anything right now. I am
10 just sort of answering your question, but
11 among the materials I have is the safety
12 merit badge book.

13 MR. SAIA: Okay.

14 Q. Would you agree that the National
15 Safety Council is a reliable safety resource?

16 MR. SAIA: Objection.

17 A. Yes.

18 Q. Would you agree that the
19 Associated General Contractors of America is a
20 reliable safety resource?

21 MR. SAIA: Objection.

22 A. As a resource I would say they
23 would be, sure.

24 Q. How about the American Society of
25 Safety Engineers?

1 MR. SAIA: Objection.

2 A. Once again, as a safety
3 organization I believe they all would be good
4 resources.

5 Q. Would you consider the principles
6 set forth by the American Society of Safety
7 Engineers to be an industry standard in the field
8 of workplace safety?

9 MR. SAIA: Objection,
10 objection.

11 A. I guess as a general rule I would
12 agree with that, yes.

13 Q. And, the same with regard to the
14 National Safety Council, would you agree that
15 standards set forth by them are industry safety
16 standards in the field of workplace safety?

17 MR. SAIA: Objection.

18 A. Again, as a resource I believe
19 that they do provide the type of information that
20 would be helpful to ensure safety in a workplace.

21 Q. Do you know what the standard of
22 care is in the construction industry with regard
23 to Jacobs Engineering --

24 MR. SAIA: Objection.

25 Q. -- vis-a-vis its role on this

1 project?

2 MR. SAIA: Objection.

3 A. They had a contract with the New
4 Jersey Turnpike Authority. Their contract was to
5 be responsible to ensure that all of the work that
6 was being undertaken by the contractor, Conti, was
7 being done in accordance with the plans and
8 specifications of this project.

9 Q. So, you agree that the industry
10 standard of care can be obtained from contracts
11 relative to the work?

12 MR. SAIA: Objection.

13 A. I don't understand that question.

14 Q. So, what is the standard of care
15 in the construction industry with regard to the
16 role of Jacobs vis-a-vis this job?

17 MR. SAIA: Objection.

18 A. Well, I believe the contract
19 required again that they be responsible to the New
20 Jersey Turnpike Authority for the performance of
21 the work that was being done in accordance with
22 their contract, and that Conti was the contractor.
23 To the extent that they had no responsibility for
24 directing or ensuring that Conti follow any of
25 their requirements, I think to the extent that if

1 they saw something they could certainly step in
2 and attempt to abate it. But they had no
3 responsibility to direct Conti in any performance
4 of the work that was being done.

5 But safety was everyone's
6 responsibility.

7 Q. What does the National Safety
8 Council say that a construction project manager
9 should do to prevent injury on a worksite?

10 MR. SAIA: Objection.

11 A. I don't believe I know.

12 Q. What does the Associated General
13 Contractors of America say that a construction
14 project manager should do to prevent injury on a
15 worksite?

16 MR. SAIA: Objection.

17 A. And that was the, again, what
18 industry are you talking about? The Associated
19 General Contractors of America?

20 Q. Yes.

21 A. Well, it was not -- that is an
22 organization that was not a recognized reference
23 in the New Jersey Turnpike Authority safety and
24 health plan. And so, therefore, there is no
25 requirement at all mandating any type of

1 compliance with that organization.

2 Q. I appreciate your response, but
3 the question is a bit different. And the question
4 is as follows. What does the Associated General
5 Contractors of America say that a construction
6 project manager should do to prevent injury on a
7 worksite?

8 MR. SAIA: Objection.

9 A. I don't know.

10 Q. And, same with regard to the
11 American Society of Safety Engineers.

12 MR. SAIA: Objection.

13 A. I don't know.

14 Q. What does the American National
15 Standards Institute say that a construction
16 project manager should do to prevent injury on a
17 worksite?

18 MR. SAIA: Objection.

19 MR. CLARK: Let's go off the
20 record.

21 (Pause.)

22 Q. Go ahead, we're back on.

23 A. There is a reference in my report
24 as to an ANSI standard for work zone safety, and I
25 only refer to those issues that relate to the

1 requirements for a back-up alarm, which seems to
2 be the focus of the allegation of negligent
3 oversight by Jacobs.

4 And to the extent that ANSI does
5 provide for certain requirements for various
6 pieces of equipment to have backup alarms, or
7 devices, there is nothing in there that I have
8 reviewed that talks about responsibility of a
9 company such as Jacobs in the oversight of a
10 contractor performing their duties as part of a
11 contract with the contracting agency.

12 Q. The question is more broad than
13 backup alarms specifically. The question deals
14 with the role of various organizations on a job
15 site.

16 You heard what I said, right?

17 A. Yes.

18 Q. Okay, so let me just ask the
19 question again or perhaps a bit differently.

20 What does the American National
21 Standards Institute say that a construction
22 project manager should do to prevent injury on a
23 worksite?

24 MR. SAIA: Objection.

25 A. I don't particularly know.

1 Q. What does OSHA say that a
2 construction project manager should do to prevent
3 injury on a worksite?

4 MR. SAIA: Objection.

5 A. Again, as it relates to the backup
6 alarms I can discuss that. But I have no
7 individual knowledge as to what OSHA's
8 requirements are for Jacobs Engineering.

9 Q. Have you ever heard of any
10 principles of construction safety management?

11 MR. SAIA: Objection.

12 A. Is that something promulgated by
13 one of those organizations, or is that just a
14 general term that you are using? Because I am not
15 familiar with that term.

16 Q. Okay. Have you ever heard of the
17 principle in construction safety management that
18 safety begins at the top? Are you familiar with
19 that principle?

20 A. No, but that sounds like it would
21 be something that would be a good principle.

22 Q. Are you familiar with the
23 principle of construction safety management that a
24 proactive rather than a reactive approach to
25 safety, is best?

1 MR. SAIA: Objection; answer.

2 A. Once again, I am not familiar with
3 those principles, but that, once again, sounds
4 like a reasonable thing to employ with respect to
5 safety of your workers.

6 Q. And same question with regard to
7 the principle that assigning specific
8 responsibility and holding people accountable are
9 key to successful safety management?

10 MR. SAIA: Objection; you can
11 answer.

12 Q. Are you familiar with that
13 principle of construction safety management?

14 MR. SAIA: Objection; you can
15 answer.

16 A. No, I am not.

17 Q. Are you familiar with the
18 principle of construction safety management that
19 planning is of the essence?

20 MR. SAIA: Objection; you can
21 answer.

22 A. No, I am not.

23 Q. Are you familiar with the
24 principle of construction safety management that
25 accidents are foreseeable and preventable?

1 MR. SAIA: Objection; you can
2 answer.

3 A. Some accidents I suspect are
4 foreseeable and preventible. Some are not.

5 Q. Would you agree that safety pays
6 as a general proposition?

7 MR. SAIA: Objection.

8 A. As a general proposition, yes.

9 Q. Did you apply any of these
10 principles and practices in your evaluation of
11 Jacobs' conduct in this case?

12 MR. SAIA: Objection.

13 A. No, I did not.

14 Q. Have you ever worked as an
15 employee of OSHA?

16 A. No.

17 Q. Have you ever worked as a
18 consultant to OSHA?

19 A. No.

20 Q. Have you ever performed services
21 for OSHA?

22 A. No.

23 Q. Have you ever been trained by
24 Department of Labor OSHA lawyers?

25 A. No.

1 Q. Have you ever been trained by
2 anyone from OSHA in OSHA's policies and procedures
3 with regard to violations of its safety standards?

4 A. No.

5 Q. Have you ever testified before the
6 Occupational Safety and Health Review Commission?

7 A. No.

8 Q. Have you ever taught anywhere on
9 the subject of the policies and procedures for law
10 enforcement for OSHA?

11 A. No.

12 Q. Have you ever published on the
13 subject of the policies and procedures -- strike
14 that.

15 Have you ever published on the
16 subject of the policies and procedures that OSHA
17 follows to enforce the law?

18 A. No.

19 Q. Have you ever advertised as having
20 competency as an OSHA expert?

21 MR. SAIA: Objection.

22 A. No.

23 Q. Have you ever been qualified in
24 any court as an expert in the policies and
25 procedures followed by OSHA?

1 MR. SAIA: Objection.

2 A. Not to my knowledge.

3 Q. Are you an expert in the policies
4 and procedures of OSHA for deciding when and why
5 to issue citations for violations of safety
6 standards?

7 MR. SAIA: Objection.

8 A. Well, to the same extent that you
9 or I or anyone else would be able to review the
10 regulations, I think we all can come to
11 conclusions and opinions as to what are the
12 requirements that have been established by OSHA.
13 So, yes, I believe anyone who has been involved in
14 evaluating OSHA requirements, can testify to that.

15 Q. Have you ever advertised services
16 related to construction safety management in any
17 trade journals?

18 A. No.

19 Q. Have you ever published in any
20 journal or anywhere on the subject of construction
21 safety management?

22 MR. SAIA: Objection.

23 A. No.

24 Q. Have you ever taught any course
25 limited to the subject of construction safety

1 management?

2 A. No.

3 Q. Have you ever attended any college
4 or university course devoted exclusively to the
5 principles and practices of construction safety
6 management?

7 MR. SAIA: Objection.

8 A. No.

9 Q. Are you a member of any
10 construction safety management societies?

11 A. No.

12 Q. Are you a member of the American
13 Society of Safety Engineers?

14 A. No.

15 Q. Are you a member of the National
16 Safety Management Society?

17 A. No.

18 Q. How about the National Safety
19 Council?

20 A. No.

21 Q. How about the Construction Safety
22 Institute?

23 A. No.

24 Q. Have you ever attended any
25 construction safety conference of any of these

1 construction safety management societies that we
2 just mentioned?

3 A. No.

4 Q. Can you tell me the industry
5 safety authorities which established the industry
6 standard with regard to the steps that a
7 construction project manager should take with
8 regard to ensuring that workers on their job sites
9 are not seriously injured or killed?

10 MR. SAIA: Objection.

11 A. Read that question back again.

12 Q. Sure.

13 (Read back...

14 "QUESTION: Can you tell me the
15 industry safety authorities which
16 established the industry standard with
17 regard to the steps that a construction
18 project manager should take with regard
19 to ensuring that workers on their job
20 sites are not seriously injured or
21 killed?")

22 * * *

23 A. Well, if we're talking about this
24 particular contract, I think it is fair to say
25 that Jacobs Engineering is not responsible for the

1 safety of the workers that are involved in the
2 contract, other than their own workers and their
3 own sub-consultants who may be working under their
4 direction.

5 They have no authority nor
6 responsibility for safety of any workers on the
7 job site other than their own.

8 Q. Do you know where the standard for
9 safety in the construction industry is derived
10 from?

11 MR. SAIA: Objection.

12 A. I have no particular understanding
13 or knowledge as to how the standard was derived,
14 other than by saying that I think standards
15 typically are derived from experience involving
16 accidents or unsafe acts, that then promulgate new
17 directives that can assist in ensuring safety on
18 the worksite.

19 So it is, I believe it is, it is a
20 function of the industry to identify and attempt
21 to do what they can to abate unsafe practices.

22 Q. Would you agree that the standard
23 of care for safety in the construction industry is
24 adopted by standards -- strike that, I've got to
25 redo that one.

1 Would you agree that the standard
2 of care for safety in the construction industry is
3 derived from standards adopted by professional
4 organizations, would you agree with that
5 statement?

6 MR. SAIA: Objection.

7 A. Again, I am not familiar with that
8 so I can't necessarily agree, but it sounds
9 reasonable.

10 Q. Your expertise is crash
11 reconstruction, right?

12 MR. SAIA: Objection.

13 A. I am a professional engineer.
14 Part of my responsibilities are traffic accident
15 reconstruction. We also do other work in the
16 firm, but that is the majority of the work we do.

17 Q. When you formed your opinions in
18 this case, did you compare the conduct of Jacobs
19 to the principles and practices of construction
20 safety management established by industry safety
21 professional organizations?

22 MR. SAIA: Objection.

23 A. I compared their responsibilities
24 to the contract that they had with the New Jersey
25 Turnpike Authority, and as to these other

1 organizations that you are referring to I don't
2 believe unless they were adopted specifically by
3 the New Jersey Turnpike Authority that there would
4 be any responsibility for Jacobs to comply with
5 any of those other organizational standards.

6 Q. So, in your view the New Jersey
7 Turnpike Authority would be considered a safety
8 authority on this case; is that your view?

9 MR. SAIA: Objection.

10 A. Well, I believe that they are the
11 contracting agency. I believe that in their
12 regulations they've cited several references to
13 safety organizations.

14 But, to the extent that the New
15 Jersey Turnpike Authority is the organization that
16 is responsible for promulgating safety
17 requirements, I don't believe that is the case.

18 Q. One of the documents you reviewed
19 in connection with this case, was the Turnpike
20 Authority Health and Safety Plan requirements,
21 correct?

22 A. That is correct.

23 Q. And you agree that those plan
24 requirements state that accident prevention
25 procedures for the project shall be based on

1 industry standards?

2 MR. SAIA: Objection.

3 A. Well, I believe as a general
4 statement the New Jersey Turnpike Authority
5 required that the general contractor, Conti, was
6 responsible for the health and safety and to
7 comply with the requirements of their wsp.

8 Q. Maybe I will just ask it a
9 different way.

10 The health and safety plan
11 requirements state that accident prevention
12 procedures shall be based on industry standards.

13 Do you have any reason to disagree
14 that that is stated in there?

15 MR. SAIA: Objection.

16 A. No.

17 Q. And, do you have any reason to
18 disagree -- or strike that.

19 The document also states that
20 absence of an applicable standard or regulation,
21 does not preclude the contractor from providing
22 appropriate controls within a S-W-P, which I
23 believe is a safety work plan.

24 A. And, again, that refers to the
25 Conti requirement that they submit a health and

1 safety plan to the New Jersey Department of -- New
2 Jersey Turnpike Authority, and that, I believe
3 that is a fair statement.

4 Q. In its most simplest form, Jacobs'
5 role on the project was to see to it that Conti
6 did its job, correct?

7 MR. SAIA: Objection.

8 A. Did its job with respect to the
9 performance of the plans and specifications.

10 The mechanism or the manner in
11 which Conti did its job was of no responsibility
12 nor consequence as far as Jacobs was concerned.

13 There were plans and there were
14 specifications for the work that was to be
15 performed. To ensure that the work was being
16 performed in accordance with the contract, that
17 was Jacobs' responsibility.

18 Q. We'll get to that, I mean, I want
19 to try to keep this deposition orderly and I don't
20 want to jump around too much.

