

# Win Before You Walk In: Mastering Pre-Trial Tactics

Part 3: Successful Discovery  
Techniques and the Importance  
of a Good Deposition

MATERIALS BY  
Andrew Smiley, Esq.

—New York State—  
**ACADEMY**  
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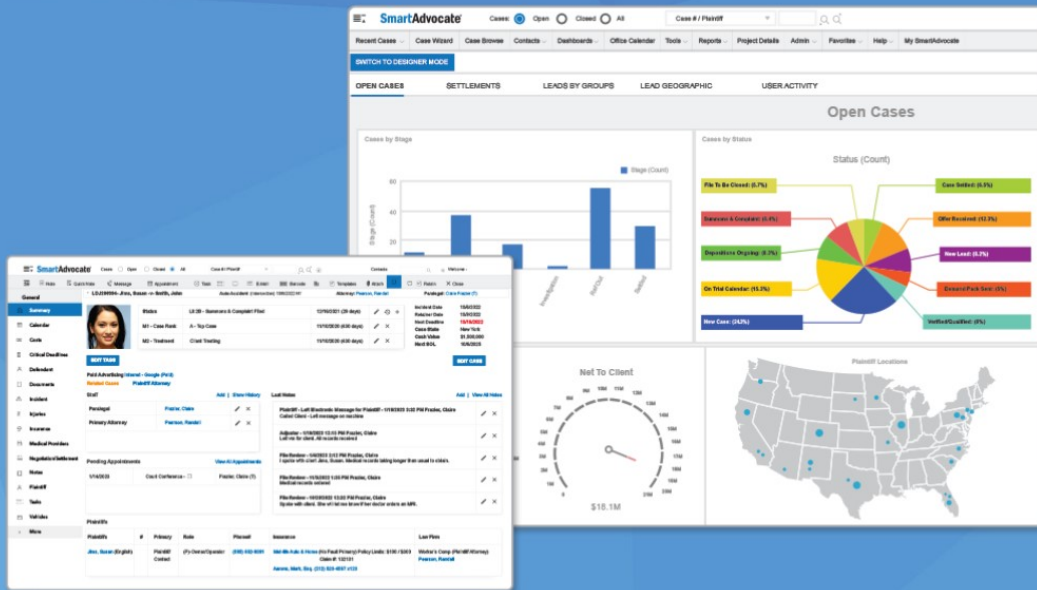
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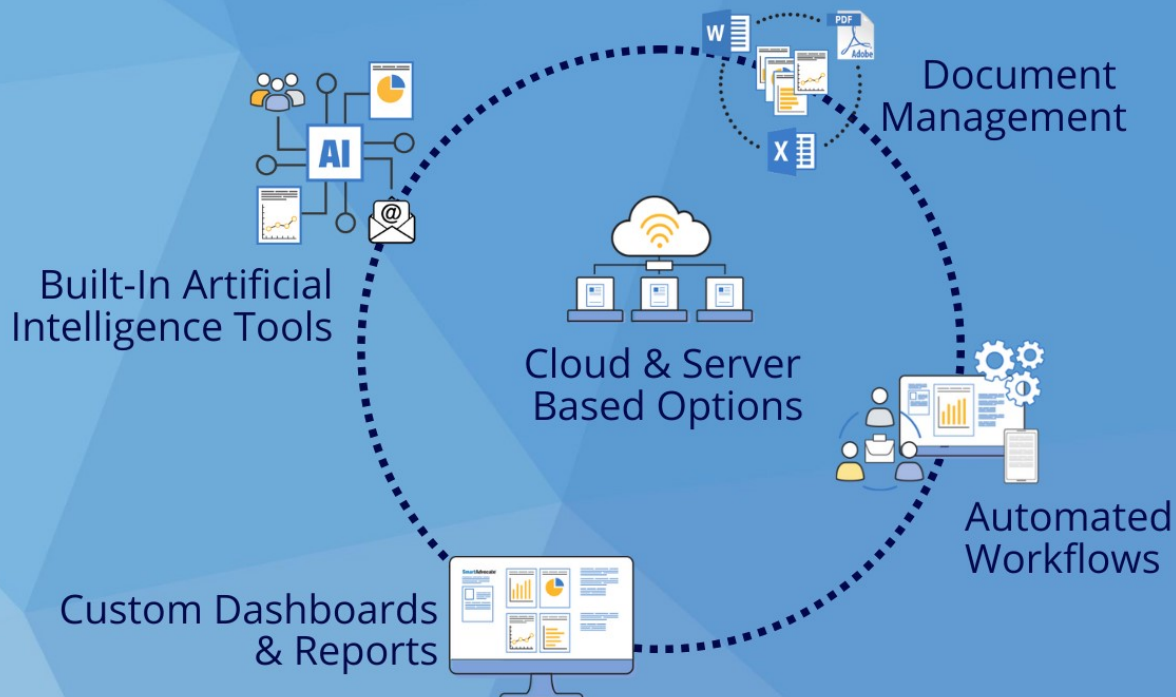
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***CURRICULUM VITAE***

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, product liability 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)*

· *The Mentor Esq. Podcast – A Podcast for Lawyers*

- Founder & Host (2019 – Present)

· *New York “Super Lawyer”*

2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026

### Bar Admissions:

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

### Organizations/Affiliations:

· New York State Academy of Trial Lawyers

- 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)
- Master CLE Instructor (2020 – present)
- CLE Instructor (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
- American Bar Association
- The American Association for Justice

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- Brooklyn Law School Alumni Association
- National Order of Barristers
- Lime Rock Drivers Club
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors & Legal Counsel

### Authored Books

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide*, 2022, The Mentor Esq. Handbook Series – Amazon Best Seller in Personal Injury Law

Smiley, Andrew J. *Successful Trial Skills – A Practical Guide to Jury Selection, Opening Statements, Direct & Cross Examinations and Closing Arguments*, 2024, The Mentor Esq. Handbook Series – Amazon #1 New Release in Trial Practice

### Continuing Legal Education (CLE) Presentations:

(88) *Win Before You Walk In – Mastering Pre-Trial Tactics – Part 3 - Successful Discovery Techniques & The Importance of a Good Deposition*, New York State Academy of Trial Lawyers, March 4, 2026

(87) *Win Before You Walk In – Mastering Pre-Trial Tactics – Part 2 - How to Frame Your Complaint to Your Advantage*, New York State Academy of Trial Lawyers, February 18, 2026

(86) *Win Before You Walk In – Mastering Pre-Trial Tactics – Part 1 - How to Settle Your Case Before Filing a Lawsuit*, New York State Academy of Trial Lawyers, January 7, 2026

(85) *Newly Admitted, Now What? The Skills You Didn't Learn in Law School – Part 2*, New York State Academy of Trial Lawyers, December 9, 2025

(84) *Newly Admitted, Now What? The Skills You Didn't Learn in Law School – Part 1*, New York State Academy of Trial Lawyers, December 8, 2025

(83) *Working with Vocational Experts in Personal Injury Litigation*, Lawline, July 24, 2025

(82) *Federal Court Confidence: Successfully Litigating Personal Injury Cases – Part 3: Motion Practice in Federal Court*, New York State Academy of Trial Lawyers, June 5, 2025

(81) *Federal Court Confidence: Successfully Litigating Personal Injury Cases – Part 2: Depositions in Federal Court*, New York State Academy of Trial Lawyers, May 1, 2025

(80) *Federal Court Confidence: Successfully Litigating Personal Injury Cases – Part 1: Overview of the Federal Court Process*, New York State Academy of Trial Lawyers, April 3, 2025

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### Continuing Legal Education (CLE) Presentations Continued:

(79) *Who's on the Hook?- Part 4: Litigation and Insurance Issues in SUM Cases*, New York State Academy of Trial Lawyers, January 8, 2025

(78) *Who's on the Hook?- Part 3: Litigation and Insurance Issues in Premise Liability Cases*, New York State Academy of Trial Lawyers, December 4, 2024

(77) *Who's on the Hook?- Part 2: Litigation and Insurance Issues in Construction Accident Cases*, New York State Academy of Trial Lawyers, November 6, 2024

(76) *Who's on the Hook?- Part 1: Litigation and Insurance Issues in Ride-Share and Rental Car Accident Cases*, New York State Academy of Trial Lawyers, October 2, 2024

(75) *Introducing Evidence and Impeaching Witnesses*, Office of The New York State Attorney General – Legal Education and Professional Development, September 26, 2024

(74) *Walking the Line: Settlement Negotiation Skills & Ethics*, New York State Academy of Trial Lawyers, July 9, 2024

(73) *Novel Negligence Cases – Part 2: How to Successfully Litigate Dram Shop Cases*, New York State Academy of Trial Lawyers, June 5, 2024

(72) *Working with Experts*, Office of The New York State Attorney General – Legal Education and Professional Development, April 2, 2024

(71) *Novel Negligence Cases – Part 3: How to Successfully Litigate Ski Accident Cases*, New York State Academy of Trial Lawyers, March 6, 2024

(70) *Novel Negligence Cases – Part 1: How to Successfully Litigate Personal Trainer and Gym Negligence Cases*, New York State Academy of Trial Lawyers, January 3, 2024

(69) *Litigation Back to Basics – Part 3: Introducing Evidence and Impeaching Witnesses*, New York State Academy of Trial Lawyers, December 6, 2023

(68) *Litigation Back to Basics – Part 2: Working With Experts*, New York State Academy of Trial Lawyers, November 1, 2023

(67) *Construction Site Injury Litigation: Pursuing or Defending Claims Against Site Owners, Contractors, and Other Third Parties*, Strafford CLE/BarBri, October 17, 2023

(66) *Litigation Back to Basics – Part 1: Preparing and Conducting Depositions*, New York State Academy of Trial Lawyers, October 4, 2023

(65) *Depositions*, Office of The New York State Attorney General – Legal Education and Professional Development, September 28, 2023

(64) *How to Litigate a Medical Malpractice Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, June 7, 2023

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

### Continuing Legal Education (CLE) Presentations Continued:

(63) *How to Litigate a Medical Malpractice Case – Part 5: Pre-Trial Preparation*, New York State Academy of Trial Lawyers, May 3, 2023

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

(59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023

(58) *How to Litigate a Construction Accident Case – Part 4: Motion Practice*, New York State Academy of Trial Lawyers, December 7, 2022

(57) *Preparing for Depositions: Best Practices for Asking and Answering Questions*, Office of The New York State Attorney General, 2022 Legislature Program, December 6, 2022

(56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022

(55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022

(54) *Trial Series: Part 2 - Opening Statement Webinar*, Queens County Bar Association, September 22, 2022

(53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law*, New York State Academy of Trial Lawyers, September 7, 2022

(52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, July 6, 2022

(51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement*, New York State Academy of Trial Lawyers, June 2, 2022

(50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions*, New York State Academy of Trial Lawyers, May 4, 2022

(49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts*, New York State Academy of Trial Lawyers, April 6, 2022

(48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action*, New York State Academy of Trial Lawyers, March 2, 2022

**Andrew J. Smiley, Esq. Curriculum Vitae, Page 6**

Continuing Legal Education (CLE) Presentations Continued:

(47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation*, New York State Academy of Trial Lawyers, February 4, 2022

(46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations*, New York State Academy of Trial Lawyers, January 5, 2022

(45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination*, New York State Academy of Trial Lawyers, December 1, 2021

(44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination*, New York State Academy of Trial Lawyers, November 3, 2021

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements*, New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection*, New York State Academy of Trial Lawyers, September 10, 2021

(41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!*, New York State Academy of Trial Lawyers, July 7, 2021

(40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial*, New York State Academy of Trial Lawyers, June 2, 2021

(39) *How to Successfully Litigate a Personal Injury Case Series - Part 5: Pre-Trial Disclosures and Gearing up for Trial*, New York State Academy of Trial Lawyers, May 5, 2021

(38) *How to Successfully Litigate a Personal Injury Case Series - Part 4: Depositions*, New York State Academy of Trial Lawyers, April 7, 2021

(37) *How to Successfully Litigate a Personal Injury Case Series - Part 3: Your Adversary, the Preliminary Conference and Initial Discovery*, New York State Academy of Trial Lawyers, March 3, 2021

(36) *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

(35) *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

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

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

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Continuing Legal Education (CLE) Presentations Continued:

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

(31) *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

(30) *Crisis Management - The Corona Virus Pandemic*, The Mentor Esq. Podcast, April 9, 2020

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

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

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

(26) *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

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

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

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

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

(21) *Effectively Using Experts in Personal Injury Cases*, Lawline, October 8, 2015

(20) *Killer Cross Examination Strategies*, Clear Law Institute, April 21, 2015

(19) *Powerful Opening Statements*, Clear Law Institute, January 13, 2015

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

(17) *Killer Cross Examination Strategies*, Lawline.com, November 20, 2014

(16) *Trial Techniques: Tricks of the Trade Update*, Lawline.com, October 14, 2014

(15) *Personal Trainer Negligence Update*, Lawline.com, October 14, 2014

## **Andrew J. Smiley, Esq. Curriculum Vitae, Page 8**

### Continuing Legal Education (CLE) Presentations Continued:

- (14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014
- (13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014
- (12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013
- (11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013
- (10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012
- (9) *“You Had Me at Hello”: Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012
- (8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012
- (7) *The Nuts and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011
- (6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011
- (5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011  
*Techniques: The Tricks of the Trade*, Lawline.com, February 16, 2011
- (4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011
- (3) *Jury Selection 101*, New York State Academy of Trial Lawyers, December 14, 2010
- (2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010
- (1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

### Television Appearances

#### *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

**Andrew J. Smiley, Esq. Curriculum Vitae, Page 9**

*CNN -Anderson Cooper 360*

*ET – Entertainment Tonight*

*Bloomberg TV*

*Headline News*

*Tru TV*

*Court TV*

*The Morning Show with Mike and Juliet*

Interests, Hobbies:

High-Performance Motorsport Racing, Lime Rock Drivers Club, Tennis, Lego, Cooking, Yoga

# DEPOSITIONS

By Andrew J. Smiley, Esq.

[www.TheMentorEsq.com](http://www.TheMentorEsq.com)

In this chapter, we are going to focus on preparing for the deposition; how to handle yourself during the deposition; and things to think about while questioning or defending a witness during the deposition. Like everything else we do as lawyers, preparation is key. Preparation, preparation, preparation! To be a successful attorney you must always (1) be prepared and (2) inform your clients. That is woven through everything that we do as attorneys. Being prepared for the deposition is as important as being prepared for the trial.

Every personal injury lawyer engages in depositions as part of the discovery process. Even if you are not trying cases, chances are you are handling depositions. After all the paperwork, the discovery, and the other issues that have been addressed in previous chapters, now is the time in a personal injury case where you really feel like you are litigating. You are engaged. You have a witness. You have an adversary in person or on Zoom, and there is a real-time back and forth. There is a confrontation, or perhaps an adversarial environment. You must get geared up for it. You must be prepared so that it goes as smoothly as possible, just like a trial. It is the behind-the-scenes preparatory work that will make your deposition go as smoothly and as effectively as possible.

## *Preparation*

Let's talk about preparation. There are two roles you may find yourself in during a deposition. You will either be questioning a witness or defending a witness. Defending a witness occurs when someone is questioning your client. If you are a plaintiff's attorney, you will be defending the deposition of your client as they are questioned by defense counsel. If you are defense counsel, you will be defending a corporate witness, a driver of a vehicle who is being sued, or a witness in your case. When defending a witness at a deposition, it is your responsibility to make sure the questions being asked of the witness by your adversary are relevant. If the question is not relevant, in improper form, or if it invades a privilege, it is your job to make an objection.

The two areas of preparation we will cover in this chapter are (1) preparing your witness and yourself to properly defend the witness and (2) preparing yourself to question an adverse witness, whether it is a layperson or an expert witness.

### *Defending a Witness*

You will likely be called upon to defend the injured party if you are a plaintiff's lawyer, or a layperson if you're representing someone who is being sued. My first tip: NEVER leave the preparation of a witness to the day of – or the morning of – the deposition. I see it happen all the time; especially before the Covid pandemic when many depositions were conducted in courthouses. A lawyer would meet with a client that morning, sit outside or sit in a room and prepare their witness right before the deposition commences. Do not do that. You should schedule a time in advance to prepare your witness. It is a standard rule in my law firm that the minute we know a deposition is scheduled, we notify our client(s) and arrange a time to prepare them *in advance* for the deposition. Why is it important to prepare in advance? First, it gives you the ability to really flush out everything with your client so that if an issue comes up, you can process the issue and deal with it. You can strategize and pull together a game plan. You do the homework you need to do before the actual deposition. You never want to be in a situation where you run into an issue during the preparation and then immediately head into the deposition. Secondly, it gives you time. You are not on the clock. You can spend as much time as needed to address issues. And those issues could be the information itself that comes up, or it could be an issue with regards to how your witness is going to respond to certain liability or damages questions.

Many times, when I am preparing a witness, he/she has a hard time articulating how their injuries have impacted their life, so I work with them during the preparation. I ask them to think about it and ask their loved ones if and how their injuries have changed them. Explain to them why it is important to be able to speak about it at the deposition. I explain to my clients the importance of giving details about the effects of the injury on their life so that the defense attorney and the claims adjuster will be able to read about it when they receive the transcript. It is difficult to argue that a client has suffered if the client fails to talk about their suffering in a deposition. Timing is important, and preparation gives you and your client that buffer zone. You allow time for the

witness to absorb what comes out of the preparation in advance of the deposition. Sometimes you will have witnesses who may need more than one preparation session, and it is good to find out in advance if that is the case. I have had clients go through multiple preparation sessions; I correct them when they give a poor response to a question and I help them practice how to answer anticipated questions. If they still need help, we schedule another session to go over everything again. If you have a client or a witness that may be a little bit more difficult to prepare, you will want that extra time. So, plan your preparation of your witness in advance.

Let me share with you what goes on behind the scenes when I prepare my client for a deposition. The first thing I like to do is ask them if they have ever been deposed. I explain what a deposition is and what the process is, and I get granular. This is the “informing” part of “informing your client.” I explain to them where the deposition will be held, whether it will be in the conference room next door to my office or over Zoom. I let them know if there is going to be one or more lawyers in attendance. I explain that there will be a court reporter who is going to take down everything that is said and that they will get a copy of the typed transcript after the deposition is completed. I let the client know if the deposition will be videotaped. If there is going to be more than one lawyer adversary, I explain they are not going to be firing questions at back and forth, but that one will take the lead and ask the majority of the questions and the other lawyer(s) will follow in turn. Clients and witnesses will take comfort and be better prepared when they know what to expect. You do not want to simply walk them into a room where they are facing lawyers and a court reporter. Explain to them that although it is a formal proceeding, it is not court. There is no judge. If they need to take breaks, they can. If they need to use the bathroom or stretch their legs, they can. Explain all of that to them so they are comfortable and understand what a deposition is. This is second nature to us, but it goes a long way for clients and witnesses who may not be familiar with how this process works.

