

==New York State==
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How to Litigate a Catastrophic
Automobile Accident Case:
Part 4 – Expert Depositions

Materials By:
Andrew J. Smiley, Esq.



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Hon. Harold B. Beeler (Ret.)
Justice of the Supreme Court, New York



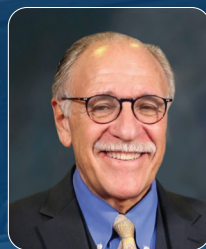
Richard P. Byrne, Esq.
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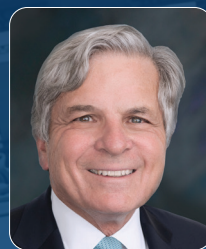
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Real Estate, Co-op and Condominium, Contracts/Corporate/Business Disputes



Michael L. Chartan, Esq.
Construction Law, Real Estate Law



Hon. Jeffrey A. Cohen (Ret.)
Associate Justice, Appellate Division, 2nd Judicial Department



Leslie D. Corwin, Esq.
Commercial, Dissolutions, Employment, Entertainment, Finance



Hon. John P. DiBlasi (Ret.)
Justice of the Supreme Court, Presiding Justice of the Commercial Division



Michael W. Emerson, Esq.
Former General Counsel, Signature Bank, HSBC, N.A., Credit Suisse Banking and Finance, Compliance



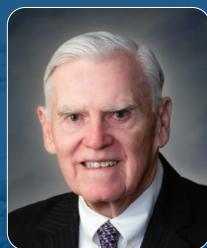
Rhonda L. Epstein, Esq.
Employment Law, Co-op and Condominium Law



David S. Feather, Esq.
Employment Law



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Associate Justice, Appellate Division, 4th Judicial Department



Hon. John G. Ingram (Ret.)
Justice of the Supreme Court, Kings, Maritime Law



Hon. E. Michael Kavanagh (Ret.)
Associate Justice, Appellate Division, 1st and 3rd Judicial Departments



Denis F. Kelly
Former Head of Mergers and Acquisitions, Prudential Securities, Investment Banking/Corporate Finance



Hon. John M. Leventhal (Ret.)
Associate Justice, Appellate Division, 2nd Judicial Department



Peter J. Mastaglio Esq.
Contract/Corporate/Business Disputes, Real Property/Land Use/Zoning, Employment



Hon. Karla Moskowitz (Ret.)
Associate Justice, Appellate Division, 1st Judicial Department



Hal Neier, Esq.
Contract/Corporate/Business Disputes, Securities, Intellectual Property, Entertainment



Hon. Daniel Palmieri (Ret.)
Justice of the Supreme Court, Nassau



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Maritime Law, Marine and Admiralty Insurance



William M. Savino Esq.
Insurance Coverage, Complex Business/Corporate Disputes



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Presiding Justice of the Appellate Division, 2nd Judicial Department



Larry P. Schiffer, Esq.
Insurance, Reinsurance, Regulatory, Complex Commercial



Jeffrey A. Schwab, Esq.
Intellectual Property, Licensing and Advertising Law



Hon. Melvin L. Schweitzer (Ret.)
Acting Supreme Court Justice, 1st Department, Commercial Division



Hon. Peter B. Skelos (Ret.)
Associate Justice, Appellate Division, 2nd Judicial Department



Hon. Ira B. Warshawsky (Ret.)
Justice of the Supreme Court, Nassau



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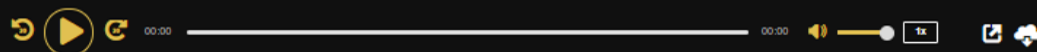
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CLE: How to Successfully Litigate a Personal Injury Case Series Part 4

APRIL 13, 2021 / "LITIGATING A PERSONAL INJURY CASE" SERIES, CLE EPISODES, SEASON 2, VIDEO EPISODES / 01:22:36

-Video Episode - Andrew discusses properly preparing and conducting depositions. 1.5 CLE credits.



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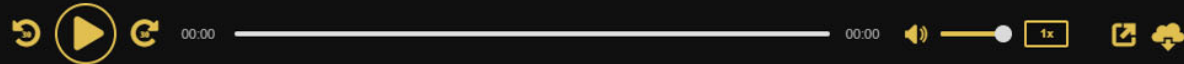
INTERVIEW

CHRIS PAIZ, ESQ

Season 2 – Episode 9: Racing Cars with Chris Paiz

JANUARY 26, 2021 / ADMIN / INTERVIEW EPISODES, SEASON 2, VIDEO EPISODES

-Video Episode - Andrew interviews Chris Paiz, a fellow lawyer and car racing enthusiast.



INTERVIEW

DA ERIC GONZALEZ

Season 2 – Episode 8: An Interview with Brooklyn, New York's DA Eric Gonzalez

DECEMBER 29, 2020 / ADMIN / INTERVIEW EPISODES, SEASON 2, VIDEO EPISODES

-Video Episode - In this week's episode, Andrew welcomes the District Attorney of Kings County in Brooklyn, New York, Eric Gonzalez.



Season 2 – Episode 7: Fighting Through the Dark

Continued Legal Education (CLE) Episodes

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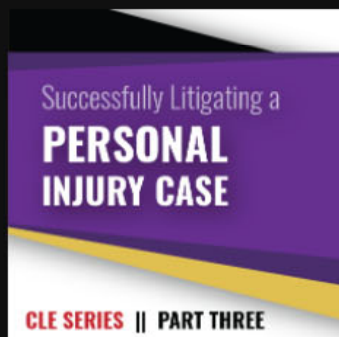
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CLE: How to Successfully Litigate a Personal Injury Case Series Part 4

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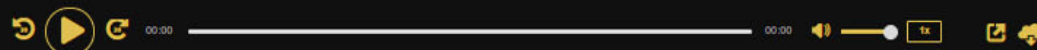
-Video Episode - Andrew discusses properly preparing and conducting depositions. 1.5 CLE credits.



CLE: How to Successfully Litigate a Personal Injury Case Series Part 3

MARCH 9, 2021 / "LITIGATING A PERSONAL INJURY CASE" SERIES, CLE EPISODES, SEASON 2, VIDEO EPISODES

- Video Episode - Andrew discusses adversaries, the preliminary conference, and the initial discovery. 1.5 CLE credits.





The Mentor, Esq.



Hosted By

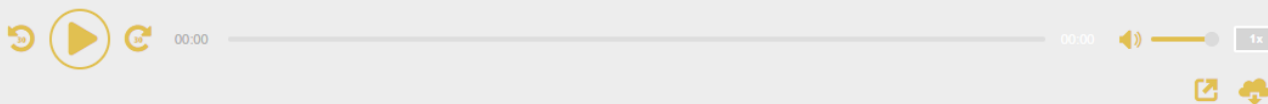
Andrew J. Smiley, Esq.

We hope you enjoy this highly rated podcast hosted by Andrew J. Smiley, Esq. and featuring interviews with other experts in law and litigation, CLE and educational series, and great legal advice.



CLE: Taking the “Umm...” out of SUM/UM Coverage

FEBRUARY 23, 2021 / ADMIN / CLE EPISODES, SEASON 2, VIDEO EPISODES / COMMENTS OFF



In Andrew's current CLE series, “How to Litigate a Personal Injury Case”, the topic of SUM and UM coverage has come up several times. In fact, it came up so many times during the Q&A sessions that the Mentor, Esq. worked with the Academy to do an entire CLE on the topic!

If you are listening and would like to answer the poll in the program for **1.5** CLE credits, you can do so by emailing the Academy at info@trialacademy.org.

Contact Andrew Smiley at andrew@thementoresq.com.

<http://www.smileylaw.com/podcast>

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- › [CLE: How to Successfully Litigate a Personal Injury Case Series Part 3](#) March 9, 2021
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- › [CLE: How to Successfully Litigate a Personal Injury Case Series Part 2](#) February 9, 2021



CLE - Taking the “Umm” out of SUM/UM Coverage





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asmiley@smileylaw.com
www.smileylaw.com
www.thementoresq.com

CURRICULUM VITAE

Education:

· Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence For The Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

· Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present

Associate, June 1996 - December 2000

Law Clerk, September 1993 - June 1996

Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation.

Andrew J. Smiley, Esq. *Curriculum Vitae*, Page 2

· *Adjunct Clinical Instructor of Law - Brooklyn Law School, Trial Advocacy Program (1998-2004)*

· *New York “Super Lawyer”*

2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021

· Bar Admissions:

- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont.

Organizations/Affiliations:

· New York State Academy of Trial Lawyers

- Immediate Past President (May 2018- May 2019)
- President (May 2017 – May 2018)
- President-Elect – (April 2016- May 2017)
- Vice President – 1st Dept. (July 2013-May 2016)
- Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)

· New York City Trial Lawyers Alliance

- Chairman of Board of Governors (July 2017 – July 2019)
- President (July 2015 – July 2017)
- Vice President (June 2013 – July 2015)
- Treasurer (June 2011 – June 2013)
- Secretary (June 2009- June 2011)
- Board of Directors (2000-present)

· Judicial Screening Committee, Kings County Democratic Party (2013)

· New York State Bar Association

· Brooklyn Bar Association

- Medical Malpractice Committee
- Supreme Courts Committee

· The American Association for Justice

· American Bar Association

· Brooklyn Law School Alumni Association

· National Order of Barristers

· Friars Club - member

Andrew J. Smiley, Esq. *Curriculum Vitae*, Page 3

Continuing Legal Education (CLE) Presentations:

How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit, New York State Academy of Trial Lawyers, February 3, 2021

How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File, New York State Academy of Trial Lawyers, January 6, 2021

Brick by Brick: Building a Personal Injury Practice, New York State Academy of Trial Lawyers, December 10, 2020

Working with Experts to Build Your Case, New York State Academy of Trial Lawyers, October 8, 2020

Fitness Industry Liability: Gyms, Trainers and Waivers, The Mentor Esq. Podcast, September 8, 2020

Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court, New York State Academy of Trial Lawyers, June 9, 2020

Crisis Management - The Corona Virus Pandemic, The Mentor Esq. Podcast, April 9, 2020

Do You Have a Federal Tort Claims Act Case in Your Office, New York State Academy of Trial Lawyers, December 10, 2019

Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts, New York State Bar Association, September 9, 2019

Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective, The Defense Association of New York, March 12, 2019

Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions, The Defense Association of New York, January 31, 2019

Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives, The Defense Association of New York, September 17, 2018

Punitive Damages – What to Plead, What to Prove: Medical Malpractice, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

Andrew J. Smiley, Esq. Curriculum Vitae, Page 4

Continuing Legal Education (CLE) Presentations Continued:

Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA, New York State Bar Association, October 11, 2015

Effectively Using Experts in Personal Injury Cases, Lawline, October 8, 2015

Killer Cross Examination Strategies, Clear Law Institute, April 21, 2015

Powerful Opening Statements, Clear Law Institute, January 13, 2015

The Dram Shop Law: New York Liquor Liability, Lawline.com, November 20, 2014

Killer Cross Examination Strategies, Lawline.com, November 20, 2014

Trial Techniques: Tricks of the Trade Update, Lawline.com, October 14, 2014

Personal Trainer Negligence Update, Lawline.com, October 14, 2014

Trial Techniques – Part 2: Cross- Examination & Closing Arguments, Brooklyn Bar Association, May 15, 2014

Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination, Brooklyn Bar Association, May 7, 2014

Health, Fitness & Adventure Sports Liability, New York State Bar Association, August 1, 2013

Direct Exams: How To Make Your Witnesses Shine, New York State Academy of Trial Lawyers, May 6, 2013

Opening Statements: A Recipe for Success, Lawline.com, August 7, 2012

“You Had Me at Hello”: Delivering an Effective and Powerful Opening Statement, New York State Academy of Trial Lawyers, April 1, 2012

Preparing the Construction Accident Case, New York County Lawyers Association, March 26, 2012

The Nuts and Bolts of a Trial, New York State Academy of Trial Lawyers, October 24, 2011

Personal Trainer Negligence, Lawline.com, March 22, 2011

Effectively Using Experts in Personal Injury Cases, Lawline.com, May 4, 2011

Andrew J. Smiley, Esq. Curriculum Vitae, Page 5

Continuing Legal Education (CLE) Presentations Continued:

Trial Techniques: The Tricks of the Trade, Lawline.com, February 16, 2011

Practice Makes Perfect: Learn to Practice Like a Pro, Lawline.com, January 18, 2011

Jury Selection 101, New York State Academy of Trial Lawyers, December 14, 2010

Practical Guidelines for Getting Items into Evidence, Lawline.com, March, 2010

Winning Your Case: Trial Skills that Count, Lawline.com, August 21, 2009

Television Appearances – Legal Commentary:

Fox News Channel

- The O'Reilly Factor
- What's Happening Now with Martha McCallum
 - America's News Room
 - Fox & Friends
- Fox Business Channel
- Neil Cavuto
- Money with Melissa Francis

CNN -Anderson Cooper 360

ET – Entertainment Tonight

Bloomberg TV

Headline News

Tru TV

Court TV

The Morning Show with Mike and Juliet

Interests, Hobbies:

Tennis, Porsche Club, Sim Racing, Yoga, Cooking

SOUTHERN DISTRICT OF NEW YORK

-----X

_____ /

Plaintiffs,

-against-

THOMPSON,

Defendants.

-----X

May 18, 2021

10:33 a.m.

VIDEOTAPED DEPOSITION BEFORE TRIAL VIA
VIDEOCONFERENCE of an Expert Witness, JEFFREY
MICHAEL SPIVAK, M.D., pursuant to Notice, before
Randi Vecchione, a Notary Public within and for
the State of New York.

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

2

3 SMILEY & SMILEY, LLP

4 Attorneys for Plaintiff

5 122 East 42nd Street, Suite 39

6 New York, New York 10168

6

BY: ANDREW SMILEY, ESQ.

7

-and-

MICHAEL SOLOMON, ESQ.

8

9

10 KERLEY, WALSH, MATERA & CINQUEMANI, P.C.

Attorneys for Defendants

11 2174 Jackson Avenue

Seaford, New York 11783

12

BY: JOHAN OBREGON, ESQ.

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STIPULATIONS

IT IS HEREBY STIPULATED
AND AGREED by and between the attorneys for the
respective parties herein, that filing and sealing
be and the same are hereby waived.

IT IS FURTHER STIPULATED AND
AGREED that all objections, except as to the form
of the question, shall be reserved to the time of
the trial.

IT IS FURTHER STIPULATED AND
AGREED that the within deposition may be signed
and sworn to before any officer authorized to
administer an oath, with the same force and effect
as if signed and sworn to before the Court.

IT IS HEREBY STIPULATED AND
AGREED by and between counsel for all parties
present that pursuant to C.P.L.R. section 3113(d)
this deposition is to be conducted by video
conference, that the court reporter, all counsel,
and the witness are all in separate remote
locations and participating via videoconference

STIPULATIONS

(LegalView/Zoom) meeting under the control of Lexitas Court Reporting Service, that the officer administering the oath to the witness need not be in the place of the deposition and the witness shall be sworn in remotely by the court reporter after confirming the witness's identity, that this videoconference will not be recorded in any manner and that any recording without the express written consent of all parties shall be considered unauthorized, in violation of law, and shall not be used for any purpose in this litigation or otherwise.

IT IS FURTHER STIPULATED that exhibits may be marked by the attorney presenting the exhibit to the witness, and that a copy of any exhibit presented to a witness shall be Emailed to or otherwise in possession of all counsel prior to any questioning of a witness regarding the exhibit in question. All parties shall bear their own costs in the conduct of this deposition by video conference, notwithstanding the obligation by C.P.L.R. to supply a copy of the transcript to the

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STIPULATIONS

deposed party by the taking party in civil
litigation matters.

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J. SPIVAK, M.D

J E F F R E Y M I C H A E L S P I V A K,
M.D., called as a witness, having been first duly
sworn by a Notary Public within and for the State
of New York, was examined and testified as
follows:

EXAMINATION BY
MR. SMILEY:

Q. What is your name, please?

A. Jeffrey Michael Spivak, M.D.

Q. Good morning, Dr. Spivak.

A. Good morning.

Q. My name is Andrew Smiley. I'm going to
ask you some questions today. As you know, I have
rendered a payment to you for \$5,300, I believe,
for your appearance today for two hours of a
deposition, so we'll go up until 12:30.

And since we do have that time limit, I
would ask that you please try and give as concise
answers to my questions as you can. And if more of
an explanation is needed you can let me know and I
can also ask you follow-ups; okay?

A. Yes. Can I just ask who else is with us?

1 J. SPIVAK, M.D

2 Q. Yes, you can ask.

3 You have your lawyer, Johan Obregon; my
4 associate, Michael Solomon; and the court reporter,
5 Randi Vecchione.

6 A. Perfect. Thank you.

7 Q. And where are you located at this moment,
8 Doctor?

9 A. I'm in Manhattan at my hospital
10 administrative office.

11 Q. Okay. Is anybody with you there?

12 A. No. I'm alone in this room.

13 Q. Now, do you have a file on this case with
14 you?

15 A. I have a number of things with me. I
16 have a copy of my IME report. I have my CV. And I
17 have the basic kind of intake and scribble sheet, I
18 call it, for him. That's essentially my file.

19 Q. What about other documents that you
20 reviewed; how do you maintain those?

21 A. I don't maintain those. They're on CDs
22 and generally they're electronically reviewed. And
23 after reviewing them they either get sent back or
24 discarded.

25 Q. Do you currently have any medical records

1 J. SPIVAK, M.D

2 in your possession, either hard copy, a digital
3 file, computer cloud in any way accessible to you
4 related to [REDACTED] [REDACTED] [REDACTED]?

5 A. Not accessible to me. The only thing I
6 have, I was recently sent an MRI CD and report. I
7 believe it was from 2014, but I apologize, I did
8 not bring that with me. That was an accident.

9 Q. When did you receive that?

10 A. Last week.

11 Q. When you say "you did not bring that with
12 you," where would that be located, if not at your
13 office?

14 A. It's at my home office desk.

15 Q. Did you charge any additional fee to
16 review those records that were sent to you?

17 A. Not that I know of, no.

18 Q. Do you have copies of all your billing
19 statements relative to this case?

20 A. Not with me, no.

21 Q. Can you produce those to Mr. Obregon?

22 A. Sure. I would be happy to.

23 MR. SMILEY: We call for the production
24 of all billing statements. We have requested
25 this in writing already.

1 J. SPIVAK, M.D

2 MR. OBREGON: Just for the record, I
3 e-mailed those to you before this deposition
4 started. And, obviously, this is being
5 recorded by video, I just ask that I be
6 provided with a copy of the video as well.

7 MR. SMILEY: Yes. Absolutely. We'll
8 provide that.

9 And we only got a billing for an updated
10 record review that you sent over today, so if
11 there's any additional billing for initial
12 exam and review we would ask for a copy of
13 that, please.

14 DOCUMENT/INFORMATION REQUESTED:

15 Q. Dr. Spivak, how is it that you got
16 involved in this case?

17 A. I was hired to do an independent medical
18 examination.

19 Q. Who hired you?

20 A. I guess Mr. Obregon's firm. I'm not sure
21 who in the firm hired me, who makes that decision.

22 Q. Had you worked for Mr. Obregon or his law
23 firm prior to this case?

24 A. The name is actually not very familiar,
25 but I certainly may have done an examination or two

1 J. SPIVAK, M.D
2 before. I've not met Mr. Obregon and seen his face
3 until today.

4 Q. The law firm that he works for, Kerley,
5 Walsh, have you done work for that firm prior to
6 this case?

7 A. As I said, it's not -- it's somewhat
8 familiar to me, so I probably have, but I have no
9 specific recollection.

10 Q. Do you know how it was that you were
11 connected with the firm for this case?

12 A. No, I do not.

13 Q. Do you get some type of letter requesting
14 your assistance?

15 A. It's often a letter or a phone call.
16 More commonly it's a phone call to the office.

17 Q. Did you receive any type of
18 correspondence from Mr. Obregon or any person at
19 his law firm to engage you in this case?

20 A. I assume I did. I don't take care of
21 that, so I don't see that, but we can certainly
22 produce any correspondences for you. That's no
23 problem.

