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Automobile Accident Case:
Part 6 – The Trial

Materials By:
Andrew J. Smiley, Esq.

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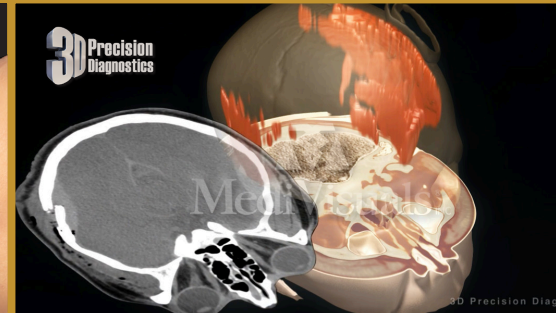
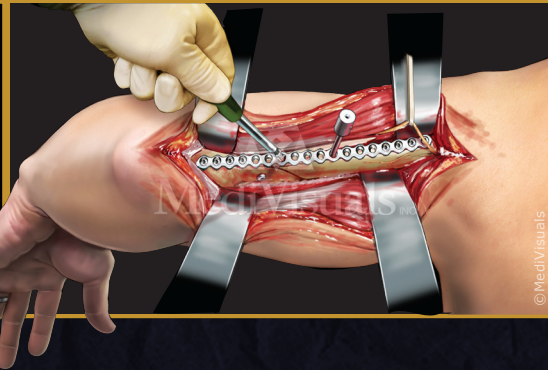
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Justice of the Supreme Court, New York



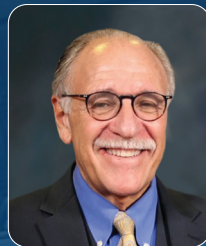
Richard P. Byrne, Esq.
Complex Commercial, Insurance/Reinsurance Risk Allocation, Employment, Construction



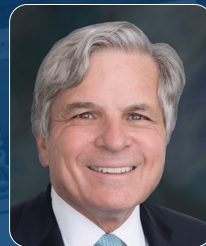
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Real Estate, Co-op and Condominium, Contracts/Corporate/Business Disputes



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Construction Law, Real Estate Law



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Contract/Corporate/Business Disputes, Real Property/Land Use/Zoning, Employment



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Insurance Coverage, Complex Business/Corporate Disputes



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Presiding Justice of the Appellate Division, 2nd Judicial Department



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Intellectual Property, Licensing and Advertising Law



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Acting Supreme Court Justice, 1st Department, Commercial Division



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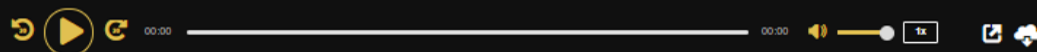
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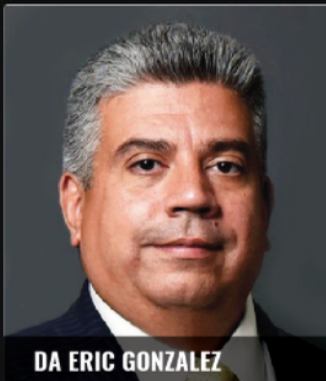
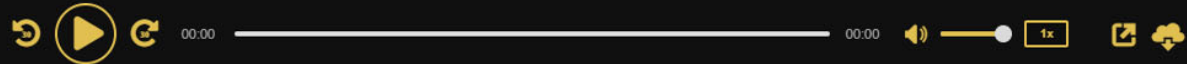
INTERVIEW

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.



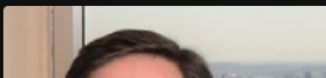
INTERVIEW

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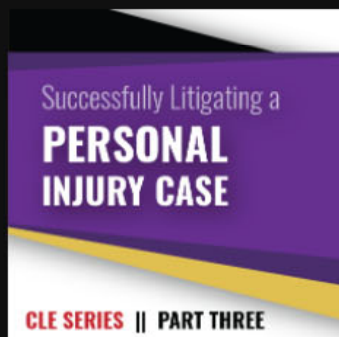
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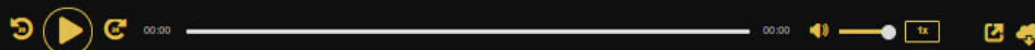
-Video Episode - Andrew discusses properly preparing and conducting depositions. 1.5 CLE credits.



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.



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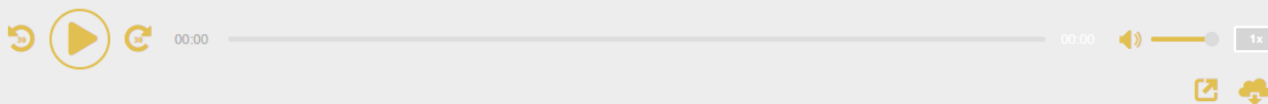
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We hope you enjoy this highly rated podcast hosted by Andrew J. Smiley, Esq. and featuring interviews with other experts in law and litigation, CLE and educational series, and great legal advice.



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.

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





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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

You may call your first witness.

14 MR. SMILEY: Thank you, your Honor. The

15 plaintiff calls the plaintiff, Dustin Dibble.

16 THE COURT: Mr. Dibble, if you will take

17 the witness stand, sir, please.

18 COURT CLERK: Step up and remain

19 standing. Hold up your right hand.

20 D U S T I N D I B B L E, after having been duly

21 sworn by the court clerk, was examined and testified

22 as follows: By the clerk

23 THE WITNESS: Yes, I do.

24 COURT CLERK: Have a seat, please. In a

25 loud, clear voice, so they can hear you

26 throughout the courtroom, please give your name

1 Direct-D.Dibble-Smiley

2 and address.

3 THE WITNESS: My name is Dustin Dibble.

4 I live at 6825 Colonial Road, Apartment 2R,

5 Brooklyn, New York, 11220.

6 COURT CLERK: Thank you. Witness has

7 been sworn.

8 MR. SMILEY: Thank you, your Honor.

9 DIRECT EXAMINATION

10 BY MR. SMILEY:

11 Q. Good afternoon, Dustin.

12 A. Good morning.

13 Q. Could you tell the jury how old you are.

14 A. I'm 25 years old.

15 Q. And when were you born? What's your date

16 of birth?

17 A. I was born September 15th, 1983.

18 Q. Where did you grow up?

19 A. I grew up in a small town outside of

20 Buffalo called Corfu, New York.

21 Q. And tell us about your family.

22 A. My mom and my dad, my mom is right there

23 (indicating), and I have two older brothers.

24 Q. And for how long did you stay in Corfu

25 before coming down to the city?

26 A. I lived there my whole life, since I was

1 Direct-D.Dibble-Smiley

2 born.

3 Q. And what are your brothers' names?

4 A. My oldest brother's name is Christian,

5 and my other brother's name is Nicholas.

6 Q. How old are they?

7 A. Nick is 30 and Chris is 33.

8 Q. What about your parents, what are their

9 names?

10 A. My mom's name is Susan and my father's

11 name is Douglas.

12 Q. What do your parents do for a living?

13 A. My mom is a teacher, special education

14 teacher, and my dad works in construction.

15 Q. Now, did you go to high school in Corfu

16 where you grew up?

17 A. The high schools were located in that

18 town, but the school district was known as Pembroke.

19 Q. Did you play any sports while in high

20 school?

21 A. Yeah. I played throughout my entire

22 time, from 7th grade up until 12th grade. I played

23 football, basketball and baseball.

24 Q. What positions did you play?

25 A. Football, I played both offense and

26 defense. I was a safety on defense and wide receiver

1 Direct-D.Dibble-Smiley

2 on offense. I was also the punter and the kicker. In

3 terms of basketball, I played shooting guard. And

4 baseball I played center field.

5 Q. And are you right handed dominant or left

6 hand dominant?

7 A. Right handed.

8 Q. What about with your legs, before your

9 accident, which was your dominant leg?

10 A. Same thing, right. It was my right leg.

11 Q. In high school did you receive any honors

12 either in academics or sports or anything else?

13 A. My senior year I made all league for both

14 basketball, football and baseball. And I also made
15 the all greater Rochester basketball team, known as
16 the Ronald McDonald team. And I was voted by my peers
17 as most athletic in our senior class and also, like
18 you mentioned before, outstanding male athlete of the
19 year voted by faculty and coaching staff.

20 Q. After graduating from high school, did
21 you go to college?

22 A. Yes, I did.

23 Q. Where did you go to school?

24 A. I went to Utica College.

25 Q. And just give the jury a general idea
26 about what type of school that is.

1 Direct-D.Dibble-Smiley

2 A. It's located right in the city of Utica,
3 New York. At the time that I started attending, it
4 was affiliated with Syracuse University. When I
5 graduated, I got a Syracuse diploma. It's a small,
6 private college, maybe about -- I think at the time
7 that I enrolled it was about 2,000 was the amount of
8 people that were going there at the time. On campus
9 housing and just a typical college.

10 Q. And did you play sports in college at
11 Utica?

12 A. Yeah. I was recruited to play football
13 there. And while I was there for football, I actually

14 submitted one of my tapes that I made myself to the

15 basketball coach and asked him if I could try out for

16 the team. I ended up playing football freshman year

17 and left the team because I wanted to play basketball.

18 And I wasn't able to do both at the same time.

19 Q. Did you play the same positions in

20 college that you told us about in high school?

21 A. Yes, I did.

22 Q. And did you graduate from Utica College?

23 A. Yes.

24 Q. Did you graduate with a degree?

25 A. Yes. I graduated with a Bachelor of

26 Science degree, *cum laude*.

1 Direct-D.Dibble-Smiley

2 Q. What does cuma laude mean?

3 A. I believe it's a GPA, overall GPA of 3.4

4 or higher.

5 Q. And did you have a degree in a specific

6 area of study?

7 A. The degree that I received was in

8 economic crime investigation, criminal justice, with a

9 concentration in computer security.

10 Q. Is there a reason that you focused in

11 that area of study while in college?

12 A. One of the reasons I picked that college,

13 not only because I was recruited, but the economic

14 crime investigation program, at the time Utica was one
15 of the only two colleges in the country that offered
16 that program. And from what I had talked about with
17 professors and orientation, it was high in demand in
18 terms of that field.

19 Q. And at the time that you got your studies
20 going in that area, did you have any idea of what you
21 wanted to use that degree for? What type of work you
22 wanted to get into?

23 A. I always had a desire to be in some type
24 of law enforcement, whether or not it had been state
25 trooper, border patrol or, you know, I was younger, I
26 talked about possibly getting into the FBI someday.

1 Direct-D.Dibble-Smiley

2 Q. When you graduated from college, when was

3 that?

4 A. Graduated in May of 2005.

5 Q. What did you do after graduation?

6 A. After graduation part of our requirements

7 for my major was I had to complete a ten week

8 internship. And I ended up getting an internship at

9 HIP Health Plans. It was located in Woodbridge, New

10 Jersey.

11 THE COURT: That's the health insurance

12 plan of New York?

13 THE WITNESS: Yes.

14 THE COURT: HIP?

15 THE WITNESS: Yes.

16 Q. Can you give the jury an idea of what

17 that internship involved and what you did?

18 A. Sure. The internship was in their

19 special investigations unit. Their main function

20 there is to focus on finding any health care fraud

21 committed against the company. And, unfortunately,

22 since I was just an intern, I was only allowed limited

23 access to the system. So, my primary obligations were

24 just to assist the other investigators in any type of

25 basic paperwork or questioning that it involved and

26 also answering their hotline to take complaints from

1 Direct-D.Dibble-Smiley

2 subscribers and providers.

3 Q. Did you eventually get a paying job in

4 the field of investigation?

5 A. Yes, I did.

6 Q. What was your first paying job?

7 A. My first paying job was at Bergdorf

8 Goodman as a loss prevention specialist.

9 Q. When did you start there?

10 A. I started there February 6, 2006.

11 Q. At the time that you started working at

12 Bergdorf, where did you live?

13 A. When I first started working there, I

14 lived on Staten Island, New York.

15 Q. Did you live with anybody?

16 A. Yes. I lived with my brother.

17 Q. Your brother Nick who is here?

18 A. My brother Nick, yes.

19 Q. And what did you do for Bergdorf Goodman?

20 What was your duties there?

21 A. I was a loss prevention specialist. We

22 were in charge of maintaining any type of integrity.

23 And we were responsible for all the merchandise and

24 the employees in the store. Also looking for

25 shoplifters, whether it was an employee or a customer.

26 Also, you know, bag checks, ID checks and any type of

1 Direct-D.Dibble-Smiley

2 accidents or credit card fraud that had happened at

3 the company.

4 Q. And what days of the week would you work

5 back then, in February into April of 2006 at Bergdorf?

6 A. It varied. The store is a retail store.

7 So, the only time it was closed was major holidays.

8 We were open seven days a week. I never had steady

9 hours in terms of the actual days. It varied from

10 week to week.

11 MR. SMILEY: Your Honor, if it's okay

12 with the Court, I think at this time it would be

13 an appropriate time to perhaps take a break. The

14 next area that we'll explore testimony will start

15 getting into the actual day of the incident.

16 THE COURT: And we would run over then.

17 MR. SMILEY: Yes. I believe we would run

18 over that time.

19 THE COURT: Okay. Very well. All right.

20 Mr. Dibble, why don't you resume your seat and

21 we'll continue your testimony tomorrow. Thank

22 you, sir.

6 CONTINUING DIRECT EXAMINATION

7 BY MR. SMILEY:

8 MR. SMILEY: May I proceed, your Honor?

9 THE COURT: You may.

10 MR. SMILEY: Thank you.

11 Q Good morning, Dustin.

12 A Good morning.

13 Q We're going to pick up where we left off,

14 which is talking about your work at Bergdorf Goodman

15 and that you were working Saturday, April 22, 2006?

16 A Yes, I was.

17 Q Okay. Tell us, what happened towards the

18 end of that day of work.

19 A Saturday, the store usually closes at 7,

20 and we leave anywhere in between 7:30, 8 o'clock,

21 depending on how long it takes the associates to get

22 out of the store, the customers and for us to do our

23 closing procedures.

24 And so we were just closing up the

25 store at that time and waiting to leave for the day.

26 Q And did you have any plans or did you make

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1 Dibble - Plaintiff - Direct/Smiley

2 any plans to go out upon finishing work on Saturday?

3 A Yes, I did.

4 Q What did you do?

5 A I received a call from one of my friends

6 that I've been friends with for a long time since I was

7 younger, and she said that she was up at a bar with

8 some of her friends and she asked if I wanted to meet

9 her there.

10 Q What is this friend's name?

11 A Her name is Nikki Della Penta.

12 Q How did you know Nikki?

13 A I've known her since I was in sixth grade,

14 we've been friends for a long time, and we even dated

15 for a couple of years.

16 Q And did you, in fact, go up and meet with

17 Nikki and some other people?

18 A Yes, I did.

19 Q And where did you go?

20 A We went to a bar up on the Upper West Side

21 of Manhattan.