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### *The Ground Rules*

Next, I like to go over “ground rules” with my client. We should all have our own ground rules that we explain to the witness; these can include things like how you prefer depositions to run and how you advise witnesses to handle themselves. This enables you to be a unified team

when you get into that room and your witness is about to be questioned for several hours. Here are my ground rules:

- (1) Keep your answers short.** If you give long-winded answers, the lawyer is going to pick up on something you say and run with it. Just answer the question. I like to give an example: I ask them what time they got up this morning. If they reply with, ‘I normally get up at 6 AM but I did not want to be late because it is a long commute to get to your office, so I got up at 5 AM today.’” That is the *wrong* answer. The right answer is, “6 AM.” Short answers!
- (2) The exception.** One exception to this rule must be explained to the client: when a question relates to your pain and suffering or the effects of the injuries on your life, give long and detailed responses. Open the floodgates. Tell everything. I explain the importance of talking about the impact that their injuries have on their lives and giving examples of it. They must know that that question is coming and be prepared to give a good answer. Tell them not to be stoic or machismo. Sometimes I have big construction macho clients who do not want to complain, even if it is the worst injury you could imagine, but it is so important to stress vulnerability in this scenario. This is where they must let it all out, because when the insurance representative or defense counsel is reviewing the transcript or writing a report, it makes it difficult for me when I go to negotiate a settlement and my adversary says, ‘Listen, your client said they are fine now.’ Your client needs to fill pages with the problems that have arisen since the injury, their hardships, and life changes. This is their time. It is their day in court. If they can properly express themselves, they most likely will not have to go to court because that helps you get their case resolved. Many clients have a hard time talking about the impact the injuries have had on their life. If they are uncomfortable, you can give them some ideas on how to articulate what they want to say. It is helpful if a spouse, parent, or friend can give them some feedback if they need an outside perspective on how they may have changed as a result of the injuries they sustained in the accident.
- (3) Listen to the question and pause before you answer.** Think it over. I explain to my clients that a pause is important; it keeps a clean record so the court reporter can get

the question and the answer, and it allows the witness and client to think before answering, which is always important. Equally important, it allows me, the lawyer, the opportunity to jump in and object if there is a reason to object. Work on this with your client during the preparation. Explain to them that while people talk over each other in normal life, it is different in a deposition. So, pause, then answer.

- (4) Tell your clients your philosophy on objecting.** Personally, I do not like to object during my client's deposition. It interrupts the flow. Ninety-nine percent of questions are appropriately asked. The questions may not be the best, they may be improper technically, but as your client's lawyer, your main goal is to get in and out of there with a clean and appropriate record of testimony. You do not want to argue with your adversary. You do not want to mess up the record or increase your transcript page count, because it ends up costing you more. Save your objections for when you really need them. Sometimes lawyers want to show their clients that they are fighting for them by objecting and being obstructive. I can only tell you how I choose to act in my depositions. I think my system of not objecting unless really necessary makes for a much smoother and more professional environment.
- (5) "The Hand."** When I do object, I have a method, called "The Hand." I did not originate this; I learned this as a young lawyer. I was thrown into a medical malpractice deposition where I was doing the questioning and an old school defense medical malpractice lawyer was doing "The Hand" with his witness; I would ask a question, and he would put his hand right up in front of the the doctor seated next to him, and he would say, "objection" - along with a concise basis for the objection. He would not drop his hand until everything was sorted out. It frustrated the hell out of me. Every time I saw the hand go up before I even said anything, I was thinking, "Ugh! Again, with the hand"! It threw me off my game a little bit, to be honest. However, I thought it was effective, and now I use it. If I am going to object, I put up my hand directly in front of my client. I tell them ahead of time that this may happen and let them know that if they see my hand go up, they need to stay quiet until my hand goes down. I explain that the hand gives me an opportunity to object and say everything that I need

to and that once the hand goes down, they are free to speak again. It is an effective technique. Use it.

After I discuss the ground rules with my clients, they understand my philosophy when we go into the deposition, and they are not wondering why I am not objecting more. They feel comfortable and have a good idea of when they should or should not speak. I also like to explain what I expect will be the natural flow and order of questions. For those of us who have done many depositions, you know there is generally a natural flow to them, right? Whether it is a plaintiff in an accident case or a witness on the defense side being questioned, it is usually chronological. It starts with background about the person, their education and continues up to the time of the accident, covers what happened at the accident, and what happened after the accident, and then works through damages and questions about treatment, pain and suffering, and impact on daily activities. It helps to explain that flow to the client. It also helps to give the client an approximate timeframe for how long they can expect the deposition to last. I will tell a plaintiff that their deposition will usually last about 2 or 3 hours. It could be longer, it could be shorter, but it is good for them to know. Again, inform your client. This is all part of the preparation process. Have that conversation. Let them know what to expect. After you go over the ground rules and what the client can expect at the deposition, you get into the meat and potatoes of the accident and issues specifically related to the liability and damages of your client's case.

However, before you prepare your client, you must prepare yourself. You need to thoroughly evaluate the case. Review all the paper discovery that you have received or exchanged. Review all your client's medical records. You need to be fully familiar with the case so that you can focus on what you think is important for this witness and this deposition. Once you know the details of the case forward and backward, talk about your approach with the client and go over what they are going to be asked. Go through the photos, if there are any, and any exhibits that you anticipate may be shown to the witness. I like to tell my clients, "Listen, you cannot do anything wrong. All I need you to remember is that you saw what caused you to fall," or "all I need you to remember is that you stopped at the stop sign, and you looked both ways." You need to say that. "All I need you to remember is ... (fill in the blank)." In most cases, there is something crucial either on liability or damages, and that is what you want to zero in on when you are prepping this

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witness. You want to zero in on potential weaknesses or problems, either in the record or in prior statements, or in what you found in the discovery or photographs. This is their chance to explain themselves, and you need to prepare them to explain it in the best way possible.

To be clear, you can never suggest something for your client to say that is not true. That is not ethical. You cannot let your client lie at a deposition or perjure themselves. You cannot be a part of anything like that. If you have a situation that is tough to deal with, you tell the client to be truthful but that they do not need to volunteer questionable information. What happens when you run into a situation that you are worried about... a prior crime, for example? You need to ask every witness during preparation if they have ever been convicted of a crime. Even if your client is a sweet little old lady who you could not imagine doing the smallest thing wrong, you need to ask her if she has ever been convicted of a crime, because that question will likely be asked at the deposition, and you do not want to be surprised. If you do not prepare for this and your client is asked that question and they say, "Yes," you are going to start sweating before the follow-up questions even start. You need to know if it is a misdemeanor. Misdemeanors do not count, and they are not allowed to ask about them. Was it a felony? If it was, you need to know what they are allowed to ask your client about that felony. In short, you need to find out the bad stuff so when the question is asked, you can prepare the witness for how to handle it, and you can be prepared for how to handle it. Ask your client if there is anything that they are worried about that could come out in questioning. Reiterate that now is the time for them to tell you so you can deal with it: bankruptcy, court litigation, all those touchy subjects. You need to know. Go over any weak spots, liabilities, causation issues and damages, or prior injuries. These are the things you really want to focus on during preparation.

Note that there is a difference between preparing a witness and impermissible coaching. Tell your client they cannot lie. Tell your client that if they do not know something, they can give themselves the benefit of the doubt if they think they know what happened. Try and be as creative as you can without suggesting something wrong. Never lie. Never ask them to lie. And just work on it as best as you can. Find the weaknesses in their answers and figure out how to get around them. Ultimately, if it is something really hard, then you want to prepare them for how to handle it when they are asked about it. Tell them to just keep the answer short. You may want to object,

or sometimes a lawyer may not follow up on it and it can slide right by. That takes experience. If you run into an issue during preparation, reach out to colleagues to talk it out if there's a specific issue that is giving you cause for concern.

When preparing your client to answer questions about medical treatment, tell them that they do not need to memorize their treatment history or know the dates of every doctor's appointment. Explain that the defense has all the records. Tell them to do the best they can, and that they can approximate. Essentially, put them at ease and focus the client on the important parts, and they will be prepared.

Finally, ask your client if they have any questions for you. It should take you a minimum of one hour to do a proper preparation of your client and likely longer than one hour if the case is more complex or if there are issues that need extra work. Take as much time as needed. Sometimes that means having another preparation session before the deposition. Whatever it takes, your client should be prepared. It is going to make their deposition go more smoothly, it is going to be better for your case, and everyone will feel at ease.

### *Questioning a Witness*

There are two types of witnesses you will question at a deposition. A "lay" witness is a person with no specialized knowledge or expertise. Examples of lay witnesses include a driver in an automobile accident or a person who witnessed an accident, or a family member of a party to the litigation. Lay witnesses have probably not been questioned at a deposition before. An "expert" witness is one with specialized knowledge or expertise, such as a physician or a hired professional expert, professional engineer, biomechanical engineer, economist, etc. There is a higher level of preparation that will go into preparing to question an expert witness.

The first thing I do before preparing for a deposition is to have the right notice served for that deposition. When you are suing a company that is a defendant, you do not want to let your adversary pick whom to produce, because it is possible to show up to a deposition and have your adversary produce a witness from the corporate office who knows little or nothing about the circumstances of the accident. This is a huge waste of time; you need to go through the process of finding another witness. How do you deal with this?

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In federal court, there is Rule 30(b)(6) to rely upon and there may be similar statutes or rules in your state of practice. In New York State, the equivalent for serving a notice on a specific defendant corporate witness is a Uniform Rule of the Court, Rule 202.20-d. In these notices, you put detailed point by point, number by number areas to which you want answers. Then, the burden shifts to the corporate defendant to produce however many witnesses are necessary to answer the questions that you have raised in your notice. If they do not have personal knowledge, it is their responsibility to do homework and speak to the appropriate people in their company to find and provide that information upon questioning at the deposition. If the defendant fails to comply with that notice and produces a witness that does not have knowledge of the points that you have listed or has not looked into getting the answer to those questions, then the defendant or the defense counsel could be sanctioned for failing to properly comply with that notice. Take the time to prepare a proper notice that specifies the topics of inquiry that matter. As in any deposition you are preparing for, you need to review your case to determine what information is needed. You need to workshop it, either by yourself, with colleagues, your partners, or your associates.

At the outset, you need to know *why* you are choosing to question each witness. For every witness, there is a reason (or multiple reasons) that you want to question that witness. You want to get more discovery. Depositions can help peel away the layers to get more information that you want to find out in your case, so you want to ask questions that will lead to more discovery. You may want to “knock out” the witness because this witness may have said something bad for your case in a statement. Understandably, you want to grill them on it and either knock it out or weaken it by asking them questions about why they have said things or what they really observed. Sometimes we call that a “knock out” witness. An example of a knock witness could be a witness listed on a police report who is quoted as saying about your client that “I saw him run the light.” You will want to take the deposition of that witness to (1) see if they show up and (2) test their perceptions of what they observed. If the witness fails to show up at the deposition you can move to preclude them from the case and thereby eliminate this potential bad evidence from coming in at trial. If the witness shows up, you may be able to cast doubt on what they claim to have seen. Maybe they were not actually in the line of sight of the accident. Maybe they were drinking all night and intoxicated. The ultimate goal is to knock out this witness from hurting your case and taking away your adversary’s argument that they have a witness that can hurt your claim.

Alternatively, you may want to “lock them in” to testimony that can help you at trial. If you know you have certain elements in your case that you need to prove and you could satisfy those elements from one of these witnesses, then “lock them in.” Then go into that deposition with the goal of getting an answer to that question that will give you the element to meet your burden at the time of trial. Whatever it is that you may need or want, you must identify it and go into your deposition of that witness with a game plan. Do not just go in and ask questions; *have a plan*. Start by reviewing your case and all the records. Sit down with all the discovery you have received, go through every page, highlight key passages, put in question marks, and make notes. A lot of homework takes place before a deposition, even in a simple auto case, but do not skip it. Find out what you are going to need to prove or disprove at trial and be prepared.

### *Prepare an Outline and Organize Exhibits*

Once you have a plan for the deposition *make an outline*. I recommend having an outline to know what to talk about and where you want to go. I use a legal pad or create a Word document for my outlines. I have point headings: background, resume, curriculum vitae – which is the resume of a professional witness – education, and employment. You may want to identify defendants and ownership and ask about who owns what, who supervises whom, and who the client’s supervisor is at work. Have different headings and write/type bullet points of what you want to ask, then go through all the documents and the topics that are important to review with that witness and have those ready and organized. You can even pre-mark exhibits to show the witness. When I get to something that I want to show the witness as an exhibit, I write it in red on my legal pad (or type in red font on the Word document). “Go to Exhibit 1, photograph of intersection.” Then later on, “Go to photo 2, exhibit of damaged vehicle,” or whatever your information may be. Your outline should be organized by what you want to ask. You should highlight the exhibits. Point arrows to them.

Your exhibits should be in a nice pile for in-person depositions or, for Zoom, scan them as PDFs<sup>1</sup>. In terms of Zoom depositions: if you organize properly, everything I am talking about can

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<sup>1</sup> PDF is an abbreviation that stands for Portable Document Format. It is a versatile file format created by Adobe that gives people an easy, reliable way to present and exchange documents - regardless of the software, hardware, or operating systems being used by anyone who views the document.

be done successfully in video depositions. And frankly, I have been finding it better over Zoom because I organize everything, I make sure the exhibits I plan to use are saved as PDFs, and I will highlight what I want to focus on within the PDF. When I am questioning the witness, I share my screen. I have my PDFs organized on my computer and ready to be shared; I click on the one that I need at the moment, go to the right page number. Everybody on the Zoom conference sees it, instead of having to have multiple copies to pass around to everybody, which is the practice for in-person depositions. By way of example, I recently conducted the deposition of a defendant physician in a very serious medical malpractice case. The medical record that I needed to go through was about 2,500 pages of an inpatient hospital chart; amongst other things, what I did to prepare for that deposition was create an Excel spreadsheet that had the PDF page number of the chart with the date, the time of the entry, and a column of relevant quotes from either this witness or other important entries. I shared my screen and put the whole chart up. Then I referenced my excel chart to identify which page to go to and state “All right, I’d like to draw your attention to PDF page 1,252.” I would click to pull it up on the screen, “Do you recognize this? I want you to see in this hospital chart the highlighted paragraph. Is that your note?”

For in-person depositions, make copies of all your exhibits before you show up, and ensure that you have a set for the court reporter and for every attorney who will be there and pass them around. Not having enough copies delays the case, as some people will need to wait to reference a neighbor’s copy. There are ways to get organized in advance that will help things go smoothly and allow you to focus on your questioning. And this takes time. You just must plan well in advance. For expert depositions, you must plan further in advance than for some of the simpler lay depositions. But whichever it is, get your exhibits organized, have your outline laying out your questions, and make sure that you have a smooth presentation to your deposition. It has to be smooth, like a beautifully choreographed synchronized performance; that is what allows you to focus on the questions you ask, and the answers given by the witness.

## Attending the Deposition

Let’s talk about being at the actual deposition. You have prepared yourself. You have your notes for the questioning. You are ready to defend your client, and the big day comes. You may be nervous, although you should not be nervous if you are well-prepared. The deposition is the

first adversarial setting you encounter in a case, and it is often the first time that you get to see and communicate with your adversary in person. This is where the case takes on its life. You can feel out your adversary, whether you think you will work well together and can begin to build some camaraderie. Being adversarial does not mean you have to be abrupt or rude or difficult; you could be as sweet as pie and still do a good job. It is events like depositions where we as a profession need to work to be more cordial with each other and understand that we are all in that room to do our job—to represent our clients—and be respectful of that. The vast majority of the time, the plaintiff’s lawyer is not the greedy lawyer who is going to be difficult until the plaintiff gets paid. And the defense lawyer is not necessarily the cold-hearted lawyer who is just sticking up for the insurance company and trying to make the plaintiff out to be a bad guy. Those are extreme cases. The reality is, that most lawyers on both sides realize it is a case that will be resolved somehow, and we all can help each other get to that point in many ways. One of the ways to do that is in a deposition. So, make it easier for your adversary by ensuring they have the materials in advance that you will be covering so they can look at them. Don not surprise them unless you really need to. If they want time to look at something, give them time. Give courtesies to each other; the courtesies and rapport between adversaries in litigation usually starts at these depositions, either over Zoom or in person.

My law partner and life-long friend, Jason Friedman, always reminds me, “You can never read tone into emails.” Sometimes you are exchanging emails or phone calls and the lawyer seems to be difficult on the other side, but then you are at a deposition, and you realize he or she is not that bad. So have conversations. Take some time during the breaks or when you step outside to meet your adversary(s), ask their view on the case, and share how you see it going. Those quick moments are a really good time to meet and be cordial. I always advise you to be nice until you are pushed to where you cannot be, but you need to go in with the attitude that you are going to be cordial at the deposition. Try not to be obstructive for the sake of it, because I see that all the time, and it rarely helps anyone.

*“The Usual Stips”*

In a deposition, you need to be aware of what we call “the usual stipulations.” Let’s talk for a moment about the rules of engagement at a deposition. I guarantee you, that less than half of lawyers have ever actually read through the usual stipulations (“stips”) that parties agree to at the start of every deposition. If you do read them, however, you will see that the most important thing in these stipulations is that ***objections are preserved***. If you do not object, you are not waiving anything at trial, and you do not have to object during the deposition just to be difficult. The only thing that is not preserved is an objection to the “form” of the question. It does not mean you lose the right to object to the question for bad form; you just lose the right to stand up at court and say, “objection to form.” You preserve the right to everything else. Thus, the only thing you need to object to is to form, and the reason for that is to make a clean record when there is an improperly formed question. For example, asking “what time did you wake up and what did you have for breakfast” could spark an objection, because it is two questions in one. That is improper form; they two questions need to be broken up. Other than that, all your objections are preserved. You do not need to worry if you miss something and fail to object. The usual stipulations say it; most state and federal statutes specify it as well. Thus, most of the time, objections during a deposition should just be to make sure there is clean form. The record may not be as clear because the way the question was asked improperly, but otherwise, you do not need to object all the time. I once had a federal court case where I was questioning an expert witness and defense counsel objected to probably 95% of my questions. And every objection was, “Objection, form. Irrelevant. Argumentative. Objection, form. Argument. Irrelevant.” I said to the guy, “We have stipulated that all your objections are preserved. I am saying on the record now and on videotape, I will waive any objection I have at the time of trial to your failure to object to something. You do not need to object to every question of mine. Let’s move on.” He said, “No, I’d like to object.” There was not much I could do. Nevertheless, the usual stipulations say you do not need to object.

As far as rules of engagement go, you are not supposed to have speaking objections or coach your witness. When I ask a witness the question, my adversary is not allowed to jump in and advise the witness on what they can and cannot say, or put parameters on their answer (i.e., “only if you remember it!”). That behavior is impermissible under almost all of the rules in federal and state court. You cannot direct a witness to not answer a question except under extremely rare circumstances such as privilege. They do not have to answer questions that are privileged, such as

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attorney-client communications. The content of privileged discussions also includes spousal privileges, work product, and self-incrimination. Since these come up only rarely, it is uncommon to be justified in directing a witness not to answer. If you are in a deposition where your adversary is being obstructive and keeps asking you to rephrase, or directing the witness not to answer, you make a clear and concise statement on the record stating that their objections are inappropriate, and they are improperly directing their witness not to answer your question. Follow up and ask them on the record if they are aware that that is against the rules and stipulations. See what they want to say. Whatever it is, make them say on the record that they stand by their choice to direct a witness not to answer. When you run into a situation where someone runs afoul of the rules or usual stipulations, I encourage you to be brief in your statement on the record and be brief in your argument with counsel. You are never going to agree. You need to agree to disagree, so be respectful. Make it known that you interpret the rules differently. If you have an adversary that is jumping in, ask respectfully if they can stop giving speaking objections, and state that it is against the rules. Let your adversary say whatever he/she wants but you know that your interpretation of the rules is on the record. Usually, challenging difficult adversaries will stop the bad behavior, but if not, always make a record.