24 Q. All right. Well, I would ask that you
25 please produce that to Mr. Obregon so that we can

1 J. SPIVAK, M.D

2 follow up on that. And to the extent that it
3 hasn't been requested, which I believe it has
4 already, we would follow up in writing on that.

5 DOCUMENT/INFORMATION REQUESTED:

6 Q. When you were engaged at some point to
7 participate in this case, were you asked to do
8 anything specifically?

9 A. No.

10 Q. Were you asked to examine Mr. Christy?

11 A. Yes.

12 Q. Were you asked to render specific
13 opinions on any specific issues?

14 A. Yes.

15 Q. What were you asked to render opinions
16 on?

17 A. Anything related to his spine. I do
18 independent medical examinations regarding spinal
19 issues. Many patients have other injuries,
20 associated things in addition to spine, but I said
21 nothing specific because for any claimant I'm going
22 to examine, it's always related to whatever spinal
23 issues they have. Sometimes neck. Sometimes back.
24 Sometimes middle back. Whatever is related to the
25 spine that's what I examine, review records for,

1 J. SPIVAK, M.D

2 and make opinions on.

3 Q. Were you asked to render an opinion on
4 what, if any, treatment that Mr. [REDACTED] had was
5 related to his automobile accident of May 26, 2017?

6 A. Yes.

7 Q. And did you specifically review the case
8 to determine what, if any, treatment he received
9 was causally related to the accident of May 26,
10 2017?

11 A. Again, that's part of my overall review,
12 but not specifically reviewing for that
13 information.

14 Q. Did you in fact make any conclusion with
15 regard to whether any specific treatment received
16 by Mr. [REDACTED] since the date of his accident to
17 present was or was not causally related to his
18 accident?

19 A. Yes, I believe I did.

20 Q. And what were your opinions as to what
21 was and what was not causally related to the
22 accident?

23 A. I would have to refer to my report, if
24 that's okay with you.

25 Q. Yes, you may. Just direct me, please, to

1 J. SPIVAK, M.D

2 where you're referring to in your report.

3 A. On page ten, third paragraph from the
4 bottom I was discussing the herniated disks that
5 Mr. [REDACTED] had and I opined that the quote, disk
6 herniation is the result of progression of the
7 degenerative disease, and is not causally related
8 to the 5/26/17 motor vehicle accident.

9 Q. Other than reference to that specific
10 disk herniation not being causally related to the
11 accident, did you render any opinions as to whether
12 any other conditions or treatment rendered to
13 Mr. [REDACTED] following this accident was or was not
14 causally related?

15 A. I don't believe I did.

16 Q. As you sit here today, do you have an
17 opinion as to whether specific treatment rendered
18 to Mr. [REDACTED] following this automobile accident
19 was or was not causally related?

20 A. I would have to review the treatments,
21 but I would have an opinion, yes.

22 Q. And what is your opinion?

23 A. Again, I don't recall. I would have to
24 review my notes to know exactly what was done, but
25 I did opine that he sustained a lumbar strain or

1 J. SPIVAK, M.D

2 sprain resulting from the accident, so treatment
3 related to that, physical therapy, sometimes even
4 injections, things like that would be appropriate
5 and would be causally related.

6 Q. What, if any, treatment that you observed
7 in the records that you reviewed in this case is
8 not, if any, causally related to the automobile
9 accident?

10 A. His surgeries.

11 Q. Which surgery?

12 A. Both surgeries, the diskectomy surgery
13 and the subsequent spinal fusion.

14 Q. So it is your opinion within a reasonable
15 degree of medical certainty that those two
16 surgeries were not causally related at all to the
17 rear-end accident of May 26, 2017?

18 A. That's correct.

19 Q. Do you have an opinion as to whether or
20 not there was an aggravation of a preexisting
21 spinal condition as a result of this accident?

22 A. I believe he had a lumbar sprain or
23 strain as a result of the accident, not an
24 aggravation of some preexisting condition.

25 Q. And do you have an opinion as to whether

1 J. SPIVAK, M.D

2 or not the lumbar strain or sprain required any
3 medical treatment?

4 A. Yes. As I said before, the nonoperative
5 treatment, things like physical therapy,
6 chiropractic care, acupuncture, medicines, those
7 would all be appropriate treatment for that.

8 Q. The epidural injections, would you agree
9 that those are causally related and required as a
10 result of his accident?

11 A. They could be, yes.

12 Q. When you say "they could be," are you
13 saying they're not causally related or they are?

14 A. I'm saying they may or may not be. I
15 don't know. I can't say for sure.

16 Q. Why can't you say for sure?

17 A. Because in reality for a lumbar sprain or
18 strain an epidural injection is not actually
19 appropriate, but for a herniated disk or for
20 pinched nerves related to that it would be
21 appropriate.

22 Q. So are you saying they're not causally
23 related?

24 A. I'm saying I'd have to review the records
25 in more detail to know whether I think that they

1 J. SPIVAK, M.D
2 were causally related in terms of relative to the
3 knowledge I have right now answering your question.

4 Q. Wasn't that part of what you were asked
5 to do was to review all of the records and
6 determine what, if any, treatment was or was not
7 causally related?

8 MR. OBREGON: Objection to form. You can
9 answer.

10 A. Yes, I guess that was part of what I was
11 supposed to do.

12 Q. So as we sit here today, is it fair to
13 say that as a review of all the records that you
14 identified in your report and in addition to the
15 2014 MRI you were just provided that the only
16 treatment that you are concluding was not causally
17 related in any way to the accident of May 26, 2017
18 were the two surgeries; is that correct?

19 A. Yes.

20 Q. And as you sit here today, you are not
21 saying that any of the other treatment that you
22 reviewed that was provided to you was not causally
23 related other than those two surgeries; correct?

24 A. Can you repeat that question again? I'm
25 sorry.

1 J. SPIVAK, M.D

2 Q. Sure. Other than those two surgeries, is
3 it fair to say that all of the other treatment that
4 you saw contained in all of the records you
5 reviewed was causally related to the May 26, 2017
6 accident?

7 MR. OBREGON: Objection to form.

8 A. No. No. I just told you no with respect
9 to the epidural steroids. The answer is I don't
10 know.

11 Q. Well, let me phrase it in a different
12 way.

13 Is there any treatment other than the two
14 surgeries that following your examination of
15 Mr. [REDACTED] and your review of all of his records
16 since the date of the accident that you opine is
17 not causally related to the automobile accident?

18 A. Much of the nonoperative treatment that
19 was done prior to surgery may or may not be
20 causally related given his history that's alluded
21 to in the records of prior back issues, possibly
22 being on narcotic medicines before the accident,
23 and the like.

24 Q. You keeping saying "may or may not be
25 related." My specific question is: Other than the

1 J. SPIVAK, M.D

2 two surgeries that you referenced that you say are
3 absolutely not related in any way to his accident
4 of May 26, 2017, do you have an opinion that any
5 other treatment you reviewed was not causally
6 related to the accident as well?

7 A. No.

8 Q. Is it fair to say that you spent at least
9 four hours reviewing all of the medical records
10 provided to you of Mr. [REDACTED]?

11 A. Yes.

12 Q. Is it fair to say that you reviewed
13 hundreds, if not thousands of pages of medical
14 treatment records?

15 A. Yes.

16 Q. And is it also fair to say that all of
17 the records that you reviewed prior to writing your
18 report were from either the date of accident, May
19 26, 2017, or sometime after the date of the
20 accident, May 26, 2017?

21 A. Yes, that's correct.

22 Q. Other than the 2014 MRI and/or report
23 that you were recently provided, have you reviewed
24 any -- withdrawn.

25 Other than the 2014 MRI and report that

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J. SPIVAK, M.D

you were recently provided, are you aware, by way of reviewing all the records you did and any references contained therein, if Mr. [REDACTED] had any treatment prior to May 26, 2017 for his back?

A. In terms of treatment the only thing I have that was alluded -- again, alluded to in the records by Mr. [REDACTED] was a note, I think, from 2010 indicating -- I'm sorry, from 2020 indicating that he had been taking narcotic medicines for five years. That would put it well before the time of the accident.

Q. Other than that note you're referring to, in the hundreds to thousands of medical records you reviewed, did you see any reference anywhere of Mr. [REDACTED] receiving treatment for a prior back issue before the accident of May 26, 2017?

A. Not that I recall.

Q. Other than that note that you just referred to, are you aware of any symptomatic pain that Mr. [REDACTED] was having from his back prior to May 26, 2017?

A. No.

Q. Is it fair to say that in your review of the hundreds, if not thousands pages of medical

1 J. SPIVAK, M.D
2 records that you reviewed relative to Mr. Christy's
3 care and treatment, that more likely than not if he
4 had received any significant treatment for lower
5 back pain prior to the date of the accident that
6 would have been reflected somewhere in those
7 records?

8 MR. OBREGON: Objection to form. You can
9 answer.

10 A. No, not necessarily.

11 Q. Did you ask Mr. [REDACTED] when you examined
12 him about his prior back condition, if any?

13 A. Yes, I did.

14 Q. And what did he tell you?

15 A. I don't see a sentence alluding to it in
16 my note, but on my scribble sheet where I do ask
17 that question there's a negative sign, so I would
18 assume he told me there was no prior history, even
19 if I can't find that reflected in my note.

20 Q. And you reviewed his deposition
21 transcript, according to your report?

22 A. From 8/28/20, yes.

23 Q. And did you review that and read it?

24 A. I read it to a degree, yes.

25 Q. Is it fair to say that upon review of

1 J. SPIVAK, M.D
2 that transcript when he was asked questions about
3 any prior treatment of his back that he responded
4 in sum and substance that other than muscle pain
5 that he had back around 2014 or '15 where he had it
6 checked out and was told it was just muscle pain he
7 had received no other treatment; did you see that?

8 A. I don't recall the specifics of the
9 transcript at this point, but that would not
10 surprise me.

11 Q. Is it fair to say that you have no reason
12 to dispute that Mr. [REDACTED] was asymptomatic with
13 regard to his lumbar spine prior to May 26, 2017?

14 A. Yes, that would be fair to say.

15 Q. And as you sit here today, is it your
16 opinion that he had any type of prior lumbar back
17 condition prior to May 26, 2017?

18 A. Yes.

19 Q. What opinion do you have with regard to
20 whether or not he had a prior lumbar spine
21 condition?

22 A. Well, he had an MRI from 2014 showing
23 degeneration of a disk. There has to be a reason
24 for that MRI to have been done. There are probably
25 medical records surrounding that that we just don't

1 J. SPIVAK, M.D

2 have to look at today.

3 Q. I'm asking you what the basis is of your
4 opinion that he had a prior lumbar spine condition?

5 A. That's the basis.

6 Q. The basis is that he had an MRI in 2014?

7 A. He had an MRI in 2014 and the allusions,
8 as I said, to preexisting medication use and the
9 prior MRI and the notes reviewed.

10 Q. But you have not observed anything
11 independently to form an opinion that he had a
12 prior condition of his lumbar spine other than
13 looking at a 2014 MRI; correct?

14 A. Yes.

15 Q. And did you see something in the 2014 MRI
16 that indicated to you that at that time he was
17 suffering from some type of prior lumbar condition?

18 A. I would have to look back at the actual
19 report. Usually there's a history that says, low
20 back pain or something like that, but I don't know
21 what it says because I don't have it in front of
22 me.

23 Q. I'm going to pull up the report and share
24 it with you. I'm not going to mark this as an
25 exhibit because I will reference it as the January

1 J. SPIVAK, M.D
2 13, 2014 MRI taken at DRA Imaging in Poughkeepsie,
3 New York.

4 And do you see my screen, Dr. Spivak?

5 A. Yes.

6 Q. Do you see the ordering physician was
7 someone named Holly Mault, M-A-U-L-T, NP?

8 A. Right, a nurse practitioner.

9 Q. That's not an orthopedist; right?

10 A. It's a nurse practitioner.

11 Q. And a nurse practitioner is not an
12 orthopedist; correct?

13 A. Not even a doctor, that's correct.

14 Q. Not even a doctor.

15 A. Working for a doctor potentially, but not
16 a doctor.

17 Q. You don't know who Nurse Mault is;
18 correct?

19 A. That's correct.

20 Q. But what you do know is that it wasn't an
21 orthopedist that sent him for this MRI; correct?

22 A. No, it may have been ordered by Miss
23 Mault at an orthopedist's direction. I don't know.
24 You know, the person writing -- there are many
25 things that I order that my physician assistant

1 J. SPIVAK, M.D

2 does the actual paperwork, so it's addressed and
3 noted to her.

4 Q. Okay.

5 A. I don't know who actually ordered or who
6 was behind it. Just that the actual hands-on of
7 ordering was done by Miss Mault.

8 Q. Now, it says, in clinical history,
9 patient complains of lower back pain after
10 shoveling ten days ago. Prior here in 2005. Do
11 you see that?

12 A. Yes.

13 Q. Okay. So he has lower back pain and
14 that's why he's having this MRI, as far as we can
15 tell from this report; right?

16 A. Yes.

17 Q. Now, let's look through the findings of
18 this report. I'll scroll through slowly, and I'll
19 here at least on my screen where it looks like, L1
20 through L5 is benign; right? There's really no
21 findings anywhere?

22 A. That's correct.

23 Q. And then at L5-S1 it says the disk is
24 moderately narrowed and desiccated. There is a
25 small focal central disk protrusion which abuts,

1 J. SPIVAK, M.D

2 but does not -- it says performs, which is probably

3 a typo, the thecal sac. There is mild bilateral

4 foraminal stenosis. Do you see all of that?

5 A. Yes.

6 Q. Now, would you consider this to be a

7 normal MRI, an abnormal MRI, an MRI that is

8 evidence of some type of condition that he has, or

9 something else, Doctor?

10 A. It's an abnormal MRI.

11 Q. And what makes it an abnormal MRI?

12 A. The findings at L5-S1.

13 Q. What findings at L5-S1 make it abnormal?

14 A. Everything that's written there. The

15 disk being desiccated. The disk being narrowed.

16 The small focal central protrusion. The foraminal

17 stenosis. Those are abnormalities.

18 Q. Okay. And is it fair to say that at this

19 time with this MRI he could have been asymptomatic;

20 correct?

21 A. Yes.

22 Q. And he could have been symptomatic;

23 correct?

24 A. That's correct.

25 Q. Is it also fair to say that if you were

1 J. SPIVAK, M.D
2 to take most men around age 50 and had them have an
3 MRI of their lumbar spine that many of those
4 individuals could be asymptomatic and have findings
5 such as this; correct?

6 A. That's correct.

7 Q. This MRI in and of itself is not evidence
8 of some preexisting spinal condition; is it?

9 MR. OBREGON: Objection to form. You can
10 answer.

11 A. It's the clinical history. It's a
12 history of low back pain, so there is pain
13 associated with it. It's the clinical history.
14 It's not a big, prolonged clinical history, but
15 there is a clinical syndrome of back pain at the
16 time of this MRI.

17 Q. And in orthopedics clinical history is a
18 very important part of your role as a physician and
19 a diagnostician; correct?

20 A. Yes.

21 Q. And it's important to take a history of a
22 patient to form a clinical impression; correct?

23 A. Yes.

24 Q. And it's important to find out when a
25 patient has pain and when a patient doesn't have

1 J. SPIVAK, M.D

2 pain; is that correct?

3 A. Yes.

4 Q. It's important to look at as many records
5 as possible to see about prior treatment to assist
6 you in forming a clinical impression; right?

7 A. Sometimes that's important. Not always,
8 but many times.

9 Q. So if a patient of yours had an MRI like
10 this and was talking about having back pain, what,
11 if any, treatment would you recommend?

12 A. I would probably recommend potentially
13 physical therapy and nonsteroidal antiinflammatory
14 medicine and giving it time.

15 Q. Okay. You wouldn't recommend surgery
16 based on this, would you?

17 A. No.

18 Q. You wouldn't recommend epidural
19 injections on this, would you?

20 A. That might be later on, but it would not
21 be part of the first line recommendation.

22 Q. What does it mean that a disk is
23 moderately narrowed and desiccated?

24 A. It means that its height is shortened,
25 and it's -- desiccated just means drying out.

1 J. SPIVAK, M.D

2 Q. And is that what we know to be
3 degenerative disk disease?

4 A. Yes.

5 Q. So is it fair to say that a review of
6 this MRI report would indicate to you that
7 Mr. [REDACTED] in January of 2014 had degenerative
8 disk disease at L5-S1?

9 A. Yes.

10 Q. What about at L1 through L5, does he
11 degenerative disk disease there?

12 A. The report indicates some very mild
13 changes at L1-2, and no abnormalities at the other
14 levels.

15 Q. Would you say that he had degenerative
16 disk disease at L1-L2 at the time of this MRI?

17 A. He has some elements of disk
18 degeneration. I don't know if I would use the word
19 disease.

20 Q. What about at L2-L3, would you call that
21 degenerative disk disease at this time?

22 A. No, there's no evidence of that based on
23 the report.

24 Q. And there's also no evidence of any type
25 of degenerative disk disease at L3-4 or L4-5 at the

1 J. SPIVAK, M.D

2 time of this MRI in 2014; correct?

3 A. Based on the report that's correct.

4 Q. And did you review the actual film, image
5 of this 2014 MRI?

6 A. Yes.

7 Q. And do you have any reason to disagree
8 with the conclusions contained in this report from
9 this radiologist?

10 A. I have no reason to disagree. I just
11 don't have it in my head or remember it enough to
12 definitely agree. That's all.

13 Q. Is it your intention to generate a
14 follow-up report with your findings of that 2014
15 MRI for Mr. Obregon and his firm?

16 A. I'm not sure. That's up to him to
17 request, but if he requests it I would generate
18 that.

19 Q. Now, here it says at L5-S1 there's a
20 small focal central disk protrusion. What is that?

21 A. That's a disk herniation essentially.
22 The word protrusion -- protrusion is a type of disk
23 herniation.

24 Q. Is there a difference between the
25 terminology of a herniation and the terminology of

1 J. SPIVAK, M.D

2 a protrusion?

3 A. No. The differential is between --
4 again, a protrusion is a type of a herniation.
5 There are other types of herniations. The
6 differential is with the word disk bulge.

7 Q. And what's the difference between a disk
8 bulge and a disk protrusion?

9 A. A disk bulge is a generalized nonfocal
10 expansion of the disk as though you took a balloon
11 and pressed on it from the top on a table and you'd
12 see it expand around the sides. That's a bulge.

13 A protrusion or a disk herniation, I
14 should say, because there are different types,
15 refers to a focal area where that extension has
16 come out because of a defect in the outer part of
17 the disk, not a generalized wearing away and
18 overall expansion of the circumference of the disk.

19 Q. What other types of herniations of a disk
20 are there other than a disk protrusion since I
21 believe you said it's one type of herniation?

22 A. Right. There are three types. Disk
23 protrusions, disk extrusions, and disk
24 sequestrations.

25 Q. Did I understand you to say there are

1 J. SPIVAK, M.D

2 three types of herniations; a protrusion, an
3 extrusion, and a sequestration?

4 A. That's correct.

5 Q. What is the difference between a
6 protrusion and an extrusion?

7 A. Protrusion is an example of what we call
8 a contained disk herniation where the material has
9 not -- the central material that leaves the disk,
10 the actual herniation is still contained within
11 outer fibers of the disk.

12 An extrusion, a piece of the disk
13 material has come further out of place and is now
14 free of the outer confines of the disk, but still
15 attached to the disk.

16 And in a sequestration the disk fragment
17 has not only come out of place, but has fallen so
18 far out of place that it no longer connects to the
19 parent disk where it came from.

20 Q. Would it be fair for a radiologist in
21 reviewing this MRI, instead of using the term
22 protrusion to have used the term herniation and say
23 there's a focal central disk herniation; would that
24 be appropriate verbiage?

25 A. Yes.

1 J. SPIVAK, M.D

2 Q. And can you tell the location of the
3 herniation here, whether it's the right side, the
4 left side, or somewhere else relative to the thecal
5 sac or spinal cord?

6 A. The word central implies that it's right
7 in the center, not to the right or left.

8 Q. Okay. So is it fair to say that on
9 January 13, 2014 there's no finding of any disk
10 bulges in Mr. Christy's back; correct?