22 Q Was that your first time going out on a

23 Saturday night in Manhattan?

24 A No, it wasn't.

25 Q Can you give the jury an idea of what your

26 habits were back then as far as when and where you

1 Dibble - Plaintiff - Direct/Smiley

2 would go out in the city?

3 A Like I said before, the days I would work

4 usually varied. Sometimes I had to work on Saturday,

5 sometimes I wouldn't. So it depends, I mean we usually

6 try to stay in the area.

7 So at the time I didn't really know

8 that many people up there, really only knew the people

9 that I worked with.

10 So when we went out, we usually

11 generally stayed just in the area where Bergdorf was

12 located.

13 Q Where was that?

14 A It's on 57th and Fifth Avenue.

15 Q And were there certain nights of the week

16 that you would typically go out or not go out?

17 A Just on the weekend, usually, I mean, the

18 days I'd have off during the week I'd used to run my

19 errands or do whatever stuff I couldn't take care of

20 because I wouldn't get out of work until, during the

21 week until 8:30, 9 o'clock, so I wasn't able to take

22 care of any errands, laundry or pay my bills, anything

23 like that that needs to take care of.

24 Q Approximately what time did you arrive at

25 the bar when you met up with Nikki and her friends?

26 A Approximately 9 o'clock, 9 p.m.

1 Dibble - Plaintiff - Direct/Smiley

2 Q Tell the jury what happened when you got

3 there, what transpired.

4 A Well, when I got there, she'd already been

5 there with a group of friends. I wasn't aware of any

6 of the friends, I didn't know them at all, they were

7 friends I believe she met when she was at college, and

8 we met up there.

9 And when I entered, they were sitting

10 at the back at a big table. There was a group of them.

11 I went to the back and sat down and just started

12 talking.

13 Q And were you guys drinking at the bar?

14 A Yes, we were.

15 Q What were you drinking?

16 A We had pitchers of beer because there was

17 so many of people that they just ordered pitchers.

18 Q And what transpired throughout the rest of

19 your stay at that first bar?

20 A I just caught up with Nikki, I hadn't seen

21 her in a while, so we just reminisced, caught up on

22 things, just talked about old times and just drank.

23 Q Can you give the jury an idea of how long

24 you were at that bar before leaving that bar?

25 A We were there maybe an hour or two.

26 Q And over the course of that time, about

1 Dibble - Plaintiff - Direct/Smiley

2 how much had you drank?

3 A Probably about three or four glasses, just

4 the typical bar glass. I don't know exactly how many

5 ounces those are, but just the typical glass you get

6 when you're out at a bar.

7 Q You were filling that with the pitchers

8 that were at the table?

9 A That is correct.

10 Q And where did you go upon leaving that

11 bar?

12 A After we left that bar, we walked, I don't

13 know how many blocks, couple of blocks, it was within

14 walking distance to a second bar.

15 Q Okay. And do you remember what the

16 weather was that night?

17 A It was raining out that night.

18 Q And who was it that left the first bar

19 from the group of people that were there to go on the

20 second bar?

21 A When we left the first bar, the only

22 people that went to the next one was me, Nikki and one

23 of her friends.

24 Q And what did you do when you got to the

25 second bar?

26 A When we got to the second bar, the Buffalo

1 Dibble - Plaintiff - Direct/Smiley

2 Sabers game was on, hockey game, and so we were just

3 watching the game and just continued to talk and have a

4 couple more drinks.

5 Q Did you have a table, like at the first

6 bar?

7 A No, the bar is pretty busy, so there

8 wasn't any available seats to sit down, so we stood the

9 whole time.

10 Q And did you have more beer at this bar?

11 A Yes, we did.

12 Q Give the jury an idea of how much you

13 drank when you were at this bar?

14 A Usually about three or four more bottles,

15 we had bottles at the second bar.

16 Q This amount of beer that you had, was this

17 something unusual for you or different from you as far

18 as prior nights going out for drinks?

19 A No. I mean, I never sat there and kept an

20 exact count of, you know, how many exact glasses or

21 bottles I had drank. But just a typical night out, I

22 mean we were there for probably a total of four or five

23 hours throughout the night, so it was just constant

24 throughout the night. It wasn't anything out of the

25 ordinary.

26 THE COURT: Excuse me, is that four or five

1 Dibble - Plaintiff - Direct/Smiley

2 hours the second bar or four or five hours total in two

3 bars?

4 THE WITNESS: Total.

5 Q And from the time you left work up until

6 the end of your stay at the second bar, did you have

7 anything to eat, any type of dinner?

8 A No, I didn't eat anything during that

9 time.

10 Q Can you give the jury an idea of your

11 drinking habits at that time, whether or not you had

12 drank beer before when you drank in college, whether or

13 not you drank any type of alcohol?

14 A Well, I had just graduated from college

15 maybe in May of 2005, so less than a year before I was

16 out there, I mean I was in college. I had a suite with

17 five other guys, we did what you do when you are in

18 college. We had parties, we drank and just the usual,

19 usual habits, you know, drank socially on the weekends

20 and you know, it wasn't any, anything out of the

21 ordinary for me to go out on a Saturday night after

22 work and have some drinks with some friends.

23 Q Back at this time in April of 2006, were

24 you about the same size that you are now?

25 A Yes.

26 Q Okay. And how tall are you?

1 Dibble - Plaintiff - Direct/Smiley

2 A I'm five ten.

3 Q And how much do you weigh?

4 A One hundred ninety pounds.

5 Q Now, what happened at the conclusion of

6 your stay at the second bar?

7 A After we left the second bar, we needed

8 to, I needed to go home at the time, I was on Staten

9 Island, so we hailed a taxi and we took a taxi to the

10 train station.

11 Q Was it still raining out at that time?

12 A Yes, it was.

13 Q And who got into the taxi?

14 A It was me, Nikki and her friend still was

15 at the time.

16 Q Do you remember her friend's name?

17 A No. I've been told it since, but I don't

18 really remember it off the top of my head, no.

19 Q Does Anthony sound familiar?

20 A Yes.

21 Q And is there a reason that you didn't stay

22 in the cab and take the cab home to Staten Island?

23 A Well, at the time I had just started that

24 job maybe a month or two before, and I mean, when I got

25 the job I had pretty much no money, and I had just

26 actually got a new apartment a couple of days before

1 Dibble - Plaintiff - Direct/Smiley

2 that night of the accident and I had to put a down

3 payment and first month's rent.

4 So, at the time I wasn't, I was kind

5 of strapped for money and through my experience from

6 taking cabs home from Bergdorf after late nights like

7 overtime at work, the cab rides around that area

8 usually are around 60, 70 dollars, not including tip

9 all the way to where I lived in Staten Island.

10 So I just, I didn't have that kind of

11 money on me at the time to be able to spend on that.

12 Q What about Nikki and Anthony, do you know

13 if they had plans to take a cab to wherever they were

14 going home?

15 A They lived in New Jersey at the time. I

16 don't know where he lived. I knew she lived in

17 Weehawken, New Jersey, so, the only mode they were able

18 to get, they intended to take the Path train back to

19 New Jersey.

20 Q And where did you take the cab to?

21 A To Union Square.

22 Q And what happened when you arrived at

23 Union Square?

24 A We got out of the cab and said our

25 goodbyes.

26 Q Do you know what time it was about the

1 Dibble - Plaintiff - Direct/Smiley

2 time that you either left the bar or got in the cab or

3 got out of the cab?

4 A I wasn't really keeping track of the time.

5 I don't remember any specific time, ever really

6 noticing any time.

7 Q And when you arrived at Union Square, was

8 it still raining out?

9 A Yes, it was.

10 Q And do you recall getting out of the cab

11 and saying goodbye to Nikki and her friend?

12 A Yes.

13 Q Okay. And do you recall how you felt at

14 that time in view of the fact you'd been drinking all

15 night? Did you feel drunk, very drunk, did you feel

16 controlled, how did you feel?

17 A I mean, like I said before, it wasn't any

18 night that was out of the ordinary. I felt I was in

19 control, I knew where I needed to go. I knew that I

20 had to get the train down to the Staten Island Ferry,

21 take the ferry over, which is a process in itself, and

22 from there I'd have to either take a local bus or take

23 a cab service to my house from there, I couldn't walk

24 or anything.

25 Q Other than the method you just described

26 to get home, did you have any other way of getting home

1 Dibble - Plaintiff - Direct/Smiley

2 that night?

3 A Other than what we said before about maybe

4 taking a taxi all the way there, which was at the time

5 pretty expensive for me, I didn't know of any other way

6 I could have gotten back on Staten Island.

7 Q What's the next thing you recall, Dustin,

8 after getting out of the cab and saying goodbye to

9 Nikki and her friend?

10 A After I got out of the cab, we said our

11 goodbyes. The next thing I remember is waking up in

12 the hospital.

13 Q And what do you recall about waking up in

14 the hospital?

15 A This guy was, they were holding me down,

16 it was a group of people and they, the guy was holding

17 me, they needed to pop my hip back into place, it had

18 been dislocated.

19 Q Do you have any recollection whatsoever

20 about this train accident, Dustin?

21 A No, I don't.

22 Q Do you remember being in the station or

23 going to the station?

24 A No.

25 Q Do you remember being on the platform at

26 any time?

1 Dibble - Plaintiff - Direct/Smiley

2 A No.

3 Q Do you have any recollection about being

4 on the tracks or how you may have gotten on the tracks?

5 A No, no, I don't.

6 Q What about anything to do so with actually

7 being struck by the train?

8 A I don't remember anything in terms of the

9 actual accident. Like I said, I got out of the cab,

10 said our goodbyes and the next thing I knew I was in

11 the hospital.

12 Q What were you wearing on the night of the

13 accident?

14 A I was wearing blue jeans, black shirt,

15 black sweatshirt, it was a down sweatshirt and

16 Timberland boots.

17 Q And can you describe what the sweatshirt

18 looked like?

19 A It was a regular like cotton sweatshirt,

20 it was a silver zipper down the front, had a hood, the

21 inside of the hood was lined with maroon and on the

22 front it said "Brooklyn" across the front in a maroon,

23 the same color maroon with white stitching around the

24 block lettering.

25 Q Do you remember what company that was from

26 or where you got that?

1 Dibble - Plaintiff - Direct/Smiley

2 A I believe it was from Old Navy.

3 Q Do you still have that sweatshirt?

4 A No, I don't.

5 Q And at my request did you dress today in a

6 similar fashion other than the sweatshirt as to how you

7 were dressed on the evening of the accident?

8 A Yes, I am.

9 Q And what you're currently wearing, just so

10 we know for the record, what are you wearing?

11 A I'm wearing a dark colored shirt, button

12 down, blue jeans and Timberland boots.

13 Q What color are the Timberland boots that

14 you are wearing?

15 A They're tan and with black sole bottoms.

16 Q And were you wearing similar boots on the

17 night of the accident?

18 A Yes.

19 Q And similar jeans on the night of the

20 accident?

21 A Yes.

22 Q Now, we expect there to be some evidence

23 or testimony that you were observed at some point on

24 the tracks and what's been described as a Muslim

25 praying, someone down on their knees with their

26 buttocks in the air, leaning forwards.

1 Dibble - Plaintiff - Direct/Smiley

2 MR. SMILEY: And with the Court's permission,

3 we'd ask that Dustin be able to come down into the well

4 of the courtroom to get into that Muslim prayer for

5 purposes of demonstrating to the jury how he may have

6 appeared on that night.

7 THE COURT: All right.

8 MR. GIORDANO: No objection.

9 Q Dustin, could you come down here, please.

10 Take your time.

11 (The witness leaves the stand.)

12 Q Now what I'd like you to do, so the jury

13 could see, take your time, get slowly down with your

14 head facing this way. This way, okay? On your knees,

15 and rest down on your arms, if you can. Okay.

16 MR. SMILEY: If the jury wants to take a

17 moment just to look to see that.

18 THE COURT: Okay.

19 MR. SMILEY: Everyone has had a moment.

20 Q All right, Dustin, thanks. You can get up

21 now.

22 (The witness resumes the stand.)

23 Q Now Dustin, I want to pick up where we

24 left off at the hospital, okay?

25 By the way, before we get to the

26 hospital, were you ever told by anybody there were any

1 Dibble - Plaintiff - Direct/Smiley

2 witnesses to your accident?

3 A No, I wasn't aware of any. I wasn't told

4 that there was any witnesses to what happened.

5 Q And as far you know, no one was going with

6 you into the train, right?

7 A I didn't have any plans to meet anyone at

8 the train station, anything like that, so no, there is

9 no reason that I know of that anyone would have been

10 with me.

11 Q As best as you can, tell the jury about

12 what you recall about the initial phase of your stay at

13 the hospital.

14 A Well, like I said, first I remember, I had

15 my hip popped back into place and then --

16 Q Which hip was that?

17 A It was my left. My left hip.

18 And the initial thing that had to

19 happen was the amputation was the first surgery and

20 then while I was there, my initial stay was -- I'd had

21 to have multiple surgeries, because in terms of the

22 sanitary conditions of the tracks, and the way it was,

23 they were concerned with any type of infection. I was

24 running a little bit of a fever, they didn't establish

25 any type of infection, but they were concerned that

26 something could develop.

1 Dibble - Plaintiff - Direct/Smiley

2 So, they took a lot of precautions to

3 go in there and continually clean out the leg and make

4 sure at no time there was a chance that I could develop

5 any infection.

6 Q By the way, what hospital was this?

7 A This is Bellevue Hospital on First Avenue.

8 Q Now, you said the dislocation of the hip

9 was your left hip, which part was amputated of your

10 body?

11 A The lower half of my right leg.

12 Q And do you know from what point of your

13 right leg the initial surgery for the amputation was

14 performed, where that was done?

15 A I don't know exactly where. I know right

16 now it's about halfway between where my ankle would be

17 and my knee, so about halfway down your shin.

18 Q And you said there were a few surgeries

19 that focused just on that area of the amputation?

20 A Yes.

21 Q Do you recall the moment when you first

22 learned that you had lost your leg and had been in a

23 train accident?

24 A Yeah, I do.

25 Q Tell the jury about that.

26 A Kind of coming to a little bit and my mom

1 Dibble - Plaintiff - Direct/Smiley

2 was standing there, and you know, I could tell by the

3 look on her face that something wasn't right and she

4 just said that they had to amputate my -- the lower

5 half of my right leg.

6 Q How did you feel when you heard that for

7 the first time?

8 A I didn't feel good.

9 Q Do you know how you reacted upon hearing

10 the news?

11 A Disbelief. You know, kind of saying,

12 something kind of nightmare, eventually you're going to

13 wake up from. I was speechless, I didn't know how to

14 react. I didn't know what to do.

15 Q You said your mom was there?

16 A Yes, she was.

17 Q Was anybody else there at the moment that

18 you first learned about this?