21 So I think the record would
22 disagree with your statement, but I don't want to
23 get into that now because I want to keep the
24 deposition in order.

25 Have you ever been qualified as an

1 expert in the principles and practices of injury
2 prevention?

3 MR. SAIA: Objection.

4 A. As a general statement I would say
5 no.

6 Q. Can you tell me all the elements
7 of a construction safety program?

8 MR. SAIA: Objection.

9 A. No.

10 Q. Would you agree with me that there
11 is no engineering question involved in the
12 question of responsibility for the injury in this
13 case?

14 MR. SAIA: Objection.

15 A. Using the word engineering, I
16 would agree that there is no engineering
17 responsibility discussed in that question. There
18 is no engineering responsibility, no.

19 Q. Since you are not an OSHA expert
20 and you are not a safety management expert, and
21 there is no engineering question involved, and you
22 are an engineer, how is it that your
23 qualifications give you the right to enlighten the
24 jury on how they should look at causation and
25 responsibility for injury prevention in this case?

1 MR. SAIA: Objection.

2 A. In this case we're addressing a
3 very limited issue, and the issue relates to the
4 responsibility of Jacobs Engineering in the
5 performance of their professional services to the
6 New Jersey Turnpike Authority.

7 As to whether or not they violated
8 any of the contractual requirements that they had
9 with the New Jersey Turnpike Authority,
10 contractual relationships, preparation of plans
11 and specifications, those are the types of things
12 that I've been involved in throughout most of my
13 engineering career.

14 I served in many municipalities as
15 well as being involved in cases involving
16 interpretation of plans and specifications. So,
17 besides preparation of plans and specifications,
18 and interpretation of plans and specifications, I
19 believe my experience over the last 30 years plus
20 of being a professional engineer, would enable me
21 to review plans and specifications, and determine
22 whether an entity was in fact in compliance with
23 those plans and specifications and contractual
24 requirements.

25 In this particular case, I am

1 addressing only the contractual requirements of
2 Jacobs with respect to their responsibilities to
3 the New Jersey Turnpike Authority, and as it may
4 relate to the safety certainly at the job site
5 while they had no active responsibility for the
6 safety of the workers that belonged to Conti, they
7 certainly had the right to maybe identify or see
8 an unsafe act and step in and correct it.

9 In fact, they even had the
10 authority to stop a job if necessary because they
11 observed an unsafe act.

12 But, they had no requirement by
13 plan, by specification or by contract to do any of
14 the things that we were just discussing with
15 respect to Conti's responsibility.

16 So, I believe my experience having
17 worked in this industry has -- allows me to
18 interpret plans, specifications and contracts.

19 Q. So essentially your role in this
20 case, boiled to its essence, is limited to whether
21 or not Jacobs violated its contract?

22 MR. SAIA: Objection.

23 Q. Is that correct?

24 A. As to the causation of this
25 accident, yes. That is correct.

1 Q. Just for the record, I will note
2 there is no breach of contract claim in this case.

3 In approximately how many cases
4 have you performed evaluations of the conduct of
5 an injured construction worker?

6 MR. SAIA: Objection.

7 A. I, I don't have a particular
8 understanding as to the number of cases that we've
9 been involved in work zone type accidents.

10 We keep track of our assignments
11 over the 30 years by numerical job numbers, and in
12 this case that was job number 6,588.

13 I would tell you that we've been
14 involved in many cases involving workers in
15 construction zones, many on behalf of the worker,
16 many on behalf of the entity that was responsible
17 for the injury. But, I cannot tell you number
18 wise. I just don't have a recollection.

19 Q. And your role in those cases,
20 would have been primarily if not -- strike that.

21 And your role in most if not all
22 of those cases, would have been by way of crash
23 reconstruction, that is to determine how the
24 incident happened, right?

25 MR. SAIA: Objection.

1 A. In most cases it would be to
2 determine how the accident happened, but it also
3 would relate to was there any negligence or
4 negligent by the parties involved.

5 Once we've determined how the
6 accident happened, then we look to determine
7 whether the causation of the accident was some
8 type of negligence or negligent on part of one or
9 more of the entities.

10 Q. So, basically by way of crash
11 reconstruction in those cases that you just
12 referred to, first you would determine how the
13 crash happened, and secondly who is at fault for
14 the crash, correct, boiled to its essence?

15 MR. SAIA: Objection.

16 A. Boiled to its essence I would say
17 that is correct.

18 Q. Do you know of any safety
19 authority that give guidance relative to how to
20 evaluate the conduct of a worker who was injured
21 on a construction project?

22 MR. SAIA: Objection.

23 A. Well, I am aware of afteraction
24 analysis that is performed. In fact, one was
25 performed in this particular case.

1 I believe Conti gathered not only
2 the Turnpike Authority, but also Jacobs and NAIK,
3 N-A-I-K, who was involved in the inspection of the
4 project for Jacobs. And, they evaluated the
5 causation, they evaluated responsibilities, they
6 evaluated what they felt were actions to be taken
7 while moving forward so as to prevent a similar
8 occurrence.

9 Q. Do you know of any safety
10 authorities in the field of construction site
11 safety that give guidance relative to how to
12 evaluate the conduct of a worker who is injured?

13 MR. SAIA: Objection; you can
14 answer.

15 A. Well, not particularly, but I
16 would say that OSHA has identified in their
17 responsibilities the advising of those entities
18 involved in the accident where they may have
19 fallen short in their administration of performing
20 safety at a particular project. And I think OSHA
21 would be the organization that in most cases does
22 deal specifically with worker safety.

23 Q. Do you know how OSHA considers the
24 behavior of workers when deciding whether or not
25 to allege violations of their standards?

1 MR. SAIA: Objection.

2 A. I think they do an overall
3 evaluation of the aspect, various aspects of the
4 accident, and attempt to identify what were some
5 shortcomings or failures on the part of all of the
6 involved, including the workers, if they weren't
7 wearing their proper safety equipment, if they
8 somehow violated requirements that as workers they
9 should have been watching out for their own
10 safety.

11 So, to the extent that I think
12 they evaluate not only the worker's responsibility
13 for their -- for the accident, but also the
14 employer and the workplace itself.

15 Q. Have you ever been qualified as an
16 expert with competency to evaluate the conduct of
17 the worker in the injury causation process?

18 MR. SAIA: Objection.

19 A. Again, I think it is part of the
20 many cases that we've been involved in where we do
21 evaluate the conduct of the worker that may have
22 been involved in an accident.

23 Q. What factors does OSHA consider
24 when evaluating the conduct of an injured worker?

25 MR. SAIA: Objection.

1 A. I can't give you factors, but I
2 would just say as a general rule they consider all
3 of the circumstances surrounding the worker's
4 actions as it may relate to the accident at hand.

5 Q. List for me all the factors that
6 you normally consider when evaluating the conduct
7 of an injured worker.

8 MR. SAIA: Objection; you can
9 answer.

10 A. Well, it depends upon the
11 accident. Certainly if it is a daytime accident
12 versus a nighttime accident there are different
13 requirements as to the type of protective
14 equipment that a worker be required to wear.

15 So, the kind of clothing that is
16 being worn. If it is the kind of accident where a
17 worker is not following the guidelines as
18 prescribed by their employer, that should
19 typically be identified in some type of a standard
20 or a requirement that the employer may have
21 published with respect to how their workers are
22 supposed to operate.

23 It is also a worker's
24 responsibility to be aware of their environment.
25 Their situational awareness is an important

1 aspect. Their ability to properly function in the
2 task, and if asked to perform something that would
3 be beyond their capabilities or beyond their
4 training, then it would be something that should
5 be considered as well.

6 In a particular case, such as a
7 work zone accident where a worker is in an active
8 work zone, it becomes important for them to always
9 be alert, for them to be aware of their
10 surroundings, and while there may be some
11 dereliction of that duty because of distraction or
12 because of some other factor, that would also be
13 taken into consideration.

14 So, those are the things I would
15 look at when I am looking at a worker's
16 responsibility for their own safety and their
17 responsibility for the causation of the accident.

18 Q. Did the worker violate any
19 specific safety instructions in this case?

20 MR. SAIA: Objection.

21 A. I don't have particular knowledge
22 of any of their safety instructions, other than to
23 say that there was some evidence certainly in the
24 police report that the worker was involved in
25 lighting a cigarette and when he had his back

1 toward the approaching vehicle.

2 And, so to the extent that he was
3 not attentive to the work zone environment where
4 he was working, I would say that would be a
5 contributory factor for this accident.

6 Q. Was there any safety rule against
7 smoking on this job site?

8 MR. SAIA: Objection.

9 A. I am not aware of any rule against
10 smoking, but certainly I would be aware of smoking
11 in an area where active construction is going on
12 and you are not being attentive to the surrounding
13 vehicle movements.

14 Q. But was there a rule against
15 smoking on this job site?

16 A. I am not aware of it.

17 Q. And did the worker violate any
18 specific safety instructions to your knowledge?

19 MR. SAIA: Objection; you can
20 answer.

21 A. Well, we have to look through the
22 safety requirements that Conti has established for
23 their workers. And then we can make a
24 determination as to whether he was standing in an
25 area where he shouldn't have been at the time.

1 Q. But as you sit here today, having
2 reviewed all the documents in this case, are you
3 aware of any specific safety instructions that the
4 worker violated in connection with this incident?

5 MR. SAIA: Objection.

6 A. Under the Conti accident slash
7 incident report that was prepared by the
8 supervisor for Conti, Mr. Craig Errigo,
9 E-R-R-I-G-O, it does list with respect to the
10 employees, that they are required to maintain an
11 acceptable distance from all vehicles, and they're
12 required to make eye contact with the drivers of
13 all vehicles. And employees will be required to
14 avoid backing up when possible, deals with the
15 other employee which is Mr. Barbosa.

16 So, to the extent that I believe
17 they talk about Mr. Silva not maintaining eye
18 contact with the driver, and not being an
19 acceptable distance from all vehicles, yes, they
20 do talk about some of his involvement in this
21 accident.

22 Q. Well, I have that accident report
23 because I know you are reading from your report.
24 We have it marked as Olcott-12. Can you take a
25 look at that report and tell me exactly what you

1 are referring to, and then we'll ask how can a
2 worker possibly maintain eye contact with the
3 driver when the worker is instructed to work
4 behind the vehicle picking up trash.

5 A. I don't know if this is the
6 particular document that I referred to. There
7 were ten corrective action items and I am looking
8 for them and I don't see them on this report.

9 Q. That is the -- I mean, I don't
10 want to quibble here. Why don't we go off the
11 record and try to iron this out.

12 (Pause.)

13 MR. CLARK: We're back on
14 unless anyone...

15 Q. Okay, so we're back on the record.
16 So, in answering the previous
17 question you are on page 16 and 17 of your report,
18 is that right?

19 A. That is correct.

20 Q. So, we have marked as Olcott-12 an
21 accident slash incident report. And would that be
22 the incident report, the first one that you are
23 referring to on page 16 of your report, which has
24 the two numbered bullet points?

25 A. That is correct.

1 Q. Is there anything in that document
2 that states that the worker violated specific
3 safety instructions?

4 A. No, I don't believe so. And,
5 again, when we are talking about worker we're
6 talking about the pedestrian that was struck, as
7 opposed to the driver who was also a worker.
8 Because it does talk about violations if you will
9 of Conti's safety requirements with respect to
10 Mr. Barbosa.

11 Q. That is correct when I said the
12 worker in that question, I was referring to the
13 injured worker.

14 MR. SAIA: Mr. Silva.

15 A. Yes, that is correct.

16 Q. And in fact, on Olcott-12 there is
17 a section that asks for what the immediate cause
18 and contributing factors were, correct?

19 A. That is correct.

20 Q. What are the two things checked
21 off?

22 A. Equipment and environment.

23 Q. And there is a box for Personnel,
24 and there is another box for Unsafe Act. Correct?

25 A. Yes, that is correct.

1 Q. And neither of those two boxes are
2 checked, correct?

3 A. That is correct.

4 Q. And the Additional Comments
5 Section also note that the injured worker was
6 wearing all of his required personal protective
7 equipment at the time of the incident, including
8 high visibility reflective clothing; states that,
9 correct?

10 A. Yes, that is correct.

11 Q. Now, the other document that you
12 referred to on page 16 and 17 of your report, is
13 the accident review slash lessons learned document
14 which is marked as Olcott-4. Correct?

15 A. Yes.

16 Q. Now, in that document it says that
17 the root cause of the incident -- strike that.

18 It says the immediate cause of the
19 accident was that Barbosa did not get out of his
20 vehicle to determine where Mr. Silva was located.
21 Right?

22 A. Yes.

23 Q. And, it says the second root cause
24 of the incident listed in the bullet is the
25 foremen's truck Barbosa was driving contains a

1 took box which may have hindered his view of Mr.
2 Silva. That is what it says, right?

3 A. Yes.

4 Q. And it also states that another
5 root cause of the incident was that the truck did
6 not have a back-up alarm which would, which could
7 have warned Silva in time to move out of the way.
8 It states that as well, right?

9 A. Yes.

10 Q. Now there is nothing in here that
11 specifically says Silva violated a specific safety
12 instruction, right?

13 MR. SAIA: Objection. You can
14 answer.

15 A. But only to the last root cause is
16 a contributing factor was Mr. Silva's proximity to
17 the vehicle that was backing up.

18 Q. We can talk about that, but that
19 doesn't say that he violated a safety instruction,
20 doesn't say that, right?

21 A. It doesn't specifically say that,
22 but, again, if you go into the next page where it
23 talks about corrective measures, it does say that
24 he is to be making eye contact with all drivers,
25 and when he's walking near a vehicle he should

1 maintain acceptable distance. Maintain acceptable
2 distance from immediate danger.

3 So, those are the two things
4 relating to Mr. Silva, making eye contact with the
5 driver and staying an acceptable distance away
6 from possible danger relating to a vehicle.

7 Q. Did you agree with the corrective
8 measures in this document?

9 MR. SAIA: Objection.

10 A. Well, I don't know whether it's
11 ever been determined that a back-up alarm in this
12 particular case as a corrective measure, could
13 have warned Mr. Silva in time. It is possible.
14 But there was no requirement for a backup alarm.

15 But that being said, I am aware of
16 many accidents where backup alarms were involved,
17 were operating, and workers were still backed
18 over.

19 Q. But that is antidotal, right?

20 A. In what way?

21 MR. SAIA: Objection.

22 A. If I am not mistaken, one of the
23 references that was offered by one of the experts
24 that was working on your behalf, talked about
25 backup alarms, and that there still were backup

1 accidents involving workers that had backup
2 alarms. So, you can't say that if it has a
3 back-up alarm it automatically will eliminate
4 backup accidents.