11 A. There's no report of that, that's
12 correct.

13 Q. And there is a report of a herniation of
14 a disk at L5-S1; is that correct?

15 A. Yes.

16 Q. Now, is it fair to say that based on that
17 MRI report alone you would not diagnose Mr. [REDACTED]
18 as having some type of degenerative back condition
19 going on?

20 A. Based on the MRI report alone, that's
21 correct.

22 Q. And based on that MRI report alone you
23 certainly wouldn't say that prior to May 26, 2017
24 he had some type of prior back condition; correct?

25 A. He did, back in 2014.

1 J. SPIVAK, M.D

2 Q. And the condition you're referring to is
3 the herniation?

4 A. And the back pain that brought on the
5 need for the decision to go ahead with an MRI.

6 Q. Does that make it a chronic condition?

7 A. Not necessarily, no.

8 Q. Do you know if he had a chronic condition
9 as of 2014?

10 A. I don't know.

11 Q. Is it fair to say that there's no
12 evidence anywhere in anything you reviewed to
13 indicate that following this MRI in January of 2014
14 up to the automobile accident of May 26, 2017 that
15 he had any significant pain in his lumbar spine?

16 A. Can you repeat that question? I'm sorry.

17 Q. Is it fair to say that there is no
18 evidence whatsoever, based upon your review of all
19 of the records that Mr. [REDACTED] had any pain in his
20 lower back following this MRI of January of 2014
21 until the happening of the automobile accident in
22 May of 2017?

23 A. Other than his report of use potentially
24 of narcotics, then there would be nothing else.

25 Q. And that one note you're referring to,

1 J. SPIVAK, M.D

2 that was a note in Dr. Neubardt's chart from
3 September 14, 2020 of a phone call; correct?

4 A. I believe so.

5 Q. That's the only note that you referred to
6 of all the hundreds, if not thousands of pages that
7 talk about prior narcotic use is a phone call note;
8 is that fair to say?

9 A. Yes.

10 Q. And there's no reference as to if he had
11 been taking narcotics prior to the date of this
12 accident for what reason he was taking them; is
13 that fair to say?

14 A. Yes.

15 Q. And, in fact, there's nothing in the
16 records that you've reviewed that indicate that he
17 was taking narcotic medication specifically for
18 lower back pain; correct?

19 A. Correct.

20 Q. How does a herniation such as the one
21 identified on this 2014 MRI occur?

22 A. Disk herniations, I would say most
23 typically occur as a result or part of a
24 degenerative process; although, traumatic
25 incidents, physical activity can cause it to happen

1 J. SPIVAK, M.D

2 within the degenerative process. And very severe
3 accidents can cause it to happen sort of
4 immediately through a large tear of the disk
5 itself.

6 Q. Have you ever had a patient who was
7 involved in an automobile accident or rear-end
8 automobile accident that you treated for herniated
9 disk?

10 A. Yes.

11 Q. At any time have you treated a patient
12 who was rear-ended in an automobile accident and
13 the evidence of a disk herniation did not appear on
14 an initial MRI, but showed up at some time later
15 on?

16 A. That can happen typically within the
17 first few weeks or so.

18 Q. What about beyond the first few weeks, if
19 someone had a partially herniated disk and then was
20 in an accident, could that disk herniate even more
21 months after the accident?

22 A. A disk can always herniate further from
23 time from anything, but that doesn't necessarily
24 make it related.

25 Q. How can you tell if a disk herniates more

1 J. SPIVAK, M.D

2 than how it was before an accident, but it's not
3 evident until months after the accident, whether
4 the accident caused that to happen or whether it's
5 part of the degenerative process?

6 MR. OBREGON: Note my objection to form.
7 You can answer.

8 A. I think temporally you look at it to see
9 how close it was to the time of the accident. If
10 it happens a year later, many months later, many
11 years later I don't think you can ascribe it to the
12 accident. If it happens days later, that's a
13 different story. There could be some initially
14 tearing that later goes on to quickly, rapidly
15 herniate.

16 Q. Could a herniation develop three months
17 after a rear-end accident that's not seen within
18 the first month on MRI?

19 A. Again, a herniation can always develop at
20 any time after an accident and after an MRI. That
21 does not make it causally related.

22 Q. But can there a causal relation where
23 someone has a partially herniated disk, like Mr.
24 Christy's shown disk protrusion/herniation in 2014,
25 then he gets into an automobile accident where he's

1 J. SPIVAK, M.D
2 rear-ended in May of 2017, and then maybe three
3 months later that same disk shows to be herniated
4 even more; could the accident cause that to happen?

5 A. No.

6 Q. Why not?

7 A. Because that's not Mr. Christy's
8 scenario. Mr. Christy's scenario is he had what
9 was described as an inconsequential disk
10 herniation, part of the degenerative process in
11 2014. He did not even have a disk herniation
12 visible in 2017 that had well since been resorbed
13 or the degenerative process had essentially
14 consumed it with further bulging of the disk. And
15 his later herniation many months later is not
16 related to the accident specifically in question.

17 Q. Now, you reviewed the records from the
18 date of the accident, I understand; is that
19 correct?

20 A. I believe I did, yes, from Vassar
21 Brothers Medical Center.

22 Q. And you saw photographs of the damage to
23 Mr. Christy's vehicle from being rear-ended by a
24 tractor trailer; correct?

25 A. I may have. I don't recall.

1 J. SPIVAK, M.D

2 Q. Well, it says in your report that you
3 reviewed four photographs that were provided to you
4 showing the auto accident damage; right?

5 A. If it says it then I did. It's faster
6 than me finding it on my report.

7 Q. I'm going to share my screen with you and
8 show you a photograph taken immediately following
9 Mr. Christy's car being rear-ended by a tractor
10 trailer. And it's one of the photographs that was
11 provided to you by defense counsel that you say you
12 looked at in your report.

13 Do you see it on my screen, sir, the back
14 of a Honda Civic?

15 A. Yes.

16 Q. And do you see how it's crushed in and
17 the back windshield is blown out and the fender is
18 off?

19 A. Yes.

20 MR. OBREGON: Note my objection to form.

21 Q. Fair to say that this is evidence of a
22 severe impact?

23 MR. OBREGON: Objection to form.

24 A. No, I don't think it's fair to say. It's
25 evidence of an impact, not necessarily severe.

1 J. SPIVAK, M.D

2 Q. Well, you wouldn't think that a light
3 impact caused this; would you?

4 MR. OBREGON: Objection to form.

5 A. It's a Honda Civic, so I think it could.

6 Q. Would you anticipate that if a belted
7 driver was in the front seat of this vehicle and
8 was hit in the rear by a tractor trailer such that
9 it caused this damage that that could cause some
10 problems to the spine of the driver?

11 MR. OBREGON: Objection to form.

12 A. Yes, it could.

13 Q. And would you agree that if the driver of
14 this vehicle had some degenerative disk disease at
15 the time that the tractor trailer rear-ended this
16 vehicle, if he was belted and sitting in the front,
17 that such an impact could aggravate that disk
18 degenerative disease?

19 A. No, it would cause a muscular lumbar
20 strain or a whiplash to the back, and more likely
21 than that.

22 Q. Do you not agree that an impact like this
23 from a tractor trailer rear-ending a vehicle of a
24 belted driver would aggravate any preexisting back
25 injury?

1 J. SPIVAK, M.D

2 MR. OBREGON: Objection to form.

3 A. A preexisting back injury, I mean, it
4 could.

5 Q. What about a preexisting back condition
6 such as the 2014 MRI, would you agree that an
7 impact like this could affect the driver's spine in
8 such a way that it could become more symptomatic?

9 A. Again, I believe it would be symptomatic
10 based on a muscular strain or whiplash, not based
11 on a degenerative disk.

12 Q. What's your basis for that opinion?

13 A. My expert knowledge of over 27 years of
14 being a spine surgeon.

15 Q. Would you expect there to be any changes
16 in an MRI of the lumbar spine following a rear-end
17 impact such as the one that we're looking at now?

18 A. There certainly could be.

19 Q. And what would cause that; would it be
20 the force of the impact that could cause that?

21 A. Yes.

22 Q. What would you expect to see, if
23 anything, in a subsequent MRI compared to the 2014
24 in Mr. [REDACTED] if an MRI was taken after this
25 accident?

1 J. SPIVAK, M.D

2 A. If there were structural injury resulting
3 from the accident you might see a fracture, you
4 might see tearing of the ligaments that support the
5 spine. You might see an acute traumatic disk
6 herniation.

7 Q. Anything else like a bulge or further
8 desiccation?

9 A. Bulge is a degenerative finding. It's
10 really not a traumatic finding. Desiccation,
11 again, not a traumatic finding. It's a
12 degenerative finding.

13 Q. So trauma can't cause a bulge?

14 A. Trauma does not cause a bulge.

15 Q. Could a rear-end accident, such as the
16 one that Mr. [REDACTED] had, cause him to be
17 symptomatic in the lumbar spine if prior to the
18 accident he was not symptomatic?

19 A. Yes.

20 Q. In fact, doesn't the record that you
21 reviewed reveal that to be case, that he went to
22 being symptomatic in his lumbar spine following
23 this accident?

24 A. Yes.

25 Q. And would you agree that the symptoms

1 J. SPIVAK, M.D

2 that he expressed in all of the records that you
3 reviewed with regard to pain in his lumbar spine
4 would be causally related to this rear-end
5 accident?

6 A. At least initially, yes.

7 Q. And for how long would you expect it to
8 be causally related?

9 A. Typically, the symptoms of a lumbar
10 muscular strain last maybe three to six months at
11 the outset.

12 Q. And then you would expect within six
13 months he would be fine?

14 A. He would be better, yes.

15 Q. Would he be fine though without symptoms?

16 A. Not everybody is fine. Every case is
17 different.

18 Q. Do you have any reason to dispute that
19 the pain that Mr. [REDACTED] made complaints of in the
20 lumbar spine area and all the records you reviewed
21 were as a result of this rear-end impact?

22 A. No, at least not until the herniation.

23 Q. So up until the point where you believe
24 there was evidence of a herniation in the lumbar
25 spine, is it fair to say all that treatment up

1 J. SPIVAK, M.D

2 until that point you would agree is causally
3 related to this accident?

4 A. No. I'm not going back to where we were
5 an hour earlier.

6 Q. Well, you have no reason to dispute
7 causal connection; correct?

8 MR. OBREGON: Objection.

9 A. I have no known reason, correct.

10 Q. And the only point you get to where you
11 start to dispute any causal connection is with
12 finding of a herniation at L5-S1 later on after the
13 accident; correct?

14 A. That's correct.

15 Q. Now, let's look at the MRI -- well, first
16 of all, there's no dispute that Mr. [REDACTED] was
17 consistent with his treatment for his back pain
18 following this accident; right?

19 A. I'm not sure what you mean by consistent.

20 Q. It's not like he had this accident and
21 then started to get treated a year or so later.
22 It's very consistent from the time of the accident
23 that he continued to report pain stemming from this
24 accident; correct?

25 A. Yes.

1 J. SPIVAK, M.D

2 Q. I'm going to show you the emergency room
3 note. And I believe you reviewed this as part of
4 your review; correct, the emergency room note from
5 the date of the accident?

6 A. Yes.

7 Q. Do you see it up on my screen, at the top
8 it says, Vassar Brothers Medical Center admit date,
9 May 26, 2017. Do you see that, Doctor?

10 A. Yes.

11 Q. And do you see where it indicates that on
12 May 26, 2017 at 15:10 EDT, the chief complaint was
13 that he was rear-ended by a tractor trailer at 70
14 miles an hour?

15 A. Yes.

16 Q. Do you see where I've highlighted lower
17 on in the history that he complains of back pain;
18 do you see that?

19 A. Yes.

20 Q. And is it fair to say that this is the
21 very first and only record you have reviewed in
22 this case that indicates back pain from any time of
23 May 26, 2017 or earlier?

24 A. No. We just looked at an MRI report
25 complaining of back pain from 2014. Other than

1 J. SPIVAK, M.D

2 that, yes.

3 Q. Okay. Now, you're aware that he went to
4 see an orthopedist named Dr. Dassa following the
5 accident?

6 A. Yes.

7 Q. I'm going to share my screen with you
8 again. Do you see this, Doctor, where it says,
9 Gabriel Dassa at the top?

10 A. Yes, I do.

11 Q. He's a board certified orthopedic
12 surgeon; correct?

13 A. That's what the record says.

14 Q. Now, this date is June 13, 2017, about
15 two weeks after the accident; correct?

16 A. Yes.

17 Q. And do you see here in the highlighted
18 sections where Mr. Christy's evaluated for pain in
19 his lumbar spine status post the motor vehicle
20 accident of May 26, 2017 where he was rear-ended by
21 a tractor trailer?

22 A. Yes.

23 Q. And you see where Mr. [REDACTED] reports to
24 Dr. Dassa that since his accident he's been having
25 persistent pain, burning, numbness, and tingling

1 J. SPIVAK, M.D

2 radiating down to his extremities?

3 A. Yes.

4 Q. And you see that he denies any prior
5 injuries?

6 A. Yes.

7 Q. Do you have any reason to dispute the
8 accuracy of the information contained in this
9 paragraph that we are looking at?

10 A. No.

11 Q. And then do you see the examination of
12 the lumbosacral spine where Dr. Dassa measures
13 flexion, extension, and so on?

14 A. Yes.

15 Q. Any reason to dispute his measurements
16 here?

17 A. No.

18 Q. Then at the end do you see where in the
19 discussion Dr. Dassa says, the patient was injured
20 on the above date and that the symptoms and
21 findings were directly caused by this accident?

22 A. Yes, I see that.

23 Q. Do you have any reason to disagree with
24 Dr. Dassa's opinion at this point?

25 A. No.

1 J. SPIVAK, M.D

2 Q. And indicates for treatment physical
3 therapy and a lumbar spine brace for support and
4 some MRIs; do you see that?

5 A. Yes.

6 Q. He doesn't recommend surgery; correct?

7 A. That's correct.

8 Q. He doesn't recommend epidurals; correct?

9 A. That's correct.

10 Q. Seems to be a reasonable recommendation
11 of treatment in your opinion?

12 A. Yes. I'm not sure I'd agree with
13 bracing, but it's certainly reasonable.

14 Q. Okay. Now, you reviewed the records from
15 Community Primary Care and many of them are noted
16 by Ralph Gargiulo, PA; correct?

17 A. Yes.

18 Q. And do you see them up on your screen
19 here where I have the September 26, 2017 note?

20 A. Yes.

21 Q. And you reviewed all of these visits as
22 part of your review; correct?

23 A. Yes.

24 Q. Do you see then that on September 26,
25 2017, this is a followup. The reason for the

1 J. SPIVAK, M.D

2 appointment, Workers' Compensation. Date of
3 accident, May 26, 2017; correct?

4 A. Yes.

5 Q. And where it indicates the result is an
6 exacerbation of lower back pain; do you see that?

7 A. Yes.

8 Q. Any reason to dispute that he was there
9 for a followup from the accident that we're talking
10 about and that he's having low back pain that's
11 been exacerbated from this accident?

12 A. Again, the word exacerbation isn't
13 appropriate, but the low back pain is still
14 associated with that accident.

15 Q. Why do you disagree with the word
16 exacerbation?

17 A. Because there's no evidence to suggest
18 that at any time immediately beforehand, as you
19 mentioned, that he had low back pain.

20 Q. But does this note --

21 A. He had back pain, but I don't know --
22 exacerbation would imply that it's sort of a
23 chronic condition that comes and goes and that the
24 accident brought it about, and there's no evidence
25 to support that.

1 J. SPIVAK, M.D

2 Q. Well, this is evidence; isn't it? You're
3 looking at records and you've referred before to
4 some notes you saw, the phone call, and that was
5 evidence in your mind of prior narcotic use. Now,
6 we're looking at a note of his Primary Care Group
7 that's referring to him having an exacerbation of
8 low back pain. Isn't this evidence to consider?

9 A. It's certainly all worth considering. I
10 just think the PA is using the word exacerbation
11 incorrectly. That's all.

12 Q. So you disagree with the PA's
13 terminology?

14 A. I would just say resulting in low back
15 pain. Exacerbation of is just not appropriate use
16 there.

17 Q. Well, there's obviously a reason that he
18 chose to use exacerbation; right?

19 A. You would have to ask him. I have no
20 idea.

21 Q. Right. And you take these records when
22 you review them at face value as part of your
23 review, don't you?

24 A. I'm not sure what you mean by at face
25 value. I don't -- if someone says something that's

1 J. SPIVAK, M.D

2 incorrect, I don't necessarily take it at any
3 value.

4 Q. Yeah, but you have no independent basis
5 for saying this is incorrect; do you?

6 A. I'm talking about right now.

7 Q. Right. Do you right now have any
8 independent basis for disputing that Community
9 Primary Care, Mr. Gargiulo is saying that
10 Mr. [REDACTED] had back pain that was exacerbated from
11 this accident?

12 A. It's caused by the accident. Exacerbated
13 is the wrong word. That's all I'm trying to say.
14 I don't agree with the word exacerbated, and that
15 won't change.

16 Q. Now, on December 5, 2017 he refers to the
17 reason for the appointment, the accident of May 26,
18 2017. He's following up. He's in back pain. And
19 he states the pain is getting worse. Do you see
20 that?

21 A. Yes.

22 Q. Do you have any reason to dispute this?

23 A. No.

24 Q. Now, on January 5, 2017 here's a medical
25 doctor, Chandra Naik. Do you know Dr. Naik?

1 J. SPIVAK, M.D

2 A. No.

3 Q. Do you see it says, Workers'
4 Compensation, date of accident, May 26, 2017, lower
5 back injury?

6 A. Yes.

7 Q. And you have no reason to dispute that
8 the reason for his visit was following up for a
9 lower back injury related to the accident of May
10 26, 2017; correct?

11 A. It says the reason for the visit was for
12 a medication refill.

13 Q. Right, related to a lower back injury for
14 May 26, 2017; right?

15 A. At this point related to a chronic use of
16 medication that maybe isn't appropriately being
17 used, but needs to be refilled or there are
18 consequences to the patient who is on too much
19 narcotics.

20 Q. Okay. I'm not asking for your commentary
21 on what you perhaps think it was going on here.
22 I'm asking your commentary on what the records are
23 indicating that you relied upon on your review,
24 okay.

25 And, specifically, when you reviewed

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J. SPIVAK, M.D

chart, did you see that he showed up on January 5,
2018 for a medication refill for a lower back
injury related to the accident of May 26, 2017?

A. Yes.

Q. Do you see that Dr. Naik took a social
history; correct?

A. I'm not sure what you mean by social
history.

Q. Do you see where it says, social history?

A. Now I see that, yes.

Q. And surgical history and hospitalization
and medical history; do you see all of that?

A. Yes.

Q. Now, again on March 19, 2018, do you see
that he goes back to the center indicating a
chronic pain followup, date of injury, May 26,
2017, chronic pain; do you see that?

A. Yes.

Q. And do you see he came back on April 9,
2018. Again, patient complains of severe pain in
right glute down leg, date of incident, May 26,
2017; do you see that?

A. Yes.

Q. And do you have any recent to dispute

1 J. SPIVAK, M.D

2 that he went in April of 2018 to his doctors and
3 complained of pain since the date of the accident?

4 A. He complained of pain. I'm not sure what
5 you mean by since the date of the accident. I
6 think his right glute pain and right leg pain was
7 new.

8 Q. Well, here it says that Workers'
9 Compensation - date of incident, May 26, 2017,
10 patient complains of severe pain in right glute
11 down leg. Do you see that?

12 A. Yes.

13 Q. Do you see anything on here to indicate
14 it's something new from something other than the
15 automobile accident?

16 A. No, it's the difference from the prior
17 notes.

18 Q. And do you see in here where it says,
19 patient continues to experience severe pain in the
20 lumbar spine. Which leg, down the right leg --
21 probably a typo. He was recently seen by Dr. Rema
22 who's now anticipating using epidural injections.
23 Do you see that?