19 A I don't remember seeing anyone else there.

20 I know that my brother was there somewhere, but he

21 wasn't, I don't remember him being in the room at the

22 time.

23 Q How long did you stay at Bellevue?

24 A I was there from the date of the accident

25 and I was discharged on May 17th.

26 Q So from April 22nd, 23rd to May 17th?

1 Dibble - Plaintiff - Direct/Smiley

2 A Correct.

3 Q And without getting through the

4 day-to-day, we don't want to take that much time.

5 And can you give the jury a general

6 idea of what was going on there, what you did over the

7 course of those three weeks?

8 A Sure. When I was first there, like I

9 said, I had go through a couple surgeries, so I stayed

10 on the intensive care floor where they continually

11 monitored my activities and the healing of the leg.

12 First they had to have a tube inside

13 of my leg to continually drain it and clean it to make

14 sure there wasn't any infection. I eventually had to

15 have that tube taken out and that was pretty painful.

16 And from there it was just a waiting

17 process. They had to come in and check every day on

18 the healing. Check my temperature to see if, like I

19 said before, if there was any infection.

20 And eventually, when they found, you

21 know, there wasn't any established infection, that it

22 was starting to heal up a little bit, I was moved down

23 to the rehab floor.

24 Q Before you moved down to the rehab floor,

25 during a time period before that, were you in any pain

26 on a regular basis at the hospital?

1 Dibble - Plaintiff - Direct/Smiley

2 A Yeah, I was in pretty bad pain.

3 Q Describe that to the jury.

4 A They had given me a morphine drip which I

5 had control of it, it was like a hand-held button that

6 you push. Didn't matter how many times I pushed it, it

7 would only release it mostly every 15 minutes at the

8 maximum.

9 But I was told by the nurses that I

10 was supposed to press the button any time I felt pain

11 because they registered how many times I pushed it, and

12 they were able to look at that and determine how much

13 pain I was in depending on how many times I pressed the

14 button.

15 Q And were you able to get out of bed during

16 the initial parts of your stay?

17 A Actually, I had to remain on my back

18 pretty much the whole time I was in the hospital, due

19 to my hip. I didn't have any surgery on it, it was

20 just they had popped it back in and that was all they

21 had done.

22 So I'd been instructed to remain on

23 my back. I couldn't roll over on my sides or roll on

24 my stomach or anything like that. I had to stay on my

25 back the entire I was there.

26 Q What did you do about when you needed to

1 Dibble - Plaintiff - Direct/Smiley

2 go to the rest room?

3 A At first I had a catheter and so I didn't

4 have to do so anything at that time.

5 But then eventually when they removed

6 that, I had to make my way. There was a bathroom in

7 the room that I was in, so I had to, with help from the

8 nurses and from my mom, made my way into a wheelchair,

9 then I was able to make it to the bathroom.

10 Q How long did you have the catheter?

11 A I don't remember the exact time. I know

12 they did take it out while I was still up on the

13 intensive care floor.

14 Q Did that cause you any discomfort, having

15 that process of the catheter?

16 A Oh, yeah, specially when they took it out.

17 Q Now, let's talk about your rehabilitation

18 in the hospital for a little bit.

19 Give the jury an understanding how

20 you went about losing your leg and how the folks at the

21 hospital working to try to get you so that you'd be in

22 a place where you can get discharged and have some type

23 of function.

24 A After it was said that I was okay to, you

25 know, move around with my hip and they moved me down to

26 the rehab floor, the day-to-day activities where I

1 Dibble - Plaintiff - Direct/Smiley

2 would do both rehabilitative in terms of physical

3 activity and I would also do other types of activities

4 like they'd bring us into an area where there was a

5 kitchen and they helped us learn how to move around in

6 the kitchen, keep our balance and do other household

7 chores that we're going to have to do when we were

8 released.

9 Also, using the bathroom, getting

10 from your wheelchair or crutches on to the toilet, be

11 able to get back off again safely.

12 Q How was your mind set, how were you

13 feeling during this process now where you got moved to

14 the rehabilitation unit and, you know, you were

15 learning how to transition to real life?

16 A At first I was happy, I mean, I was happy

17 to get off the intensive care floor, be able to get

18 around again, kind of be active a little bit, a little

19 more lax on the rehab floor.

20 Once I started doing the rehab and

21 having to go through all that, it was really

22 frustrating, because you go from being able to do the

23 simplest thing like walk up and down the stairs, and

24 use the bathroom and go to the bathroom and stuff like

25 that, to having to learn that all over again.

26 So, it was really frustrating when I

1 Dibble - Plaintiff - Direct/Smiley

2 first got down there.

3 Q How did they teach you to use the

4 bathroom?

5 A Well, they had like an example, like a

6 fake toilet set up and it had like a seat over it like

7 a chair seat and in terms of using the wheelchair, they

8 taught us how to bring the wheelchair up next to it,

9 and you have to transition yourself using the handles

10 from the wheelchair and the handles on the toilet seat

11 that they had, and pull yourself up on to it while

12 using the balance from my leg, from my left leg.

13 Q Is it fair to say for a period of time

14 when you'd go to the bathroom even for urination that

15 you would sit on the toilet?

16 A Yes, I had to. I didn't have any balance

17 at that time.

18 Q Okay. And for how long did you stay

19 through out that period of rehabilitation before being

20 discharged?

21 A I'd say I was on rehab for maybe a week

22 and a half. About half the time I was there I was on

23 the rehab floor.

24 Q And before being discharged, Dustin, did

25 you have any concerns about going back home by

26 yourself?

1 Dibble - Plaintiff - Direct/Smiley

2 A I knew my Mom was going to be there, so

3 that helped out a lot, but I didn't know what to

4 expect. You know, I had been home for three weeks, and

5 knew what I could do while I was on the rehab floor.

6 The larger kitchen -- but the way, my

7 apartment was set up, it was a wide open space, so I

8 was concerned and the bathroom was farther away from

9 where my bed was, I didn't have a bathroom in the same

10 room, have that luxury.

11 So, I was worried about how I was

12 going to get to the bathroom constantly. I didn't have

13 any of the things they had at the hospital at the time.

14 I didn't have a shower chair or a seat to go over the

15 toilet or any type of handles or anything like that.

16 So, I was concerned about how I was

17 going to function in my own apartment.

18 Q What was your status as far as what you

19 could do or couldn't do when you were discharged from

20 the hospital?

21 A Well, when I was first discharged I had

22 crutches, I was able to move around just with my

23 crutches, I didn't have a wheelchair or anything at the

24 time.

25 But my limb was still really weak, I

26 couldn't crouch for very long substances. And I

1 Dibble - Plaintiff - Direct/Smiley

2 couldn't stand on it. And I'm still working on my

3 balance, something I'm still getting used to, so I

4 couldn't stand for very long periods of time, I'd

5 always have to sit down if I was waiting.

6 Like I remember when I was

7 discharged, my Mom had to go get the car and I had to

8 wait in the waiting room still, because I wasn't able

9 to stand outside and wait, and also, in terms of the

10 weather conditions, it was raining out or anything like

11 that, I always had to be careful because all I had was

12 my crutches, and if those slipped, I was pretty much

13 going down.

14 Q Do you recall the day you were discharged

15 from the hospital?

16 A Yes, I do.

17 Q Tell us what you recall about that day.

18 A They weren't sure what day it was going to

19 be, so I kind of found out that day that I was going to

20 be discharged and I was pretty happy, I was ready to

21 get out of there. Right to get back to normal life.

22 And I was discharged and we, my mom

23 had driven in that day, driven the car in, and she came

24 and picked me up and we just went, we went home.

25 Q At that time did you have any type of

26 prosthesis, prosthetic device to use for your leg?

1 Dibble - Plaintiff - Direct/Smiley

2 A No, at that time the incision on the

3 bottom of my leg still wasn't -- excuse me, wasn't

4 completely healed, so I wasn't able to get any type of

5 prosthesis yet.

6 Q And when you left the hospital, did you

7 have at that time the opportunity to see the status of

8 the leg that had been amputated?

9 A Yes.

10 Q What did it look like?

11 A I had to constantly keep it wrapped. So

12 it was still, it was still kind of swollen, had a lot

13 of fluids still, and the bottom was pretty bad, pretty

14 bad scar, pretty bad scab still trying to heal.

15 Q What was it like when you looked down and

16 you didn't see your leg, the rest of your leg or your

17 foot there?

18 A I try my hardest not to look at it at the

19 time. But whenever I did, you know, it was just

20 unbelievable. I didn't, I didn't, I couldn't believe

21 it. I didn't know what to do.

22 Q Did you continue with any type of medical

23 treatment after your discharge?

24 A Yes, I did.

25 Q Okay, tell us about that.

26 A I had to constantly, like I said, it

1 Dibble - Plaintiff - Direct/Smiley

2 wasn't healed, so I had to, when I first was

3 discharged, I had to frequently go back for checkups

4 to, they wanted to check on the status of the healing,

5 see how it was doing, make sure everything was moving

6 along nicely.

7 Q How frequently did you have to go back to

8 the hospital to the clinic there?

9 A I don't remember exactly, maybe like every

10 other week I would say the appointments were at first,

11 and once it healed, then they were, they were less

12 frequent.

13 Q And as far as rehabilitation, and learning

14 how to make use and get around, how did you work on

15 that?

16 A They had given me exercises when I left,

17 the person I was working with gave me a sheet of

18 exercises to work on when I was home, stretching and

19 trying to strengthen my quads and my hip again.

20 The main concern was with my hip

21 because they wanted to make sure when I get my

22 prosthesis, I was able to walk the best that I could

23 without any weakness.

24 Q And did there come a time when you first

25 started the process of getting a prosthesis?

26 A Yes.

1 Dibble - Plaintiff - Direct/Smiley

2 Q Tell us about that.

3 A I'd finally found out that after one of my

4 checkups that it was healed completely and I was able

5 to get a prosthetic. I had been, when I was in some of

6 the hospital checkups, the person had come, a couple of

7 prosthesis companies had come in and talked with me,

8 and you know, advertise themselves and based on those

9 suggestions, I picked one specific company to do my

10 prosthetic.

11 Q And who was that?

12 A The name is Ultrapedics is the company

13 name, it's run by Eric Swelski.

14 Q Why did you decide to go with Mr. Swelski

15 and his company?

16 A They were located near where I was at the

17 time, they were in Brooklyn. He had been doing it for

18 a long time, 30 years, and what I really liked about

19 it, they were, they did custom made legs. Assessed

20 your situation, took his measurements, and really took

21 into account your lifestyle and what the type of person

22 you are, and tried to find the best way he could to get

23 a leg that would fit the person that you were.

24 Q What did you talk with Mr. Swelski about

25 in discussing your lifestyle and what type of leg you

26 wanted to fit into that lifestyle?

1 Dibble - Plaintiff - Direct/Smiley

2 A Well, I explained to him that I'd been

3 physically active, you know, I worked out and I played

4 basketball and whatever other sports I could at the

5 time.

6 So I was concerned that I wouldn't be

7 able to have a leg that I could do all those things

8 with, I could move around and, you know, make these

9 feel comfortable again and be able to walk.

10 Q When did this process start where you

11 worked with Mr. Swelski on developing some type of

12 prosthesis?

13 A I don't remember the exact date. When I

14 came in and went to his office for the first time, he

15 took a lot of measurements, and did stuff like that, we

16 discussed with what different types of leg there are.

17 You know, his process and how he

18 makes the casting and how he develops the leg and stuff

19 like that.

20 Q And throughout this time period, what was

21 happening with regards to your job at Bergdorf Goodman?

22 A I was lucky, I had just started, but the

23 manager I had at the time was a really nice guy and he

24 was able to talk with our Human Resources Department

25 and he got them to be able to give me disability

26 payment while I was out.

1 Dibble - Plaintiff - Direct/Smiley

2 Q And how long did you stay out of work

3 before returning in any measure?

4 A I was out from the date of the accident

5 until late June, I came back part time.

6 Q So just about a little more than a month

7 after discharge you went back part time?

8 A Correct.

9 Q And at that time did you have a prosthetic

10 leg?

11 A No. I did have one, it was a temporary

12 one when I first went back, but it wasn't very

13 comfortable, so I never wore it.

14 Q So, what did you do instead?

15 A I just had to go to work just with my

16 crutches and just have my leg. I wore pants like

17 snap-on pants at the time. I just had my legs out, I

18 didn't have anything to wear on it.

19 Q And you would commute back and forth with

20 crutches?

21 A Yes.

22 Q Did you work full days?

23 A No, at the time when I first went back, I

24 started doing rehab, I had to go back to Bellevue and

25 do rehab with physical rehab with a person and I used

26 my temporary leg to do the rehab, but I would take it

1 Dibble - Plaintiff - Direct/Smiley

2 off as soon as I was done and after that I would

3 usually go off to work and work, whatever time I got

4 there, until the end of the day.

5 Q Around that time period now in the end of

6 June, how frequently were you doing rehabilitation?

7 A I was going two times a week, Tuesdays and

8 Thursdays for about an hour, hour and a half.

9 Q And what would you do during a time at

10 rehab?

11 A We did different things on different days.

12 Whether I first started doing it, a lot was stretching,

13 getting, you know, my movement back, my range of motion

14 back and then eventually we moved on to different

15 things such as movement and strengthening my legs and

16 different types of things to work on my balance and

17 help me out with high balance.

18 Q And how did you come along, how were you

19 progressing?

20 A At first it was really challenging, like

21 I'd say the temporary leg wasn't very comfortable.

22 It's nothing like I have, the one now.

23 So I really didn't want to wear it as

24 much as I could, so when we first started doing it it

25 was really challenging to be on it and he really wanted

26 me to be on the treadmill and trying to walk.

1 Dibble - Plaintiff - Direct/Smiley

2 The pain I was in with that leg, I

3 couldn't do it. So at first it was really difficult

4 but then as time went by and I got more used to it and

5 I got back, eventually when I got the leg I have now I

6 was able to be more active and really push myself while

7 I was there.

8

9 (Transcript continued on next page.)

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1 Direct-D.Dibble-Smiley

2 (Whereupon Lori Sacco relieves Heyward

3 Davis.)

4 Q. What were your goals at the time of

5 starting rehabilitation as far as where you wanted to

6 get as a result of getting a prosthetic leg and

7 working at it?

8 A. My main concern when I first started was

9 I wanted to be able to walk the best that I could. I

10 didn't want to have any type of significant limp or,

11 you know, any dipping down or anything like that. My

12 main concern was to try to strengthen my legs and hip

13 to try to get myself back to a point where I could

14 walk and appear normal.

15 Q. And currently you've been talking about

16 what you have now. Can you tell the jury what you use

17 as far as a leg now?

18 A. Yeah. The difference between the one I

19 have now and my temporary one, the temporary one was

20 just about as basic as you can get. You probably have

21 seen them before. It has a basic casting. Basic

22 mold. And then just a straight bar. And that's it,

23 with a base as the foot.

