

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25I N D E X T O W I T N E S S E S

<u>PROCEEDING</u>	<u>PAGE</u>			
104 Hearing	13			
<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>RE-DIRECT</u>	<u>RE-CROSS</u>
<u>Voir Dire</u>				
Jeffrey Lakin				
By Mr. Nguyen	11		47	
By Mr. LoPiano		17		45
By the Court	38			
<u>Court Decision</u>			47	
Jeffrey Lakin				
By Mr. Nguyen	68, 76		139	
By Mr. Lopiano		73, 98		140

I N D E X T O E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVID</u>
D7	9/9/14 doctor report	79	
D6	CV for Doctor Lakin	79	
D8,9 & 10	pictures of spine	90	

<u>SUMMATIONS</u>	<u>PAGE</u>
Mr. Nguyen	160
Mr. LoPiano	168
<u>VERDICT</u>	229

1 THE COURT: Good morning ladies and
2 gentlemen. This is Mr. Mark Cava, Jr. v. Elizabeth
3 Saimson, S-A-M -- since I let Janice out of the case.
4 This is docket number 8823-13. It's a continuing
5 trial. It's now Friday morning, August 7th. Counsel
6 can I have your appearances please?

7 MR. LOPIANO: Good morning Your Honor.
8 Christian LoPiano, LoPiano, Kenny and Stinson on behalf
9 of Plaintiff, Mark Cava, Junior.

10 THE COURT: Welcome.

11 MR. NGUYEN: Good morning Judge. Nghia
12 Nguyen from Law Office of Viscomi and Lyons on behalf
13 of the Defendant, Elizabeth Saimson Judge.

14 THE COURT: Welcome counsel. All right. The
15 first point of business is we're going to conduct the
16 104 Hearing which we've talked about with Doctor Lakin
17 with regards to EMG, more particularly his report of
18 January 23, 2015, the last paragraph where he
19 indicates, it should also be noted that my review,
20 underline my review of the recently submitted electro
21 diagnostic testing of December 15th, 2014 that the
22 examinee had normal elector physiological study -- and
23 no evidence suggests -- peripheral neuropathy,
24 myopathy, or plexopathy. -- okay. So the issue is, is
25 the doctor qualified to make that determination.

1 Again, let the record reflect we've argued this a
2 couple of days ago. This is not being offered or the
3 Court finds it's not a business record. The -- the
4 point was the doctors its been understood represented
5 that he reviewed the report of Mastri, M-A-S-T-R-I. I
6 think that's how they say it. Which is exhibits not in
7 evidence. Exhibit of P12, 12/5 and 14 and 12/29/14.
8 Those are the records are in question. So counsel why
9 don't you ask the good Doctor Lakin to come up to the
10 stand.

11 MR. NGUYEN: Thank you Judge. At this time
12 defense would like to call Doctor Lakin up.

13 THE COURT: Appreciate it. Doc.

14 MR. LOPIANO: Your Honor before we get
15 involved if I may just put one statement on the record?

16 THE COURT: Sure. You can keep coming Doc.
17 Don't worry.

18 MR. LOPIANO: I just want to reserve the
19 Right to make one additional argument in the event Your
20 Honor finds that the Doctor is qualified. I want to
21 reserve the Right. I have one additional argument why
22 he should not testify as to in terms of when this was
23 certified.

24 THE COURT: What's the argument? Who? Go
25 ahead.

1 MR. LOPIANO: I'm sorry. In terms of -- in
2 terms of when this was served. So I don't want to
3 waste the Court's time now. But I'd like to an
4 argument in the event --

5 THE COURT: Well -- would it make any
6 difference if he's -- we don't have to go through a 104
7 Hearing?

8 MR. LOPIANO: Actually -- actually it may.
9 And it's a very brief argument. The first time that I
10 ever received anything from Doctor Lakin regarding his
11 comment about this EMG was no July 21st, 2015 which is
12 basically last week and there was a certification of
13 due diligence was attached. I did not have any time
14 you know to file a motion you know to strike it because
15 it says within twenty days. This is within twenty days
16 of the trial date. This EMG was done a long time ago,
17 number one. Number two, it was actually referred to in
18 Doctor Duhare's (phonetic) initial report which Doctor
19 Lakin you know did review and provide an addendum. So
20 to the extent that you know I'm getting an opinion now
21 you know basically on the eve of trial. I mean the
22 Friday before the trial --

23 THE COURT: Well let the record reflect I
24 also -- even though it wasn't pushed too hard and it
25 was put on the record, that I did not allow Doctor --

1 Doctor Webber (phonetic) the chiropractor because his
2 report I said came in too late and therefore I
3 prohibited any testimony from Doctor Webber at all.
4 Whether it be as a treating doctor and/or as an
5 opinion. So in -- and I believe you did say Judge
6 what's good for the goose is good for the gander. You
7 told me July 30th is too late. How come this is not on
8 time? But the difference I try to make was that Doctor
9 Webber had no -- this is -- Doctor Lakin is an
10 addendum to his report. So you were aware that he's
11 involved. Doctor Webber offered no opinion. You're
12 getting opinion testimony. This is a supplement.
13 There's a couple things, the weight to be given to it
14 because he doesn't -- if I read Doctor Lakin, I'm not
15 going to put words in his mouth. I'm not going to tel
16 him what to say. However, he doesn't rely upon it. He
17 doesn't -- barely references the EMG in his report. So
18 my concern originally which is why we have this 104
19 Hearing is he just extrapolate and just take it, I've
20 reviewed it and this is what it says. Okay? If that's
21 what it's being offered for, it's a business record,
22 it's hear say. It's not in. If he's saying that in
23 fact that's a 104 Hearing purpose, I reviewed it. I'm
24 qualified to review it. And these are my opinions. If
25 it is his opinion. Your point being if it's an opinion

1 as opposed to just an extrapolation he's offering an
2 opinion on the eve of trial.

3 MR. LOPIANO: It is. That --

4 THE COURT: Not a bad point.

5 MR. LOPIANO: I haven't --

6 THE COURT: Not a bad point. Not a bad
7 point.

8 MR. LOPIANO: That I haven't had a -- a
9 reasonable opportunity --

10 THE COURT: Yea. No, no, no, no.

11 MR. LOPIANO: And I -- and again --

12 THE COURT: Well you had the fifteen ad
13 limine motions it would have been sixteen.

14 MR. LOPIANO: Correct. But goose and the
15 gander --

16 THE COURT: Okay. Well at -- wasn't sort of
17 number one as well your first motion saying you can't
18 refer to -- but that's really the business records hear
19 say.

20 MR. LOPIANO: Yea. That's the --

21 THE COURT: Okay.

22 MR. LOPIANO: James v. Ruiz argument.

23 THE COURT: That's a little different
24 argument.

25 MR. LOPIANO: But this -- this -

1 THE COURT: It's a little different.

2 MR. LOPIANO: You know this actually put the
3 cart before the horse. Let's put the horse before the
4 cart --

5 THE COURT: Whichever.

6 MR. LOPIANO: In that you know if -- if it's
7 really -- if it's in an opinion based upon a review of
8 a new record that could have --

9 THE COURT: Well --

10 MR. LOPIANO: Done before I was never on
11 notice of it.

12 THE COURT: Well I -- I'm not saying what
13 weight to give it. And Doctor -- and I'm not saying
14 what Doctor Lakin's going to testify to. This is an
15 addendum. At some point he says look I read this and
16 it doesn't change my opinion from the old opinion;
17 okay? I'm not going to say what I think of EMG's.
18 It's irrelevant what I think of EMG's. After you have
19 an MRI. I mean it's -- it's -- and Doctor Ragukonis
20 (phonetic) isn't here -- strike that. You know he was
21 the -- management guy in Paramus. He -- he's the one
22 that sent him over to Mastri. You know? So we don't
23 have his testimony. Why'd you send him over there? If
24 you already have an MRI why do you even need the EMG?
25 You know you already know that he's -- he claims he has

1 a herniated disc. You know? I -- I don't know why he
2 was sent over there.

3 MR. LOPIANO: Yea but --

4 THE COURT: You know? And we'll never know.
5 Not in this trial.

6 MR. LOPIANO: Either way whether it's --
7 either way what's -- what is absolutely certain is that
8 it is a new opinion. It's offered as a new opinion on
9 the eve of trial that wasn't given before and very well
10 could have been given before because this was --

11 THE COURT: All right.

12 MR. LOPIANO: Out there a long, long time
13 ago.

14 THE COURT: Fair enough.

15 MR. NGUYEN: Well Judge --

16 THE COURT: Maybe all this -- you know I
17 didn't allow Doctor Webber. Why should I allow this
18 opinion?

19 MR. NGUYEN: Well Judge he did -- Doctor
20 Lakin did reference Doctor -- Mastri's records and that
21 was in his second addendum dated January 23rd, 2015
22 Judge --

23 THE COURT: Wait. Wait. Time out. Which
24 one are you talking about now?

25 MR. NGUYEN: The second addendum of January

1 23rd, 2015 Judge before the discovery end date.

2 THE COURT: Yea but -- opinion rendered
3 deliberately. Okay. But how come -- it's not a
4 question when he rendered the opinion. It's when did
5 counsel receive it? Not -- not when he did it but was
6 it timely? Counsel is saying he only got this in July.
7 About a week before the trial. Granted I understood
8 depositions were taken after discovery end date. Which
9 I truly appreciate that attorney's work with each
10 other. But yes it is dated January 23rd, 2015 but
11 counsels telling -- what I'm hearing is that he didn't
12 receive it until last week. Two --

13 MR. LOPIANO: What I said was I received his
14 last addendum with that. To the extent that I am
15 corrected that it was referenced in the January 23rd --

16 THE COURT: Yea that's what I'm looking at.
17 Yea.

18 MR. LOPIANO: Yea. I -- I forgot that it was
19 referenced in the January 23rd --

20 THE COURT: Well that -- that makes a little
21 a little difference. You know -- no -- no problem
22 Christian. I understand now.

23 MR. LOPIANO: Okay.

24 THE COURT: Cause I -- I looked at it -- so
25 I'll stand corrected that it -- it was -- it had been

1 forwarded before the trial date. Okay. Then it --
2 then it --

3 MR. LOPIANO: We'll move forward with the
4 other issue.

5 THE COURT: No. So we'll -- I heard it.
6 Denied it. But -- well no cause you did bring it to my
7 attention the beginning of the week and you said well
8 hey if you're going to throw Doctor Webber out why not
9 just throw Doctor Lakin? But maybe that was the last
10 one. And -- and I -- let me say this I -- on the
11 record, I appreciate when attorney's work with each
12 other in discovery and you know discovery end dates are
13 there for a reason. But if attorney's work together
14 the way I think the rules are supposed to -- what I
15 think. So -- so let's ask Doctor Lakin about what he
16 knows about EMG's which I'm sure will be --. All
17 right.

18 MR. NGUYEN: Thank you Judge.

19 THE COURT: Go ahead counsel.

20 VOIR DIRE BY MR. NGUYEN:

21 Q Good morning Doctor Lakin.

22 A Good morning.

23 Q Can you give the Court the benefit of your
24 education, training and experience?

25 A Yes. You want me to start from college?

1 Q Yes please.

2 A Yes. I graduated Muhlenberg College, downtown
3 Pennsylvania, summa cum laude. Attended New Jersey
4 Medical School, graduated 1985. I then did my
5 residency in general surgery and orthopedics at New
6 Jersey Medical School followed by a fellowship of one
7 year at Columbia Presbyterian Hospital New York City in
8 New York -- fellowship. And completed that in 1991.

9 Q And what was the residency in?

10 A Orthopedic surgery.

11 Q And also your fellowship, what was that in?

12 A Hand and upper extremity.

13 MR. LOPIANO: Excuse me Your Honor I'm -- I'm
14 having trouble locating the Doctor's CV. Do you have a
15 -- an extra copy of the Doctor's CV?

16 THE COURT: It was -- I received it as
17 attached to one of the reports.

18 MR. LOPIANO: Thank you. Thanks a lot. I'm
19 okay.

20 THE COURT: Okay. Got you.

21 MR. NGUYEN: You got it?

22 THE COURT: I have it too.

23 MR. NGUYEN: Judge you have a copy? I'm --

24 THE COURT: No. You gave it to me along with
25 the report.

1 BY MR. NGUYEN:

2 Q And Doctor do you have any hospital
3 privileges?

4 A Yes I do.

5 Q And where is that?

6 A At St. Mary's Hospital in Passaic, New Jersey as
7 well as Chilton Memorial Hospital in Pompton Plains.

8 Q And what State's are you licensed as a
9 medical doctor?

10 A In New Jersey.

11 Q When was that?

12 A 1986.

13 Q And do you have any board certifications?

14 A Yes I am. Board certified in orthopedic surgery.
15 I re-certified successfully two times. And my
16 certification is good until 2024.

17 Q And when was your -- your most recent re-
18 certification?

19 A Just this past year.

20 Q And what does it mean to be board certified?

21 A Board certified means completing a written
22 examination and successfully passing that as well as
23 being peer reviewed by your peers.

24 Q And is that the highest certification
25 recognized in your field?

1 A Yes it is.

2 Q And you're -- are you also a fellow in the
3 American Academy of Orthopedic Surgeons?

4 A Yes I am.

5 Q And what is that?

6 A Again it's just -- you have to be board certified
7 to be a fellow.

8 Q And where did you begin working?

9 A Excuse me?

10 Q When did you begin working in private
11 practice?

12 A In -- approximately 1992.

13 Q And do you -- do you have your own private
14 practice in orthopedics today?

15 A Yes I do.

16 Q And do you treat patients as part of your
17 practice?

18 A Yes I do.

19 Q As part of your training and education did
20 you receive training in reading EMG studies in medical
21 school?

22 A Yes I did.

23 Q And what does that training entail?

24 A Again in -- in medical school and orthopedic
25 residency you're expected to know EMG's and NCV testing

1 and the interpretation of testing. It's part of --
2 part of the -- in the textbooks there's chapters on
3 EMG's, nerve connection velocity testing. It's also a
4 part of our board certification. You're tested on it.
5 There's question on EMG's and it's retesting. So it's
6 part -- part of our training as an orthopedic surgeon.

7 Q Okay. And there was questions on the board
8 certification the orthopedics on your last time you
9 took it; correct?

10 A Yes there was.

11 Q Last year? When you did your residency did
12 you get training in reviewing and using EMG studies?

13 A Yes. It's part of the textbooks in orthopedics.
14 And you're expected to pass that for your boards.

15 Q Okay. And what were your fellowship; did you
16 receive training in EMG studies during your fellowship
17 too?

18 A Yea. You -- especially doing the hand and upper
19 extremity I was also used to differentiating between
20 spinal cord problems, -- problems -- EMG's and NCV
21 testing.

22 Q Okay. And how many times did you sit for the
23 board to be certified in orthopedics?

24 A Well the -- two years -- the first you can take
25 the exam is when you -- you're done with your program

1 and then I had to re-certify, that was in 1994. I had
2 to re-certify again in 2004. And I had to re-certify
3 again in 2014.

4 THE COURT: So you just received another
5 certification then Doctor?

6 A Until 2024 Your Honor.

7 THE COURT: What about 2014?

8 A Yea. -- 2014

9 THE COURT: 2004 --

10 A 2014 then 2014.

11 THE COURT: -- so you just did it last year?

12 A Well I took it -- Your Honor I took it two years
13 early to give myself plenty of time.

14 THE COURT: Oh okay. Thank you.

15 Q And each time you sat for the boards were you
16 testing your knowledge and use of the EMG studies?

17 A Yes it was.

18 Q And how many years have you been practicing?

19 A Practicing in -- private practice about twenty
20 seven, twenty eight years.

21 Q And how often over the number of these years
22 have you reviewed these EMG studies?

23 A Frequently.

24 Q And do you routinely rely upon the EMG
25 studies for the diagnosis and treatment of your

1 patients?

2 A As part of the diagnosis. Yes.

3 Q Yes. As part of your private practice too?

4 A Yes I do.

5 Q Okay. And you interpret and read these EMG's
6 to treat your patients; correct?

7 A Correct.

8 MR. NGUYEN: Judge at this time the defense
9 respectfully submit that Doctor Lakin is qualified to
10 read, interpret EMG studies as part of his private
11 practice in orthopedic surgery.

12 THE COURT: Okay. Counsel any cross on that?

13 MR. LOPIANO: Thank you. Yea.

14 CROSS EXAMINATION BY MR. LOPIANO:

15 Q Doctor the training that you had for EMG's
16 was that only at the time when you were in medical
17 school?

18 A No. The training is life long training. You're
19 -- it's part of your -- it's part of your training in
20 medical school, part of your training in residency and
21 part of my training even now -- reviewing EMG's and
22 NCV's. This is a life long commitment.

23 Q Okay. I understand you currently review
24 EMG's. My question is when is the last time you had
25 any training or course materials in terms of how to

1 read an EMG? When's the last time that occurred?

2 A I -- I -- when I prepared for my boards I reviewed
3 it. I quickly -- with my private practice I'll look at
4 issues. It's constant learning.

5 Q Okay. I understand that. But have you taken
6 any courses?

7 A In -- it's implied in orthopedics that you're
8 going to know how to do EMG's and NCV testing and
9 interpret the testing. It's in part and parcel. I
10 could give you a chapter of the book -- update eleven
11 -- and -- MD. You could look at the chapter on nerve
12 testing -- on -- on nervous systems. EMG is mentioned
13 there. -- and orthopedic surgery EMG and NCV testing's
14 will be mentioned.

15 Q I --

16 A -- chapters reviewed. It's part and parcel of
17 orthopedics. I'm board certified in general
18 orthopedics. That's part of my knowledge base.

19 Q Okay. Doctor I'm going to ask you the
20 question. If you could give me a yes or no. I'm
21 trying to ask a very simple question. I'm not trying
22 to brow beat you by any means. Have you taken any
23 courses within the past five years with respect to
24 reading an EMG? A course. Yes or no?

25 A There -- there's no reason for me to take a

1 course. But no.

2 THE COURT: The --

3 Q Okay. Do they offer courses in terms of how
4 to interpret an EMG?

5 A Again it's -- it's part and parcel of my -- of my
6 training. Part and parcel of my education. Again I've
7 studied EMG's. They're in the textbook. They're
8 something we're expected to know. It's something I use
9 every day. There was no reason for me to even look to
10 take for a course.

11 Q Okay. My question was do they offer courses
12 in training to read EMG's; yes or no?

13 A I'm -- I'm unaware. I can't -- I can't answer
14 that question.

15 Q Okay. So you don't whether any courses were
16 offered. But you certainly haven't taken any within
17 the past five years; correct?

18 A Correct.

19 Q Okay. Now do you perform -- perform back
20 surgery?

21 A I did in the past. Not presently.

22 Q Okay. When's the last time you ever
23 performed back surgery?

24 A Approximately ten years ago.

25 Q Okay. When you performed back surgery

1 approximately ten years ago; where did you do that?

2 A At St. Mary's Hospital.

3 Q Were you the primary physician or the co-
4 physician, or what capacity were you?

5 A A primary physician.

6 Q Okay. What was the type of back surgery?

7 A It was a disc herniation.

8 Q Okay. Do you treat patients with disc
9 herniations?

10 A Very common in my practice.

11 Q Okay. Do you -- do you -- you just don't
12 perform surgery on them; correct?

13 A Right.

14 Q Do you perform pain management on patients
15 that have back injuries in your practice?

16 A Personally perform?

17 Q Correct.

18 A No.

19 Q Okay. Why not?

20 A Because I -- I refer that out to a -- I refer that
21 out to my colleagues who do it more frequently than I
22 do.

23 Q Okay. Do you actually perform the EMG
24 yourself on your patients?

25 A No I do not.

1 Q Have you ever performed an EMG yourself on a
2 patient?

3 A No I have not.

4 Q Ever?

5 A No.

6 Q Have you ever spoken with an -- strike that.
7 The person that performs an EMG what is that person
8 called?

9 A The person's called whatever her name is.

10 Q No not the persons name. I'm sorry Doctor.
11 I mean the title of the person.

12 A Again I've seen testing done by a variety of
13 different specialities for EMG's.

14 Q Okay. Do you have any understanding as to
15 what specialities perform EMG's?

16 A I -- again there's a variety of different
17 specialities performing EMG's.

18 Q Okay. Do you know any orthopedic --
19 orthopedic surgeons that perform EMG's?

20 A There are some that perform EMG's.

21 Q Do you know whether any of those orthopedics
22 that perform EMG's have special training to perform the
23 EMG?

24 A I'm not sure.

25 Q Do you know whether the -- any person who

1 performs an EMG needs special training to perform and
2 EMG?

3 A Again to -- I can't answer that question.

4 Q So you don't know?

5 A No I don't know.

6 Q Okay. The person that performed the EMG in
7 this case do you know who that was?

8 A I believe it was Doctor Mastri.

9 Q Okay. Do you know what qualifications Doctor
10 Mastri has?

11 A No I do not.

12 Q Okay. Do -- and you have no idea what
13 qualifications if any are necessary to perform an EMG?

14 A No I do not.

15 Q Do you know what qualifications if any are
16 required to interpret an EMG?

17 A Again it's -- it's part and parcel, interpretation
18 in our practice to interpret the EMG's. So it's -- in
19 -- the field of orthopedics it's required to interpret
20 EMG's.

21 Q Okay. When you say interpret an EMG, how
22 exactly do you do that? What do you look at?

23 A Again you're looking at the amplitudes. You're
24 looking at the wave lengths. You're looking at the
25 different nerves that were tested and -- patterns.

1 It's a whole -- it's a whole phase to look at.

2 Q Are you aware of any literature or based upon
3 your experience as to whether there's a false negative
4 or a false positive with EMG's?

5 A Yea. There could be.

6 Q Okay. And what's your understanding of that?

7 A Again it -- my understanding -- Your Honor if I
8 could just expand a little bit? EMG's are used to
9 confirm your clinical impression. It's not a gold
10 standard test. But it has a false positive rate
11 anywhere from ten to twenty five percent -- the
12 literature. But it's to confirm your clinical
13 impression and it should be for diagnosis purposes
14 only.

15 Q Have you ever relied upon and the results of
16 an EMG to perform or not perform spinal surgery?

17 A I used -- I used EMG's to confirm my clinical
18 impressions.

19 Q Doctor please listen to the question. Have
20 you ever performed an EMG -- striek that. Have you
21 ever performed a spinal surgery where you relied on the
22 EMG; yes or no?

23 A I can't answer that question.

24 Q The last time you ever performed spinal
25 surgery was ten years ago?

1 A Correct.

2 Q When's the last time you performed spinal
3 surgery before the last time?

4 A I can't recall.

5 Q How many times have you ever performed spinal
6 surgery?

7 A Approximately a hundred times.

8 Q How many times have you reviewed an EMG to
9 decide whether you're going to perform spinal surgery?

10 A At -- as solely as an indicator or as part of --
11 part of a case?

12 Q In any -- in any way.

13 A Again EMG's is used to confirm my clinical
14 impression. So if there is a doubt in the case and
15 you're not sure you might want to order an EMG to
16 confirm -- or not confirm your clinical impressions.
17 It's not a sole indicator. It's part of the tools.

18 Q Understood.

19 A The most important thing is history and physical
20 examination.

21 Q The last time you performed spinal surgery do
22 you have a recollection of that?

23 A No I do not.

24 Q Okay. Do you have a recollection of what
25 tests if any were performed prior to performing spinal

1 surgery?

2 A No I do not.

3 Q Do you have a recollection of ordering an EMG
4 to confirm your clinical diagnosis in terms of your
5 intention to perform or not to perform spinal surgery?

6 A No I do not.

7 Q Okay. Do you have a recollection of ever
8 discussing the results of the EMG, if one was performed
9 with that patient who you performed spinal surgery on?

10 A Again in -- in my -- in my case it's part of the
11 clinical -- you know I can't remember ten years ago.
12 And that specific case -- . But part of my practice I
13 rely on EMG's. Again when there's -- when there's a
14 concern again when -- to confirm my clinical
15 impressions or not to confirm my clinical impressions.

16 Q Okay. Is there anything in your CV other
17 than your training, your residency, when you went to
18 medical school and afterwards, anything that has
19 anything to do with specialized training with respect
20 to reading EMG's; yes or no?

21 A Again it's incorporated in being a board
22 orthopedic surgeon. It's part of the examination.
23 It's part of being tested on.

24 Q Okay. And again you have no idea whether a
25 certification is required by any organization or entity

1 for a person to perform an EMG; correct?

2 A Again I just testify to my field of specialty.

3 Q You don't know?

4 A I'm -- my -- I'm testifying to my field of
5 specialty. Outside fields, specialized training I
6 can't answer that question.

7 Q Okay. I just want to be clear. Again I'm
8 not trying to belabor it. You don't know whether there
9 is any special training or certification required for a
10 person to perform and interpret an EMG; correct?

11 A Outside of my field I can't comment on other
12 specialties requirements.

13 Q Okay. Doctor Mastri in his report where he
14 signed it has the initials M.D. --

15 THE COURT: Thank you. I was going to ask
16 that question. Go ahead.

17 MR. LOPIANO: I was trying to get there.

18 THE COURT: No. No. I -- I just wrote a
19 note.

20 MR. LOPIANO: Slow moving train you know?

21 THE COURT: What the heck does CAQ --

22 Q Well let's -- let's go -- let's go with the
23 one that I think I know the answer to. M.D. is medical
24 doctor?

25 A Correct.

1 Q C.A.Q.S.M. What is that?

2 A I'm not sure what that is.

3 Q Okay. Have you ever seen that designation or
4 acronym before or after a Doctor or individual who
5 performed or interpreted an EMG?