5 Q. I don't think anyone is saying
6 that. We're certainly not saying that.

7 That is kind of sort of why I
8 started the deposition with the safety merit badge
9 book, in the sense that just boiling the
10 principles of safety down to its essence, which I
11 think the boy scouts do rather well.

12 So, you agree that safety is about
13 taking precautions, stopping injury or loss before
14 it happens; you agree with that general safety
15 principle?

16 MR. SAIA: Objection, asked and
17 answered.

18 A. Yes.

19 Q. So, OSHA requires when there is an
20 obstructed view, they require a spotter or a
21 backup alarm; right?

22 A. No.

23 Q. No? Okay.

24 A. They require a spotter. And
25 obstructed view, they talk about a mechanical --

1 let me see if I can get the right words.

2 MR. CLARK: Is it okay if I
3 withdraw that question so we can just
4 move forward?

5 MR. SAIA: Sure.

6 Q. So, I will withdraw the question
7 just so we can move forward.

8 A. Okay.

9 Q. I just want to try to keep it on
10 track so that we can go more expeditiously. Trust
11 me, we'll come back to that stuff.

12 Do you consider yourself a safety
13 professional, that is one who has dedicated his or
14 her life to worker injury prevention?

15 MR. SAIA: Objection. You can
16 answer.

17 A. No.

18 (WHEREUPON a photo was
19 received and marked as Exhibit Desch-8
20 for identification.)

21 Q. I want to talk about the part of
22 your report or your opinion where you said
23 something about they could see the mirror,
24 therefore it is not obstructed, something some
25 that effect. Can you tell us what that opinion

1 is?

2 A. Sure.

3 Q. So, it is page 57 of your report
4 number 10?

5 A. Yes, that is where we talk about
6 obstructed view. But in the report we talk
7 further about what is considered an obstructed
8 view.

9 But, on opinion number 10 --

10 Q. Yes.

11 A. -- it says a blind spot differs
12 greatly from an obstructed view. All vehicles
13 have blind spots. The State Police photos
14 captured a view from the rear that confirmed that
15 there is no obstructed view since the view of the
16 rear-view mirror is completely unobstructed.

17 MR. SAIA: Page 51.

18 Q. So let's focus on -- you can look
19 at 51 if you want to read it to yourself.

20 A. Sure.

21 Q. But I would like you to, once you
22 are done doing that, if that makes you more
23 comfortable to read it to yourself, but once you
24 are done doing that I'd like to go back to page 57
25 and opinion number 10.

1 A. Okay.

2 Q. Are you ready?

3 A. Yes.

4 Q. All right. So, I have the police
5 photos here. They were marked as Olcott-6, at
6 least some of them were. And, page 3 from
7 Olcott-6, you agree that that is one of the State
8 Police photos.

9 A. Yes.

10 Q. So we've marked that separately as
11 Desch-8. Do you see that?

12 A. Yes.

13 Q. All right. Is this the photo that
14 supports opinion number 10 on page 57?

15 A. Yes.

16 Q. All right. So can you explain
17 that, what you meant there in terms of the photo
18 captured a view from the rear that confirmed there
19 is no obstructed view since the view of the
20 rear-view mirror is completely unobstructed.

21 What did you mean by that, and
22 feel free to work off Desch-8 photo in explaining
23 that.

24 A. Well, I think you can see that
25 there is a tire that is mounted in the bed, and

1 there are also some tools and the handles of which
2 you can see do obstruct portions of the mirror --
3 of the window, but the term obstructed view refers
4 to a completely obstructed view where there is no
5 opportunity to see at all.

6 An example would be in a truck
7 such as the stake body truck where the front
8 portion of the bed has a large significant panel
9 that would prevent movement forward of objects
10 and/or material that is being carried on the bed
11 from moving in to the occupant compartment. Well,
12 you can't see through that, that is an obstructed
13 view.

14 So, this is a partially-obstructed
15 view, but according to the definitions of
16 obstructed view, this would not qualify. And,
17 again, the reason is because I can clearly see the
18 rear-view mirror. A driver in that position would
19 clearly be able to look out the rear-view mirror
20 without any obstructions. And beyond that the
21 driver would clearly be able to turn their body
22 and their head and their shoulders and look
23 directly out that window that would of course
24 eliminate any obstruction to view. So, that is
25 the opinion that we raise in number 10.

1 Q. So, I think in your sworn
2 testimony there you just said that you agree that
3 there is at least a partially obstructed view out
4 the back window, is that correct?

5 MR. SAIA: Objection.

6 A. There could be. Which can be
7 overcome by a driver who now turns their head as
8 required by their driver manual, and any other
9 reasonable competent manual or regulation that
10 would tell you that you have additional
11 responsibility besides just looking in your
12 mirror; you have to look and turn your head and
13 see if you can see something directly.

14 And I can see that if I did that
15 in this particular case, I would clearly be able
16 to see out the back window if I turned my head.

17 Q. Let me just go off the record for
18 a second.

19 (Pause.)

20 Q. So, and I don't want to you know,
21 bicker or argue as to what you said on the record
22 because it is on the record.

23 But I thought in that long sort of
24 narrative answer that you gave to the previous
25 question, you said that there is tires and a tool

1 and at least a partially obstructed view.

2 A. Yes.

3 MR. SAIA: Objection.

4 Q. Sorry, go ahead, is that correct?

5 MR. SAIA: Objection.

6 A. That is correct. And, again, if
7 you look at the OSHA definition, page 51, I do
8 state that they define an obstructed view to the
9 rear as anything that would block out or interfere
10 with the overall view of the operator, and that
11 clearly is not the case here.

12 Q. Okay. Well, the record is already
13 clear that you are not an OSHA expert and do not
14 hold yourself out as an OSHA expert; correct?

15 MR. SAIA: Objection.

16 A. That is correct, but I can read
17 the definition as can you.

18 Q. One of the documents in your file
19 which we marked as Desch-5 is a 1987 letter of
20 interpretation from OSHA. Correct? (Indicating.)

21 A. Yes.

22 Q. Okay. So, it is your opinion that
23 as long as the driver can see something out the
24 rear view window -- or strike that.

25 So, it is your opinion that OSHA's

1 reference to obstructed view or the standard
2 refers to only a completely obstructed view --

3 MR. SAIA: Objection.

4 Q. -- and that a partially obstructed
5 view does not count; is that correct?

6 MR. SAIA: Objection.

7 A. According to their definition that
8 is correct. It is an overall, that means entirely
9 obstructed view.

10 Q. Okay.

11 A. And the example I gave of that
12 headache board if you will on a flatbed that will
13 completely obstruct the view except through the
14 outside rear-view mirrors.

15 MR. CLARK: Want to take a
16 five-minute break?

17 * * *

18 (Break taken.)

19 * * *

20 Q. So going back to opinion number 10
21 on page 57.

22 A. Yes.

23 Q. So, you say there is no obstructed
24 view since the view of the rear-view mirror is
25 completely unobstructed. That is what it says,

1 right?

2 A. That is correct.

3 Q. Now, the view of the rear-view
4 mirror is completely unobstructed from the
5 perspective of the person that took this photo.
6 Correct?

7 A. That is correct.

8 Q. And let's do this. On Desch-5,
9 and here is what we'll do, we'll do it in pencil.
10 That way -- we'll initially do it in pencil.

11 Why don't you put an arrow
12 pointing up of the approximate area where you
13 would estimate the person taking this photo to
14 stand.

15 MR. SAIA: Objection.

16 Q. So...

17 A. You can't see along the driver
18 side of the truck, and you certainly can't see
19 entirely along the inside of the box that is on
20 the driver side. So it certainly would be
21 somewhere in this vicinity where this person was
22 standing. Of course you are looking from here and
23 you have a view that goes all the way to the left
24 and you have a view that goes all the way to the
25 right.

1 So, this is the range of views
2 from where this person was standing. (Indicating.)

3 MR. SAIA: Pete, are you still
4 with us?

5 MR. BOUTON: I am.

6 MR. SAIA: Okay.

7 Q. So this dot at the bottom of the
8 photo, is your best estimation of where the photo
9 would have been taken from?

10 A. Yes.

11 Q. I am going to write on here to
12 indicate that. I am going to circle the circle a
13 little darker with a blue pen, and I am going to
14 write photo taken here with an arrow to that blue
15 dot. (Indicating.) Do you see that?

16 A. Yes.

17 MR. CLARK: Now, let's go off
18 the record for a second.

19 (Pause.)

20 (WHEREUPON New Jersey State
21 Police Investigation Report is marked as
22 Exhibit Desch-9 for identification.)

23 Q. So, back on the record. Do you
24 recall the testimony where Barbosa said that he
25 was about 80 to 100 feet away and that he started

1 backing up in a slow and controlled fashion less
2 than five miles an hour?

3 MR. SAIA: Objection. Are you
4 referring to the report or his
5 deposition?

6 MR. CLARK: Deposition.

7 A. Yes, the deposition said that
8 distance, but I think in the report it was only 20
9 feet, but that he did talk about backing up in a
10 slow fashion. He gave an estimate of I think five
11 miles per hour.

12 Q. Or less, I thought it was less
13 than five.

14 A. Could be, four or five he said, he
15 was backing up at four or five.

16 Q. I probably have the exact quote.

17 MR. SAIA: Page 44.

18 Q. So, at Barbosa's dep at pages 15
19 or 43, he said he was in a slow and controlled
20 fashion less than five miles per hour.

21 Do you have any reason to dispute
22 that he testified to that, being less than five
23 miles an hour?

24 A. No. He estimated four to five on
25 page 44 of his deposition.

1 Q. Okay. Now let's just read from
2 Olcott-3 here with me, please, which is the
3 incident report, page one. It says, Manuel placed
4 the vehicle in -- strike that. It says that after
5 the impact, Manuel placed the vehicle in park and
6 exited the vehicle. Do you see that?

7 A. Yes.

8 Q. Upon inspection Joao, the injured
9 worker, was discovered underneath the passenger
10 side of the vehicle just in front of the right
11 rear tire with his head and part of his chest
12 extending out from underneath the vehicle.

13 Is that what that says?

14 A. Yes.

15 Q. So, so can we, can we put an arrow
16 here saying worker found here? (Indicating.)

17 MR. SAIA: Objection, you can
18 answer.

19 Q. Would that be fair?

20 A. Well, again, depending upon his
21 height, I would say worker was found between the
22 center of the vehicle and the right side partially
23 sticking out.

24 I think the police report shows
25 the diagram which may or may not be very accurate.

1 But I think it showed a representation at least.

2 Q. That is pre accident.

3 A. It is hard to see.

4 MR. SAIA: Also looking at
5 4296.

6 Q. Okay, good.

7 A. Uh-huh.

8 MR. CLARK: All right, so let's
9 just mark some things, please.

10 (WHEREUPON a New Jersey State
11 Police Vehicle Report was received and
12 marked as Exhibit Desch-10 for
13 identification.)

14 (WHEREUPON a December 11, 2013
15 statement was received and marked as
16 Exhibit Desch-11 for identification.)

17 (WHEREUPON a daily log was
18 received and marked as Exhibit Desch-12
19 for identification.)

20 (Pause.)

21 Q. All right, we're back on the
22 record. We've marked a number of exhibits, and
23 what we tried to do basically off the record is to
24 talk informally about the final resting point of
25 the worker, injured worker.

1 In any event, we're looking at
2 Desch-10. The second page has a diagram, do you
3 see this?

4 A. Yes.

5 Q. And, it shows in the diagram
6 pedestrian number 1 final rest.

7 A. Yes.

8 Q. And that appears that his head is
9 near the rear passenger tire, correct?

10 A. But in front of, forward of,
11 between the front right tire and the rear right
12 tire.

13 Q. And it appears the rest of his
14 body is outside of the vehicle as opposed to under
15 it, correct?

16 A. Yes.

17 Q. Now, we've marked as Desch-12
18 another exhibit, and this looks like a Conti
19 subcontractor daily log which is essentially a
20 report of the incident.

21 And there it says that Joao and
22 Pedro start walking back to clean up, looked
23 behind, didn't see anything and heard a bump.
24 Pedro yelled to Manny, stop. Under passenger side
25 of truck in front of rear -- it says -- strike

1 that. It says Joao is under passenger side of
2 truck in front of rear tire.

3 Do you see that?

4 A. Yes.

5 Q. And then the next page on Desch-12
6 which was also marked as Olcott-17, there looks
7 like a little diagram, and that would appear to
8 show the head near the tire and the rest of the
9 body on the outside of the vehicle as opposed to
10 under it, correct?

11 A. Well, again, it is only a
12 rectangle. I don't know if you can tell from the
13 rectangle which side is the head and which side is
14 the body because it is not consistent with what is
15 marked as Conti --

16 Q. We're going to get to that, trust
17 me, we're going to get to that. I am doing the
18 ones showing him outside the vehicle and then I am
19 going to go to the other evidence.

20 A. But, again, you are trying, you
21 are trying to suggest that this particular 04293
22 says that the head was in one direction or the
23 other. It is just a rectangle. You can't tell
24 from that diagram anything about his orientation.

25 Q. But assuming the rectangle

1 represents his body, it looks like a good part of
2 the rectangle is outside the vehicle as opposed to
3 under it, correct?

4 MR. SAIA: Objection.

5 A. I would say so, more than half of
6 it is outside.

7 Q. Right. Then there is another
8 diagram included within Desch-12, Conti 04296
9 which appears to flip it with the head on the
10 outside and the body underneath the vehicle. Do
11 you see that?

12 A. Once, again, you are suggesting
13 that the other diagram that we were looking at,
14 has any representation of where the head and the
15 body are. It does not. It is a rectangle.

16 This is the only one that shows a
17 head, arms and a body and feet. Or legs. And
18 this one is consistent with the narrative that has
19 been written regarding how he was found with his
20 head and part of his chest extending out from
21 underneath the vehicle.

22 Q. You said with his head and part of
23 his chest extending out from underneath the
24 vehicle?

25 A. Yes.

1 Q. Olcott-12, page one, it says that?
2 MR. CLARK: He's looking at
3 Olcott-3.

4 Q. That also says it, which appears
5 to be another incident report. Okay.

6 Now police reports don't always
7 get it right, correct?

8 MR. SAIA: Objection.

9 Q. You agree with that in your many
10 years of doing this?

11 A. I have seen where there have been
12 some errors in some portion of a police report,
13 certainly.

14 Q. And in this case the police
15 weren't actual witnesses to anything; they came
16 upon the scene after. Right?

17 MR. SAIA: Objection.

18 A. They did come upon it after, yes.

19 Q. There is also a reference in the
20 police report, page 5 of 6 which we marked as
21 Desch-9, that the worker was struck in the middle
22 portion of the rear of the vehicle. You remember
23 reading that, right?