24 The difference between that and the one I

25 have now is, the one I have now has a pump on it where

26 the bar would be. And the way that the pump works is

1 Direct-D.Dibble-Smiley

2 every time I step, it pumps the air out of the socket

3 I have, and it's able to hold the prosthetic to my leg

4 tightly.

5 Q. And how often during the day do you wear

6 your prosthesis?

7 A. I wear it from the time I wake up until

8 sometimes I'll have bad days where I have to get home

9 and I will be in just too much pain, and I have to

10 take it off as soon as I get home. Most of the time I

11 wear it from the time I wake up until right before I

12 go down and go to sleep.

13 Q. Does the device itself cause pain or

14 discomfort?

15 A. It depends, because the way it works is

16 the sleeve that I have that goes over it, that holds

17 the leg to my actual leg, to the stump, is a major

18 component. And the problem with those sleeves is they

19 stretch out from wearing them and from me working out

20 and they break down. If there is any type of hole in

21 it at all, I'll lose that suction from the vacuum, and

22 it will be extremely uncomfortable and cause a lot of

23 pain.

24 Q. What can you do now with your leg and

25 what can't you do? Give the jury an idea of how

26 you're able to adapt with it.

1 Direct-D.Dibble-Smiley

2 A. I can -- Obviously I can walk again with

3 this leg. That's my main -- that's the main thing I

4 can do. I can work out. I can be on a treadmill. I

5 can walk, maybe jog for a couple minutes, not very

6 high speeds and for not very long. I can do just my

7 basic functions. I can go up and down stairs. I can

8 climb, do all of those things.

9 MR. SMILEY: With the Court's permission,

10 would Dustin be able to come down, I'll bring a

11 chair for him, so he could show the prosthesis to

12 the jury and the status of his leg?

13 THE COURT: Yes.

14 Q. Dustin, at my request, so not to cause

15 anybody any awkwardness, did you wear some gym shorts

16 under the jeans that you have on now?

17 A. Yes.

18 Q. Okay. Would it be okay with you, what I

19 would like you to do is take off your pants so we

20 could show the jury your prosthesis, give them an idea

21 and explain it to them and show the current status of

22 your leg. I'll bring out a chair for you right here.

23 I want to make sure everybody can see.

24 MR. SMILEY: Is that okay for the jurors

25 in the back?

26 JURY PANEL: Yes.

1 Direct-D.Dibble-Smiley

2 Q. Do you want to take off the sock down

3 there also. Okay. Now can, you know, as you're

4 seated here, can you explain for the jury what they're

5 looking at here that's on your right leg?

6 A. I'll start at the bottom. This part

7 right here (pointing), you can see it's a little

8 broken, but it's a basic foot covering that they give.

9 You can see it's hollow on the inside, just looks like

10 a basic foot. This is something that comes with it so

11 that you can walk and it gives a flat movement.

12 MR. SMILEY: Let the record reflect or

13 may the record reflect, your Honor, that the foot

14 Dustin is referring to looks like a fake beige
15 bare foot, which is a covering that goes over the
16 prosthetic actual item.

17 THE COURT: Yes.

18 A. And the type of foot I have, it's called
19 an action foot. As you can see, it's titanium plated.
20 And what it does is gives me the ability so when I
21 step down, this gives away a little bit. When I step,
22 your foot becomes a little bit more flat. So, it's
23 not like you're stepping down like that. It gives it
24 more leeway. So, when it comes down.

25 This part right here (indicating) is what
26 I was talking about with the pump. As you can see,

1 Direct-D.Dibble-Smiley

2 the tubing goes up into the bottom of the casting of

3 the leg. Every time I take a step, every time I put

4 pressure on the leg, the pump moves. I can't show you

5 as well. When I step, the pumps move in a little bit.

6 It pumps the air from, I believe, the side of this

7 cast out through the tube and out through the bottom.

8 So, I can maintain the suction on my leg.

9 This part right here (pointing), it's

10 made of micro fiber. This is the basic mold of the

11 leg, if that's how you want to call it. And then this

12 sleeve that you can see right here (pointing), this is

13 the basic sleeve that holds, you know, my actual leg

14 onto inside of this part of the leg.

15 If you can see, you know, you can see

16 that the pump is working. I don't know if you guys

17 can see it as well, but you can see the outline of --

18 outline of the leg inside the pump, that's kind of a

19 way for me to be able to judge if it's maintaining

20 suction. If I look at this and I don't see any type

21 of outline or anything like that, I know there must be

22 some type of hole in there or something where the air

23 isn't being held inside tightly.

24 Q. And how would you go about taking this

25 off? In other words, on a typical evening, when would

26 you take off your -- your prosthetic device? Would it

1 Direct-D.Dibble-Smiley

2 be when you get home? When you sit on the couch? Or

3 before bed?

4 A. Like I said, it depends on what type of

5 day I had. Where it's a day I had to walk and stand,

6 I had to stand on the bus or train on the way home, I

7 might be in a little bit of pain. I might take it off

8 as soon as I get home. Other than that, I usually

9 just wait until right before I get into bed. I'm

10 literally sitting on my bed and take it off and just

11 roll over.

12 Q. Can you show the jury how you take it

13 off?

14 A. Yeah. The basic sleeve slides right
15 down, slides off. You can see the inside of it. It's
16 molded. It's specifically molded. When I went to
17 Eric, he takes plaster and molds it around my leg and
18 makes this cast out of the plaster mold. That he
19 does.

20 My leg doesn't go all the way down to the
21 bottom. There is a section on the bottom space in
22 between, and that's what this pump is for, to pump
23 that air and keep it tight on my leg. That's the
24 basic setup of the leg.

25 MR. SMILEY: With the Court's permission,
26 may I bring this closer to the jury, the

1 Direct-D.Dibble-Smiley

2 prosthetic device?

3 THE COURT: Yes.

4 (Whereupon Mr. Smiley displayed the

5 prosthetic device to the jury.)

6 Q. Now, Dustin, what do you -- what do you

7 currently have now covering the stump of your leg that

8 you still have?

9 A. These right here are basic socks that I

10 got from the prosthetic guy (indicating). And the

11 purpose of these is when he takes the mold, the stump

12 itself, it increases in volume and loses volume. It

13 depends on a lot of different factors, the weather,

14 how much I'm on it, if I gained any weight, if I lose

15 any weight. It depends a lot.

16 So, this loses volume from the time he

17 has taken that cast. And the purpose of these socks,

18 I actually always have to carry a couple of these

19 around, additional ones around with me wherever I go,

20 because if at any point I feel any pressure in one

21 specific spot or any pain, then I'm suppose to take

22 the leg off and check and see if there is any redness,

23 any specific spot. And if so, I might have to take

24 some of these socks off or put some on to help my leg

25 fit in there better, to make sure it's not going down

26 too far.

1 Direct-D.Dibble-Smiley

2 Q. Now, when you took off those two socks, I

3 see still left on your leg is some type of jell

4 device?

5 A. Yeah. This is a jell liner. This is the

6 initial thing that goes on every morning. This goes

7 on. Obviously you don't have to wear these socks.

8 When he first designs the leg, it's intended not to

9 wear any of these. You wear like an initial kind of

10 pantyhose type stocking that comes up to about here

11 (indicating). I have to wear these. This goes on

12 initially, and this is the basis of the inside of it.

13 Q. Would you mind removing the jell liner so

14 the jury can see your leg?

15 A. Yeah.

16 Q. And can you tell the jury what they are

17 looking at here?

18 A. As I mentioned before, sometimes red

19 spots show up. You can see right here on my shin

20 there is a red spot right there (indicating), which

21 means I'm probably sinking down into that a little too

22 far. And so I probably have to add another layer

23 sometime today. And that's just stuff that I should

24 check constantly throughout the day. Check if I have

25 any spots anywhere specific. And if I do, like I

26 said, I have to add socks. The leg is breaking down a

1 Direct-D.Dibble-Smiley

2 little bit right here (indicating).

3 Q. Indicating to the inside part of your

4 right knee?

5 A. Right, the inside part. You can see

6 there is a little bit of a callous there. It's from

7 rubbing up against like this (indicating). One of the

8 legs -- one of the cases I had prior to this one was a

9 little too tight up here, and it would constantly push

10 on the inside of my leg and on the outside. So, I had

11 to have that one redone as you can see. But every

12 once in a while, depending on what type of shoes I'm

13 wearing or if I'm sinking down too far, it will rub up

14 against that and it will break down the skin.

15 Q. Now, if you didn't have your prosthesis

16 on and you didn't have any assisted device, would you

17 be able to get around in this situation?

18 A. Probably with by crawling. I wouldn't be

19 able to totally move around. I've been told not to --

20 I've been told by the doctors and by the rehab people

21 not to hop anywhere just due to the condition of my

22 hip and also, you know, if I got used to constantly

23 hopping around, they are afraid it could wear and

24 tear, wear and tear on my hip.

25 Q. Okay. Now, can you just go through the

26 process, please, of putting your prosthesis back on?

1 Direct-D.Dibble-Smiley

2 A. Sure.

3 Q. As you would typically do in the morning

4 time.

5 A. I need --

6 Q. You need something?

7 A. Yeah. I need a spray bottle. This is

8 just a spray bottle that I need. It's a combination

9 of water and a small amount of rubbing alcohol. The

10 purpose of this is this jell is kind of sticky. So, I

11 can't exactly just put it right on. I need to spray

12 the inside of it with this combination, so that when I

13 slide it on, it's a little bit easier to move right on

14 over the leg. So, I have to spray the inside of this

15 a little bit.

16 And then this one, this liner is designed

17 so there is actually a knee spot for my knee right

18 there (indicating). So, I have to line it up so that

19 that knee spot will cover over my knee. So, I have to

20 line it up with the end like that and just slide it

21 slowly on, all the way up. And sometimes, luckily

22 right there I don't have to, but sometimes in the

23 mornings I'll have to do this maybe two or three

24 times, because it's important to make sure there is no

25 space at the bottom of this. Sometimes I will do it

26 and it won't -- you know, I'll maybe miss a spot or,

1 Direct-D.Dibble-Smiley

2 you know, it might get stuck, and I might move it

3 down, and there will be air in the bottom.

4 It is really important that I have the

5 bottom part completely up against the bottom of the

6 stump to make sure that there is no air or discomfort.

7 So I can't really -- You know, this isn't moving

8 around on my leg. So, sometimes I'll have to do that

9 maybe two or three times to make sure it's good, but

10 luckily that time I got it on my first try.

11 And then I have to put the socks on over

12 the covering. Basic like you are putting it on your

13 foot almost. Slide it up. I try to lay this part

14 down a little bit (indicating). I have to make sure
15 that it doesn't come up over this (pointing), because
16 this is the part that suctions to this other part and
17 holds it tight. So, I have to make sure that the sock
18 doesn't come up to that part. This little space here
19 isn't suppose to be here, but I need a new one of
20 these.

21 Again with the socks, I also have to make
22 sure that they are snug on here and there is not any
23 wrinkles or any movements like that (indicating). I
24 couldn't put it on like that. But I really have to
25 pay attention to every detail of when I put this on,
26 because just the slightest thing, if I do it wrong, I

1 Direct-D.Dibble-Smiley

2 will notice right away, as soon as I put that on. It

3 will cause discomfort, and I will have to take it off

4 and do the whole process over again to make sure I'm

5 as comfortable as possible.

6 Q. Dustin, on a day like today, when it's

7 really cold out, does it have any bearing on what you

8 need to do as far as the liners and the socks?

9 A. Actually not when it's cold out, when

10 it's hot out. In my experience, it tends to be when

11 it's really hot, my leg kind of swells up a little

12 bit. During those days I, you know, I usually change

13 a lot of socks. Like in the beginning of the day I

14 will have like one sock on. By the end of the day,
15 because my leg has been in there so long, and it won't
16 be kind of swelled up from the heat, 'cause it's been
17 in there, I will have to take it off and put a couple
18 of more layers of socks on by the end of the day.

19 So, after I have all of this on, then I
20 have to fit it inside the leg. I usually have a shoe
21 on when I do this.

22 Q. Do you need help?

23 A. No. So, after I slide it in like that, I
24 make sure it's in like all the way. You know, I've
25 been told that it -- if you could see the circle, my
26 kneecap is right here (indicating). It should come

1 Direct-D.Dibble-Smiley

2 right below my kneecap. It shouldn't be too tight on

3 my kneecap or pushing it up, because that can cause

4 any type of damage or pressure on my knees.

5 After I have it on like that

6 (indicating), then I move this blue -- this is like a

7 blue cover on. It covers, 'cause this part of the

8 leg, these parts (pointing) can actually get kind of

9 sharp. After that, I pull this part up, over the

10 actual coverings of the legs, right here (indicating),

11 and then I just slide this slowly, slowly up like that

12 (indicating).

13 Again, it's important during this part

14 for me to make sure that I don't have any air pockets

15 back here and I didn't -- you know, nothing is stuck

16 behind my leg. It's smooth back there (indicating).

17 And I have to make sure that it's smooth all the way

18 up. And there is a space right here (indicating).

19 And it covers what I was showing you right here on the

20 jell liner (pointing), that it comes up over that.

21 And like I said before, it's smooth and it comes up a

22 good distance.

23 Q. Relax. And then you have the foot

24 covering?

25 A. Well, I don't usually take this off every

26 night. I don't have to take this off. So that's

1 Direct-D.Dibble-Smiley

2 usually on there already.

3 Q. I see you're putting a sock over the

4 prosthetic foot.

5 A. Right.

6 Q. Is that any type of special sock? What's

7 the need for that?

8 A. Are you talking about this (indicating)?

9 Q. Yes.

10 A. This sock just covers the basic foot.

11 And as you can see, there is a lot of -- You know, it

12 gets -- There is grease and oil down here. So, it's

13 basically to cover up the foot and just protect it

14 from any wear and tear that it might incur from being

15 inside this, this covering.

16 Q. Now, I see on the covering you have it

17 looks like some type of grip tape or trainer's tape

18 around the foot. Can you explain that?

19 A. Well, believe it or not, these things

20 right here actually are kind of expensive. And this

21 one broke on me right there (indicating), as you can

22 see from the foot, right there, coming through on the

23 bottom. So, instead of having to buy a new one, I

24 kind of tried to do a makeshift fix with some tape the

25 best I could.

26 Q. Okay.

1 Direct-D.Dibble-Smiley

2 A. So, this just slides right back on. The

3 covering, like I said before, I usually don't take

4 that off. That usually remains on. And you can see

5 this tube. If you can see this tube right here

6 (indicating), that's a main part of the pump. I

7 usually have to check the tube to make sure there is

8 no cuts, any type of punctures like that.

9 So, I can, just after that, I can just

10 tuck that into the covering. And I usually wear some

11 type of -- I wear like a regular sock over the foot.