6 A I -- I've never recognized that before.

7 Q Okay. What initials if any do you recall
8 seeing after whomever it was that wrote a report for an
9 EMG?

10 A Yea. It was done -- performed by Doctor Mastri.

11 Q My question is when you've reviewed, you said
12 in your practice you've reviewed numerous EMG's, you
13 actually do it all the time; correct?

14 A Right.

15 Q That's what you testified to. Okay. And in
16 fact you're a hand surgeon --

17 A Right.

18 Q You specialize in hand surgery; right?

19 A Well general orthopedics and a sub-speciality in
20 hand.

21 Q Okay. Well you don't perform back surgery
22 and your CV says that you have a specialized training
23 in hand surgery; do you not?

24 A Correct.

25 Q And actually that's what some of your

1 letterhead says that you specialize in hands; correct?

2 A It's -- it's -- I did a fellowship training in
3 hand surgery.

4 Q Okay. Have you ever performed surgery on a
5 patient's hands where there's a negative EMG? Yes or
6 no?

7 A Am I -- yes I have.

8 Q How many times?

9 A A few but it has been done.

10 Q How many hand surgeries have you done in your
11 entire career?

12 A Probably over fifteen hundred, two thousand.

13 Q Of those fifteen hundred to two thousand how
14 many of those patients had EMG's? Every one?

15 A Again it's to confirm my clinical impression. If
16 someone has an avert peripheral nerve entrapment
17 there's no reason to get it. Again sometimes -- and
18 other times in other cases you know it's warranted.
19 Again in the world that we live in and medical/legal
20 world -- carpel tunnel -- carpel tunnel surgery or
21 peripheral nerve entrapment you want to get an EMG to
22 document the function of the nerve. So a good majority
23 of the time when I do their surgery on peripheral nerve
24 about 99.9 percent there is an EMG or NCV testing done.

25 Q Okay. So that was a very long answer. I

1 just want to make sure I have an answer to my question.
2 You've done approximately fifteen hundred to two
3 thousand hand surgeries in your career; correct?

4 A Correct.

5 Q Okay. And of those fifteen hundred to two
6 thousand is it ninety nine percent you do EMG studies?

7 A If it's going to be for carpel tunnel and
8 peripheral nerve entrapment for that sub-specialty yes.

9 Q Okay. So in ninety nine percent of those
10 cases where you've done hand surgery you've had an EMG;
11 correct?

12 A Correct.

13 Q Okay. Of those -- so it's pretty much you
14 know fourteen to nineteen hundred; correct?

15 A The --

16 Q Where you've had EMG's.

17 A Again you're -- we're talking about when I did
18 hand surgery that involves fractures tendon repairs,
19 masses removal tendinitis. When it's sub-divided into
20 carpel tunnel syndrome or cubital tunnel syndrome, or
21 some peripheral nerve entrapment then these cases 99.9
22 percent have EMG or nerve conduction --.

23 Q Okay. Well let's just say the -- the one's
24 with the carpel -- carpel tunnel with suggested nerve
25 entrapment; okay?

1 A Okay.

2 Q Can we just -- how many surgeries on those
3 people?

4 A It's a good share. I can't tell -- I can't tell
5 you you know exact amount --

6 Q Can you give me a reasonable approximation?

7 A Probably around five hundred.

8 Q Okay. So in about five hundred patients you
9 perform carpel tunnel surgery for a nerve entrapment
10 and on ninety nine percent of those five hundred
11 patients you performed an EMG; correct?

12 A Correct.

13 Q You didn't perform the EMG. You sent them to
14 somebody; correct?

15 A Correct.

16 Q Okay. And then you obtained the test
17 results; correct?

18 A Correct.

19 Q And you incorporated that in your clinical
20 diagnosis; correct?

21 A No. I review the test itself. The -- the value
22 and the figures of the test to see if I agree with or
23 agree -- or not with the -- with the person that read
24 the report and then I rely on those studies.

25 Q Okay. And of those five hundred patients

1 that had the EMG how many of those patients did you do
2 surgery on where there was a negative EMG?

3 A Very few.

4 Q How many?

5 A I'd say less than one percent.

6 Q Okay.

7 MR. LOPIANO: May I approach the witness Your
8 Honor?

9 THE COURT: Sure.

10 Q Doctor do you have the report of Doctor
11 mastri in front of you?

12 A No I do not.

13 Q Okay. Do you have your file with you?

14 A No I do not.

15 Q You didn't bring your file with you?

16 A No I did not.

17 Q One, two -- let me make sure I got the entire
18 Mastri report here. I have six pages. Is that what
19 you have counselor?

20 THE COURT: I have seven.

21 MR. LOPIANO: Six. I'm looking for an extra
22 copy because I have one that has six and then I have
23 another one that has three. I apologize.

24 THE COURT: I'm just looking at the exhibit
25 book you gave me.

1 MR. LOPIANO: Yea I know. But I --

2 THE COURT: I -- I have --

3 MR. LOPIANO: I took mine out --

4 THE COURT: Seven.

5 MR. LOPIANO: And my partner has -- I have
6 three. So let me see if I can find the other three
7 pages so we're complete. Sorry. Give me a second.

8 Q Okay. Doctor I'm going to show you exhibit
9 P12. Is this the EMG study that you reviewed in this
10 case? It's a yes or no when you're -- when you're
11 done. Just let me know.

12 THE COURT: Counselor we're now getting into
13 the -- the report itself and the weight of it. I mean
14 first I have to find --

15 MR. LOPIANO: I want to ask a specific --

16 THE COURT: He's qualified to even do it. I
17 mean that's the purpose of a 104 Hearing. This will be
18 repetitive if I -- okay, go ahead.

19 MR. LOPIANO: If you just give me a little
20 leeway Your Honor. I won't belabor --

21 THE COURT: No. Absolutely. I apologize.
22 Of course.

23 A Yes it is.

24 Q Okay. You reviewed this entire report;
25 correct?

1 A Correct.

2 Q Okay. Do you know where the needles were
3 placed?

4 THE COURT: Now we're getting into the
5 report.

6 A Again --

7 THE COURT: I'll allow it. I mean you guys
8 brought this up. I mean it's like after -- after the
9 fact.

10 A Again for -- what's commonly done for the --
11 musculoskeletal group, there's -- the needles were
12 placed in the muscles itself and along the path of the
13 nerve route -- placed along the paths of the nerve
14 routes.

15 Q Okay. You would agree would you not that the
16 accuracy of the results depends upon where exactly the
17 needles were placed; correct?

18 A Correct.

19 Q Do you know exactly where the needles were
20 placed on this EMG?

21 A Again he doesn't -- the doctor doesn't
22 specifically state where he placed the needles.
23 Commonly they're placed in the muscle groups.

24 Q Okay. I'm asking if you know where this
25 doctor placed the needles.

1 A I -- I don't know where this doctor placed the
2 needles.

3 Q Okay. Don't you need to know where the
4 doctor placed the needles to know if the test is
5 accurate?

6 A Again he's saying that he placed it into the
7 anterior tibialis, the gastronimia (phonetic), the
8 vastus medialis, the parnose (phonetic) -- as well as
9 the -- spinals.

10 Q Okay. Right.

11 A So he placed it in a variety of different muscle
12 groups.

13 Q All right. But you don't know exactly where?

14 A In those muscle groups.

15 Q Okay. And if they're not placed specifically
16 where they need to be the results are not going to be
17 accurate; correct? Yes or no?

18 A That's correct.

19 Q Okay. You never spoke with Doctor Mastri?

20 A No I did not.

21 Q Okay. You see on page three it says test
22 date 12/15/14; you see that page?

23 A Correct.

24 Q And there are squiggly lines?

25 A Correct.

1 Q Okay. What's the first box upon the left?
2 What squiggly line is that?

3 A That's -- superficial peroneal --.

4 Q Okay. And what does that mean? What does OT
5 -- it looks like there's initials or I'm sorry,
6 letters, O, P and T. What does the O stand for?

7 A Again I can't -- I don't -- for that comment I
8 can't comment to that.

9 Q You don't know what that O stands for?

10 A No. From when I review the test myself I'm
11 looking for fibrillations (phonetic) on the -- on the
12 -- I'm looking for fibrillations on the examination.
13 I'm looking for reflective wave lengths and then for
14 myself when I personally review the study I rely
15 heavily on the -- on the recruitment, the EMG's as well
16 as the amplitude duration and I also look at the
17 numeric studies for latencies to see if there's any
18 difference.

19 Q Okay. But --

20 A The -- the forms I don't routinely look at.

21 Q Are the -- forms important for the accuracy
22 of the results?

23 A Yes they are.

24 Q Okay. And you don't know what the -- forms
25 mean?

1 A No they're -- they're -- to me I'm looking for --
2 for me in this I'm looking to see if there's any
3 fibrillation -- any fibrillations or -- potentials.
4 For me I'm relying basically on the numbers itself.
5 When I review the test I rely on the numeric values.

6 Q Okay. So you rely upon the numbers
7 themselves, not the actual -- form that's --

8 A Right.

9 Q That's produced as a result of where the
10 needles are placed; correct?

11 A Correct.

12 Q Which is also dependent upon where the
13 needles are placed if they're placed properly; correct?

14 THE COURT: Counsel aren't we getting into
15 the weight of the report now?

16 MR. LOPIANO: Well it goes into --

17 THE COURT: To whether he's qualified or not?

18 MR. LOPIANO: It actually goes into -- two
19 more minutes Your Honor.

20 THE COURT: Okay.

21 MR. LOPIANO: And I promise --

22 THE COURT: No it's a half hour.

23 MR. LOPIANO: All right?

24 THE COURT: I'm just saying you know it's a

25 104 Hearing.

1 MR. LOPIANO: I --

2 THE COURT: And then we're going to be
3 repeating all the same stuff again if in fact I find
4 him qualified which is still a jump ball right now.

5 MR. LOPIANO: Okay. Fair enough.

6 Q Let me ask you this Doctor, do you -- you
7 don't know what the O means on the upper left --

8 A Correct.

9 Q Box? You don't know what the P means on the
10 upper left box --

11 A Correct.

12 Q Right? You don't know what the T means?

13 A Correct.

14 Q Do you know what the Q means?

15 A No I do not.

16 Q The waves -- so what you're saying is you do
17 not know how to interpret these waves; correct?

18 A Again when I rely on --

19 Q It's a yes or no.

20 A In this case I rely on the -- the velocities
21 itself.

22 Q Do you ever review the waves on any of the
23 EMG's that you review; yes or no?

24 A Most of the times the waves aren't -- aren't
25 available for my review?

1 Q Is that a no?

2 THE COURT: Yes it is. I'll take it as a no.

3 Q Thank you. So you only look at the numbers
4 and you look at the conclusion; correct?

5 A I look at the numbers and the conclusion.

6 Correct.

7 MR. LOPIANO: Okay. That's all I have Your
8 Honor.

9 THE COURT: All right.

10 BY THE COURT:

11 Q Doctor you indicated that you have no -- if
12 you -- if you understand that some people believe
13 there's a sub-specialty to do or perform EMG's than
14 there are certain State's that require certifications
15 for an -- to do an EMG?

16 A Yes.

17 Q And what counsel was just asking with
18 regards, isn't the skill of the examiner paramount in
19 conducting and interpreting the EMG testing? That
20 where or how they do the test -- as opposed to
21 radiologists where I would -- well now they have
22 digital stuff. But I always liked when they used to
23 take the box and try to figure out which end is up.
24 But everybody agrees the radiologist does his job
25 unless somebody moves. But EMG isn't it a little bit

1 more subjective and the way they do the test and the
2 examiners ability to do the test correctly; wouldn't
3 that factor -- you know how do you know he did it
4 right? Or do you just make an assumption he did it
5 right?

6 A Again Your Honor in my practice I'll rely on --
7 I'll rely on --

8 Q That's the issue. Did you do an independent
9 evaluation of this -- of the EMG or did you take the
10 language, which there's nothing wrong with it if in
11 fact you -- you used it. Doctors are entitled to in
12 fact rely upon what other doctors say and render your
13 opinion. But your -- your language in your report is
14 identical, verbatim to what Doctor Mastri put in his
15 report. I -- I don't -- I agree maybe there's only so
16 many ways you can write the sentence. But --

17 A I --

18 Q The verbiage is exactly the same. Where they
19 go -- blah, blah, blah. You know it -- it just -- it
20 gives one the impression that you looked at his report,
21 took that information, well and -- let the record
22 reflect I'm just moving along like a --

23 MR. LOPIANO: Copy and paste?

24 THE COURT: Yea. Thank you.

25 A Your Honor in -- routinely I deal in hand and

1 upper extremity surgery, I look at the EMG's --

2 Q Well I don't doubt you're looking at it.

3 A And to -- and the latencies and the sensory
4 velocities are most important. So for myself I always
5 look at the velocities and the numbers. And again here
6 there were all normal numbers. -- his report. There
7 was nothing out of the ordinary. I looked at the --
8 normal, not out of the ordinary. So I know the muscles
9 are fine based upon the -- based upon the sensory
10 testing there was no difference basically between the
11 nerves. They weren't slowed down significantly --

12 Q No. I --

13 A So to me I looked at it and I -- found there was
14 no evidence of any affected nerves. There's just no
15 evidence of any brachial plexus injury and there's no
16 injuries -- myself and Doctor Mastri came to the same
17 conclusion --

18 Q So --

19 A -- results.

20 Q It's your belief that you have a sufficient
21 knowledge of the human anatomy to make that or be
22 qualified to make that decision?

23 A Right.

24 Q On the EMG? But you don't receive any
25 special training and if you -- it's not like even an on

1 line class I -- you know back in 2014 -- when you get
2 your re-certification I know I asked you a specific
3 question, by the way what have you done about EMG's?
4 You seem to lump everything -- you can't do that. But
5 you seem to like say hey in my training I'm an
6 orthopedic -- you know I'm board certified which takes
7 some doing. You know? But somehow you're saying just
8 because I'm a board -- and don't take that the wrong
9 way. I'm not trying to minimize it. That somehow --
10 because some people there's a specialty doing that.

11 It's assumed in that you're in a certified that
12 therefore, of course I can read EMG's. You know I -- I
13 have to do it all the time. I mean granted --

14 A Again Your Honor it's part of -- part of my
15 practice. I'm always differentiating between -- and
16 I'm -- I'm always between a peripheral --

17 Q Well that's -- see --

18 A So I'm always looking at the results myself.
19 Looking at the numbers themselves to see if there's a
20 metabolic problem -- generalized nerves.

21 Q But wasn't your only purpose in looking at
22 this Matri's report was to see if it changed your
23 opinion with regards to whether it was a herniation and
24 you said I read it. It doesn't change my opinion. You
25 didn't really have to read it to form that opinion

1 because Mastroi doesn't give it any weight either. He
2 just says there must be some other cause. But you --
3 you already -- already have an MRI saying herniate --
4 in the plaintiffs opinion. So you didn't rely upon it.
5 So if I -- if you don't testify to it you didn't rely
6 upon it; did you? I -- I don't -- your report doesn't
7 say I relied upon it. It's -- that's what's clear --

8 A Again -- in --

9 Q In my opinion. You didn't rely upon it.

10 A In -- in this case Your Honor --

11 Q Yea?

12 A What -- clinically is neurologically intact there
13 is no -- there was no -- there was no reason to even
14 order an EMG or NCV testing.

15 Q But we don't have Doctor Ragukonis as to why
16 he asked for it. That -- that goes to the weight.
17 We're not talking about your ability to -- to -- to
18 render an opinion with regards to the EMG results and
19 the question was that you did really have to -- did you
20 really have to even read it? Because it's a -- it's a
21 positive. So there's really no reason for you to
22 interpret it -- hey I agree with the guy. Cause that
23 was your purpose in looking at. Does it change my
24 opinion? There's no way it could change your opinion
25 because if -- a hundred and eighty degrees in the other

1 direction. He supports your findings.

2 A Again it -- this is another test that supports my
3 clinical findings.

4 Q Yea. But you -- you also indicate -- I'm not
5 positive that the plaintiffs doctor said this is not
6 the gold test. As a matter of fact there's -- its
7 known to have errors in it. It's -- it's twenty five
8 percent false positive. So how much weight do we give
9 any of these reports? I -- I don't know if it's even
10 necessary and it sounds like a lot of things we've done
11 in this case which aren't necessary. But being good
12 lawyers they cover all their bases. So I don't want to
13 sound critical either of that. I -- forty some years
14 I've never had to argue about a EMG. I don't you know
15 it looks like the radar when you got a ticket years
16 ago. You know it's the only thing I know about radar.
17 The speeding ticket. So. But do you really need that
18 report to render your opinion? Isn't the MRI what
19 you're looking at to determine as to whether there was
20 an injury here? A permanent injury?

21 A Well again it's the clinical examination and my --
22 is unremarkable.

23 Q Well you only examined him one time; didn't
24 you?

25 A My review of the MRI.

1 Q Yea. That goes to the weight though --.

2 A My -- my review of the MRI did not reveal any disc
3 herniation. I found a bulge.

4 Q Yea. So --

5 A And this just confirms -- this is another test --

6 Q Oh no. It --

7 A It's another -- test that confirms that this
8 patient has normal neurological functioning.

9 Q I don't mean to make slight of EMG's. But
10 that's why I've never really had to deal with them
11 because most people -- but so Doctor you don't -- is
12 there a sub-specialty neuro electro diagnostic
13 medicine? Can you get a certification in that? I mean
14 --

15 A I -- certifications in my own field. Commonly --
16 refer out to --

17 Q Well that -- that's what I'm saying. If we
18 had Doctor Mastri here he would be qualified. He says
19 this is what I do all the time. And this is my
20 specialty. I don't know -- I'm not aware of any
21 licensing or any certification such as the board
22 certification -- you're not aware of any certifications
23 for --

24 A I -- I've seen different specialities. I've seen
25 physical medicine doctors do tests. I've seen

1 neurologists do tests. There's a variety of different

2 ---

3 Q Well cause you have certification for
4 radiologists. I've -- never really looked into a
5 certification for EMG. I mean we all know board
6 certified radiologists and -- okay.

7 THE COURT: I'm rambling here. I apologize
8 because I don't know -- I did some -- a little research
9 and it wasn't -- help me -- help me make a decision.
10 Go ahead counselor. Go ahead. I'm rambling.

11 MR. LOPIANO: I just have two questions. I'm
12 not trying to be repetitive.

13 THE COURT: You're not. Go ahead counsel.

14 BY MR. LOPIANO:

15 Q Have you ever stuck needles in a patient and
16 performed an EMG? Yes or no?

17 A No.

18 Q Okay. You don't know where these needles
19 were stuck? Yes -- you don't know?

20 A I wasn't there when he performed the test.

21 Q Okay. The results are dependent upon the
22 accuracy in the placement of the needles; correct?

23 A Correct.

24 Q So obviously there's some sort of
25 subjectivity in terms of where the needles are placed;

1 correct?

2 A Correct.

3 Q The needles aren't always placed in the exact
4 same position every time; are they?

5 A No they're not.

6 Q In fact you don't even know where any of
7 these needles were?

8 A I wasn't there at the time the test was performed.

9 Q Okay. And you've never done that yourself?

10 A Correct.

11 Q Okay. And there is a large degree of
12 subjectivity in terms of the results?

13 A In terms of --

14 Q Interpretation of the results?

15 A Where the needles were placed to be subjective.

16 Q Okay. All right. And --

17 THE COURT: All right.

18 A The objective findings results stand for
19 themselves.

20 Q And -- all right. But if the needles aren't
21 properly placed then the objective findings are flawed;
22 correct?

23 A Correct.

24 Q And you can get a false negative?

25 A Correct.

1 Q Which could be up to twenty five percent of
2 the time; correct?

3 A Correct.

4 Q Okay.

5 MR. LOPIANO: That's all I have Your Honor.

6 THE COURT: Okay. Go ahead. Counsel

7 anything else you want to ask in --

8 MR. NGUYEN: Just one question.

9 THE COURT: My rambling dissertation.

10 RE-DIRECT BY MR. NGUYEN:

11 Q Doctor Lakin do you have to take a class on
12 how to -- EMG in order to read the results of the EMG?

13 A No you don't.

14 Q Okay.

15 THE COURT: He's not aware of any. And I --
16 I can only go -- agreed. But this is going to be the
17 Court's ruling, and we spent a good time on this. I'm
18 going to allow the Doctor to testify as to his
19 interpretation of the waves. Though I have some issue
20 as to whether he interpreted the waves or just read the
21 bottom of the report and looked at the numbers. To me
22 he didn't rely upon it to make his decisions. But that
23 goes to the relevancy of the weight of it. I -- I say
24 this with some reservation because I'm not aware of any
25 specialty or any certifications that I could find

1 looking at New Jersey and a neuro electro diagnostic
2 medicine that -- and I read a position paper. But that
3 position paper is obviously slanted cause they don't
4 think -- doctor. That they actually think it should be
5 a neurologist who does it. Talking about nerve
6 conduction. But I also do find that even the hands and
7 the specialities that he's in he needs to know how
8 EMG's, but this is a positive EMG. There's no -- no
9 basis for it --. But then again if you want you're
10 going to have to read the whole Doctor Mastri -- or at
11 least not allow him to talk about Doctor Mastri -- he
12 says look we still got to look into this. This isn't
13 -- it wasn't the end all and -- Doctor Mastri either.
14 He says we got to -- got to do some more work. And we
15 already know, we heard from the good Doctor for the
16 plaintiff and he's testified to it. He also had an
17 opportunity to talk about the EMG where I think it's --
18 it's somewhat consistent with the Doctor says, it's a
19 cooperative. -- these are false positives. It goes to
20 the weight. As to how much weight the jury's going to
21 give it I'm not sitting as the ninth juror. But I know
22 how much weight I would give it. But I think I'm going
23 to allow him to testify to it. If I told you I was in
24 -- unequivocal about that I'd be mis-representing what
25 I'm looking at. Cause I couldn't find anything that

1 says you need a certification to do it. So I'm relying
2 basically upon his experience in doing hand surgery.
3 It may be a push. It goes to the weight that he has to
4 know EMG's. But we're talking about his back. So how
5 much -- it goes to -- again I'm just going to repeat
6 myself, it goes to the weight. I will -- we'll talk
7 about what I'm going to allow in the presentation to
8 the jury. My gut reaction tells me I'm going to allow
9 the transcript or what was been read or listened to as
10 to what the good doctor said on Tuesday. I remember
11 the testimony --

12 MR. LOPIANO: Tuesday.

13 THE COURT: And what he said about EMG's.
14 Okay. So I'm going to allow him to testify to his
15 readings of it based upon and you know you had
16 extensive cross but he can repeat in front of the jury
17 too. I don't want to make it sound like -- go ahead
18 counsel.

19 MR. LOPIANO: Just so we're clear.

20 THE COURT: Yea.

21 MR. LOPIANO: He's going to say that he
22 interpreted the EMG and it was normal; correct?

23 THE COURT: Yes.

24 MR. LOPIANO: He's not going to say I agree
25 with Doctor Mastri who performed the test --

1 THE COURT: He's -- that --

2

3 MR. LOPIANO: Read it and says it's normal --

4 THE COURT: That's hear say.

5 MR. LOPIANO: He's not bootstrapping in
6 another doctor's opinion --

7 THE COURT: If he was I wouldn't permit it.

8 MR. LOPIANO: Just so we're clear.

9 THE COURT: Absolutely.

10 MR. LOPIANO: It's his -- it is his
11 interpretation of the EMG -

12 THE COURT: Same -- same thing I said Monday
13 or Tuesday that it's not a -- it's not a business
14 record. I'm not allowing the testimony --

15 MR. LOPIANO: And he never --

16 THE COURT: And that's the reason --

17 MR. LOPIANO: He never --

18 THE COURT: For the 104 Hearing. He didn't
19 take that -- granted I say it's the same language --
20 it's a simple sentence. So there's only so many ways
21 you can write it.

22 MR. LOPIANO: Yea.

23 THE COURT: And it is identical to exactly
24 what Doctor Mastri -- but then that sort of boxes you
25 in to --

1 MR. LOPIANO: Well what he can say, just so
2 we're absolutely clear, so the Doctor's clear and I
3 don't want something just bleeding out all of a sudden
4 you know? Okay?

5 THE COURT: Never happened here before.

6 MR. LOPIANO: Never. Right? How many bells
7 can we ring? I don't know. I don't want him saying
8 that yes I performed it and Doctor Mastri read it as
9 normal and I agree with him. I came to the same
10 conclusion.

11 THE COURT: It's his opinion and that's where
12 I had some issues. But the January 2014 report.
13 Fifteen. Okay. That's what he's going to be able to
14 testify to. Granted the poor jurors have been sitting
15 in there. I thought it would take a little -- a little
16 less time. Okay. All right. So we're going to bring
17 the jury in and two minutes. I just want to get
18 something off my desk that I thought I --.

19 (BREAK IN HEARING)

20 THE COURT: I did do some research myself and
21 I wasn't able to come up with any -- I was looking for
22 certifications with regards to the EMG's. I couldn't
23 find any. I did find some position papers but I -- I
24 don't give a whole lot of weight to position papers
25 because that's what they are. Positions. They don't

1 have to be objective. They are subjective's. We want
2 to limit the people who can do this cause we want to
3 make -- they want to make an income. You know. So we
4 don't want other guys doing it. You know they all have
5 to come to me. So I couldn't give it any weight. I
6 will tell you what I read. I want to be candid with
7 you that I found an interesting question. I wish there
8 was something that was so clear I could say hey State
9 verses Langan you know they -- they let it in. So
10 okay. Two minutes. Don't go anywhere Doc. I'm -- I'm
11 coming right back.