24 A. Yes.

25 Q. But as you sit here, do you know

1 actually where he was struck?

2 I mean, there seems to be some
3 evidence that he was struck on the right rear
4 passenger side. There is another statement in the
5 police report that he was struck in the middle.

6 And we do know, and I don't think
7 it is disputed, that he was found, his final
8 resting position was in the right rear portion.
9 So the question is, basically do you know actually
10 where he was struck as you sit here?

11 MR. SAIA: Objection.

12 A. Well, I don't believe that they
13 ever identified any particular evidence on the
14 vehicle that would indicate where he was struck.

15 But I know from Mr. Silva's own I
16 believe testimony as opposed to maybe the witness
17 who observed him, they saw him or he indicated
18 that he was hanging on to the back of the truck
19 and I think they mentioned the hitch which is in
20 the center of the truck.

21 As the truck was backing up, he's
22 hanging on. So that would suggest to me that his
23 body is primarily underneath as he's hanging on
24 and it is dragging him backward, and at some point
25 he lets go and it runs over him.

1 Q. If that is how it happened, how
2 would he be found near the wheel on the right rear
3 passenger side based on your experience and
4 everything?

5 A. Well, again, there is no way that
6 we're going to be able to determine how he rotated
7 underneath.

8 We only know how he was observed
9 to be standing behind the middle of the truck, we
10 know that there was some evidence that he hang
11 on -- he hung on to the back of the truck, and we
12 know where he comes to rest.

13 So, the truck may or may not have
14 been backing in a straight fashion. I think you
15 look at a diagram and you can see that it is
16 somewhat angulated so maybe he was in the process
17 of turning somewhat as he was backing? It is
18 possible.

19 Q. Is it also possible that he could
20 have been struck on the right rear section near
21 the tire where he was found at the final resting
22 point?

23 MR. SAIA: Objection.

24 A. Again, there is -- the
25 possibilities are endless. But where he was I

1 think observed by one of the witnesses to be
2 struck, is more consistent with being in the
3 middle of the truck.

4 Q. But where, are you able to
5 pinpoint that in the record where a witness
6 actually said he was struck in the middle?

7 I mean, we see it in the narrative
8 part but I don't see it in any of the witness
9 statements.

10 We've marked as Desch-1 Pedro
11 Purificaco's witness statement, and he appears to
12 be the only actual eyewitness to the striking.

13 And actually his report says, was
14 not looking in the direction of the truck.
15 Instead he heard the noise, and when he turned
16 around and saw Silva under the back end of pickup
17 truck while it was moving in reverse. And then he
18 shouted to Manny to stop. Pickup truck stops. I
19 am paraphrasing. And he went to aid Joao Silva at
20 the rear passenger side of the vehicle.

21 Worker head was between tire and
22 wheel housing.

23 That is really the only eyewitness
24 account, right, Desch-11?

25 MR. SAIA: Objection. You are

1 referring off the police report for the
2 statement of witnesses?

3 MR. CLARK: But I think, I
4 think Purificacao is the only eyewitness
5 to the actual -- even he's not an
6 eyewitness to the extent he didn't see
7 the impact, he saw the immediate
8 aftermath.

9 MR. SAIA: You have Barbosa.

10 MR. CLARK: Barbosa testified
11 he didn't see him, he never saw him.

12 MR. SAIA: Yeah, but it's
13 inconsistent with the police report
14 itself.

15 MR. CLARK: Correct.

16 Q. So, Mr. --

17 A. I am just looking for the area
18 where it was described that he was hanging on to
19 the back.

20 This is one area, but I saw it
21 somewhere else as well. But where he stopped to
22 light a cigarette, he heard something coming
23 towards him. The rear middle portion of the Conti
24 pickup truck then struck him. He grabbed ahold of
25 whatever he could, losing his grip and being

1 dragged under the truck sustaining severe injury.

2 Again, this is the police report
3 but there was an actual witness statement I
4 believe that confirmed that.

5 Q. The statement, the statement in
6 the police report, to that effect that he was
7 struck in the center, you don't know where that
8 came from, though, do you? I mean, the only
9 witness statement I am seeing is Desch-11.

10 MR. SAIA: Objection.

11 A. I don't know if, and, again...

12 Q. You are saying there is a version
13 from the worker himself in his deposition, I
14 guess, right? I am just trying to --

15 A. Whose statement was that? Is this
16 Pedro's?

17 Q. Just what exhibit are we looking
18 at?

19 A. This is Desch-11.

20 Q. Just for the record, as far as I
21 understand, that is the only eyewitness statement
22 that there is in the case. I could be wrong, but
23 that is my understanding for whatever it's worth.

24 MR. SAIA: And by written
25 statement, you are referring to a written

1 statement as by the individual himself as
2 opposed to the police officer taking a
3 statement?

4 MR. CLARK: Right, as opposed
5 to --

6 THE WITNESS: Or Conti taking a
7 statement.

8 MR. CLARK: Right. With regard
9 to someone who actually saw it.

10 Let's go off the record for a
11 second.

12 (Pause.)

13 MR. SAIA: Back on the record.
14 I am only commenting because the police
15 report says that they spoke directly with
16 Mr. Silva and Mr. Barbosa and Pedro.

17 MR. CLARK: But, we're not
18 arguing, we're just trying to sort out
19 the record. It can't be Barbosa because
20 he said he never saw him, so we know it
21 is not him.

22 MR. SAIA: Well, that is his
23 testimony in deposition.

24 MR. CLARK: That is true, but
25 that is why I am asking the witness while

1 nailing it down, in the police report
2 narrative...

3 MR. SAIA: Off the record.

4 (Pause.)

5 MR. CLARK: Back on the record.

6 I am looking at page 4 of 6 of the police
7 report marked as Desch-9, and the officer
8 gives his sum and substance of his
9 discussion with Pedro Purificacao at the
10 Conti construction yard. And, that does
11 not say that he was hit in the center of
12 the vehicle.

13 And then the reference on page
14 5 of 6 of the report where it says as he
15 did, he heard something coming towards
16 him, period. The rear middle portion of
17 the Conti pickup truck then struck him.

18 MR. SAIA: Sounds like it is
19 coming from Silva directly.

20 MR. CLARK: There is no, there
21 is no reference to who if anyone that is
22 coming from. In the beginning of the
23 paragraph he's just relating a
24 conversation with Manuel Barbosa at the
25 Conti construction yard.

1 It says, in the course of
2 being struck, his hardhat fell off his
3 head and was found under the vehicle
4 crushed toward the front-end. After the
5 vehicle came to a stop, Joao was found
6 underneath the truck with his head and
7 upper body being wedged between the right
8 side leaf springs and the right rear
9 tire. His body was directly underneath
10 the truck with his head facing in a
11 southerly direction. And then assistance
12 was rendered.

13 Q. All right. So, Mr. Desch, based
14 on us having summarized this and reviewed things,
15 can you tell us, do you know where he was struck,
16 can you tell within a reasonable degree of
17 probability?

18 MR. SAIA: Objection, you can
19 answer.

20 Q. And if so, what exactly is it
21 based on?

22 A. Well, I think it is based upon an
23 eyewitness who had observed the impact. His
24 description being that it was toward the center of
25 the truck. His witness -- the witness also

1 indicated that as Mr. Silva fell down, he grabbed
2 for a portion of the truck, grabbed on to the
3 hitch, but lost the ability to maintain that
4 control and then the truck went over him.

5 Q. And what is the name of that
6 witness that you just referred to?

7 A. Well, we're talking about a couple
8 renditions, and part of it is as mentioned in the
9 Conti report.

10 Q. So I am just trying --

11 A. Okay.

12 Q. Sorry, just so the record is
13 clear, I am just trying to be precise here. I
14 want to go witness by witness that said what you
15 just referenced. Because you said there was a
16 witness. And I just want to try to pinpoint
17 exactly the name of that witness and what that
18 witness said.

19 A. I believe it is witness Pedro
20 Purificacao.

21 MR. CLARK: And, just for the
22 record, it is Purificacao,
23 P-U-R-I-F-I-C-A-C-A-O.

24 Q. And can we pinpoint in the record
25 where Purificacao gave that rendition that you

1 just stated?

2 A. I, I don't know whether in fact it
3 is Mr. Purificacao's rendition, but in the
4 description of the incident it talks about the
5 employees Silva and Purificacao were walking
6 south.

7 And so that description I believe
8 comes from an interrogation by whomever filled out
9 this report, and I believe it was the supervisor
10 Mr. Errigo.

11 Q. Now, Errigo is not an eyewitness
12 as far as you know, right?

13 A. He's not.

14 Q. Now you are reading off Olcott-3.

15 A. Yes.

16 Q. Where in Olcott-3 does it say that
17 he was struck in the middle portion of the rear of
18 the vehicle?

19 MR. SAIA: Objection to form.

20 Answer.

21 A. If you go to this exhibit which I
22 don't see marked here, but it must be marked...

23 Q. Hold on, let's just do it this
24 way, let's stick with Olcott-3 just so we can be
25 precise.

1 A. All right.

2 Q. In Olcott-3 does it say anywhere
3 in there that the worker was struck in the middle
4 portion of the rear of the vehicle?

5 A. No. It just says that he was
6 struck by the vehicle and knocked down.

7 Q. Right. And then the second
8 document you want to look at, was Olcott-12,
9 incident report. So does it say anywhere in there
10 that he was struck in the middle of the rear of
11 the vehicle?

12 A. Only to the extent that it
13 discusses how Mr. Silva made an attempt to grasp
14 the hitch as it approached from behind him.

15 Now, the hitch is right in the
16 center of the pickup truck. So in order to grasp
17 the hitch, that would suggest to me that as he was
18 falling down he's grabbing what is the closest
19 thing to him, and it is the hitch.

20 So, if it is in the center of the
21 vehicle, that is where I believe he was likely
22 standing. I don't see, though, in this particular
23 report where it talks about being struck in the
24 center.

25 Q. All right. But, what is the

1 width, approximate width of the rear of the
2 vehicle?

3 A. I don't have that in my report,
4 but I would say it is somewhere around six, six
5 feet, six and a half feet.

6 Q. So, if it is about six feet, then
7 the hitch will be about three feet from the two
8 edges of the vehicle. Correct?

9 A. Clearly somewhere between three
10 and three and a half feet.

11 Q. So the worker clearly could have
12 reached the hitch if he's standing near the rear
13 passenger tire or somewhere in that area. He
14 doesn't have to be standing exactly at the hitch
15 area to reach the hitch. Correct?

16 MR. SAIA: Objection.

17 A. I think in the time that it would
18 take for him to be -- to turn around and realize
19 he was -- the truck was approaching, and then to
20 be struck as he's falling, I think he's grabbing
21 for the nearest thing. So if it is the hitch,
22 he's right in the middle of the vehicle.

23 Q. But you don't know that he was
24 actually in the middle of the vehicle, you are
25 just sort of like surmising that?

1 MR. SAIA: Objection.

2 A. No. There was some of the
3 evidence we just reviewed where it talks about him
4 being struck in the middle of the vehicle. I
5 don't think we can find it right now, but there
6 was something that said the middle. I mean, there
7 is some basis for that in the record.

8 MR. SAIA: Do you have the
9 police report? Do you have the police
10 report we marked? Ha-ha.

11 MR. CLARK: Listen, I know
12 there is references, and you know, we're
13 now handing him the police report where
14 it indicates that, but that is what I am
15 trying to get at. I am trying to
16 determine like the admissible evidence on
17 that, so I am trying to find out exactly
18 where that statement is coming from.

19 Q. Let me ask the question simply.
20 Mr. Desch, is there any eyewitness that gave a
21 statement that said he was struck in the middle
22 rear of the vehicle that you have seen?

23 MR. SAIA: Objection.

24 A. I can't say that I remember that
25 being an eyewitness statement, no.

1 Q. And it appears the best eyewitness
2 is Mr. Purificacao, is that right, based on
3 everything you've seen?

4 A. That is correct, because he was
5 working with Mr. Silva, the two of them were
6 walking together, they were working together.

7 Q. And we've marked as Desch-11 the
8 statement that Purificacao gave in the case,
9 right? (Indicating.)

10 A. That is correct, but where was the
11 handwritten statement that he gave? I thought
12 there was a handwritten statement as well.

13 Q. Are you referring to this?
14 (Indicating.) That is the handwritten statement by
15 Barbosa.

16 A. Oh, by Barbosa, okay.

17 Q. I don't recall a handwritten
18 statement by Purificacao.

19 A. Okay, all right.

20 Q. So, in his written statement
21 Desch-11, does it say anywhere in there that he
22 was struck in the rear?

23 A. Well, the center of the rear is
24 what we're talking about.

25 Q. Correct.

1 A. We know he was struck by the rear.

2 Q. Yes.

3 A. Okay, no, I didn't see it there.

4 Q. Thanks. Is there anything, did you
5 want to say something?

6 A. No. Just again, it is, it is
7 referenced.

8 Q. I know it is referenced in the
9 police report, but I am trying to get the trial
10 admissible evidence. If we have to actually have
11 a witness testify to that, and it can't be the cop
12 because he wasn't there.

13 MR. SAIA: But he is a cop.

14 A. It could be the cop, he spoke to
15 the witness and that's what he wrote.

16 Q. That is up to the judge.

17 A. Okay.

18 Q. All right. But do you know what
19 witness this is coming from on page 5 of 6 of the
20 police report?

21 A. We only had one witness and that
22 was Pedro.

23 MR. SAIA: Objection.

24 A. So, I presume it what Pedro.

25 Q. But, it appears the sum and

1 substance of Pedro in the police report appears on
2 the previous page at 4 of 6, take a look, where he
3 references that he went to the construction yard,
4 the Conti construction yard, and spoke to Pedro,
5 and then he summarizes what Pedro told him. Do
6 you see that?

7 A. Yes.

8 Q. And is there anything in that
9 section of the report that indicates he was struck
10 in the middle portion of the rear?

11 A. Not in that particular area. It
12 is further on. This is an entire report. And,
13 while it doesn't say it in that portion, it does
14 say it later on.

15 Q. But this portion begins with,
16 summarizing that he spoke to Manuel Barbosa at the
17 yard. That is where that portion begins with,
18 right, in that paragraph?