### *Instant Rulings*

If you do not get the answer you want due to your adversary being obstructive, or directing a witness not to answer, mark it for a ruling, and don not be afraid to get a ruling right then and there. Always bring the phone number of the judge on your case, his/her chamber's phone number, and the courtroom's phone number with you, and be ready to use it. Do not bluff about marking for a ruling. Do not wait. Tell the lawyer that you will get the judge on the phone if they continue being obstructive, wait for a break, and then make the call. You can even take a break right then and there to call the judge. Sometimes just the threat of calling the judge will curb bad behavior. What I like to do sometimes is mark everything for a ruling and then towards the end of the deposition or at a lunch break, I will say, "All right. I am going to call the judge now to get a ruling on all the questions you blocked or refused to let the witness answer. I would ask if you want to re-consider your prior objections before we call the judge." Sometimes defense counsel will reconsider when they see you are about to call the judge, but if not, call the judge. You will usually

get the judge or the law secretary on the phone. Ninety-nine percent of the time I will get somebody on the phone, and they will admonish your adversary and make them let the witness answer the question. Do it. Do not be shy. You must be familiar with all the rules. My partners and I bring copies of court deposition rules of engagement and prior court orders.

That said, you can always bend the rules a little bit when defending a witness; there is some gamesmanship to these situations. Your job is ultimately to defend and protect your case and your client. If I have a client that likes to talk and who keeps giving long-winded answers despite all the preparation we have done, sometimes I will pull that client out of the room. And if my adversary wants to put a statement on the record, saying that taking the client out of the room is not allowed and asking me not to do it again, I will thank them and say I understand, then move on. Sometimes you must use your judgment and take one for the team if you see there is a real problem. You may have to face the wrath of a judge or law secretary, and it is up to you to find that line. Again, when extreme measures need to be taken, you must be prepared to take them if it is important enough for your case.

### *Questioning the Witness*

Listen. When you are questioning a witness, listen, *really listen*, to the answer. Do not just blindly follow your outline and script; you need to be flexible enough to go off-script if you need to. Many times, an answer will contain something worth following up on, so pay attention. If you are losing focus and you are having a difficult time trying to muscle through it, take a break. Have a sip of water. Regroup. You need to be in the right mindset to truly listen to the answers being presented. I cannot stress this enough.

Get your answer. Whatever your question is, make sure you get the answer. I cannot tell you how many times a witness either will not answer you or think they did, especially expert witnesses. They think they can sneak by with a vague answer. Your adversary may object that the question was “asked and answered”, but if that is the case you can reply that your question was not answered and that you will keep asking until you are given an answer to your question. You should ask for read backs from the court reporter, if need be, but you do not leave your deposition until you get the answers to your questions.

Let the witness answer your question. It is important to let your witness finish their answer. Do not talk over them. If they want to ramble, sit back, and let them ramble; you can get some good stuff from witnesses who like to talk too much. Do not cut them off and move on as soon as they have answered your initial question. Let them talk, see if you get lucky. Believe me, it happens. I have had many witnesses volunteer information that proved to be helpful in the case.

Ask all the “W” questions: Who, What, Why, Where, When. When you are questioning a witness, it can almost seem like you are a curious fifth grader: “Oh really? You spoke with that person? *When* did you speak with them? *Why* did you speak with them? *Where* did this conversation take place? And *what* did you talk about? *Who* was with you?” Just be curious; that is important. Go into depositions being curious and satiate your curiosity. That is when you will know you have conducted a good deposition.

Do not be embarrassed to not know something or to ask a question that you do not know an answer to. It is equally important not to hide from questions where you are afraid of the answer; that is more of a cross-examination tactic. Those are the answers that you do not want to be surprised by at trial. That is another reason to conduct a deposition, to find out the bad stuff, to question experts and hear their opinions, and see if there is the potential for damage to your case. You want to find everything out at a deposition so you can better understand how to deal with it in your case and at trial. It may affect the settlement posture. It may affect how you approach the witness at trial in your questioning. It may affect future depositions or discovery that you need, so ask away. Ask open-ended questions. Ask questions until you feel you have obtained the answer that you want. At heart, the deposition is when you want to ask things you do not know. If the witness says a term or a phrase that you are unfamiliar with, do not just nod and pretend you understand because you are afraid of looking stupid if you make it known that you are not sure what it means. The witness has no idea you do not know what it means; you could just be asking anyway for their definition or for the benefit of others in the room. I will often ask witnesses to define things that I think I know because I am curious how they define them, since we may not have the same understanding. Do not be embarrassed.

When you have completed your deposition, do not expect to have hit a home run. Do not expect the witness to say, “It was my fault. You’re right, Mr. Smiley. I know. I know. You have

me. You wore me down. I did it. I blew through the red light. I wasn't watching where I was going. Yes, I operated on the wrong limb." It just doesn't happen. I think once in the almost 60-year history of my firm, we had a doctor admit that they departed from the accepted standard of care, and that was the only time we got such a fortunate answer in a deposition. You are most likely not going to get a confession. Properly prepared witnesses are not going to give you exactly what you are hoping for, so do not be deflated if that does not happen. Instead, feel good about the fact that you have done a thorough deposition, because you have explored every area, closed up loose ends, and received the answers that you wanted. You have learned more than you knew beforehand. That is when you should feel satisfied that you have done a good job. If you are an associate and you have to report back to your senior partner, feel good. You covered all the bases, you have explanations. The witness may not have admitted why he ran a red light, but you know what he did say. Just make sure you get the information that you went into the deposition hoping to get. That is a successful deposition. A good deposition will have meant that you covered all your points and that you tied up all your loose ends, and it is going to help you prepare for trial better, evaluate your case better, or lead to future discovery.

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STIPULATIONS

IT IS HEREBY STIPULATED AND  
AGREED by and between (among) counsel for  
the respective parties hereto, that:

All rights provided by the  
C.P.L.R., including the right to object to  
any question, except as to form, or to move  
to strike any testimony at this (these)  
examination(s), are reserved, and, in  
addition, the failure to object to any  
question or to move to strike any testimony  
at this (these) examination(s) shall not be  
a bar or waiver to make such motion at, and  
is reserved for the trial of this action;

IT IS FURTHER STIPULATED AND  
AGREED by and between (among) counsel for  
the respective parties hereto, that this  
(these) examination(s) may be sworn to by  
the witness(es) being examined, before a  
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deemed a waiver of the rights provided by  
Rules 3116 and 3117 of the C.P.L.R., and  
shall be controlled thereby;

IT IS FURTHER STIPULATED AND  
AGREED by and between (among) counsel for  
the respective parties hereto, that this  
(these) examination(s) may be utilized for  
all purposes as provided by the C.P.L.R.;

IT IS FURTHER STIPULATED AND  
AGREED by and between (among) counsel for  
the respective parties hereto, that the  
filing and certification of the original of  
this (these) examination(s) shall be and  
the same hereby are waived;

IT IS FURTHER STIPULATED AND  
AGREED by and between (among) counsel for  
the respective parties hereto, that a copy  
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furnished to counsel representing the  
witness(es) testifying, without charge.

IT IS FURTHER STIPULATED AND  
AGREED by and between(among) counsel for  
the respective parties hereto, that all  
rights provided by the C.P.L.R., and Part  
221 of the Uniform Rules for the Conduct of  
Depositions, including the right to object  
to any question, except as to form, or to  
move to strike any testimony at this  
examination is reserved; and in addition,  
the failure to object to any question or to  
move to strike any testimony at this  
examination shall not be a bar or waiver to  
make such motion at, and is reserved to,  
the trial of this action.

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STIPULATIONS

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

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

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

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VIDEOCONFERENCE STIPULATION

IT IS HEREBY STIPULATED AND AGREED by  
and between counsel for all parties present that  
pursuant to the CPLR section 3113(d) this  
deposition is to be conducted by video  
conference, that the court reporter, all counsel,  
and the witness are all in separate remote  
locations and participating via videoconference  
(LegalView/Zoom) meeting under the control of  
Lexitas Court Reporting Service, that the officer  
administering the oath to the witness need not be  
in the place of the deposition and the witness  
shall be sworn in remotely by the court reporter  
after confirming the witnesses identity, that  
this videoconference will not be recorded in any  
manner and that any recording without the express  
written consent of all parties shall be  
considered unauthorized, in violation of law, and  
shall not be used for any purpose in this  
litigation or otherwise.

IT IS FURTHER STIPULATED that exhibits  
may be marked by the attorney presenting the  
exhibit to the witness, and that a copy of any

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2 exhibit presented to a witness shall be e-mailed  
3 to or otherwise in possession of all counsel  
4 prior to any questioning of a witness regarding  
5 the exhibit in question. All parties shall bear  
6 their own costs in the conduct of this deposition  
7 by videoconference, notwithstanding the  
8 obligation by CPLR to supply a copy of the  
9 transcript to the deposed party by the taking  
10 party in civil litigation matters.  
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# REQUEST FOR JUDICIAL INTERVENTION

UCS-840  
(rev. 07/29/2019)

\_\_\_\_\_ COURT, COUNTY OF \_\_\_\_\_

Index No: \_\_\_\_\_ Date Index Issued: \_\_\_\_\_

## For Court Use Only:

| CAPTION Enter the complete case caption. Do not use et al or et ano. If more space is needed, attach a caption rider sheet. |                            | IAS Entry Date |
|-----------------------------------------------------------------------------------------------------------------------------|----------------------------|----------------|
| -against-                                                                                                                   | Plaintiff(s)/Petitioner(s) | Judge Assigned |
|                                                                                                                             |                            |                |
|                                                                                                                             | Defendant(s)/Respondent(s) | RJI Filed Date |

## NATURE OF ACTION OR PROCEEDING Check only one box and specify where indicated.

| COMMERCIAL                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | MATRIMONIAL                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> Business Entity (includes corporations, partnerships, LLCs, LLPs, etc.)<br><input type="checkbox"/> Contract<br><input type="checkbox"/> Insurance (where insurance company is a party, except arbitration)<br><input type="checkbox"/> UCC (includes sales and negotiable instruments)<br><input type="checkbox"/> Other Commercial (specify): _____<br><b>NOTE:</b> For Commercial Division assignment requests pursuant to 22 NYCRR 202.70(d), complete and attach the <b>COMMERCIAL DIVISION RJI ADDENDUM (UCS-840C)</b> .                                                                                                                    | <input type="checkbox"/> Contested<br><b>NOTE:</b> If there are children under the age of 18, complete and attach the <b>MATRIMONIAL RJI ADDENDUM (UCS-840M)</b> .<br>For Uncontested Matrimonial actions, use the Uncontested Divorce RJI ( <b>UD-13</b> ).                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>REAL PROPERTY</b> Specify how many properties the application includes: _____<br><input type="checkbox"/> Condemnation<br><input type="checkbox"/> Mortgage Foreclosure (specify): <input type="checkbox"/> Residential <input type="checkbox"/> Commercial<br>Property Address: _____<br><b>NOTE:</b> For Mortgage Foreclosure actions involving a one to four-family, owner-occupied residential property or owner-occupied condominium, complete and attach the <b>FORECLOSURE RJI ADDENDUM (UCS-840F)</b> .<br><input type="checkbox"/> Tax Certiorari<br><input type="checkbox"/> Tax Foreclosure<br><input type="checkbox"/> Other Real Property (specify): _____ | <b>TORTS</b><br><input type="checkbox"/> Asbestos<br><input type="checkbox"/> Child Victims Act<br><input type="checkbox"/> Environmental (specify): _____<br><input type="checkbox"/> Medical, Dental or Podiatric Malpractice<br><input type="checkbox"/> Motor Vehicle<br><input type="checkbox"/> Products Liability (specify): _____<br><input type="checkbox"/> Other Negligence (specify): _____<br><input type="checkbox"/> Other Professional Malpractice (specify): _____<br><input type="checkbox"/> Other Tort (specify): _____                                                                                                                                                                                   |
| <b>OTHER MATTERS</b><br><input type="checkbox"/> Certificate of Incorporation/Dissolution [see <b>NOTE</b> in <b>COMMERCIAL</b> section]<br><input type="checkbox"/> Emergency Medical Treatment<br><input type="checkbox"/> Habeas Corpus<br><input type="checkbox"/> Local Court Appeal<br><input type="checkbox"/> Mechanic's Lien<br><input type="checkbox"/> Name Change<br><input type="checkbox"/> Pistol Permit Revocation Hearing<br><input type="checkbox"/> Sale or Finance of Religious/Not-for-Profit Property<br><input type="checkbox"/> Other (specify): _____                                                                                             | <b>SPECIAL PROCEEDINGS</b><br><input type="checkbox"/> CPLR Article 75 (Arbitration) [see <b>NOTE</b> in <b>COMMERCIAL</b> section]<br><input type="checkbox"/> CPLR Article 78 (Body or Officer)<br><input type="checkbox"/> Election Law<br><input type="checkbox"/> Extreme Risk Protection Order<br><input type="checkbox"/> MHL Article 9.60 (Kendra's Law)<br><input type="checkbox"/> MHL Article 10 (Sex Offender Confinement-Initial)<br><input type="checkbox"/> MHL Article 10 (Sex Offender Confinement-Review)<br><input type="checkbox"/> MHL Article 81 (Guardianship)<br><input type="checkbox"/> Other Mental Hygiene (specify): _____<br><input type="checkbox"/> Other Special Proceeding (specify): _____ |

## STATUS OF ACTION OR PROCEEDING Answer YES or NO for every question and enter additional information where indicated.

|                                                                 | YES                      | NO                                                             |
|-----------------------------------------------------------------|--------------------------|----------------------------------------------------------------|
| Has a summons and complaint or summons with notice been filed?  | <input type="checkbox"/> | <input type="checkbox"/> If yes, date filed: ____/____/____    |
| Has a summons and complaint or summons with notice been served? | <input type="checkbox"/> | <input type="checkbox"/> If yes, date served: ____/____/____   |
| Is this action/proceeding being filed post-judgment?            | <input type="checkbox"/> | <input type="checkbox"/> If yes, judgment date: ____/____/____ |

## NATURE OF JUDICIAL INTERVENTION Check one box only and enter additional information where indicated.

|                                                                                 |                                                     |
|---------------------------------------------------------------------------------|-----------------------------------------------------|
| <input type="checkbox"/> Infant's Compromise                                    |                                                     |
| <input type="checkbox"/> Extreme Risk Protection Order Application              |                                                     |
| <input type="checkbox"/> Note of Issue/Certificate of Readiness                 |                                                     |
| <input type="checkbox"/> Notice of Medical, Dental or Podiatric Malpractice     | Date Issue Joined: ____/____/____                   |
| <input type="checkbox"/> Notice of Motion                                       | Relief Requested: _____ Return Date: ____/____/____ |
| <input type="checkbox"/> Notice of Petition                                     | Relief Requested: _____ Return Date: ____/____/____ |
| <input type="checkbox"/> Order to Show Cause                                    | Relief Requested: _____ Return Date: ____/____/____ |
| <input type="checkbox"/> Other Ex Parte Application                             | Relief Requested: _____                             |
| <input type="checkbox"/> Poor Person Application                                |                                                     |
| <input type="checkbox"/> Request for Preliminary Conference                     |                                                     |
| <input type="checkbox"/> Residential Mortgage Foreclosure Settlement Conference |                                                     |
| <input type="checkbox"/> Writ of Habeas Corpus                                  |                                                     |
| <input type="checkbox"/> Other (specify): _____                                 |                                                     |



For help in completing this form, click on the yellow question marks or comment symbol for instructions. Please make sure that your **Highlight Fields** option is on so that the fields that need to be completed are light blue in color on the form. Turn it on by clicking on the **Highlight Fields** button that is on the far right side of the purple message bar.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_



X



\_\_\_\_\_

Plaintiff(s),

- VS -



\_\_\_\_\_

Defendant(s).

\_\_\_\_\_X

**REQUEST FOR  
PRELIMINARY CONFERENCE**

Index No.: \_\_\_\_\_



The undersigned hereby requests a preliminary conference.

The names, address and telephone numbers of all attorneys/pro se litigants appearing in the action are as follows:



☐ Attorney for Plaintiff(s)

☐ Plaintiff(s), Pro se

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(     )     -     \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(     )     -     \_\_\_\_\_



☐ Attorney for Defendant(s)

☐ Defendant(s), Pro se

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(     )     -     \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(     )     -     \_\_\_\_\_



Dated: \_\_\_\_\_, 20\_\_



\_\_\_\_\_

Signature

\_\_\_\_\_  
Print Name

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

-----X

\_\_\_\_\_  
\_\_\_\_\_

**Plaintiff(s)**

**-against-**

- (1) \_\_\_\_\_  
(2) \_\_\_\_\_  
(3) \_\_\_\_\_  
(4) \_\_\_\_\_  
(5) \_\_\_\_\_

**Defendant(s)**

-----X

**BREIF CASE DESCRIPTION**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**APPEARANCES:**

|             |  |
|-------------|--|
| Plaintiff:  |  |
| Firm:       |  |
| By:         |  |
| Phone/Fax:* |  |
| Email:*     |  |

**Hon.** \_\_\_\_\_

**IAS Part** \_\_\_\_\_

**Index No.:** \_\_\_\_\_

**DCM Track:** \_\_\_\_\_

**Preliminary Conference  
Stipulation and Order  
For Medical, Dental and  
Podiatric Malpractice  
Actions**

**Appearance No:** \_\_\_\_\_

**RJI Date:** \_\_\_\_\_

\*not for service purposes

NAME OF CASE: \_\_\_\_\_ INDEX NO. \_\_\_\_\_ PAGE 2

|              |  |
|--------------|--|
| Defendant 1: |  |
| Firm:        |  |
| By:          |  |
| Phone/Fax:*  |  |
| Email:*      |  |

\*not for service purposes

|              |  |
|--------------|--|
| Defendant 2: |  |
| Firm:        |  |
| By:          |  |
| Phone/Fax:*  |  |
| Email:*      |  |

\*not for service purposes

|              |  |
|--------------|--|
| Defendant 3: |  |
| Firm:        |  |
| By:          |  |
| Phone/Fax:*  |  |
| Email:*      |  |

\*not for service purposes

**If there are Defendants #4 or #5 or others in this case, please insert pages for additional parties.**

**THIS ACTION** having come on for a Preliminary Conference pursuant to Section 202.56 of the Uniform Rules of the New York State Trial Courts in order to establish a schedule for the completion of disclosure and other related matters. The parties stipulate and it is hereby:

**ORDERED** that the action is entitles to a preference pursuant to CPLR 3403(A)(5), and it is further

**ORDERED** that there is to be timely compliance with each of the items below within the time set forth unless the time is extended by a “**so-ordered**” OR **court-approved written stipulation**.

**I. INSURANCE INFORMATION**

Insurance coverage information shall be provided in writing with respect to each defendant for all applicable periods within 30 (thirty) days as follows [check applicable spaces]

- \_\_\_ Primary Coverage, including insurance carrier, policy number(s) and policy coverage periods;
- \_\_\_ Excess coverage, including insurance carrier, policy number(s) and policy coverage periods; and
- \_\_\_ Declaration sheets.