12 THE WITNESS: No problem.

13 (BREAK IN HEARING)

14 THE COURT: Then we wait a minute.

15 COURT CLERK: -- something for the record --.

16 MR. NGUYEN: Judge we had discussed in
17 chambers this morning about my request -- instructions
18 to --

19 THE COURT: Sure.

20 MR. NGUYEN: The jury about the out pocket,
21 not being able to pay for it.

22 THE COURT: No. Thank you. I say no because
23 I think it just exacerbates the problem. Because we
24 had a discussion and what my concern had been that if
25 in fact one of his doctors who could have, might have

1 sought his bills to be paid and they were -- you didn't
2 bring this up either, that if his bills weren't paid,
3 why weren't they paid? It opens up a whole other can
4 of worms as to whether there was any findings by any
5 mediators or arbitrators as to that. I mean why -- why
6 do that? What -- what's the point? No, no. You tell
7 me. I'm listening. I mean I --

8 MR. NGUYEN: No. I'm just concerned Judge --

9 THE COURT: I hate to say it sometimes I
10 never give attorney's the chance to talk. I just sort
11 of jump on it before they have a --

12 MR. NGUYEN: The concern I have Judge is that
13 might gather some sympathy from the jurors about him
14 not being able to pay when the payment is not really an
15 issue. Because he said I can't -- he said I stopped
16 going because I can't pay for it out of pocket.

17 THE COURT: Well -- the jury charge says
18 medical bills aren't an issue. I tell them in the jury
19 charge they're not an issue.

20 MR. NGUYEN: When an issue --

21 THE COURT: And he hasn't said by the way you
22 know I would have to pay three -- that's the other
23 reason I -- I indicated -- I don't know who's report it
24 was. I said there's going to be no testimony with
25 regards to how much additional -- you know whether it's

1 -- I mean I find any certain -- so be it with surgery.
2 It's totally -- beyond speculation. It's -- what would
3 you say? I mean other than say, oh by the way don't
4 feel bad for him cause he can't pay his bills and he's
5 -- he's got a little baby and he -- he needs to work --
6 I can't take --

7 MR. LOPIANO: Yea but --

8 THE COURT: Because he also said I couldn't
9 take the time off of work. Wasn't that what I also
10 recollect? He said why'd you stop going to Webber? Is
11 it Webber? Yea. And him saying well I got to work.
12 Granted we know Webber worked probably twenty hours a
13 day, give or take because he was -- the question was it
14 was eight o'clock at his office. Like a lot of good
15 chiropractors. They're blue collar guys and a lot
16 their clients come in after five o'clock. They don't
17 -- so tell me how you're going to express it? I'm not
18 -- I don't want to say no to you. But I'm having a
19 little --

20 MR. NGUYEN: Well --

21 THE COURT: Trouble --

22 MR. NGUYEN: The request I have is a proposed
23 instruction would be that --

24 THE COURT: Though I did want to have the
25 summations today and not Monday. Go ahead.

1 MR. NGUYEN: Is that ladies and gentlemen of
2 the jurors (sic) you have heard testimony from the
3 plaintiff that he did not go for additional treatment
4 because he could not afford and pay out of pocket for
5 treatment. But the issue of --

6 THE COURT: You can say the -- the medical
7 bills aren't an issue.

8 MR. LOPIANO: That's it.

9 THE COURT: I have no trouble with you saying
10 that cause I'm going to tell hem the same thing.
11 They're not an issue.

12 MR. NGUYEN: Medical bills about --

13 THE COURT: He never made a demand for any
14 medical bills either.

15 MR. NGUYEN: Medical bills about either the
16 future or even the past or when he was going.

17 MR. LOPIANO: I -- I -- I think --

18 MR. NGUYEN: I want to clarify.

19 MR. LOPIANO: What counsel wants in a
20 nutshell -- I don't want to make his argument but I
21 think I want to state it in its clearest form as I can
22 do, as best maybe. Is basically he wants Your Honor to
23 tell the jury you should disregard his testimony that
24 he didn't go to the doctor because of you know he
25 couldn't pay for it --

1 THE COURT: Yea.

2 MR. LOPIANO: That's essentially what he
3 wants you -- wants you to say.

4 THE COURT: That -- that's exactly what it
5 is. I didn't -- I didn't think there was any jump ball
6 on that one. I think that's what you want to say.
7 Look he didn't go cause he couldn't afford him. But --

8 MR. LOPIANO: But he wants you to tell the
9 jury you must disregard his testimony that that's not
10 -- you know something you can consider --

11 THE COURT: No. I -- I --

12 MR. LOPIANO: And I don't think that's proper
13 because it was --

14 THE COURT: I can't -- I can't tell the jury
15 that. I mean I can't tell the jury that. I mean the
16 questions how do you want to bring it up in your
17 closing? That's -- that's what I thought you were
18 talking about because I'm not going to give the charge
19 to that. That's his testimony. He -- I said be
20 careful what you ask for.

21 MR. LOPIANO: I mean the -- what should be
22 reflected on the record, again not to belabor this. We
23 do have to get to the rest of the case --

24 THE COURT: Thank you.

25 MS. LOPIANO: Is -- is that we dealt with

1 this in chambers before. We had a very long discussion
2 about it and when we discussed it in chambers I thought
3 we had an understanding this is how it was going to be
4 handled and I conformed. I was very careful --

5 THE COURT: Right --

6 MR. LOPIANO: With that understanding.

7 THE COURT: Yea he -- and he was. I think
8 counsels entitled -- you could say medical bills aren't
9 an -- I mean -- I'm not going to tell the jury to
10 disregard his testimony. Isn't that what you're --

11 MR. NGUYEN: Well not disregard but --

12 THE COURT: You've been here before -- before
13 and you know I very seldom tell a jury what to do if I
14 can help it. I mean that's their job. How much weight
15 they want to give it.

16 MR. NGUYEN: Not -- Judge but to clarify it's
17 not an issue whether payment --

18 THE COURT: The issue is no medical bills.
19 That -- that's a non-issue. I'm going to tell the jury
20 that medical bills aren't an issue. There's no demand
21 to pay medical bills. I mean it'd be different if he
22 went and said by the way I want all this additional --

23 MR. NGUYEN: Well medical bills and ability
24 to pay or not pay it. Cause the issue in the testimony
25 was that he couldn't afford to pay for it which kind of

1 implies --

2 THE COURT: But he --

3 MR. NGUYEN: That it was --

4 THE COURT: He never said that the other
5 bills were paid. He didn't say by the way I was
6 getting paid by the insurance company and all of a
7 sudden they told me they weren't going to pay anymore.
8 You know they have their cut off lines, it has maybe
9 nothing to do with the actual treatment. They just
10 said well you're six months. I don't know if that's
11 the reason. It could have been the arbitrary decision
12 by an insurance company to cut him off. I don't know.
13 That's the issue we're trying to -- I don't want to say
14 avoid. You can -- you can tell the jury that you know
15 medical bills are an issue. Never were. There is no
16 claim for it. I don't know what else I can tell them.
17 I'm not going to tell the jury that by the way
18 disregard anything he says about medical bills. He
19 didn't have out of pocket. I -- I mentioned one time
20 that a lot of motions -- but being good lawyers I just
21 don't see -- I don't read into it what you read into
22 it. I think by emphasizing it it doesn't help. I
23 think -- I think it just exacerbates the problem. Say
24 out of pocket. Well then you got to get into
25 insurance. Don't you? I mean you say well what he

1 meant by out of pocket his insurance company wasn't
2 paying for it.

3 MR. LOPIANO: Hmm mmm.

4 THE COURT: And that's the issue we were
5 trying to avoid. The old 1948 oh -- oh you said
6 insurance, oh my God mal -- it's not as bad as it used
7 to be. When I start practicing forty some years ago
8 it's like oh you mentioned the magic -- oh insurance.
9 Every -- I'm not saying everybody knows that you have
10 insurance. I mean otherwise you're not driving an
11 automobile in New Jersey --

12 MR. LOPIANO: Legally.

13 THE COURT: So it's the same reason we ask
14 that form question, do you have any opinion? It's not
15 a big deal anymore. Strike that. I'm not making --
16 I'm not a legislator. I hear you. But I think it --
17 it -- it opens a whole can of worms. I mean you can
18 say that the medical bills aren't an issue. If you
19 want to. I don't know why you would but if you want to
20 you could say medical bills are -- don't -- because I
21 say it like -- tenth page, fifteenth page of my jury
22 charge. It's -- we're killing this thing here. Go
23 ahead.

24 MR. LOPIANO: Just to --

25 THE COURT: The last one.

1 MR. LOPIANO: Just to complete the circle.
2 Not to get the last word. But to complete the circle.
3 If counsel gets up in his summation and says to the
4 jury you know he testified that he didn't go to the
5 doctor because he had to pay out of his pocket, he
6 cannot argue to the jury that is unbelievable because
7 he had coverage which would have --

8 THE COURT: No.

9 MR. LOPIANO: Okay?

10 THE COURT: Oh my goodness gracious --

11 MR. LOPIANO: I mean I just want to be -- I
12 just want to be clear --

13 THE COURT: I -- hey I --

14 MR. LOPIANO: I want to -- maybe stating the
15 obvious. But I want to stop --

16 THE COURT: I commented on -- fifteen
17 motions, ad limine motions I said that's being a good
18 lawyer. But oh my goodness --

19 MR. LOPIANO: But before we drive off that
20 cliff I want to say listen there is a cliff out there.

21 THE COURT: Counsel -- counsel he's -- he's
22 before me at all -- he's a lot. I know he's not going
23 to say that. That -- that's not even the furthest
24 thing from his mind. Want to talk about getting in the
25 back door? It's like by the way I'm going to cut to

1 the basket now but you got to stand there and let me do
2 it. I mean it -- it don't happen. You know. Oh my
3 goodness. Oh. Oh.

4 MR. NGUYEN: Well I won't go down that far
5 Judge.

6 THE COURT: It's like the vampires --

7 MR. LOPIANO: Won't go down that far he says.
8 Go down there at all. That's my point.

9 THE COURT: I love jurors. They're sitting
10 back there. What else do we got?

11 MR. NGUYEN: We got --

12 MR. LOPIANO: Let's go.

13 THE COURT: It's only two hours past when I
14 thought we'd be doing this.

15 MR. LOPIANO: Let's go. Let's go. Let's go.

16 MR. NGUYEN: -- in chambers Judge --

17 THE COURT: On Friday in the summer. The
18 shore is beckoning.

19 MR. NGUYEN: Before --

20 THE COURT: Okay. Go ahead.

21 MR. NGUYEN: We put on the record that a high
22 low offer was made.

23 THE COURT: Yes. Done. Okay. The high low

24 --

25 MR. NGUYEN: And was rejected.

1 THE COURT: I was advised in chambers that
2 there was a -- comments with regard to high low. I
3 didn't comment to what it should be. But whatever
4 representations were made the plaintiff said no to and
5 for whatever purpose.

6 MR. LOPIANO: Yea just -- and again just to
7 complete that circle so everything is clear on the
8 record --

9 THE COURT: I feel like I'm in another
10 universe here. We got the circle --

11 MR. LOPIANO: There was a -- there was a high
12 low -- it's like a yin yang. There was a high low
13 offer --

14 THE COURT: Am I yang? Okay. Go ahead.

15 MR. LOPIANO: There was a high low offer of
16 17,100. The one hundred being a policy limit and there
17 was an offer made of 2,500. That's the extent of the
18 settlement negotiations. There was an offer for a
19 judgement which was filed -- a letter which was sent --

20 THE COURT: That was 75,000 wasn't the offer?

21 MR. LOPIANO: Offer for judgement for 75,000.
22 There was an -- letter sent a long time ago. All of
23 that had expired. In fact there actually was an -- the
24 plaintiff said we would accept \$50,000.00 when the
25 matter was last listed before trial. So if we're

1 putting --

2 THE COURT: I have more than I need to know.

3 MR. LOPIANO: Settlement discussions on the
4 record. Just so we're clear.

5 THE COURT: I -- it -- all -- yes there was a
6 high low. Thank you.

7 MR. LOPIANO: And we're done.

8 THE COURT: And it was offered at --
9 yesterday after whatever.

10 MR. NGUYEN: Just one more point Judge.

11 THE COURT: Sure. Absolutely.

12 MR. NGUYEN: The -- the last time there was
13 some discussion Judge, not before Your Honor. It was
14 before Judge -- I understand that plaintiffs counsel
15 now says there was a offer of fifty thousand but that
16 was never -- that was probably relayed to Judge -- it
17 was never relayed to me when we were talking
18 separately.

19 THE COURT: Oh no no. Let's see --

20 MR. LOPIANO: It's --.

21 THE COURT: What the jury does.

22 MR. LOPIANO: Yea. Let's go.

23 THE COURT: Before we start getting into
24 these other arguments. You know I -- I gave you my
25 opinion back on Monday when there was no offer I

1 understood as to -- I won't tell you what I thought
2 because it's irrelevant. But I -- I did have a booklet
3 that I had the chance to read over the weekend as to
4 the particulars of the case and I said no offer? And
5 let -- my voice heightened when I said no offer? I
6 don't know if that gets on the record -- transcript is
7 --

8 MR. LOPIANO: I -- I hope so.

9 THE COURT: Yea. But there was -- but there
10 was some -- discussion. You know so all right.
11 Everybody ready? I'd just like to get the jury in
12 here. I -- I know you guys are working hard.

13 MR. LOPIANO: Well we got to get -- we got to
14 get staged. Just one second. Make --

15 THE COURT: Sure.

16 MR. LOPIANO: Sure we're all good here.

17 THE COURT: Now do -- do you have a copy of
18 what you want to say in your summation with regards to
19 what you listened to on the transcript -- the -- the --

20 MR. LOPIANO: Oh do you want the Court Smart?

21 THE COURT: Yea. Only because I could --

22 MR. LOPIANO: Yea. You could listen to it.

23 You want to give him --

24 THE COURT: I can --.

25 MR. LOPIANO: The times? But the times that

1 you have are different than what's on the --

2 THE COURT: Well it --

3 MR. LOPIANO: Give it to him.

4 THE COURT: It's just --

5 MR. LOPIANO: We'll give you -- yes we'll do
6 the best we can.

7 THE COURT: Just the area. Cause that way I
8 could --

9 MR. LOPIANO: Yea. Absolutely.

10 THE COURT: Address that why we -- cause what
11 the game plan is or was that we're going to listen to
12 Doctor Lakin's testimony then we're going to take a
13 break to go over the jury's charge just to make sure
14 we're all in agreement and set up any arguments with
15 regards to what you're going to tell the jury, but I
16 thought we were doing that at 10:30. But what -- what
17 I don't want to have happen in fairness to all the
18 parties particularly the plaintiff I -- I don't want to
19 let the jury at some late afternoon on a Friday and say
20 by the way I don't think that's fair to plaintiffs. I
21 don't think it's fair to anybody. But if I stop
22 talking so much maybe I could get to it. Oh you're
23 going to use it?

24 MR. NGUYEN: I'm sorry Judge?

25 THE COURT: You going to use it?

1 MR. NGUYEN: Yes. Just to show the --

2 THE COURT: Oh no it's okay. I -- I --

3 MR. LOPIANO: He feels like he has to use it

4 --

5 THE COURT: That -- that's okay.

6 MR. LOPIANO: Because you know --

7 THE COURT: I mean I feel like I'm here on

8 Sunday at the next Giant game. You know.

9 COURT CLERK: Are you going to use it from

10 here? Are you going to use it from there?

11 MR. LOPIANO: Yea. I think I'll -- I'll have

12 her.

13 THE COURT: Way too much technology for me.

14 MR. LOPIANO: It's not always bad.

15 THE COURT: No it's not -- hey --

16 MR. LOPIANO: Just remember -- just remember

17 you can get a cell phone. You don't have to answer it

18 when you don't want to; okay? Just because you have it

19 --

20 THE COURT: I always like the people, I have

21 a cell phone. You don't answer anyway so what's the

22 point?

23 MR. LOPIANO: Like my wife. You know?

24 COURT CLERK: Shall we go off the record or

25 --

1 THE COURT: We're on the record? I didn't
2 know we were on the record. So. We're close to
3 starting?

4 MR. NGUYEN: Ready Judge.

5 THE COURT: You ready?

6 MR. NGUYEN: Yes.

7 COURT CLERK: I will get the jury?

8 THE COURT: Yes please. Yea it's working --
9 get hurt on it. Do we -- do we know what --

10 MR. LOPIANO: Oh did you put the days on
11 there? You put the days?

12 THE COURT: Which is -- which is the one with
13 regards to the EMG comments? We don't -- so it's on
14 the disc though? It's not -- I can't get a copy of
15 what they're going to say?

16 MR. LOPIANO: Well I actually have the -- I
17 actually have the disc. If you want to use the court
18 smart --

19 THE COURT: No. I -- I thought I could just
20 --

21 COURT CLERK: Jury entering.

22 (JURY ENTERS THE COURTROOM)

23 THE COURT: All right. Welcome back. Have a
24 seat. I hope you were able to do something profitable,
25 pleasurable all the above on -- yesterday. It does

1 seem like it was a long time ago. At least to me.
2 Again, as I tell people patience is a virtue so I
3 appreciate your patience. What's happened over the
4 last couple hours is this arguments with regards to
5 some of the testimony you might hear, some that you may
6 not hear. So I would like to tell you that I cut down
7 the length of the trial. I can't say that it did.
8 Except we've been out here arguing over what you're
9 going to hear. And that's outside your presence cause
10 if I said you're not going to hear it then you heard it
11 then it's like well forget what you heard. You know so
12 you try never to do that because it's very difficult to
13 tell people -- it's sort of like when you cross
14 something out and everybody says well what did they
15 cross out? You tell -- hey don't do that. But people
16 do that. It's just human nature. Curiosity. So we're
17 going to have Doctor Lakin testify and this is the last
18 witness you're going to hear. Okay? So counsel would
19 you like to call Doctor Lakin back? Keep -- keep in
20 mind that Doctor Lakin was already sworn in this matter
21 previously when we had the 104 Hearing. Doctor you're
22 still under oath. Okay. Counsel.

23 MR. NGUYEN: Thank you Judge.

24 DIRECT EXAMINATION BY MR. NGUYEN:

25 Q Good morning Doctor Lakin.

1 A Good morning.

2 Q Could you introduce yourself to the jurors?

3 A Yes I'm Doctor Jeffrey F. Lakin, M.D.

4 Q And could you give the jury the benefit of
5 your education, training and experience?

6 A Yes I can. I graduated college in 1981,
7 Muhlenberg College, sum cum laude in Allentown,
8 Pennsylvania. I attended the University of Medicine
9 and Dentistry New Jersey Medical School, graduated in
10 1985. I then -- did a residency in general surgery
11 followed by four years of orthopedics at New Jersey
12 Medical School and then I did a one year fellowship at
13 the Robert E. Carroll hand fellowship and upper
14 extremities in New York City, New York.

15 Q What was the residency?

16 A The residency? It was in orthopedic surgery.

17 Q And what did the residency entail?

18 A It involved two years of general surgery followed
19 by four years of general orthopedics.

20 Q And what is the fellowship?

21 A A fellowship is just specialized training.

22 Q And what does that entail --?

23 A I was responsible for research, teaching as well
24 as taking care of patients at the -- University and in
25 the sub-speciality of hand surgery and upper extremity

1 surgery.

2 Q What is orthopedic surgery?

3 A Orthopedic surgery is a physician who examines the
4 musculoskeletal system for complaints, diagnosis and
5 recommends treatment, whether it be non-operative or
6 operative.

7 Q Do you have any hospital privileges?

8 A Yes I do.

9 Q And where are they?

10 A At St. Mary's Hospital in Passaic as well as
11 Chilton Memorial Hospital part of the Atlantic Health
12 System in Pompton Plains.

13 Q And are you licensed as a medical doctor?

14 A Yes I am.

15 Q And when was that when you obtained your
16 license?

17 A 1986.

18 Q Do you have any board certifications?

19 A Yes I do.

20 Q And what does that mean? What field and what
21 does that mean?

22 A It involves -- board certification involves
23 completing a residency program, taking a written exam
24 at the end of your program and then two years later
25 being peer reviewed by your peers and then taking an

1 oral examination. And then at the time I got my board
2 certification you couldn't be grand fathered. You have
3 to stay current with your license and be re-certified.
4 And I took the re-certification exam the first time it
5 was offered for myself in 2004 to be re-certified in
6 2014 and then again became re-certified from 2014 to
7 2025 recently. That involved taking a written
8 examination as well as being peer reviewed by peers.

9 Q Are all orthopedists board certified?

10 A Majority.

11 Q And is that the highest certification
12 recognized in your field?

13 A Yes it is.

14 Q Are you also a -- a fellow in the American
15 Academy of Orthopedic Surgeons?

16 A Yes I am.

17 Q And what does that mean?

18 A Again it means you have your board certification
19 and be in good standing with your peers.

20 Q When did you begin working in private
21 practice?

22 A Approximately 1992.

23 Q And do you currently own your own private
24 practice in orthopedics?

25 A Yes I do.

1 Q Do you treat patients as part of your
2 practice?

3 A Yes I do.

4 Q And have you treated patients with back and
5 neck problems?

6 A Yes I have.

7 Q And in your practice have you performed
8 surgeries for the neck and back?

9 A Yes I have.

10 Q In your practice and treatment of patients do
11 you do MRI's?

12 A Yes I do.

13 Q Can you tell us how often?

14 A MRI's?

15 Q Yes.

16 A Almost every patient comes in with an MRI.

17 Q And in your practice and treatment of
18 patients do you do EMG's?

19 A Yes I do.

20 Q All right. Can you tell us how often?

21 A Frequently. Probably about two to three, four
22 times a week.

23 Q And you view the MRI's and EMG's as part of
24 your evaluation and treatment of your patients?

25 A Yes I do.

1 Q Have you previously been accepted as an
2 expert in the field of orthopedic surgery in the past?

3 A Yes I have.

4 Q How many times?

5 A I can't recall.

6 MR. NGUYEN: At this time the defense offers
7 Doctor Jeffrey Lakin as an expert in the field of board
8 certified orthopedic medicine.

9 MR. LOPIANO: I have a few questions on
10 qualifications Your Honor.

11 THE COURT: All right. With the
12 understanding there's already been some lengthy
13 discussion at the 104 Hearing that -- that --

14 MR. LOPIANO: I'll keep it brief Your Honor.

15 THE COURT: Okay. Sure.

16 CROSS EXAMINATION BY MR. LOPIANO:

17 Q Doctor you don't recall how many times you've
18 been qualified as an expert to testify in court?

19 A No I don't.

20 Q Can you give me an approximation?

21 A -- this month in court approximately twice.

22 Q So you testified two times this month? What
23 about last month?

24 A I can't recall. Probably about the same.

25 Q Is it fair to say that you testify about two

1 times a month for the past three, four years? Is that
2 fair?

3 A No. There's sometimes I don't testify for seven
4 months.

5 Q Okay. Well when you testified it was always
6 on behalf of the defense, the recent testimony;
7 correct?

8 A No. I testify on -- the recent was done on behalf
9 of the defense. Yes.

10 Q Okay. Now Doctor your board certified in
11 orthopedic surgery; correct?

12 A Correct.

13 Q And you have specialized training as a hand
14 surgeon; correct?

15 A Correct.

16 Q Any specialized training for neck or back?

17 A Again I'm board certified in general orthopedics.
18 That's what I took my re-certification. It encompasses
19 neck and back and the entire musculoskeletal system.

20 Q Do you have any specialized training as an
21 orthopedic surgeon to perform surgery on a spine?

22 A It's -- it was part of my training as a -- in --
23 in -- as a resident and part of my training in -- as --
24 in my residency.

25 Q Are -- doctors who perform spine surgery have

1 specialized training to perform spinal surgery;
2 correct?

3 A Some do.

4 Q Okay. Neurosurgeons; correct?

5 A Correct.

6 Q Orthopedic surgeons that are fellows in spine
7 surgery; correct?

8 A Correct.

9 Q You don't have any of those special training
10 or certifications; correct?

11 A Correct.

12 Q You have performed spinal surgery?

13 A Correct.

14 Q When's the last time?

15 A About ten years ago.

16 Q Okay. Haven't performed any spinal surgery
17 since?

18 A No.

19 Q Okay. You were asked questions about the
20 EMG's just briefly. You don't perform EMG's; correct?

21 A Correct.

22 Q Needles are stuck in people and that's how an
23 EMG is performed; correct?

24 A Correct.

25 Q Okay. If the needle isn't stuck properly

1 than the test results aren't accurate; correct?

2 A That could be correct.

3 Q Okay.

4 MR. LOPIANO: Thank you. That's all I have
5 on qualifications.

6 THE COURT: The Court hereby finds Doctor
7 Lakin qualified to give opinion testimony in the field
8 of orthopedics.

9 DIRECT EXAMINATION BY MR. NGUYEN:

10 Q Doctor Lakin did you treat the plaintiff in
11 this case?

12 A No I did not.

13 Q Okay. But you were retained by the defense
14 to perform an examination of the plaintiff?

15 A Correct.

16 Q When did that exam take place?

17 A September 9, 2014.

18 Q And where did the exam take place?

19 A It took place I believe in my office.

20 Q And did you do certain tests for the
21 examination?

22 A Yes I did.

23 Q Okay. How long did the examination take
24 place?

25 A Approximately twenty to thirty minutes.

1 Q Okay. And is that typical of the examination
2 you would perform for any of your patients?

3 A Correct.

4 Q Did you perform all the tests that were
5 needed to complete your examination of the plaintiff?

6 A Yes I did.

7 Q Okay. Were there any tests that you would
8 have performed for -- patient that you did not perform
9 when you examined the plaintiff?