19 A. But Manuel Barbosa never saw the
20 pedestrian, so I don't know how you could get he
21 was struck in the middle of the truck from Manuel
22 Barbosa's testimony.

23 Q. Right. I don't know either.

24 A. Nor would he be able, Mr. Barbosa,
25 would not be able to say that Mr. Silva stopped to

1 light a cigarette as he heard something coming
2 toward him.

3 Mr. Barbosa wouldn't be able to do
4 that. So I know we've jumped away from the very
5 first portion where you talk about how he spoke to
6 Mr. -- to Pedro, and then we jumped to the next
7 portion where he spoke to Mr. Barbosa. But then
8 there is still discussion of what was said.

9 Q. Okay. As you sit here today, do
10 you know if he was struck in the middle portion of
11 the rear or if he was struck by the right rear
12 tire where he was found?

13 MR. SAIA: Objection.

14 A. What do you mean struck by the
15 right rear tire? He was struck by some portion of
16 the rear of this pickup truck.

17 Q. I stand corrected. So as you sit
18 here, do you know if he was struck in the middle
19 portion of the rear, or the right rear portion
20 near the tire where he was found?

21 MR. SAIA: Objection, asked and
22 answered.

23 A. No, I don't.

24 Q. All right. Let's just go off the
25 record for a minute.

1 * * *

2 (Break taken.)

3 * * *

4 Q. Can you draw an arrow in this
5 vicinity pointing up as to -- and then I want to
6 indicate that at that arrow, worker found here.

7 MR. SAIA: Objection. Jerry,
8 the area in the photograph where he's
9 found isn't depicted in the photograph.
10 We can stipulate to that.

11 Q. Well, what I was getting at was
12 like an arrow about here pointing up and say
13 worker found -- well, worker found here, somewhere
14 in the right rear tire where he was found.

15 A. Well, why don't we look at the
16 photo that was from the side of the truck, then we
17 can point to it in there.

18 Q. Well, because I am trying to do it
19 on the same photo, and let's just ask then without
20 reference to that at this point.

21 Would the worker have been found
22 in this vicinity?

23 MR. SAIA: Objection.

24 Q. Or this vicinity?

25 MR. SAIA: Let me note my

1 objection.

2 I mean, there is three
3 different versions of where the body was
4 found.

5 The one has the picture, the
6 diagram from the outside, one with him
7 partially outside the truck and inside,
8 and then you have the police report which
9 says his head is between the tire and the
10 leaf spring, and the rest of his body is
11 underneath the truck.

12 So that is why I am objecting.
13 You are asking for him to extrapolate as
14 to those three different versions.

15 Q. Okay, all right, so let me ask it
16 a different way or something.

17 Can we agree that the worker what
18 found somewhere in this vicinity?

19 A. Well, you are pointing to a
20 picture that shows this vicinity being the back of
21 the truck behind the truck and that is not a fair
22 statement.

23 He was not behind the truck. He
24 was in front of, and there is no view of this
25 photo that would show where he was struck.

1 MR. SAIA: Struck or found?

2 THE WITNESS: Where he was

3 found.

4 Q. Was he found near the right rear
5 passenger tire?

6 A. Yes.

7 Q. And that is all I am really
8 getting at, and I just wanted to depict that on
9 this picture somehow, that you know, I just wanted
10 to kind of put an arrow toward the area where the
11 right rear passenger tire would be found.

12 A. Well, I can point an arrow toward
13 where the right rear passenger is, but it doesn't
14 necessarily depict where he was found, because you
15 can't see that in this photo.

16 So, if that is what you want, the
17 right rear tire would be in this area right here.
18 Right rear tire in this area.

19 Q. Okay, perfect. So, I am just
20 going to write on here in blue right rear tire, I
21 am just going to accentuate that arrow that you
22 just drew at the lower portion of the picture. And
23 we're going to note that as right rear tire area,
24 is that fair?

25 A. Toward right rear tire area,

1 because it certainly doesn't depict the right rear
2 tire. Looking toward the right rear, yes.

3 Q. Can we say toward right rear tire
4 area or...

5 A. Sure.

6 Q. Great. Now, I just want to go
7 back to your report, please, to page 57, paragraph
8 10.

9 A. Uh-huh, yes.

10 Q. And you say there is no obstructed
11 view since the view of the rear-view mirror is
12 completely unobstructed.

13 Do you see that?

14 A. Yes.

15 Q. And you are saying that the view
16 of the rear-view mirror is completely unobstructed
17 from where the photo was taken. Correct?

18 A. Correct.

19 Q. If the photo was taken from
20 another area, then the view of that mirror may in
21 fact be obstructed. Correct?

22 MR. SAIA: Objection.

23 Q. Depending on which area behind the
24 vehicle it was taken.

25 A. Well, when you say if the photo

1 was taken from another area, you are not referring
2 to Desch-8, because we know that the photo was
3 taken from approximately where we have that blue
4 dot. But if I moved further to the left, and
5 outside the truck, maybe ten feet to the left of
6 the truck, I may not be able to see that mirror
7 because now the tire may be in the way.

8 If I moved to the right of the
9 truck, maybe ten feet to the right of the truck, I
10 may not be able to see that mirror because maybe
11 those handles would be in the way.

12 But from the rear of the truck,
13 which is where we're now positioned, I can clearly
14 see that mirror, and I would believe I could see
15 that mirror the entire extreme from left to right
16 of this truck.

17 Only if I moved exterior left and
18 right, would I not be able to see the mirror. But
19 that again is only one way that you can see
20 something behind you is with the mirror.

21 Q. Looking in the mirror, would the
22 driver be able to see the tire?

23 A. I don't know.

24 Q. Looking in the mirror, would the
25 tire (sic) be able to see the tools sticking up?

1 A. Would the driver be able to see
2 the tools?

3 Q. Looking in the mirror.

4 A. In the mirror? It's possible,
5 yes.

6 Q. Well, anything is possible they
7 always say, right, so we're just trying to go on
8 probable.

9 A. Well...

10 Q. So the question is, the driver
11 sitting in the driver seat, looking -- strike
12 that.

13 The question is the driver sitting
14 in the driver seat of the vehicle, in this photo,
15 would the driver be able to see the tools through
16 the rear-view mirror?

17 A. Some of the handles of the tools
18 he would be able to see because of the angle that
19 he would be looking through the mirror; it may
20 reflect some of those tools.

21 He would not see the tire because
22 that is directly behind him and his angle looking
23 into the mirror would not reflect the tire.

24 Q. But what if the mirror is adjusted
25 to capture that field of view where the tire is,

1 would he then be able to see the tire?

2 MR. SAIA: Objection.

3 A. Well, now you are talking "ifs"
4 again. If the mirror was not properly adjusted so
5 that you could look out the back of your truck,
6 yeah, I would say so.

7 You could see yourself in the
8 mirror if you turned it to a certain way.

9 Q. So, the simple fact that you can
10 see the rear-view mirror doesn't thereby make the
11 view unobstructed, right, because it all depends
12 on what the mirror is showing?

13 MR. SAIA: Objection.

14 A. You're only referring to the
15 mirror. Unobstructed view would be that if I
16 tried to look behind me, I would be unable to look
17 behind me because there is something physical in
18 the way of my ability to see anything, anything
19 complete behind me.

20 I can see through the mirror, so
21 that is one way I can see. But I can, because
22 this is not a crew cab type pickup truck, that,
23 that window that is behind the driver that extends
24 the entire width of this vehicle, is only a few
25 inches behind him.

1 I can turn my head as required by
2 the driver's manual and put my face up against
3 that window and I would have absolutely no
4 obstruction.

5 MR. CLARK: Can you read back
6 the question? I forgot the question.

7 (Read back...

8 "QUESTION: So, the simple fact
9 that you can see the rear-view mirror
10 doesn't thereby make the view
11 unobstructed, right, because it all
12 depends on what the mirror is showing?")

13 * * *

14 Q. So you wrote in your report, page
15 57 paragraph 10, there is no obstructed view since
16 the view of the rear-view mirror is completely
17 unobstructed.

18 You wrote that, right?

19 A. That is correct.

20 Q. So...

21 A. By definition of obstructed view,
22 that is correct.

23 Q. And your understanding of -- your
24 understanding of obstructed view, is as long as
25 something can be seen out the back window, it is

1 not obstructed under the OSHA standard?

2 MR. SAIA: Objection.

3 Q. As long as something can be seen.

4 MR. SAIA: Objection.

5 A. Page 51 talks about the OSHA
6 standard. And, page 51 indicates that OSHA has
7 defined the term obstructed view to the rear to be
8 anything that would block or interfere with the
9 overall view of the operator of the vehicle, to
10 the rear of the vehicle.

11 And that you can tell cannot be
12 considered an obstructed view, because from the
13 operator's position, he can look out that, that
14 rear window of his truck either through,
15 indirectly through the mirror, or he can certainly
16 turn his head and see.

17 That tire would not affect him in
18 being able to look out the rear. He even
19 indicated in his testimony that he didn't have an
20 obstructed view. There was nothing blocking his
21 view.

22 So, I know you are trying to get,
23 to go to the definition of obstructed view in my
24 opinion number 10 where I say that there is a
25 partial obstruction. There is no question about

1 it. But, not from the driver's position. He can
2 see, he can see out that rear-view mirror, he can
3 see out through the window itself.

4 And based upon the testimony of
5 Mr. Barbosa, he did not have an obstructed view.

6 Q. Could he see the tools through the
7 rear-view mirror?

8 A. I believe the handles would have
9 been visible to him, sure.

10 Q. What about the shafts?

11 A. Well, that is what I am talking
12 about, the handles, the shafts, the wood, yes. I
13 think so.

14 Q. So, your understanding of the OSHA
15 standard is that if the view is partially
16 obstructed, then it is not an obstructed view
17 under the standard; is that your testimony?

18 MR. SAIA: Objection.

19 A. Yes, yes that is correct.

20 Q. What if that partial obstruction,
21 obstructs the driver's view of a worker standing
22 behind the truck?

23 A. Then he has a responsibility to
24 get out of his truck and walk around or get a
25 spotter. That is his responsibility.

1 Q. But that obstruction would not be
2 considered an obstruction under the OSHA standard
3 in your view; is that correct?

4 MR. SAIA: Objection.

5 A. That is correct.

6 Q. I've just got to take a minute.

7 (Pause.)

8 Q. Is that safe?

9 MR. SAIA: Objection.

10 A. Is what safe?

11 Q. Backing up a vehicle with no
12 backup alarm and a partial obstruction that may
13 block the view of a worker standing behind the
14 truck.

15 MR. SAIA: Objection; you can
16 answer.

17 A. Really depends upon the situation.
18 How obstructed is your view. That certainly has a
19 bearing on what would be considered safe or
20 unsafe.

21 I mean, I would suspect that every
22 time we back out of a parking stall in a parking
23 lot we have an obstructed view. We use our
24 mirrors, we use our heads, and we attempt to abate
25 any of the obstructions that are caused by simply

1 the things that are behind us.

2 But you can't always eliminate all
3 obstructions. Which is why now they have these
4 devices in some of our vehicles that will
5 determine proximity of objects so that we can have
6 additional ability to see behind us or hear behind
7 us.

8 Q. You agree that an obstructed view
9 of a backing work vehicle is a hazard?

10 MR. SAIA: Objection; you can
11 answer.

12 A. Any backing vehicle can be a
13 potential hazard.

14 Q. And would that include a backing
15 vehicle with a partially obstructed view?

16 A. It can be.

17 Q. And, there are ways to minimize
18 the effects of such hazards, right?

19 A. Yes.

20 Q. And you would agree that one of
21 the ways to minimize the hazard of a backing work
22 vehicle with a partially obstructed view, is a
23 back-up alarm, correct?

24 A. Backup alarm has no help at all in
25 being able to see or hear if something is behind

1 your vehicle.

2 Q. So, we'll read the question back
3 and just listen to the question and just try to
4 focus and answer that particular question.

5 A. Okay.

6 Q. Because the question wasn't
7 whether or not a back-up alarm helps a driver see.

8 The question is does the backup
9 alarm help to minimize the hazard of a work
10 vehicle backing up with a partially obstructed
11 view where there is a worker standing behind the
12 vehicle.

13 MR. SAIA: Objection to form.

14 You can answer.

15 THE WITNESS: I think we're
16 going to read back the question.

17 (Read back...

18 "QUESTION: And you would agree
19 that one of the ways to minimize the
20 hazard of a backing work vehicle with a
21 partially obstructed view, is a back-up
22 alarm, correct?)"

23 * * *

24 MR. SAIA: Objection.

25 A. The answer was no, because a

1 backup alarm has nothing to do to eliminate a
2 partially obstructed view. And that was your
3 question. You went into more detail in the
4 follow-up, but you didn't say that in the initial
5 question.

6 Q. Let's just take it from the top
7 then.

8 You would agree that a work
9 vehicle with a partially obstructed view, is a
10 hazard, a potential hazard. Right?

11 MR. SAIA: Objection.

12 A. A potential hazard, yes.

13 Q. And, a way to minimize that hazard
14 of a work vehicle backing up when there is a
15 working standing behind the truck, is a back-up
16 alarm; would you agree?

17 A. Yes.

18 MR. SAIA: Objection.

19 Q. Now, I noticed in your garage back
20 here you have a similar vehicle to the vehicle
21 that was involved in this incident; correct?

22 A. Yes.

23 Q. All right. And what is that
24 vehicle? I see it's got a Reading cargo body,
25 it's got the toolboxes on the side.

1 A. It is a Ford, I believe, I believe
2 it is an F250 pickup truck with a crew cab.

3 Q. All right. And, does that have a
4 back-up alarm or a backup camera or proximity
5 sensor warning?

6 MR. SAIA: Objection.

7 A. It has no proximity sensor. I
8 don't believe that one has a back-up camera
9 because there would be no need for a back-up
10 camera. I can look out the back of the vehicle
11 and see what is behind me, or look through my
12 mirrors. But it does have a back-up alarm.

13 Q. And what year is that vehicle?

14 A. I don't remember. It is within
15 the last three years.

16 Q. And do you own that vehicle, your
17 company own that vehicle?

18 A. It does.

19 Q. And why does it have a back-up
20 alarm?

21 MR. SAIA: Objection.

22 A. I put the backup alarm in because
23 I felt that it would help if someone were standing
24 on the ground behind it to know that I was backing
25 up.

1 Q. And was that before or after you
2 became involved in this case?

3 A. It was before.

4 MR. CLARK: Let's go off the
5 record for a second.

6 (Pause.)