24 A. Yes.

25 Q. And is there anything in here to indicate

1 J. SPIVAK, M.D

2 that the pain that he's complaining of, the severe
3 pain, is anything other than continuing pain that's
4 gotten worse from the date of this accident?

5 A. There's the new complaint of pain in the
6 right leg. That's all. There is continued
7 additional pain reported.

8 Q. And do you have any reason to dispute
9 that his complaints of pain at this appointment
10 relate to the automobile accident?

11 A. Yes.

12 Q. And what's your basis for that?

13 A. I believe prior to this appointment he
14 had herniated the disk on the right side at L5-S1,
15 which is not related to the accident specifically.

16 Q. When do you think he herniated his disk
17 at L5-S1?

18 A. I believe -- I would have to look back,
19 but probably between this note and the note before.

20 Q. So between April 9, 2018 and March 9,
21 2018 you think that he herniated a disk?

22 A. Yes.

23 Q. So do you think that his pain that's
24 referred to on March 19th of 2018 that says, under
25 today's visit on date of this note, comes to refill

1 J. SPIVAK, M.D
2 pain medication for lumbar disk disease resulting
3 from Workers' Compensation injury from May 26,
4 2017, you think that somehow something changed
5 where then in 2018, a month later, April 9th in
6 that month he had something new happen, a new
7 herniation and that made his pain worse completely
8 unrelated to the accident?

9 A. The right leg pain is completely
10 unrelated to the accident.

11 Q. And the disk herniation that you're
12 saying must have happened between these two visits
13 sometime in March to April of 2018 was completely
14 unrelated to the accident as well?

15 A. Yes.

16 Q. And none of the sequela from the impact
17 caused his spine to further herniate a disk in the
18 lumbar spine?

19 A. Not in this case, no.

20 Q. And he did have a herniation back in
21 2014; right, at L5-S1?

22 A. Yes.

23 Q. And then you're saying this is a new
24 herniation in 2018, not the same one?

25 A. That's correct.

1 J. SPIVAK, M.D

2 Q. Same disk though; right?

3 A. Same disk level, that's correct.

4 Q. So you're saying sometime between 2014
5 and 2018 the disk moved back into place and then
6 moved back out?

7 A. No. That's not how it works.

8 Q. How does it work?

9 A. Between 2014 this very small reportedly
10 inconsequential disk herniation essentially
11 resolved. What happens is the disk can fortify and
12 strengthen. The small protruded fragment can dry
13 out and shrink. And the disk degeneration
14 progresses so that by 2017 when the injury MRI is
15 done there's no visible disk herniation whatsoever.
16 This is two separate unrelated disk herniations.

17 Q. Did you compare the two films?

18 A. Which films?

19 Q. Of 2017 and 2018.

20 A. Yes.

21 Q. And did you compare the films of 2014
22 with 2017 and 2018?

23 A. No.

24 Q. Let's look at the 2017 MRI for a moment.

25 All right, Doctor, I have up on the screen MRI from

1 J. SPIVAK, M.D
2 Vassar Brothers Medical Center. It says Nuvance
3 Health at the top. July 28, 2017. Do you see
4 that?

5 A. Yes, but I also want to point out that
6 we're not looking at MRIs. We're looking at MRI
7 reports.

8 Q. Okay. Looking at the MRI report. And
9 previously we were looking at the MRI report for
10 2014; right?

11 A. Yes. You just said earlier let's compare
12 the MRIs, but we're not comparing MRIs. That's --

13 Q. Right, we're comparing MRI reports.
14 Thank you for the clarification.

15 On here it says, patient was hit by a
16 truck, May 26, 2017. Clinical history. Complains
17 of legs going numb, weakness in legs, and pain in
18 lower back; right?

19 A. Yes.

20 Q. Now, you're saying the legs going numb,
21 the weakness in his legs has nothing to do with the
22 accident?

23 A. No, I'm not saying that at all.

24 Q. So would you agree that his complaints at
25 the time of this MRI of his legs going numb and

1 J. SPIVAK, M.D

2 weakness in his legs and pain in his lower back
3 were caused by the accident?

4 A. Yes.

5 Q. And how does that anatomically work that
6 his legs are going numb and he has weakness in his
7 legs as a result of this accident?

8 A. Something may have irritated the nerves
9 even back, I think, in 2014. The report may have
10 indicated -- we're losing track, that he had
11 foraminal stenosis, and that certainly could have
12 been temporally sort of instantly exacerbated, and
13 that's an exacerbation of the stenosis causing a
14 new symptom. The symptom of legs going numb and
15 weakness in the leg.

16 Q. So this would be an exacerbation of
17 spinal stenosis is what would cause the legs to go
18 numb and the weakness in his legs?

19 A. It would be a transient increase in the
20 foraminal stenosis at L5-S1 based on the whiplash
21 to the back causing some irritation of the nerves
22 and the subsequent symptoms.

23 Q. Would it mean the disk is in connection
24 at all with the thecal sac or the nerves?

25 A. The foraminal is on the side. It's

1 J. SPIVAK, M.D

2 unrelated to the thecal sac. Simply the exiting
3 nerves.

4 Q. Now, here where it says, severe pain in
5 the right glute down leg on the April 9, 2018,
6 you're saying this is a new finding; right?

7 A. Absolutely.

8 Q. But in the MRI where he's talking about
9 complaints in his legs, going numb, and weakness,
10 and pain in his back, that is connected; right, to
11 the accident?

12 A. Yes.

13 Q. Now, when we look at this MRI report from
14 July of 2017 there's some new findings on this
15 report from the 2014 one; correct?

16 A. There are new reported findings, correct.

17 Q. New reported findings.

18 Do you have any reason to dispute these
19 new reported findings?

20 A. Yes.

21 Q. And what is your basis for disputing
22 these reported findings?

23 A. My review of the images, so I agree with
24 my findings, whatever they would be, whether or not
25 these findings say what they say.

1 J. SPIVAK, M.D

2 Q. What were your findings from your review
3 of this MRI in 2017?

4 A. I'm going to quote from my notes. I
5 reviewed the images of the study which show a broad
6 disk bulge at L5-S1 with retrolisthesis resulting
7 in right greater than left recess and foraminal
8 narrowing. There was also moderate stenosis at
9 L3-4, and mild stenosis at L4-5 with moderate
10 bilateral facet arthrosis at L3-4, L4-5, and L5-S1.

11 Q. So what specifically do you disagree with
12 from the radiologist's findings in this MRI report
13 of July 2017?

14 A. Please scroll down for a minute.

15 I actually believe there is a stenosis at
16 L3-4, at least according to my review, and mild at
17 L4-5. And I don't really see a discussion -- maybe
18 lower down there is of foraminal -- of facet
19 arthritis.

20 Q. And you think there's facet arthritis in
21 your review?

22 A. Yes.

23 Q. But that's not indicated on here?

24 A. Not that I can see unless you can point
25 it out.

1 J. SPIVAK, M.D

2 Q. What about the findings at L1-L2 and
3 L2-L3 where these are new findings now, according
4 to this MRI report, from the 2014; would you agree
5 with that?

6 A. I would have to look at the study again.
7 I didn't comment on those levels in my review.

8 Q. Okay. So, first, let's look at this and
9 then I'll pull up the 2014 MRI. So here on the
10 July 2017 MRI following the accident, a few months
11 after the accident, it has a broad based disk bulge
12 at L1-L2. Do you see that?

13 A. Yes.

14 Q. Do you dispute that finding?

15 A. I'd have to review the images to know
16 whether I agree or not with it.

17 Q. As you sit here today, do you have any
18 reason to dispute it?

19 A. No.

20 Q. And at L2-L3, moderate disk bulge causing
21 mild to moderate bilateral foraminal narrowing and
22 mild spinal stenosis, that's a new finding as well;
23 right?

24 A. It's a new reported finding compared to
25 the 2014 MRI. Agreeing that it's a new finding

1 J. SPIVAK, M.D
2 would mean that I agree with the report, and I have
3 to review the images to let you know if I actually
4 agree with the report or not.

5 Q. Right. And when you wrote in your chart
6 that the 2017 MRI is reported as unchanged from
7 2014, you would have to agree now that that is not
8 accurate, that it is changed; right?

9 A. Say that again.

10 Q. I'm putting on the screen page ten of
11 your report.

12 A. Yes.

13 Q. Do you see on the highlight where it
14 says, the MRI is reported as unchanged from a prior
15 2014 scan; do you see that?

16 A. I do see that.

17 Q. Would you agree that that's not accurate,
18 that it is changed, the MRI report from 2017 is
19 changed from the 2014?

20 A. I think there's a typo there. I don't
21 know how I could have said that because at the time
22 of writing that report I'd never seen the scan or
23 report from 2014.

24 Q. So it's either a typo, or in any event,
25 it's not accurate; correct? Your statement in your

1 J. SPIVAK, M.D

2 report that the MRI is reported as unchanged from a
3 prior 2014 scan, that's not accurate?

4 A. I would have to see the MRI -- can you go
5 back to the 2017 MRI report?

6 Q. Yes, I can.

7 So we just looked at how there's new
8 findings at least at L1-L2 and L2-L3 from 2014;
9 right, these are new findings?

10 A. Could you scroll down? I want to answer
11 your question.

12 It's the slight progression since the
13 prior study, that's from the impression.

14 Q. Okay.

15 A. That was the basis of that statement, I
16 assume.

17 Q. All right, but your statement is not
18 about a slight progression. Your statement in your
19 report says, the MRI is reported as unchanged from
20 a prior 2014 scan; correct?

21 A. That's what it says, correct.

22 Q. And that is not accurate; correct?

23 A. It's poorly worded. I would give you
24 that.

25 Q. Other than poorly worded, it is not

1 J. SPIVAK, M.D

2 accurate; correct?

3 A. It's poorly worded.

4 Q. It's wrong; right, Doctor? It's not just
5 poorly worded. It's wrong?

6 MR. OBREGON: Objection.

7 A. Similarly changed is essentially
8 unchanged. So I think it's poorly worded. I
9 wouldn't say it's wrong.

10 Q. You won't concede that your statement
11 that the MRI is reported as unchanged from a prior
12 2014 scan is wrong? You won't concede that?

13 A. I think it's poorly worded.

14 Q. Okay. And, Doctor, you're specifically
15 hired to focus in on areas of whether there are
16 changes or not from different MRIs; correct?

17 A. No. I'm specifically hired to review the
18 case in its entirety, not -- not for what you just
19 specifically said.

20 Q. Are you aware as an orthopedic surgeon
21 who's hired to come in as an expert and give
22 testimony as far as what is causally related and
23 not, that a statement by you in your report saying
24 that an MRI is reported as unchanged from a prior
25 2014 scan carries the weight of anybody reading it

1 J. SPIVAK, M.D

2 to believe that there is no change from the 2014 to
3 the 2017 MRI reports?

4 A. It's simply missing the word, essentially
5 unchanged, which would make it correct. That's all
6 I'm saying. And, in fact, if it does change with
7 more degenerative changes between 2014 and 2017 it
8 actually helps the defense, so I'm sorry I worded
9 it incorrectly, but it should say as essentially
10 unchanged. I'm not sure why you're harping on it.

11 Q. Okay. Either way there were new findings
12 in his spine as reported in the 2017 MRI report
13 from the 2014 report; will you agree with that?

14 A. Could you go to the bottom of the report,
15 please? Could you go to the 2014 report, please?

16 Q. Yes, I can. I'm now sharing with you the
17 2014 MRI.

18 A. Could you go to the bottom of the report,
19 please?

20 Q. Yes.

21 A. Okay. Can you go back?

22 Q. While we're still on this report I just
23 want to clarify.

24 In this report at L1-L2 and L2-L3 this
25 report is saying that at those levels they're not

1 J. SPIVAK, M.D
2 finding any significant foraminal stenosis and
3 they're not identifying any disk bulges; would you
4 agree with that?

5 A. It's not reported. That's correct.

6 Q. Okay. And in the MRI, which I'm turning
7 to now of 2017, following the accident, at L1-L2
8 it's a mild broad based disk bulge and mild
9 bilateral foraminal narrowing and mild spinal
10 stenosis, that is a new finding in this report
11 following the accident that did not exist as being
12 reported in 2014; would you agree with that?

13 A. Yes.

14 Q. And would you agree that the finding at
15 L2-L3 of a moderate disk bulge causing mild to
16 moderate bilateral foraminal narrowing and mild
17 spinal stenosis is a new finding being reported
18 after this accident from the MRI report taken in
19 2014?

20 A. Yes.

21 Q. Now, in 2017 they're stating that there
22 is a mild broad based disk. It doesn't say whether
23 it's a bulge or a herniation or anything here. It
24 just says, mild broad based disk. Do you
25 understand what that means?

1 J. SPIVAK, M.D

2 A. Yes.

3 Q. What does that mean?

4 A. I understand -- you're right. It's
5 missing a description on that. That's what I
6 understand.

7 Q. Okay. And it could be a profusion as
8 existed in 2014 that's not indicated; correct?

9 A. I believe you mean protrusion.

10 Q. I'm sorry, protrusion, yes.

11 A. Yes.

12 Q. Which would be a herniation; correct?

13 A. If the radiologist meant to use the word
14 protrusion that would be another word for a type of
15 herniation.

16 Q. Is there evidence that you see from this
17 report that the protrusion or herniation as we
18 discussed in 2014 at L5-S1 has resolved on its own
19 and that there's no longer a herniation at L5-S1?

20 A. From the report, no.

21 Q. Then if we go to the report in 2018, I'm
22 now sharing with you the May 14, 2018 report
23 ordered by Dr. Rema, clinical history, motor
24 vehicle accident, May 26, 2017, has had two recent
25 epidurals with --

1 J. SPIVAK, M.D

2 A. Excuse me, you're reading and I'm seeing
3 you. You're not showing me anything.

4 Q. I apologize. I thought I was sharing the
5 screen.

6 Okay. Now I have up on the screen,
7 again, from the same radiology facility at Vassar
8 Brothers, May 14, 2018. This was ordered by Dr.
9 Rema. Do you know Dr. Rema?

10 A. No, I don't.

11 Q. You reviewed his records though; correct,
12 as part of your analysis in this case?

13 A. Yes, I believe so.

14 Q. Do you see here that he's ordering this
15 report on May 14, 2018, and he gives a clinical
16 history as in the reason for this report as a motor
17 vehicle accident, May 26, 2017. Do you see that?

18 A. Yes.

19 Q. Does that indicate to you that Dr. Rema
20 is ordering this MRI in connection with treatment
21 he has been rendering to Mr. [REDACTED] for back pain
22 from a motor vehicle accident stemming from May 26,
23 2017?

24 A. I can't read Dr. Rema's mind. That would
25 be a question for him.

1 J. SPIVAK, M.D

2 Q. Well, reading this report, when you look
3 at the clinical history, which we did back in 2014,
4 which you said you relied upon in determining that
5 he had back pain at that time, isn't it equally
6 fair to rely upon this clinical history when you're
7 reviewing records to say that Dr. Rema is sending
8 him for an MRI in connection with a motor vehicle
9 accident of May 26, 2017?

10 MR. OBREGON: Objection to form.

11 A. No. He's sending him there because of
12 the reason for exam, which was radiculopathy, and
13 the clinical history, which is right-sided
14 sciatica. Pain into toes. That's a new finding
15 why he was sent for this new updated MRI.

16 The clinical history of the motor vehicle
17 accident, I can't speak to why Dr. Rema put that in
18 there or not or what his opinions are. That would
19 be something he would speak to, not me.

20 Q. When you're reviewing the records in Mr.
21 Christy's case I notice that some of the things you
22 take at face value that you read, such as the fact
23 that there was a report of prior narcotic use, you
24 take that at face value in forming your opinion,
25 but then you see something like here, which would

1 J. SPIVAK, M.D
2 normally be taken at face value when a clinical
3 history of motor vehicle accident of May 26, 2017,
4 and you say you're not so sure about that; correct?

5 A. No, I'm not ignoring the history of the
6 motor vehicle accident --

7 MR. OBREGON: Objection to form.

8 A. -- I'm simply stating that it's part of
9 his overall history, but the reason for the exam is
10 the new right-sided radiculopathy and sciatica.

11 Q. Now, at L1-L2, L2-L3, these findings are
12 generally reported to be the same as the July 2017
13 MRI; correct?

14 A. Yes.

15 Q. Now, there appears to be a report of a
16 disk bulge at L3-L4. Do you see that?

17 A. Yes.

18 Q. Do you know how it is that that bulge
19 could be reported as seen on this MRI, but not
20 reported as seen in the prior two?

21 A. It could either be just simply a
22 progression of the degenerative process, most
23 likely, or it could be the same as the previous one
24 read by a different radiologist. I don't know. I
25 haven't scrolled down to know who read it or it

1 J. SPIVAK, M.D
2 could just be something that is a matter of opinion
3 that's correct or incorrect.

4 Q. Again, at L5 there's a mild disk bulge
5 being reported here. Do you see that?

6 A. Yes.

7 Q. And then at L5-S1 it says, there's a
8 right-sided paracentral moderate sized disk
9 herniation. Do you see that?

10 A. Yes.

11 Q. This is referring to the same disk that
12 was reported as being herniated in 2014; right?

13 A. Same disk level, that's correct.

14 Q. Same general area, right, maybe a little
15 more to the right here as reported in 2014?

16 A. No, it's focal and to the right. It's a
17 different herniation.

18 Q. And what do you mean when you say, a
19 different herniation; it's in a different area?

20 A. It's a new acute herniation on the right
21 side causing this new sciatica how ever many more
22 months closer to -- nine/ten months later.

23 Q. How did this new herniation, as you call
24 it, develop?

25 MR. OBREGON: Objection to form.

1 J. SPIVAK, M.D

2 A. That's what we call a theological
3 question. That's a question asking for an answer
4 like I'm God that I would be able to give the
5 answer. Herniations, as I said before, more
6 commonly than not develop as part of the
7 degenerative process without any accident or
8 incident.

9 Q. Would you agree, Doctor, that an accident
10 or incident can move forward the degenerative
11 process?

12 A. No.

13 Q. Would you agree, Doctor, that an accident
14 or an incident can cause sequela that can
15 ultimately cause a herniation in the lumbar spine?

16 A. I don't even understand the question.
17 What do you mean by sequela?

18 Q. Now, before this MRI we know that
19 Mr. [REDACTED] was undergoing a lot of treatment for
20 the accident; right?

21 A. Yes.

22 Q. We know that he had physical therapy;
23 correct?

24 A. Yes.

25 Q. Could this herniation have been related

1 J. SPIVAK, M.D

2 to --

3 A. By the way, when you said for the
4 accident, it was for the pain, but, yes.

5 Q. So the physical therapy was treating him
6 for his pain from the automobile accident; correct?

7 A. At that point it's possible that it was
8 just -- I would say yes.

9 Q. Okay. You'll concede that?

10 A. It's not a concession. It's a yes.

11 Q. Okay. And during physical therapy, could
12 that cause the L5-S1 disk to herniate?

13 A. Anything can cause a disk to herniate. A
14 sneeze commonly causes a disk to herniate. Bearing
15 down in the bathroom causes a disk to herniate. I
16 can't say for certain that any one thing does not
17 cause -- did not cause a disk to herniate.

18 Q. Okay. So put it another way, you have no
19 reason definitively to say that his physical
20 therapy didn't result in this herniation, do you?

21 A. Yes, I do.

22 Q. And how can you say that?

23 A. It would be a case report. It's
24 essentially an event that does not happen.

25 Q. So physical therapy cannot cause a

1 J. SPIVAK, M.D

2 herniation of a disk?

3 A. I just told you. I didn't say it cannot.
4 It just almost routinely forever does not. It's
5 much more common that he had a bad sneeze one
6 morning and herniated his disk. That would be
7 much, much, much more common.

8 Q. Okay. So it's your opinion that there's
9 no way the physical therapy that he was undergoing
10 from this accident could have caused this
11 herniation; is that correct?

12 MR. OBREGON: Objection.

13 A. No. My opinion is there's nothing to
14 suggest that any physical therapy caused this disk
15 herniation.

16 Q. Right, but is it your opinion -- is it
17 reasonable that it could have occurred --

18 A. No.

19 Q. -- during the physical therapy?

20 A. It's that uncommon of an event that it's
21 not a reasonable conclusion.

22 Q. What about the epidural injections,
23 injecting into the area of the L5-S1, could that
24 cause a disk to herniate?