**II. BILL OF PARTICULARS**

(a) A further Verified Bill of Particulars shall be served upon each defendant within 2 (twenty) days as to the following items: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

(b) Defendant(s) shall serve upon plaintiff a Verified Bill of Particulars as to the affirmative defenses and/or counterclaims in the Answer (when demanded) within 20 (twenty) days.

**III. MEDICAL RECORDS AND AUTHORIZATIONS**

(a) HIPAA-compliant medical authorizations, *if not already provided with the Bill of Particulars*, shall be furnished to defendant(s) within 20 (twenty) days as to the following healthcare providers; \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

(b) Following plaintiff's deposition, plaintiff shall provide HIPAA-compliant authorizations for appropriate records within 10 (ten) days of receipt of a written request from the defendant(s).

(c) Medical records shall be furnished by the defendant(s) within 30 (thirty) days as follows [check where applicable, and identify specifically]:

1. \_\_\_ Office records, including reports and correspondence \_\_\_\_\_
2. \_\_\_ Hospital chart. \_\_\_\_\_
3. \_\_\_ Billing records. \_\_\_\_\_
4. \_\_\_ Autopsy Report. \_\_\_\_\_
5. \_\_\_ Radiology film/report. \_\_\_\_\_
6. \_\_\_ Curriculum vitae of defendant(s) \_\_\_\_\_
7. \_\_\_ Hospital rules and regulations. \_\_\_\_\_
8. \_\_\_ Other. \_\_\_\_\_

\_\_\_\_\_

- (d) If a medical record to be supplied by a defendant is not available, within 30 (thirty) days, an affidavit shall be supplied by defendant, or by a records custodian with personal knowledge, which shall set forth a statement concerning the customary record-keeping practices of the physician/hospital, and the date, nature and location of the search conducted, including all efforts undertaken to locate such records.
- (e) If the records described in paragraph (d) above are subsequently located, they shall be promptly supplied to all parties. Any party who fails to produce such items more than 30 (thirty) days after they are located but, in any event, no later than 30 (thirty) days prior shall be precluded from introducing the items into evidence unless good cause is demonstrated.

#### IV. DEPOSITIONS

- \* All dates listed below are dates certain and may **NOT** be adjourned unless the time is extended by a “so-ordered” **OR** court-approved written stipulation.
- \* Inability to obtain medical records prior to the deposition dates shall **NOT** be cause for adjournment of the deposition. If the records obtained reveal the need for additional information, a further limited deposition may be held by agreement of the parties or by Order of the Court.

**(a) Dates:**

Plaintiff(s) on or before \_\_\_\_\_

Defendant \_\_\_\_\_ on or before \_\_\_\_\_

Defendant \_\_\_\_\_ on or before \_\_\_\_\_

Defendant \_\_\_\_\_ on or before \_\_\_\_\_

Defendant \_\_\_\_\_ on or before \_\_\_\_\_

Defendant \_\_\_\_\_ on or before \_\_\_\_\_

**THE DEPOSITION OF EACH DEFENDANT SHALL BE CONDUCTED ON THE DATE SET FORTH ABOVE EVEN THOUGH AN EARLIER SCHEDULED DEPOSITION OR ANOTHER DEFENDANT WAS NOT CONDUCTED.**

**(b) Deposition of Institutional Defendant(s)**

Within 30 (thirty) days after plaintiff's deposition, plaintiff shall serve upon counsel for any institutional defendant(s) a demand for the identification of no more than 5 (five) health care providers who are referred to, or made entries, in the medical records. Within 20 (twenty) days of service of the demand, the institutional defendant(s) shall provide the full name and employment status of each of these individuals, and, if not under the institution(s) control, the last known address of each individual. Within 5 (five) business days thereafter, plaintiff shall designate the first witness under the institution(s)' control to be deposed and the institutional defendant(s) shall produce said witness. Plaintiff shall then designate additional witnesses under the defendant(s) control for the deposition within 5 (five) business days after said EBT. If the institutional defendant(s) do not voluntarily produce the additional requested witnesses within 20 (twenty) days of plaintiff's designation, plaintiff may seek an order compelling additional depositions pursuant to statute.

All of these individuals shall be deposed on or before \_\_\_\_\_.

**(c) Non-Party Witness Depositions:**

Plaintiff is to advise defendant(s) within 30 (thirty) days of this Preliminary Conference Order whether the following non-party witnesses will be produced for deposition voluntarily, or whether a subpoena will be necessary. If the latter, plaintiff is to provide the witnesses' last known addresses within 30 (thirty) days of this Stipulation and Order.

Name of Non- Party Witness: \_\_\_\_\_

Name of Non- Party Witness: \_\_\_\_\_

**(d) Time and Place:**

Plaintiff(s)' deposition(s) shall be held at \_\_\_\_\_,  
commencing at \_\_\_\_\_ (a.m.) (p.m.)

Defendant(s)' deposition(s) shall be held as follows [List the time and place for each deposition]:

\_\_\_\_\_  
\_\_\_\_\_

**(e) Objections:**

- \* ALL questions asked at any deposition must be answered UNLESS they (a) infringe upon privilege, (b) bear SOLELY on the negligence of a co-defendant and NOT in any way on the potential negligence of the deponent, or (c) are palpably irrelevant.
- \* If a party makes an objection as to *form*, the objector shall immediately and succinctly indicate the nature of the defect so as to permit correction. In any event, the witness shall answer the question.
- \* Depositions shall not be interrupted for an attorney-deponent conference.

- \* Counsel for the deponent shall NOT engage in coaching during the deposition and shall NOT suggest answers to questions (e.g. “If you know...”; “If you remember...”)

#### **V. PHYSICAL EXAMINATIONS**

Defendant(s) who wishes to conduct a physical or mental examination pursuant to CPLR 3121 shall designate in writing an examining physician or other specialist within 30 (thirty) days of plaintiff's deposition. The examination of the plaintiff must be conducted at least 30 (thirty) days before the filing of the Note of Issue.

Specialty: \_\_\_\_\_

Defendant(s) shall serve upon all parties written reports of any examining physician within 60 (sixty) days after the examination, and at least 30 (thirty) days before trial. Pursuant to CPLR 3121, plaintiff shall provide defendant(s) with a written report by any non-treating examining physician within 60 (sixty) days after an examination, and at least 60 (sixty) days before trial.

#### **VI. OTHER DISCLOSURE \***

**(a) Witnesses:** Parties shall exchange names and addresses of all FACT WITNESSES concerning liability and/or damages (other than expert witnesses) no later than 60 (sixty) days before trial. Parties shall also exchange adverse party statements within that same period.

**(b) Photographs and Videotapes:** Parties shall exchange all photographs and/or videotapes within 60 (sixty) days after their creation and/or availability but not less than 30 (thirty) days before trial absent a showing of good cause.

**(c) Employment:** If loss of earnings is claimed, authorizations for plaintiff's employment records (including W-2's, 1099's and/or income tax returns) for a period of \_\_ years before the claimed malpractice and continuing to date, shall be provided within 30 (thirty) days.

**(d) Collateral Sources:** Plaintiff shall provide authorizations for the following collateral source providers within 30 (thirty) days: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**(e) Discovery Notices:** Responses to the following outstanding Discovery and Inspection Notices shall be furnished within 30 (thirty) days: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

\*This disclosure demand shall be considered ongoing and continuous. If requested items subsequently become available, they are to be supplied immediately upon receipt of the same to all parties to the action.



**XII. FURTHER DIRECTIVES: It is**

**ORDERED** that failure to comply with the terms of this STIPULATION AND ORDER may result in sanctions as authorized by CPLR 3126, and it is further

**ORDERED** that a compliance conference shall be held on \_\_\_\_\_ at \_\_\_\_\_ (AM)(PM), and it is further

**ORDERED** that **ALL *prior* discovery** orders of this court be brought to any and all subsequent conference.

**SO STIPULATED**

Plaintiff: \_\_\_\_\_

Defendant #1 \_\_\_\_\_

Printed Name: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Defendant #2: \_\_\_\_\_

Defendant #3 \_\_\_\_\_

Printed Name: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Defendant #4: \_\_\_\_\_

Defendant #5 \_\_\_\_\_

Printed Name: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_

**SO ORDERED:**

Dated: \_\_\_\_\_

\_\_\_\_\_  
**JUSTICE OF THE SUPREME COURT**

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK  
INDIVIDUAL ASSIGNMENT PART [OR JUSTICE] \_\_\_\_\_

Index No. \_\_\_\_\_

DCM Track \_\_\_\_\_

*Plaintiff(s),*

- against -

*Defendant(s).*

**PRELIMINARY CONFERENCE  
ORDER**

(202.8, 202.12 and 202.19  
of the Uniform Rules)

**APPEARANCES**

Plaintiff(s): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant(s): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

It is hereby ORDERED that disclosure shall proceed as follows:

- (1) **Insurance Coverage:** If not already provided, shall be furnished by \_\_\_\_\_ on or before \_\_\_\_\_.
- (2) **Bill of Particulars:**  
(a) Demand for a bill of particulars shall be served by \_\_\_\_\_ on or before \_\_\_\_\_.  
(b) Bill of particulars shall be served by \_\_\_\_\_ on or before \_\_\_\_\_.  
(c) A supplemental bill of particulars shall be served by \_\_\_\_\_ as to Items \_\_\_\_\_ on or before \_\_\_\_\_.
- (3) **Medical Reports and Authorizations:**  
Shall be served as follows: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- (4) **Physical Examination:**  
(a) Examination of \_\_\_\_\_ shall be held \_\_\_\_\_  
\_\_\_\_\_  
(b) A copy of the physician's report shall be furnished to plaintiff within \_\_\_\_\_ days of the examination.
- (5) **Depositions:** Depositions of ☐ Plaintiff(s) ☐ Defendant(s) ☐ All Parties shall be held \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- (6) **Other Disclosure:**  
(a) All parties, on or before \_\_\_\_\_, shall exchange names and addresses of all eye witnesses and notice witnesses, statements of opposing parties, and photographs, or, if none, provide an affirmation to that effect.  
(b) Authorization for plaintiff(s)' employment records for the period \_\_\_\_\_ shall be furnished on or before \_\_\_\_\_.  
(c) Demand for discovery and inspection shall be served by \_\_\_\_\_ on or before \_\_\_\_\_. The items sought shall be produced to the extent not objected to, and objections, if any, shall be stated on or before \_\_\_\_\_.  
(d) Other [interrogatories, etc.] \_\_\_\_\_  
\_\_\_\_\_

**(7) End Date for All Disclosure:**

(8) **Impleader:** Shall be completed on or before \_\_\_\_\_.

(9) **Compliance Conference:** Shall be held on \_\_\_\_\_.

(10) **Motions:** Any dispositive motion(s) shall be made on or before \_\_\_\_\_.

(11) **Note of Issue:** \_\_\_\_\_ shall file a note of issue/certificate of readiness on or before \_\_\_\_\_. A copy of this order, an affirmation stating that the terms of the order have been complied with, and an affidavit of service of the affirmation and note of issue shall be served and filed with the note of issue on or before said date.

**FAILURE TO COMPLY WITH ANY OF THESE DIRECTIVES MAY RESULT IN THE IMPOSITION OF COSTS OR SANCTIONS OR OTHER ACTION AUTHORIZED BY LAW.**

**SO ORDERED:**

**Dated:**

J.S.C.

## ADDITIONAL DIRECTIVES

In addition to the directives set forth above, it is further ORDERED as follows:

**Dated:**

**SO ORDERED:**

TS-13a (REV 4/15/02)

J.S.C.

## PRELIMINARY CONFERENCE ORDER

**X. ADDITIONAL DIRECTIVES:**

## X. ADDITIONAL DIRECTIVES

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No.: 1 [REDACTED] 1

-----X

[REDACTED], individually and as parent  
and natural guardian of L.E., an infant,

Plaintiff,

-against-

**NOTICE OF  
DISCOVERY  
AND INSPECTION**

[REDACTED]  
[REDACTED]

Defendants.

-----X

**PLEASE TAKE NOTICE**, that pursuant to C.P.L.R. 3120(a) and the Rules of the Appellate Division, the plaintiff, by her attorneys, SMILEY & SMILEY, LLP, herein demands production of the following for inspection and copying:

1. Produce and provide copies of any and all photographs, slides, videotapes, or motion pictures in defendant's custody and control depicting:

(a) The scene of the accident and of the infant plaintiff. If no such photographs are in the possession, custody of any parties you represent in this action, state so in the sworn reply to this demand.

(b) The infant plaintiff taken prior to and during the trial of the above-captioned litigation. This is a continuous demand.

(c) Any damage to the defendant's vehicle caused by the accident.

2. Surveillance tapes and photographs of the infant plaintiff. This is a continuing demand.

3. The names and current address of all persons that witnessed the occurrence alleged in the complaint.

4. Statements of the infant plaintiff whether oral, written, taped, stenographic, signed or photographic, in the custody or possession of the defendants.

5. Accident reports of the defendants made in the regular course of business.

6. Invoices and/or bills for any repairs that were made to the defendant's vehicle following the accident.

7. Copy of defendant, [REDACTED], drivers license.

**PLEASE TAKE FURTHER NOTICE**, that these items are to be produced within twenty (20) days of receipt of the Notice at the offices of SMILEY & SMILEY, LLP, attorneys for the plaintiff, 122 East 42<sup>nd</sup> Street, Suite 3900, New York, New York 10168.

**PLEASE TAKE FURTHER NOTICE**, that the party served may submit copies of all documents requested, on or before the return date of this Notice in lieu of personal appearance.

**PLEASE TAKE FURTHER NOTICE**, that upon failure to comply with this demand, a motion will be made pursuant to C.P.L.R. 3126.

**PLEASE TAKE FURTHER NOTICE**, that this is a continuing demand and should any of the information requested become available or known in the future, then you are required to furnish same at such time.

Dated: New York, New York  
February 11, 2021

Yours, etc.

SMILEY & SMILEY, LLP  
Attorneys for Plaintiff

By: 

ANDREW J. SMILEY  
122 East 42<sup>nd</sup> Street, Suite 3900  
New York, New York 10168  
(212) 986-2022

TO: BAKER, MCEVOY & MOSKOVITS, P.C.  
Attorney(s) for the Defendants

████████████████████████████████████████████████████████████████████████████████  
One Metrotech Center, 8<sup>th</sup> Fl  
Brooklyn, NY, 11201  
(212) 857-8230

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No.: 1 [REDACTED]

-----X  
[REDACTED], individually and as  
parent and natural guardian of L.E., an infant,

Plaintiff,

-against-

[REDACTED]  
[REDACTED]

Defendants.

**DEMAND A BILL OF  
PARTICULARS TO  
DEFENDANT'S  
AFFIRMATIVE  
DEFENSE OF  
CULPABLE  
CONDUCT OF  
PLAINTIFF**

-----X  
The plaintiff, by her attorneys, SMILEY & SMILEY, LLP, hereby demands that the defendants serve a response to the plaintiff's Demand for a Bill of Particulars within twenty (20) days of the service of this demand.

1. The time and date of infant plaintiff's alleged culpable conduct.
2. The location of infant plaintiff's alleged culpable conduct.
3. A general statement of each and every act and omission constituting infant plaintiff's alleged culpable conduct.

Dated: New York, New York  
February 11, 2021

Yours, etc.

SMILEY & SMILEY, LLP  
Attorneys for Plaintiff

By: 

\_\_\_\_\_  
ANDREW J. SMILEY  
122 East 42<sup>nd</sup> Street, Suite 3900  
New York, New York 10168  
(212) 986-2022

TO: BAKER, MCEVOY & MOSKOVITS, P.C.  
Attorney(s) for the Defendants

████████████████████████████████████████████████████████████████████████████████  
One Metrotech Center, 8<sup>th</sup> Fl  
Brooklyn, NY, 11201  
(212) 857-8230

~~CONFIDENTIAL~~/cj

-----X

SSA [REDACTED] RS,

Plaintiff,

Index No. [REDACTED] 2020

-against-

██████████ FAN ██████████ NE ██████████ ENT ██████████ P. ██████████ d  
██████████ MPSON ██████████ C,

Defendants.

-----X

**PLEASE TAKE NOTICE**, that in accordance with Section 3041, Rules 3042 and 3043

and Section 3044 of the CPLR, you are hereby required to serve upon the Law Office of

██████████aret ██████████in ██████████ntes, located at 200 Madison Avenue, New York, NY 10016 on

**SEPTEMBER 4, 2020 at 10:00 a.m.**, a Verified Bill of Particulars pursuant to the following

1. State the date and time of day of the occurrence.
2. State the location of the occurrence, giving its address (by number, street, city or town or if the place of the occurrence had no address, describing its location from fixed geographical sites):
  - (a) if within a building, give the floor number and the location thereon; street floor or ground floor to be considered as the first floor;
  - (b) if upon a stairway, set forth the location of the stairway in the premises, stating between what floors it is situated; also the particular step on said stairway, counting from the bottom;

- (c) if on the sidewalk, the distance from the nearest intersection and from the curb and building lines;
  - (d) if within an elevator, describe the elevator sufficiently to differentiate it from other elevators in the building.
- 3. If the plaintiff claims a dangerous, unsafe, or defective condition was the cause of the occurrence:
  - (a) describe that condition;
  - (b) set forth in what manner the condition described was dangerous, defective and/or unsafe;
  - (c) specify the date and time when the condition was caused or created;
  - (d) set forth the identity of the person or entity who caused or created the condition.
- 4. State the manner in which it is claimed the alleged accident occurred.
- 5. State the acts or omissions constituting the negligence claimed, specifying the exact date or dates when the alleged acts were committed and, if there is more than one defendant, the acts or omissions of each defendant constituting the alleged negligence.
- 6. If actual notice is claimed, set forth:
  - (a) the name(s) of the person(s) who is/are claimed to have given such notice;
  - (b) the name(s) of the person(s) to whom notice is claimed to have been given;
  - (c) whether the notice was written or oral;
  - (d) the date the notice was given; and
  - (e) if in writing, provide a true copy thereof.
- 7. If constructive notice is claimed, set forth the length of time it will be claimed the alleged condition existed.
- 8. State the injuries claimed, giving the location, duration and extent of each and specifying those claimed to be permanent.

9. State the length of time plaintiff was confined:
  - (a) to hospital;
  - (b) to bed;
  - (c) to house.
10. The names and addresses of doctors, hospitals and any other medical providers and dates treatment was rendered.
11. State the length of time plaintiff(s) will claim incapacity from employment.
12. State the following:
  - (a) vocation of plaintiff(s) at time of alleged occurrence;
  - (b) name and address of employer;
  - (c) average weekly earnings;
  - (d) if self-employed, a detailed statement of how alleged loss of earnings or income is calculated.
13. If the plaintiff attended school at the time of this incident, provide:
  - (a) the name of the school;
  - (b) the plaintiff's grade;
  - (c) the amount of time missed from school due to the occurrence.
14. Set forth a detailed statement of amounts claimed as special damages, if any, for:
  - (a) physician's services;
  - (b) hospital expenses;
  - (c) nurses' services;
  - (d) medical supplies;
  - (e) loss of earnings;
  - (f) any additional or other special damages.