12 Sometimes I'll wear high socks. It depends, because I

13 really have to pay attention to this tubing, because

14 it's like the main part of the leg. I have to make

15 sure that no damaging happens to the tube. So,

16 sometimes I will wear a higher sock to make sure it

17 covers it, it doesn't catch on anything or caught up

18 and torn or anything like that.

19 Then in terms of putting my shoe back on,

20 I have these inserts that I have to, if I'm --

21 depending on what type of shoes I wear, I have these

22 black inserts. You can see this one is a little bit

23 thinner, but I have different thicknesses. Some are

24 really thick. Some are really thin like this

25 (indicating).

26 The purpose of these is the foot isn't

1 Direct-D.Dibble-Smiley

2 the exact length. So, I'm a little bit shorter on my
3 right side now. So, the purpose of these is depending
4 on what type of shoe I wear, whenever I have to get a
5 new pair of shoes, all the shoes I have now, I had to
6 test out and go through a lot of trial and error to
7 see what type of insert I needed with that. You know,
8 I would start with a thin one. I could tell right
9 away it's too low. I have to put a thicker one in.

10 Whenever I switch my shoe or use a different shoe, I
11 have to try to find the best insert to put in it.

12 Also sometimes with my shoes, I will have
13 a tendency to lean a little bit to my right. So, I

14 also have inserts that are just like this same thing

15 but cut in half. So, it will be a half of this. So,

16 I will put this along with the half of the insert

17 sometimes in some of my shoes so that when my foot

18 comes down, it's not coming down to the right. It's

19 coming down more on a balanced plain.

20 And I usually have -- I usually have a

21 shoehorn to help me get my shoe on. Like I said, I

22 have a shoehorn next to my bed, on my dresser, that I

23 use, 'cause sometimes the shoes, they are a little bit

24 difficult to get on over the foot. You know,

25 different shoes are harder to put on than others. So,

26 I just line up the shoe typically.

1 Direct-D.Dibble-Smiley

2 Usually I have a shoehorn for this part.

3 Then I just slide it on. And I always have to make

4 sure whatever shoe I'm wearing is as tight as I could

5 possibly tie it. Because I can't have it loose at

6 all. If my foot is coming out of the shoe at all or

7 anything like that, I will tell right away. And it

8 will really have an impact on how I'm able to walk.

9 So, I always have to make sure that I tie

10 the shoe possibly as tight as I can. I usually tie it

11 in a double knot. And that's the process.

12 Q. Okay. If you want to put your other shoe

13 on, and then I ask you to take your time to get back

14 to the witness stand, and then we'll continue. I'll

15 give your wallet to your mom if that's okay.

16 A. Yeah, that's fine.

17 Q. Thank you, Dustin.

18 A. You're welcome.

19 Q. Now, Dustin, you told us about what you

20 can do with that foot and that leg, the artificial

21 foot and leg. Can you tell the jury about what you

22 can't do that you used to be able to do?

23 A. Sure. As you can see, when you guys

24 looked at it, there is no ankle joint. So, the foot

25 basically has to stay flat. So, any type of jumping,

26 I have pretty much no ability really to any type of

1 Direct-D.Dibble-Smiley

2 jumping, any vertical at all.

3 Also as I mentioned before, running, I

4 can't run. I wouldn't even say jog. If I could jog

5 maybe on a treadmill, maybe like a couple minutes, but

6 I can't do any type of running, any sprinting,

7 anything like that. So, really makes it hard for me

8 to play any type of sports or, you know, even go for a

9 jog or a run in the morning, working out.

10 The other thing with the leg is with the

11 pump, I'm only allowed to have a certain amount of

12 weight on it. And I weigh, like I mentioned before,

13 about 190 pounds. And the maximum amount of weight

14 for the pump is 220. So, I have to really make sure
15 that whatever I have, I can't carry or have any
16 additional weight of more than 30 pounds on me, which
17 makes it hard for me to work out. I can't use any
18 type of free weights or anything like that. I always
19 have to use stationery machines.

20 And then also when me and my brother
21 moved into our recent apartment, I couldn't be much
22 help during the move, because I can't -- I couldn't
23 carry -- you know, I couldn't carry a couch up the
24 stairs. I can't carry, you know, big bags or anything
25 like that. A lot of the stuff I carried was just
26 stuff that I had to carry in just one hand, because we

1 Direct-D.Dibble-Smiley

2 had to go up the stairs.

3 The other thing is stairs. I have to

4 always hang on to a railing just because I have decent

5 balance, but sometimes my foot gets caught. I won't

6 lift it high enough or I won't bring it forward

7 enough, and it will get caught on the stairs.

8 Whenever I go upstairs, I always make sure I have a

9 grip on a handle somewhere. During the move I had to

10 make a lot of trips, because I could only carry a

11 certain amount of things, which made that really

12 difficult.

13 Q. Physically as far as sports, things that

14 you used to do for fun and enjoyment before your

15 injury, what can't you do anymore that you used to

16 enjoy doing physically?

17 A. I used to play a lot of basketball with

18 the people I worked with at the time at Bergdorf

19 Goodman. We used to go over to the New York Sports

20 Club that was up the street, and we would play a lot

21 of pick-up basketball. I can't compete in that. I

22 mean, will go by the court by our apartment and I'll

23 shoot around. But I can't -- The other day -- This

24 last summer I was there and a couple kids asked me to

25 play a pick-up game, but, I mean, I can't compete with

26 them, with those pick-up games. I can't even, you

1 Direct-D.Dibble-Smiley

2 know, really run. Like I said, I have no jumping

3 ability. So, I usually just go and shoot around. So,

4 I can't compete in any of those.

5 We also have a company softball team, the

6 company I work for now. And I was asked if I wanted

7 to play on the team this last year, and I had to say

8 no, I can't 'cause I can't -- I can't run around the

9 bases or be in the outfield and, you know, run after a

10 ball or anything like that.

11 Q. Anything else physically as far as

12 physical activities that you want to do that you can't

13 do?

14 A. The leg itself is not waterproof. I

15 can't take it in any water. I can't get it wet. So,

16 pretty much any type of swimming I can't do, because I

17 can't -- you know, I can't go jump in a pool, jump off

18 from a dock into a pond or any type of those

19 activities.

20 We have a family tradition where me and

21 my brothers and all of my male relatives, we go up to

22 the Adirondacks every summer and we get a cabin. We

23 go and jump off the rocks and the cliffs into the

24 water. Ever since this happened, every year I have to

25 sit around and watch all -- watch them all do that

26 while I can't participate in any of that.

1 Direct-D.Dibble-Smiley

2 Q. Socially has this injury that you

3 suffered and the loss of your leg had an impact on you

4 as far as your social life, Dustin?

5 A. Yeah, it has. Back when I was -- before

6 the accident happened I would pretty much, if I got

7 invited to go on a vacation or just an event, you

8 know, a friend say hey, come over and have a couple

9 people over to my house something, it's something I

10 would always try to do. But when my leg the way it is

11 and the process that I have to go through in terms of

12 taking it off, like if I'm sleeping over somewhere,

13 since it happened, I avoid all of those. I make up

14 excuses. I tell them that I can't go there because I
15 have something else planned or something like that.
16 And I just -- You know, I'm kind of ashamed to tell
17 them that I can't. That's the reason I don't want to
18 do any of those things.

19 So, I turned down opportunities for
20 vacations. You know, someone saying, let's go to
21 Miami. I'm going to be flying into Miami this
22 weekend. Do you want to see if you can go with me.
23 And I make up, like I said, I make up excuses. I say
24 oh, I got something planned for this weekend. I can't
25 go because someplace, especially a warm weather place,
26 I don't wear shorts anymore. I just -- I don't go out

1 Direct-D.Dibble-Smiley

2 in public with any shorts. I don't want to have to

3 deal with, you know, the looks that people give you

4 and just the way that I look with shorts on. So, I

5 don't wear those.

6 So, going to anything warm with a beach,

7 I can't be on the sand with this, because I can't have

8 any -- take the risk of getting sand inside the pumps

9 and ruining the holes or any of those. So, I avoid

10 going to any type of beach or any situation like that.

11 Q. What about dating, are you currently

12 involved with anybody?

13 A. No. I haven't dated anyone since the

14 accident happened. Kind of bothers me. I mean, you

15 go out and you meet someone. And I just wonder to

16 myself, you know, what point am I going to have to

17 tell them. Is it something, I meet someone. Hey, how

18 are you doing. I have a prosthetic leg. It's not a

19 great way to open up a conversation.

20 So, I go out there and, you know, I

21 always battle with when do I have to do this. Then I

22 avoid a lot of situations like that, because I don't

23 want to have to do that. I don't want to have to get

24 to the point where, you know, maybe we've been on a

25 couple dates, and they don't know, and I tell them

26 about the leg, and then I don't get anymore dates. So

1 Direct-D.Dibble-Smiley

2 then I wonder to myself is it because of my leg or did

3 I do something.

4 I mean, it's something I always have to

5 make a decision on. And it really pushes me to avoid

6 those types of things.

7 Q. Can you give the jury just a few examples

8 of things that people with two healthy legs might take

9 for granted that you run into problems with or have

10 run into problems with as a result of not having all

11 of your right leg?

12 A. One thing that I can definitely think of

13 is stairs. Just going up and down stairs. You know,

14 back in the day, the house I grew up in, we had a set
15 of stairs in our house. And I would run up and down
16 those stairs and swing down them. I would be up and
17 down them in five minutes or five seconds. But you
18 take that for granted, because now -- I took it for
19 granted, because now any time I have to take stairs,
20 it takes me a considerable amount of time to go up and
21 down those stairs, especially depending on the
22 situations. Like in this weather, it's a little bit
23 colder, slippery. And ice and rain and snow, I have
24 to take special precaution going down the stairs,
25 because I can't feel what I'm stepping on with my
26 right leg. So, if I'm stepping on some ice or, you

1 Direct-D.Dibble-Smiley

2 know, a crack or a bump or anything like that, I won't

3 be able to tell till it's too late.

4 Another thing is getting up, going to the

5 bathroom. You know, wake up in the middle of the

6 night, maybe had too much water before you went to

7 bed. And you wake up in the middle of the night and

8 you have to go to the bathroom. No problem. You hop

9 out of the bed. Run to the bathroom, go. And you're

10 back in your bed in a matter of minutes.

11 With me, I can't do that. I have to

12 either put on my leg or I have to find my crutches and

13 make my way to the bathroom. And while I'm there, I

14 have to hold myself up, make sure I have my balance,
15 go through the whole process and get back in bed. And
16 it doesn't sound like -- maybe it might not sound like
17 a big deal, but it's enough to deter me from getting
18 up, out of my bed. Sometimes I will just hold it and
19 hold it and put it off until the very last minute,
20 when I just -- you know, I have no other choice but to
21 do that.

22 (Continue on the next page.)

23

24

25

26

1 Dibble - Plaintiff - Direct/Smiley

2 T4

3 DIRECT EXAMINATION (Continued)

4 BY MR. SMILEY:

5 Q Dustin, currently do you suffer from any

6 physical pain or discomfort as result of your injuries

7 from the accident?

8 A Yes.

9 Q Could you tell the jury what that's about?

10 A My hip is fully healed, but sometimes when

11 I workout or if, you know, I'm walking around, or

12 standing for too long, it starts to hurt a little bit

13 because the way the leg is, I was told as much as I can

14 to put pressure on both legs while I'm standing, but

15 you can only do that for so long.

16 So a lot of time when I have to like

17 wait for the bus or the train, excuse me, I have to

18 lean on my left leg, and I put a lot of pressure on

19 that. Sometimes it takes its toll on my hip.

20 But in terms of the stump, the best

21 way for me to describe it, is it's like a burning,

22 tingling sensation that is constantly, I just

23 constantly have, every waking moment of every day.

24 Best way I think that I've been

25 describing it, when your foot first falls asleep, when

26 it starts to wake back up and it kind of hurts a little

1 Dibble - Plaintiff - Direct/Smiley

2 bit and it burns a little bit, that's just the way it

3 constantly feels all the time.

4 Q By the way, Dustin, previously you

5 mentioned you would travel, a friend invited you to

6 Miami. Have you experienced any problems involving

7 your prosthesis, whether it is something to fly or

8 travel or go through security or airport or here in

9 this courthouse?

10 A Yes, probably airport security is

11 extremely tight now. With this leg, it sets off the

12 metal detector any time. For flying, any time I go to

13 the airport, as soon as I walk through the metal

14 detectors I have to explain to them, you know, what the

15 deal is. Then they put me in one of those side rooms

16 where I have to pull up, you know, if I don't have any

17 type of pants that can be easily pulled up, I have to

18 take my pants off or down and they inspect the leg,

19 they wipe it down with something looking for like bomb

20 residue or anything like that. They wipe that down,

21 run their tests, and then maybe like 10, 15 minutes

22 process, at the least to wait and go through that.

23 So any time I'm going to fly

24 somewhere, I always have to give myself some extra time

25 because that happens every time, it's not, it's not

26 uncommon for me to do that, because they always make me

1 Dibble - Plaintiff - Direct/Smiley

2 do that any time I go through the metal detector, but

3 any place that has metal detectors, sets it off

4 anywhere.

5 So any time I go through that, I

6 always have to explain to them, I have to show them the

7 components, show them the leg or anything like that,

8 any time I go through security.

9 Q Dustin, as you sit here today, do you have

10 any concerns about your future and about the fact of

11 your injury or your ability to do or not do things that

12 you had planned for the future?

13 A Yeah. You know, it changed my whole

14 outlook on my future. I'm big, we have a big family, a

15 our family is really important too, that's the way I

16 was raised, and I have on my mind a lot of things we

17 did when we were young, when we were family, it's

18 something I always wanted to be able to do with my

19 kids.

20 You know, for example, back at our

21 house we used have to a pond in the back of our house

22 and we would go down there and we'd be down there and

23 one of the big things was we used to race my dad out in

24 the pond and we used to try to catch him, and I know

25 that, I know that I'm not going to be able to do that

26 if I have any kids or anything like that.

1 Dibble - Plaintiff - Direct/Smiley

2 I'm not going to be able to have any

3 races with them or help them out with basketball or

4 football or participate with them in any sports or

5 anything like that.

6 Also I'd like to own a house

7 eventually, and I just don't know if I know what it

8 takes to -- from my dad and my mom had go through to

9 upkeep a house, and I just don't know if I'll be able

10 to, whether I'm, you know, I might be able to do it

11 now, but what about when I'm 55, 56 years older, I'm

12 not going to be able to climb on ladders, clean up the

13 gutters on the house, or do any repairs or paint a

14 house.

15 That stuff is a real concern to me,

16 because it's all things I wanted to be able to do when

17 I get older, it wasn't something I thought was ever

18 going to be a problem for me.

19 Q What impact, as best you can describe it,

20 has the injuries that you suffered caused on you

21 emotionally, the type of person you are?

22 A What I've been told by people before the

23 injury I was very outgoing, I participated a lot in

24 conversations and I was very outgoing with people,

25 meeting new people. I never had a problem with that.