25 A. No.

1 J. SPIVAK, M.D

2 Q. What about injections of Bupivacaine in
3 the area of the L5-S1, could that lead to a
4 herniation?

5 A. No.

6 Q. What about a patient compensating for
7 back pain in the manner of walking or moving to try
8 and compensate for the pain, could that cause a
9 herniation?

10 A. No.

11 Q. What about if Mr. [REDACTED] was moving his
12 body in a certain way to try and compensate for his
13 pain either in the performance of his work or his
14 activities of daily living, could that cause the
15 L5-S1 to herniate?

16 A. No.

17 Q. But a sneeze could?

18 A. Yes.

19 Q. I'm going to go back. We left off at
20 April 9, 2018 with his Primary Care. And then you
21 saw after April 9, 2018 he went back on May 9,
22 2018. You saw that?

23 A. Yes.

24 Q. You see under today's visit it says, has
25 WC injury. Do you know what that refers to?

1 J. SPIVAK, M.D

2 A. Yes.

3 Q. Workers' Compensation, meaning on-the-job
4 injury?

5 A. Yes.

6 Q. And you're aware he was on the job at the
7 time of this automobile accident and that's what
8 it's referring to?

9 A. Yes.

10 Q. So it's saying here, has WC injury and
11 has been seeing Dr. Rema with epidural injections
12 and recently a short course of oral steroids. He
13 continues to be in pain. Scheduled for MRI by Dr.
14 Rema. Do you see that?

15 A. Yes.

16 Q. Is it reasonable from reading this note
17 of May 9, 2018 to presume that this is why Dr. Rema
18 referred him for the 2018 MRI?

19 MR. OBREGON: Objection to form. You can
20 answer.

21 A. What's the this? This is why? I don't
22 know what you mean by that.

23 Q. The statement in today's visit of this
24 note of May 9, 2018 that he has a Workers'
25 Compensation injury for which he's been seeing Dr.

1 J. SPIVAK, M.D

2 Rema with epidural injections and a short course of
3 steroids, he continues to be in pain, and he's
4 scheduled for an MRI by Dr. Rema.

5 By reading that, does that indicate to
6 you that that is why he was going for the MRI
7 because of his continued pain despite Dr. Rema's
8 treatment for this accident?

9 A. No. We know from the note prior that he
10 was sent for the MRI for the new sciatica in the
11 right lower extremity. The new right leg pain.

12 Q. Okay. He goes back on June 12, 2018.
13 Again, it indicates a Workers' Compensation injury,
14 May 26, 2017. Had back surgery May 31st. Had
15 recent surgery due to Workers' Compensation injury
16 of the lumbar area to fix a sciatic condition.
17 Comes for refill of pain meds. Do you see that?

18 A. Yes.

19 Q. And you dispute this statement that his
20 surgery was due to his Workers' Compensation injury
21 of the lumbar area?

22 A. I'm not disputing the statement. This is
23 a statement of a physician assistant of a medical
24 doctor. This is not an orthopedist physician's
25 assistant even. And the statement simply could be

1 J. SPIVAK, M.D
2 referring to the insurance that everybody is
3 getting paid for, which is Workers' Compensation.
4 And it was this PA's opinion that this is there,
5 but that does not imply that this PA actually has
6 the opinion that the need for surgery was based on
7 a Workers' Comp injury or the motor vehicle
8 accident earlier because that would be completely
9 overstepping the PA's fund of knowledge. So you're
10 harping on this really doesn't make sense to me.

11 MR. SMILEY: Can we pause for two
12 minutes, please. I have to address something
13 very quickly.

14 MR. OBREGON: Sure.

15 (Brief recess was taken.)

16 Q. You see he went on July 17, 2018 and the
17 reason for the appointment is also followup for
18 back pain, date of incident, May 26, 2017?

19 A. Yes.

20 Q. Do you see that he goes regularly to this
21 facility monthly to be checked out all the way
22 through at least October of 2019, and that in every
23 one of these notes it references that his back
24 injury is related to the car accident; correct?

25 A. It doesn't relate it. It just mentions

1 J. SPIVAK, M.D

2 the fact that he had a Workers' Comp injury and was
3 there for followup and refill of pain medicine
4 because this seems to be the facility that would
5 provide Mr. [REDACTED] his pain medicine.

6 Q. Now, you also reviewed records of his
7 orthopedic surgeon; correct?

8 A. Who are you referring to?

9 Q. Dr. Neubardt.

10 A. Yes.

11 Q. And are you aware that Dr. Neubardt has
12 opined that the need for the surgeries was as a
13 result of the car accident?

14 A. I don't know of that opinion.

15 Q. Well, you reviewed his records; right?

16 A. Yes.

17 Q. And did you review them to see whether or
18 not the surgeon who actually performed the
19 procedures believed them to be a result of the
20 accident in this case?

21 A. I thought you were referring to some
22 narrative report later on where he actually had a
23 legal opinion, so I don't know what you're
24 specifically referring to, but I'm happy to have
25 you refer me to it.

1 J. SPIVAK, M.D

2 Q. Okay. So I have up on the screen a note
3 that you were provided in the records that you were
4 given from Dr. Neubardt. It's dated July 2018. Do
5 you see this here? It has his name at the top and
6 it says copy.

7 A. Yes.

8 Q. It says, diagnosis, status post
9 microlumbar diskectomy. Surgery was performed on
10 May 31, 2018. Restrictions "patient is able to
11 work four hours per day due to past spinal surgery
12 due to an injury he sustained at work on May 26,
13 2017." And it's signed by Dr. Neubardt who
14 performed the surgery. Do you see that?

15 A. Yes.

16 Q. And you reviewed this note as part of
17 your review in this case; correct?

18 A. I assume I did.

19 Q. And so you see here that Dr. Neubardt
20 certainly connects and puts in writing that the
21 surgery of the microlumbar diskectomy was due to
22 the injury he sustained on May 26, 2017; right?

23 A. We both read it just now. I see what's
24 written.

25 Q. You didn't comment on this in your report

1 J. SPIVAK, M.D

2 at all, did you?

3 A. No, I did not.

4 Q. Do you disagree with Dr. Neubardt --

5 A. Yes.

6 Q. -- when he says that it was sustained
7 because of this?

8 A. He sustained an injury, but I don't think
9 that's the cause of the herniation which required
10 the surgery. And depending on what Dr. Neubardt
11 really means by that, and I'd have to ask him, I
12 might disagree with that.

13 Q. Do you know Dr. Neubardt?

14 A. No.

15 Q. Do you know of his reputation at all?

16 A. Yes.

17 Q. And what do you know of his reputation?

18 A. I choose not to answer that question.

19 Q. Well, do you know him to be of a bad
20 reputation?

21 A. I know of a mixed reputation. And that's
22 all I'm going to say about that, so move on.

23 Q. Well, respectfully, Doctor, I'm allowed
24 to ask you questions. You can't tell me to move
25 on.

1 J. SPIVAK, M.D

2 A. And I don't have to answer.

3 Q. Well, you kind of do.

4 A. I'm not going to disparage another
5 surgeon, so I'm not going to say anything more.

6 Q. Do you think that you're in a better
7 position having reviewed the records and spending
8 some time at once with Mr. [REDACTED] to determine
9 whether or not a surgery performed was caused by
10 his accident more so than the surgeon who was
11 treating him for his condition and actually did the
12 surgery?

13 A. I'm in a much better position to make
14 that opinion having reviewed everything than Dr.
15 Neubardt had on that day when he wrote the note.

16 Q. Okay. So you disagree with him; correct?

17 A. Depending on what he's actually saying I
18 probably disagree with him.

19 Q. Well, it says "past spinal surgery due to
20 an injury he sustained at work on May 26, 2017."
21 That's pretty clear; right?

22 A. You just read it. I don't know what he
23 really means by that. I'd have to ask him or you
24 could ask him.

25 Q. Well, reading this document it says that

1 J. SPIVAK, M.D

2 --

3 A. It doesn't say it's causally related.
4 It's not a real legal type opinion document, so I
5 don't know what you mean.

6 Q. Okay.

7 A. I can't really comment any further.

8 Q. Did you review the reports of the
9 Workers' Compensation independent medical exam
10 doctors?

11 A. I may have some of them, yes. I don't
12 recall.

13 Q. And you don't do Workers' Compensation
14 evaluations, do you?

15 A. I don't think I -- no, I do -- I guess
16 the answer to your question is no. I don't really
17 know what that means, but no.

18 Q. Well, what it means is when you fill out
19 forms for Workers' Compensation and you are asked
20 to evaluate records and propose treatment and give
21 an opinion on whether you think the treatment is
22 causally connected to the workplace injury and
23 should be approved by Workers' Compensation to pay
24 for that treatment; are you aware of that?

25 A. Yes.

1 J. SPIVAK, M.D

2 Q. And do you do that?

3 A. No. Only for my own patients.

4 Q. Right. So you're aware that there are
5 doctors that are hired specifically on behalf of
6 the Workers' Compensation Board to evaluate
7 treatment and proposed treatment and to render an
8 opinion as to whether or not a workplace accident
9 was causally connected to that treatment? You're
10 aware of that; correct?

11 A. Correct.

12 MR. OBREGON: Objection to form.

13 Q. And you were given the reports of two
14 doctors that saw Mr. [REDACTED] on multiple occasions
15 and rendered reports; correct?

16 A. Yes.

17 Q. One was Dr. Hausmann and the other was
18 Dr. Sawyer. Do you know them?

19 A. I know Dr. Sawyer from the past. I don't
20 know Dr. Hausmann.

21 Q. So I'm going to share my screen with you.
22 This is a report recently of December 3, 2020 from
23 Steven Hausmann, M.D. Do you see this on your
24 screen?

25 A. Yes.

1 J. SPIVAK, M.D

2 Q. And you reviewed this as part of your
3 analysis of this case that you were hired for;
4 correct?

5 A. Yes.

6 Q. And you see that in addition to December
7 3, 2020 that Dr. Hausmann examined Mr. [REDACTED] on
8 July 5th of 2020 and on February 2nd of 2020? You
9 see that; right?

10 A. Yes.

11 Q. And he did prior reports relating to
12 those evaluations that you were provided with and
13 you reviewed as well; correct?

14 A. Yes.

15 Q. So he evaluated him three times and he
16 reviews the prior medical history and he lists all
17 the review of records in each report similar to the
18 way you reviewed a list of your review of all the
19 records; right?

20 A. He lists what records he reviewed, yes.
21 I don't know about the word all, but yes.

22 Q. In a similar way to you he was asked to
23 evaluate Mr. [REDACTED] with an actual exam, to review
24 all the reports, and to render an opinion on
25 causation; correct?

1 J. SPIVAK, M.D

2 A. I don't know that this would be for
3 causation, but he was rendering an opinion.
4 Workers' Compensation evaluations I thought
5 typically were to -- whether further treatment
6 requested were appropriate, but I could be wrong.

7 Q. So let me scroll down. All right.

8 And do you see under diagnosis where it
9 says, work related low back injury, status post
10 lumbar laminectomy and recent lumbar decompression
11 and fusion under diagnosis. Do you see that?

12 A. Yes.

13 Q. Do you see where it says, where I've
14 highlighted, relative to the lumbar spine he would
15 have a marked temporary partial degree of
16 disability. If he returned to work he would
17 require a sedentary job, no lifting over ten
18 pounds, no repetitive bending or stooping. He
19 could stand and walk two to three hours per day and
20 sit the remainder of the time he's not working. Do
21 you see that?

22 A. Yes.

23 Q. Do you see where it then says, the above
24 diagnosed conditions are causally related to the
25 date of the injury for this claim. Do you see

1 J. SPIVAK, M.D

2 that?

3 A. Yes.

4 Q. And you disagree with Dr. Hausmann;
5 right?

6 A. Yes.

7 Q. You think he's wrong in his opinion;
8 correct?

9 A. I disagree. I don't think it's a fair
10 characterization to say he's wrong.

11 Q. Okay. Well, you have your opinion, he
12 has his opinion; right?

13 A. And they're different, that's correct.

14 Q. Doesn't mean you're right and he's wrong
15 or he's right and you're wrong; correct?

16 A. That's correct.

17 MR. OBREGON: Objection to form.

18 Q. You're just doctors that disagree, have
19 different opinions; right?

20 A. We have different opinions.

21 Q. Okay. But he's an orthopedist; right?

22 A. I don't know him to be a spine specialist
23 in any way. I know Dr. Sawyer is not a spine
24 specialist and has never operated on a spine as far
25 as I know, but I don't know Dr. Hausmann's record

1 J. SPIVAK, M.D

2 and career as an orthopedic surgeon, what he does.

3 I would be a very bad person to opine on somebody's
4 hip or knee problem, but somebody who does hips and
5 knees would be a very bad person to opine on
6 somebody's spine problem.

7 Q. Okay. So you're saying to really opine
8 on Mr. Christy's case you need to be a surgeon, and
9 if you're a board certified orthopedist alone that
10 the opinion wouldn't be as credible as yours on a
11 causation issue like this?

12 A. I believe I would have more expertise on
13 an opinion regarding a spinal issue than an
14 orthopedic surgeon who's board certified who has
15 never really taken care of any spine patient in an
16 operative fashion.

17 Q. Would you agree that --

18 A. And I don't know, Dr. Hausmann may be a
19 spine surgeon. I'm not disputing that. I just
20 don't know.

21 Q. Okay. All right. Now, I'm bringing you
22 to Dr. Sawyer's IME evaluation of October 9, 2018.
23 Do you see that on the screen?

24 A. Yes.

25 Q. And he's a board certified orthopedic

1 J. SPIVAK, M.D

2 surgeon. Do you see that?

3 A. Yes.

4 Q. And he evaluated him on May 1, 2018. Do
5 you see that?

6 A. Yes.

7 Q. And also again October 2018?

8 A. Yes.

9 Q. And you reviewed this record as part of
10 your review; correct?

11 A. Yes.

12 Q. And similar to you, he examined him, he
13 took a history, and he reviewed records, he lists a
14 lot of the records that he reviewed, and then he
15 forms an impression and opinion.

16 In his causal relationship, which I have
17 for you, he says "the above diagnosis is causally
18 related to the work-related injury of May 26,
19 2017." Do you see that?

20 A. Yes.

21 Q. And the diagnosis he's referring to is
22 lumbar sprain with aggravation of congenital spinal
23 stenosis, status post L5-S1 microlumbar diskectomy
24 and aggravation of low back pain postoperatively.
25 Do you see that?

1 J. SPIVAK, M.D

2 A. Yes.

3 Q. So he's an orthopedic surgeon that has
4 causally connected this first surgery, because this
5 was before the second one, to this accident;
6 correct?

7 A. In his opinion, correct.

8 Q. It's his opinion?

9 A. Yes.

10 Q. And you didn't reference this in your
11 report that this was his finding; correct?

12 A. Excuse me?

13 Q. You didn't reference his finding in your
14 report, did you?

15 A. This is not part of his medical care.
16 It's listed as something reviewed, but it's not
17 part of his active medical care to be listed.

18 Q. But it was part of your review to review
19 this record; right?

20 A. It's in my record review, yes.

21 Q. And conceivably there's a reason that you
22 charge money to review this record prior to
23 rendering your report; right?

24 MR. OBREGON: Objection to form.

25 A. Could you repeat that question about me

1 J. SPIVAK, M.D

2 charging money?

3 Q. Yes. So you charge money, you get paid
4 for your review of medical records as part of your
5 medical exam service; right?

6 A. That's correct.

7 Q. So you get paid to review this report;
8 right?

9 A. Yes.

10 Q. So there's obviously a reason that you
11 charge money to review this report, you feel that
12 it's somehow connected with your work in evaluating
13 the claim; right?

14 A. I review all the records that are sent to
15 me. I don't decide what records to be sent to me
16 or not.

17 Q. So, so far we can agree that you disagree
18 with Dr. Hausmann and Dr. Sawyer, both who reviewed
19 medical records, examined Mr. [REDACTED], and give an
20 opinion that all the treatment and surgeries are
21 causally connected to the accident? You disagree
22 with them; right?

23 MR. OBREGON: Objection to form.

24 A. That's correct.

25 Q. Did you review the report of Dr. Jeffrey

1 J. SPIVAK, M.D

2 Perry?

3 A. Yes. I'm sorry, from the beginning, that
4 was another report that was sent to me last week.

5 Q. Do you know who Dr. Perry is?

6 A. Yes, I know him very well.

7 Q. Okay. And do you have an opinion as to
8 him and his reputation in his area of practice?

9 A. No.

10 Q. Do you find him to be a credible
11 physician?

12 A. Credible, yes.

13 Q. And you reviewed his report, so you're
14 aware that he reviewed all of the records that you
15 reviewed; correct?

16 A. Yes.

17 Q. And he also evaluated Mr. [REDACTED];
18 correct?

19 A. You have to scroll and show me, but that
20 would not surprise me.

21 Q. Okay. He does his range of motion?

22 A. Yes.

23 Q. And let's look at his impression. That
24 Mr. [REDACTED] was in his usual state of health until
25 May 26, 2017, at which time he was in a motor

1 J. SPIVAK, M.D
2 vehicle collision sustaining significant and
3 permanent injuries to his lumbar spine, which has
4 required a course of physical therapy as well as
5 narcotic analgesics and opioids as well as a
6 diskectomy, as well as a lumbar fusion. Do you see
7 where he says that?

8 A. Yes.

9 Q. Then do you see where I've highlighted he
10 says, "it can be stated within a reasonable amount
11 of medical certainty that the competent producing
12 cause of his current condition and the treatment
13 that he has received thus far with respect to
14 bodily injuries to his neck, shoulders, and low
15 back are as a direct consequence of the injuries
16 sustained in the accident of May 26, 2017." Do you
17 see that?

18 A. Yes.

19 Q. So now he is the third surgeon -- third
20 physician's report that we've looked at who
21 causally connects all of the treatment and
22 procedures to the accident; correct?

23 MR. OBREGON: Objection to form.

24 A. I'm not -- with each of the others I have
25 disagreed with their conclusion. I don't know that

1 J. SPIVAK, M.D
2 they're direct causally related as much as this.
3 This is directly causally relating it and I
4 disagree with the conclusion.
5 Q. Okay. And you're right and he's wrong or
6 are you saying you just differ?
7 A. I come to a different conclusion.
8 Q. Now, you've testified before today under
9 oath like this; correct?
10 A. Yes.
11 Q. Approximately how many times have you
12 testified under oath at a deposition prior to
13 today?
14 A. At a deposition that isn't related to my
15 own medical malpractice?
16 Q. No, any time that you were questioned
17 under oath at a deposition. Approximately, how
18 many times has that happened?
19 A. It's happened twice for IMEs. This is
20 the second time. And probably for other unrelated
21 work in my medical practice, four or five times.
22 Q. And I understand that you have had
23 lawsuits brought against you for malpractice prior
24 to today?
25 A. Yes.

1 J. SPIVAK, M.D

2 Q. Were you deposed in connection with any
3 of those lawsuits?

4 A. I just said about four or five of them.

5 Q. And are any of those cases still pending?

6 A. Yes, one case is pending.

7 Q. What's the name of the plaintiff in that
8 case?

9 A. Bruce Schifffrin, S-C-H-I-F-F-R-I-N, I
10 believe.

11 Q. Where is that case pending?

12 A. I don't know.

13 Q. Do you know what county it's in?

14 A. No.

15 Q. Have you been deposed in that case?

16 A. No.

17 Q. Have all of the other cases been
18 resolved?

19 A. Yes.

20 Q. Have all of them been dismissed as they
21 relate to you?

22 A. No, there's been one settlement.

23 Q. And what case was that where there was a
24 settlement?

25 A. I'm trying to remember the name.

1 J. SPIVAK, M.D

2 Sometimes you choose to put names out of your head
3 on purpose. I can get it for you, but I don't know
4 the name offhand.