15. Set forth a true copy of any contract, lease or express warranty referred to in the complaint; if an oral contract, express warranty or lease is claimed, state the names of the persons who allegedly entered into the same, the date and place the same was allegedly entered and the substance thereof.
16. If violation of any rule, regulation, code, ordinance, law or statute is claimed, specify the Chapter, Article, Section and Paragraph of same allegedly violated by each defendant.
17. With respect to each plaintiff, separately, state:
  - (a) residence address at time of the alleged occurrence;
  - (b) residence address at present time;
  - (c) date of birth;
  - (d) social security number.
18. If loss or diminution of services, society and/or consortium is claimed, specify precisely the services, society and/or consortium claimed to have been lost or diminished, the dates between which loss or diminution is claimed and the manner in which the damages claimed have been computed.

**IN THE EVENT THAT THE WITHIN CLAIM INCLUDES A CLAIM FOR  
VICARIOUS LIABILITY**

19. State the basis upon which it is claimed that defendant is vicariously liable.
20. Specify the acts or omissions of the individual(s) or entity(ies) upon which you base your claim of vicarious liability.
21. Specify whether or not it is claimed that defendant(s) and said individual(s) or entity(ies) had:
  - a) an employer-employee relationship;
  - b) a principal-agent relationship;
  - c) an employer-independent contractor relationship;
  - d) If none of the above, state the nature of the relationship between defendant and the said individual(s) or entity(ies) allegedly giving rise to vicarious liability on the part of defendant(s).
22. Specify all acts or omissions of the said individual(s) or entity(ies) which allegedly caused or contributed to the injury complained of herein.

23. Do you claim that the defendant(s) had notice, either actual or constructive, of any facts indicating that the defendant(s) knew or should have known that the said individual(s) or entity(ies) had engaged in acts or omissions of the same type as alleged herein prior to the date of the subject occurrence? If so, state whether such notice is actual and/or constructive. If actual notice is claimed, identify the person(s) by name, title and/or job description, who possessed such actual notice. If constructive notice is alleged, state the facts upon which such claim is predicated.
24. Specify any policies and/or provisions allegedly violated which caused and/or contributed to the injury complained of in connection with the claim of vicarious liability.
25. Specify any statutes, rules, regulations and/or ordinances allegedly violated in connection with the claim of vicarious liability.

**PLEASE TAKE FURTHER NOTICE**, that unless the above demand is complied with within thirty (30) days, an application will be made to preclude the plaintiff(s) from giving any evidence in accordance with the aforementioned rules.

Dated: New York, New York  
July 22, 2020

Yours, etc.

LAW OFFICE OF

[REDACTED] ET AL. [REDACTED] IN [REDACTED] [REDACTED] TES

[REDACTED] RT [REDACTED] AN  
[REDACTED] ure [REDACTED] int [REDACTED] L [REDACTED] (2)

Attorney for Defendants

[REDACTED] [REDACTED] AN [REDACTED] NE [REDACTED] ENT CORP.,  
and [REDACTED] MPSON LLC  
200 Madison Avenue, 2nd Floor  
New York, New York 10016  
Phone: (646) [REDACTED] 250

TO: SMILEY & SMILEY, LLP  
Attorney For: [REDACTED] SA [REDACTED] RS  
122 East 42nd Street, Suite 3900  
New York, NY 10168  
Phone: (212) 986-2022

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No.: 1 [REDACTED]

-----X  
[REDACTED], individually and as parent  
and natural guardian of L.E., an infant,

Plaintiff,

**DEMAND  
FOR EXPERTS**

-against-

[REDACTED]  
[REDACTED]

Defendants.

-----X

**PLEASE TAKE NOTICE**, that the plaintiff, by her attorneys, SMILEY & SMILEY, LLP, pursuant to C.P.L.R. 3101(d), demands that the defendants provide the following information:

1. Identify each person with whom the defendants expect to call as an expert witness at trial;
2. Disclose in reasonable detail the subject matter on which expert is expected to testify;
3. State the substance of the facts and opinions on which expert is expected to testify;
4. State the qualifications of each expert; and
5. A summary of the grounds upon which expert's opinion is based.

Defendants are required to produce the demanded information at the offices of SMILEY & SMILEY, LLP, 122 East 42<sup>nd</sup> Street, Suite 3900, New York, New York 10168 within twenty (20) days of this Demand.

**PLEASE TAKE FURTHER NOTICE**, that the party served may submit copies of all documents requested, on or before the return date of this Notice in lieu of personal appearance.

**PLEASE TAKE FURTHER NOTICE**, that this is a continuing demand and should any of the information requested become available or known in the future, then you are required to furnish same at such time.

Dated: New York, New York  
February 11, 2021

Yours, etc.

SMILEY & SMILEY, LLP  
Attorneys for Plaintiff

By:   
ANDREW J. SMILEY  
122 East 42<sup>nd</sup> Street, Suite 3900  
New York, New York 10168  
(212) 986-2022

TO: BAKER, MCEVOY & MOSKOVITS, P.C.  
Attorney(s) for the Defendants

  
One Metrotech Center, 8<sup>th</sup> Fl  
Brooklyn, NY, 11201  
(212) 857-8230

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No.: 156912/2023

-----X  
JANET LIDDONI and JOHN LIDDONI,

Plaintiffs,

-against-

34 EAST 68<sup>TH</sup> STREET LLC,

Defendant.  
-----X

**DEMAND FOR  
PRODUCTION  
OF INSURANCE  
AGREEMENTS**

**PLEASE TAKE NOTICE** that pursuant to Section 3101(f) of the CPLR, no later than ninety days after service of an answer pursuant to CPLR Rule 320, CPLR § 3011, or CPLR § 3019, the defendant shall provide to the plaintiffs, and any other party in the action, proof of the existence and contents of any insurance agreement in the form of the insurance policy in place at the time of the loss or, if agreed to by the plaintiffs in writing, in the form of a declaration page, under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in this action or to indemnify or reimburse for payments made to satisfy the entry of final judgment. Information and documentation, as evidenced in the form of a copy of the insurance policy in place at the time of the loss or declaration page, shall include:

1. All primary, excess, and umbrella policies, contracts or agreements issued by private or publicly traded stock companies, mutual insurance companies, captive insurance entities, risk retention groups, reciprocal insurance exchanges, syndicates, including, but not limited to, Lloyd's Underwriters as defined in six thousand one hundred sixteen of the insurance law, surplus lines insurers, and self-insurance programs insofar as such documents relate to the claim being litigated;
2. If the insurance policy in place is provided, a complete copy of any policy, contract, or agreement under which any person or entity may be liable to satisfy part or all of a judgment that

may be entered in this action or to indemnify or reimburse for payments made to satisfy the entry of final judgment as referred to in this demand, including, but not limited to, declarations, insuring agreements, conditions, exclusions, endorsements, and similar conditions;

3. The contact information, including the name and e-mail address of an assigned individual responsible for adjusting the claim at issue;

4. The total limits available under any policy, contract, or agreement, which shall mean the actual funds, after taking into account erosion and any other offsets, which can be used to satisfy a judgment described in this demand or to reimburse for payments made to satisfy the judgment.

**PLEASE TAKE FURTHER NOTICE:** For the purposes of this demand, an application for insurance shall not be treated as part of an insurance agreement.

**PLEASE TAKE FURTHER NOTICE:** You must make reasonable efforts to ensure that the information remains accurate and complete and provide updated information to any party to whom this information has been provided at the filing of the note of issue, when entering into any formal settlement negotiations conducted or supervised by the court, at a voluntary mediation, and when the case is called for trial, and for sixty days after any settlement or entry of final judgment in the case, inclusive of all appeals.

**PLEASE TAKE FURTHER NOTICE:** Pursuant to CPLR § 3122-b, the information provided pursuant to this demand shall be accompanied by a certification by each defendant and by a certification by any attorney appearing for the defendant, sworn in the form of an affidavit or affirmation where appropriate, stating that the information is accurate and complete, and that reasonable efforts have been undertaken and will be undertaken, to ensure that this information remains accurate and complete.

Dated: New York, New York  
January 2, 2024

Yours, etc.,

SMILEY & SMILEY, LLP

A handwritten signature in black ink, appearing to read 'J.D. Friedman', with a stylized flourish at the end.

By:

---

JASON D. FRIEDMAN

Attorneys for Plaintiff

122 East 42<sup>nd</sup> Street, Suite 3900

New York, NY 10168

(212) 986-2022

TO: EHRLICH GAYNER, LLP  
Attorneys for Defendant  
150 Broadway, Suite 909  
New York New York 10038  
(212) 827-0555

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No.: 1

-----X  
[REDACTED],

Plaintiffs,

-against-

**BILL OF  
PARTICULARS**

[REDACTED]

Defendants.

-----X

Plaintiff, [REDACTED], by her attorneys, SMILEY & SMILEY, LLP, hereby submit the following as and for their Verified Bill of Particulars in response to the demand of the defendants, [REDACTED]. and [REDACTED] LLC, as follows:

1. The date and time of the accident was January 21, 2020 at approximately 8:25 A.M.
2.
  - (a) Not applicable
  - (b) Not applicable
  - (c) The accident occurred on the sidewalk directly in front of 55 Thompson Street, New York, New York 10012.
  - (d) Not applicable.
3.
  - (a) On January 21, 2020 at approximately 8:25 A.M., the weather in New York City was around 30 degrees Fahrenheit. The sidewalk directly outside 55 Thompson Street was hosed down with water creating an icy and slippery condition.
  - (b) The sidewalk was hosed down with water and the temperature outside was below freezing, creating the icy and slippery condition.
  - (c) The dangerous and defective condition of the sidewalk occurred sometime prior to plaintiff traversing on the above-mentioned sidewalk.

(d) The dangerous and defective condition was created by an agent, servant or employee of [REDACTED], and B [REDACTED] LLC.

4. Defendants, [REDACTED], [REDACTED], by a servant, agent, and/or employee, in below freezing weather conditions, hosed down the sidewalk with water creating an icy and slippery condition.

5. The defendants, [REDACTED] [REDACTED] their agents, servants and/or employees, were negligent in failing to properly operate, control, manage, inspect, repair, maintain and supervise the aforesaid premises; in causing and permitting an unsafe and hazardous condition to exist at the aforesaid premises; in hosing down the sidewalk in front of the aforesaid premises with water in 20 degree weather, causing the sidewalk to become icy and slippery; in failing to sand and salt and otherwise remove the ice which had accumulated on the aforesaid sidewalk after having hosed down the sidewalk; in failing to provide the plaintiff with a safe means of traversing the aforesaid area at the aforesaid premises; in failing to provide caution signs thereat; in failing to provide warning signs thereat; in failing to provide barricades; in causing and permitting the plaintiff to enter into a position of danger; in subjecting said plaintiff to unusual and unnecessary hazards and dangers; in failing to employ adequate and sufficient help to properly maintain the aforesaid defective sidewalk at the aforesaid location; in causing and permitting the condition that brought about the fall of the plaintiff at the aforesaid location; in creating a trap-like condition; in creating a nuisance, and in failing to maintain said area in a reasonable, safe and suitable condition.

6. (a)-(e) Plaintiff is unable to further respond to this demand until completion of further discovery proceedings and depositions. However, at this time, plaintiff is not aware that

actual notice of the alleged condition was given to either defendants, its servants, agents, and/or employees.

7. Plaintiff is unable to respond to this demand until completion of further discovery proceedings and depositions. However, without in any way conceding that constructive notice is a necessary prerequisite to suit herein, plaintiff claims that the defendants, its servants, agents and/or employees had constructive notice of the said dangerous and defective conditions and caused, allowed and permitted same to exist and remain for an unreasonably long period of time prior to this accident, when they knew or could and should have known of the existence of said dangerous and defective conditions which existed for an unreasonably long period of time prior to this accident, the exact nature and/or duration of which is not presently known or available to the plaintiff, and subject to further discovery proceedings, and a reasonable inspection would have revealed the existence of said dangerous and defective conditions.

8. The plaintiff, [REDACTED], sustained the following injuries:

DISPLACED INTRAARTICULAR RIGHT DISTAL RADIUS FRACTURE NECESSITATING SURGERY IN THE NATURE OF OPEN REDUCTION AND INTERNAL FIXATION OF RIGHT DISTAL RADIUS INTRAARTICULAR FRACTURE WITH FIXATION OF 2 OR MORE FRAGMENTS ON JANUARY 31, 2020 AT NEW YORK PRESBYTERIAN, LOWER MANHATTAN HOSPITAL;

PLAINTIFF WAS CAUSED AND WILL CONTINUE TO BE CAUSED TO UNDERGO AN EXTENSIVE REGIMEN OF PHYSICAL THERAPY WHICH WILL CONTINUE FOR AN UNSPECIFIED PERIOD OF TIME;

TRAUMATIC ANXIETY;

PSYCHOLOGICAL ANGUISH;

EMOTIONAL DISTRESS AND DEPRESSION;

TRAUMATICALLY INDUCED ARTHRITIS IS EXPECTED TO DEVELOP IN THE FUTURE AT THE AFFECTED SITES AND JOINTS;

LOST AND DECREASED ENJOYMENT OF LIFE;

LOST ENJOYMENT OF PRE-ACCIDENT SOCIAL ENDEAVORS;

SEVERE PAIN, SWELLING, TENDERNESS, LIMITATION OF MOTION, DECREASED RANGE OF MOTION, IMPAIRMENT OF FUNCTION OF SKIN, BONE, MUSCLE, CARTILAGE, LIGAMENTS, TENDONS, JOINTS, BLOOD VESSELS, AND NERVES.

9. (a)-(c) To be provided.
10. New York Presbyterian – Lower Manhattan Hospital  
170 William Street,  
New York, New York 10038  
Admission: January 21, 2020 – Emergency Room  
January 31, 2020-Surgery

██████████, M.D., F.A.A.O.S.  
New York Downtown Orthopedic Associates  
170 William Street, 8<sup>th</sup> Floor  
New York, New York 10038

The dates of treatment are contained within the medical records.

11. To be provided.
12. (a)-(d) To be provided.
13. (a)-(c) Not applicable. The plaintiff was not a student at the time of the accident.
14. (a)-(f) To be provided.
15. Not applicable.
16. At the time of trial, plaintiffs' attorneys will ask the Court to take judicial notice of all statutes, rules, regulations, ordinances, codes, and industry standards. Plaintiffs and their attorneys reserve their right to supplement this response after completion of their discovery.

17. (a) At time of the occurrence, plaintiff resided at [REDACTED] New York, New York 10003.

(b) Plaintiff currently resides at [REDACTED], New York, New York 10003.

(c) Plaintiff's date of birth is [REDACTED]

(d) Pursuant to General Business Law 399-dd(6) "No person may file any document available for public inspection with any state agency, political subdivision, or in any court of this state that contains a social security account number of any other person, unless such other person is a dependent child, or has consented to such filing, except as required by federal or state law or regulation, or by court rule." The plaintiff expressly declines to consent to such filing due to valid concerns regarding possible identity theft. The last 4 digits of the plaintiff's Social Security number are XXX-XX-1686.

18. Not applicable.

19. The defendants, [REDACTED]  
[REDACTED] are vicariously liable for the actions of their agents, servants, and/or employees.

20. See response, paragraph 5.

21. (a)-(d) Plaintiff is unable to respond to this demand until completion of further discovery proceedings and depositions.

22. Plaintiff is unable to respond to this demand until completion of further discovery proceedings and depositions.

23. Plaintiff is unable to further respond to this demand until completion of further discovery proceedings and depositions. However, at this time, plaintiff is not aware that actual

notice and or constructive notice of the alleged condition was given to either defendants and its servants, agents, and/or employees.

24. Plaintiff is unable to respond to this demand until completion of further discovery proceedings and depositions.

25. At the time of trial, plaintiffs' attorneys will ask the Court to take judicial notice of all statutes, rules, regulations, ordinances, codes, and industry standards. Plaintiffs and their attorneys reserve their right to supplement this response after completion of their discovery.

Dated: New York, New York  
August 27, 2020

Yours, etc.

SMILEY & SMILEY, LLP  
Attorneys for Plaintiff

*Michael S. Solomon*

By: \_\_\_\_\_  
MICHAEL S. SOLOMON  
122 East 42<sup>nd</sup> Street, Suite 3900  
New York, New York 10168  
(212) 986-2022

TO:

\_\_\_\_\_  
Attorneys for Defendant,

\_\_\_\_\_  
200 Madison Avenue, 2<sup>nd</sup> Floor  
New York, New York 10016  
(\_\_\_\_\_) \_\_\_\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index No.: 12345/2021

-----X  
JENNIE DOE,

Plaintiff,

-against-

STREB, INC.,

Defendant.  
-----X

**STIPULATION**

*IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED*, by and between the attorneys for the respective parties that the **SIXTH AFFIRMATIVE DEFENSE** contained in the Answer of the defendant, STREB, INC., alleging that the Court lacks personal jurisdiction in this action, is hereby withdrawn with prejudice.

Dated: New York, New York  
January 7, 2019

SMILEY & SMILEY, LLP

LAW FIRM, LLP

By: \_\_\_\_\_

ANDREW J. SMILEY

Attorneys for Plaintiff  
122 East 42<sup>nd</sup> Street, Suite 3900  
New York, New York 10168  
(212) 986-2022

By: \_\_\_\_\_

Attorneys for Defendant  
1 Broadway, Suite 1234  
New York, New York 10038  
Tel.: (212) 000-0000

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No.: 12345/2021

-----X  
JAMES DOE,

Plaintiff,

**STIPULATION**

-against-

THE CITY OF NEW YORK, CITY OF NEW YORK  
DEPARTMENT OF PARKS AND RECREATION and  
RIVERSIDE PARK CONSERVANCY, INC.,

Defendants.  
-----X

*IT IS HEREBY STIPULATED AND AGREED*, by and between the attorneys for the respective parties that the **TENTH AFFIRMATIVE DEFENSE** contained in the Answer of the defendants, THE CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF PARKS AND RECREATION and RIVERSIDE PARK CONSERVANCY, INC., alleging that the plaintiff, JAMES DOE, did not appear for an oral examination pursuant to Section 50h of the General Municipal Law, before the commencement of this action, is hereby withdrawn with prejudice.

Dated: New York, New York  
February 26, 2021

SMILEY & SMILEY, LLP

JAMES E. JOHNSON



By: \_\_\_\_\_

ANDREW J. SMILEY

Attorneys for Plaintiff,  
JAMES DOE  
122 East 42<sup>nd</sup> Street, Suite 3900  
New York, New York 10168  
(212) 986-2022

By: \_\_\_\_\_

Corporation Counsel  
Attorneys for Defendants,  
THE CITY OF NEW YORK, CITY OF NEW  
YORK DEPARTMENT OF PARKS AND  
RECREATION and RIVERSIDE PARK  
CONSERVANCY, INC.  
100 Church Street  
New York, New York 10007  
Tel.: (212) 356-2725

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

\_\_\_\_\_ /

Plaintiff(s),

Civil Action No.:

- against -

JEFF ALAN THOMPSON and EAGLE TRANSPORT  
SERVICES, INC.,

Defendant(s) .

----- X

EXPERT DEPOSITION of GARY YOUNG, taken by  
Plaintiff, held remotely via Zoom/LegalView  
Videoconferencing, on May 20, 2021, at 1:05 p.m.  
before a Notary Public of the State of New York.