7 (WHEREUPON a photo was
8 received and marked as Exhibit Desch-13
9 for identification.)

10 Q. I just wanted to note for the
11 record, so, just for the record we've marked the
12 photo we've been talking about as Desch-13.

13 A. Okay.

14 Q. So, I want to go back to this
15 again.

16 Now, page 57, paragraph 10, you
17 say that there is no -- you say there is no
18 obstructed view since the view of the rear-view
19 mirror is completely unobstructed. You said that,
20 right?

21 A. I will read the opinion number 10.
22 Is that what you are talking about?

23 Q. I am not. I am just focusing on
24 the last portion of the last sentence.

25 A. Okay, all right. And, again,

1 based upon the definition in OSHA of obstructed
2 view --

3 Q. Yes.

4 A. -- it is not an obstructed view,
5 because it is not completely obstructed.

6 Q. Okay. And based -- I understand
7 that, thank you for that testimony.

8 And, based on this phrase and your
9 sentence there is no obstructed view since the
10 view of the rear-view mirror is completely
11 unobstructed -- Do you see that in there, you
12 wrote that?

13 A. Yes.

14 Q. So, basically what you are saying
15 is as long as you can see the mirror, then there
16 is no obstructed view; is that right?

17 MR. SAIA: Objection. Asked and
18 answered.

19 A. Obstructed in accordance with the
20 definition of OSHA, that is correct.

21 Q. So we have what we're going to
22 call -- we're going to number these pages on
23 Desch-8.

24 So, first one we're going to call
25 it page one, which we've written that in a

1 rectangular box in the upper right-hand corner
2 picture of it.

3 Do you see that?

4 A. Yes.

5 Q. And then we're going to now do
6 page 2. And we've written that in the upper
7 right-hand corner of the second page of Desch-8
8 exhibit.

9 Do you see that?

10 A. Yes.

11 MR. CLARK: Can you please just
12 read back his answer to the last question
13 and answer, the previous one?

14 (Read back...

15 "QUESTION: Okay. And based --
16 I understand that, thank you for that
17 testimony.

18 And, based on this phrase and
19 your sentence there is no obstructed view
20 since the view of the rear-view mirror is
21 completely unobstructed -- Do you see
22 that in there, you wrote that?

23 "ANSWER: Yes.

24 "QUESTION: So, basically what
25 you are saying is as long as you can see

1 the mirror, then there is no obstructed
2 view; is that right?

3 "MR. SAIA: Objection. Asked
4 and answered.

5 "ANSWER: Obstructed in
6 accordance with the definition of OSHA,
7 that is correct.")

8 * * *

9 Q. So, let's outline the mirror, and
10 we'll use a red pen to do that, okay? Is this the
11 mirror we're talking about?

12 A. Yes.

13 Q. And it goes to about here, right?

14 A. I would say so.

15 Q. Then we come back here, right?

16 A. Yes.

17 Q. So that is the mirror in red,
18 right?

19 A. Yes.

20 Q. By the way, it looks like looking
21 in the mirror that there is some lighting
22 interference from job site lighting; do you see
23 that?

24 MR. SAIA: Objection.

25 A. I don't know what it is from.

1 Could be flash photography for all I know.

2 Q. In any event, we've outlined the
3 rear-view mirror in red, correct?

4 A. Yes.

5 Q. Okay. So, now we're going to
6 block everything out with a brown marker.
7 Everything is blocked out of the rear-view window.
8 Do you see I am blocking it out with a brown
9 marker?

10 A. Yes.

11 MR. SAIA: Note my objection.

12 Q. And we come all the way through.
13 And now, with the black marker I have blocked
14 everything out except the mirror. Correct?

15 A. Yes.

16 Q. So the only -- so the mirror is
17 still clearly visible, right?

18 A. Yes.

19 Q. But everything else out of the
20 rear-view window is blocked out, right?

21 MR. SAIA: Note my objection to
22 this entire line.

23 A. Yes.

24 MR. SAIA: The attorney has
25 modified a particular photograph.

1 Q. So, based upon your testimony,
2 page two of Desch-8, would still be considered an
3 unobstructed view, correct?

4 A. Correct. And you say, my
5 definition. It is not my definition. It is
6 OSHA's definition.

7 Q. Well, it is your understanding or
8 interpretation of OSHA's definition, correct?

9 A. It is mine. It should be yours
10 and it should be anybody that reads the definition
11 to understand that it has to be completely
12 obstructed. As the example I gave, if I put a
13 piece of plywood over the entire back of that
14 vehicle, it would be an obstructed view, but that
15 is not the case.

16 Q. And only under that circumstance
17 in your view does OSHA mandate a spotter or backup
18 alarm, correct?

19 A. Correct.

20 Q. Okay. Is that safe?

21 A. Is what safe?

22 MR. SAIA: Objection.

23 Q. That interpretation you just gave.

24 MR. SAIA: Objection.

25 Q. Is that safe?

1 MR. SAIA: Objection.

2 A. Absolutely it is safe. Do you
3 think backing up in the parking lot of your local
4 Shop Rite is unsafe?

5 All you have is your rear-view
6 mirror and your head to turn, and if you think
7 that is unsafe, then everybody that ever backs
8 their vehicle up would be unsafe.

9 Q. Is, when you said I back up and
10 that is what I have, does that apply to you as
11 well, that is all you have?

12 A. Everybody.

13 Q. All right. What car do you take
14 when you ordinarily go shopping?

15 A. I take my Toyota Sequoia.

16 Q. What year is it?

17 A. I believe, again, I think it is a
18 2016.

19 Q. Okay, does that have a back-up
20 camera?

21 A. No. Yes, it does, I do have a
22 camera in that. Came with the vehicle.

23 Q. And it also has a proximity
24 warning sensor as well, you get close to something
25 it will start beeping fast?

1 A. It does.

2 MR. SAIA: Want to ask me that
3 question?

4 Q. And your Ford F250 with the
5 Reading utility body, has the backup alarm,
6 correct?

7 A. We installed it, that is correct.
8 It didn't come with it.

9 Q. And did it, did it, do you feel it
10 is safer with that than without it?

11 MR. SAIA: Objection, you can
12 answer.

13 A. It is safer for an operator to at
14 least give audible warning if there is a person
15 behind it. But it is not safer to back up,
16 because I personally have experienced where a
17 back-up alarm would do nothing to prevent a driver
18 from running into an object.

19 Q. Do you think that that audible
20 warning is a good thing for someone who may be
21 standing behind the vehicle?

22 MR. SAIA: Objection.

23 A. It could be, although, again, I've
24 given you indication where I know that audible
25 warnings have been available, and yet backup

1 accidents still occur.

2 I think that is one of the
3 referenced materials that one of your experts
4 used, he cited the studies that have been done
5 where it didn't matter that there was a back-up
6 alarm. Workers were still run over.

7 I mean, there is a lot of other
8 things that happen on a construction site. There
9 is other vehicles that have backup alarms that are
10 beeping. There is roadway traffic. So, there is
11 no guarantee that a back-up alarm would have given
12 any warning to Mr. Silva that this pickup truck
13 was backing.

14 Q. What did it cost you to put that
15 backup alarm on there approximately?

16 MR. SAIA: Objection.

17 A. I have no idea.

18 Q. It certainly was not cost
19 prohibitive, correct?

20 MR. SAIA: Objection.

21 A. I don't have -- I told you, I
22 don't know what it cost us.

23 Q. But it wasn't cost prohibitive to
24 you, right?

25 MR. SAIA: Objection.

1 A. Well, if it was cost prohibitive
2 then there wouldn't be a back-up alarm, I agree
3 with that.

4 Q. Yeah, that is what I am getting
5 at. And why did you install it again? You
6 testified to that already, I just forget what you
7 said.

8 MR. SAIA: Objection, asked and
9 answered.

10 A. I think it is helpful to alert
11 people that may be behind my vehicle that the
12 pickup truck is in the process of backing.

13 Q. And that is a benefit potentially
14 to those people?

15 A. Sure.

16 Q. Should Joao Silva have had that
17 benefit on the day of the incident, the benefit of
18 a back-up alarm like you provided on your own Ford
19 F250 Reading utility body pickup truck?

20 MR. SAIA: Objection.

21 A. What do you mean should have?
22 Should have, could have, would have, did have, was
23 required to have? Which -- what do you mean
24 should have?

25 Q. Well, I mean, let's just step

1 back. I mean, that is the essence of the case,
2 right?

3 A. It is.

4 Q. So you are having trouble
5 answering that one?

6 A. No, there is no requirement that
7 there be a back-up alarm. So therefore, what do
8 you mean by should have?

9 Q. Let me ask you a question. When
10 you come to trial in this case and you got eight
11 jury members there, right, and you get up and say
12 no backup alarm, didn't need it, etcetera,
13 etcetera, and how are you going to testify with a
14 straight face on that one given Desch-13?

15 MR. SAIA: Objection, don't
16 answer. Ask him a real question, Jerry.

17 Q. Let me ask you a question. Are you
18 glad that your counsel has directed you not to
19 answer that? I mean, you've been doing this for
20 30 years or so, I think you said, some six
21 thousand cases. Right?

22 A. Yes.

23 Q. Do you think you need counsel's
24 assistance and do you feel more comfortable that
25 he directed you not to answer that?

1 MS. SAIA: Objection, don't
2 answer. Ask him a real question, Jerry.

3 MR. CLARK: I think they're
4 both real questions. I think a lot of
5 people would want to know the answer to
6 that, but that is okay.

7 MR. SAIA: You can ask him what
8 the basis of his opinion is. You can't
9 ask him insane questions as it relates to
10 what he thinks the attorney may think,
11 and whether or not it is a good idea or
12 bad idea to have a question like that.

13 MR. CLARK: I didn't ask him
14 what the attorney thinks.

15 Q. How can you reconcile the two?

16 A. What two?

17 Q. You coming to court and saying no
18 backup alarm needed, didn't need it, not required,
19 you know; and Desch-13.

20 I mean, you basically have the
21 same truck and you have a back-up alarm on it that
22 no one required you to put on, you did it because
23 it was the prudent thing to do.

24 MR. SAIA: Objection. You can
25 answer.

1 A. Jacobs had a back-up alarm on
2 their vehicles, prudent thing to do. They were,
3 they were concerned...

4 Q. Agreed.

5 A. Okay, but what does it have to do
6 with Conti? They have no responsibility for
7 Conti's operations, construction, workers, or
8 anything relating to their processing this job.
9 This job has been given to them by the New Jersey
10 Turnpike Administration. They are to follow the
11 contract.

12 There was nothing, nothing in the
13 contract that required that Conti have a back-up
14 alarm, and there is nothing that would say that it
15 was Jacobs' responsibility to make sure that Conti
16 had backup alarms for their trucks.

17 Q. You know, I had a whole line of
18 questioning about that, where I was going to go
19 through everything that disputes that.

20 But, the reason I am not going to
21 do it is because that is the principles and
22 practices of construction safety management for
23 which you already testified you are not an expert
24 in.

25 So, I think it will be wasting all

1 our time to go down and do that.

2 MR. SAIA: Fine, no question.

3 THE WITNESS: No, I am not
4 answering.

5 Q. And the principal, that is where
6 you have an owner and you have like a project
7 manager, and a construction general contractor and
8 subcontractors, and there is all kinds of rules
9 and standards about the principles and practices
10 of construction safety management, which, for the
11 most part have nothing to do with contracts; it is
12 all in the, it is in the standards, the National
13 Association of Home Builders, and the National
14 Safety Council, American Society of Safety
15 Engineers, Associated General Contractors of
16 America, OSHA. That all discusses what a
17 contractor like Conti can and should do by way of
18 trying to make job sites in New Jersey safer.

19 A. I agree.

20 MR. SAIA: No question.

21 MR. CLARK: All right, I meant
22 to say Jacobs in that previous question.

23 Off the record.

24 (Pause.)

25 MR. CLARK: Peter, do you have

1 any questions?

2 MR. BOUTON: I do not.

3 (Pause.)

4 Q. Barbosa testified he never saw
5 him, right, or couldn't see him?

6 A. Not that he couldn't see him. He
7 said he never saw him.

8 MR. SAIA: Objection.

9 A. He could have seen him if he
10 looked for him. He could have seen him if he got
11 out of his truck and walked around like he said he
12 did.

13 Q. You said on page 16 of your report
14 that the incident report lists the immediate cause
15 of the incident to be, in number 2 you said, there
16 was an operational light tower approximately 50
17 yards from the scene of the incident facing north,
18 which Barbosa states in addition to the traffic
19 was shining in his mirrors as he backed up making
20 it difficult to see behind him.

21 A. Correct.

22 Q. Wouldn't that also be considered
23 an obstruction, that light --

24 MR. SAIA: Objection.

25 Q. -- that lighting issue?

1 A. Well, again, I think you have to
2 go back to the actual accident scene. I think if
3 you asked Mr. Silva, he said he didn't think the
4 lights were on.

5 So, I don't know where you are --
6 I mean, does Mr. Barbosa try to come up with
7 reasons why he ran over a fellow co-worker, and
8 say, well, the lights were in my eyes, or the
9 lights were affecting me?

10 It is possible he could have said
11 that. He's trying to justify why he just ran over
12 a co-worker.

13 But Mr. Silva, when you ask him,
14 were the lights on, the tower lights, were they
15 affecting you? He said, no, as far as I remember.
16 I will go back and look at his deposition. But I
17 am pretty sure you asked him or somebody asked him
18 that question.

19 Q. But...

20 A. You thought the lights in the
21 tower were off at the time of the accident, page
22 96 of his deposition.

23 Q. But you know he's got like a
24 severe head injury, you know that?

25 MS. SAIA: Objection.

1 A. Okay.

2 MR. SAIA: Objection.

3 Q. Okay?

4 A. Sure.

5 MR. SAIA: Are you saying that
6 your client is incompetent to testify?

7 Q. And secondly, you saw the scene
8 photos which show the light tower is on, right?

9 MR. SAIA: Objection.

10 A. Isn't that light tower in front of
11 the truck?

12 Q. Well, that one is.

13 A. Well, where is the one that shows
14 the ones in back?

15 Q. Well, it wouldn't be this photo
16 because that is showing that way.

17 A. Well, show me a picture that shows
18 the light towers in back.

19 Q. Okay. How about in the photo
20 number 3, the light in the rear-view mirror?

21 MR. SAIA: Objection.

22 A. You mean the one that could be the
23 flash from the camera that they took the picture
24 from?

25 Q. So, are you saying there is no

1 light tower behind the vehicle?