5 Q. Was it Spiegel; was that the name?

6 A. There was a Phyllis Siegel, which I was
7 dropped from. Spiegel, no.

8 Q. Okay.

9 A. It's an Israeli name. I just don't
10 remember. I can find it for you. I'm not hiding
11 anything.

12 Q. Okay. And, generally speaking, did that
13 case involve a spinal surgery that you performed?

14 A. No, actually. I performed three spinal
15 surgeries on that case, but he was ultimately
16 paralyzed by a pain specialist trying a procedure,
17 and they sued the pain specialist who didn't have a
18 deep enough pocket so they then chose to sue me and
19 NYU as well.

20 Q. Did you consent to the settlement of the
21 cause of action against you?

22 A. I don't have the choice of consenting or
23 not. NYU had the choice.

24 Q. And NYU settled the claim brought against
25 you in that case?

1 J. SPIVAK, M.D

2 A. Yes.

3 Q. Did you testify in that case?

4 A. Yes.

5 MR. SMILEY: Counsel, we would just ask
6 for that case to be identified, please. And
7 we'll follow up in writing.

8 MR. OBREGON: Thank you.

9 DOCUMENT/INFORMATION REQUESTED:

10 Q. Doctor, approximately how many
11 independent medical exams do you perform on behalf
12 of defense law firms on a given year?

13 A. I would say somewhere between 70 and 80.
14 Maybe 75.

15 Q. And I saw your billing statement. It
16 indicates that for an IME your base rate is \$7,000,
17 which includes evaluation of materials and an
18 evaluation of the plaintiff; is that correct?

19 A. Yes.

20 Q. So that's a \$7,000 fee you charge?

21 A. Yes.

22 Q. So is it fair to say that if you do 75,
23 approximately a year, at \$7,000 that you make
24 approximately \$525,000 a year performing
25 evaluations of injured plaintiffs and writing

1 J. SPIVAK, M.D

2 reports for defense law firms?

3 A. Yes.

4 Q. What percentage of your practice do you
5 devote to performing IMEs?

6 A. Time wise I spend two hours a week doing
7 it. The remainder of the week is my clinical
8 practice.

9 Q. In this specific case, am I correct then
10 that you would have charged Mr. Obregon's law firm
11 \$7,000 to examine Mr. [REDACTED], review the records,
12 and write a report?

13 A. Yes.

14 Q. And that, I believe, you sent an
15 additional bill for additional records reviewed in
16 March for an additional \$2,375; does that sound
17 right?

18 A. That may very well be. If it takes more
19 than two hours it's an extra charge.

20 Q. So fair to say that just on this case
21 alone the work you were hired to do you've billed
22 out Mr. Obregon's firm \$9,375?

23 A. Yes.

24 Q. And with the fee that I paid to you to
25 appear today for a two-hour deposition, you've

1 J. SPIVAK, M.D
2 generated \$14,675 as a result of work in connection
3 with this case?

4 A. Yes.

5 Q. Will you be sending any additional bills
6 to Mr. Obregon for any time or review of records
7 you spend in preparation for today's deposition?

8 A. No.

9 Q. How much time did you spend examining
10 Mr. [REDACTED] ?

11 A. I don't recall specifically.

12 Q. Did you make a note of it?

13 A. No.

14 Q. Where did you examine him?

15 A. In an office in Manhattan on 2nd Avenue.

16 Q. The day that you examined him, were you
17 performing any other examinations of injured
18 plaintiffs as well?

19 A. I don't recall. If I did, it was one
20 more. It's either one or two.

21 Q. Generally, how long do you spend in your
22 physical examination of injured plaintiffs?

23 A. Typically, the visit will take, depending
24 on how complex it is, somewhere between half an
25 hour and 50 minutes.

1 J. SPIVAK, M.D

2 Q. And do you know with Mr. [REDACTED] if it
3 was closer to the half hour or closer to the 50
4 minutes that you spent in your exam of him?

5 A. He had a lot of kind of history to go
6 through, so I would assume it's somewhere in the
7 middle of that, but I don't recall specifically.

8 Q. Was anybody present with you and
9 Mr. [REDACTED] during the examination?

10 A. Probably not. Not directly with us. I
11 have a secretary who leaves when the claimant is
12 all set to go back to the hospital office.

13 Q. Now, you say you took handwritten notes
14 of the examination?

15 A. Yes.

16 Q. And you still have those notes?

17 A. Yes, I do.

18 Q. Would you please provide a copy of those
19 to Mr. Obregon?

20 A. Sure.

21 Q. And we'd request a copy of the notes of
22 that examination, please.

23 A. It's a single page, but I would be happy
24 to provide it to you.

25 MR. OBREGON: We ask that any requests be

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J. SPIVAK, M.D

made in writing and we'll respond appropriately.

MR. SMILEY: Thank you.

Randi, if you could index the request for me, please.

DOCUMENT/INFORMATION REQUESTED:

Q. Did you review the medical records before your physical examination of Mr. [REDACTED]

A. Yes.

Q. And did you write any of your report before you started to examine him in person?

A. No.

Q. Do you have anybody assist you in the preparation of your reports?

A. Yes.

Q. Who assists you?

A. In the preparation of my reports, no, nobody assists me.

Q. Do you have anybody assist you in your examination?

A. No.

Q. Do you actually type up the reports yourself?

A. No, I dictate it. It gets sent, I

1 J. SPIVAK, M.D

2 believe, to India where it gets transcribed and
3 then I edit the report.

4 Q. The section where you talk about the
5 records reviewed, do you dictate all of that or do
6 you have a staff member that does that section for
7 you?

8 A. I dictate it.

9 Q. So everything contained within your
10 report was actually dictated by you?

11 A. Yes.

12 Q. And everything contained in your report
13 was proofread by you for accuracy?

14 A. Yes.

15 Q. Do you know Adam Bender, a physician?

16 A. I know the name, but I don't know that I
17 know him personally by any experience, no.

18 Q. Do you agree that the surgical procedures
19 performed by Dr. Neubardt, specifically the
20 laminectomy and the fusion, were medically
21 reasonable procedures to perform?

22 A. Yes.

23 Q. If Dr. Bender -- withdrawn.

24 Dr. Bender, a neurologist, was also hired
25 by Mr. Obregon's firm to evaluate Mr. [REDACTED], and

1 J. SPIVAK, M.D

2 he said that in his report that the medical need
3 for lumbar fusion and the laminectomy is
4 questionable. Do you agree with that statement?

5 A. I'm not sure what he's questioning, so I
6 don't agree or disagree. You would have to ask
7 him.

8 Q. Do you know Dr. Sinha? Does that name
9 sounds familiar?

10 A. The first name.

11 Q. I think it's Rubin?

12 A. No, I don't. I take it back. The Sinha
13 I know is a financial analyst. So I don't know a
14 Dr. Sinha.

15 Q. You said in your report that he should be
16 able to work full time; is that true?

17 A. If that's what I said in my report then
18 it's true.

19 Q. What type of work can he do full time in
20 your opinion?

21 A. I believe he can do his job full time.

22 Q. Do you know what's involved in his job?

23 A. I know it involved a fair amount of
24 driving and sales and looking and assessing
25 situations.

1 J. SPIVAK, M.D

2 Q. And is it your opinion that he's not in
3 pain even though he states that he is?

4 A. No, that's not my opinion.

5 Q. Do you have any reason to dispute
6 Mr. Christy's statement that he is still in
7 significant pain in his lumbar spine?

8 A. Do I have reason to dispute it, yes, I
9 have reason to dispute, but I don't dispute it.

10 Q. You don't dispute it?

11 A. You asked me if I had reason to dispute
12 it. There is reason to dispute it.

13 Q. Do you dispute it?

14 A. I don't dispute it or not dispute it.
15 The reason to dispute it would be, again, drug
16 seeking behavior because nobody is taking him off
17 of narcotics. So he needs to be in pain to get
18 more narcotics, but I'm not disputing anything. I
19 don't know him well enough and haven't spent enough
20 time with him to dispute it or not dispute it.

21 Q. Are you aware that he stopped working at
22 his job due to pain?

23 A. Yes.

24 MR. OBREGON: Objection.

25 A. That's his claim that he stopped working.

1 J. SPIVAK, M.D

2 I don't have a reason why.

3 Q. Are you aware that he reduced his hours
4 of work to part time for a period of time due to
5 pain?

6 A. Yes.

7 Q. And are you aware that he was fired
8 because he wasn't able to work full time?

9 A. I believe that's in the note somewhere.

10 MR. OBREGON: Objection to form.

11 Q. And do you believe that the reason he's
12 not working is so that he can get narcotic
13 medication?

14 A. No. I think he claims pain potentially
15 because of that. I think he's maybe not working
16 until this lawsuit gets settled.

17 Q. What is your basis for saying that?

18 A. Because that's a common motivation of
19 plaintiffs in lawsuits. If they work and do full
20 time they can't get -- achieve the same benefits of
21 a lawsuit. That's a possible motivation for him
22 not to work. That's all. I'm not saying it is.
23 I'm just saying it's possible.

24 Q. And do you think that he had the
25 laminectomy surgery because of his lawsuit?

1 J. SPIVAK, M.D

2 A. No, he had the laminectomy surgery
3 because of an acute disk herniation which occurred
4 nine months after his accident.

5 Q. Do you believe he was in significant pain
6 such that he chose to undergo the laminectomy?

7 A. Yes.

8 Q. And what about the lumbar fusion, do you
9 agree that he was in significant enough pain to
10 undergo the lumbar fusion?

11 A. I believe so.

12 Q. And do you think he was able to work full
13 time before the laminectomy despite --

14 A. I didn't know him beforehand. I can't
15 really comment on that.

16 Q. So prior to your examination you don't
17 have an opinion as to whether his inability to work
18 from the date of the accident up until your
19 examination was connected to pain from this
20 accident; do you?

21 MR. OBREGON: Objection to form.

22 A. Can you repeat the question?

23 Q. Sure. You're aware that he limited his
24 work hours and that he was unable to work full time
25 as he claims due to the pain in his back from this

1 J. SPIVAK, M.D

2 accident; correct?

3 A. Yes.

4 Q. Do you dispute that he was unable to work
5 due to pain from his accident?

6 A. No.

7 How much longer are you planning because
8 I do -- I did plan two hours for this.

9 Q. Yep, we're at 12:31. I'm just wrapping
10 it up, Doctor.

11 Doctor, have you ever performed a lumbar
12 fusion on one of your patients following an
13 accident where they were rear-ended by another
14 vehicle?

15 A. I can't think of one specifically, but I
16 certainly may have.

17 Q. In your review of all of the records
18 including Mr. Christy's deposition and your
19 questioning of him, did you come across any
20 reference to any other accidents that Mr. [REDACTED]
21 had either before or after the motor vehicle
22 accident of May 26, 2017?

23 A. I don't believe so. I don't recall any
24 specific ones.

25 Q. And is it fair to say that you don't have

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J. SPIVAK, M.D

a belief that he had sustained an injury to his
back from some unknown accident unrelated to the
May 26, 2017 car accident?

MR. OBREGON: Objection.

A. I had no information that would suggest
that.

Q. I thank you for your time. I have no
further questions for you, Doctor.

MR. OBREGON: Thank you, Doctor.

A. My pleasure.

(Time noted: 12:33 p.m.)

JEFFREY MICHAEL SPIVAK, M.D.

Subscribed and sworn to before me
this _____ day of _____ 20__.

NOTARY PUBLIC

1 ----- I N D E X -----

2

3 WITNESS EXAMINATION BY PAGE

4 JEFFREY MICHAEL

5 SPIVAK, M.D. MR. SMILEY 6

6

7 ----- DOCUMENT REQUEST -----

8 PAGE 8 Billing statements

9 11 Correspondence from Mr. Obregon or
10 his law firm

11 101 Copy of the notes from examination

12

13 ----- INFORMATION TO BE FURNISHED -----

14 PAGE 97 Name of settled case to be
15 identified

16

17 ----- EXHIBITS -----

18 (None)

19

20

21 RULINGS

22 PAGE LINE

23 (None)

24

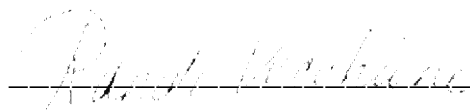
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CERTIFICATE

I, Randi Vecchione, a Shorthand Reporter
and Notary Public of the State of New York,
do hereby certify:

That, JEFFREY MICHAEL SPIVAK, M.D., the
witness whose examination is hereinbefore set
forth, was duly sworn, and that such
examination is a true record of the testimony
given by such witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage; and that I am
in no way interested in the outcome of
this matter.



Randi Vecchione

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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[REDACTED],

Plaintiff(s),

Civil Action No.:

[REDACTED]

-against-

JEFF ALAN THOMPSON and EAGLE TRANSPORT
SERVICES, INC.,

Defendant(s).

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EXPERT DEPOSITION of GARY YOUNG, taken by
Plaintiff, held remotely via Zoom/LegalView
Videoconferencing, on May 20, 2021, at 1:05 p.m.
before a Notary Public of the State of New York.

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G A R Y Y O U N G ,
having been first duly sworn before a Notary
Public of the State of New York, was
examined and testified as follows:

BY REPORTER:

Q State your name for the record.

A Gary Young.

Q What is your address?

A 4 Trenton Avenue, West Trenton, New
Jersey 08625.

EXAMINATION BY

MR. SMILEY:

Q Good afternoon, Mr. Young.

A Good afternoon, Mr. Smiley.

Q I am going to ask you some questions
today. I assume this is not your first time
being deposed under oath.

A Correct.

Q So you know the ground rules, and if
anything comes up that you need to take a
break or I'm not clear, just say the word.

Okay?

A Excellent.

Q All right. I ask that you please have

1 G. Young
2 your report in this case available as I would
3 like to go through certain items contained
4 within your report and I think it will just
5 help things move more quickly. Okay?

6 A Fine.

7 Q Were you retained by Mr. Obregon or
8 his law firm to get involved in this
9 litigation where the Plaintiff is my client,
10 [REDACTED]?

11 A Yes.

12 Q How is it that you were engaged? And
13 by that I mean had you worked with
14 Mr. Obregon or his firm previously, or did
15 they find you through some other connection?

16 A I believe some other connection.

17 Q Do you know what that connection was?

18 A No.

19 Q What were you asked by Mr. Obregon or
20 his firm to do in this case?

21 A To complete a vocational evaluation of
22 Mr. [REDACTED].

23 Q What specifically did that mean: To
24 complete a vocational evaluation of
25 Mr. [REDACTED]?

1 G. Young

2 A Generally, and in this case, it's
3 review of pertinent records, so in this case
4 there's medical records, a lifecare plan,
5 economic report and a vocational report,
6 medical records and paper review and then we
7 did assume meeting with Mr. [REDACTED] on
8 January 29th of this year, and then write the
9 report.

10 Q Were you asked to form certain
11 opinions and/or conclusions as a result of
12 your analysis?

13 A No.

14 Q Were you asked to determine if Mr.
15 [REDACTED] had sustained any impairment of
16 earning ability as a result of his accident
17 of May 26, 2017?

18 A No.

19 Q Have you formed any opinion on whether
20 or not Mr. [REDACTED] had sustained an
21 impairment of his earning capacity?

22 A That's a two-part question. I'm not
23 looking at the medical side of that only the
24 vocational side.

25 Q Did you form an opinion --

1 G. Young

2 MR. SMILEY: Withdrawn.

3 Q Were you asked to form an opinion as
4 to whether or not his employment ability is
5 different following the happening of an
6 accident on May 26, 2017, than it was prior
7 to the happening of that accident?

8 A Not specifically but that is the issue
9 of the report.

10 Q Now, as part of doing your report you
11 indicated you reviewed records; is that
12 right?

13 A Correct.

14 Q Now, referring to your report which
15 just let the record reflect is annexed to an
16 expert witness exchange served by defense
17 counsel, and it is dated February 15, 2021
18 where at the top left it says YVA for Young
19 Vocational Analytics.

20 A Correct.

21 Q I'd like to direct your attention,
22 let's start on page three of your report
23 please, where at the top you indicate:
24 Records Reviewed.

25 A Correct.

1 G. Young

2 Q Now, I see a list of medical records
3 next to bullet points and then I see under a
4 section of medical records a few specific
5 records that you reference; is that correct?

6 A Yes.

7 Q Are there any other medical records
8 other than those that you refer to on this
9 page three of your report that you reviewed
10 as part of your analysis in this case?

11 A No. Only those things that would be
12 quoted in, for instance, the primary care
13 would have test results and things like that
14 from labs and things. But it's only those
15 sources.

16 Q So, for example, you didn't review
17 specifically the records of Dr. Seth Neubardt
18 whose the surgeon who performed two surgeries
19 on Mr. [REDACTED], correct?

20 A Well, no, I did have the surgery
21 listed at the bottom of page three and this
22 was the 9/11/20 surgery.

23 Q Right, and you saw that within the
24 White Plains hospital chart where the surgery
25 was performed, correct?

1 G. Young

2 A Correct.

3 Q Other than that you didn't review Dr.
4 Neubardt's own notes outside of that White
5 Plains Hospital chart, correct?

6 A Correct.

7 Q And is it fair to say also you did not
8 review the records of Dr. Rema who is a pain
9 management specialist?

10 A Correct.

11 Q And is it also correct that you did
12 not review the records of a Dr. Gabriel Dassa
13 who is an orthopedic surgeon?

14 A Well, unless they were quoted into the
15 others, I didn't specifically quote those.
16 They may be but I'm not sure.

17 Q Is it fair to say that instead of
18 going through various doctors who I don't see
19 listed here, that if the records are not
20 cited on this page three of your report, and
21 they're not included within the records that
22 you have the bullet points next to, then it's
23 fair to say you did not review those as part
24 of your analysis?

25 A Correct.

1 G. Young

2 Q Now, did you review the tax returns of
3 Mr. [REDACTED] ?

4 A Yes, I did.

5 Q Do you have those as part of your
6 file?

7 A Yes.

8 Q Do you have those available to you
9 now?

10 A Yes.

11 Q Can you tell me which specific tax
12 returns that you possess that you reviewed?

13 A 2015 through 2019.

14 Q And what did his income show on his
15 tax return from 2015?

16 A I don't recall. I -- go ahead, I'm
17 sorry.

18 Q That's all right.

19 Do you have the record with you that
20 you can look at?

21 A Yes.

22 Q Could you do that please.

23 A What would you -- what are you --

24 Q What was his income reported, Mr.
25 Christy's income for 2015 on his tax return?

1 G. Young

2 A The wages are zero.

3 Q Okay. Is there any income reported
4 that he earned of any source?

5 A There's a taxable income total of --
6 I'm sorry. Hold on a second. There's a
7 capital gains -- other gains -- no, capital
8 gains of 32,416.

9 Q Okay.

10 A And a taxable income of 7816.

11 Q Okay.

12 How about for 2016, what was his
13 taxable income for that year?

14 A Zero as far as wages. Capital gains
15 of 20,000. For taxable income of zero after
16 exemptions. I believe that's all.

17 Q And then you list the taxable income,
18 I believe in your report for the years 2017,
19 '18 and '19?

20 A Correct.

21 Q On page 12; is that right?

22 A Yes.

23 Q Am I correct that it was \$89,628 for
24 2017; \$125,058 for 2018; and \$48,137 for
25 2019?

1 G. Young

2 A Yes, what page?

3 Q Yes, twelve on your report, sir.

4 A I looked at an earlier note but I was
5 closing some windows.

6 Q That's okay.

7 A Yes, I believe that your numbers look
8 right.

9 Q Did you determine the source of income
10 for those years '17, '18 and '19 that total
11 those numbers?

12 A Yes.

13 Q What is it that he earned \$89,628
14 during 2017?

15 A From his employment.

16 Q Was that base salary, was that bonus,
17 was that commission? Did you determine what
18 it was?

19 A It was a combination of all.

20 Q And did you determine what the
21 combination was, how much was base salary,
22 how much was commission, and the like?