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

SMILEY & SMILEY, LLP

Attorneys for Plaintiff

122 East 42nd Street

New York, New York 10168

BY: ANDREW SMILEY, ESQ.

-and-

MICHAEL SOLOMON, ESQ.

KERLY, WALSH, MATERA & CINQUEMANI, P.C.

Attorney for Defendant

200 Sheffield Street, Suite 208

Mountainside, New Jersey 07092

BY: JOHAN OBREGON, ESQ.

XXXXXX

1

2 G A R Y Y O U N G ,

3 having been first duly sworn before a Notary

4 Public of the State of New York, was

5 examined and testified as follows:

6 BY REPORTER:

7 Q State your name for the record.

8 A Gary Young.

9 Q What is your address?

10 A 4 Trenton Avenue, West Trenton, New

11 Jersey 08625.

12 EXAMINATION BY

13 MR. SMILEY:

14 Q Good afternoon, Mr. Young.

15 A Good afternoon, Mr. Smiley.

16 Q I am going to ask you some questions  
17 today. I assume this is not your first time  
18 being deposed under oath.

19 A Correct.

20 Q So you know the ground rules, and if  
21 anything comes up that you need to take a  
22 break or I'm not clear, just say the word.  
23 Okay?

24 A Excellent.

25 Q All right. I ask that you please have

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G. Young

your report in this case available as I would like to go through certain items contained within your report and I think it will just help things move more quickly. Okay?

A Fine.

Q Were you retained by Mr. Obregon or his law firm to get involved in this litigation where the Plaintiff is my client, [REDACTED]?

A Yes.

Q How is it that you were engaged? And by that I mean had you worked with Mr. Obregon or his firm previously, or did they find you through some other connection?

A I believe some other connection.

Q Do you know what that connection was?

A No.

Q What were you asked by Mr. Obregon or his firm to do in this case?

A To complete a vocational evaluation of Mr. [REDACTED].

Q What specifically did that mean: To complete a vocational evaluation of Mr. [REDACTED]?

1 G. Young

2 A Generally, and in this case, it's  
3 review of pertinent records, so in this case  
4 there's medical records, a lifecare plan,  
5 economic report and a vocational report,  
6 medical records and paper review and then we  
7 did assume meeting with Mr. [REDACTED] on  
8 January 29th of this year, and then write the  
9 report.

10 Q Were you asked to form certain  
11 opinions and/or conclusions as a result of  
12 your analysis?

13 A No.

14 Q Were you asked to determine if Mr.  
15 [REDACTED] had sustained any impairment of  
16 earning ability as a result of his accident  
17 of May 26, 2017?

18 A No.

19 Q Have you formed any opinion on whether  
20 or not Mr. [REDACTED] had sustained an  
21 impairment of his earning capacity?

22 A That's a two-part question. I'm not  
23 looking at the medical side of that only the  
24 vocational side.

25 Q Did you form an opinion --

1 G. Young

2 MR. SMILEY: Withdrawn.

3 Q Were you asked to form an opinion as  
4 to whether or not his employment ability is  
5 different following the happening of an  
6 accident on May 26, 2017, than it was prior  
7 to the happening of that accident?

8 A Not specifically but that is the issue  
9 of the report.

10 Q Now, as part of doing your report you  
11 indicated you reviewed records; is that  
12 right?

13 A Correct.

14 Q Now, referring to your report which  
15 just let the record reflect is annexed to an  
16 expert witness exchange served by defense  
17 counsel, and it is dated February 15, 2021  
18 where at the top left it says YVA for Young  
19 Vocational Analytics.

20 A Correct.

21 Q I'd like to direct your attention,  
22 let's start on page three of your report  
23 please, where at the top you indicate:  
24 Records Reviewed.

25 A Correct.

1 G. Young

2 Q Now, I see a list of medical records  
3 next to bullet points and then I see under a  
4 section of medical records a few specific  
5 records that you reference; is that correct?

6 A Yes.

7 Q Are there any other medical records  
8 other than those that you refer to on this  
9 page three of your report that you reviewed  
10 as part of your analysis in this case?

11 A No. Only those things that would be  
12 quoted in, for instance, the primary care  
13 would have test results and things like that  
14 from labs and things. But it's only those  
15 sources.

16 Q So, for example, you didn't review  
17 specifically the records of Dr. Seth Neubardt  
18 whose the surgeon who performed two surgeries  
19 on Mr. [REDACTED], correct?

20 A Well, no, I did have the surgery  
21 listed at the bottom of page three and this  
22 was the 9/11/20 surgery.

23 Q Right, and you saw that within the  
24 White Plains hospital chart where the surgery  
25 was performed, correct?

1 G. Young

2 A Correct.

3 Q Other than that you didn't review Dr.  
4 Neubardt's own notes outside of that White  
5 Plains Hospital chart, correct?

6 A Correct.

7 Q And is it fair to say also you did not  
8 review the records of Dr. Rema who is a pain  
9 management specialist?

10 A Correct.

11 Q And is it also correct that you did  
12 not review the records of a Dr. Gabriel Dassa  
13 who is an orthopedic surgeon?

14 A Well, unless they were quoted into the  
15 others, I didn't specifically quote those.  
16 They may be but I'm not sure.

17 Q Is it fair to say that instead of  
18 going through various doctors who I don't see  
19 listed here, that if the records are not  
20 cited on this page three of your report, and  
21 they're not included within the records that  
22 you have the bullet points next to, then it's  
23 fair to say you did not review those as part  
24 of your analysis?

25 A Correct.

1 G. Young

2 Q Now, did you review the tax returns of  
3 Mr. [REDACTED]?

4 A Yes, I did.

5 Q Do you have those as part of your  
6 file?

7 A Yes.

8 Q Do you have those available to you  
9 now?

10 A Yes.

11 Q Can you tell me which specific tax  
12 returns that you possess that you reviewed?

13 A 2015 through 2019.

14 Q And what did his income show on his  
15 tax return from 2015?

16 A I don't recall. I -- go ahead, I'm  
17 sorry.

18 Q That's all right.

19 Do you have the record with you that  
20 you can look at?

21 A Yes.

22 Q Could you do that please.

23 A What would you -- what are you --

24 Q What was his income reported, Mr.  
25 Christy's income for 2015 on his tax return?

1 G. Young

2 A The wages are zero.

3 Q Okay. Is there any income reported  
4 that he earned of any source?

5 A There's a taxable income total of --  
6 I'm sorry. Hold on a second. There's a  
7 capital gains -- other gains -- no, capital  
8 gains of 32,416.

9 Q Okay.

10 A And a taxable income of 7816.

11 Q Okay.

12 How about for 2016, what was his  
13 taxable income for that year?

14 A Zero as far as wages. Capital gains  
15 of 20,000. For taxable income of zero after  
16 exemptions. I believe that's all.

17 Q And then you list the taxable income,  
18 I believe in your report for the years 2017,  
19 '18 and '19?

20 A Correct.

21 Q On page 12; is that right?

22 A Yes.

23 Q Am I correct that it was \$89,628 for  
24 2017; \$125,058 for 2018; and \$48,137 for  
25 2019?

1 G. Young

2 A Yes, what page?

3 Q Yes, twelve on your report, sir.

4 A I looked at an earlier note but I was  
5 closing some windows.

6 Q That's okay.

7 A Yes, I believe that your numbers look  
8 right.

9 Q Did you determine the source of income  
10 for those years '17, '18 and '19 that total  
11 those numbers?

12 A Yes.

13 Q What is it that he earned \$89,628  
14 during 2017?

15 A From his employment.

16 Q Was that base salary, was that bonus,  
17 was that commission? Did you determine what  
18 it was?

19 A It was a combination of all.

20 Q And did you determine what the  
21 combination was, how much was base salary,  
22 how much was commission, and the like?

23 A I didn't determine -- I did not get a  
24 breakdown. I was interested more in the  
25 total.

1 G. Young

2 Q Do you know what his base salary was  
3 for 2017?

4 A No.

5 Q Do you know how much of that 89,000  
6 was based on commissions from work done in  
7 the year of 2016, if any?

8 A No, I do not know.

9 Q And the same for 2018. The \$125,058,  
10 do you know what that's from?

11 A Same, his employment.

12 Q And do you know what the base salary  
13 was for his employment in 2018?

14 A No.

15 Q Do you know how much of that 125,000  
16 was from commissions from prior to 2018 or  
17 prior to 2017?

18 A No.

19 Q What about 2019, do you know what that  
20 amount of money \$48,137 refers to?

21 A The same, his employment.

22 Q Do you know whether that was for  
23 part-time employment or full-time employment?

24 A That was mostly part-time employment.

25 Q And do you know how many hours or how

1 G. Young

2 many months of 2019 he worked to earn 48,137?

3 A It was most of the year and four hours  
4 a day.

5 Q So it would be about half time of a  
6 normal work year?

7 A Correct.

8 Q Does that sort of line up with if 2017  
9 was a normal work year, then the numbers  
10 reflected in 2019 would be about half of that  
11 showing working half the amount of time; is  
12 that fair to say?

13 A Yes.

14 Q Did you review any economic reports or  
15 analyses as part of your review in this case?

16 A Well, we have a Dan Wolstein's report.  
17 He didn't have numbers in it, that's why I  
18 mention that.

19 Q Right.

20 Did you review any other economic-type  
21 reports, for example, from an economist?

22 A I do not think so.

23 Q We had provided defense counsel with a  
24 report from our expert economist, Dr.  
25 Lambrinos. Did you review his report?

1 G. Young

2 A Yes, I have. I had it under that name  
3 rather than economist. So I apologize for  
4 that.

5 Q For what purpose did you review Dr.  
6 Lambrinos' report?

7 A More of a background information. I  
8 was not asked to do any economic analysis.  
9 So it was just looking at the information for  
10 background rather than for drawing  
11 conclusions.

12 Q When you saw in Dr. Lambrinos' report  
13 that he listed a loss of income from prior to  
14 the accident earning capacity as opposed to  
15 future earning capacity, did you find any  
16 reason to disagree with those findings?

17 A I did not draw any conclusions at all.

18 Q So you certainly don't have any  
19 independent reason to dispute anything in Dr.  
20 Lambrinos's report, correct?

21 MR. OBREGON: Objection to  
22 form. You can answer.

23 A I'm neither affirming or discrediting.

24 Q What about Dr. Wolstein, do you know  
25 who he is?

1 G. Young

2 A Sure.

3 Q How do you know Dr. Wolstein?

4 A Well, he's in New Jersey mostly and so  
5 am I. We go to conferences together.

6 Interesting -- I forget if it's his  
7 father-in-law or stepfather who was Charles  
8 Kincaid. Do you know him?

9 Q Yes.

10 A Okay. And then Dan took over the  
11 practice and I'm doing the same thing with my  
12 daughter. So we've talked over this issue,  
13 and we've gone out to dinner and things like  
14 that.

15 Q Great. So you both enjoy a cordial  
16 professional relationship, is that fair to  
17 say?

18 A Yes.

19 Q And you have respect for his work and  
20 he has respect for your work, is that fair to  
21 say?

22 A Yes.

23 Q When you reviewed his report in this  
24 case, did you have any disagreement with any  
25 of his conclusions?

1 G. Young

2 A The one conclusion, the report --  
3 well, let me first say I think he writes a  
4 good report, it's methodical and I think he  
5 would say the same about mine, that they're  
6 not, you know, just a narrative report as  
7 many are. But he thought that, and I agree,  
8 that Mr. [REDACTED] does have some ability to  
9 work and not in his previous capacity as what  
10 is called a comfort advisor.

11 Q Okay.

12 COURT REPORTER: I'm sorry.  
13 Comfort advisor?

14 Q Yes.

15 A Basically selling air conditioning and  
16 heating is what that is but it's now called a  
17 comfort advisor.

18 Q And did you find any fault with his  
19 conclusion that Mr. [REDACTED] is no longer able  
20 to work in the employment that he did prior  
21 to this accident?

22 A Well, that would be the comfort  
23 advisor.

24 Q Right. And do you have any issue with  
25 his conclusion about that?

1 G. Young

2 A No, because my report is essentially  
3 the same conclusion.

4 Q Is it fair to say that both you and  
5 Mr. Wolstein -- Dr. Wolstein agree that,  
6 first of all, [REDACTED] earning  
7 potential is less now after the accident, as  
8 a result of the accident, than it was before  
9 the accident?

10 A That's probably true except there  
11 would be the transferability of similar  
12 positions at Home Depot and Lowe's with  
13 the -- like they have kitchen designers and  
14 things like this where they do not leave the  
15 store, but I don't think that he would be  
16 able to earn the 125,000 he did in one year.

17 Q And you don't dispute the fact that he  
18 did have the ability to earn \$125,000 before  
19 this accident happened, correct?

20 A Well, it was only the one year, so I  
21 would just look at that statistically as  
22 being an aberration.

23 Q What about the other years where he  
24 was earning --

25 A The 89,000?

1 G. Young

2 Q Yeah.

3 Let me put it another way. He can't  
4 make \$89,000 a year now based on your  
5 analysis; is that fair to say?

6 A It's probably true, yes.

7 Q Okay.

8 And based on your analysis he can't  
9 even make half of that, \$48,000, is that  
10 true?

11 A He might be able to make that or more  
12 if he got the job with Home Depot.

13 Q So let's refer to that. Now, we know  
14 that the \$48,000 and change that he made in  
15 2019 was working half schedule, in other  
16 words, part-time, right?

17 A Correct.

18 Q So if you were to multiply that times  
19 two, that's really more of an \$86,000 annual  
20 salary, right?

21 A 86? I think you meant 96.

22 Q 96, yeah, full time.

23 A Correct.

24 Q Now, you talk about the fact that you  
25 don't --

1 G. Young

2 MR. SMILEY: Withdrawn.

3 Q You agree, don't you, that he can't  
4 work full-time now, right?

5 A That is not my call. That is for  
6 physicians. The difficulty with this report  
7 was that I saw him only a couple of months  
8 after the surgery, so I did not think he was  
9 fully healed. So I do not think that the  
10 physical capacities have been maximizing.

11 Q Now, based on the records you reviewed  
12 you saw that he was restricted by the medical  
13 opinions as well as his own testimony about  
14 his pain so working only four hours or so a  
15 day, correct?

16 A Well, that was before the second  
17 surgery.

18 Q And do you have reason to believe that  
19 since the second surgery he's able to work  
20 more or has anything changed?

21 A That's not my call, that's the  
22 physician's statement.

23 Q Well, you evaluated him on January 29,  
24 2021 which was many months after his second  
25 surgery, right?

1 G. Young

2 A I think it was three months, correct?

3 Q Well, the surgery was in September,  
4 right, of 2020?

5 A Okay, so five months, yes.

6 Q So at the time that you evaluated him  
7 five months after the surgery, had you seen  
8 anything to the contrary of the fact that he  
9 still could only work in a sedentary job  
10 part-time at about four hours a day?

11 A I do not specifically recall seeing  
12 anything that set any limitation -- as any  
13 physical limitation of four hours.

14 Q You didn't see anything differently or  
15 you're saying you didn't see that at all in  
16 any of the records?

17 A I don't recall seeing it at all. Let  
18 me amplify to that. Nothing that had enough  
19 detail to it that would be meaningful. For  
20 instance, just for explanation, if I receive  
21 something that says "light duty" you would  
22 like to know a little bit more about sitting  
23 and standing and crawling and things like  
24 that rather than just in two words.

25 Q So, in other words, if you saw

1 G. Young  
2 something where a doctor made a statement  
3 such as, "The claimant is working part-time  
4 20 hours per week capacity and may continue  
5 to do so with a lifting restriction of ten  
6 pounds, avoiding any repetitive bending or  
7 squatting, no vertebral ladder climbing,"  
8 that type of statement would be relevant to  
9 you, right?

10 A Correct.

11 Q In fact, you did have that statement  
12 if you look at page three of your report, I'm  
13 quoting from your report the statement that  
14 you included in there from Dr. Soyer. Do you  
15 see that on page three?

16 A Correct.

17 Q So, in fact, you had that information  
18 and you found it relevant enough that you put  
19 it in your report on this case, correct?

20 A Correct. The only flaw in that is  
21 that it is prior to the second surgery. So  
22 we do not know whether that second surgery  
23 had any effect plus or minus.

24 Q Did you review any records after  
25 September of 2020 when he had that second

1 G. Young

2 surgery?

3 A Just a brief follow-up but nothing  
4 specific regarding work.

5 Q So in any event, am I correct that  
6 your conclusion was that he could go and work  
7 part-time now, right?

8 A I don't necessarily address the  
9 part-time because there was no addressing by  
10 a physician on that. So the only thing I can  
11 do is say here are jobs that are appropriate  
12 based on the information I have at this time.  
13 And I thought that it was premature to state  
14 that Mr. [REDACTED] had reached maximum medical  
15 improvement.

16 Q Let's go to your report page 13  
17 please.

18 A Okay.

19 Q Do you see the paragraph that starts  
20 with "Mr. [REDACTED] may be able"?

21 A Right.

22 Q Can you read that paragraph slowly  
23 please.

24 A (Reading): Mr. [REDACTED] may be able to  
25 return to part-time work as a comfort advisor

1 G. Young

2 in a retail setting, such as, Home Depot  
3 where he can advise and sell HVAC systems as  
4 service jobs for the store eliminating the  
5 necessity to travel or physically maneuver  
6 around attics and basements.

7 Q So that's your opinion, right, that  
8 paragraph?

9 A Yes.

10 Q And you're saying, in your opinion, he  
11 can return to part-time work, correct?

12 A Well, in that type of position. The  
13 other positions noted earlier on page 12  
14 would have been in a full-time capacity.

15 Q So now if we go to page 12 that's as a  
16 customs service representative, a cashier or  
17 an office clerk, right?

18 A Yes.

19 Q And are you saying that those are the  
20 types of positions that he can work at, at  
21 Home Depot, for example?

22 A No, they would not be Home Depot.  
23 They would be -- well, cashiers would be in  
24 Home Depot. The other two would be  
25 traditional office jobs.

1 G. Young

2 Q And those are full-time salaries,  
3 right, that you put here on page 12 of your  
4 report?

5 A Correct.

6 Q So you're saying that now if he were  
7 to work full-time, based on his limitations  
8 and his education and his experience and  
9 background, assuming he could work full-time  
10 that's what, a 40-hour-week, sir?

11 A Yes.

12 Q These are the three types of jobs that  
13 you believe he would qualify for?

14 A Correct.

15 Q And these are all minimum wage-type  
16 jobs, right?

17 A Not minimum wage but \$15 an hour, \$20  
18 an hour, somewhere around there.

19 Q Well, what's the current minimum wage  
20 in New York State?

21 A 7.25.

22 Q What is a 15-dollar an hour full-time  
23 job relate to as an annual salary, do you  
24 know?

25 A I think it's 25,000.

1 G. Young

2 Q So the cashier job you list, that  
3 would be a minimum wage job?

4 A No.

5 Q I'm sorry. That would be a 15-dollar  
6 an hour job?

7 A Yes.

8 Q And if he was only able to work  
9 part-time at one of these types of jobs as  
10 you indicate he can work part-time, right, or  
11 are you saying he could do these full time?

12 A The part-time full-time issue is not  
13 mine. That is for the doctors to decide.  
14 The same thing with the Home Depot job if he  
15 could do that full time, it would increase  
16 the salary range.