2 MR. SAIA: Objection.

3 A. I don't know that there is or
4 isn't. But I can only tell you that one person who
5 was driving the truck said that the lights
6 affected his visibility. One person who was
7 struck by the truck said he didn't think the light
8 towers were on. And you can't show me a photo that
9 shows that there were light towers that may have
10 obstructed his visibility.

11 Q. Okay, but the question though, is,
12 if light towers or lighting was obstructing his
13 visibility, wouldn't that be considered an
14 obstruction under OSHA?

15 A. No.

16 Q. What about the letter of
17 interpretation that says in fact lighting, job
18 site lighting is an obstruction --

19 A. It could be.

20 Q. -- or lighting.

21 A. It could be. But when you are
22 talking about an obstruction, you are talking
23 about a physical obstruction.

24 Lighting can be disabling. I am
25 driving down the road, somebody has got their high

1 beams on. That's disabled my vision, it is a
2 disabling light, it is not an obstruction.

3 Q. But doesn't OSHA include poor job
4 site lighting?

5 A. As, what?

6 Q. As an obstruction.

7 A. Let me see what you are talking
8 about and it will determine whether poor job site
9 lighting can be an obstruction in accordance with
10 their definition.

11 Q. Well, I know counsel...

12 A. Which is total complete inability
13 to see. Total and complete.

14 Q. Under your understanding of OSHA?

15 A. Under their definition.

16 Q. Got it.

17 And of course it doesn't say total
18 and complete anywhere in the OSHA definition, does
19 it?

20 A. Overall. They use the word
21 overall.

22 Q. In the OSHA definition?

23 A. Yes.

24 Q. No. That is in the other...

25 A. Oh, that is ANSI, that is ANSI.

1 Q. Okay. So anyway we have Conti 2873
2 which shows the rear light tower. Do you see the
3 one behind the vehicle and the one in the front in
4 that diagram?

5 A. That light tower over there would
6 not obstruct the vision of a driver who is looking
7 in this direction. That is off to his left. You
8 wouldn't even be able to see that light tower in
9 that rear-view mirror.

10 Q. But there is a thing of a, a shiny
11 thing going there. Which would clearly go to the
12 rear-view mirror.

13 A. I don't agree.

14 Q. Okay. If you're like running this
15 job and -- would you have done anything
16 differently by way of safety to prevent needless
17 injury and death to workers on the job site --

18 MR. SAIA: Objection.

19 Q. -- vis-à-vis use of trucks?

20 MR. SAIA: Objection.

21 A. You mean if I was Conti running
22 the job?

23 Q. If you were anyone running the
24 job.

25 A. Well, Conti, Conti is running the

1 job. So, if I were Conti, what would I have done?
2 I would have done everything I think they did do,
3 which is they have these safety meetings on a
4 regular basis, they try to identify things that
5 could be potential hazards. They have published
6 things that tell their drivers what to do so as
7 not to have backup accidents. If you can't see,
8 get a flagman, get a flagger. If you can't see,
9 move your head around, do something. You can't
10 back into a blind area. Okay, they did all that.

11 Q. Why do you say Conti was running
12 the job when there is, for example, the expression
13 of interest document on this job Exhibit Q to our
14 motion papers in Hurlihy-1, that says, we are
15 cognizant that this project will require field
16 supervision on an around-the-clock basis on
17 certain nights and weekends. And where Jacobs
18 talks in detail about how it is going to oversee,
19 manage the job.

20 MR. SAIA: Objection.

21 A. They're not overseeing, managing
22 Conti. They are not allowed to oversee or manage
23 Conti.

24 They are allowed to make sure that
25 Conti follows the plans and specifications.

1 If there is a problem with what
2 Conti is doing, they have the right to tell Conti
3 you are not performing your contract in accordance
4 with the plans and specifications. They have
5 absolutely no right or responsibility to tell
6 Conti how to process and run this job.

7 Q. Okay. Well, I am not going to
8 bicker with you on that. The testimony in the
9 records clearly do not support that statement, but
10 that is okay.

11 MR. SAIA: No question, no
12 question.

13 MR. CLARK: They don't. They
14 don't support that statement. I could go
15 through and summarize it all, but just
16 read our statement of facts and you will
17 see it.

18 It's got pin cites to the
19 record and quotes from both Conti people
20 and Jacobs' people that clearly says
21 Jacobs is running the job and can tell
22 Conti what to do.

23 MR. SAIA: No question.
24 Respectfully disagree.

25 MR. CLARK: In fact, in fact

1 Barbosa testified that the Jacobs'
2 personnel would regularly come and tell
3 them what to do on various things, most
4 importantly vis-à-vis safety issues. But
5 that deals with the whole...

6 MR. SAIA: Jerry, note my
7 objection to the speech. We're here for
8 question.

9 MR. CLARK: That deals with the
10 whole principles and practices of
11 construction safety management issue.

12 Q. Do you dispute that operational
13 light towers and northbound turnpike traffic was
14 shining in his mirrors as he backed up, making it
15 difficult to see behind him; do you dispute that
16 or you just don't know either way?

17 MR. SAIA: Objection.

18 A. I don't see any evidence that it
19 was, that is correct.

20 Q. How about the incident report and
21 the statement from Barbosa in those reports that
22 said that?

23 MS. SAIA: Objection, asked and
24 answered.

25 A. That said, what? That his vision

1 was obstructed by light towers? Or that there were
2 light towers in the area?

3 Q. That said exactly what you wrote
4 on page 16 in your report, that the light tower 50
5 yards away and the northbound turnpike traffic was
6 shining in his mirrors as he backed up, making it
7 difficult to see behind him.

8 A. That is...

9 MR. SAIA: Objection, that is
10 not Mr. Barbosa's statement.

11 A. No, that is not Mr. Barbosa's
12 statement.

13 Q. Do you dispute that that is in
14 fact what happened?

15 So, let me ask you a question.
16 So, when we want to say he was struck in the
17 middle, there is plenty of evidence of that and
18 you don't say that is not Purificacao's statement,
19 and that is not... You just say it is in there so
20 it must be true. Because you think it helps you.

21 But, when we go to something else,
22 like that there was an obstruction from shining
23 light towers, you are like, well, that is not a
24 statement, he didn't say that. Why is that?

25 MR. SAIA: Objection.

1 Q. What is up with that disconnect
2 there?

3 A. Well, here is the disconnect.
4 Are you going to allow your client
5 to talk about the fact that he didn't think that
6 there were lights that would be obstructing the
7 view of the driver? He didn't think they were on?
8 Now, the fact that there are lights and the lights
9 are on a tower, and they are up at this elevation,
10 much higher than the truck; do you think really
11 that that is going to shine in a rear-view mirror
12 obstructing his vision of a pedestrian? Seriously.

13 Q. Well, I am not sure. But when you
14 look at, when you look at, when you look at
15 Desch-8, page 1 and 2, I think it is quite clear
16 that there is lights shining through that
17 rear-view mirror. I mean, you can see right in
18 the photo.

19 MR. SAIA: Note my objection.

20 A. You know, it would have been great
21 if somebody would have taken a picture from inside
22 the driver's position to see if you could see
23 somebody in the back. But they didn't.

24 But I will tell you, in my opinion
25 there is no way that a light tower would have

1 shined into that mirror and obstructed
2 Mr. Barbosa's ability to see Mr. Silva in his
3 rear-view mirror. And certainly wouldn't have
4 obstructed his ability to see him if he simply
5 turned his head around and looked out the rear
6 window.

7 Q. I don't have any other questions
8 at this time, I think I am good for now, unless...

9 * * *

10 EXAMINATION

11 BY MR. SAIA:

12 Q. A couple questions for you, sir.
13 Start off with, are you a Licensed Professional
14 Engineer in the State of New Jersey?

15 A. Yes.

16 Q. Are you a Licensed Professional
17 Engineer in the State of New York?

18 A. Yes.

19 Q. Licensed Professional Engineer in
20 the State of Pennsylvania?

21 A. Yes.

22 Q. Licensed Professional Engineer in
23 the State of Ohio?

24 A. Yes.

25 Q. Are you a former construction

1 official?

2 A. Yes.

3 Q. Are you a member of the Institute
4 of Transportation Engineers?

5 A. Yes.

6 Q. Are you a member of the National
7 Society of Professional Engineers?

8 A. Yes.

9 Q. As part of being a professional
10 engineer, and in addition you are also an accident
11 reconstructionist; correct?

12 A. Yes.

13 Q. As part of being an accident
14 reconstructionist and being a Professional
15 Engineer as well, in determining cause of an
16 accident, how an accident occurred and what
17 factors lead to an accident, isn't one of the most
18 important things for you to first learn is to how
19 the accident actually occurred before placing
20 blame?

21 A. Well, clearly the intent is to
22 gather as much information about the occurrence,
23 not only as it would relate to the drivers and
24 pedestrian in this case, but also as it would
25 relate to the environment in which they were

1 working.

2 So, yes, that information of
3 course since we weren't there, the accident
4 happened in 2013, we only were engaged recently in
5 this assignment, we would have to rely upon much
6 of the discovery that has been exchanged.

7 But accident reconstruction is
8 sort of like putting a puzzle together, you have
9 as many pieces as you possibly can and then you
10 attempt to offer opinions relating to different
11 questions that may be asked.

12 Q. And as it relates to this matter,
13 once you've made, concluded as relates to the
14 accident reconstructionist, how the accident
15 occurred, do you then further go on to look at the
16 responsibilities of the various parties in this
17 matter?

18 A. Yes.

19 Q. And as part of that, you review
20 among other things the New Jersey Turnpike's
21 contract with the defendant Jacobs?

22 A. Correct.

23 Q. And as part of that did you review
24 the New Jersey Turnpike Authority's construction
25 manual?

1 A. Yes.

2 Q. And as part of the review of that,
3 did you observe the fact that under the terms and
4 conditions of the contract that the New Jersey
5 Turnpike Authority had with Jacobs, that the
6 contractor, Conti, was solely responsible for
7 safety?

8 A. I will only qualify the answer by
9 saying when you say solely, it certainly was their
10 primary responsibility for safety.

11 But, as we've said before, Jacobs
12 or NIOSH*, or any individual that was on that job
13 site who observed an unsafe act, had the
14 responsibility to bring it to the attention of
15 whomever, that there was an unsafe act. So that
16 is just normal.

17 It's sort of like you are driving
18 down the road and you see an accident, you have a
19 responsibility to stop and offer assistance.

20 It's the same thing with safety,
21 so, yeah, that was there, they had that ability
22 but it was not their responsibility.

23 Q. So that if you -- so what you are
24 saying is that if Jacobs actually observed in this
25 particular case someone driving, for example,

1 without headlights on, would that be an issue?

2 A. That is a good example, yes.

3 Q. And is that responsibility that
4 you've just described, that is both an OSHA
5 requirement and State requirements as well,
6 correct, as a Professional Engineer?

7 A. Yes.

8 Q. And that is actually captured in
9 the New Jersey Construction Manual, which states,
10 job safety is solely the responsibility of the
11 contractor; the engineer should remind the
12 contractor whenever it appears that safety has
13 been overlooked. However, it is not the intent --
14 however, it is not intended to shift that
15 responsibility to the engineer at any time.

16 Did I read that correctly?

17 A. Yes.

18 Q. Okay. Did you see any information
19 in any of the material that you reviewed that any
20 employee of Jacobs actually saw the accident?

21 A. I did not see any material that
22 would indicate that a Jacobs employee saw the
23 accident.

24 MR. SAIA: Jerry, these are all
25 the exhibits?

1 MR. CLARK: Not all of them.

2 MR. SAIA: I need the exhibits.

3 MR. CLARK: Do you know which
4 ones?

5 MR. SAIA: Well, I would like
6 to see all of them.

7 MR. CLARK: Those are the ones
8 we marked today. These are --

9 MR. SAIA: This does not
10 include his report that I am looking for
11 that was actually in his file. I think
12 -- oh, here it is.

13 Q. Mr. Desch, you were shown what's
14 been marked as Desch-9 for identification, which
15 is the State Police Investigation Report. And
16 Mr. Clark asked you questions about this, pointing
17 out that there was interviews apparently by the
18 State Police of both Mr. Barbosa and
19 Mr. Purificacao -- how do you pronounce his name?
20 Purificacao.

21 Let me just take a little closer
22 look at this document and particularly the first
23 page; and do you see where it says the police
24 officers actually interviewed Mr. Silva?

25 A. Yes.

1 Q. And there was an actual
2 information apparently set forth in the report
3 that was obtained from Mr. Silva?

4 A. Yes.

5 Q. In particular, Mr. Silva told the
6 police officer at page three of six that he was
7 finishing his shift and was asked to clean up a
8 portion of the construction site along the roadway
9 picking up debris.

10 A. Yes.

11 Q. And it says, as he was walking
12 southbound he heard a slight noise closing in on
13 him.

14 A. Yes.

15 Q. And suddenly being struck by the
16 back of the truck.

17 A. Yes.

18 Q. And that he states that he grabbed
19 the rear of the bumper and lost his grip.

20 A. Yes.

21 Q. And that is actually a statement
22 that Mr. Silva actually gave the police officer,
23 correct, upon this document?

24 A. Yes, that is correct.

25 Q. And in addition to that, the

1 police officer reports on page 5 he's talking
2 about Mr. Silva stopping for -- to light a
3 cigarette.

4 Based upon your review of the
5 police report now, does that indicate that that
6 information was obtained from Mr. Silva himself?

7 MR. CLARK: Objection, doesn't
8 indicate that.

9 A. No, it doesn't indicate that.

10 Q. The statement says, as he did he
11 heard something coming towards him. Anyone else,
12 either Mr. Barbosa or Mr. --

13 A. Pedro.

14 Q. -- Pedro, could they have
15 determined what he heard other than Mr. Silva
16 himself?

17 A. No, but the lighting of the
18 cigarette Pedro would have had the ability to see
19 that.

20 Q. But there is no question about the
21 fact that within the direct section of the police
22 report attributed to Mr. Silva, he stated that he
23 heard the noise coming on him, that he was struck
24 by the back of the truck.

25 A. Yes.

1 Q. Now, let's talk a little bit about
2 line of sight. As it relates to the OSHA
3 requirement, would it not be true based upon
4 what's been marked as Desch-8, page two, Mr. Clark
5 blacked out the rest of the window. But you can
6 see the mirror itself. Based upon line of sight,
7 because you can see the mirror itself, would the
8 driver then be able to see behind him?

9 A. Through the mirror, yes.

10 Q. Okay. And as it relates to line of
11 sight as you indicated, would almost be like a
12 window, that if the window was far away from you
13 the window would obstruct your view, but if you
14 are close up it does not?