23 A I didn't determine -- I did not get a
24 breakdown. I was interested more in the
25 total.

1 G. Young

2 Q Do you know what his base salary was
3 for 2017?

4 A No.

5 Q Do you know how much of that 89,000
6 was based on commissions from work done in
7 the year of 2016, if any?

8 A No, I do not know.

9 Q And the same for 2018. The \$125,058,
10 do you know what that's from?

11 A Same, his employment.

12 Q And do you know what the base salary
13 was for his employment in 2018?

14 A No.

15 Q Do you know how much of that 125,000
16 was from commissions from prior to 2018 or
17 prior to 2017?

18 A No.

19 Q What about 2019, do you know what that
20 amount of money \$48,137 refers to?

21 A The same, his employment.

22 Q Do you know whether that was for
23 part-time employment or full-time employment?

24 A That was mostly part-time employment.

25 Q And do you know how many hours or how

1 G. Young

2 many months of 2019 he worked to earn 48,137?

3 A It was most of the year and four hours
4 a day.

5 Q So it would be about half time of a
6 normal work year?

7 A Correct.

8 Q Does that sort of line up with if 2017
9 was a normal work year, then the numbers
10 reflected in 2019 would be about half of that
11 showing working half the amount of time; is
12 that fair to say?

13 A Yes.

14 Q Did you review any economic reports or
15 analyses as part of your review in this case?

16 A Well, we have a Dan Wolstein's report.
17 He didn't have numbers in it, that's why I
18 mention that.

19 Q Right.

20 Did you review any other economic-type
21 reports, for example, from an economist?

22 A I do not think so.

23 Q We had provided defense counsel with a
24 report from our expert economist, Dr.
25 Lambrinos. Did you review his report?

1 G. Young

2 A Yes, I have. I had it under that name
3 rather than economist. So I apologize for
4 that.

5 Q For what purpose did you review Dr.
6 Lambrinos' report?

7 A More of a background information. I
8 was not asked to do any economic analysis.
9 So it was just looking at the information for
10 background rather than for drawing
11 conclusions.

12 Q When you saw in Dr. Lambrinos' report
13 that he listed a loss of income from prior to
14 the accident earning capacity as opposed to
15 future earning capacity, did you find any
16 reason to disagree with those findings?

17 A I did not draw any conclusions at all.

18 Q So you certainly don't have any
19 independent reason to dispute anything in Dr.
20 Lambrinos's report, correct?

21 MR. OBREGON: Objection to
22 form. You can answer.

23 A I'm neither affirming or discrediting.

24 Q What about Dr. Wolstein, do you know
25 who he is?

1 G. Young

2 A Sure.

3 Q How do you know Dr. Wolstein?

4 A Well, he's in New Jersey mostly and so
5 am I. We go to conferences together.

6 Interesting -- I forget if it's his
7 father-in-law or stepfather who was Charles
8 Kincaid. Do you know him?

9 Q Yes.

10 A Okay. And then Dan took over the
11 practice and I'm doing the same thing with my
12 daughter. So we've talked over this issue,
13 and we've gone out to dinner and things like
14 that.

15 Q Great. So you both enjoy a cordial
16 professional relationship, is that fair to
17 say?

18 A Yes.

19 Q And you have respect for his work and
20 he has respect for your work, is that fair to
21 say?

22 A Yes.

23 Q When you reviewed his report in this
24 case, did you have any disagreement with any
25 of his conclusions?

1 G. Young

2 A The one conclusion, the report --
3 well, let me first say I think he writes a
4 good report, it's methodical and I think he
5 would say the same about mine, that they're
6 not, you know, just a narrative report as
7 many are. But he thought that, and I agree,
8 that Mr. [REDACTED] does have some ability to
9 work and not in his previous capacity as what
10 is called a comfort advisor.

11 Q Okay.

12 COURT REPORTER: I'm sorry.
13 Comfort advisor?

14 Q Yes.

15 A Basically selling air conditioning and
16 heating is what that is but it's now called a
17 comfort advisor.

18 Q And did you find any fault with his
19 conclusion that Mr. [REDACTED] is no longer able
20 to work in the employment that he did prior
21 to this accident?

22 A Well, that would be the comfort
23 advisor.

24 Q Right. And do you have any issue with
25 his conclusion about that?

1 G. Young

2 A No, because my report is essentially
3 the same conclusion.

4 Q Is it fair to say that both you and
5 Mr. Wolstein -- Dr. Wolstein agree that,
6 first of all, [REDACTED] earning
7 potential is less now after the accident, as
8 a result of the accident, than it was before
9 the accident?

10 A That's probably true except there
11 would be the transferability of similar
12 positions at Home Depot and Lowe's with
13 the -- like they have kitchen designers and
14 things like this where they do not leave the
15 store, but I don't think that he would be
16 able to earn the 125,000 he did in one year.

17 Q And you don't dispute the fact that he
18 did have the ability to earn \$125,000 before
19 this accident happened, correct?

20 A Well, it was only the one year, so I
21 would just look at that statistically as
22 being an aberration.

23 Q What about the other years where he
24 was earning --

25 A The 89,000?

1 G. Young

2 Q Yeah.

3 Let me put it another way. He can't
4 make \$89,000 a year now based on your
5 analysis; is that fair to say?

6 A It's probably true, yes.

7 Q Okay.

8 And based on your analysis he can't
9 even make half of that, \$48,000, is that
10 true?

11 A He might be able to make that or more
12 if he got the job with Home Depot.

13 Q So let's refer to that. Now, we know
14 that the \$48,000 and change that he made in
15 2019 was working half schedule, in other
16 words, part-time, right?

17 A Correct.

18 Q So if you were to multiply that times
19 two, that's really more of an \$86,000 annual
20 salary, right?

21 A 86? I think you meant 96.

22 Q 96, yeah, full time.

23 A Correct.

24 Q Now, you talk about the fact that you
25 don't --

1 G. Young

2 MR. SMILEY: Withdrawn.

3 Q You agree, don't you, that he can't
4 work full-time now, right?

5 A That is not my call. That is for
6 physicians. The difficulty with this report
7 was that I saw him only a couple of months
8 after the surgery, so I did not think he was
9 fully healed. So I do not think that the
10 physical capacities have been maximizing.

11 Q Now, based on the records you reviewed
12 you saw that he was restricted by the medical
13 opinions as well as his own testimony about
14 his pain so working only four hours or so a
15 day, correct?

16 A Well, that was before the second
17 surgery.

18 Q And do you have reason to believe that
19 since the second surgery he's able to work
20 more or has anything changed?

21 A That's not my call, that's the
22 physician's statement.

23 Q Well, you evaluated him on January 29,
24 2021 which was many months after his second
25 surgery, right?

1 G. Young

2 A I think it was three months, correct?

3 Q Well, the surgery was in September,
4 right, of 2020?

5 A Okay, so five months, yes.

6 Q So at the time that you evaluated him
7 five months after the surgery, had you seen
8 anything to the contrary of the fact that he
9 still could only work in a sedentary job
10 part-time at about four hours a day?

11 A I do not specifically recall seeing
12 anything that set any limitation -- as any
13 physical limitation of four hours.

14 Q You didn't see anything differently or
15 you're saying you didn't see that at all in
16 any of the records?

17 A I don't recall seeing it at all. Let
18 me amplify to that. Nothing that had enough
19 detail to it that would be meaningful. For
20 instance, just for explanation, if I receive
21 something that says "light duty" you would
22 like to know a little bit more about sitting
23 and standing and crawling and things like
24 that rather than just in two words.

25 Q So, in other words, if you saw

1 G. Young
2 something where a doctor made a statement
3 such as, "The claimant is working part-time
4 20 hours per week capacity and may continue
5 to do so with a lifting restriction of ten
6 pounds, avoiding any repetitive bending or
7 squatting, no vertebral ladder climbing,"
8 that type of statement would be relevant to
9 you, right?

10 A Correct.

11 Q In fact, you did have that statement
12 if you look at page three of your report, I'm
13 quoting from your report the statement that
14 you included in there from Dr. Soyer. Do you
15 see that on page three?

16 A Correct.

17 Q So, in fact, you had that information
18 and you found it relevant enough that you put
19 it in your report on this case, correct?

20 A Correct. The only flaw in that is
21 that it is prior to the second surgery. So
22 we do not know whether that second surgery
23 had any effect plus or minus.

24 Q Did you review any records after
25 September of 2020 when he had that second

1 G. Young

2 surgery?

3 A Just a brief follow-up but nothing
4 specific regarding work.

5 Q So in any event, am I correct that
6 your conclusion was that he could go and work
7 part-time now, right?

8 A I don't necessarily address the
9 part-time because there was no addressing by
10 a physician on that. So the only thing I can
11 do is say here are jobs that are appropriate
12 based on the information I have at this time.
13 And I thought that it was premature to state
14 that Mr. [REDACTED] had reached maximum medical
15 improvement.

16 Q Let's go to your report page 13
17 please.

18 A Okay.

19 Q Do you see the paragraph that starts
20 with "Mr. [REDACTED] may be able"?

21 A Right.

22 Q Can you read that paragraph slowly
23 please.

24 A (Reading): Mr. [REDACTED] may be able to
25 return to part-time work as a comfort advisor

1 G. Young
2 in a retail setting, such as, Home Depot
3 where he can advise and sell HVAC systems as
4 service jobs for the store eliminating the
5 necessity to travel or physically maneuver
6 around attics and basements.

7 Q So that's your opinion, right, that
8 paragraph?

9 A Yes.

10 Q And you're saying, in your opinion, he
11 can return to part-time work, correct?

12 A Well, in that type of position. The
13 other positions noted earlier on page 12
14 would have been in a full-time capacity.

15 Q So now if we go to page 12 that's as a
16 customs service representative, a cashier or
17 an office clerk, right?

18 A Yes.

19 Q And are you saying that those are the
20 types of positions that he can work at, at
21 Home Depot, for example?

22 A No, they would not be Home Depot.
23 They would be -- well, cashiers would be in
24 Home Depot. The other two would be
25 traditional office jobs.

1 G. Young

2 Q And those are full-time salaries,
3 right, that you put here on page 12 of your
4 report?

5 A Correct.

6 Q So you're saying that now if he were
7 to work full-time, based on his limitations
8 and his education and his experience and
9 background, assuming he could work full-time
10 that's what, a 40-hour-week, sir?

11 A Yes.

12 Q These are the three types of jobs that
13 you believe he would qualify for?

14 A Correct.

15 Q And these are all minimum wage-type
16 jobs, right?

17 A Not minimum wage but \$15 an hour, \$20
18 an hour, somewhere around there.

19 Q Well, what's the current minimum wage
20 in New York State?

21 A 7.25.

22 Q What is a 15-dollar an hour full-time
23 job relate to as an annual salary, do you
24 know?

25 A I think it's 25,000.

1 G. Young

2 Q So the cashier job you list, that
3 would be a minimum wage job?

4 A No.

5 Q I'm sorry. That would be a 15-dollar
6 an hour job?

7 A Yes.

8 Q And if he was only able to work
9 part-time at one of these types of jobs as
10 you indicate he can work part-time, right, or
11 are you saying he could do these full time?

12 A The part-time full-time issue is not
13 mine. That is for the doctors to decide.
14 The same thing with the Home Depot job if he
15 could do that full time, it would increase
16 the salary range.

17 Q Let's assume for the moment that all
18 of the medical records that you reviewed
19 indicate that he needs to do part-time work,
20 okay, let's assume that for a moment.

21 A Okay.

22 Q And, in fact, you haven't seen
23 anything in any of the records you've
24 reviewed to the contrary saying he can go
25 into full-time work, have you?

1 G. Young

2 A I haven't seen anything either way.
3 That's the problem with the assessment. A
4 vocational counselor relies on the decisions
5 in the medical community. So that could
6 include physical therapist or functional
7 capacity evaluation to set the physical
8 capacities.

9 It is then up to us to take that
10 information along with the assessment of the
11 person's skills to identify jobs that would
12 be appropriate.

13 Q So the only note that you saw was the
14 one that you put on page three of the report
15 by the Workers Compensation IME doctor which
16 references part-time with restrictions of
17 lifting ten pounds?

18 A Well, as I said earlier, with enough
19 specificity that I thought was meaningful.

20 Q Did you look at any other reports from
21 Workers Compensation other than this one
22 evaluation from Dr. Soyer?

23 A I looked at plenty of Workers
24 Compensation reports, physical therapy. But
25 the problem, again, is almost all of that is

1 G. Young
2 before the second surgery, so it losses
3 validity. I mean to take it to the absurd
4 level if, God forbid, Mr. [REDACTED] underwent
5 the surgery and died, you know, all of that
6 is meaningless.

7 So what we have to do is to assess
8 after that second surgery because he could
9 have improved greatly, he could have
10 deteriorated, and we need to know that
11 answer.

12 Q So what you're saying you would need
13 to see some type of medical record after the
14 second surgery that would indicate that he
15 still needs to do sedentary work for you to
16 opine that he's limited to sedentary or
17 part-time work?

18 A I agree with you except it's not my
19 position to determine whether it's sedentary,
20 light or whatever.

21 Q But it is your job to determine
22 whether or not he can, based on his injuries
23 and his background and many other factors,
24 whether or not he can work full-time or
25 part-time, right, isn't that part of your

1 G. Young

2 job?

3 A Except that I cannot set what the
4 restrictions are. That is up to the doctors
5 or therapists.

6 Q Now, I'm asking you then if you had a
7 medical record that you can review that set
8 forth those restrictions, then it would be
9 your job to opine based on those restrictions
10 whether he qualifies for full-time work or
11 part-time work, right?

12 A Right. The only thing I would add to
13 that is something that was current.

14 Q Okay.

15 So did you review a record from a Dr.
16 Steven Hausmann dated December 3rd, 2020 and
17 Dr. Hausmann did an orthopedic surgery
18 examination of Mr. [REDACTED] on behalf of the
19 Workers Compensation Board?

20 A I did not see that.

21 Q Okay.

22 I'm going to share that with you on my
23 screen right now. Do you see my screen, sir?

24 A Hold on. I have to close some things
25 so I can see your screen.

1 G. Young

2 Q Okay.

3 A Okay, yes, I can see the record.

4 Q And do you see at the top it says
5 Steven Hausmann M.D. and the date is
6 December 3rd, 2020?

7 A Correct.

8 Q Now, December 3rd, 2020 would be three
9 months after -- approximately three months
10 after the second surgery, right?

11 A Yes.

12 Q And it would be approximately two
13 months and change prior to your evaluation,
14 right?

15 A Yes.

16 Q Okay.

17 And you see here where he gives a
18 history, I'm showing you, that he previously
19 examined him on July 5th, 2020 which was
20 before the second surgery, and also on
21 February 2nd, 2020 which was after a
22 laminectomy surgery but before the lumbar
23 fusion surgery, right?

24 A Correct.

25 Q Now, I'm going to scroll all the way

1 G. Young
2 down and you see under diagnosis where it
3 says (Reading): Work-related low back
4 injury. Status post lumbar laminectomy and
5 recent lumbar decompression and fusion."

6 Do you see that?

7 A Yes.

8 Q Do you see here where he says that the
9 claimant would be amenable for permanency for
10 the lumbar spine?

11 A Yes.

12 Q Do you have any reason, by the way as
13 you sit here today, to dispute that Mr.
14 [REDACTED] sustained back injury in the
15 automobile accident of May 26, 2017 that
16 caused him to have a lumbar laminectomy and a
17 lumbar decompression infusion?

18 MR. OBREGON: Objection. You
19 can answer.

20 A No, but if I could go back if you
21 continue in the paragraph you were showing,
22 the last thing you showed, it was making my
23 point for me where he says (Reading):
24 Permanency cannot be assigned until he's one
25 year postoperative from the date of that

1 G. Young

2 procedure.

3 Q Okay.

4 A So that's why I'm hedging things.

5 Because believe me it makes Dan and my life
6 much easier if we had a very definitive set
7 of physical capacities.

8 And regarding your question, I have no
9 opinion at all about the causation of any of
10 Mr. Christy's spinal difficulties. Again,
11 that's medical. And vocationally it does not
12 matter whether it was caused by an accident,
13 an automobile accident or a fall or a
14 degeneration. We're looking at the physical
15 capacities after the injury.

16 Q Now looking at this highlighted
17 section I have up on the screen where it
18 says, "Relative to the lumbar spine, he would
19 have a marked, temporary, partial degree of
20 disability. If he returned to work he would
21 require a sedentary job with no lifting over
22 ten pounds and no repetitive bending or
23 stooping. He could stand and walk two to
24 three hours per day and sit the remainder of
25 the time. He is not currently working."

1 G. Young

2 Do you see that?

3 A Yes.

4 Q Do you see where it says, "The above
5 diagnosed conditions are causally related to
6 the date of injury for this claim."

7 Do you see that, sir?

8 A Yes.

9 Q Does this indicate to you that this is
10 a medical doctor, an orthopedic surgeon, at
11 least in December of 2020, saying that these
12 as of the time of that examination would be
13 his limitations to work?

14 MR. OBREGON: Objection to
15 form. You can answer.

16 A Yes, I would agree with you.

17 Q Okay.

18 And based on reading this medical
19 documentation, would you agree that this
20 would limit him to some type of part-time
21 work?

22 A No.

23 Q Do you believe he could work full-time
24 based on this?

25 A Looking only at this statement because

1 G. Young
2 my previous statement, and the doctor's
3 previous statement that they would want a
4 year before they fully assess this.

5 This is basically saying that Mr.
6 [REDACTED] can work in a sedentary job and part
7 of that definition is no lifting over ten
8 pounds. And stand or walk two to three hours
9 and sit the remainder, which he doesn't say
10 two to three hours, so I assume this is full
11 time.

12 Q So if he can only stand and walk two
13 to three hours per day total, what type of
14 jobs did you indicate in your report could he
15 do where he could sit for the remaining six
16 to five hours per day?

17 A The jobs I mentioned earlier in my
18 report.

19 Q And I'm going to go to those. Let's
20 see what page they're at. That would be a
21 cashier? The cashier is one?

22 A Yeah, the cashier, the customer
23 service, I think there was an office clerk
24 and the job at Home Depot, all would fit
25 that -- all would fit that physical capacity.

1 G. Young

2 Q So can you tell me what type of
3 cashier job someone could have where they
4 could sit daily for five to six hours as a
5 cashier?

6 A Sure -- you're going the wrong way.

7 Q I'm going the wrong way? What page is
8 it on?

9 A 12, I think. Right there.

10 Q What jobs could he work at as a
11 cashier where he could sit five to six hours
12 a day?

13 A This is a limited range of cashiers
14 places, such as, parking lots, self-service
15 gasoline stations would be appropriate.
16 Grocery stores. Retail would not be.

17 Q And do you know if any of those stores
18 are actually hiring somebody in his area
19 right now?

20 A No.

21 Q So you're just assuming that, that he
22 could get it if there was a job available,
23 right?

24 A Correct.

25 Q What about customer service

1 G. Young
2 representative, what type of customer service
3 representative can sit at their job full time
4 for five to six hours a day?

5 A Well, these are people more like order
6 clerks. They're not people in retail or
7 something like that. So they're in offices
8 answering phones.

9 Q What jobs are you aware of that are
10 available now for Mr. [REDACTED] to get as a
11 customer service representative where he
12 could sit five to six hours a day?

13 A I didn't specifically look at any
14 jobs.

15 Q So you don't know if there are any
16 jobs available for him now to do that, do
17 you?

18 A No.

19 Q And office clerks in general, which
20 types of jobs could he sit full time for five
21 to six hours a day and do those jobs?

22 A Things like an order clerk, a rally
23 clerk, things of this order.

24 Q Do you know if any of those jobs are
25 currently available anywhere near Mr.

1 G. Young

2 Christy's residence?

3 A No.

4 Q Assuming there was a job and it was
5 available, you're saying that -- and he could
6 do it full-time, that base case scenario he'd
7 be making \$36,230?

8 A In these three positions, yes.

9 Q Are there any positions that he can
10 work full time at now where he can sit five
11 to six hours and earn more than \$36,230 a
12 year?

13 A The Home Depot position would be
14 appropriate to earn probably 40 to \$50,000.

15 Q And what's your basis of saying he can
16 earn 40 to \$50,000 at a job at Home Depot?

17 A Because I talked with people who have
18 done this job and that's generally the wages
19 they earn.

20 Q What people have you spoken to, to ask
21 about those wages?

22 A Over the years numerous ones.

23 Q Can you tell me who?

24 A Not specifically, no.

25 Q It's not that scientific, is it

1 G. Young

2 Mr. Young, that you're saying that he could
3 earn a certain amount of money at a job at
4 Home Depot but you can't even cite the basis
5 from where you get that value from?