17 Q Let's assume for the moment that all  
18 of the medical records that you reviewed  
19 indicate that he needs to do part-time work,  
20 okay, let's assume that for a moment.

21 A Okay.

22 Q And, in fact, you haven't seen  
23 anything in any of the records you've  
24 reviewed to the contrary saying he can go  
25 into full-time work, have you?

1 G. Young

2 A I haven't seen anything either way.  
3 That's the problem with the assessment. A  
4 vocational counselor relies on the decisions  
5 in the medical community. So that could  
6 include physical therapist or functional  
7 capacity evaluation to set the physical  
8 capacities.

9 It is then up to us to take that  
10 information along with the assessment of the  
11 person's skills to identify jobs that would  
12 be appropriate.

13 Q So the only note that you saw was the  
14 one that you put on page three of the report  
15 by the Workers Compensation IME doctor which  
16 references part-time with restrictions of  
17 lifting ten pounds?

18 A Well, as I said earlier, with enough  
19 specificity that I thought was meaningful.

20 Q Did you look at any other reports from  
21 Workers Compensation other than this one  
22 evaluation from Dr. Soyer?

23 A I looked at plenty of Workers  
24 Compensation reports, physical therapy. But  
25 the problem, again, is almost all of that is

1 G. Young

2 before the second surgery, so it losses  
3 validity. I mean to take it to the absurd  
4 level if, God forbid, Mr. [REDACTED] underwent  
5 the surgery and died, you know, all of that  
6 is meaningless.

7 So what we have to do is to assess  
8 after that second surgery because he could  
9 have improved greatly, he could have  
10 deteriorated, and we need to know that  
11 answer.

12 Q So what you're saying you would need  
13 to see some type of medical record after the  
14 second surgery that would indicate that he  
15 still needs to do sedentary work for you to  
16 opine that he's limited to sedentary or  
17 part-time work?

18 A I agree with you except it's not my  
19 position to determine whether it's sedentary,  
20 light or whatever.

21 Q But it is your job to determine  
22 whether or not he can, based on his injuries  
23 and his background and many other factors,  
24 whether or not he can work full-time or  
25 part-time, right, isn't that part of your

1 G. Young

2 job?

3 A Except that I cannot set what the  
4 restrictions are. That is up to the doctors  
5 or therapists.

6 Q Now, I'm asking you then if you had a  
7 medical record that you can review that set  
8 forth those restrictions, then it would be  
9 your job to opine based on those restrictions  
10 whether he qualifies for full-time work or  
11 part-time work, right?

12 A Right. The only thing I would add to  
13 that is something that was current.

14 Q Okay.

15 So did you review a record from a Dr.  
16 Steven Hausmann dated December 3rd, 2020 and  
17 Dr. Hausmann did an orthopedic surgery  
18 examination of Mr. [REDACTED] on behalf of the  
19 Workers Compensation Board?

20 A I did not see that.

21 Q Okay.

22 I'm going to share that with you on my  
23 screen right now. Do you see my screen, sir?

24 A Hold on. I have to close some things  
25 so I can see your screen.

1 G. Young

2 Q Okay.

3 A Okay, yes, I can see the record.

4 Q And do you see at the top it says  
5 Steven Hausmann M.D. and the date is  
6 December 3rd, 2020?

7 A Correct.

8 Q Now, December 3rd, 2020 would be three  
9 months after -- approximately three months  
10 after the second surgery, right?

11 A Yes.

12 Q And it would be approximately two  
13 months and change prior to your evaluation,  
14 right?

15 A Yes.

16 Q Okay.

17 And you see here where he gives a  
18 history, I'm showing you, that he previously  
19 examined him on July 5th, 2020 which was  
20 before the second surgery, and also on  
21 February 2nd, 2020 which was after a  
22 laminectomy surgery but before the lumbar  
23 fusion surgery, right?

24 A Correct.

25 Q Now, I'm going to scroll all the way

1 G. Young

2 down and you see under diagnosis where it  
3 says (Reading): Work-related low back  
4 injury. Status post lumbar laminectomy and  
5 recent lumbar decompression and fusion."

6 Do you see that?

7 A Yes.

8 Q Do you see here where he says that the  
9 claimant would be amenable for permanency for  
10 the lumbar spine?

11 A Yes.

12 Q Do you have any reason, by the way as  
13 you sit here today, to dispute that Mr.  
14 [REDACTED] sustained back injury in the  
15 automobile accident of May 26, 2017 that  
16 caused him to have a lumbar laminectomy and a  
17 lumbar decompression infusion?

18 MR. OBREGON: Objection. You  
19 can answer.

20 A No, but if I could go back if you  
21 continue in the paragraph you were showing,  
22 the last thing you showed, it was making my  
23 point for me where he says (Reading):  
24 Permanency cannot be assigned until he's one  
25 year postoperative from the date of that

1 G. Young

2 procedure.

3 Q Okay.

4 A So that's why I'm hedging things.

5 Because believe me it makes Dan and my life  
6 much easier if we had a very definitive set  
7 of physical capacities.

8 And regarding your question, I have no  
9 opinion at all about the causation of any of  
10 Mr. Christy's spinal difficulties. Again,  
11 that's medical. And vocationally it does not  
12 matter whether it was caused by an accident,  
13 an automobile accident or a fall or a  
14 degeneration. We're looking at the physical  
15 capacities after the injury.

16 Q Now looking at this highlighted  
17 section I have up on the screen where it  
18 says, "Relative to the lumbar spine, he would  
19 have a marked, temporary, partial degree of  
20 disability. If he returned to work he would  
21 require a sedentary job with no lifting over  
22 ten pounds and no repetitive bending or  
23 stooping. He could stand and walk two to  
24 three hours per day and sit the remainder of  
25 the time. He is not currently working."

1 G. Young

2 Do you see that?

3 A Yes.

4 Q Do you see where it says, "The above  
5 diagnosed conditions are causally related to  
6 the date of injury for this claim."

7 Do you see that, sir?

8 A Yes.

9 Q Does this indicate to you that this is  
10 a medical doctor, an orthopedic surgeon, at  
11 least in December of 2020, saying that these  
12 as of the time of that examination would be  
13 his limitations to work?

14 MR. OBREGON: Objection to  
15 form. You can answer.

16 A Yes, I would agree with you.

17 Q Okay.

18 And based on reading this medical  
19 documentation, would you agree that this  
20 would limit him to some type of part-time  
21 work?

22 A No.

23 Q Do you believe he could work full-time  
24 based on this?

25 A Looking only at this statement because

1 G. Young

2 my previous statement, and the doctor's  
3 previous statement that they would want a  
4 year before they fully assess this.

5 This is basically saying that Mr.  
6 [REDACTED] can work in a sedentary job and part  
7 of that definition is no lifting over ten  
8 pounds. And stand or walk two to three hours  
9 and sit the remainder, which he doesn't say  
10 two to three hours, so I assume this is full  
11 time.

12 Q So if he can only stand and walk two  
13 to three hours per day total, what type of  
14 jobs did you indicate in your report could he  
15 do where he could sit for the remaining six  
16 to five hours per day?

17 A The jobs I mentioned earlier in my  
18 report.

19 Q And I'm going to go to those. Let's  
20 see what page they're at. That would be a  
21 cashier? The cashier is one?

22 A Yeah, the cashier, the customer  
23 service, I think there was an office clerk  
24 and the job at Home Depot, all would fit  
25 that -- all would fit that physical capacity.

1 G. Young

2 Q So can you tell me what type of  
3 cashier job someone could have where they  
4 could sit daily for five to six hours as a  
5 cashier?

6 A Sure -- you're going the wrong way.

7 Q I'm going the wrong way? What page is  
8 it on?

9 A 12, I think. Right there.

10 Q What jobs could he work at as a  
11 cashier where he could sit five to six hours  
12 a day?

13 A This is a limited range of cashiers  
14 places, such as, parking lots, self-service  
15 gasoline stations would be appropriate.  
16 Grocery stores. Retail would not be.

17 Q And do you know if any of those stores  
18 are actually hiring somebody in his area  
19 right now?

20 A No.

21 Q So you're just assuming that, that he  
22 could get it if there was a job available,  
23 right?

24 A Correct.

25 Q What about customer service

1 G. Young

2 representative, what type of customer service  
3 representative can sit at their job full time  
4 for five to six hours a day?

5 A Well, these are people more like order  
6 clerks. They're not people in retail or  
7 something like that. So they're in offices  
8 answering phones.

9 Q What jobs are you aware of that are  
10 available now for Mr. [REDACTED] to get as a  
11 customer service representative where he  
12 could sit five to six hours a day?

13 A I didn't specifically look at any  
14 jobs.

15 Q So you don't know if there are any  
16 jobs available for him now to do that, do  
17 you?

18 A No.

19 Q And office clerks in general, which  
20 types of jobs could he sit full time for five  
21 to six hours a day and do those jobs?

22 A Things like an order clerk, a rally  
23 clerk, things of this order.

24 Q Do you know if any of those jobs are  
25 currently available anywhere near Mr.

1 G. Young

2 Christy's residence?

3 A No.

4 Q Assuming there was a job and it was  
5 available, you're saying that -- and he could  
6 do it full-time, that base case scenario he'd  
7 be making \$36,230?

8 A In these three positions, yes.

9 Q Are there any positions that he can  
10 work full time at now where he can sit five  
11 to six hours and earn more than \$36,230 a  
12 year?

13 A The Home Depot position would be  
14 appropriate to earn probably 40 to \$50,000.

15 Q And what's your basis of saying he can  
16 earn 40 to \$50,000 at a job at Home Depot?

17 A Because I talked with people who have  
18 done this job and that's generally the wages  
19 they earn.

20 Q What people have you spoken to, to ask  
21 about those wages?

22 A Over the years numerous ones.

23 Q Can you tell me who?

24 A Not specifically, no.

25 Q It's not that scientific, is it

1 G. Young

2 Mr. Young, that you're saying that he could  
3 earn a certain amount of money at a job at  
4 Home Depot but you can't even cite the basis  
5 from where you get that value from?

6 MR. OBREGON: Objection to  
7 form.

8 A I cited the basis. I just don't  
9 remember the name off -- off the top of my  
10 head.

11 Q What is the basis of your statement  
12 that he can earn upwards of \$50,000 working  
13 at Home Depot?

14 A Having seen this job and talked with  
15 the workers doing the job.

16 Q And when was the last time you saw a  
17 worker doing that job and they told you  
18 that's what they were earning?

19 A Probably last year -- no, I'm sorry  
20 2019. Before the pandemic.

21 Q Have you ever looked at any Home Depot  
22 job listings?

23 A Yes.

24 Q And have you looked to see what they  
25 pay?

1 G. Young

2 A Well, this job is a commission-type of  
3 position and generally Home Depot does not  
4 list wages in their job postings.

5 Q And they make commission at Home  
6 Depot?

7 A In the type of position I'm talking  
8 about, yes. Many of the positions, no.

9 Q So which positions do they offer  
10 commission and what's the starting salary for  
11 those positions that you say Mr. [REDACTED]  
12 would be qualified to work at?

13 A They would be similar to his past  
14 work, but instead of doing HVAC he would be  
15 doing something, such as, kitchen design.

16 Q Can you tell me specifically that Home  
17 Depot has available positions for someone in  
18 a kitchen design department that offers a  
19 base salary in commission?

20 A No, because that was outside the scope  
21 of my report.

22 Q But you're saying he could do this  
23 work, and this is what he would make, but you  
24 have nothing that you could provide to  
25 substantiate that, correct?

1 G. Young

2 A Well, I did not do it at the time of  
3 my report, and I did not know that that was  
4 one of the questions that I would need to  
5 update that information for this deposition.

6 Q Do you know where the closest Home  
7 Depot is to where Mr. [REDACTED] lives?

8 A No.

9 Q Do you know where the closest Lowe's  
10 is to where Mr. [REDACTED] lives?

11 A No.

12 Q Would that matter if he needed to  
13 drive an hour or more each way or round trip  
14 to get to work, would that have an impact on  
15 his ability to take certain jobs?

16 A Well, probably the doctors will have  
17 to assess that but I would agree with you  
18 that that may be problematic.

19 Q Can you tell me based on your analysis  
20 in this case a specific job that Mr. [REDACTED]  
21 could do right now full time and how much it  
22 would pay him?

23 A No, but I did not do that type of  
24 analysis.

25 Q Isn't that part of what your job is,

1 G. Young

2 Mr. Young, is to say what type of job he  
3 qualifies for and how much it would pay him?

4 A Well, that is what I did. However, in  
5 looking at specific jobs it is also  
6 problematic because you're assuming a perfect  
7 fit between the person, in this case Mr.  
8 [REDACTED], and the job. That's why I like to  
9 look at broad spectrums of occupations  
10 because it gives, I think, a clearer  
11 understanding of what is going on with these  
12 specific jobs.

13 Q You put in your report that you  
14 acknowledge that he's limited to sedentary  
15 jobs. Can we agree on that?

16 A At this point, yes, that appears to be  
17 true. I just don't want you to think that --  
18 to miss the point that I don't think that  
19 that has been fully determined but that's not  
20 my issue anyway so...

21 Q Your job, if I understand correctly,  
22 as a vocational expert is to evaluate records  
23 and evaluate a person and determine what if  
24 any types of jobs that that person currently  
25 could qualify for, correct?

1 G. Young

2 A Within medically determined physical  
3 capacity.

4 Q And from everything you've reviewed  
5 currently, at least at the time of your  
6 analysis, he was limited to sedentary work,  
7 correct?

8 A Basically yes.

9 Q So you looked into jobs that you felt  
10 he could do involving sedentary work,  
11 correct?

12 A Yes.

13 Q And you agree that before this  
14 accident he was not limited to sedentary  
15 work, correct?

16 A Before the accident, yeah. Correct.

17 Q So would you agree, sir, that as a  
18 result of this accident he went from being  
19 able to get employment in work that was not  
20 limited to sedentary work, and as a result of  
21 this accident, currently as of the time of  
22 your evaluation, he was limited to sedentary  
23 work?

24 A Yes, the other thing is that he had  
25 the heart problems during this period of

1 G. Young

2 time, and whether the impact of the change in  
3 his physical capacity were due only to the  
4 back problems or it also includes the cardiac  
5 problems, is a medical determination.

6 Q And you haven't seen one shred of  
7 medical documentation regarding his heart  
8 that indicates that in any way he has work  
9 restrictions due to any heart condition, have  
10 you?

11 A No, but again I'm not trying to  
12 demonstrate -- I'm not trying to address that  
13 issue because it is not my issue. I just  
14 admit that it's there.

15 Q But you evaluated what he was able to  
16 do before this accident, correct?

17 A Yes.

18 Q And before this accident he had no  
19 restrictions at all to do any work, right?

20 A I don't know if that's true. I will  
21 agree with you that he had no restrictions to  
22 do the work he was doing previously.

23 Q Are you aware, have you looked at  
24 anything to indicate to you that he had any  
25 restrictions from doing any kind of work at

1 G. Young

2 the time of his accident?

3 A I have not seen that, no.

4 Q So as far as your review and  
5 everything you've analyzed, he did not have  
6 any restrictions relating to what type of  
7 work he could do as of the time of this  
8 accident, correct?

9 A That's basically true, yes.

10 Q Not just basically true, it is true.  
11 You haven't seen anything that says that he  
12 was restricted from doing any kind of work as  
13 of the happening of this accident, correct?

14 A Well, I haven't seen anything listing  
15 whether he was restricted or not, that's the  
16 problem. And he wasn't an older worker who  
17 has had stenosis, which is generally  
18 something that takes time to develop, again,  
19 that's not my call.

20 I'm just saying the important thing  
21 where I sit is he was able to do his past  
22 work without any difficulty. He did state  
23 that he had moved on from his past work which  
24 was as a plumber into something light, but,  
25 again, that was his choice I don't know if it

1 G. Young

2 was medically required. But he decided to do  
3 that.

4 Q He --

5 A Just let me finish my statement.

6 I'm just taking this all off his word  
7 or the doctor's words but I'm not making that  
8 call. Whether he had restrictions or not  
9 doesn't matter because he was able to do his  
10 past work.

11 Q He was able to do his past work before  
12 the accident and as a result of the accident,  
13 you would agree, he's no longer able to do  
14 that past work?

15 A I'm not here to comment on whether  
16 it's the result or not. I'm just stating  
17 that he can no longer do it. Causing was not  
18 my issue. But I have no -- I'm not doubting  
19 it. I'm just saying I cannot comment.

20 Q So can we agree as of the time of your  
21 evaluation he can't do the work that he did  
22 at the time of his accident, can we agree on  
23 that?

24 A Yes.

25 Q Can we agree that at the time of his

1 G. Young

2 accident his work was not considered

3 sedentary, can we agree on that?

4 A Correct.

5 Q And can we also agree that at the time

6 of his accident he was able to work full

7 time?

8 A Yes, yes, at the time of his accident.

9 Q And can we also agree that at the time

10 of his accident he was able to earn an income

11 upwards of \$100,000?

12 A For the one year, yes.

13 Q Close to \$90,000 on an annual basis

14 for two others years, correct?

15 A Correct.

16 Q And can we agree as of now he cannot

17 earn anywhere near 90 to \$100,000 in the

18 workplace?

19 A Correct.

20 Q Can we also agree that at best, based

21 on your vocational analysis, he could earn

22 somewhere in the \$30,000 range working full

23 time?

24 A Unless we're talking about the Home

25 Depot he can earn up to 50,000.

1 G. Young

2 Q And that's where you're stating though  
3 that you have no specific job at Home Depot  
4 that you can show us would pay him that?

5 A Not at this time, correct.

6 Q And of the jobs working full-time he  
7 could only earn an annual salary of the  
8 \$30,000 range, can we agree that if he had to  
9 work part-time it would probably be somewhere  
10 in the \$15,000 range yearly?

11 A Approximately, yes.

12 Q So you don't dispute the fact that  
13 prior to May 26, 2017 he had the earning  
14 capacity ability to earn anywhere from 90 to  
15 \$100,000, and currently he has the earning  
16 capacity to earn anywhere from 15,000 to  
17 \$30,000-something?

18 A The only thing I would add to that is  
19 depending upon the medical information.

20 Q But based on the records you've seen  
21 so far would you agree with that statement,  
22 that at the time of the accident he was able  
23 to earn somewhere between around \$90,000 but  
24 presently now he's looking at, on the low  
25 end, \$15,000 a year if he works part-time to

1 G. Young

2 somewhere in the 30,000-dollar range if he's  
3 working full-time, you would agree with that,  
4 right?

5 A Unless we include the Home Depot, yes.

6 Q Except for that Home Depot job that  
7 you can't give me any specifics about, right?

8 A Not specific names, correct.

9 Q And you don't know if that specific  
10 Home Depot job in kitchen sales you're  
11 referring to, is even located anywhere in the  
12 county that he lives in, do you?

13 A Not specifically.

14 Q Can you go to page 13 please of your  
15 report.

16 A Okay.

17 Q If you could go to the second full  
18 paragraph, the last line. Can you read that  
19 for me it begin with the word "it."

20 A (Reading): It is also acknowledged.  
21 That line?

22 Q Yes.

23 A (Reading): It is also acknowledged  
24 that his back problems now limit him to  
25 sedentary jobs.

1 G. Young

2 Q When you say that in your report,  
3 you're saying you are acknowledging this that  
4 his back problems limit him to sedentary  
5 jobs?