10 A No I did not.

11 Q You reviewed the plaintiffs medical records
12 in this case?

13 A Yes I did.

14 Q And did that include review of diagnostic
15 films?

16 A Yes it did.

17 Q How long did it take you to review the
18 medical records and diagnostic films?

19 A I can't recall specifically but approximately
20 probably, maybe an hour.

21 Q Did you receive compensation for your exam of
22 the plaintiff?

23 A Yes.

24 Q And review of the records?

25 A Yes I did.

1 Q What was the compensation if you know?

2 A I believe it was \$400.00.

3 Q Are you being compensated for being here
4 today?

5 A Yes I am.

6 Q And do you recall what you're being paid?

7 A I don't know. My office manager would know those
8 details.

9 Q If you were not here testifying today would
10 you be in your office treating and seeing your
11 patients?

12 A Yes I would.

13 Q Doctor I would like to direct your attention
14 to the examination of the plaintiff in this matter and
15 please feel free to refer to your reports if you need
16 to review your recollection.

17 THE COURT: You have a number on that
18 counsel? I can't read my own handwriting.

19 MR. NGUYEN: The first one will be -- the
20 first report on September 9th, 2014 Judge.

21 MR. LOPIANO: I don't think it was pre-marked
22 Your Honor.

23 THE COURT: Yea. I didn't think it was
24 either. That's why I'm --

25 MR. LOPIANO: Yea. I don't have it --

1 THE COURT: Asking.

2 MR. LOPIANO: As a pre-marked. That's all.

3 THE COURT: All right.

4 MR. LOPIANO: But can we mark it?

5 THE COURT: Well what was the last number we
6 have for the defense?

7 COURT CLERK: I got -- next number is six --.

8 THE COURT: All right. D6. That's the
9 January -- September -- take my notes. September 9th,
10 2014 report.

11 MR. NGUYEN: I'm sorry Judge. Did you mark
12 that -- copy? D6 will be the CV for Doctor Jeffrey
13 Lakin.

14 COURT CLERK: CV. Okay. Okay.

15 THE COURT: Oh okay. All right.

16 MR. NGUYEN: And then D7 will be Doctor
17 Lakin's reports.

18 BY MR. NGUYEN:

19 Q Doctor before we continue let me ask you
20 this, will all the opinion you give here today be
21 within a reasonable degree of medical probability?

22 A Yes they will.

23 Q When you examined the plaintiff did you
24 obtain a history from the plaintiff?

25 A Yes I did.

1 Q And what was that history?

2 A The history at that time was he was the driver of
3 a car that was stopped and struck in the rear. He was
4 taken by ambulance to Hackensack Hospital. X-rays were
5 done. I was told there was -- at the time told there
6 were no fractures. He was given no immobilization. He
7 was given no braces, no crutches, no splints. He was
8 discharged that same day. He then came under the care
9 of his primary care physician, Doctor Raza who -- who
10 ordered an MRI of his lumbar spine and then he was
11 referred to an orthopedic surgeon Doctor Matarese where
12 he underwent physical therapy for a couple of months.
13 And he states that he was doing well at the time after
14 being released from Doctor Matarese's care. And that
15 recently in February of 2013 which is almost a year and
16 a half after the accident he started to develop
17 increase in his lower back pain and he came under the
18 care of a chiropractor Doctor Webber and was treated by
19 Doctor Webber from February 2013 to March of 2014. And
20 at the time I examined September 9th, 2014 he wasn't
21 under the care of any physicians.

22 Q And the days of the service of the
23 chiropractor that was given to you by the plaintiff
24 during your examination; is that correct?

25 A Correct.

1 Q Did the plaintiff tell you that he saw his
2 primary care physician, Doctor Raza in January of 2009
3 for lower back pain?

4 A No he did not.

5 Q Did the plaintiff tell you as part of his
6 history what was his employment? What he did for a
7 living?

8 A He -- he -- it was part of the -- as a -- an
9 apprentice in custom -- in custom -- custom -- custom
10 building.

11 Q Please give the jury the benefit of the
12 physical exam that you performed and your findings?

13 A Again the physical examination when you examine
14 someone's spinal complaint or complaints involving
15 herniated discs possibly in the neck or lower back you
16 want to focus in to see if there's any cut off of a
17 nerve root, and the nerves come out of your spine and
18 they go in -- into your arms or they go down to your
19 legs. So nerves have a function in motor examination
20 that they provide strength to your muscles. So in this
21 case when I tested the muscles of his upper extremities
22 and the muscles of his lower extremities there was
23 completely full power in his upper and lower
24 extremities muscles. Also examined sensory, each nerve
25 route has a specific sensory level that -- and this

1 gentleman, his sensation was completely normal. And
2 then also you do special reflexes such as if you do the
3 biceps reflex, triceps or the brachialis they go to
4 specific nerve routes, C5, C6, C7. In the lower
5 extremities -- test that we call lumbar, the lower,
6 two, three, and four -- four. The ankle reflex test is
7 S1, which is the S1 nerve root. So when I examined
8 this gentlemen a sensory examination was completely
9 normal. That means the nerves weren't being pressed on
10 that manifest in a sensory loss.

11 His motor examination was completely normal
12 and full and his reflexes were completely -- full. And
13 then there are special tests in orthopedics that you
14 could do to put tension on nerve roots and that we call
15 the spurling's maneuver where you go back and turn it
16 to one side and if it reproduces pain at that extremity
17 it's positive. There's also a straight leg raising
18 test where you lift the leg to thirty to seventy
19 degrees and if it produces pain in a specific pattern
20 that those nerves go to motor and sensory that's a
21 positive test.

22 So everything I did on this gentlemen had a
23 normal objective findings. And again as far as his
24 motion they were all within normal limits for his neck
25 and for his -- again for his lower back. He -- to bend

1 forward with his knees straight to two inches to his --
2 fingers toes -- fingertips to toes which is -- which is
3 normal.

4 So there's nothing on exam that I elicited
5 that found any problems with any motor or sensory or
6 nerves or any nerve routes.

7 Q So there's no findings about any abnormal
8 findings for the lower back; is that correct?

9 A The -- the only thing is there's just some minimal
10 tenderness on palpation.

11 Q Okay. And there was no findings for regards
12 to any neck pain?

13 A Neck pain it was non-tender, full range of motion
14 and his sensation and motor reflexes were all normal.

15 Q What complaints did plaintiff make to you
16 when you first examined the plaintiff?

17 A He said -- his complaints were of neck and lower
18 back pain. The neck pain had gotten better and was no
19 longer present and the lower back pain was made worse
20 with prolonged positions such as sitting, standing.
21 Gets some pain with sleeping and he had some pain
22 lifting heavy weights.

23 Q By the way Doctor Lakin is a complaint of
24 pain a subjective or objective finding?

25 A It's a subjective.

1 Q Can you explain to the jury what is meant by
2 objective verses subjective?

3 A A subjective test is something that you're relying
4 on the patient to tell you they're having pain. It's
5 something that can be limited by the patients response.
6 Objective is by looking for you know a strength,
7 looking for a sensory, you're doing a test or an MRI,
8 you're looking at something -- that's something the
9 patient can't subjectively influence. It's there.
10 It's hard evidence.

11 Q And as far as your examination of the
12 plaintiff you reviewed medical records that the
13 plaintiff received with treatment?

14 A Yes I did.

15 Q Okay. Did that include records for his
16 physical therapy?

17 A Yes. Yes it did.

18 Q Did that include records for his chiropractic
19 treatment?

20 A Eventually I did receive notes on his chiropractic
21 treatment.

22 Q Okay. I'm going to hand you what has been
23 previously been pre-marked as D4 and D5. Tell you that
24 D4 is the physical therapy records and D5 is the
25 chiropractic treatment records.

1 A Correct.

2 Q And in your review of the physical therapy
3 records did they indicate the period that he underwent
4 physical therapy?

5 A Correct.

6 Q Was that for the period -- when did that
7 start? Physical therapy?

8 A Physical therapy started in February 7th, 2012.

9 Q And that was two months after the accident in
10 November 2011?

11 A Correct.

12 Q And physical therapy, when did that end?

13 A It ended in March 5th, 2012.

14 Q Did -- when you asked the plaintiff about his
15 history did he tell you that he only went for physical
16 therapy seven times?

17 A No. The plaintiff in his history told me that he
18 went to physical therapy three times a week for a
19 couple months.

20 Q The records -- only shows seven times; is
21 that correct?

22 A Correct.

23 Q And after the one month physical therapy
24 ended in March of 2012 when did plaintiff have any
25 other treatment?

1 A Again --

2 Q Active treatment.

3 A Again he stated to me that he -- he did well after
4 the therapy and he didn't seek recent treatment until
5 February of 2013.

6 Q And he told -- he didn't seek treatment again
7 until February 2013. But in your review of the
8 chiropractic treatment does that not state that the
9 first day of treatment was January 15th, 2014?

10 A Yes it does.

11 Q And how long did the chiropractor treatment
12 last based on your view of the chiropractic treatment?

13 A It lasted from January 15th, 2014 to March 14th,
14 2014.

15 Q So is that about two months -- two months of
16 chiropractic treatment?

17 A Correct.

18 Q And for during that two months the total of
19 the chiropractic treatment -- about fourteen times?

20 A Correct.

21 Q And based on your review of the records did
22 that two months of chiropractic treatment did it show a
23 pattern of where the plaintiff described -- complaints
24 to the chiropractor -- chiropractor?

25 A Yes it does.

1 Q And does it indicate a pattern that you saw
2 -- the pain complaints? On a scale to one to ten.

3 A No it does not. Oh yes it does. It does. It --
4 the frequency of his complaints continue, it occurs
5 eighty to one hundred percent of the time. On a scale
6 of one to ten with ten being the highest possible level
7 of pain, the patients pain was -- graded as a ten.

8 Q And at some point towards the end of the
9 chiropractic treatment that was in March did it not go
10 from ten all the way down to a two?

11 A Yes it did.

12 Q And did the plaintiff tell you about his pain
13 -- as reported to the chiropractor when you examined
14 him?

15 A No he did not.

16 Q Did the plaintiff tell you about any
17 recommendations that he received -- epidural or steroid
18 injections?

19 A -- my notes. No he did not.

20 Q And what is a epidural steroid injection?

21 A Again an epidural injection is used to treat
22 someone that has a herniated disc.

23 Q Okay.

24 A Commonly.

25 Q And are there risks associated with epidural

1 steroid injection?

2 A Yes there are.

3 Q Okay. Do you -- do you know the percentage
4 of the risks --

5 A Very small.

6 Q And did the records indicate that he ever
7 underwent any epidural steroid injections?

8 A No he did not.

9 Q Do the record indicate that he ever underwent
10 any surgeries?

11 A No he did not.

12 Q Now Doctor at this point I want to direct
13 your attention to the diagnostic studies that you
14 reviewed and I understand that you have them on a CD
15 which I'll bring up to --

16 A Yes.

17 Q Screen for your testimony.

18 THE COURT: Counsel what's this now?

19 MR. NGUYEN: I'm sorry Judge?

20 THE COURT: I said what are -- what are you
21 going to be showing?

22 MR. NGUYEN: The MRI films Judge on the
23 screen.

24 THE COURT: I just want to make sure I heard
25 it right.

1 Q -- for you to stand --.

2 MR. LOPIANO: I'm sorry. I have never seen
3 that. Whatever the doctor's holding. I don't know.

4 A These are --

5 THE COURT: Is that what's up on the board?

6 MR. NGUYEN: No. These -- more diagrams of
7 -- pictures of the vertebrae and the spinal column.

8 THE COURT: Are they of the plaintiff?

9 MR. NGUYEN: They're not of the plaintiff.

10 They are more of a demonstrative evidence Judge and to
11 explain --

12 MR. LOPIANO: I've -- I've --

13 THE COURT: Show them to counsel.

14 MR. LOPIANO: I've never seen it. That's all
15 Your Honor.

16 THE COURT: I -- show them to you.

17 MR. NGUYEN: -- now Judge.

18 THE COURT: And I'm not going to suggest that
19 he could use the same one's that we used on Tuesday
20 which are in color.

21 MR. NGUYEN: -- pre-mark these at this
22 particular point in time. But for your ease of
23 reference I don't want to confuse you. I know you have
24 them in set order. -- you intend on using so -- mark
25 it so there's no confusion to you.

1 THE WITNESS: Sorry about that.

2 THE COURT: Oh everybody does that.

3 MR. LOPIANO: Your Honor can I be heard at
4 side bar for one second please?

5 THE COURT: Sure.

6 MR. LOPIANO: Where is the side bar?

7 (AT SIDE BAR - INAUDIBLE)

8 MR. NGUYEN: D8 will be the axial -- D8 will
9 be the axial view of the spine.

10 THE COURT: Okay.

11 MR. NGUYEN: D9 is a sagittal view of the
12 spine. D10 is both --.

13 THE COURT: Okay.

14 MR. NGUYEN: Thank you.

15 BY MR. NGUYEN:

16 Q Did you review MRI films in this case?

17 A Yes I did.

18 Q And those MRI films were of the plaintiff?

19 A Correct.

20 Q And when were those MRI films taken?

21 A They were taken in January 14, 2012.

22 Q And what were those MRI films taken of? What
23 part of the body?

24 A The lumbar spine.

25 Q Doctor can you please show us the jury -- and

1 the jury your review of the MRI films? And what --
2 what was your findings?

3 A Okay.

4 Q You can approach the screen if it's easier
5 for you.

6 A Can I -- can I just show these exhibits for the
7 jury just to -- for edification and teaching purposes
8 only?

9 Q Sure. Make -- clearer for your review.

10 A What happens is in the lower back you have bone
11 and then you have -- material and then you have bone.
12 And behind those bones you have the spinal cord and the
13 nerve roots.

14 Q Doctor you can just put it on here -- Judge
15 can you see? I'm sorry.

16 THE COURT: Sure. I also have it up here.

17 A You -- you have bone you have disc -- you have
18 bone and you have disc and a disc is like a jelly
19 doughnut. It's made up of an outer fiber called
20 angelus fibrosis. Inside of it is a jelly, like in a
21 jelly doughnut called the nucleus pulposus. And when
22 you're look at an MRI it's important to look at it in
23 more than one view and this view over here is the
24 sagittal is that we're looking at it from the side.
25 And if you see over here this is -- this material, this

1 material, this material and coming out are the nerve
2 routes that I described that go to the specific -- in
3 the -- in the legs. So this is what we call the
4 sagittal view, you're looking at it from the side.
5 Then if you have like a you know a bologna or you cut a
6 salami and you cut it at home, that's the axial view,
7 which is a cross section -- which is a cross section
8 view and that would demonstrate -- that'll demonstrate
9 the disc -- looking on this view over here like you're
10 cutting in half. Then you'll find the disc material.
11 Then over here is the spinal cord which you see over
12 here and then you see on the sides, the nerve routes.
13 And what always gets -- you know it's hard to visualize
14 -- pictures. Is what's the difference between a bulge
15 and a herniation? It's a big difference. A bulge is
16 just a small bubble. It's like a tire that just
17 presses out. It hasn't broken out of the tire and
18 pressed on the nerve so there's no nerve compression
19 from a bulge. A herniation is when that jelly comes
20 out of the doughnut and presses on the nerve route.
21 And it's going to cause symptoms down at the leg -- or
22 sensory exam and what I want to show you on the views,
23 this is a text book showing axial view of the disc of a
24 bulge. Just a little bulgy. Here's the spinal cord
25 and just a little bulging. But it's so important to

1 take a look at that axial view to see if there's any
2 pressure on the spinal cord over here or on the nerve
3 roots. So that's a bulge. It's just a little out
4 pouching.

5 A herniation, it squeezes out of the disc and
6 it'll cut off and press on the spinal cord and this is
7 the spinal cord over here you could see it's pressed on
8 it. But it's not only good to look at one view you
9 have to look at the cut where you cut the salami in the
10 axial view. You could see here it's pushed right here
11 into the spinal. It's pressed on it. You see no space
12 over here where it's a bulge where it might just be
13 touching. Here the disc material is actually pressing
14 on the -- on the spinal cord. And taking a look at Mr.
15 Cava's MRI here's his disc, here's the nerve roots and
16 here's the spinal cord and it's -- there's a space.
17 You could see. It's a bulge. It's not pressing into
18 the disc like it's demonstrated over here. It's just
19 the bulge it's a little bit of out patching. Go to the
20 next view. And again here's his spinal cord and this
21 -- here's the disc over here --

22 Q I'm sorry Doctor. I don't --

23 A The disc -- here's the L5 S1 disc --

24 Q Want to interrupt you.

25 A Here's the spinal cord. It's not cutting it off

1 at all.

2 Q I'm sorry to interrupt you. I think some of
3 the jurors are having difficulty seeing behind you. If
4 you want to use the pointer instead of that --

5 A And here's --

6 Q Easier --

7 A Here's the nerve root here and here's the nerve
8 root here and there's the nerve root over here and
9 there's no pressure on the nerve roots. So it's a
10 bulge cause it's out pouching on this view but when you
11 cut it like the salami it's not -- in the other view
12 which is important it's not pressing on the nerve roots
13 at all. So this -- I diagnosed him of having a disc
14 bulge at L5 S1.

15 Q A bulge is induced by trauma?

16 A They -- they could be.

17 Q And can people have a bulge and not even know
18 it?

19 A Yes. The majority of the population thirty to
20 forty percent of the people --

21 MR. LOPIANO: Just note my objection Your
22 Honor.

23 THE COURT: Yea. That's --

24 Q And can bulges go away with time?

25 A Yes they can.

1 Q Doctor did you have an opportunity to review
2 the EMG study in this matter?

3 A Yes I did.

4 Q And what is an EMG study?

5 A Again it -- it's an objective test that measures
6 the speed of the nerve root as it comes out of the
7 spine and also the signal it sends to the muscles.

8 Q Can you tell the jury what your review of the
9 EMG study showed?

10 A Again there was no pressure on the nerve root. It
11 had normal signal. When it's tested for its sensory it
12 had normal signal when it's tested for its motor
13 response. And so --

14 Q And what -- I'm sorry. And what's the
15 significance of that finding?

16 A That there's no pressure on the nerve root.

17 Q And in your review of the MRI taken from the
18 plaintiff in this case did you find any signs of --
19 spinal cord or nerve root compression at any level?

20 A No I did not.

21 Q Again what's the significance of that
22 finding? Of no evidence of compression?

23 A Again it correlated completely with my exam that
24 he had normal neurological examination.

25 Q Can bulge and herniation be caused wear and

1 tear in the normal aging process?

2 A Yes it is.

3 Q And bulge -- have you seen bulges in a male
4 in his twenties?

5 A Yes I have.

6 Q Doctor Lakin based on the -- your physical
7 examination of the plaintiff and based on your review
8 of all the medical records and based on your review of
9 the diagnostic studies, the MRI's and the EMG; did you
10 formed an opinion about whether or not this plaintiff
11 sustained a permanent injury caused by this accident in
12 November of 2011?

13 A Yes I did.

14 Q And what is that opinion?

15 A That he sustained no permanent injury as a result
16 of the motor vehicle accident.

17 Q And is that opinion given within a reasonable
18 degree of medical probability?

19 A Yes it is.

20 Q And your opinion too also includes that is
21 the plaintiff in any way disabled as a result of this
22 accident?

23 A No he's not.

24 Q And your opinion is based upon the MRI's and
25 EMG's; correct?

1 A And -- and -- and also my clinical examination.

2 Q Okay. And MRI's and EMG's are -- they're
3 objective medical evidence --

4 A Correct.

5 Q That you rely upon? And you rely upon MRI's
6 and EMG's as part of your -- your practice -- private
7 patients; correct?

8 A Correct.

9 Q And after you review all the medical records
10 and all the diagnostic testing did you find any
11 objective evidence to correspond to plaintiffs
12 subjective complaints?

13 A No I do not.

14 Q Thank you Doctor. That's all the questions I
15 have for you at this time.

16 THE COURT: Thank you. Counsel. Mr.

17 Lopiano?

18 MR. LOPIANO: Yes Your Honor. Thank you.

19 THE COURT: Cross?

20 MR. LOPIANO: I have to -- yea we have to do

21 a quick --. Okay? Quick. Quick.

22 THE COURT: Oh switching --

23 MR. LOPIANO: Yea. Quick change.

24 THE COURT: All right. I'm amazed when an

25 electric light goes on so --

1 MR. LOPIANO: I just hope it works. Every
2 time you take it out you hope it works. Good we're up.
3 Thank you.

4 CROSS EXAMINATION BY MR. LOPIANO:

5 Q Good afternoon Doctor.

6 A Good afternoon.

7 Q You don't know how much you're being paid to
8 testify today?

9 A No not the exact amount.

10 Q Do you have any idea what you're being paid?

11 A It could be roughly between \$1,500.00 to
12 \$2,500.00.

13 Q All right. When you testified last week what
14 were you paid?

15 A I actually have to check my office manager with
16 that.

17 Q Okay. Does your fee vary upon which day you
18 testify?

19 A No. My office manager keeps records of the fees
20 -- testifying.

21 Q Okay. You're testifying on behalf of the
22 defense in this case; correct?

23 A Correct.

24 Q Okay. You received records in this case?

25 A Yes I did.

1 Q When you received the records in this case
2 didn't you understand that you were going to provide a
3 report that was going to assist the defense in this
4 case?

5 A I provide an independent medical evaluation on
6 behalf of the defense.

7 Q When you received the records did you
8 understand that you were performing an examination and
9 writing a report on behalf of the defense that would be
10 submitted in court on this case; yes or no?

11 A Yes.

12 Q Okay. Who did you receive the records from?

13 A The records -- came to me from a third party,
14 ExamWorks.

15 Q ExamWorks. What's ExamWorks?

16 A ExamWorks is a -- is a third party company that
17 collects records and sets up independent medical
18 evaluations.

19 Q Well they -- in fact they -- they set up
20 exams for the defense; do they not?

21 A In this case, correct.

22 Q Well when -- you've done other reports for
23 ExamWorks; have you not?

24 A Yes.

25 Q ExamWorks is a publicly traded company on the

1 New York Stock Exchange; is it not?

2 A I'm not sure about that.

3 Q How many times have you written a report for
4 ExamWorks?

5 A This week? About -- I'd say about six, seven
6 times.

7 Q Okay. Is that what you do every week for
8 ExamWorks?

9 A It varies. Some weeks there is none. Some weeks
10 there can be some more.

11 Q Okay. How long has that been the practice?

12 A For approximately about a year.

13 Q Okay. You work for any other third party
14 defense medical companies?

15 A Yes I do.

16 Q How many other defense medical companies do
17 you work for?

18 A For -- for IMX.

19 Q Okay. How many of those reports do you do on
20 a weekly basis?

21 A It varies.

22 Q How much did you do -- how many -- well
23 today's Friday so it's pretty much the end of the week.

24 How many reports did you do for the defense IMX company
25 this week?

1 A Approximately six.

2 Q Okay. So you did about six or seven for
3 ExamWorks this week and you did about six or seven for
4 IMX; right? So it's about thirteen; fourteen; right?

5 A Correct.

6 Q How much you charge for each report?

7 A We -- it's \$400.00.

8 Q \$400.00 for each report. For all of those
9 reports did you examine plaintiffs?

10 A Yes I did.

11 Q None of those reports were written for the
12 plaintiff; correct?

13 A No they weren't.

14 Q How much do you charge for the --

15 A Excuse me just for the -- excuse me repeat that
16 question again.

17 Q All of those reports you examined plaintiffs
18 to write a report on behalf of the defense; correct?
19 Those fourteen cases. Whether it be for ExamWorks or
20 for IMX; correct?

21 A Correct.

22 Q Okay. And how much do you charge for the
23 exam?

24 A The exam is a total fee for of \$400.00.

25 Q Okay. Do you remember Mark Cava?

1 A No -- I have -- not -- not -- not -- I can't -- I
2 can't -- not specifically.

3 Q Do you remember him at all? If you passed
4 him on the street would you recognize him?

5 A No I would not.

6 Q If I identified this gentleman here with the
7 nice colored shirt on as Mark Cava; does that refresh
8 your recollection? Do you now remember Mark Cava?

9 A No I couldn't give you a -- I can't answer that
10 question. I can't specifically say yes or no.

11 Q Do you remember the exam that you performed?

12 A The exam is in the -- reflected in my records.

13 Q Do you remember the exam? Do you have a
14 specific recollection as you sit here today of the exam
15 that you performed?

16 A It's as reflected -- as reflected in my report.

17 Q I understand it's reflected in your report.
18 What I'm asking you do you remember actually --

19 MR. NGUYEN: Asked and answered already
20 Judge.

21 MR. LOPIANO: It has been asked. It hasn't
22 been answered Your Honor. I'm just trying to get an
23 answer.

24 Q Do you remember doing the exam? Do you
25 remember the exam?

1 A I -- I did the examination and it's reflected in
2 my report. And specific details of the exam, I
3 couldn't tell you. It's reflected in the report.