6 MR. OBREGON: Objection to
7 form.

8 A I cited the basis. I just don't
9 remember the name off -- off the top of my
10 head.

11 Q What is the basis of your statement
12 that he can earn upwards of \$50,000 working
13 at Home Depot?

14 A Having seen this job and talked with
15 the workers doing the job.

16 Q And when was the last time you saw a
17 worker doing that job and they told you
18 that's what they were earning?

19 A Probably last year -- no, I'm sorry
20 2019. Before the pandemic.

21 Q Have you ever looked at any Home Depot
22 job listings?

23 A Yes.

24 Q And have you looked to see what they
25 pay?

1 G. Young

2 A Well, this job is a commission-type of
3 position and generally Home Depot does not
4 list wages in their job postings.

5 Q And they make commission at Home
6 Depot?

7 A In the type of position I'm talking
8 about, yes. Many of the positions, no.

9 Q So which positions do they offer
10 commission and what's the starting salary for
11 those positions that you say Mr. [REDACTED]
12 would be qualified to work at?

13 A They would be similar to his past
14 work, but instead of doing HVAC he would be
15 doing something, such as, kitchen design.

16 Q Can you tell me specifically that Home
17 Depot has available positions for someone in
18 a kitchen design department that offers a
19 base salary in commission?

20 A No, because that was outside the scope
21 of my report.

22 Q But you're saying he could do this
23 work, and this is what he would make, but you
24 have nothing that you could provide to
25 substantiate that, correct?

1 G. Young

2 A Well, I did not do it at the time of
3 my report, and I did not know that that was
4 one of the questions that I would need to
5 update that information for this deposition.

6 Q Do you know where the closest Home
7 Depot is to where Mr. [REDACTED] lives?

8 A No.

9 Q Do you know where the closest Lowe's
10 is to where Mr. [REDACTED] lives?

11 A No.

12 Q Would that matter if he needed to
13 drive an hour or more each way or round trip
14 to get to work, would that have an impact on
15 his ability to take certain jobs?

16 A Well, probably the doctors will have
17 to assess that but I would agree with you
18 that that may be problematic.

19 Q Can you tell me based on your analysis
20 in this case a specific job that Mr. [REDACTED]
21 could do right now full time and how much it
22 would pay him?

23 A No, but I did not do that type of
24 analysis.

25 Q Isn't that part of what your job is,

1 G. Young

2 Mr. Young, is to say what type of job he
3 qualifies for and how much it would pay him?

4 A Well, that is what I did. However, in
5 looking at specific jobs it is also
6 problematic because you're assuming a perfect
7 fit between the person, in this case Mr.

8 [REDACTED], and the job. That's why I like to
9 look at broad spectrums of occupations
10 because it gives, I think, a clearer
11 understanding of what is going on with these
12 specific jobs.

13 Q You put in your report that you
14 acknowledge that he's limited to sedentary
15 jobs. Can we agree on that?

16 A At this point, yes, that appears to be
17 true. I just don't want you to think that --
18 to miss the point that I don't think that
19 that has been fully determined but that's not
20 my issue anyway so...

21 Q Your job, if I understand correctly,
22 as a vocational expert is to evaluate records
23 and evaluate a person and determine what if
24 any types of jobs that that person currently
25 could qualify for, correct?

1 G. Young

2 A Within medically determined physical
3 capacity.

4 Q And from everything you've reviewed
5 currently, at least at the time of your
6 analysis, he was limited to sedentary work,
7 correct?

8 A Basically yes.

9 Q So you looked into jobs that you felt
10 he could do involving sedentary work,
11 correct?

12 A Yes.

13 Q And you agree that before this
14 accident he was not limited to sedentary
15 work, correct?

16 A Before the accident, yeah. Correct.

17 Q So would you agree, sir, that as a
18 result of this accident he went from being
19 able to get employment in work that was not
20 limited to sedentary work, and as a result of
21 this accident, currently as of the time of
22 your evaluation, he was limited to sedentary
23 work?

24 A Yes, the other thing is that he had
25 the heart problems during this period of

1 G. Young
2 time, and whether the impact of the change in
3 his physical capacity were due only to the
4 back problems or it also includes the cardiac
5 problems, is a medical determination.

6 Q And you haven't seen one shred of
7 medical documentation regarding his heart
8 that indicates that in any way he has work
9 restrictions due to any heart condition, have
10 you?

11 A No, but again I'm not trying to
12 demonstrate -- I'm not trying to address that
13 issue because it is not my issue. I just
14 admit that it's there.

15 Q But you evaluated what he was able to
16 do before this accident, correct?

17 A Yes.

18 Q And before this accident he had no
19 restrictions at all to do any work, right?

20 A I don't know if that's true. I will
21 agree with you that he had no restrictions to
22 do the work he was doing previously.

23 Q Are you aware, have you looked at
24 anything to indicate to you that he had any
25 restrictions from doing any kind of work at

1 G. Young

2 the time of his accident?

3 A I have not seen that, no.

4 Q So as far as your review and
5 everything you've analyzed, he did not have
6 any restrictions relating to what type of
7 work he could do as of the time of this
8 accident, correct?

9 A That's basically true, yes.

10 Q Not just basically true, it is true.
11 You haven't seen anything that says that he
12 was restricted from doing any kind of work as
13 of the happening of this accident, correct?

14 A Well, I haven't seen anything listing
15 whether he was restricted or not, that's the
16 problem. And he wasn't an older worker who
17 has had stenosis, which is generally
18 something that takes time to develop, again,
19 that's not my call.

20 I'm just saying the important thing
21 where I sit is he was able to do his past
22 work without any difficulty. He did state
23 that he had moved on from his past work which
24 was as a plumber into something light, but,
25 again, that was his choice I don't know if it

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G. Young

was medically required. But he decided to do that.

Q He --

A Just let me finish my statement.

I'm just taking this all off his word or the doctor's words but I'm not making that call. Whether he had restrictions or not doesn't matter because he was able to do his past work.

Q He was able to do his past work before the accident and as a result of the accident, you would agree, he's no longer able to do that past work?

A I'm not here to comment on whether it's the result or not. I'm just stating that he can no longer do it. Causing was not my issue. But I have no -- I'm not doubting it. I'm just saying I cannot comment.

Q So can we agree as of the time of your evaluation he can't do the work that he did at the time of his accident, can we agree on that?

A Yes.

Q Can we agree that at the time of his

1 G. Young

2 accident his work was not considered

3 sedentary, can we agree on that?

4 A Correct.

5 Q And can we also agree that at the time

6 of his accident he was able to work full

7 time?

8 A Yes, yes, at the time of his accident.

9 Q And can we also agree that at the time

10 of his accident he was able to earn an income

11 upwards of \$100,000?

12 A For the one year, yes.

13 Q Close to \$90,000 on an annual basis

14 for two others years, correct?

15 A Correct.

16 Q And can we agree as of now he cannot

17 earn anywhere near 90 to \$100,000 in the

18 workplace?

19 A Correct.

20 Q Can we also agree that at best, based

21 on your vocational analysis, he could earn

22 somewhere in the \$30,000 range working full

23 time?

24 A Unless we're talking about the Home

25 Depot he can earn up to 50,000.

1 G. Young

2 Q And that's where you're stating though
3 that you have no specific job at Home Depot
4 that you can show us would pay him that?

5 A Not at this time, correct.

6 Q And of the jobs working full-time he
7 could only earn an annual salary of the
8 \$30,000 range, can we agree that if he had to
9 work part-time it would probably be somewhere
10 in the \$15,000 range yearly?

11 A Approximately, yes.

12 Q So you don't dispute the fact that
13 prior to May 26, 2017 he had the earning
14 capacity ability to earn anywhere from 90 to
15 \$100,000, and currently he has the earning
16 capacity to earn anywhere from 15,000 to
17 \$30,000-something?

18 A The only thing I would add to that is
19 depending upon the medical information.

20 Q But based on the records you've seen
21 so far would you agree with that statement,
22 that at the time of the accident he was able
23 to earn somewhere between around \$90,000 but
24 presently now he's looking at, on the low
25 end, \$15,000 a year if he works part-time to

1 G. Young

2 somewhere in the 30,000-dollar range if he's
3 working full-time, you would agree with that,
4 right?

5 A Unless we include the Home Depot, yes.

6 Q Except for that Home Depot job that
7 you can't give me any specifics about, right?

8 A Not specific names, correct.

9 Q And you don't know if that specific
10 Home Depot job in kitchen sales you're
11 referring to, is even located anywhere in the
12 county that he lives in, do you?

13 A Not specifically.

14 Q Can you go to page 13 please of your
15 report.

16 A Okay.

17 Q If you could go to the second full
18 paragraph, the last line. Can you read that
19 for me it begin with the word "it."

20 A (Reading): It is also acknowledged.
21 That line?

22 Q Yes.

23 A (Reading): It is also acknowledged
24 that his back problems now limit him to
25 sedentary jobs.

1 G. Young

2 Q When you say that in your report,
3 you're saying you are acknowledging this that
4 his back problems limit him to sedentary
5 jobs?

6 A It appears so. I don't know if "it's
7 my opinion" is the right term. I think that
8 as being a medical decision and I have no
9 reason not to disagree with it. Not artfully
10 said.

11 Q I'm sorry. I didn't hear that.

12 A Not artfully said. I don't like the
13 double negatives.

14 Q I understand. That's okay.

15 Now, in the next paragraph you say
16 "Mr. [REDACTED] may be able to return to
17 part-time work as a comfort advisor in a
18 retail setting such as Home Depot."

19 Do you see that?

20 A Yes.

21 Q And that's your opinion that you can't
22 do that full time, correct, only part-time?

23 A He may be able to do it full time.
24 I'm not sure on that.

25 Q In your report you don't say that he

1 G. Young

2 may be able to do it full-time, you say he
3 may be able to do it part-time, correct?

4 A Correct.

5 Q Now, further down on the page there's
6 a paragraph that starts with "the issue of
7 him returning to jobs."

8 A Yes.

9 Q In the last sentence you reference the
10 fact that he has significant heart issues
11 which impacts his ability to work?

12 A Correct.

13 Q Have you seen anything in your review
14 of this case, either from the records you
15 reviewed or your interview of Mr. [REDACTED] or
16 anything else, to lead you to believe that
17 any heart issues have limited his ability to
18 work?

19 A Not specifically, no.

20 Q And as you sit here today, do you have
21 an opinion, when you performed this
22 vocational analysis, as to whether any heart
23 issues he currently has would prevent him
24 from available work in the workplace?

25 A Well, I just thought it was prudent,

1 G. Young
2 and actually the restrictions for heart
3 difficulties and spinal difficulties
4 basically would be the same type of
5 limitations as far as lifting and things like
6 that.

7 The only thing where the heart
8 possibly could be involved is in what most
9 people are considered to be stressed in
10 stress-like duties.

11 Q As of now can you tell me if there are
12 any jobs that he cannot do now specifically
13 because of any heart issue or heart condition
14 he has?

15 A No. If you read the next paragraph it
16 sort of explains that, you know, I'm just --
17 I believe it is important in my report to
18 bring that issue up or acknowledge that issue
19 but not say that, you know, like I looked at
20 his EKG.

21 Q Can we go please to page 14, your
22 conclusions.

23 A Sure.

24 Q You state at the top that he was
25 injured in an accident on May 26, 2017?

1 G. Young

2 A Yes.

3 Q You don't dispute that?

4 A That's not my issue, but I don't
5 dispute it.

6 Q You don't dispute what you say in your
7 next paragraph as far as the treatment that
8 he had, including a micro lumbar discectomy
9 and a fusion surgery?

10 A Correct.

11 Q And you don't dispute that those
12 surgeries were related to the accident of
13 May 26, 2017?

14 A Correct.

15 Q And then in the third paragraph it
16 says, "Prior to the accident, Mr. [REDACTED] had
17 some neck and back problems." Do you see
18 that?

19 A Yes.

20 Q What is your basis for saying that he
21 had some neck and back problems?

22 A That was in discussion with him.

23 Q Other than that, did you see any other
24 medical records?

25 A Oh, let me just add to that. I'm not

1 G. Young
2 saying that they were conclusive. I
3 considered them more like the terrible thing
4 that happens with a person's age.

5 Q Right. I'm just asking if you've
6 reviewed any medical records as part of your
7 analysis in this case that indicated to you
8 that he had any type of prior back or neck
9 problems?

10 A Not specifically, no.

11 Q Then at the bottom of that paragraph
12 you conclude, "If he's able to return to a
13 part-time position as comfort manager, he
14 will not have further economic loss." Do you
15 see that?

16 A Correct.

17 Q What do you mean by that?

18 A Well, if I'm recalling he was
19 part-time at the time of him leaving the job.
20 If he returns to part-time the assumption is
21 he could earn in some more capacity.

22 Q So you're basically saying if he was
23 able to go back to the job at the time he got
24 fired working part-time, then he wouldn't
25 have future economic loss more than what he

1 G. Young
2 was earning at the time that he was working
3 part-time and fired?

4 A I believe you said the question
5 correctly, yes.

6 Q But what this does not mean is that
7 he's not suffering economic loss as a result
8 of this accident, correct?

9 A Correct.

10 Q Because indeed he has suffered already
11 economic loss as a result of this accident,
12 correct?

13 MR. OBREGON: Objection to
14 form. Between the date of the
15 accident and now you mean?

16 MR. SMILEY: Yes.

17 Q He has suffered economic loss as a
18 result of this accident from the date of
19 accident until now, correct?

20 A Yes.

21 Q And you would agree that moving
22 forward now he will continue to sustain
23 economic loss as a result of the happening of
24 this accident, correct?

25 MR. OBREGON: Objection to

1 G. Young

2 form. You can answer.

3 A Yes, and approximately half of what he
4 was making prior -- half of what he was
5 making prior to the accident.

6 Q So if he was making on average about a
7 \$90,000 annual full-time salary at the time
8 of the accident, then moving forward, based
9 on your answer just now, he would be
10 sustaining about \$45,000 a year economic loss
11 moving forward?

12 A Yes.

13 Q What about the loss of potential
14 commissions, is that calculated in your
15 consideration of future economic loss?

16 A No, because it really does not matter
17 whether it's commission, straight salary,
18 draw against commission, salary plus
19 commission, et cetera. It's at the end of
20 the year how much they made. You know, there
21 are some jobs where it's a lien, you know,
22 you don't make much and at other times of the
23 year you make more. Things like that. So
24 it's best just to look at what the person
25 actually made.

1 G. Young

2 Q Is it also fair to look at a
3 percentage and in other words say that he was
4 able to work a hundred percent at the time of
5 the accident, and now as a result of the
6 accident he's able to work 50 percent of the
7 time so whatever the numbers were between
8 what he was doing full time and what's
9 part-time, his economic loss is now
10 50 percent of what it was?

11 A Generally, yes.

12 Q All, Doctor, I thank you for -- are
13 you a doctor?

14 A No, I'm not. I decided against that
15 path.

16 Q Well, you look like one so maybe
17 that's why I called you "doctor."

18 A Oh, thank you, sir.

19 Q With the glasses and the nice bald
20 head like mine.

21

22 (Continued on next page for jurat
23 accommodation.)

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G. Young

A Thank you, sir.

MR. SMILEY: Well, it was nice
speaking with you. Thank you for your
time today.

(Time noted: 2:05 p.m.)

GARY YOUNG

Subscribed and Sworn to before me
this day of , 2021.

Notary Public

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C E R T I F I C A T E

I, VILMA TORRES, hereby certify that the
Expert Deposition held before me on the 20th day of
May, 2021; that said witness was duly sworn before
the commencement of testimony; that the testimony
was taken stenographically by myself and then
transcribed by myself; that the party was
represented by counsel as appears herein;

That the within transcript is a true record
of the Expert Deposition of said witness;

That I am not connected by blood or marriage
with any of the parties; that I am not interested
directly or indirectly in the outcome of this
matter; that I am not in the employ of any of the
counsel.

IN WITNESS WHEREOF, I have hereunto set my
hand this 9th day of June, 2021.

A handwritten signature in cursive script, appearing to read "Vilma Torres", is written over a horizontal line.

VILMA TORRES, RPR, CSR

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STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED by
and between the attorneys for the respective
parties herein, that filing and sealing be and
the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form of the
question, shall be reserved to the time of the
trial.

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be sworn to and
signed before any officer authorized to
administer an oath, with the same force and
effect as if signed and sworn to before the
Court.

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VIDEOCONFERENCE STIPULATION

IT IS HEREBY STIPULATED AND AGREED by
and between counsel for all parties present that
pursuant to the CPLR section 3113(d) this
deposition is to be conducted by video
conference, that the court reporter, all counsel,
and the witness are all in separate remote
locations and participating via videoconference
(LegalView/Zoom) meeting under the control of
Lexitas Court Reporting Service, that the officer
administering the oath to the witness need not be
in the place of the deposition and the witness
shall be sworn in remotely by the court reporter
after confirming the witnesses identity, that
this videoconference will not be recorded in any
manner and that any recording without the express
written consent of all parties shall be
considered unauthorized, in violation of law, and
shall not be used for any purpose in this
litigation or otherwise.

IT IS FURTHER STIPULATED that exhibits
may be marked by the attorney presenting the
exhibit to the witness, and that a copy of any

1
2 exhibit presented to a witness shall be e-mailed
3 to or otherwise in possession of all counsel
4 prior to any questioning of a witness regarding
5 the exhibit in question. All parties shall bear
6 their own costs in the conduct of this deposition
7 by videoconference, notwithstanding the
8 obligation by CPLR to supply a copy of the
9 transcript to the deposed party by the taking
10 party in civil litigation matters.
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STIPULATIONS

IT IS HEREBY STIPULATED AND
AGREED by and between (among) counsel for
the respective parties hereto, that:

All rights provided by the
C.P.L.R., including the right to object to
any question, except as to form, or to move
to strike any testimony at this (these)
examination(s), are reserved, and, in
addition, the failure to object to any
question or to move to strike any testimony
at this (these) examination(s) shall not be
a bar or waiver to make such motion at, and
is reserved for the trial of this action;

IT IS FURTHER STIPULATED AND
AGREED by and between (among) counsel for
the respective parties hereto, that this
(these) examination(s) may be sworn to by
the witness(es) being examined, before a
Notary Public other than the Notary Public
before whom this (these) examination(s) was

1
2 (were) begun; but the failure to do so, or
3 to return the original of this (these)
4 examination(s) to counsel, shall not be
5 deemed a waiver of the rights provided by
6 Rules 3116 and 3117 of the C.P.L.R., and
7 shall be controlled thereby;

8
9 IT IS FURTHER STIPULATED AND
10 AGREED by and between (among) counsel for
11 the respective parties hereto, that this
12 (these) examination(s) may be utilized for
13 all purposes as provided by the C.P.L.R.;

14
15 IT IS FURTHER STIPULATED AND
16 AGREED by and between (among) counsel for
17 the respective parties hereto, that the
18 filing and certification of the original of
19 this (these) examination(s) shall be and
20 the same hereby are waived;

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22 IT IS FURTHER STIPULATED AND
23 AGREED by and between (among) counsel for
24 the respective parties hereto, that a copy
25 of the within examination(s) shall be

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furnished to counsel representing the
witness(es) testifying, without charge.

IT IS FURTHER STIPULATED AND
AGREED by and between(among) counsel for
the respective parties hereto, that all
rights provided by the C.P.L.R., and Part
221 of the Uniform Rules for the Conduct of
Depositions, including the right to object
to any question, except as to form, or to
move to strike any testimony at this
examination is reserved; and in addition,
the failure to object to any question or to
move to strike any testimony at this
examination shall not be a bar or waiver to
make such motion at, and is reserved to,
the trial of this action.

* * *

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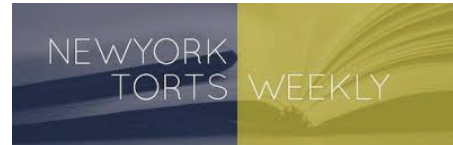
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