15 A. I think that is a fair statement.

16 Q. And as it relates to the -- your
17 analysis as it relates to this matter and the line
18 of sight, it is your opinion that there is no
19 obstruction because Mr. Barbosa was looking in the
20 mirror could see behind him. Correct?

21 A. He could.

22 Q. And, in addition to not only using
23 the mirror, Mr. Barbosa would be able to turn
24 around and actually look through the back of the
25 window, correct?

1 A. Yes.

2 Q. And when Mr. Barbosa, if he did
3 turn around, his face would be, what, about two,
4 three inches from the mirror, the window itself?

5 A. I would suspect that is a
6 reasonable estimate, yes.

7 Q. And there was side-view mirrors on
8 the vehicle as well?

9 A. Yes.

10 Q. And would that show the rear
11 portion of the vehicle at certain points?

12 A. Not directly behind the vehicle,
13 no. Off to the left or right side.

14 Q. As it relates to Mr. Barbosa's
15 testimony, do you recall whether he testified that
16 he actually turned his head to look behind?

17 A. I know he said that he actually
18 got out and he walked around the vehicle. But I
19 don't remember if he said he turned his head. I
20 am looking for that right now.

21 He said there was no spotter used
22 because he could see well behind him and there was
23 nothing blocking his view to back up. He looked
24 behind to see if Mr. Silva and other workers were
25 in his path of travel as he was backing up and did

1 not see him.

2 Q. Okay. As it relates to --

3 A. He was looking in his mirrors is
4 what he said. The tire did not block his view
5 because he was looking in his mirrors.

6 So, he clearly did not turn his
7 head around and look out the window as far as I
8 can tell.

9 Q. As it relates to making a
10 determination as to what view the individual has,
11 you would have to be in the same position that
12 that individual was at the time of the accident,
13 correct?

14 A. Yes.

15 Q. Because you, as you've testified
16 to, you can move your head, you can move your body
17 to get different views of sight. Correct?

18 A. Yes.

19 Q. And as it relates to this, did you
20 see any testimony from anyone who testified other
21 than Mr. Barbosa as to what Mr. Barbosa actually
22 could see?

23 A. No.

24 Q. And so the only testimony that we
25 have in this case as to line of sight, is what Mr.

1 Barbosa testified to and that is that he had an
2 unobstructed view?

3 A. Yes.

4 Q. As it relates to those light
5 towers, you know, what are they, 50 feet up or
6 something?

7 A. Depends upon the height that they
8 want -- I don't think 50 feet is required. They're
9 probably less than that. They might be as high as
10 a telephone pole which is 40. But I would say
11 they're probably around 30 feet high.

12 Q. And based upon the 30 feet high,
13 that would not be blocking or creating a view that
14 would be obstructed?

15 A. Not in my opinion, no.

16 Q. And as it relates to the position
17 of Mr. Barbosa when he was found according to the
18 police report, he was found under the truck with
19 his head and upper body being wedged between the
20 right side leaf spring, and the right rear tire.

21 Have you seen any photographs or
22 any other documentation that indicates that that
23 is incorrect other than some drawings?

24 A. No.

25 Q. And the police report goes on.

1 And this is, states that, Pedro then safely
2 stabilized Joao's neck and body and lowered him to
3 the ground taking about 30 seconds before Joao
4 came to and asked Pedro for help.

5 Did I read that correctly?

6 A. Yes.

7 Q. So to the best of your knowledge
8 based upon your review of all the documentation
9 here, was Mr. Silva moved after the truck came to
10 a stop and prior to the police officers arriving?

11 A. Yes.

12 Q. And as part of this matter and
13 other matters that you've dealt with, are you
14 often required to refer to both the ANSI standards
15 and OSHA standards in determining, for example, in
16 this case whether or not a back-up alarm was
17 required?

18 MR. CLARK: Objection to the
19 form of the question.

20 I mean, he's already testified
21 he's not an OSHA expert, doesn't rely on
22 OSHA in crash reconstruction cases. And
23 the way the question was phrased, was do
24 you regularly in the past rely on OSHA.
25 As, for example, in this case it doesn't

1 make any sense and it doesn't -- it is
2 not a fair reflection of what he already
3 testified to.

4 A. When it comes to accidents that
5 occur in work zones, yes.

6 Q. And while you don't hold yourself
7 out generally as an OSHA expert, have you
8 testified and provided opinions as it relates to
9 an accident -- in motor vehicle accidents, as
10 relates to in the construction field what happens,
11 as to what applicable standards apply under OSHA?

12 MR. CLARK: Note my objection.
13 If that is the case, I am definitely
14 going to be asking for those reports
15 because I don't think he testified to
16 that.

17 A. I, I think relating to testimony,
18 I don't recall any cases where I have testified.
19 There may be. But I just don't recall any.

20 But we've written other
21 reconstruction reports that have discussed some of
22 the requirements of OSHA or ANSI or a contract or
23 other documents that would require a particular
24 entity to follow up, prescribe norm, and then
25 whether the lack of or the compliance with of that

1 norm, had anything to do with the accident. So I
2 can recall cases like that, but I don't know about
3 testimony.

4 Q. As part of your work as an
5 accident reconstructionist, you are required at
6 times to cite to in your reports in your opinions
7 as relates to OSHA standards and ANSI standards?

8 A. Yes.

9 MR. CLARK: Objection to the
10 form, because it's not qualified by a
11 court based on a report; it is based on
12 testimony. He said there is no testimony
13 he recalls.

14 Q. You are a Licensed Professional
15 Engineer, correct?

16 A. That is correct.

17 Q. And as part of your work in the
18 past 30 years in doing accident reconstructions
19 including doing work as it relates to accidents
20 that occurred in a work zone, you have become
21 familiar at least in part with the requirements of
22 backup alarms?

23 A. Yes.

24 Q. And as it relates to your review
25 in this matter as has been testified to by

1 virtually every one, defendants, OSHA does not
2 require a back-up alarm on the pickup truck in
3 question, correct?

4 A. OSHA does not require, the
5 Turnpike Authority do not require, Jacobs did not
6 require. And up until the time of the accident, I
7 don't believe Conti required. But they did
8 install them after the accident.

9 MR. SAIA: Is that an
10 objection, Pete?

11 MR. BOUTON: Say that again?

12 MR. SAIA: I said, was that an
13 objection by you?

14 (Pause.)

15 * * *

16 MR. CLARK: Where shall I
17 begin?

18 * * *

19 EXAMINATION

20 BY MR. CLARK:

21 Q. So, you had said something about
22 he grabbed the trailer hitch, but the police
23 report that counsel read said he grabbed the rear
24 bumper.

25 A. Well, one of the documents that we

1 talked about, and let the record reflect that
2 there is somewhere where they said he grabbed the
3 hitch, so. I don't recall where it was.

4 Q. But the police report that counsel
5 just read to you, says he grabbed the rear bumper.
6 Do you remember that?

7 MR. SAIA: Objection.

8 A. Well, only to the extent that the
9 hitch is mounted on the rear bumper. I don't know
10 if it excludes the fact that he grabbed the hitch.

11 Q. And the bumper is -- part of the
12 bumper is behind the right rear passenger tire,
13 right?

14 A. The bumper extends the entire
15 width of the vehicle from left to right, right to
16 left. It of course encompasses both left and
17 right rear tires.

18 Q. You read in there that Barbosa was
19 able to see behind him. Do you remember that when
20 counsel asked you about that?

21 A. Yes.

22 Q. What was he able to see behind
23 him?

24 A. Well, his testimony, he was able
25 to see clearly anything behind him including

1 workers.

2 Q. So then why did he hit the worker
3 if he had a clear view behind him?

4 A. Because he wasn't looking.

5 Q. Was he mad at the worker for
6 something?

7 A. I think he was inattentive.

8 Q. Yeah, but you read on page 23 of
9 your report, that he was looking behind, he had a
10 clear view, but he hit the guy anyway.

11 So, was he trying to hit him or
12 something doesn't make sense there, right?

13 MR. SAIA: Objection.

14 A. It doesn't make sense. What
15 doesn't make sense is if he was looking behind
16 him, he would have seen the worker. So, I guess
17 he wasn't looking behind him.

18 Q. Well, what if he was looking
19 behind him but he couldn't see through the tools
20 like you testified to earlier, how the shafts and
21 the handle would be blocking the view out the
22 back?

23 MR. SAIA: Objection,
24 misconstrues his testimony.

25 A. I don't believe I said that the

1 tools would have obstructed his view of the worker
2 standing behind his vehicle.

3 Q. You said on page 23 of your
4 report, summarized his deposition, he looked
5 behind to see if Mr. Silva and the other workers
6 were in his path of travel as he was backing up
7 and did not see Mr. Silva.

8 Do you remember that in there?

9 A. Yes.

10 Q. So, then, how did he hit him? If
11 that is true, how did he hit him?

12 A. Well, who says that is true?

13 MR. SAIA: Objection.

14 Q. Are you calling Barbosa a liar?

15 A. That is not a liar.

16 Q. Okay.

17 A. Mr. Barbosa just ran over a
18 co-worker. He also said the lights were
19 obstructing his ability to see.

20 Q. God forbid that be true.

21 A. Well, God forbid that be true. But
22 I will tell you what, if I was Mr. Barbosa I would
23 start to come up with all kind of reasons other
24 than my own negligence as to why I just ran over
25 somebody.

1 Q. How about if you were a hired
2 expert, would you come up with all kinds of
3 reasons to say that it is not obstructed because
4 you think that might help your client?

5 MR. SAIA: Objection.

6 A. Or your experts.

7 Q. Even though your own truck in your
8 backyard has the very thing you say that wasn't
9 required...

10 MR. SAIA: Objection, Jerry,
11 ask a real question.

12 A. There was not one document, not
13 one document in these reams and reams of discovery
14 except for your experts that accused Jacobs of
15 failure to act in accordance with their contract.
16 Nobody.

17 Q. Oh, they admitted that, Mr.
18 Decasas the project manager admitted that. But let
19 me ask you a question.

20 MR. SAIA: Objection.

21 Q. On the spectrum of cases; and you
22 know there is good cases and bad cases, you know.
23 So, like you write a report in a case and you are
24 really stretching to give, you know. And then on
25 the other one, you are like, I think you were

1 talking about one over the break where there was
2 like a drunk driver or something, you know. And
3 that is on the other end of the spectrum where it
4 is easy.

5 Where does this case fall on the
6 straight-face-meter spectrum in giving opinions?

7 MR. SAIA: Objection, don't
8 answer that.

9 Jerry, ask a real question.

10 MR. CLARK: Those are all real
11 questions, but I think we all know the
12 obvious answer to it, so I don't have any
13 other, further questions.

14 MR. SAIA: Pete, do you have
15 anything?

16 MR. BOUTON: I do not.

17 MR. SAIA: We are done, thank
18 you.

19 THE WITNESS: Good.

20 * * *

21 (Pause.)

22 * * *

23 MR. CLARK: We are on the
24 record.

25 We've marked today Exhibits 1

1 through 13. I am going to keep Exhibit
2 number 8 and number 13 and send them to
3 defense counsel.

4 And defense counsel is going
5 to send us Exhibits 1 through 12 except
6 number 8, because these come from
7 Mr. Desch's file. Thank you.

8 MR. SAIA: Actually what I am
9 going to do is I am actually putting 8
10 and 13 into this grouping as well,
11 recognizing that they're just photocopies
12 of it, but that way we'll have a complete
13 record of all the exhibits in one batch.

14 * * *

15 (WHEREUPON, the deposition is
16 hereby concluded at 2:25 p.m.)

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C E R T I F I C a T I O N

I, Patricia A. Terracciano, Certified Shorthand Reporter and Notary Public duly and qualified in and for the State of New Jersey, do hereby certify there came before me the deponent herein, namely JOHN A. DESCH, who was by me duly sworn to testify to the truth and nothing but the truth concerning the matters in this cause.

I further certify that the foregoing transcript is a true and correct transcript of my original stenographic notes.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

PATRICIA A. TERRACCIANO
CERTIFIED SHORTHAND REPORTER

A	32:8,11;42:24; 123:13,15;139:15	19:2,3;24:11;26:7; 28:24;36:19;42:5; 44:22;50:17;52:6; 57:20;60:11,20; 61:12;64:5,24;67:2, 11;77:6;84:19;86:4; 95:15,25;101:17; 102:23;104:5;110:1; 135:11	along (3) 54:17,19;126:8 although (1) 102:23 always (5) 6:21;38:8;62:6; 85:7;91:2 America (5) 12:19;15:13,19; 16:5;108:16 American (7) 12:24;13:6;16:11, 14;17:20;23:12; 108:14 among (2) 12:11;122:20 analysis (2) 34:24;128:17 and/or (2) 8:9;50:10 angle (2) 85:18,22 angulated (1) 64:16 ANSI (7) 16:24;17:4;113:25, 25;132:14;133:22; 134:7 answered (6) 46:17;79:22;96:18; 98:4;104:9;117:24 anticipate (1) 6:18 antidotal (1) 45:19 apparently (2) 125:17;126:2 appear (1) 60:7 appears (9) 59:8,13;61:9;62:4; 65:11;76:1;77:25; 78:1;124:12 applicable (2) 28:20;133:11 apply (3) 20:9;101:10;133:11 appreciate (1) 16:2 approach (1) 18:24 approached (1) 73:14 approaching (2) 39:1;74:19 appropriate (1) 28:22 approve (1) 10:24	approximate (3) 8:8;54:12;74:1 approximately (6) 5:12,13;33:3;84:3; 103:15;109:16 area (21) 10:16;39:11,25; 54:12;66:17,20; 74:13,15;78:11;80:8; 82:10,17,18,23,25; 83:4,20,23;84:1; 115:10;118:2 argue (1) 51:21 arguing (1) 68:18 arms (1) 61:17 around (13) 29:20;65:16;74:4, 18;89:24;109:11; 115:9;120:5;128:24; 129:3,18;130:7; 131:11 around-the-clock (1) 115:16 arrangements (1) 9:8 arriving (1) 132:10 arrow (9) 54:11;55:14;57:15; 80:4,6,12;82:10,12,21 aspect (2) 36:3;38:1 aspects (1) 36:3 assigning (1) 19:7 assignment (2) 9:7;122:5 assignments (2) 7:3;33:10 assist (1) 25:17 assistance (3) 70:11;105:24; 123:19 assistant (1) 10:4 Associated (5) 12:19;15:12,18; 16:4;108:15 Association (1) 108:13 assume (1) 5:19 assumed (1) 10:21
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