4 Q Okay.

5 A But the exam was personally done by myself.

6 Q I understand that. Do you have a
7 recollection of how long the exam took? Yes or no?

8 A In -- a routine examination -- myself for -- for a
9 back problem and a neck problem approximately between
10 twenty to thirty minutes.

11 Q Okay. I understand you're testifying -- I
12 want to be clear. If I ask you a question if you have
13 a specific recollection I want to know as you sit here
14 today if you remember it. So for example if you had
15 breakfast this morning and I asked you what you had for
16 breakfast you have a specific recollection. If I ask
17 you what you --

18 THE COURT: Ask a question counsel.

19 MR. LOPIANO: I'm sorry?

20 THE COURT: You don't have to give a lecture.
21 Ask a question.

22 MR. LOPIANO: Okay. I'm sorry.

23 THE COURT: No, no. It's okay.

24 Q Do you have a specific recollection as you
25 sit here today as to how long it took you to perform

1 your clinical examination of Mark Cava; yes or no?

2 A No.

3 Q Is there anything indicated in your report as
4 to how long your examination of Mark Cava took?

5 A No.

6 Q Do you remember the date that you took the
7 exam of Mark Cava without looking at your report?

8 A No I don't.

9 Q Do you remember how many exams of plaintiffs
10 you performed that day when you examined Mark Cava?

11 A I couldn't tell you.

12 Q Okay. Can you give me an approximation?

13 A I couldn't -- I can't tell you. I can't answer
14 that.

15 Q Okay. Do you have any idea how many defense
16 exams you did for IMX and ExamWorks that week?

17 A I can't recall.

18 Q Okay. Do you recall receiving records prior
19 to performing the exam of Mark Cava?

20 A The records that were received before seeing Mark
21 Cava.

22 Q Okay. Did you bring those records?

23 A No I did not.

24 Q Did you bring your file?

25 A No I did not.

1 Q Do you know how much time you spent totally
2 on this case on behalf of the defense?

3 A Review of records before hand approximately an
4 hour. Review of records in preparation for the trial
5 an hour to two hours.

6 Q Can you ballpark in terms of all the reports
7 that you wrote, the examination, all the time that you
8 spent on this case can you give me a ballpark? Cause
9 you don't have your billing records; correct?

10 A Correct.

11 Q Okay. Can you give me an approximation as to
12 ballpark approximation -- how much time? Total time
13 that you spent?

14 A In preparing this case approximately two to three
15 hours.

16 Q Okay. So that includes the exam, your review
17 of all the records and all the reports that you wrote?
18 Two to three hours?

19 A Correct. And review of the MRI and -- MRI
20 imaging.

21 Q Okay. So the outside is three hours;
22 correct?

23 A Correct.

24 Q Okay. Without looking at the reports -- you
25 have the reports that you wrote in front of you?

1 A Yes I do.

2 Q Without looking at them how many did you
3 write?

4 A I believe there was one original examination and
5 then there was two addendum emanations.

6 Q How many times did you examine him?

7 A Just once.

8 Q Did you ever ask to re-examine him at any
9 time?

10 A No I did not.

11 Q Okay. When you received the records of Mark
12 Cava; what did you do?

13 A Did you do the exam first? Did you review the
14 records? Did you review the films? Do you remember in
15 sequence -- specifically do you remember how you did
16 that?

17 A Again my usual routine is I'll glance through the
18 records to see what's brought by the patient,
19 especially if there's any films. I always ask the
20 patient if they brought films with them. Because I
21 want to make sure there's films that were -- films that
22 were provided to me. In this case there was. And then
23 I scan through the records just for generally to see
24 the general -- of the case because some patients --
25 some patients don't remember -- they can't recall

1 things. So I'll look through the chart just as a -- a
2 brief cursory before I -- to see what's there provided
3 to me. And then also, when I conduct the history so I
4 could go through it in a logical order with the
5 patient, or the plaintiff in this case.

6 Q Okay. So just so -- so we're clear you get
7 the records, you scan them briefly to get the gestalt
8 and you see if there are any films; correct? So you
9 have a general idea of what's transpired and why he's
10 there; correct?

11 A Correct.

12 Q Okay. But you don't specifically -- you're
13 not detail orientated in terms of reading every record
14 at that point; correct?

15 A Correct.

16 Q Does there come a point in time when you get
17 detail oriented? In terms of I want to look at each
18 record and see what the progression of this gentlemen's
19 symptoms were or what's reflected in the other doctors
20 medical records who actually treated the plaintiff?
21 Did you do that?

22 A Again --

23 Q Yes or no?

24 A There was -- there was a -- there was a -- that
25 was -- there was a detailed review afterwards.

1 Q Okay. When did you do the detailed review?

2 A When I'm -- when I'm -- before I write the report
3 I'll just match up the dates to see if -- in -- what
4 the patient told me. In this case it was similar to
5 what the patient told me the records reflected.

6 Q Okay. And when you say the records the
7 records that you received prior to the initial report
8 that you wrote; correct?

9 A Correct.

10 Q And you did this detailed review of the
11 records that you list in your report cause you wanted
12 to make sure that listen I got all my facts straight.
13 I got all the details. So when I'm going to write an
14 opinion I'm goign to sign this report that's goign to
15 go to court I want to make sure that everything is
16 completely true and accurate; correct?

17 A Again --

18 Q Yes or no?

19 A You're -- I can't answer that question.

20 Q Why not?

21 A Because you're -- you're -- you're -- you're
22 taking things out of context. I'm writing this report
23 on my examination of the patient. It's my opinion. My
24 review of his records, my review of his studies and
25 it's my opinion that's being asked to be testified that

1 I sign my name to. It's my opinion. The records is
2 used to help support the facts of the case and -- as
3 used -- as used. And in this case the most important
4 part is my exam of the patient and my review of the
5 records. Not to rely on the opinions. It's my opinion
6 that's being asked for.

7 Q I understand that. But my question to you
8 was prior to you signing your prot and sending it off
9 -- oh by the way when you signed the report and sent it
10 off did you send it off to defense counsel or did you
11 send it to ExamWorks? The company that hired you.

12 A Again it's sent to ExamWorks.

13 Q Okay. How many offices do you have?

14 A I have one office.

15 Q Okay. You have an office in Freehold?

16 A No I do not.

17 Q Do you have an office in -- on Becker Farm
18 Road in Roseland?

19 A No I do not.

20 Q Okay. You have an office in Pennsylvania?

21 A No I do not.

22 MR. LOPIANO: May I approach the witness Your
23 Honor?

24 THE COURT: Sure.

25 Q I'm going to show you a report. Just take a

1 moment. I don't want you to answer any questions yet.

2 Just let me know when you're done looking at it.

3 MR. NGUYEN: Judge I want to object at this

4 time. This was not provided to me before --

5 THE COURT: Yea. Get a little closer so I

6 can hear it.

7 MR. NGUYEN: Judge I'm going to object

8 because I have not been provided a copy of this before

9 today.

10 THE COURT: I don't know what it is.

11 MR. NGUYEN: I don't know what it is either

12 Judge.

13 THE COURT: It hasn't been identified.

14 MR. LOPIANO: Let's see if he can first

15 identify it and then we'll go from there.

16 THE COURT: Well let me see what it is.

17 Thanks Doc. Okay. Go ahead Doc.

18 Q Tell me when you're done.

19 A Done.

20 Q You looked at it?

21 A Yes I did.

22 Q Is your name at the top of that?

23 A Yes it is.

24 Q It says Jeffrey F. Lakin; correct?

25 A Correct.

1 Q It says board certified orthopedic surgery,
2 Freehold New Jersey?

3 A Correct.

4 Q Okay. You don't have an office in Freehold?

5 A No. For ExamWorks I'll see -- I'll see patients
6 for ExamWorks. Not in my office. In an -- in an
7 office that's rented for -- by ExamWorks two times a
8 month and Freehold is one of the places that this exam
9 is done.

10 Q So are these examinations that you do for
11 ExamWorks in Freehold two times a month are those
12 inclusive of the six to seven reports that you write
13 each week?

14 A It's --

15 Q Or is that in addition?

16 A No. Again, for my own practice you're asking --
17 I'll do two half days for ExamWorks of this month and
18 the -- as -- as part of the few that come through my
19 office per -- per -- per month.

20 Q Okay. All right. And what about IMX Medical
21 Management Services?

22 A Again I'll do two -- approximately a month I'll do
23 two half days for IMX and I'll do approximately one
24 full day.

25 Q Okay. So where do you travel around and

1 perform exams for the defense? You have your office.
2 You have Freehold. You said some location in Freehold.
3 Do you go to other places? Do you go to Pennsylvania?
4 Because it --
5 A No. No.
6 Q Looks like according to the letterhead IMX is
7 in Malverne, Pennsylvania. Do you go to Pennsylvania
8 --
9 A No I don't.
10 Q To perform exams?
11 A No I do not.
12 Q So you just perform exams in two places?
13 A For -- for IMX and for exams in Freehold, Cherry
14 Hill as well as -- as well as Ewing.
15 Q Okay. Cause on -- on the letterhead it says
16 New Jersey locations, Paramus, Ridgewood, you perform
17 exams in Paramus Ridgewood for IMX?
18 A No I do not.
19 Q You perform exams in Piscataway for IMX?
20 A No I do not.
21 Q You perform exams in Freehold?
22 A Yes.
23 Q Cherry Hill?
24 A Yes.
25 Q How many days a week you go down to Cherry

1 Hill to do defense exams?

2 A One day a month.

3 Q Okay. How about Mays Landing?

4 A None.

5 Q How about Kearny?

6 A None.

7 Q How about Mercerville/Ewing?

8 A Half day.

9 Q Okay. Can I have that back? Doctor when you
10 wrote your report, your first report that's dated
11 September 9; is it not? 2014?

12 A Correct.

13 Q Okay. And you have that report in front of
14 you?

15 A Correct.

16 Q Okay. The records that you have listed on
17 the first page; when did you do a detailed review of
18 those records? That was after some time; right? After
19 the exam?

20 A Correct.

21 Q Okay. And you -- you don't recall how much
22 time you spent actually doing the detailed review?

23 A Correct.

24 Q And actually the -- the records that you
25 reviewed are on page four; correct? Of your report.

1 A Correct.

2 Q And just for -- so we're clear the total
3 pages of your report, five pages; correct?

4 A Correct.

5 Q Okay. Could you tell me -- could you go to
6 page four where it says review of records?

7 A Right.

8 Q You see that part?

9 A Correct.

10 Q Okay. Could you read that? Could you read
11 that part starting with I reviewed?

12 A I reviewed the MRI report and the MRI films on a
13 CD -- from 1/14/12. Answers to interrogatories and
14 depositions --

15 Q Let me stop you there. I'm sorry to
16 interrupt. Who's answers to interrogatories did you
17 review?

18 A I believe it's the plaintiffs.

19 Q Did you review the defendants?

20 A I'm not -- I can't recall.

21 Q Okay. Did you think it was important to know
22 the defendants version of the accident as to how the
23 accident happened or how severe it was in the
24 formulations of your opinions in this case?

25 A Again I base my opinion on the history of the

1 records that I use to review.

2 Q Is that a no? So you didn't want to see the
3 defendants answers to form any basis of your opinions
4 in this case?

5 A Again I -- I can't recall if I did or didn't.

6 Q Okay. When -- okay so as you sit here today
7 you don't know who's answers to interrogatories you
8 reviewed but you -- you're assuming it's the
9 plaintiffs?

10 A Correct.

11 Q It may have been the defendants, you don't
12 know?

13 A Correct.

14 Q The deposition. What deposition did you
15 read?

16 A I can't recall.

17 Q Who's deposition did you read?

18 A I can't recall.

19 Q You're absolutely certain are you not that
20 you actually reviewed a deposition prior to rendering
21 your report; correct?

22 A Correct.

23 Q What weight if any did you put on whatever
24 deposition you did read?

25 A Again it was records that were used for my reviews

1 verifying again if there was a -- accident and again if
2 the claimant was involved. It was cursory. For me
3 it's the again it's -- it's used just for that
4 purposes.

5 Q I'm sorry. Did the deposition that you
6 reviewed form any basis of your opinions in this
7 matter?

8 A No it did not.

9 Q It did not?

10 A No it did not.

11 Q Do you recall reading Mark Cava's deposition
12 to see well what was he asked at deposition? What did
13 he testify to in terms of what history you took when
14 you did your exam?

15 A Again I took the history from Mark Cava that day
16 and there was no -- that -- that was -- that was what
17 he elicited to me that day at that examination.

18 Q Okay. But you did review a deposition
19 transcript; correct?

20 A Correct.

21 Q All right. May I approach the witness Your
22 Honor?

23 THE COURT: Yes you might.

24 Q I'm going to show you the first page from the
25 -- Mark Cava's deposition. Is there a date on that?

1 A Date is December 9th, 2014.

2 Q And your report is September 9, 2014;
3 correct?

4 A Correct.

5 Q So how could you have reviewed his deposition
6 transcript --

7 A That -- that's what I --

8 Q In writing your report.

9 A Said that there was answers to interrogatories and
10 depositions submitted to my review. I don't know whose
11 it was. I'm -- we're assuming that was the plaintiffs
12 -- answers.

13 Q Do you know whether anybody was deposed in
14 this matter other than Mark Cava?

15 A No I do not.

16 Q Okay. But you're certain you reviewed a
17 deposition transcript?

18 A That -- if it's listed in my thing and there was
19 answers to interrogatories and depositions that were
20 submitted to my review.

21 Q And certainly you billed for it because it's
22 referenced as one of the records that you reviewed;
23 correct?

24 A No I'm -- no I'm billing for my examination.

25 Q Okay. Now Doctor you acknowledge that Mark

1 Cava was injured in this accident; correct?

2 A According to his history. Yes.

3 Q Well not according to his history. According
4 to the opinions that you're giving to this jury today
5 is it your testimony that within a reasonable degree of
6 medical probability that Mark Cava was in fact injured
7 as a result of this crash; yes or no?

8 A He sustained sprains to his cervical spine and
9 lumbar spine. Yes.

10 Q Okay. And sprains and strains of the
11 cervical and lumbar spine they can be permanent; can
12 they not?

13 A No. Not --

14 Q Never?

15 A Not -- not in a -- you know it's not defined as a
16 permanent injury by itself in -- in this setting where
17 the patient full motion and he has full -- in this --
18 not in a hypothetical, in this setting where someone
19 has full motion and full function there's no permanency
20 for a strain.

21 Q I'm asking you in general Doctor. In
22 general. Can a sprain or strain ever be permanent?
23 Ever?

24 A I've never seen it.

25 Q Okay. Now Doctor getting back to the records

1 that you reviewed, did you review any records which
2 pre-dated the accident?

3 A No I did not.

4 Q Did you ever review any records that pre-
5 dated the accident? At any time. And if you need to
6 look at your other reports if you don't recall please
7 so do.

8 A No I did not.

9 Q I created a time line. I'm really not going
10 to belabor. I'm going to try to go through it as quick
11 as possible. I just want to make sure that these
12 records that you reviewed and if you recall whether the
13 information that's contained on the time line you know
14 is the same information that's contained in the
15 records; okay? Fair enough.

16 A -- hard time visualizing it.

17 Q Fair enough. Okay. If you can see it --.

18 A I still can't see it.

19 Q Do you want to come out?

20 A If you want to bring it closer --

21 Q I don't want to bring it closer -- I just
22 don't know how much the jury's going to be able to see
23 it and I want the Judge to see it. So if you need to
24 move around. November 19, 2011 that's the night of the
25 crash or the next morning; did you review records from

1 the emergency room? And if you need to review your
2 reports to refresh --

3 A Yes I did.

4 Q Okay. Isn't it true that Mark Cava
5 complained of neck and back pain in the emergency room?
6 He was transported via ambulance. He was in full
7 spinal immobilization when they took him to the ER?

8 A Well you have to -- you have to produce those
9 records in front of me. I can't -- I can't recall
10 details of that. But you have to -- if you want to
11 show me --

12 THE COURT: You answered the question. Next
13 question.

14 A If you want to show me the records I'll be more
15 than happy to look at it.

16 THE COURT: No.

17 A The specific records from that date.

18 Q There you go Doctor.

19 A -- what page is that on?

20 Q I think P -- P4.

21 A Again -- what -- those records?

22 Q Okay. Did you review these records and did
23 they form a basis or part of the basis for your
24 opinions in this case?

25 A Yes it did.

1 Q Okay. And the records reveal that he was
2 taken via ambulance in a full spinal immobilization.
3 He was seen in the ER and he had complaints of neck and
4 back pain; correct?

5 A Correct.

6 Q Okay. You reviewed those records before;
7 correct?

8 A Correct.

9 Q Do you discuss those records in your report?

10 A Again it's also in his records he was cleared from
11 the bed board --

12 Q The -- Doctor you need to answer my question.
13 I'm sorry. Did you review those records? Are those
14 records discussed in your report? Yes or no?

15 A Again when I asked the patient if he left the
16 emergency room with any immobilization in his history
17 he said that he left with no immobilization, no --, no
18 braces, no splints and that's also reflected --
19 reflected in the emergency room records.

20 Q Okay. Now Doctor he saw Doctor Rasa his
21 private physician, his primary care physician; correct?

22 A Correct.

23 Q Okay. When he saw Doctor Rasa do you know
24 what he complained of?

25 A I can't specifically testify to that.

1 Q Is it --

2 A Unless -- but --

3 Q Reflected in your report?

4 A In my report reflects that after the emergency
5 room he went to see his private physician Doctor Rasa
6 where he was -- had an MRI done as well as --
7 medications.

8 Q Okay. Doctor do you recall when he went to
9 see Doctor Rasa and the record that you reviewed --
10 cause you did review Doctor Rasa's records; right?

11 A Correct.

12 Q Okay. Will you agree with me that when he
13 saw Doctor Raza he complained of headache, neck pain,
14 shoulder pain, muscle aches, back pain, left ankle pain
15 and Doctor Raza recommended physical therapy for two to
16 three weeks; will you agree with me on that?

17 A Well I want to verify it by reviewing the records
18 myself. What -- what's that? What section is that on
19 here?

20 Q Doctor Raza's records.

21 A Okay. And what number is that?

22 Q P6. It's a yes or no. I don't need you --

23 A Well --

24 Q To read Doctor Raza's records --

25 THE COURT: Well you're repeating his

1 records. You're getting it all on the record. I mean
2 I -- I'm not -- I didn't hear any objection to all the
3 comments with regards to -- under those -- time lines.
4 It would be one thing to say Doctor Langan (phonetic)
5 date. Not what he said, not what he did. You know.
6 The Doctor says on page four he reviewed the notes.

7 A If he -- if he -- specifically -- I just want to
8 request records to make sure --

9 THE COURT: No. Go ahead.

10 A What he's saying. Again Doctor Raza's notes it
11 says back pain, headache, ankle pain, shoulder pain,
12 muscle aches, neck pain. It doesn't say left ankle
13 pain. It just says ankle pain.

14 Q Okay. And it has a recommendation of physical
15 therapy for two to three weeks? See that as well?

16 A In his notes from his first visit there is a --
17 yea referral for physical therapy.

18 Q Thank you Doctor. Now he went back to see
19 Doctor Raza on December 7th and he also went back to
20 him on the fifteenth; correct?

21 A He went back on 12/7/2011 and he went back on
22 12/15/2011. Correct.

23 Q Okay. And he continued to complain of low
24 back pain; correct?

25 A -- review of Doctor Raza's records.

1 Q Okay. Did you review any records at all in
2 terms of when Mark Cava had any complaints of back pain
3 at all at any time prior to the crash of November 18,
4 2011?

5 A Again in asking him in his history he -- on
6 previous injuries to his neck or lower back he denied
7 any.

8 Q Okay. I asked if you reviewed any records.
9 I didn't ask you what his history. I asked if you
10 reviewed any records at any time that revealed that Mark
11 Cava ever complained of low back pain; yes or no?

12 A No.

13 Q Okay. Did you ever ask to -- ExamWorks or
14 anyone for any medical records for Mark Cava to see if
15 he had any complaints of neck or back pain before?

16 A No. I asked the claimant himself.

17 Q Okay. As you sit here today is it your
18 opinion that Mark Cava's back pain when he went to the
19 emergency room and then when he went to see Doctor Raza
20 was related to the car crash?

21 A Based upon the history given to me, yes.

22 Q Okay. And your review of the records;
23 correct?

24 A Correct.

25 Q Okay. And then he went for an MRI on January

1 14th, 2012; correct?

2 A Correct.

3 Q Okay. Do you know why he was sent for an
4 MRI?

5 A Again I'd have to look at Doctor Raza's notes to
6 see why he specifically sent him for the MRI. But
7 probably look at --

8 Q Will you agree with me that Doctor Raza sent
9 him for an MRI the low back pain in view of his
10 complaints of significant lower back pain?

11 A There was an indication on the MRI report.
12 Indication is for pain.

13 Q Okay. So -- but as you sit here today with
14 all the records that you reviewed you don't understand
15 that Doctor Raza --

16 A Wait. No, no, no --

17 Q Can you let me finish please? You don't
18 understand that Doctor Raza sent him for an MRI for low
19 back pain that he was complaining of after the
20 accident?

21 MR. NGUYEN: Objection Judge. Doctor Lakin
22 doesn't speculate --

23 THE COURT: Its been asked and answered.
24 Let's move it along. He said yes.

25 Q The MRI in your review of the film reveals a

1 bulge; correct?

2 A Correct.

3 Q At L5 S1; correct?

4 A Correct.

5 Q That's an objective finding; correct?

6 A Correct.

7 Q If a person twenty one year old has a
8 complaint of back pain and an MRI is ordered by the
9 doctor whose examining and treating that patient and
10 the MRI reveals a bulge at L5 S1 does that correlate
11 with the patients symptoms of back pain?

12 A Again -- subjective complaints are -- have to be
13 looked at very, very carefully in this case because
14 thirty to forty percent of the population --

15 MR. LOPIANO: Objection Your Honor.

16 THE COURT: Just -- just answer --

17 A Again --

18 THE COURT: You asked the question.

19 MR. LOPIANO: I didn't ask him to start -- I
20 asked him a specific question.

21 THE COURT: You put an age in there. All
22 right. Repeat the question.

23 Q Doctor can an MRI that shows an L5 S1 disc
24 cause a patient back pain; yes or no?

25 A Disc what? Bulge? Herniation?

1 THE COURT: Yea --

2 Q Can an L5 S1 disc bulge cause back pain in a
3 patient?

4 A It could.

5 Q Okay.

6 THE COURT: Thank you.

7 Q Thank you. Did Mark Cava have any disc
8 bulges in his spine other than the one that you say you
9 saw at L5 S1?

10 A No.

11 Q Okay. Did Mark Cava have any degeneration in
12 any part of his spine based upon the MRI that you
13 reviewed?

14 A No.

15 Q In fact there's nothing in your report that
16 says that Mark Cava had any degeneration or
17 degenerative changes in your report; correct?

18 A Correct.

19 Q And there's nothing in any of your two
20 subsequent reports that talk about any degeneration of
21 Mark Cava's spine; correct?

22 A Correct.

23 Q Okay. Did Mark Cava have a bulge at L5 S1
24 that you say you saw prior to the accident?

25 A What --

1 Q Yes or no?

2 A In -- in speaking the general population thirty to
3 forty percent of people are going to have a bulged disc
4 --

5 MR. LOPIANO: Objection Your Honor. I didn't
6 ask that Your Honor. I asked about Mark Cava. If he
7 doesn't have an opinion he can tell me. He doesn't
8 need to give me statistics about other patients. I'm
9 talking about Mark Cava.

10 A I -- I can't answer that question.

11 THE COURT: That's the -- that's the answer.

12 Q Okay. So you don't know whether he had the
13 bulge?

14 A No I do not.

15 Q Okay. If he had the bulge and he had
16 complaints of back pain prior to the crash you would
17 expect to see a medical record that would document
18 that; would you not?

19 A Again most bulges are asymptomatic so I would
20 expect to see that in the records.

21 Q Well an asymptomatic bulge means that there's
22 no complaint of pain. That's what asymptomatic means;
23 correct?

24 A Correct.

25 Q If Mark Cava had a -- symptomatic disc bulge

1 at L5 S1 you would expect if he was in pain he would
2 have seen a doctor and there'd be a record that he went
3 to a doctor with a complaint of lower back pain --

4 A There's --

5 Q Correct?

6 A There's a lot of different causes for lower back
7 pain. You can't specifically say a bulge is causing
8 the pain.

9 Q Okay. Do you believe that the bulge at L5 S1
10 that you say you saw on the MRI film was caused by the
11 accident?

12 A No I do not.

13 Q Why not?

14 A Again, one I had -- I had also the -- the ability
15 to examine Mr. Cava and he had a normal examination.
16 If there's a high density -- indicated an annular tear
17 that shows a fresh injury that would show up in the
18 MRI.

19 Q Okay.

20 A In this case there was no high intensity --
21 showing that there was any recent trauma to that -- to
22 that spinal cord or to that disc. So based upon my
23 opinion not seeing any high intensity -- indicating
24 inflammation or a tear the outside of -- outside of the
25 disc and he had a normal examination. I don't think

1 it's caused from the -- in my opinion it's not caused
2 from the accident.