26 Or I was always very, I won't say cocky, I was always

1 Dibble - Plaintiff - Direct/Smiley

2 very sure of myself, I had confidence in myself as a

3 person, and what my abilities were and now I know, I

4 just, I don't, best way for me to describe it, I just

5 don't have any confidence in myself, I don't feel like

6 I know what my capabilities are, and I don't feel like

7 best way I guess for me say, I don't feel like I could

8 do anything.

9 Back before the accident I felt I

10 could do anything I wanted to do. I could just be

11 anything I wanted to be. But I just don't feel the

12 same way now.

13 Q Is there any particular part about the

14 injuries that you suffered that is worse than anything

15 else?

16 A When I think of two things I'd like to

17 say, it's one part, but it's multiple parts, I mean

18 something like this. Not just one worse thing. Worse

19 thing for me, one of the worst things is the

20 uncertainty, like I said, I can move around now and I

21 can trip on something or maybe trip going up the stairs

22 and catch myself, but, you know, I don't know what I'm

23 going to be able to do when I'm an older, older man.

24 I won't have the capabilities I have

25 now. I don't know if I'll be able to handle myself and

26 take care of myself when I'm older. Like I don't know

1 Dibble - Plaintiff - Direct/Smiley

2 what I'm going to be able to do. And that uncertainty

3 of my future, not knowing, not knowing where I'm going

4 to be, where I can go, what I'm able to do, it really,

5 really bothers me and eats at me.

6 And then the other thing that gets to

7 me is the pain that I'm in every day, but also, the

8 pain that I know I've caused my family and the people

9 that have had to go through, people have had to go

10 through this with me.

11 And I know my mom especially --

12 excuse me. I know my mom especially, she's spent time

13 with me since the accident happened, on her, so I know

14 I put them through this kind of pain and suffering as

15 much as I have to go through. It's really been hard on

16 me.

17 Q Thank you, Dustin.

18 MR. SMILEY: I don't have any further

19 questions.

20 THE COURT: Ladies and gentlemen, we're going

21 to take a ten-minute break.

22 THE OFFICER: All rise.

SUPREME COURT OF THE STATE OF NEW YORK.
COUNTY OF QUEENS: CIVIL PART 31

-----X
OSCAR E. AMADOR,

PLAINTIFF,

-against-

Index No.
717192/17

CAROL R. LYNCH and PHILIP J. LYNCH,

DEFENDANTS.

-----X

Supreme Court
25-10 Court Square
Long Island City, New York 11101
March 3, 2020

* * * E X C E R P T O F A J U R Y T R I A L * * *

B E F O R E :

HON. FREDERICK D.R. SAMPSON, JUSTICE

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CAROL B DRUCKER
Senior Court Reporter

1 (Whereupon proceedings were conducted but not
2 transcribed at this time.)

3 (Whereupon, the following is an
4 * * * E X C E R P T * * * of a Jury Trial:)

5 MR. DUER: Your Honor, at his point I would like
6 to take a witness out of turn.

7 THE COURT: Based upon stipulation between
8 counsel you agree to --

9 MR. DUER: To call Robert Genna before plaintiff
10 has rested.

11 THE COURT: There is no objection?

12 MR. SMILEY: No objection, judge.

13 THE COURT: Now, I had mentioned to you sometimes
14 witnesses are taken out of turn. Sometimes we do this
15 because of scheduling and them being professionals, so at
16 this point we are going to suspend the case of the
17 plaintiff, and we are going to allow defense to call their
18 witness. It will be out of turn, and we are going to take
19 that witness right now.

20 You may call your witness.

21 MR. DUER: Thank you, your Honor.

22 I call Robert Genna.

23 THE COURT: Counsel, if you would be so kind as
24 to have a seat while the oath is being administered.

25 R O B E R T G E N N A, having been first duly sworn by the

1 Clerk of the Court, testified as followed:

2 THE CLERK: Please state and spell your name for
3 the record.

4 THE WITNESS: It is Robert Genna, G-E-N-N-A.

5 THE CLERK: Now, spell your name -- first name
6 and then the last name slowly.

7 THE WITNESS: Robert, R-O-B-E-R-T; Genna,
8 G-E-N-N-A.

9 THE CLERK: In what county do you reside?

10 THE WITNESS: Suffolk County.

11 (Whereupon, proceedings were conducted but not
12 transcribed at this time.)

13 (Whereupon, the following is an

14 * * * E X C E R P T * * * of a Jury Trial.)

15 THE COURT: You may cross examine.

16 MR. SMILEY: Thank you, your Honor.

17 CROSS EXAMINATION

18 BY MR. SMILEY:

19 Q. Good afternoon, Mr. Genna.

20 A. Good afternoon.

21 Q. Fair to say you are a man of science?

22 A. I hope so.

23 Q. When you come to a court of law like this, you come to
24 talk about science, right?

25 A. I come to talk about --

1 THE COURT: Sir, I am going to ask now if the
2 question requires a yes or no answer, simply answer yes or
3 no without any editorializing. If there is an explanation
4 required, they will present that, or you can give that
5 afterwards based on a question, so just answer the questions
6 yes or no if they are asked in that form.

7 You may restate your question.

8 BY MR. SMILEY:

9 Q. When you come to a court of law like in a case like
10 this, you come to bring your scientific expertise correct, sir?

11 A. Correct.

12 Q. And your opinion is only good upon the facts upon
13 which your opinion is based?

14 A. Correct.

15 Q. Is it fair to say you do a fair amount of homework
16 before you give an opinion to a jury?

17 A. Yes.

18 Q. And that involves taking measurements, right?

19 A. Yes.

20 Q. Taking photographs?

21 A. Yes.

22 Q. Doing your due diligence as far as inspections?

23 A. Yes.

24 Q. Let's talk about what you did and what you didn't do
25 in this case.

1 I saw Defendant's Exhibit G, H and I which you purport
2 are lines of sight, correct?

3 A. Yes.

4 Q. Those are only lines of sight that you purport that
5 Oscar Amador had as he looked up the roadway, correct?

6 A. Could you rephrase that please?

7 Q. Yes.

8 You only brought to this jury photographs that you
9 created to purport to be a line of sight of Oscar Amador's view
10 looking up in the direction of Carol Lynch, correct?

11 A. Yes.

12 Q. You didn't also create line of sight diagrams for this
13 jury to consider showing what Carol Lynch's line of sight would
14 be as she approached the intersection, did you?

15 A. It is the same thing.

16 Q. Well, you didn't show that line of sight going past
17 the intersection to see how far she could see, did you?

18 THE COURT: It is a yes or no.

19 THE WITNESS: I would have to qualify my answer.

20 THE COURT: Okay.

21 Q. Sir, is it fair to say you did not create any diagram
22 that shows the line of sight that Carol Lynch would have looking
23 southbound beyond the intersection to see how far down Little
24 Neck Parkway she could see for vehicles such as Oscar Amador
25 approaching that intersection, did you?

1 A. If you are looking for a yes or no, I have to qualify
2 my answer.

3 Q. I am asking: If you created a diagram --

4 A. Same thing as the motorcycle can see.

5 THE COURT: Let me ask you this, sir: If you did
6 it only from Carol Lynch, you would have to do it from the
7 point certain from Carol Lynch to observe moving forward;
8 would that be accurate?

9 THE WITNESS: I would have to qualify my answer,
10 your Honor.

11 THE COURT: You can qualify your answer.

12 THE WITNESS: May I have that exhibit, please?

13 THE COURT: I am asking a question without the
14 exhibit.

15 If you were asked to determine the sight line
16 from a particular person, you would have to do that from a
17 set position?

18 THE WITNESS: Yes.

19 THE COURT: And what position would you set it
20 for Carol Lynch.

21 THE WITNESS: The same position that I set it for
22 the motorcycle in the opposite direction.

23 THE COURT: Okay.

24 BY MR. SMILEY:

25 Q. Did you take measurements of the Audi?

1 A. Yes.

2 Q. You --

3 A. I'm sorry.

4 No, I did not take specific measurements of the Audi.
5 I have that --

6 THE COURT: That's enough; yes or no.

7 A. No.

8 Q. When you went to go see the Audi, you didn't take any
9 measurement, correct?

10 A. No.

11 THE COURT: No, you didn't.

12 THE WITNESS: I put my ruler in and took some
13 photographs.

14 THE COURT: Did you take measurements of the
15 Audi, yes or no?

16 THE WITNESS: I would have to qualify my answer,
17 your Honor.

18 THE COURT: What measurements did you take?

19 THE WITNESS: I put a ruler and took photographs,
20 so that's the measurements.

21 THE COURT: What measurements did you take?

22 THE WITNESS: They are in the photographs, your
23 Honor.

24 THE COURT: Sir, tell me a measurement. I am not
25 trying to be tricky. You took a measurement. Tell me what

1 the measurement was.

2 THE WITNESS: I put a ruler in the photograph and
3 showed --

4 THE COURT: And measured what?

5 THE WITNESS: The front of the Audi.

6 THE COURT: What were your measurements?

7 THE WITNESS: I would have to look at the
8 photograph, your Honor.

9 THE COURT: Your witness.

10 BY MR. SMILEY:

11 Q. You measured the front of the Audi?

12 A. The height.

13 Q. And you have a photograph of that?

14 A. I don't think I have them in front of me here. I
15 would have to see --

16 (Whereupon, there was a pause in the
17 proceedings.)

18 A. I have a few pictures of the measurement that I took
19 in front of the Audi.

20 Q. You didn't discuss the measurements in your direct,
21 correct?

22 A. Excuse me?

23 Q. You didn't discuss any of those measurements in your
24 direct examination?

25 A. I did not.

1 Q. Do you take any measurement at the location of the
2 accident to determine how far the Audi was from the left side of
3 Grand Central Parkway when it came to a complete stop?

4 A. No, I didn't.

5 Q. You didn't?

6 A. No.

7 Q. You didn't think that would be important?

8 A. I used the photograph.

9 Q. You didn't measure it though, did you?

10 A. No, I didn't know exactly where it was, so I used the
11 photographs.

12 Q. For a scientific purpose to try to determine the width
13 of room between the Audi and the side of the road, you don't
14 have that measurement to use as part of forming your opinion, do
15 you?

16 A. I don't have the specific measurement, but it is in
17 the photograph.

18 Q. You don't have any measurement.

19 A. It is in the photograph.

20 THE COURT: Sir, you have to just answer the
21 question. Either you took a measure or you didn't.

22 THE WITNESS: No, I did not.

23 THE COURT: Then that's the answer.

24 You did not take a measurement?

25 THE WITNESS: No.

1 BY MR. SMILEY:

2 Q. In fact, did you take any measurements regarding the
3 position of the Audi at the location of the scene of the
4 accident?

5 A. No.

6 Q. And when you testified earlier that where the Audi was
7 stopped was one hundred feet from the entrance to the Grand
8 Central Parkway, did you actually measure the front of that Audi
9 to the front of the Grand Central Parkway to get one hundred
10 feet?

11 A. I didn't --

12 THE COURT: Yes or no?

13 A. No, I did not.

14 Q. But you told the Court that you did, right?

15 A. No, I told the Court that I estimated the distance
16 based on car lengths from where the Audi was stopped to the
17 entrance to the parkway.

18 Q. So you just stood there, sir. You took some
19 photographs, and you figured in your mind and your expertise how
20 long cars are and how many lanes and what that distance would
21 be? You eyeballed it?

22 A. I didn't eyeball it. I took a ruler out, and I
23 measured it and came up with approximately a hundred feet.

24 Q. Well, that's not science. Science is an actual
25 measurement, right? You take out a ruler and you measure the

1 length?

2 A. I just said I measured it with a ruler, and it is
3 approximately one hundred feet.

4 Q. Where is that measurement? Do you have a picture of
5 the ruler showing one hundred feet?

6 A. No, sir, I don't.

7 Q. That is just your recollection?

8 A. Yes.

9 Q. And you know coming into this case that there is a
10 claim that the Audi struck the back of the motorcycle. You are
11 aware that that is a claim in this case, right?

12 A. Yes.

13 Q. And, in fact, in the police report Oscar Amador gives
14 a statement to the police that is contained in Exhibit Ten that
15 says he was struck by the Audi, right?

16 A. Correct.

17 Q. And Carol Lynch has a statement in that police report
18 that says the vehicles collided, correct?

19 A. Correct.

20 Q. And as a scientist, it is important for you to
21 consider that in coming to this Court in front of this jury and
22 giving your opinion, correct?

23 A. I would have to qualify my answer.

24 THE COURT: Yes or no.

25 THE WITNESS: I can't answer it yes or no.

1 Q. Well, you have to consider that?

2 A. I would have to qualify my answer.

3 Q. Did you consider the statements within the police
4 report that her vehicle either struck Oscar Amador or their
5 vehicles collided? Did you consider that, yes or no?

6 A. I did.

7 Q. All right.

8 Now knowing that there was a claim that they either
9 collided or that the Audi struck the motorcycle, sir, didn't you
10 think it would be important to take a look at that motorcycle?

11 A. I did.

12 Q. And did you take any steps to go and actually look at
13 that motorcycle?

14 A. I requested to examine the motorcycle.

15 Q. And what happened to that request?

16 A. I was told I wasn't allowed.

17 Q. Who told you you weren't allowed?

18 A. I don't recall specifically who told me.

19 Q. Okay.

20 MR. SMILEY: Let the record reflect, for the
21 record, as an officer of the Court there was no request by
22 anyone to have Mr. Amador's motorcycle inspected by this
23 witness.

24 Q. Now, it is important in a case like this if you are
25 going to come and testify to this jury to have that kind of

1 inspection, isn't it?

2 A. Yes -- excuse me.

3 Q. It is important in a case like this if you are going
4 to come in as an expert for the defense to have inspected the
5 motorcycle personally, isn't it?

6 A. I think it would. I can't answer it yes or no. I
7 would have to qualify my answer.

8 Q. I don't want you to qualify your answers, sir.

9 A. I would have to qualify my answer in this question.

10 Q. Did you think it would be important for you to
11 physically look at the motorcycle before coming today to testify
12 in front of this jury?

13 A. It would have been helpful.

14 Q. Because if you looked at it, you could have taken
15 measurements, correct?

16 A. I could have.

17 Q. You could have measured the height of the right rear
18 saddle bags, correct?

19 A. I could have.

20 Q. You could have compared that to the height of the
21 front fender. You said you measured the front fender?

22 A. I did.

23 Q. And you have no reason to dispute that the front
24 fender of the Audi lines up perfectly with the right saddle bag?

25 A. That's a very difficult question to answer. I am not

1 sure where on the Audi the saddle back would line up to.

2 Q. You don't know that because you didn't measure.

3 A. There are differences of height along the front of the
4 Audi.

5 Q. Do you have --

6 A. When I looked at the Audi, I didn't see any marks on
7 the Audi to correspond to where the area of the motorcycle is
8 alleged to have had contact.