3 Q Okay. In any of the records that you
4 reviewed did you ever see L5 disc bulge anywhere
5 written?

6 A No I did not.

7 Q Did you ever see L5 S1 herniation with an
8 annular tear in his records written anywhere?

9 A No.

10 Q You didn't see it anywhere in any of his
11 records?

12 A No. That I could recall.

13 Q And you reviewed Doctor Materese's records?

14 A Correct.

15 Q And you reviewed Doctor Ragukonis's records?

16 A Yes.

17 Q And you didn't see it anywhere in there?

18 A No I did not. I can't recall.

19 Q Okay. You want to take a moment and look at
20 those records and see if you see it?

21 A Which -- which one?

22 Q Matarese is P8. Take your time Doctor.

23 UNIDENTIFIED FEMALE: Doctor Ragukonis is

24 P11.

25 MR. NGUYEN: Judge sidebar?

1 THE COURT: Yea I was going to say -- yea
2 thank you. Finally.

3 (AT SIDEBAR - INAUDIBLE)

4 MR. LOPIANO: I'm sorry?

5 THE COURT: Yea continue to ask the question.

6 MR. LOPIANO: Okay. Thank you Your Honor.

7 BY MR. LOPIANO:

8 Q Doctor did you take a moment to look at
9 Doctor Materese's records?

10 A --.

11 Q Do you see the words L5 S1 disc herniation in
12 Doctor Materese's records; yes or no?

13 A Now which -- this is -- again --

14 Q If you can't find it Doctor I'll move on.

15 A Can't find it.

16 Q Did Doctor Matarese discuss with Mark Cava
17 having him undergo epidural injections if the physical
18 therapy didn't work? Does his records reflect that?

19 A Again it's a consultation request physical therapy
20 three times a week for four to six weeks. Patient was
21 authorized for epidural -- injections.

22 Q Okay. Is -- did you see anything in Doctor
23 Materese's records about a discussion of surgery if the
24 epidurals don't work?

25 A No I do not.

1 Q Okay. May I approach the witness Your Honor?

2 THE COURT: Please.

3 Q Thank you. Doctor you see -- let me direct
4 your attention under plan -- underline --

5 THE COURT: Time out. Let's have another
6 sidebar. This is --

7 MR. LOPIANO: Okay.

8 THE COURT: This is all --

9 (AT SIDEBAR - INAUDIBLE)

10 BY MR. LOPIANO:

11 Q Do you see where it says operative treatment
12 or surgery? You see where it says that under plan?
13 Yes or no?

14 A I just see plan.

15 Q Can you read what's under plan?

16 A And this is --

17 Q I gave you the record Doctor.

18 A I know. But you gave me a record that doesn't
19 have a date on it. I want to make sure that I'm
20 entering something into evidence that you're asking me
21 to read somebody else's report. So this has no date on
22 it or anything. I don't know who it could be from.

23 THE COURT: Well if you don't know what it is
24 don't -- don't address it.

25 A I can't -- I can't comment on this piece of paper.

1 Q Okay.

2 THE COURT: Okay. Fair enough.

3 Q Doctor did Doctor Matarese perform a straight
4 leg raising test?

5 A I have to look at his records.

6 Q Okay. Did you note in your report whether
7 Doctor Matarese performed a straight leg raising test?

8 A No I -- again my report was based on my
9 examination.

10 Q Did your report discuss whether there was a
11 straight leg raising test that was positive found by
12 Doctor Matarese; yes or no?

13 A Well again Your Honor I can't answer the question
14 --

15 THE COURT: No. What -- you know -- that --
16 that's your answer.

17 A I can't --

18 THE COURT: Okay?

19 A I can't answer his -- I can't comment on another
20 doctors physical examination.

21 Q You reviewed --

22 THE COURT: That's the answer.

23 Q You reviewed the record; did you not?

24 A I can't comment on another doctors physical
25 examination.

1 THE COURT: All he asked you now is did you
2 review the records? That's all -- that's the question
3 before you.

4 Q Did you review --

5 A Yes.

6 Q Doctor Matarese's records?

7 A Yes.

8 Q Did you --

9 THE COURT: Okay.

10 Q Look to see when you reviewed Doctor
11 Matarese's records if he found a positive straight leg
12 raising test? Did you look for that?

13 A I can't recall.

14 Q Okay. When you reviewed Doctor Ragukonis'
15 record did you see whether he had a positive straight
16 leg raising test? Did you do that?

17 A Again -- what -- positive straight leg raising
18 test I don't know what Doctor Matarese calls a positive
19 test. I don't know what Doctor Ragukonis calls a
20 positive test. All I know is what causes a positive
21 test in my examination which is from your board of
22 orthopedic surgery and -- physical examination --

23 THE COURT: You can only comment on your
24 exam?

25 Q Doctor --

1 A I only can comment on my own examination.

2 THE COURT: That's it.

3 Q That's not what I asked you. I asked you --

4 A I only can comment on my own examination.

5 THE COURT: That's it. Next question.

6 Q Doctor when you reviewed the plaintiffs
7 medical records they formed the basis of your opinion
8 -- can you let me finish before you shake your head?
9 When you reviewed plaintiffs medical records, all of
10 the medical records for you to give your opinion didn't
11 you look at the plaintiffs medical records to see what
12 was the nature of the treatment and the findings that
13 the other doctors had?

14 A I can't comment --

15 Q Yes or no?

16 A I can't comment on another doctors physical
17 examination.

18 Q I'm not asking you to comment --

19 THE COURT: That's not the question. Did you
20 look at it?

21 Q Did you look at it?

22 A I looked --

23 THE COURT: That's it --

24 A I looked at it.

25 THE COURT: He answered. Yes.

1 Q Okay. Did it form the basis of your opinion?

2 A No. The basis of opinion is based upon my history
3 taking of the patient, my review of the objective
4 testing which was --

5 THE COURT: Okay.

6 A The MRI, my review of the EMG's, and my review of
7 a normal neurological study.

8 Q Okay.

9 THE COURT: Okay.

10 A That was the basis of my opinion.

11 Q Okay.

12 THE COURT: Next question.

13 Q And the doctor -- treating doctors records
14 did not form the basis of your opinion?

15 A Correct.

16 Q But the EMG --

17 THE COURT: --

18 Q Did perform -- did form the basis of your
19 opinion?

20 A It helped correlate that the patient had normal
21 neurological function.

22 Q Okay.

23 A There was no compression on the MRI. There was no
24 compression on my physical examination. And the EMG --
25 showed that there was no compression of the nerve root.

1 Q Okay.

2 A All consistent with not being a disc herniation.
3 No compression on -- element.

4 THE COURT: Okay. Thank you.

5 Q Doctor you don't perform EMG's; correct?

6 A Correct.

7 Q Okay. Do you know how EMG's are performed?

8 A Yes I do.

9 Q How are EMG's performed?

10 A Again EMG's is by placing a needle that's --
11 verses a surface into a muscle and measuring a response
12 based upon electro -- impulse.

13 Q Okay. Never in your life have you performed
14 an EMG; correct?

15 A No I have not.

16 Q Never in your life have you had any training
17 as to how to perform an EMG; correct?

18 A Correct.

19 Q You understand that EMG's have false
20 negatives that may be up to twenty five percent;
21 correct?

22 A Correct.

23 Q You understand that EMG's are very dependent
24 upon where the needles are placed in a patients back;
25 right?

1 A Correct.

2 Q Because if the needles aren't properly placed
3 then the test results are not valid; correct?

4 A Correct.

5 Q Do you know where the needles were placed in
6 Mark Cava?

7 A No I do not.

8 Q Have you talked to --

9 A I told you --

10 Q Doctor --

11 THE COURT: You answered. Next question.

12 Q Did you ever talk to Doctor Mastri to confirm
13 where he placed the needles to see if it was accurate?

14 A No I did not.

15 Q Okay. So you don't know if that test was
16 accurately performed at all; do you?

17 A Again --

18 Q Yes or no?

19 A Again based upon the results that I saw it was a
20 normal examination.

21 Q You don't know whether that test was
22 performed accurately cause you don't know where the
23 needles were placed; yes or no?

24 A They said they were placed in the muscle groups.

25 I wasn't there putting the needles into the muscle

1 groups so I can't testify exactly where he put it into
2 his muscle groups.

3 Q So you can't testify that the results of that
4 EMG are accurate; correct?

5 MR. NGUYEN: Objection Judge --

6 THE COURT: Its been asked and answered. He
7 -- he said --

8 Q Correct?

9 THE COURT: He doesn't know how they were
10 placed. Okay.

11 A I don't know how -- I don't know where -- I know
12 they were put in the muscles. I don't know which -- I
13 don't know exactly where he put it in those -- those
14 muscles.

15 MR. LOPIANO: Okay. That's all I have Your
16 Honor.

17 THE COURT: Thank you Mr. --. Okay. Re-
18 direct?

19 RE-DIRECT EXAMINATION BY MR. NGUYEN:

20 Q Doctor Lakin when you perform examinations
21 for ExamWorks and the other company you schedule at
22 different locations for the convenience of the
23 patients?

24 A Correct.

25 Q Okay. And in this case you had prepared an

1 initial report and then you prepared subsequent --
2 addendums; is that correct?

3 A Correct.

4 Q Okay. And did you need to re-examine the
5 plaintiff in order to prepare your addendums?

6 A No I did not.

7 Q Did I or you ever discuss the plaintiff prior
8 to your examination of the plaintiff in this case?

9 A No we did not.

10 Q And did you or I ever discuss the plaintiff
11 prior to you preparing your report or addendums in this
12 case?

13 A No we did not.

14 MR. NGUYEN: That's all the questions I have
15 Judge. Thank you.

16 MR. LOPIANO: I think one question Your
17 Honor.

18 THE COURT: Absolutely Mr. Lopiano. Go
19 ahead.

20 MR. LOPIANO: If it's two or three I don't
21 want to mislead the Court --

22 THE COURT: No, no I'm not holding you to one
23 question.

24 MR. LOPIANO: In any way. May I approach the
25 witness?

1 THE COURT: Yes you might.

2 MR. LOPIANO: The last time. Hopefully.

3 RE-CROSS EXAMINATION BY MR. LOPIANO:

4 Q Doctor that page that I just handed you is
5 that Doctor Mastri's the last page of his report?

6 A Again Your Honor I don't want to --

7 THE COURT: Did you look at it --

8 Q It's signed by Doctor --

9 THE COURT: When you prepared --

10 Q I'm sorry.

11 THE COURT: Did -- did you have it when you
12 prepared your report?

13 A Yes I did. Oh no -- I can't testify exactly
14 because it's not -- it's --

15 THE COURT: Do you reference it in you
16 reports? You indicate -- don't you?

17 A There's -- there's no date specific on this report
18 where I could be sure where it came from Your Honor.

19 THE COURT: Well it's -- it's -- it's --

20 MR. NGUYEN: If we can provide the whole --

21 THE COURT: It's attached to another report;
22 isn't it? It's all part of one report?

23 A It's just -- my piece of paper with no date Your
24 Honor. I can't --

25 MR. LOPIANO: Can I withdraw the question?

1 I'll ask another one. So we can -- I'll tell you I
2 will just --

3 THE COURT: Thank you. No that's okay.
4 Thank you Mr. Lopiano.

5 MR. LOPIANO: Okay.

6 Q The piece of paper that you have before you
7 is it signed by a Sammy Mastri, M.D., C.Q., M.S.
8 whatever the initials he's got after that?

9 A Yes.

10 Q Okay. It's signed by him; right?

11 A Correct.

12 Q And after his name and his signature it says
13 M.D.; right?

14 A Correct.

15 Q What's M.D. stand for? Medical doctor?

16 A Correct.

17 Q Okay. The other letters that are after that;
18 what's that?

19 A C.A.Q.S.M.

20 Q What's that?

21 A I have no idea.

22 Q Okay. You would agree would you not that
23 Doctor Mastri is -- is trained to perform EMG's?

24 A I -- I -- I --

25 Q Yes or no?

1 A I -- I -- I don't know Doctor Mastri. I don't
2 know him personally. I don't know his --

3 Q Well wait a minute --

4 A Qualifications.

5 Q You don't know if he's qualified to perform
6 an EMG?

7 A Again --

8 Q Yes or no?

9 A I can't qualify -- I can't testify on Doctor
10 Mastri's qualifications. I'm not Doctor Mastri. I'm
11 Doctor Lakin.

12 THE COURT: But --

13 Q But Doctor Mastri is the one that performed
14 the EMG that you're testifying to; correct?

15 A I looked at the results. Correct.

16 Q Okay. Well not only did you look at the
17 results, you looked at numbers --

18 A Correct.

19 Q Waves, and everything else; right?

20 A Correct.

21 Q Did you actually look at the waves?

22 A I relied mainly on the -- on the numbers for this
23 case.

24 Q In fact you don't know what the waves mean do
25 you?

1 A I usually don't look at the waves.

2 Q You don't know what the waves mean do you?

3 A No I -- I look -- I look for fibrillations. I
4 look for -- I look for deep stabilization. I don't
5 look at the specifics of the waves.

6 Q So it's no?

7 A Correct.

8 Q Okay. Doctor Mastri, he signed that;
9 correct?

10 A Correct.

11 Q Okay. Do you see any indication on that page
12 above his signature as to whether Doctor Mastri
13 performed a straight leg raising test; yes or no?

14 A Yes.

15 Q I think it's highlighted. You see it?

16 A Yes.

17 Q Okay. And what does he say?

18 A Again I can't testify --

19 Q I'm just asking you what he --

20 THE COURT: All he asked -- what it says
21 Doctor.

22 Q Says.

23 A I can't testify to --

24 Q What does the record say?

25 A Your Honor it says a positive straight leg raise

1 test. But --

2 MR. LOPIANO: No more questions. Thank you
3 Doctor.

4 THE COURT: Thanks. Whatever it's worth.
5 Okay. All right. Thank you Doc. You can step down.

6

7 THE WITNESS: Your welcome.

8 THE COURT: All right. Ladies and gentleman
9 of the jury it's part of my job is to have time
10 management. If I said I did -- I did a less than poor
11 job here I'd be understating it. I didn't do a good
12 job with the time management. In fact I would classify
13 my job as poor. However, I was going to deny you
14 lunch, I can't do that because that was not my plan.
15 So what I'm going to ask you to do, Lenny's is the only
16 game in town right now. If you don't go over there now
17 you're not going to find anything to eat. And you
18 can't leave the building today. So if you're inclined
19 to eat, which I suggest you do I'm going to ask you if
20 you want to go down to Lenny's and you're -- I haven't
21 charged you yet. So I'm going to talk to the
22 attorney's about scheduling; all right? I don't want
23 to make any representations I can't deliver. So if you
24 could come down there and be back in the room by say
25 one -- 1:05 and we'll tell you what we're doing; all

1 right? I just need to talk to the lawyers. I don't --
2 the lobster bisque isn't bad by the way. Tell Lenny I
3 -- I recommend it.

4 (JURY EXITS THE COURTROOM)

5 THE COURT: Sorry counsel. All right. The
6 door is now closed. The goal was to finish. These are
7 your options and I'm not recommending any of them -- up
8 to the jury. I can let them eat now, finish up. We
9 did the jury charge, I just added the names. I was
10 going to ask Maria to -- check it out to make sure --
11 okay. The jury verdict sheet is two questions you
12 know? I don't want to hold you gentleman and ladies to
13 how long you're going to testify. Strike that. You
14 don't testify.

15 MR. LOPIANO: Seems like --.

16 THE COURT: Excuse me. Just my impression --
17 sometimes that your summations. The goal I had hoped
18 to accomplish was 1:30 that the jury would go out. I
19 thought we'd have everything done by 1:30. And it's
20 really up to the plaintiff. Do I want to tell the jury
21 to come back on Monday to listen to this? Absolutely
22 no. However, I don't want -- I've already expressed
23 myself louder than I meant because I was only saying I
24 was hoping we'd get through this. So you tell me what
25 you're inclined to do. I would prefer to do everything

1 today.

2 MR. LOPIANO: I -- I want to do everything
3 today. I really do.

4 THE COURT: All right. Fair enough. Take a
5 look at the jury charge. I'll talk to the jury with
6 your permission at one o'clock and tell them what we're
7 going to do. The issue was with regards to the
8 snippets. I did read -- mispronounce it since I never
9 read the case before but it's obviously on point. The
10 only snippet which came up was the force.

11 MR. LOPIANO: Did you listen to that one?

12 THE COURT: Yes. Counsel I'll hear you
13 because we -- we talked about -- the only other person
14 I have to be concerned about is Paul because he's a
15 union man and I get yelled at and rightfully so that
16 when I ask staff to stay hours -- like we did two weeks
17 ago. The jury came in at seven o'clock on Friday two
18 weeks ago. I'm -- I'm to discourage that conduct by
19 myself because then they have to pay overtime. And the
20 State doesn't like overtime because I don't get paid
21 overtime.

22 UNIDENTIFIED MALE: Do you want to --

23 THE COURT: Well I'm going to try to figure
24 out what your schedule is Paul because I don't want to
25 screw you out of -- well strike that. You know your --

1 UNIDENTIFIED MALE: Well -- no problem.
2 They'll get somebody else.

3 THE COURT: All right. Well. So the -- the
4 one was the force. The question and I don't have the
5 --

6 MR. LOPIANO: We can play it. It'd be easier
7 if we just play it.

8 THE COURT: Well it's what a minute? Or it's
9 forty five seconds.

10 MR. LOPIANO: We can pull that up real quick.

11 THE COURT: Because the issue that came up is
12 that if it refers to the impact of the cars or he talks
13 about the damage to the cars then I won't allow it.

14 MR. LOPIANO: He does not.

15 THE COURT: If he doesn't talk about the
16 damage to the cars I'm inclined to allow it. That it
17 says you need a lot of force. We all know you're not
18 supposed to be able -- you know no disrespect to some
19 other defense doctors who like to talk about force and
20 this is impossible, you can't have double herniations.
21 It's impossible to have herniations based upon this.
22 It wasn't a big enough hit. So counsel what -- did you
23 have a chance to -- if -- let's talk about the force
24 was 5:45:54:45 and it goes for fifteen, thirty three
25 seconds.

1 UNIDENTIFIED FEMALE: Want me to play it?

2 THE COURT: Yea. Why not? Can I -- will I
3 be able to hear it?

4 MR. LOPIANO: Yea.

5 THE COURT: Oh okay.

6 MR. LOPIANO: You don't even have to get up
7 Your Honor.

8 THE COURT: No I don't hear.

9 (RECORDING BEING PLAYED AT 12:59:36)

10 MR. LOPIANO: Is it your testimony if I
11 understand you correctly for the disc to herniate
12 centrally it takes more force or a significant amount
13 of force to herniate the disc --?

14 THE WITNESS: In this case --

15 (RECORDING CONTINUES)

16 MR. LOPIANO: You want to start it again?

17 THE COURT: No, no.

18 (RECORDING PLAYS)

19 THE WITNESS: -- then this herniation --
20 enforced on the right or the left. We do have a very
21 -- a very thick band of -- of -- the posterior part of
22 the vertebral body and the annulus centrally. It's
23 called the -- ligament.

24 (RECORDING PAUSED AT 1:00:06)

25 UNIDENTIFIED FEMALE: That's it.

1 MR. LOPIANO: That's it.

2 THE COURT: That's it. Counsel what do you
3 have to say about that? I mean he doesn't talk about
4 hey look at the pictures in the car. Look at how the
5 -- well I don't think the window was blown out at the
6 accident. But eventually it got kicked out. That's
7 the rear window of the plaintiffs car. Doesn't sound
8 --

9 MR. LOPIANO: There's no bio-mechanical
10 opinion there.

11 THE COURT: Oh no, no. It's not a bio-
12 mechanical opinion because he's not referring to the
13 cars. But --

14 MR. NGUYEN: He's not referring to cars but I
15 don't know if that -- in what context is that -- in
16 what order that was taken Judge. I didn't listen to
17 his whole testimony to see if that at any point before
18 that he was talking about cars. I remember; did he
19 not?

20 THE COURT: I --

21 MR. NGUYEN: -- force -- force.

22 THE COURT: I -- I remember listening for the
23 cars because I thought that's where it was going to go.
24 I didn't hear anything about the car. I'm not positive
25 but I'm nearly positive he was never shown pictures of

1 the car. Hey look at the car --

2 MR. LOPIANO: Not to the doctor.

3 THE COURT: I -- I'm saying it's my
4 recollection which I'm pretty confident on that one he
5 didn't look at the pictures so he didn't say oh my
6 goodness look at the -- you know the trunk is in the
7 front seat. You know his --

8 MR. LOPIANO: It's not even in his report.

9 THE COURT: So I --

10 MR. LOPIANO: I mean he -- you know?

11 THE COURT: I mean the issue there was he's
12 twenty one years old, his resiliency of a twenty one
13 verses an old man like me that you know it wouldn't
14 take a lot to --

15 MR. LOPIANO: Do it. But in a twenty one --

16 THE COURT: That's not a bio-mechanical
17 opinion. He's saying it needs force. I think a doctor
18 is qualified to talk about force as long as he doesn't
19 talk about well they had the seatbelts on. He didn't
20 go forward. It takes -- you know now we're getting
21 into pressure. We're getting into the three thousand
22 pound truck. You know. So --

23 MR. LOPIANO: Delta force whatever they call
24 that.

25 THE COURT: Well that's -- that's --

1 MR. LOPIANO: Delta D. Right?

2 THE COURT: Look I barely got out of law
3 school forget that topic. I'm just looking -- let me
4 just --. Oh humbug.

5 MR. LOPIANO: You want to play the next one
6 Your Honor?

7 THE COURT: What? Yea. Go ahead. The other
8 one I didn't have too much causation.

9 UNIDENTIFIED FEMALE: That's this one.

10 THE COURT: That's --

11 (RECORDING BEING PLAYED AT 1:02:03)

12 MR. LOPIANO: It's -- your testimony that
13 this was caused by the -- by the crash; correct?

14 THE WITNESS: Without a doubt within a
15 reasonable degree of medical probability this was
16 caused by -- by the -- of the motor vehicle accident.
17 First there was the annular tear too he's twenty one
18 years old. Twenty one year olds don't have incidental
19 disc herniation.

20 (RECORDING PAUSED AT 1:02:24)

21 UNIDENTIFIED FEMALE: That's it.

22 THE COURT: That's what he said.

23 MR. NGUYEN: Your Honor.

24 MR. LOPIANO: Next one.

25 UNIDENTIFIED FEMALE: And then the last one.

1 THE COURT: I found what I was looking for.
2 This morning counsel enlightened me with an opinion
3 Condella v. Cumberland Farms which I did read. I --
4 very frankly sounds a lot like what I did yesterday
5 when my first reaction was, no way.

6 MR. LOPIANO: I'm two for two?

7 THE COURT: Then after I read the case I said
8 well, maybe. It -- my concern was unduly emphasized in
9 plaintiffs side of the case. That is not. It -- it's
10 -- they are snippets. But then again the testimony
11 wasn't that long. The standard that I always used is
12 to give everybody a lot of -- when I say everybody, the
13 attorney's, excuse me. A lot of latitude in their
14 summations with the comments not to restrain them. As
15 long as they can be shown the facts. How can you be --
16 terrible. Good one. Good legal opinion to beat. How
17 can you do better than that? Because the Condella case
18 was the video, which we don't have videos in this
19 courtroom and the Judge did let it in. It's not going
20 to mislead the jury. The only concern I had that it's
21 not representing the record. I -- I'm trying not to
22 give any undue inferences because I don't want to take
23 away the jury's Right to assess the credibility. It's
24 still a credibility issue. It's not a -- it's evidence
25 in the sense it's testimony. But I don't -- I don't

1 consider evidence until it's unequivocal you must
2 accept this as a fact. They don't. I just don't want
3 them to -- and he's not saying this is the certified
4 record. That is what he said. You know it's not like
5 it's -- it is selected specific portions. Agreed. But
6 that was also in Condella. Condella was video and they
7 spliced it. Counsel -- I'm just reading from -- I'm so
8 old I can't even figure out what the page numbers are
9 because they stick them all together. I mean I always
10 like a book where it says -- but it says, counsel is to
11 be given broad latitude in summation but comment must
12 be restrained within the facts. These are the facts.
13 Showing -- suggested by the evidence deduced. This
14 isn't a suggestion. If it was an inference that
15 they're asking to draw from something that was said I
16 may have some difficulty with it. I may have some
17 concerns. But it's not asking for inferences to be
18 drawn based upon reasonable -- the facts. This is a
19 fact. The fact is he testified to it. It's up to the
20 jury to determine how much weight to give it. You
21 know? I don't think -- like I said this morning about
22 three hours ago my first reaction was no. Now he
23 changed my mind. I don't believe it unduly emphasizes
24 the plaintiffs side of the case. For all intents and
25 purposes I consider this the 104 Hearing because I'm

1 not going to do it again. It took a little longer than
2 I hoped. But it is a fair and accurate representation
3 of the doctors testimony. You can't beat it. The
4 words are out of his own mouth. I thought it might be
5 hear say to hear say -- by the way this is what he
6 said. That's not. It's actually his words. So it's
7 -- it's not like well this is what I heard last night
8 on the tape. That's what I anticipated. I am not -- I
9 am so far behind the times in every technological -- to
10 me it would take a month to do this. Not an hour. I
11 -- I -- like this cause I'm --

12 MR. LOPIANO: It took us a while to put the
13 clip together.

14 THE COURT: Hey I'll be retired by the time
15 they get -- I just hope I'm retired by the time
16 electronic filing comes along because I re -- I can't
17 refuse. I have to. I can't look at the stuff on the
18 screen. I get --.

19 So what I'm going to do is tell the jury --
20 how much time you got ladies and gentlemen need to
21 organize your thoughts before you sum up? You tell me.
22 I'll tell the jury. If you want to get a bit. Well no
23 offense. I'm not telling you you can't eat but --

24 MR. LOPIANO: Well they have to eat; don't
25 they?

1 THE COURT: Well I'm going to tell them they
2 could put their -- well yea let's see how --

3 MR. LOPIANO: I mean otherwise -- I mean it's
4 one o'clock they're --

5 THE COURT: No, no. I agree. I was going to
6 ask them to put it aside but it gets -- I don't know
7 how many people get hot food. So I'm going to go in
8 there at 1:15 and see how they're doing. I mean if you
9 don't mind. I'm not going to talk to them. I'm just
10 going to see how they're doing cause I was going to
11 give them the option to come back on Monday. And I'm
12 not encouraging that because I've already been told I'm
13 on vacation Monday. It doesn't bother me coming back
14 because I'm not really on vacation. I'm going to be
15 here. But that's my --. So I don't want to hold any
16 of you as to how long it's going to take for summation.

17 MR. LOPIANO: I'll try to keep mine a half
18 hour or less.

19 THE COURT: That's --

20 MR. LOPIANO: You know? If I could twenty
21 minutes --

22 THE COURT: Half hour?

23 MR. NGUYEN: I'll try to Judge.

24 THE COURT: No that's okay.

25 MR. LOPIANO: Without you know --

1 THE COURT: Jury charge is twenty five
2 minutes. Okay? You have the one that I proposed and I
3 added the names, the correct names.

4 MR. LOPIANO: The verdict sheet. Where's the
5 verdict sheet?

6 THE COURT: The verdict sheet I'll give it to
7 you in a minute. I thought I did it but I just
8 realized what I didn't take --

9 MR. LOPIANO: Did you see the one? I had
10 emailed one --

11 THE COURT: I haven't seen that. But I did
12 take the one that the defense had the back of their
13 papers.

14 MR. LOPIANO: Okay.

15 THE COURT: I want to say that. They had all
16 the liability issues but the one question at the end
17 after you decide the percentages the question is, has
18 the Plaintiff, Mark Cava proven by a preponderance of
19 the evidence that he sustained a permanent injury
20 proximately caused by the November 8th, 2011 motor
21 vehicle accident? That's the question.

22 MR. LOPIANO: I would say crash instead of
23 accident.

24 THE COURT: Yea. And then the two is what
25 amount of money. You know it says a little bit more

1 than that --

2 MR. LOPIANO: Okay.

3 THE COURT: That's it. It's -- it's one
4 question.

5 MR. LOPIANO: -- have harms and losses, past,
6 present and future pain and suffering? Because that's
7 really what --

8 THE COURT: I -- all I -- all I ever said --

9 MR. LOPIANO: That's what I had in my -- in
10 mine.

11 THE COURT: Oh really? I didn't see that
12 one. But this one was what amount would fairly and
13 reasonably compensate Plaintiff, Mark Cava for his
14 damages, his disability, impairment, loss -- pain and
15 suffering --.

16 MR. LOPIANO: Can I give you --

17 THE COURT: Sure. I apologize for my -- my
18 -- and I also crossed out Janice (phonetic). Something
19 like that.

20 MR. LOPIANO: Find the one that we sent.

21 THE COURT: Oh take a look at that. I'm just
22 going to see what the -- see if they took the last of
23 her bisque. It comes out of a can. It's not all that
24 good. It's not like down the shore on the pier and --.

25 (BREAK IN HEARING)

1 THE COURT: Everybody ready? Everybody
2 behind that --

3 MR. LOPIANO: Yea. Yea. We're ready.

4 THE COURT: All right. Let's get that jury
5 in here.

6 MR. LOPIANO: Let's go. Rock and roll.

7 THE COURT: Oh man. You have to go this way.
8 Yea.

9 MR. LOPIANO: They said okay if its got to go
10 a little longer or you -- you ask them or what? --
11 say?

12 THE COURT: That's what they said. They said
13 no rush. They said they agree.

14 MR. LOPIANO: Awesome.

15 THE COURT: As long as I'll tell him -- I'm
16 going to tell them I decided it's a liability issue.
17 They don't have to decide that. I forgot to tell them
18 that. I don't know how long it would have taken them
19 to decide that though --

20 MR. LOPIANO: Better -- maybe it's better to
21 hear it from me.

22 THE COURT: Oh by the way.

23 MR. LOPIANO: If the Court -- if the Court --
24 if the Court agrees with Mr. Lopiano --

25 THE COURT: There's something to be said

1 about that. You know. It's funny because I think I
2 tried one of my first cases -- forty years ago. It was
3 Sheriff looking for his -- from 1938 looking for
4 overtime. At 1973. Chief Abrams. Bergen County
5 Police. I think Judge Polito was sitting here.
6 Because my office was directly above it. I had to go
7 walk all the way downstairs to the third floor.

8 (PAUSE)

9 THE COURT: Okay. Okay.

10 (JURY ENTERS COURTROOM)

11 THE COURT: Everybody wolf down their lunch?
12 Way to go. All right. Have a seat ladies and
13 gentlemen. You're now going to hear the summations in
14 reverse order of the openings as I indicated before
15 under the black and white rules. The one other thing I
16 can tell you when you've been sequestered or out of the
17 ear shot of here the Court heard arguments as to who is
18 responsible for the accident. The Court has determined
19 that the defendant is responsible for the accident.
20 You therefore don't have to make a determination as to
21 liability. The issue will be as I set forth in my jury
22 charge if in fact the plaintiff is entitled to any
23 damages. Big job but the liability issue I've decided
24 that there's no question in this Court's mind that the
25 defendant was responsible for the accident. Okay? So

1 with that I'm going to turn the floor over to the
2 defendant. Counsel, the floor is yours.

3 MR. NGUYEN: Thank you Judge.

4 THE COURT: Your welcome.

5 MR. NGUYEN: Good afternoon ladies and
6 gentlemen. This is the last opportunity I would have
7 to speak with you and on behalf of my client Elizabeth
8 Saimson I want to take the time now to thank you again
9 for taking the time to serve as jurors. We understand
10 this is an important job --. We do appreciate your
11 time. We understand you're busy. You're taking time
12 out -- your day for our case and we do appreciate that.

13 In addition to thanking you for your time and
14 your attention I also wanted to take the time to thank
15 you for the opportunity to give me the chance to tell
16 you what we think is important in this case. Nothing I
17 or plaintiffs counsel say to you is evidence. But I do
18 appreciate the time that you did take out to listen to
19 the evidence and the witnesses that we presented in
20 this case.

21 Now when we first met and spoke with you --
22 spoke to you on Tuesday I told you that you would have
23 to decide the liability and damages. But as you just
24 heard the Judge has just told you that he has
25 determined that the defendant, my client was at fault

1 for this accident. So you no longer have to decide
2 this issue. But you still have to decide one
3 important issue. And that issue is damages. The Judge
4 will instruct you on the law but in this case the
5 plaintiff must prove to you by a preponderance of the
6 evidence most likely not that the plaintiff sustained a
7 permanent injury -- objective medical evidence.

8 Now you heard from the plaintiff. He told he
9 was hurt and he told you how he got treatment. And he
10 told you that he still is in pain. Now that's not
11 entirely accurate. Allow me to show you what we
12 represent to you or what the facts about this case is
13 really about. The accident happened on November 18th,
14 2011. When was the first time he saw his primary care
15 physician doctor? He saw him on 11/23/2001. Three
16 times. Only three times. Last visit December 15th,
17 2011. His primary care physician recommend physical
18 therapy. When is the first time he goes to see a
19 physical therapist? Not until February 7th, 2012. And
20 when did he see it until? Approximately one month.
21 During that one month how many times did he go see the
22 physical therapist? Seven times. Then when's the next
23 active treatment? Not until almost two years later did
24 he go see a chiropractor. And when he did go see the
25 chiropractor for the period from January 15th, 2014 it

1 was almost only two months. We have it from January
2 15th all the way to March 17^t, 2014. And during that
3 time period how many times did he go see the
4 chiropractor? He only saw him fourteen visits. Then
5 what happens? Where is the next treatment? Where is
6 the next period of active treatment? Almost one and a
7 half years later did he then go see this chiropractor
8 for one visit, July 27th, 15. A week ago. One week
9 ago when he knew he had to show up for trial for this
10 week.

11 Now what does all this mean? I'm going to
12 break it down to you. Twenty two physical therapy and
13 chiropractic treatment visits for over almost four
14 years. That's forty four (sic) months ladies and
15 gentlemen for a person who says I still have pain from
16 an accident that happened November 18th, 2011. No
17 injections. No surgery's. He still complains I still
18 have pain. Does that make any sense to you? When we
19 first met on Tuesday and I spoke to you and I
20 introduced myself I said as jurors you -- use your
21 common sense. Judge the credibility of the witnesses.
22 Listen to what they have to say. It's undisputed that
23 he did not have -- injections in this case. Now is
24 that credible for a person who says he still have so
25 much pain? That he's still -- as of today. When his

1 own doctor said it's safe. You can have it. He said
2 it's a rare person who will have the risk of infection.
3 And even his own doctor said infection risk to the
4 lower back is none. None.

5 MR. LOPIANO: Objection Your Honor.

6

7 THE COURT: Yea. Counsel move it along on
8 that issue please. Don't -- don't dwell on it.

9 MR. NGUYEN: This case -- I will Judge. This
10 case isn't about whether or not the plaintiffs a good
11 father. It's not about whether you like him and it's
12 not about whether you feel bad for him. What this case
13 is about is this case is one and one thing only. Has
14 the plaintiff proven to you more likely than not that
15 he has sustained a permanent injury causily related to
16 this accident almost four years ago by objective
17 credible medical evidence? And I submit to you that
18 plaintiff has not proven his case.

19 You're going to remember when I spoke to you
20 again Tuesday I talked about the difference between
21 subjective and objective complaints. Let me remind you
22 again. Subject complaints if someone says I feel pain.
23 I have a stomach ache. I don't feel well. You can't
24 see it. You can't prove it. Object complaints are
25 what you can see and feel. And what are some of the

1 examples of objective medical evidence? EMG's, MRI's.

2 Now you heard from two doctors. Doctor
3 Duhare who examined the plaintiff -- plaintiff. And
4 you also heard from Doctor Lakin who also examined the
5 plaintiff on behalf of the defense. Neither of these
6 doctors were the treatment -- plaintiffs treating
7 physicians. Both were hired specifically for the
8 purpose of examining the plaintiff. Now the law and
9 the court rules allow defense to obtain their own
10 expert to examine the plaintiff. Only the eight of you
11 get to decide how much weight to give to each of --
12 testimony of these doctors. In addition to weighing
13 the credibility of these doctors you are also allowed
14 to weigh the credibility of the plaintiff.

15 Now I want to talk to you about Doctor Duhare
16 for a moment. He told you that he used EMG's tests as
17 part of your practice. And he tells you about fifteen
18 percent of it is accurate -- inaccurate. He does rely
19 on EMG's to treat his patients. Now that means that
20 eighty -- eighty five percent of that must be reliable.
21 The plaintiff did undergo an EMG. He underwent an EMG
22 in December 15, 2014. That EMG as interpreted by
23 Doctor Lakin was normal. Now the plaintiff wants you
24 to disregard the EMG because it was negative. But rest
25 assured if it was positive he would have had all his

1 doctors come in and testify to the results of being
2 positive. It wasn't. It was negative. And this was
3 done in December of 2014. Doctor Duhare also said that
4 he reviewed MRI's which is an objective test and he
5 found an extrusion at the L5 S1. And he said it was
6 permanent and -- related to this accident. But what he
7 didn't tell you and what he didnt explain to you in
8 detail was the -- physical therapy and then the
9 fourteen chiropractic treatment almost three years
10 later. Apparently that wasn't important to him in his
11 diagnosis of the plaintiff and the examination of the
12 plaintiff.

13 Now you also heard from Doctor Lakin who is a
14 board certified orthopedic surgeon. Now plaintiff
15 wants you to disregard what Lakin has to say because he
16 does examinations for other defense firms and
17 consultant firms. But just because he makes a living
18 doing these examinations doesn't mean he -- disregard
19 his testimony. Now what does Doctor Lakin have to
20 say? He said he's qualified to read EMG's. He uses
21 them. He relies upon them in treating his own private
22 patients. And he told you upon his review of the EMG
23 it was negative. Supporting his opinions about the
24 diagnosis of -- permanency. Now he said that after he
25 reviews MRI films he saw a small bulge, a small bulge

1 at L5 S1. Not a herniation. He also opined that the
2 plaintiff had sustained sprains to his cervical and
3 lumbar spine, that's his neck and back. But no
4 permanent injury was sustained in this accident. And
5 there was no further -- in the -- treatment.

6 Now the plaintiffs attorney talked to you
7 about the concept of -- and as -- evaluating this case
8 it's -- pain and suffering over the course of his life
9 expectancy. He -- calculate that -- as a certain
10 number of years, maybe a certain amount of months and
11 -- breaking down the days in seconds. You are not
12 necessarily bound by any numbers that -- suggest to
13 you. And even the Judge will give you instruction that
14 you can -- even disregard -- all together.

15 Now what does this all come down to? During
16 the course of this trial you saw a lot of the
17 presentations. You saw -- powerpoint, you see all
18 these -- photographs. But what it really comes down to
19 that's what it comes down to, the course of treatment.
20 The -- what did he do for himself with respect to his
21 pain complaints?

22 Now the plaintiff has the burden of proof.
23 Only the plaintiff. The defendant has no burden. They
24 don't have to show or disprove anything to you. Only
25 the plaintiff has a burden of proof to you. And what

1 is that burden? He has to show to you and prove to you
2 to your satisfaction that he sustained a permanent
3 injury causily related to this accident the objective
4 medical evidence. It is not a popularity contest
5 ladies and gentlemen and not about sympathy. It's
6 about the evidence and facts. Whether the person who's
7 injured, who is pain goes to only seven physical
8 therapy treatment over one month. Stops, wait another
9 almost two years. Then goes to fourteen chiropractor
10 treatment. And wait another eighteen months and then
11 go see -- one chiropractor treatment last Monday.
12 That's over the course of almost four years. After you
13 consider all the testimony and evidence it is my
14 clients contention that the plaintiff has not proven
15 his case and ask that you return a verdict in my
16 clients favor. Again thank you for your time and
17 consideration on behalf of my client.

18 THE COURT: Thank you very much counsel.
19 Appreciate it. All right. Mr. Lopiano.

20 MR. LOPIANO: Thank you Your Honor.

21 THE COURT: Your welcome.

22 MR. LOPIANO: Just give me a second.

23 THE COURT: Sure.

24 MR. LOPIANO: Ladies and gentlemen of the
25 jury its -- its been an ebb and flow trial. We've had

1 some days where we're moving kind of quickly. We've
2 had a lot of down time and I don't want to take anymore
3 of your time. I just want to highlight some things.
4 But let me just start with this, I was raised that if
5 you do something wrong you take responsibility for it
6 and when you take responsibility for it then you know
7 what you -- you acknowledge that you did wrong and you
8 apologize to the person and you make good for whatever
9 the harm or loss that you -- caused. The reality is is
10 that we live in a world where you know what? We live
11 with human beings. People make mistakes. But you know
12 what? It happens all too often that you know bad
13 things happen to good people. And you know what?
14 Sometimes bad things shouldn't happen but they do.

15 If we could go back to November 18, 2011 then
16 we could all join arm in arm and say you know what
17 Elizabeth? You're not driving tonight. You're not
18 going to pick up your boyfriend. You're going to stay
19 home after work. We wouldn't be here. Mark Cava
20 wouldn't be here. We wouldn't have been forced to file
21 a lawsuit. He wouldn't be forced to come into this
22 court and come before you and tell you listen I'm hurt.
23 I have a herniated disc in my back. I was told that
24 you know what? I need injections because the physical
25 therapy doesn't work. But you know what? He found a

1 chiropractor. But you know what? This is what we're
2 forced to do. The defendant today, as we sit here
3 today, as you sit here today and you listen to me wrap
4 up my closing argument hopefully sooner than later, the
5 Judge has ruled that the defendant was one hundred
6 percent responsible for causing the accident. The
7 defendant never came to you and said I acknowledge
8 responsibility. So you know what? When bad things
9 happen to good people and they don't accept
10 responsibility our great country provides from its
11 inception that ladies and gentlemen and citizens of the
12 United States of America are going to make that
13 determination and you're going to decide the facts.
14 You're going to decide what you believe and what you
15 don't believe.

16 Now ladies and gentlemen this case has been
17 about the story of Mark Cava, Junior. You don't know
18 who he was before -- before Monday. Now you know
19 someone -- something about him. So what do we have
20 prior to November 18, 2011? Okay. 21.05 years, all
21 those days without any complaints of neck or back pain
22 except from one episode of back pain. One episode in
23 2009 when he was eighteen years old he went to his
24 primary care physician, he was given some medication,
25 he took an x-ray and you know what? It resolved.

1 That's what the evidence showed. It was undisputed.
2 Doctor Lakin came in here and I asked him did you
3 review any prior records? He said no. Later on when I
4 pressed him when I was trying to get an answer from him
5 did you -- well what records did you review? What
6 records did you rely upon? He kept saying the same
7 thing. I relied upon my clinical exam. Specifically
8 when I asked him did you look and rely upon records?
9 And he said no. The only record he wanted to talk
10 about was the EMG. So he has no prior injuries to his
11 neck or back, he had no MRI's, no CAT scans of his neck
12 or back. He never saw a chiropractor. He never saw an
13 orthopedist. Never saw a pain management specialist.
14 Had no restrictions on his lifestyle or activities.
15 Testified he worked twelve hour days in carpentry and
16 construction. He's doing physical labor. He's lifting
17 heavy blue stone. He's installing doors. He's
18 carrying materials without any problems. That's what
19 he did. Every day. And you know what? You haven't
20 seen any evidence to the contrary because if there was
21 a medical record where he was complaining of pain, or
22 if there was some injury on the job or something like
23 that you would have heard about it. But you know what?
24 You haven't heard any evidence.

25 The Judge has instructed you and will

1 instruct you that the evidence in the case that you
2 need to consider is what you heard here from the
3 witness stand and what the Judge has allowed you to
4 hear. No googling. No outside sources. No nothing.
5 These are the facts. This is the evidence of this case
6 that you must determine whether you believe it or don't
7 believe it. You use your common sense. Do you believe
8 Doctor Duhare's testimony or do you believe Doctor
9 Lakin's testimony? Who is telling the truth? Who
10 answered the questions? It's not about you know a
11 battle of wills. Do I win? Does Doctor Lakin win?
12 It's not about that. Can you just give us the facts?
13 Can you just answer the question? Did he answer the
14 question truthfully? Did he evade the question? Did
15 he not want to answer the question? Did he want to
16 give the answer, the same answer to every question? I
17 submit to you I leave that to your judgement cause you
18 decide who you believe. Prior to the accident he's
19 going to the gym, he's lifting weights.

20 I explained to you and you heard the Judge
21 tell, Judge Langan has ruled as a matter of law. That
22 issue is not before you. So now what's -- what is
23 before you? The next issue that's before you is what
24 must the plaintiff prove? Has the Plaintiff, Mark Cava
25 proven by a preponderance of the credible evidence that

1 he sustained a permanent injury caused by the accident?
2 And if so what amount of money would fairly compensate
3 him for his harms and losses for the injuries caused by
4 the crash? These are the issues which we have the
5 burden to prove. I submit to you that the evidence has
6 been pretty compelling. But you know what? That's not
7 the standard. The standard is for a plaintiff to
8 sustain the burden of proof is a preponderance of the
9 evidence, is it more likely than not? Just tip the
10 scales of the justice. Remember I told you three
11 hundred pieces of paper on one side, three hundred and
12 one on the other? Three hundred and one that's --
13 that's our burden of proof. Nothing on one side, a
14 feather, we have to just tip the scales. That's it.
15 We don't have to nail it down. We just have to tip the
16 scales.

17 And then the question is, was this accident a
18 proximate cause? Was it a substantial factor in
19 bringing about the back pain and the injury that we're
20 talking about? You have seen no medical records. The
21 only testimony you actually heard from any doctor is
22 the plaintiffs doctor, Doctor Duhare. Doctor Duhare
23 who performs spinal surgery. Who performed spinal
24 surgery two weeks ago as an assistant. Okay? Doctor
25 Lakin hasn't preformed spinal surgery in ten years.

1 Doctor Duhare actually performs his own pain
2 management. Mark Cava testified well you know what?
3 The reason why I stopped going to the doctors is
4 because they told me I had to pay out of pocket, number
5 one. And number two, they told me that if the physical
6 therapy doesn't work and the chiropractic doesn't work,
7 guess what he's looking at? He's looking at
8 injections. He's looking at spinal injections that do
9 have a risk of infection and do have a risk of
10 paralysis. Now did he go on line as we all would
11 probably do and search and what did he find? Well he
12 found the fear that he was most afraid of. You know
13 what? He found you know people saying you know what?
14 It didn't work for me. Not only did it not work there
15 are people that had bad results. There are risks. But
16 you know what? When you're twenty one years old and
17 you're told that you know what? If the conservative
18 treatment fails and you can have injections are you
19 going to take that risk? Or are you going to do
20 everything you can in your power to try to avoid it?
21 Modify your activities. See a chiropractor. See
22 somebody else. Yea he lived in pain. Yea he dealt
23 with it. He sucked it up. He had a one year old at
24 home. I need to provide for my family. He lost his
25 job because he couldn't do what he used to do without

1 any limitation. Don't fault him for that. He didn't
2 ask for that. He did nothing wrong. Except be a
3 courtesy person on the road and say you know what? You
4 can come out of the parking lot, boom. Done. Three
5 thousand pounds at thirty miles an hour into the rear
6 of his vehicle without any warning. No horn. No
7 nothing. And that's what happened. About five foot
8 five a hundred and seventy pounds verses a three
9 thousand pound torpedo coming into the rear of your
10 vehicle --

11 MR. NGUYEN: Objection Judge.

12 THE COURT: Yea. Strike the word torpedo.

13 MR. LOPIANO: So what do we have? What are
14 the harms and losses that he sustained? Because really
15 you have to value two lives here. Two lives in one
16 person. You have the life that he had before without
17 pain or limitation with whatever he wanted to do and he
18 did it as we're all entitled to do. He got up at six
19 o'clock in the morning, put in the twelve hour day,
20 went home, saw his girlfriend hopefully to be wife some
21 day and his child and that's what he did every day and
22 he played basketball with his friends. Helped his
23 family out, helped his dad out around the house, did
24 what he had to do; okay? You know what? That was his
25 life before. His life after the crash is not the same.

1 It's forever changed. And if you believe that he had a
2 permanent injury than it is going to last for the rest
3 of his life. But you know what? Now he has a life at
4 twenty one. He has a life with pain in his left
5 shoulder, neck and back at the scene of the crash. It
6 last for a while. The neck. The shoulder. But guess
7 what? It resolved. He -- when he had the CAT scan in
8 the emergency room and it revealed a disc bulge you
9 know what? Well we've heard testimony you know disc --
10 disc bulges are asymptomatic. They don't mean
11 anything. Well you know what? Whether that disc bulge
12 was there or not before the accident he never
13 complained of neck pain. We never saw any record in
14 twenty one years of his life prior to the accident of
15 neck pain, but he had it then. But you know what? He
16 was lucky. The neck pain resolved and it went away.
17 He was unlucky that the back pain never went away. And
18 you know what's reasonable? This is what's reasonable.
19 Think about this. Twenty one year old kid, no
20 limitations on his activities, he's able to lift up
21 blue stone, heavy doors, do installation, working
22 twelve hour days, he's involved in this crash, all of a
23 sudden he has pain. He's strapped down on the
24 stretcher, they put a -- a collar on him, they
25 immobilize him, they bring him to the ER. He sits

1 there in the pediatric ER section looking at the
2 ceiling tiles. I can't move. I can't move. Can you
3 undue my legs? And then you know what? An hour or two
4 later he's taken for some x-rays and CAT scans and you
5 know what? When he's finally out of there he says I
6 won't go to work the next day. Maybe it'll get better
7 and I'll try to go to work. He tries to go to work.
8 He has to lie down in a driveway to alleviates his back
9 pain.

10 So then he goes and sees Doctor Raza a couple
11 days later. Doctor Raza, what does Doctor Raza do? Oh
12 you know what? Okay. We're going to give you some
13 medication. We're going to talk about some therapy;
14 all right? And we'll see how it gets -- see how things
15 go. He sees Doctor Raza another two times. It's --
16 it's not getting any better. So let's get an MRI. He
17 gets an MRI January 12th. After the MRI Raza's office
18 called him. You heard the testimony. Now do you
19 believe him or do you not believe him? Is he credible?
20 Is he not credible? Is he making this up? Is he
21 saying well you know what? Four years from now I'm
22 going to be in Bergen County and I'm going to have a
23 lawsuit so I better make sure I go to my doctor. No.
24 He goes for the MRI. They call him, they say listen
25 you have a herniated disc. We want you to see a

1 specialist. We want you to see Doctor Matarese. So
2 what does he do? He calls and he goes to Matarese.
3 Who does he go with? Does this make sense? He goes
4 with Destiny and he goes with his child. First time to
5 see an orthopedist he's never seen before. Now he
6 knows I have a herniated disc. I really don't
7 understand what that means. He sees Matarese.
8 Matarese says you know what? You're a young guy.
9 You're healthy. Let's give you some medication. Let's
10 get some therapy. But I just want you to know if it
11 doesn't work we'll talk about injections and if that
12 doesn't work we'll talk about surgery. Surgery? I'm
13 twenty one years old. I'm not going to have surgery.
14 So he goes home. He does his googling. He does
15 whatever research he's going to do. He does the
16 physical therapy. He sees Matarese a few more times
17 and you know what? Yea then he stops. Because you
18 know what? He's like it's not doing anything for me.
19 So yea he stops. So he takes medication. He does
20 exercises on his own.