9 Q. That's what the -- what I am asking. I am asking if
10 you had measurements -- had taken measurements of the Audi and
11 the saddle bag, you could compare the height of the saddle bag
12 to the front of the Audi; couldn't you have done that?

13 A. I did that.

14 Q. Tell us what the measurements were of the saddle bag
15 of the motorcycle.

16 A. I would have to look at the picture of the motorcycle
17 to tell you what the height of the saddle bags are.

18 Q. Go ahead.

19 A. Give me an exhibit.

20 Q. How can you measure a motor vehicle's sight?

21 A. Where is the ruler there?

22 Q. I haven't seen any ruler in the back of the
23 motorcycle, sir. I am not asking what is in your binder. I am
24 asking what is in evidence.

25 A. Well, are you asking me to show you this picture with

1 the ruler?

2 THE COURT: Take the picture down, sir.

3 See, this trial is about what is in evidence in
4 this trial. I don't know what you looked at, sir. I am
5 just telling you how I conduct a trial.

6 Next question.

7 BY MR. SMILEY:

8 Q. Now isn't it true, sir, you are not really coming in
9 here as an objective expert in this case? Isn't that true?

10 A. You are looking for a yes or a no, or do you want to
11 me to answer the question?

12 Q. Looking for a yes or no.

13 A. I am completely objective in the work that I do.

14 Q. All right.

15 Now, if you were objective, you wouldn't have anything
16 to do with the work you have done previously for Mr. Duer's law
17 firm, would it?

18 A. I am not sure I understand.

19 Q. You have testified for his law firm before today,
20 haven't you?

21 A. I have.

22 Q. On many occasions, haven't you?

23 A. Yes.

24 Q. How many occasions?

25 A. I don't know that number specifically.

1 THE COURT: How about approximately?

2 Q. Ballpark it.

3 A. Fifteen maybe.

4 Q. Fifteen times?

5 Mr. Duer called you to testify in a courtroom like
6 this on behalf of his defendant client, correct?

7 MR. DUER: Objection.

8 THE COURT: Basis.

9 MR. DUER: It never happened.

10 THE COURT: He never testified --

11 MR. DUER: Not me -- not me.

12 THE COURT: -- fifteen times for your firm?

13 MR. DUER: That I can't say. I can't represent
14 that. He said, "Mr. Duer."

15 MR. SMILEY: I will rephrase.

16 THE COURT: Let's not play with this.

17 Have you testified on behalf of the plaintiff's
18 firm --

19 MR. SMILEY: Defendant.

20 THE COURT: -- defendant's firm approximately
21 fifteen times?

22 THE WITNESS: Previously, yes, your Honor; not
23 for Mr. Duer.

24 THE COURT: Understood.

25 BY MR. SMILEY:

1 Q. Do you know the name of his law firm?

2 A. Yes.

3 Q. What is that?

4 A. Picciano and Scahill.

5 Q. When did you first start testifying in a courtroom on

6 behalf of Picciano and Scahill?

7 A. I don't recall the year.

8 Q. Because it was that long ago?

9 A. No, I just don't recall the year.

10 Q. Fair to say at least ten years ago is when you first

11 started testifying for the firm?

12 A. It is possible.

13 Q. Isn't it likely?

14 A. I said, "It is possible."

15 Q. Each of those times they pay you, sir, to come

16 testify, right?

17 A. That's correct.

18 Q. They pay you before trial to do your analysis,

19 correct?

20 A. Yes, sir.

21 Q. And how much have they paid you in this case before

22 trial?

23 A. Probably six to seven thousand dollars.

24 Q. And how much have they paid you to come to testify

25 here in court?

1 A. About three thousand dollars.

2 Q. About ten thousand dollars?

3 A. Correct.

4 Q. For that they don't even get a diagram from you to
5 show this jury, correct?

6 MR. DUER: Objection.

7 A. I don't understand.

8 THE COURT: You have to stand for your objection,
9 and your objection is overruled.

10 Q. You didn't bring a diagram showing the analysis
11 that -- that you prepared to explain to this jury what happened
12 in this case objectively, did you?

13 A. I did not make a diagram, correct.

14 Q. That's something that is normally done by accident
15 reconstructionists?

16 A. Not necessarily.

17 Q. It would be helpful?

18 A. In this case I didn't think it was necessary.

19 Q. And on the fifteen times prior that you testified for
20 Picciano and Scahill, the fees were about the same in those
21 cases?

22 A. It varies.

23 Q. Approximately ten thousand dollars a pop?

24 A. Not necessarily.

25 Q. And there are cases that they have retained you on to

1 analyze and review and they paid you that don't go to trial?

2 A. That's correct.

3 Q. About how many of those cases have you done for

4 Mr. Duer's law firm?

5 A. I don't know that number.

6 Q. More than twenty?

7 A. Yes.

8 Q. More than fifty?

9 A. Probably between fifty to one hundred.

10 Q. So between fifty to one hundred cases that they paid
11 you to review that didn't go to trial, correct?

12 A. Correct.

13 Q. And about fifteen or so that they paid you to come and
14 testify at trial?

15 A. That's probably accurate.

16 Q. Would it be a reasonable statement for me to make that
17 as of today you have received consulting job work that you have
18 done for the law firm of Picciano & Scahill you have made over
19 one hundred thousand dollars easily?

20 A. Over the last ten years I would say that's probably
21 accurate.

22 Q. Maybe two hundred thousand dollars?

23 A. I don't know what that number is.

24 Q. You have done quite well working for them.

25 MR. DUER: Objection.

1 THE COURT: Sustained.

2 Question answer stricken from the record.

3 Direct the jury to disregard.

4 BY MR. SMILEY:

5 Q. Now, let's see what else you did to give an objective
6 opinion to this Court.

7 Did you hear any evidence or were you provided any
8 evidence today at this trial to support any opinion that Oscar
9 Amador just fell without any impact?

10 THE COURT: That's a yes or a no.

11 A. Did I hear any evidence that he just fall without an
12 impact?

13 Q. Yes.

14 A. From testimony? Previous testimony?

15 Q. No.

16 I am asking about any evidence in this courtroom that
17 you could point us to or any hypothetical that Mr. Duer gave you
18 as part of your opinion today that supports any opinion based on
19 the fact that he just fell?

20 A. I am not understanding your question. You want me to
21 give my opinion as to what I think happened?

22 Q. No, sir.

23 I am asking: What, if any, evidence is there
24 scientifically that his motorcycle just fell without any
25 contact?

1 A. The evidence that I pointed out on my previous
2 testimony which I will be happy to explain again.

3 Q. Specifically, what evidence that it just fell without
4 any contact?

5 A. There's a couple of photographs that show the mark on
6 the ground and where the position of where the Audi is that, in
7 my opinion, clearly indicates that it fell as it was moving
8 ahead of the Audi.

9 Q. That's your objective opinion?

10 A. That's my opinion, your Honor -- counsel.

11 Q. Now, you say that the motorcycle is thirty-six inches
12 wide from handlebar to handlebar?

13 A. That's the width of the handlebars, the estimated
14 width of the handlebars.

15 Q. There is no evidence that the handlebars of his car
16 had any contact with the Audi, is there?

17 A. I didn't see any evidence of contact, no.

18 Q. How wide are his motorcycle tires?

19 A. Typically motorcycle tires are approximately four
20 inches.

21 Q. How wide was the space at the time that you think that
22 Mr. Amador passed Mrs. Lynch? How wide a space was there
23 between her car and the left side of the roadway?

24 A. My estimate would be about five feet.

25 Q. Plenty of room to go by on a motorcycle, right?

1 A. I think it's a little bit narrow because that only
2 leaves you with about twelve inches on either side of the
3 vehicle. So my opinion, that's narrow.

4 Q. Why would he fall if he had four to five feet of room?
5 The tires are only four inches. Why wasn't there enough room?

6 A. I think it is a very narrow distance between the
7 driver's side of the Audi, and this is an estimate. It could
8 have been less; and if it was less, again, it would explain why
9 he fell to the ground.

10 Q. You are still not explaining why there is not enough
11 room, scientifically, for him to get by.

12 A. I don't feel comfortable driving my vehicle with less
13 than a foot on either side of it. When you are going through
14 something -- if you are moving between a truck and a curb, and
15 you have only twelve inches on either side, you gotta take
16 precautions. You can't move fast, and in my opinion the vehicle
17 was going faster than the Audi in a very narrow circumstance and
18 that's what caused him to fall.

19 Q. Do you claim to be an expert in the operation of
20 motorcycles?

21 A. No.

22 I claim be an expert in --

23 Q. That's a yes or no.

24 A. I would have to qualify that answer.

25 Q. Do you claim to be an expert in the operation of

1 motorcycles?

2 A. I would have to qualify.

3 Q. Can you answer yes or no?

4 A. I will repeat myself. I would have to qualify my
5 answer.

6 Q. Do you have a motorcycle license?

7 A. No.

8 Q. Can't be an expert in driving a motorcycle when you
9 don't have a motorcycle license, correct?

10 A. I would have to qualify that answer.

11 Q. Okay.

12 Now, you -- you were talking about the speed that you
13 claim that Mr. Amador passed Mrs. Lynch's vehicle. You say he
14 was going faster than her?

15 A. Yes.

16 Q. You how fast was he going?

17 A. I don't know.

18 Q. You have no idea?

19 A. I have no idea of how fast he was going at the time he
20 lost control of his vehicle.

21 Q. No idea?

22 A. No.

23 I would be estimating it.

24 Q. Well, isn't that part of why you are here, sir, to
25 reconstruct the accident? If you are going to give an opinion

1 to this jury in this very serious matter that he was going
2 faster than her, and he was going so fast that he lost control
3 of his motorcycle, don't you think, scientifically, you should
4 tell this jury how fast he was going with a reasonable degree of
5 scientific certainty?

6 A. Are you looking for a yes or no, or do you want me
7 qualify my answer?

8 Q. Yes or no.

9 Don't you think you should be able to tell the jury
10 that?

11 A. Let me qualify my answer.

12 Q. Yes or no.

13 A. Let me qualify my answer.

14 Q. Did you take steps to determine the speed of
15 Mr. Amador's vehicle at the time that you believe he was passing
16 Mrs. Lynch's car?

17 A. I didn't have enough physical evidence for me to give
18 a precise speed of the motorcycle. I can give an estimate
19 because I know how he accelerated. And I know roughly how fast
20 the Audi was going. I don't think he was going in an excessive
21 rate of speed, but given the conditions he was traveling in, it
22 is very difficult.

23 Q. That's a lot of information to opine on based on just
24 looking at the photographs, isn't it?

25 A. It is not just the photographs. You have to look at

1 evidence when you look at the photographs, and you go to the
2 scene and evaluate it.

3 Q. So, do you know where the motorcycle came to rest?

4 A. Specifically no. There are no pictures that indicate
5 that, but you see where the tire -- the scrap mark ends, so you
6 can get an estimate as to where the motorcycle came to rest.

7 Q. I am not talking about estimates.

8 Scientifically, weren't there steps, sir, that you
9 could have taken, had you chosen to do so, to come to this jury
10 and scientifically show them where you believe the motorcycle
11 came to a rest in the roadway? Couldn't you have done that?

12 A. I would be happy to show you where the motorcycle came
13 to rest.

14 Q. Well, you didn't show us, did you?

15 A. Sure, I did.

16 Give me one of those exhibits, and I will show you
17 where the scrap mark ends, and that's where the motorcycle came
18 to rest.

19 Q. How far was it in feet was that from the front of the
20 Audi vehicle when it came to stop?

21 A. If I have to estimate, it would be fifteen feet or so.

22 Q. That's not very scientific, is it?

23 A. This is not a scientific field, counsel. This is an
24 estimate of science. It's an approximation. It is not like DNA
25 or fingerprints. You make estimations. It is not a precise

1 scientific field, not like DNA or fingerprints. An analyst in
2 this field makes estimations.

3 Q. So you are saying you couldn't create a scale diagram,
4 place the vehicles where you believe the evidence showed they
5 were, show the distances, show where the Audi came to rest and
6 where the motorcycle came to the rest? You couldn't do that for
7 this jury?

8 A. I have perfect pictures to show you.

9 Q. That's not my question.

10 A. Then I have to qualify my answer.

11 THE COURT: The question is: Could you have done
12 that, sir?

13 That's a yes or no.

14 A. I could have done that.

15 THE COURT: If you just answer the question --
16 everything can't be qualified.

17 You could have done it was the answer.

18 Next question.

19 Q. Now, you said you looked at the photographs of the
20 motorcycle and the only damage you saw was a scrap mark on the
21 bar of the motor vehicle?

22 A. Well, you want this as a yes or a no?

23 Q. Yes.

24 MR. DUER: Objection, your Honor.

25 THE COURT: Come up.

1 (Whereupon, there was an off-the-record
2 discussion held in the robing room.)

3 THE COURT: I am going to ask you to rephrase
4 your question.

5 BY MR. SMILEY:

6 Q. Sir, did you see damage to Oscar Amador's motorcycle
7 when you reviewed the photographs in evidence?

8 A. I did.

9 Q. Where did you see damage to his motorcycle?

10 A. Predominantly the scrap marks on the left side.

11 Q. Where else?

12 A. That was the most significant damage that I noted.

13 THE COURT: The question is not "significant."
14 You said "predominantly." Where else did you see damage?

15 The jury and the Court are trying to get answers
16 to the question, so when you say "predominantly," where else
17 did you see damage?

18 A. I saw damage on the left side of the motorcycle.

19 Q. And the damage you saw -- the only damage you saw was
20 to the bar on the left side of the motorcycle?

21 A. Yes.

22 Q. Do you see damage anywhere else to his motorcycle as a
23 result of this accident?

24 A. No.

25 Q. Did you look closely?

1 A. Yes.

2 Q. Now, when you went to the scene -- the location to do
3 a site inspection and you take some photographs, did you mark
4 the pavement at all to try to line up the actual locations of
5 where the scratch mark was?

6 A. No.

7 Q. Did you take any measurements that were photographed
8 so the jury can see specific measurements you took?

9 A. No.

10 Q. Did you create a scale diagram of the accident
11 location?

12 A. No.

13 Q. These are all things you could have done, correct?

14 A. Correct.

15 Q. Before going to look at the Audi, you were aware that
16 there was no claim of damage to the Audi, correct?

17 A. Possibly; I don't recall specifically.

18 Q. And it is no surprise to you that a collision like
19 this could occur where the front of an Audi hits the right rear
20 saddle bag of a motorcycle and there be no scratch on the Audi?
21 That could happen, right?

22 A. I suppose that's a possibility.

23 Q. I am sure in the thousands of accident reconstructions
24 you have done over the last forty years there have been
25 instances where vehicles have collided and one of the vehicles

1 shows no damage, correct?

2 A. That's possible.

3 Q. Well, it's likely, isn't it?

4 A. I said it is "possible."

5 Q. And the Audi involved in this case -- you know the
6 model number, right?

7 A. Yes.

8 Q. And you know what year it was, right?

9 A. Yes.

10 Q. What year was it?

11 THE WITNESS: May I look at my notes, your Honor?

12 THE COURT: Absolutely.

13 (Whereupon, there was a pause in the
14 proceedings.)

15 A. 2013.

16 Q. Now, you use something called, um, Expert Auto Stats
17 to determine specifications for the car -- did you do that?

18 A. Yes.

19 Q. And what year did you get the expert auto stats for
20 the Audi?

21 A. A 2012 on the Audi stats.

22 Q. You didn't do the 2013, right?

23 A. I did it on another program.

24 Q. You didn't do it on the auto stats, right?

25 A. No.

1 Q. The one on the other program that's also showing 2012
2 statistics on this Audi, right?

3 A. Well, it comes up model year 2013.

4 Q. Do you know if that one that you are just referring to
5 now that says 2012 and also talks about 2013, that's referring
6 to the defendant's car? Are you sure about that?

7 A. Yeah, the VIN number matches, so that's what it came
8 up with.

9 Q. Why would you use a report of a 2012 instead of a 2013
10 vehicles?

11 A. That's what I printed out.

12 Q. How long was the scrap mark on the concrete?

13 A. I don't know specifically. I said, looking at the
14 photographs, I estimate it possibly about fifteen feet.

15 Q. You didn't measure it, right?

16 A. No.

17 Q. You could have measured it, right?

18 A. It wasn't there when I went there.

19 Q. You could have used methods -- scientific methods to
20 determine the length of the -- that mark, couldn't you have?

21 A. Yes, I could have.

22 Q. But you didn't, did you?

23 A. No.

24 MR. SMILEY: Can we please show the witness
25 Exhibit Three?

1 (Whereupon, there was a pause in the
2 proceedings.)

3 BY MR. SMILEY:

4 Q. Okay.

5 Now, sir, you know what this shows on Exhibit Three --
6 what view this is?

7 A. Yes.

8 Q. Are you aware at some point this would have been the
9 approximate view of Carol Lynch as she was approaching Grand
10 Central Parkway Service Road to turn right, right?

11 A. Yes.

12 Q. How far of a line did she have looking down Little
13 Neck Parkway from this perspective? How far could she see if
14 there were no cars in this photograph?

15 A. Several hundred feet.

16 Q. Two hundred?

17 A. At least, minimum.

18 Q. Four hundred?

19 A. Perhaps.

20 Q. Five hundred?

21 A. I would say probably about five hundred. That's an
22 estimate.

23 Q. Did you take the measurement?

24 A. No.

25 Q. Did you do your Google map thing where you took that

1 photograph, and you put a line here, and you shot the line down
2 Little Neck Parkway so you could come to tell this jury what
3 Carol Lynch's line of sight would have been looking down to see
4 if she could have seen any vehicles before entering that
5 intersection?

6 A. From this point here, counsel?

7 Q. Yes.

8 A. No, not at all.

9 Q. That would have been helpful, wouldn't it have?

10 A. Not at all.

11 Q. Well, how far down should Carol Lynch have been able
12 to see Oscar Amador if he was up in the roadway?

13 A. At this point here?

14 Q. Yeah.

15 A. Without any cars?

16 Q. Yeah.

17 A. So no cars on the road except the Audi and the motor
18 vehicle?

19 Q. Yeah.

20 A. How far down she could see?

21 Q. Yeah.

22 A. Whatever estimate I said, five hundred feet.

23 Q. There is no reason she shouldn't have seen him before
24 the accident, right?

25 A. You want me to assume how far down she could see a

1 motorcycle approach?

2 Q. Yeah.

3 A. Maybe five hundred feet.

4 Q. My question is, sir: There is no reason why she,
5 Carol Lynch, should not have been able to see Oscar Amador
6 before she made that right-hand turn assuming -- assuming what
7 you have been assuming, that he came up and passed her?

8 A. I am not sure I understand your question.

9 Q. Let's assume for the moment what you have been
10 testifying that you believe that she made the turn and Oscar
11 came and passed her, okay?

12 A. Correct.

13 Q. How far back on the Little Neck Parkway would he have
14 had to have been at the point where she is about to make this
15 right-hand turn?

16 A. I have no idea.

17 Q. No idea?

18 A. How am I going to know what his speed is if he is
19 stopping for a light? If he is accelerating? Decelerating? No
20 possible way to scientifically analyze that.

21 Q. Is it fair to say because she had several hundred feet
22 in your explanation -- wherever it was -- she should have seen
23 him?

24 A. I don't know where he is. I don't know if there are
25 cars, so I don't know what your question is.

1 Q. All right.

2 I want you to assume that Carol Lynch testified as she
3 approaching to make the right-hand turn, she looked down Little
4 Neck Parkway, this view, sees no northbound traffic, okay?

5 A. Okay.

6 Q. I want you to further assume Carol Lynch's version
7 that he came out of nowhere and passed her on the left, and this
8 accident occurred, okay?

9 A. Okay.

10 Q. Based on those two assumptions, shouldn't she have
11 seen him coming northbound on Little Neck Parkway before the
12 turn?

13 A. I think it is a possibility.

14 Q. Shouldn't she have, not a possibility? We are talking
15 science here.

16 A. No, we are not talking science, counsel.

17 I said I think it is possible.

18 Q. Within a reasonable degree of scientific certainty
19 wouldn't she have seen him?

20 A. I said it is possible.

21 Q. Well --

22 A. That's my answer.

23 Q. Well, if he is --

24 THE COURT: Let me ask you the question

25 differently: If she was positioned there, based upon all of

1 your calculations and speed and whatever, would the
2 motorcycle be in her sight line?

3 That's a yes or a no.

4 THE WITNESS: It's possible.

5 THE COURT: It is not -- sight line is not a
6 possibility.

7 As an accident reconstructionist, would not any
8 position down that road be in her sight line?

9 That's a yes or a no.

10 THE WITNESS: Yes; it could be, yes.

11 BY MR. SMILEY:

12 Q. It is not that hard to just say "yes."

13 MR. DUER: Objection.

14 THE COURT: Sustained.

15 Q. Just to be clear for this jury, if there is(sic) no
16 other cars coming northbound, based on your analysis of this
17 accident, before she made that right turn, Carol Lynch should
18 have seen Oscar Amador on his motorcycle; isn't that true, sir?

19 A. I would say could have.

20 Q. You won't acknowledge it?

21 THE COURT: Let's move on.

22 Q. How fast would Oscar Amador have to have been
23 traveling on his motorcycle for Carol Lynch not to see him
24 before the turn because he is not far away, made the turn and
25 Oscar come up, catch up on her, and, as you claim, pass her on

1 the left? How fast did he have to be driving?

2 A. I can't answer that question. I don't know where he
3 is on the road. I don't know how fast he is going as he is
4 coming up. I can't answer that question.

5 Q. Do you even know what the difference in speed was at
6 the time of this incident between the two vehicles?

7 MR. DUER: Objection.

8 THE COURT: Overruled.

9 It is a yes or no.

10 A. No.

11 Q. Do you know how it was, based on your analysis, that
12 Oscar Amador fell -- how his motorcycle actually fell? How did
13 it go from being upright and straight to down on the ground?

14 A. Do I know how it happened or why?

15 Q. How.

16 A. I don't know how -- I know how it happened, yes. He
17 went down on the ground on the left side of the vehicle.

18 Q. Okay.

19 How did that happen? How did he go from riding on his
20 motorcycle to all of a sudden being on his left side down on the
21 ground?

22 A. Because he is traveling too fast for a narrow
23 condition.

24 Q. Well, if it is as narrow as you claim, you don't know
25 the measurement, and he fell to the left, wouldn't he have

1 fallen off the roadway onto the grass to the left there?

2 A. I don't know -- he fell. Obviously, he fell in front
3 of Audi because of the mark.

4 Q. Sir, did you run any analysis based upon the potential
5 for evidence in this trial to show that there was a collision
6 between the Audi and the motorcycle?

7 A. Define analysis.

8 Q. Do you calculate where the vehicles would end up?
9 Where the sight lines would be? What speeds they would have
10 been at? Where they started at? Where they ended at based on
11 the actual collision?

12 A. I can testify as to how I thought this accident
13 occurred which is what I thought I did.

14 Q. That's not what I am asking.

15 The only analysis that you performed was based upon
16 your claim that there was no contact between the vehicles,
17 correct?

18 A. There is no evidence -- no physical forensic evidence
19 in my opinion to indicate that the front of the Audi contacted
20 the back of the motorcycle.

21 Q. And that's based on your --

22 A. That's my analysis, counsel.

23 Q. Your analysis of looking at the back of the
24 motorcycle, right?

25 A. That's my analysis looking at all the evidence I have

1 discussed, examining the Audi and looking at the pictures of the
2 motorcycle.

3 Q. My question, sir, is different.

4 My question: Did you perform any reconstruction based
5 upon the potential for evidence in this trial coming out that
6 there was a collision between the two vehicles? Did you attempt
7 to reconstruct this evidence based upon a collision of the two
8 vehicles?

9 A. Yes.

10 There is a nine page report in my report that
11 indicates my reconstruction. It is a nine page report of my
12 analysis.

13 MR. SMILEY: Objection.

14 Move to strike.

15 THE COURT: Overruled.

16 Q. Do you present this jury with any analysis based upon
17 a collision?

18 A. Absolutely.

19 It is a nine page report that I turned over to
20 counsel.

21 Q. I am not asking what you gave to your lawyer. I am
22 asking what you gave to this jury.

23 Did you give them any analysis based on a collision of
24 the two vehicles?

25 THE COURT: Today?

1 MR. SMILEY: Today.

2 A. No; I didn't, no.

3 Q. Are you aware, sir, that there was testimony at this
4 trial that there was a collision between these two vehicles?

5 A. I'm aware.

6 Q. Even though you are aware that there is evidence in
7 this case that the two vehicles collided, you were unable to
8 come and testify to this jury about a reconstruction of this
9 accident based upon a collision, weren't you?

10 A. You would have to define the word "evidence," please.

11 Q. I don't have to define that for you.

12 THE COURT: Okay, this is not -- both gentlemen,
13 this not a debate, so next question.

14 Q. Knowing that there is information of a collision
15 between these two vehicles -- and you knew that from the police
16 report, right?

17 A. Yes.

18 Q. Did you come objectively prepared to discuss how this
19 accident could have occurred based upon a collision of these
20 vehicles?

21 A. I did, yes.

22 Q. And what is your opinion if there was a collision of
23 the speed of the vehicles at the time of the collision?

24 A. You want -- I am not sure I understand that. Rephrase
25 that.

1 MR. DUER: Objection, your Honor.

2 THE COURT: Overruled.

3 MR. DUER: Two questions.

4 A. What is the question?

5 Q. So you did an analysis based on a collision?

6 A. No, I did an analysis based on the evidence that I
7 examined.

8 Q. My question is: I want you to assume there is
9 evidence in this case the defendant -- she testified, I may have
10 hit him, okay? Our vehicles may have collided. You know from
11 the police report it talks about a collision, being struck,
12 right?

13 A. Yes.

14 Q. Did you take that information and do an accident
15 reconstruction, based on a collision between the two vehicles to
16 then be able to explain to this jury what you believe occurred
17 leading up to those events to cause a collision? Did you do
18 that analysis?

19 A. I am -- you would have to please rephrase the question
20 because I am confused as to --

21 THE COURT: Let me try this.

22 MR. SMILEY: Thank you.

23 THE COURT: Did you exclude any possibility of
24 the contact between the vehicle and the motorcycle?

25 THE WITNESS: Your Honor --

1 THE COURT: That's a yes or no.

2 THE WITNESS: Where on the vehicle, your Honor?

3 THE COURT: You are saying there was no contact.

4 THE WITNESS: I am saying in my opinion --

5 THE COURT: No, sir. I am asking a specific
6 question: Did you take in consideration at all that there
7 was contact?

8 THE WITNESS: I can't rule out incidental contact
9 between the right side of the motorcycle and the driver's
10 side of the Audi as the motorcycle is moving up alongside
11 the Audi. I can't rule that out. Maybe there was
12 incidental contact. I didn't see any evidence of that but
13 maybe there was.

14 BY MR. SMILEY:

15 Q. Where was that incidental contact?

16 A. I just said it.

17 Q. Where?

18 A. Where what? I just testified to that.

19 Q. Between the vehicles; where would that incidental
20 contact have been?

21 A. I said if -- if there was any incidental contact, it
22 occurred with the right side of the motorcycle and the driver's
23 side of the Audi when the motorcycle was moving up into that
24 narrow space -- if.

25 THE COURT: Okay.

1 That's move on.

2 We are not -- let's proceed with a different line
3 of questioning at this point.

4 BY MR. SMILEY:

5 Q. Where was the motorcycle when Carol Lynch made her
6 right turn onto Grand Central Parkway?

7 A. I don't believe, in my opinion, that it was on the
8 service road yet.

9 Q. Where was it?

10 A. Making its turn after the Audi was already on the
11 service road.

12 Q. Did it start to make its turn?

13 A. What? The motorcycle or the Audi?

14 Q. The motorcycle.

15 Did it start to make its turn when she made her turn?

16 A. I think the motorcycle made its turn after the Audi
17 was on the service road.

18 Q. Okay.

19 Now, can you tell this jury specifically where that
20 motorcycle was when the Audi made its turn?

21 A. No.

22 Q. What was the position of the motorcycle prior to it
23 going down to the ground into a skid? What was the orientation
24 of the motorcycle?

25 A. Obviously, it had to be upright.

1 Q. Was it straight? Was it angled one way or the other?

2 A. I have no idea.

3 Q. You have no idea?

4 A. There is no way for me to determine that.

5 Q. Wouldn't the position of the motorcycle result in a
6 different position that it would end up after the incident
7 occurred when it went down?

8 A. I don't understand your question.

9 Q. If the motorcycle is angled to the right in front of
10 her car and an impact occurred, would you expect it to end up
11 coming to rest in the same position as if the motorcycle was
12 straight when it was hit?

13 A. There are many factors there that I can't answer that
14 question.

15 MR. SMILEY: Now can we please show Exhibit Six
16 to the witness?

17 THE COURT: Yes.

18 Come up.

19 (Whereupon, there was an off-the-record
20 discussion held in the robing room.)

21 BY MR. SMILEY:

22 Q. I would like to wrap it up because we are at the end
23 of the court date, sir.

24 Finally, was there any consideration in your mind of
25 how to present your accident reconstruction to this jury based

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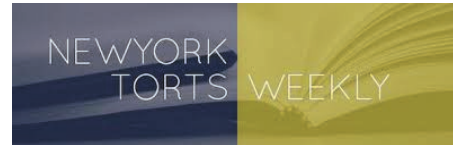
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