21 Then ultimately you know he comes down and he
22 sees the -- he sees the chiropractor. He goes -- he
23 loses his job. He takes a job in a deli that he can
24 do. He gets another job luckily. And then his boss,
25 you know nice guy says you know what? You look like

1 you're in a lot of pain. I know a Doctor Webber. A
2 chiropractor. You ever try a chiropractor? He says
3 no. Let me try the chiropractor. He does. He tries
4 the chiropractor. And you know what? Finally he's
5 getting some relief. Now Duhare said well if the PT --
6 not going to work and you could tell he wasn't a huge
7 fan of chiropractic medicine but he says you know what?
8 Give it a try. It basically glorified PT. But in fact
9 Doctor Webber was the one who gave him some exercises
10 to do, got him going again. Just like he said. He
11 said give me two to three months. I'll get you moving
12 again. All right? I'll -- I'll try to reduce it to a
13 level where you can function. So he gave him some
14 bands to do. Gave him some exercises to do. Gave him
15 you know -- showed him how to do some squats. And you
16 know what he's been doing? He's been doing it every
17 day. Every morning. Every night. The patches for the
18 electrical stimulation he bought himself one. Because
19 you know what? He says I can't afford -- you know he
20 wants me to pay out of pocket. So yea. So he did --
21 he's doing what he can do.

22 After a while it doesn't get any better. So
23 what happens? He winds up seeing Doctor Ragukonis. Oh
24 and by the way a doctor that you know when defense
25 counsel said well you know there was nothing. He just

1 saw the chiropractor and then he went back. No he
2 forgot about Doctor Ragukonis who again started talking
3 about injections. Who again was talking about the risk
4 of what there was. He sent him to Doctor Matarese.

5 So what do we have? We have objective
6 medical testing of the CT scan. We have the herniated
7 disc which is a central herniation with the annular
8 tear. We have a treatment with the PCP, the
9 orthopedist, the chiro, the pain management and they
10 all recommended the epidurals. Yea. He refused the
11 epidurals because he's afraid. Now you know what?
12 When he heard Doctor Duhare's testimony, you heard his
13 testimony nobody explained that there's different type
14 of epidurals. It didn't sound so bad. Well you know
15 what? Maybe now he's going to go ahead and do those
16 epidurals. But you know what? Don't hold that against
17 him. It's a very personal decision. Someone's going
18 to come with a needle and they're going to stick it in
19 your spine and they're going to say oh well there's a
20 very small risk. But you know what? There's a risk
21 you could be paralyzed. Twenty one. Twenty two.
22 Twenty three. At what point do you say you know what?
23 I'm going to take that risk. You know what? In the
24 meantime you're going to fault him for doing everything
25 that he can? An hour in the morning doing his

1 exercises. An hour at night. He's got a little son at
2 home. An -- an energetic four year old. Can't pick
3 him up. Can't throw him around the pool. Do stuff
4 like that. Like every other dad does. You heard
5 Destiny's testimony and he doesn't understand.

6 So at the end of the day yea he has -- he has
7 permanent spinal injuries to his spine. He has a
8 central disc herniation and Doctor Duhare -- Duhare
9 told you and showed you on the film he showed you where
10 that signal was. He showed you where that tear was.
11 He showed you in great detail; okay? Outlined the
12 areas and structures. He used the models and he
13 explained you know how it was. He also talked about
14 the force. One thing Doctor Duhare didn't talk about
15 if you recall the one piece of evidence that I didn't
16 show him -- his testimony was well you know it takes a
17 lot of force to herniate a disc centrally. Because the
18 disc on the outside okay? There's no ligaments there,
19 but centrally right behind there's that longitudinal --
20 I can't even remember the exact word but there's a
21 ligament that runs up and down the spine and if you
22 recall he said the amount of force it takes to herniate
23 that disc, it takes a lot of force and a lot of energy.
24 So what's the one thing that Duhare didn't talk about?
25 He didn't talk about the photos. He didn't need to see

1 the photos. You know why? Because he's so -- he told
2 you and he showed you and he explained to you that for
3 a disc to herniate like that it takes real force, real
4 energy, real trauma. And he says a lot of times you
5 don't see it. You know why? Cause he said four to six
6 months. Four to six months that high intensity signal
7 with the tear okay? That you see, that he saw on that
8 film that was done two months after the accident. He
9 showed you that. And he also explained to you he says
10 well -- I said how do you know it was caused by the
11 accident? And he said well you know what? He said
12 look at all the other discs. They're beautiful.
13 They're white. They're plump. There's no loss of disc
14 space. There's no loss of height. There's no
15 degenerative changes. I said well what would you
16 expect if you saw it? He said well if you saw it you'd
17 see that picture with the desiccation. You'd see the
18 disc going from normal, to thinning, to bulging, to
19 herniation, to osteophytes, to rigging. None of that.
20 There's none of that in anywhere in his spine. And you
21 know what? Even when Doctor Lakin looked at the film
22 he says it's a bulge. When I asked him if that bulge
23 was before the accident or after the accident, he said
24 I can't tell you. How long has it been there? I can't
25 tell you. Is it related to the accident? No. How so?

1 I didn't get an answer. But it's not related. Well
2 what did he have? Oh he had a sprain/strain. Well you
3 know Doctor Duhare if that was there before what would
4 you expect? Oh you'd see a lot more degeneration and
5 Doctor Duhare actually explained. He said you know
6 what? When I look at that I see the central
7 herniation, I see the annular tear and I see a little
8 bit of normal age related degeneration. Normal.
9 Spondylolisthesis. I can't remember the exact word.
10 But he said I see a little bit of that. Normal wear
11 and tear for a person his age. And when he was asked
12 by defense counsel, well wait a minute. You know he
13 does heavy lifting; right? You know he worked in
14 construction; right? And you would see degeneration
15 somebody's who's overusing their back. Who's carrying
16 blue stone. He said yea but you're going to -- that's
17 decades. Decades. Not on a twenty one year old.

18 So getting back to the harms and losses. Yea
19 he was out of work. Doctor Matarese kept him out of
20 work. He didn't do it on his own. He has pain every
21 day. Every day since the accident that's what he
22 testified to. Yea it waxes and wanes. Some days are
23 better than others. But it's every day. The pain
24 continues to go into his right leg and it's going to
25 continue into the future. It's a permanent. It's a

1 permanent change to the spine. What Doctor Duhare said
2 is that once it's done it's not going to go back. Even
3 with further treatment. He continues to have the
4 stiffness. Loss of range of motion. We had him come
5 out of the witness stand and bend over. That's the
6 best he could do at twenty four. That wasn't the way
7 he was before. Sixteen to twenty inches from his toes
8 at twenty four years old. Can't even sleep and he
9 needs help getting dressed. He can't even put on his
10 own socks in the morning. You heard about the routine
11 that he has to go through when he has to put his boots
12 on. He laces up his boots and the way that he laces up
13 his boots is that well he has to put his foot up, slip
14 his foot into the boot, put it up on a -- and then bend
15 over so he could do it. Otherwise he wears slip ons
16 because he can't tie his shoes. Twenty four years old.
17 He can't even tie his shoes normally. He can't
18 participate in any activities with his son. Go to the
19 gym and play basketball as he did prior to the crash.
20 These are all things. This is the life that he had
21 before that he doesn't have anymore. This is what was
22 taken away. And he has restriction on the ability to
23 do his job but yet he still does his job. He gets
24 help.

25 Now the law is an injury shall be considered

1 permanent when the body part or organ has not healed or
2 function normally and will heal to function normally
3 with further medical treatment. We must prove that he
4 sustained a permanent injury by a preponderance of the
5 evidence. I submit to you when you look at and
6 consider the credible evidence, credible that's the key
7 word. Who do you find credible? Who do you believe?
8 I believe we met our burden of proof. And we need to
9 do it by objective, credible, medical evidence. That's
10 the MRI's. The normal function of a disc in the spine
11 is not supposed to cause pain. That's not what he has.
12 It's conceded the MRI's and CAT scan are objective
13 credible medical evidence. The herniated disc is
14 permanent and it will never function normally. Even
15 Doctor Duhare, how many times did he say, well there's
16 stuff that you could do? Even if he does injections it
17 offers temporary relief. There's no cure.

18 He has a life expectancy of 54.3 years.
19 Broken it down in terms of days, 19,834 days. And we
20 also broke it down into hours. Now his condition is
21 permanent. That means for the rest of his life he's
22 going to be dealing with this condition. Now ladies
23 and gentlemen Doctor Duhare discussed this and just
24 briefly you'll recall okay? Look at all of the discs
25 and you know what? I don't know that you need a

1 medical degree at this point to figure out which one
2 doesn't belong and why? Even if it didn't have the
3 circle over there, could you figure out which disc is
4 not normal? The other discs they look all fine. Look
5 at that. It's right out into the canal. And you know
6 what? You see that white signal there he's talking
7 about? That's the annular tear.

8 Doctor Lakin, he didn't treat Mark. His job
9 was to help the defense. Yea defense counsel said he
10 makes a pretty good living. He makes a living doing
11 defense. Well we know that. Not only does he do it in
12 his office, he does it in Freehold. He does work for
13 ExamWorks. He does work for IMX. And you know what?
14 He's the only doctor who didn't have a straight leg
15 raise test. How is it that every doctor has a straight
16 leg raise test except him? There's no explanation for
17 that. He concedes that there's a disc bulge. When I
18 asked him if -- if it was there before he couldn't give
19 me an answer. Only one with a straight leg test that
20 was negative.

21 Doctor Duhare, board certified orthopedic
22 surgeon. He testified all the discs were normal. No
23 abnormalities or degenerative changes except for the
24 one disc and that's important. Because when we asked
25 him about well did that mild degeneration that you saw

1 -- he said it's normal age related. Did it cause him
2 any problems? Did it cause him any pain? He says no,
3 it was totally asymptomatic. So you're going to hear
4 one of the arguments or one of the charges that you're
5 going to hear is called an aggravation charge and
6 basically what it is is that to the extent you find in
7 the credible medical evidence based upon Doctor
8 Duhare's testimony that there was some level of either
9 degeneration or desiccation or loss, something in that
10 disc that maybe pre-existed because he was working
11 construction that was totally asymptomatic, if the
12 force of this accident coupled with that pre-existing
13 now causes all these problems, the law says you're
14 entitled to recover for that. So if you believe that
15 there was some normal degeneration and it was
16 aggravated by the accident then we submit the plaintiff
17 has sustained the burden of proof on that issue in
18 terms of proving a permanent injury as an aggravation.

19 Doctor Lakin said there was no degeneration
20 on the film. Nothing. Well if there's no degeneration
21 on the film then how does a twenty one year old all of
22 a sudden have a bulging disc? After a trauma where he
23 was hit at thirty miles an hour by a three thousand
24 pound vehicle. No explanation. When asked whether he
25 had an opinion within a reasonable degree of medical

1 probability of whether the acute centrally herniated
2 disc was caused by the motor vehicle accident this is
3 what he said, he said first is the annular tear and he
4 says then twenty years -- twenty year olds they just
5 don't have incidental disc herniations. And within a
6 reasonable degree of medical probability his current
7 lower back condition is permanent. He has a permanent
8 injury to his lower spine and even with further work up
9 and treatment it's all palliative. And will only offer
10 temporary relief.

11 As far as the issue of the EMG is concerned
12 Doctor Duhare explained to you that it's just one test.
13 One test of many. Now the defense would have you
14 believe that the bulge according to their doctor,
15 despite Doctor Duhare's testimony of an annular tear
16 and a central herniation is not related to the accident
17 and is only sprain/strains and you know what? It's
18 absolutely insignificant because there was an EMG.
19 Well you know what? He's not trained to do an EMG.
20 And when I asked him about the EMG just this morning,
21 earlier today and I said well do you do them? He said
22 no. I said do you know how they're done? Well yea.
23 They stick needles and they measure the voltage. And I
24 asked him I said well don't you need to know where the
25 needles are put? Isn't it dependent upon the accuracy

1 of where the needles are placed? Because if the
2 needles aren't placed correctly then how do you know
3 that the test result is verifiable or truly objective?
4 Because there is a subjective component to it. He said
5 I don't know. When I asked him I said well what
6 training do you need to do an EMG? He says I don't
7 know. I said well I'm showing you Doctor Mastri's
8 record and it has this -- the letters after MD. What
9 does that stand for? I don't know. Who does EMG's? I
10 don't know. I rely upon them. Do you read the waves?
11 No I -- I look at the numbers and the conclusion. But
12 if you look at the numbers and conclusion and you don't
13 know where the needles are placed and you haven't
14 spoken to Doctor Mastri well you -- then how do you
15 know the test is accurate? More importantly ladies and
16 gentlemen if the defense is going to have you believe
17 that the EMG as opposed to the MRI is the be all and
18 end all where's Doctor Mastri? Why didn't he come in
19 and testify? They could have had him come in and
20 testify and say you know what? I did this test right.
21 I made sure all the needles were where they are
22 supposed to be. I read the waves. I read the
23 amplitudes. And you know what? You know what? You
24 know why they didn't call him? I'm make a suggestion
25 --

1 THE COURT: Counsel don't make suggestions.

2 MR. LOPIANO: Okay. What did Doctor Mastri
3 find in his record to the strain of Doctor Lakin when I
4 asked him to read it? A positive straight leg raising
5 test consistent with a centrally herniated disc and an
6 acute annular tear. Maybe that's why he's not here.
7 But he didn't come. So you know what? You need to
8 weigh the credibility. But this is what Doctor Duhare
9 said about the EMG. I want you to hear it in his
10 words.

11 (RECORDING BEING PLAYED AT 2:34:22)

12 MR. LOPIANO: What is an EMG?

13 THE WITNESS: EMG's, it's a compilation
14 study. It tests the muscles and the -- the nerves that
15 they're testing for, either upper or lower extremities.
16 And the -- the muscles are -- it's a test of -- to
17 analyze the chemical activity of muscles by putting
18 needles into individual muscles and reporting -- of the
19 muscles at rest and when contracting voluntarily. And
20 the other half of the test is by putting superficial
21 probes and stimulating nerves -- and reporting the
22 different --.

23 MR. LOPIANO: And what does that come out
24 like in a wave or something?

25 THE WITNESS: Like a wave. A wave -- yes.

1 MR. LOPIANO: Do you perform EMG's?

2 THE WITNESS: No.

3 MR. LOPIANO: The people that perform EMG's,
4 they have some sort of training to do that?

5 THE WITNESS: Yes.

6 MR. LOPIANO: Okay.

7 (RECORDING STOPPED AT 2:35:21)

8 MR. LOPIANO: And then I asked him about well
9 a false negative and here's what he said.

10 (RECORDING BEING PLAYED AT 2:35:27)

11 THE WITNESS: -- together. Unfortunately EMG
12 and nerve connection studies are -- they have a fifty
13 percent false negative. In other words you could have
14 a problem with the nerve but it doesn't show up on the
15 test -- because it sometimes fifty percent it doesn't
16 show and two, there's an interpretive factor. The
17 person doing the test has interpreted it and there's
18 that factor too that --

19 MR. LOPIANO: So -- in terms of the accuracy
20 of the results?

21 THE WITNESS: Exactly.

22 MR. LOPIANO: Okay.

23 (RECORDING STOPPED AT 2:35:56)

24 MR. LOPIANO: And then I asked him I said
25 well you know would you expect an EMG with a centrally

1 herniated disc to be positive? And this is what he
2 said.

3 (RECORDING BEING PLAYED AT 2:36:07)

4 MR. LOPIANO: Now with this type of
5 herniation, a central disc herniation with an annular
6 tear would you expect to see a positive EMG?

7 THE WITNESS: More often than not with a
8 central disc herniation you don't have a positive
9 radiculopathy. Even in patients that are complaining
10 of pain and numbness going into one or both legs
11 because the test is really geared towards the nerve
12 being narrowed down to the where the neuro canal --
13 when you get the -- disc herniations or the more
14 lateral disc herniations like the para-central disc
15 herniations added to the right or to the left you have
16 to understand that the -- the -- the annulus -- doesn't
17 have any additional reinforcement -- on the left or on
18 the right and they -- more material and put pressure on
19 the nerve. The central part of the annulus fibrosis
20 (phonetic) also has this very thick ligament that goes
21 from C1 to the tail bone, it's called the posterior
22 longitudinal ligament and it further reinforces it. So
23 to get a central disc herniation takes more force. But
24 the -- the -- the problem is that it's not putting
25 pressure directly on the nerve route. So this is why

1 often it does not show a radiculopathy on the -- on the
2 EMG and nerve connection studies.

3 (RECORDING STOPPED AT 2:37:33)

4 MR. LOPIANO: And when I asked him whether he
5 had a reasonable degree of medical probability and
6 opinion as to causation, this is what he said.

7 (RECORDING BEING PLAYED AT 2:37:47)

8 MR. LOPIANO: It -- it's your testimony that
9 this was caused by the -- by the crash; correct?

10 THE WITNESS: Without a doubt within a
11 reasonable degree of medical probability this was
12 caused by -- by the -- of the motor vehicle accident.
13 First there was the annular tear -- too he's twenty
14 years old. Twenty one year olds don't have incidental
15 disc herniations.

16 (RECORDING STOPPED AT 2:38:10)

17 MR. LOPIANO: And with respect to permanency.
18 This is the last clip. This is what he said.

19 (RECORDING BEING PLAYED AT 2:38:16)

20 MR. LOPIANO: Now Doctor do you have an
21 opinion whether the -- within a reasonable degree of
22 medical probability whether the injuries are permanent
23 in this case?

24 THE WITNESS: Within a reasonable degree of
25 medical probability I feel that that his current lower

1 back condition is permanent in nature and he has a
2 permanent injury to his lower back.

3 MR. LOPIANO: Okay. Do you have an opinion
4 within a reasonable degree of medical probability as to
5 whether these injuries are -- permanent and that the
6 body parts that were injured have not healed and will
7 not heal to function normally with or without further
8 treatment?

9 THE WITNESS: Within a reasonable degree of
10 medical probability his current condition is permanent
11 and his lower back condition is permanent. Even with
12 further work up and treatment they're all palliative.
13 They're not going to cure his lower back. Many of them
14 can make him feel better for a period of time. But
15 then none of them are curable.

16 (RECORDING STOPPED AT 2:39:08)

17 MR. LOPIANO: So the first question on the
18 jury verdict sheet. Did Mr. Cava sustain a permanent
19 injury caused by the accident? I submit to you that
20 the credible evidence says yes. It's our burden of
21 proof and we met our burden on that. That issue.

22 The last question, what sum of money will
23 fairly and reasonably compensate Mark Cava for the
24 harms and losses, and the injuries that he sustained as
25 a result of the crash? Compensate. The word is

1 compensate. Compensate means balance. It means
2 balance the scales. On one side of the scale you have
3 the harms and losses. On the other side of the scale
4 you have what is going to make up for that? There's
5 nothing. If you could wave a magic wand and give him
6 back his spine you know what? No amount of money would
7 be acceptable. But unfortunately that's not the way
8 life works. The way our system works however is that
9 it's your job to determine what is fair? How do we
10 compensate him for the harms and losses? How do we
11 compensate a twenty one year old with a herniated disc
12 that's more likely than not going to have to go for
13 epidural injections at some point if he gets over the
14 risk? His fear of the risk. But today you have to
15 give a verdict that looks into the future. For now a
16 twenty four year old young male that has a bad back
17 that has a permanent condition. And you know what?
18 You're going to go away from this jury. He's going to
19 go on with his life. And you know what? Another 54.3
20 years, so then how do you figure? Well wait a minute.
21 How am I going to compensate him for that? How is he
22 going to be when he's thirty? How is he going to be
23 when he's forty? How about fifty? How about when his
24 son goes and has kids and they come -- comes over to
25 his house and they want to see grandpa and they want to

1 go on grandpa's knee or grandpa can you take me on the
2 rides? Can you take me to the amusement park? Well
3 you know what? That's why it's not an easy decision.
4 And it's not an easy determination to make. How do you
5 do that?

6 So ladies and gentleman there is a tool that
7 you could use -- utilize. It's called a time unit
8 rule. And basically this is to put it in perspective
9 or give you an analogy. So you see the pencils over
10 here? Those are the pencils that you're going to have
11 when you go into the jury room so if I gave each one of
12 you a pencil and I said you know what? We're going to
13 take whatever time necessary and we're going to -- I
14 want you to draw a forest on the back wall with the
15 pencil. You'd look at me and say Mr. LoPiano it's time
16 to go home and -- but if I asked you to draw one tree,
17 one tree and use that tree as the basis for your forest
18 you could probably dot hat. So you heard the testimony
19 of Mark. You heard his testimony. You heard Destiny's
20 testimony. You heard Doctor Duhare's testimony as to
21 how it's going to be permanent. You heard his
22 testimony about what he does every morning when he
23 wakes up. You heard his testimony about how he can't
24 get a good night sleep. You heard his testimony about
25 what he does when he comes home. So you know what?

1 Take an hour. Take one hour the he has to endure his
2 back problems because of this crash. Just take one
3 hour. And you know what? You all figure it out. You
4 write down your number and you discuss it amongst
5 yourselves and you know what? You come up with a
6 number. Somebody's going to say you know what? I
7 think this is good and somebody's going to say that's
8 crazy. You know I'm not -- but just focus on one hour.
9 One unit of time and once you have that one unit of
10 time I suggest to you you know what? You all look each
11 other in the eye when you have that number and you say
12 square? Do you agree? And if you all agree on that
13 one hour then you have a true verdict for the pain and
14 suffering that he's gone through and continues to go
15 through for that one hour. Once you have that done now
16 what you can do is now you can use the formula. Okay?
17 So there's twenty four hours in a day, three hundred
18 and sixty five days in a year and then you take that
19 number and you times it by 54.3 and then you have a
20 verdict. You have a verdict for his future pain and
21 suffering that now will compensate him. Will balance
22 the scales for the harms and losses the he has
23 sustained as a result of the crash. No discounts. No
24 artificial caps. The scales must be balanced. That's
25 what the law provides.

1 So what's going to happen is when you get to
2 that number somebody's going to say you know what?
3 That's crazy. That? And then you know what? Then you
4 know what you do? Then you all get together and you
5 say wait a minute. We agreed on that one hour being
6 true, fair compensation for that one hour and if that
7 one hour is true then the bottom number is true. No
8 discounts, no artificial caps. We live in New Jersey.
9 It's your decision. No outside influences.

10 Ladies and gentlemen I -- I've represented
11 Mark since we filed the lawsuit over two years ago.
12 You heard his testimony, he didn't want to be here.
13 He's not coming before you -- he's not peddling you.
14 He doesn't want to come to court. But you know what?
15 They wouldn't take responsibility for the accident. We
16 had to have the Judge make the decision. The case
17 didn't resolve. We did everything we could to show you
18 objective credible evidence and I believe we sustained
19 our burden of proof. And I just ask you to give a true
20 verdict. Thank you..

21 THE COURT: Okay. Thank you counsel. Could
22 anybody be kind enough to move the easel so I can see
23 the jury. I can see parts of them but I -- I have to
24 move around. Thank you counsel.

25 MR. LOPIANO: -- the screen? You're good?

1 THE COURT: That's okay counsel. I have the
2 rear view. The bleacher seats on the T.V. screen. I
3 never got the good seats.

4 All right. Ladies and gentlemen of the jury
5 you're going to have to listen to me. That's the way
6 it works. Okay? This is called the jury charge and
7 you'll notice I sat on my glasses again. I broke them
8 even more. So if I have to put them off and on, I
9 refuse to buy one of those chains around your neck,
10 that's how stubborn I can be. However, I may have to
11 put them off and on so I can read this. And I say
12 this, the jury charge.

13 I'm now going to tell you about the
14 principles of law governing this case. You are
15 required to accept my instructions as the law. You
16 should consider these instructions as a whole and do
17 not pick any particular instruction and place any undue
18 emphasis upon it. Don't cherry pick. Any ideas of
19 what you have that the law is or what the law should be
20 or any statements by attorney's that the law may be
21 must be disregarded by you if they're in conflict with
22 my charge.

23

24

(DAYS PROCEEDING CONTINUED IN VOLUME 2)

25

1 Certification

2 I, Kerry Lang, the assigned transcriber, do hereby
3 certify the foregoing transcript of proceedings on CD
4 No. 1, from index number 10:23:03 to 11:10:39,
5 11:10:43 to 11:11:35, 11:15:10 to 1:08:44, 1:49:41 to
6 3:15:58 and 4:16:35 to 4:21:01 is prepared in full
7 compliance with the current Transcript Format for
8 Judicial Proceedings and is a true and accurate non-
9 compressed transcript of the proceedings as recorded.

10

11 /s/ Kerry Lang Date 11-30-15
Kerry Lang AOC#614

12

13

14 _____ (Date)
KING TRANSCRIPTION SERVICES
3 South Corporate Drive, Suite 203
15 Riverdale, NJ 07457

16 (973) 237-6080

17

18

19

20

21

22

23

24

25