6 A It appears so. I don't know if "it's  
7 my opinion" is the right term. I think that  
8 as being a medical decision and I have no  
9 reason not to disagree with it. Not artfully  
10 said.

11 Q I'm sorry. I didn't hear that.

12 A Not artfully said. I don't like the  
13 double negatives.

14 Q I understand. That's okay.

15 Now, in the next paragraph you say  
16 "Mr. [REDACTED] may be able to return to  
17 part-time work as a comfort advisor in a  
18 retail setting such as Home Depot."

19 Do you see that?

20 A Yes.

21 Q And that's your opinion that you can't  
22 do that full time, correct, only part-time?

23 A He may be able to do it full time.  
24 I'm not sure on that.

25 Q In your report you don't say that he

1 G. Young

2 may be able to do it full-time, you say he  
3 may be able to do it part-time, correct?

4 A Correct.

5 Q Now, further down on the page there's  
6 a paragraph that starts with "the issue of  
7 him returning to jobs."

8 A Yes.

9 Q In the last sentence you reference the  
10 fact that he has significant heart issues  
11 which impacts his ability to work?

12 A Correct.

13 Q Have you seen anything in your review  
14 of this case, either from the records you  
15 reviewed or your interview of Mr. [REDACTED] or  
16 anything else, to lead you to believe that  
17 any heart issues have limited his ability to  
18 work?

19 A Not specifically, no.

20 Q And as you sit here today, do you have  
21 an opinion, when you performed this  
22 vocational analysis, as to whether any heart  
23 issues he currently has would prevent him  
24 from available work in the workplace?

25 A Well, I just thought it was prudent,

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G. Young

and actually the restrictions for heart difficulties and spinal difficulties basically would be the same type of limitations as far as lifting and things like that.

The only thing where the heart possibly could be involved is in what most people are considered to be stressed in stress-like duties.

Q As of now can you tell me if there are any jobs that he cannot do now specifically because of any heart issue or heart condition he has?

A No. If you read the next paragraph it sort of explains that, you know, I'm just -- I believe it is important in my report to bring that issue up or acknowledge that issue but not say that, you know, like I looked at his EKG.

Q Can we go please to page 14, your conclusions.

A Sure.

Q You state at the top that he was injured in an accident on May 26, 2017?

1 G. Young

2 A Yes.

3 Q You don't dispute that?

4 A That's not my issue, but I don't  
5 dispute it.

6 Q You don't dispute what you say in your  
7 next paragraph as far as the treatment that  
8 he had, including a micro lumbar discectomy  
9 and a fusion surgery?

10 A Correct.

11 Q And you don't dispute that those  
12 surgeries were related to the accident of  
13 May 26, 2017?

14 A Correct.

15 Q And then in the third paragraph it  
16 says, "Prior to the accident, Mr. [REDACTED] had  
17 some neck and back problems." Do you see  
18 that?

19 A Yes.

20 Q What is your basis for saying that he  
21 had some neck and back problems?

22 A That was in discussion with him.

23 Q Other than that, did you see any other  
24 medical records?

25 A Oh, let me just add to that. I'm not

1 G. Young

2 saying that they were conclusive. I  
3 considered them more like the terrible thing  
4 that happens with a person's age.

5 Q Right. I'm just asking if you've  
6 reviewed any medical records as part of your  
7 analysis in this case that indicated to you  
8 that he had any type of prior back or neck  
9 problems?

10 A Not specifically, no.

11 Q Then at the bottom of that paragraph  
12 you conclude, "If he's able to return to a  
13 part-time position as comfort manager, he  
14 will not have further economic loss." Do you  
15 see that?

16 A Correct.

17 Q What do you mean by that?

18 A Well, if I'm recalling he was  
19 part-time at the time of him leaving the job.  
20 If he returns to part-time the assumption is  
21 he could earn in some more capacity.

22 Q So you're basically saying if he was  
23 able to go back to the job at the time he got  
24 fired working part-time, then he wouldn't  
25 have future economic loss more than what he

1 G. Young

2 was earning at the time that he was working  
3 part-time and fired?

4 A I believe you said the question  
5 correctly, yes.

6 Q But what this does not mean is that  
7 he's not suffering economic loss as a result  
8 of this accident, correct?

9 A Correct.

10 Q Because indeed he has suffered already  
11 economic loss as a result of this accident,  
12 correct?

13 MR. OBREGON: Objection to  
14 form. Between the date of the  
15 accident and now you mean?

16 MR. SMILEY: Yes.

17 Q He has suffered economic loss as a  
18 result of this accident from the date of  
19 accident until now, correct?

20 A Yes.

21 Q And you would agree that moving  
22 forward now he will continue to sustain  
23 economic loss as a result of the happening of  
24 this accident, correct?

25 MR. OBREGON: Objection to

1 G. Young

2 form. You can answer.

3 A Yes, and approximately half of what he  
4 was making prior -- half of what he was  
5 making prior to the accident.

6 Q So if he was making on average about a  
7 \$90,000 annual full-time salary at the time  
8 of the accident, then moving forward, based  
9 on your answer just now, he would be  
10 sustaining about \$45,000 a year economic loss  
11 moving forward?

12 A Yes.

13 Q What about the loss of potential  
14 commissions, is that calculated in your  
15 consideration of future economic loss?

16 A No, because it really does not matter  
17 whether it's commission, straight salary,  
18 draw against commission, salary plus  
19 commission, et cetera. It's at the end of  
20 the year how much they made. You know, there  
21 are some jobs where it's a lien, you know,  
22 you don't make much and at other times of the  
23 year you make more. Things like that. So  
24 it's best just to look at what the person  
25 actually made.

1 G. Young

2 Q Is it also fair to look at a  
3 percentage and in other words say that he was  
4 able to work a hundred percent at the time of  
5 the accident, and now as a result of the  
6 accident he's able to work 50 percent of the  
7 time so whatever the numbers were between  
8 what he was doing full time and what's  
9 part-time, his economic loss is now  
10 50 percent of what it was?

11 A Generally, yes.

12 Q All, Doctor, I thank you for -- are  
13 you a doctor?

14 A No, I'm not. I decided against that  
15 path.

16 Q Well, you look like one so maybe  
17 that's why I called you "doctor."

18 A Oh, thank you, sir.

19 Q With the glasses and the nice bald  
20 head like mine.

21

22 (Continued on next page for jurat  
23 accommodation.)

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G. Young

A Thank you, sir.

MR. SMILEY: Well, it was nice  
speaking with you. Thank you for your  
time today.

(Time noted: 2:05 p.m.)

-----  
GARY YOUNG

Subscribed and Sworn to before me  
this            day of            , 2021.

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Notary Public

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C E R T I F I C A T E

I, VILMA TORRES, hereby certify that the Expert Deposition held before me on the 20th day of May, 2021; that said witness was duly sworn before the commencement of testimony; that the testimony was taken stenographically by myself and then transcribed by myself; that the party was represented by counsel as appears herein;

That the within transcript is a true record of the Expert Deposition of said witness;

That I am not connected by blood or marriage with any of the parties; that I am not interested directly or indirectly in the outcome of this matter; that I am not in the employ of any of the counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of June, 2021.

A handwritten signature in cursive script, appearing to read "Vilma Torres", is written over a horizontal line.

VILMA TORRES, RPR, CSR

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| <b>2</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                       |  |

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MATTHEW J. IZQUIERDO,

Plaintiff,

- against - Civil Action No.

1:16-cv-05618-AT

-RLE

RICHARD A. TAFT and IANNI CONCESSION INC.,

Defendants.

. . . . .X

122 East 42nd Street

New York, New York

March 9, 2017

11:08 a.m.

DEPOSITION of BRIAN HUNTER, a Non-Party  
Witness in the above-entitled action, taken by the  
respective parties pursuant to the Federal Rules of  
Civil Procedure and Order, , and held at the above  
time and place before Lisa Paciullo, a Shorthand  
Reporter and Notary Public of the State of New York.

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

SMILEY & SMILEY, LLP

Attorneys for Plaintiff

122 East 42nd Street 39th Floor

New York, New York 10168

BY: ANDREW J. SMILEY, ESQ.

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Attorneys for Defendants

30 Vesey Street

New York, New York 10168

BY: PAUL LIMA, ESQ.

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B. HUNTER

(Prior to the commencement of the deposition, exhibits were marked.)

(Whereupon, a packet of State Police Records was marked Plaintiff's Exhibit 1 for identification, as of this date.)

(Whereupon, a color photograph was marked was marked Plaintiff's Exhibit 2A for identification, as of this date.)

(Whereupon, a color photograph was marked Plaintiff's Exhibit 2B for identification, as of this date.)

(Whereupon, a color photograph was marked Plaintiff's Exhibit 2C for identification, as of this date.)

(Whereupon, a color photograph was marked Plaintiff's Exhibit 2D for identification, as of this date.)

(Whereupon, a color photograph was marked Plaintiff's Exhibit 2E for identification, as of this date.)

(Whereupon, a color photograph was marked Plaintiff's Exhibit 2F for identification, as of this date.)

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B. HUNTER

(Whereupon, a color photograph was  
marked Plaintiff's Exhibit 2G for  
identification, as of this date.)

(Whereupon, a color photograph was  
marked Plaintiff's Exhibit 2H for  
identification, as of this date.)

(Whereupon, a color photograph was  
marked Plaintiff's Exhibit 2I for  
identification, as of this date.)

(Whereupon, a color photograph was  
marked Plaintiff's Exhibit 2J for  
identification, as of this date.)

(Whereupon, a color photograph was  
marked Plaintiff's Exhibit 2K for  
identification, as of this date.)

(Whereupon, a color photograph was  
marked Plaintiff's Exhibit 2L for  
identification, as of this date.)

(Whereupon, a color photograph was  
marked Plaintiff's Exhibit 2M for  
identification, as of this date.)

(Whereupon, a color photograph was  
marked Plaintiff's Exhibit 2N for  
identification, as of this date.)

1 B. HUNTER

2 (Whereupon, a color photograph was  
3 marked Plaintiff's Exhibit 20 for  
4 identification, as of this date.)

5 (Whereupon, a color photograph was  
6 marked Plaintiff's Exhibit 2P for  
7 identification, as of this date.)

8 B R I A N H U N T E R,

9 having first been duly sworn by  
10 a Notary Public of the State of New York,  
11 was examined and testified as follows:

12 BY THE REPORTER:

13 Q Please state your name for the record.

14 A Brian Hunter.

15 Q Please state the address of your place of  
16 business.

17 A 55 Crystal Run Road, Middletown, New York  
18 10941.

19 EXAMINATION BY

20 MR. SMILEY:

21 Q Good morning, Investigator Hunter.

22 A Good morning.

23 Q My name is Andrew Smiley. I represent  
24 Matthew Izquierdo and I'm going to be asking you  
25 some questions today; all right?

1 B. HUNTER

2 A Okay.

3 Q I ask, as you just did, please give me a  
4 verbal response to all of my questions as opposed to  
5 a nod or a shake of the head; all right?

6 A Correct.

7 Q If at any time you need to take a break,  
8 just let me know and we'll be happy to accommodate  
9 you; all right?

10 A Okay.

11 Q I'm going to hand you for your reference  
12 during the course of my questioning two items that  
13 we've marked as exhibits.

14 The first is what's been marked as  
15 Plaintiff's Exhibit 1 for identification. It is a  
16 pretty thick stack of records that we received in  
17 response to a subpoena served on the State of New  
18 York for all of this, State Police investigative  
19 materials.

20 A Okay.

21 Q I'm going to give this to you. I put  
22 different stickies and numbers on it to try and help  
23 us find things to talk about and make sure it  
24 doesn't take too long to look for them. So if you  
25 could just hold this by you for the moment and I'll

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B. HUNTER

let you know when I need you to refer to it.

And I've also marked some photographs as Plaintiff's Exhibits 2A through 2P, which were a part of the State investigative file and we'll be looking at these also during today's questioning; all right?

This is not a memory test, so if there's something that you don't know, feel free to look at these records or just say that you don't know it; all right?

A Okay.

Q What is your current employment please?

A I'm an investigator with the New York State Police.

Q For how long have you been an investigator?

A Since January 7th, 20 -- I've been an investigator since July 28th of 2016.

Q Generally speaking, what are your duties as an investigator with the New York State Police?

A I'm a full-time investigator with the Collision Reconstruction Unit for the State Police.

Q If we refer to that as CRU, is that okay?

A Yes.

1 B. HUNTER

2 Q What does it mean to be a full-time  
3 investigator with CRU?

4 A My primary responsibilities is just  
5 investigating serious personal injury collisions  
6 usually involving criminal culpability and fatal  
7 collisions.

8 Q What, if any, position did you hold with  
9 the New York State Police immediately prior to being  
10 promoted to the position of investigator?

11 A I was a trooper from entering academy on  
12 January 7th of 2002 up until the point when I got  
13 promoted to investigator.

14 Q Generally speaking, did your duties on a  
15 day-to-day basis change in any significant manner  
16 from 2002 until 2016 at the time that you were  
17 employed as a trooper with the New York State  
18 Police?

19 A Yes.

20 Q Could you explain?

21 A As a trooper, I responded to anything that  
22 was required; crimes, collisions, domestics, speed  
23 enforcement. Basically, I was a patrol officer.

24 Q During that time as a patrol officer, did  
25 your duties change? For example, did you join part

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B. HUNTER

of the CRU during your time as a trooper or any  
other units within the State Police?

A Yes. I joined the Collision  
Reconstruction Unit as a trooper back in, I believe  
it was April of 2014.

Q Prior to joining the Collision  
Reconstruction Unit as a trooper in April of 2014,  
were you a member of any other units within the New  
York State Police?

A No.

Q Did you have to undergo any specific  
training in order to join the CRU in April of 2014?

A Yes, I did.

Q Could you tell me about that training?

A The first course I took was through IPTM,  
Institute of Police Technology Management. It's run  
by the University of North Florida.

The first course I took was at scene crash  
homicide investigation. That was an 80-hour  
two-week course.

Q Did you take any other courses in order to  
make you eligible to join the CRU unit in April of  
2014?

A Yes. I believe it was the following year

1 B. HUNTER

2 I continued the training. At some point around the  
3 same time frame, April/May 2015, I took another  
4 course through IPTM again. It was advanced  
5 collision investigation and then that was 80 hours,  
6 a two-week course.

7 Following that, I believe there was a  
8 one-week break between the two, I took  
9 reconstruction through IPTM again, which was another  
10 two-week course, 80 hours.

11 Q Have you, to date, undergone any other  
12 training other than the courses you've mentioned in  
13 the field of accident reconstruction?

14 A Yes. I've taken pedestrian and bicycle  
15 collision investigations. I've taken the human  
16 factors in collision reconstruction, both run  
17 through IPTM as well. I've taken crash data  
18 retrieval, both the technical course and the analyst  
19 course.

20 Q Anything else that you recall, any other  
21 training programs?

22 A I've also done the training as far as the  
23 forensic mapping. It's also 3D scanning, mapping.

24 Q Any of the courses that you just mentioned  
25 that you took after your date of the report that you

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B. HUNTER

rendered involving the accident with  
Matthew Izquierdo, date of accident being May 17,  
2016?

A The analyst for the crash data retrieval  
was taken after the report was submitted.

Q Did you have any training in crash data  
retrieval prior to your work on the report you  
prepared regarding this May 17, 2016, accident?

A Just retrieving the information.

Q What about analysis?

A No.

Q Did you perform any analysis of the crash  
data retrieval information that was retrieved in  
this accident of May 17, 2016?

A Prior to the report, no.

Q Did you do any analysis after you rendered  
your report of the crash data retrieval information?

A The only thing I rendered there was a, I  
believe, a table of the 5 seconds prior which was  
added after the initial report, during the peer  
review.

Q Do you know if that table you're referring  
to was part of the State Police records in  
connection with this accident that have been

1 B. HUNTER

2 disclosed?

3 A I'm not aware of what records were  
4 disclosed.

5 Q Was that part of your report in any way by  
6 way of like a supplemental report or anything like  
7 that?

8 A It would have been -- I believe in part of  
9 my report, I indicated the speeds from the crash  
10 data retrieval. I don't know if I -- I don't  
11 believe there's -- actually, I don't believe  
12 there's -- no, there isn't a snap picture of the  
13 actual table.

14 Q Okay.

15 A The crash data retrieval is not included  
16 with -- an actual copy of the crash data retrieval  
17 is not included with the report. That's a separate.

18 Q Okay. We'll look at that in a little bit.

19 Do you have any certifications by the  
20 State or any other entity as an accident  
21 reconstructionist?

22 A No.

23 Q Back in May, specifically on May 17, 2016,  
24 what was your position with the New York State  
25 Police?

1 B. HUNTER

2 A I was a trooper.

3 Q What, if any, involvement did you have  
4 with the CRU?

5 A I was part of the Collision Reconstruction  
6 Unit on a part-time basis.

7 Q Can you tell me how that worked, where  
8 your duties would go from the regular state trooper  
9 duties to something a little bit different and more  
10 involved with the CRU?

11 A You would be called out as needed and we  
12 would do, at that time, two-week rotations every so  
13 many weeks and then go back to the road.

14 Q Your involvement with this case involving  
15 Matthew Izquierdo on May 17, 2016, was that solely  
16 in your capacity as a trooper with CRU or did you  
17 wear a hat as a trooper within the CRU as well as  
18 duties as a state trooper, if that makes sense?

19 A No. That -- on that particular time I was  
20 doing my rotation and I was with the Collision  
21 Reconstruction Unit.

22 Q I'm going to draw your attention to that  
23 day. Do you recall how it was that you became  
24 notified that there was an accident that occurred  
25 which was requiring some response by you?

1 B. HUNTER

2 A Yes.

3 Q Tell me about that please.

4 A Investigator Dan Smith advised me that we  
5 were responding to a two-vehicle personal injury  
6 collision.

7 Q Dan Smith, was he a supervisor of yours at  
8 that time?

9 A No. He was a full-time investigator with  
10 the Collision Reconstruction Unit.

11 Q Would that position that Dan Smith had on  
12 that day be the same position that you currently  
13 have?

14 A I'm in a different one, but the same type  
15 of position.

16 Q Were you on duty at the time as a trooper  
17 when you got notified by Investigator Smith?

18 A Well, I was doing my rotation in the  
19 Collision Reconstruction Unit at that time and we  
20 were actually working when we were notified.

21 Q Were you working out in the field or were  
22 you working at an office or something else?

23 A I don't recall if I was in the office  
24 which would have been at the Collision  
25 Reconstruction Unit or if we were in the field.

1 B. HUNTER

2 Q The address you gave to Lisa, our court  
3 reporter, at the beginning of this deposition, is  
4 that the Collision Reconstruction Unit address?

5 A For Troop F, yes.

6 Q Could you just give me that address again  
7 please?

8 A 55 Crystal Run Road in Middletown, New  
9 York. And the zip code is 10941.

10 Q Thank you.

11 Do you have an actual recollection, as you  
12 sit here today, of responding to this particular  
13 accident on May 17, 2016?

14 A Yes.

15 Q Could you tell me what you recall when you  
16 first arrived at that scene, what you observed?

17 A I observed a vehicle, which was a Dodge,  
18 down an embankment. It was -- the ramp was a  
19 southbound direction. The vehicle was down an  
20 embankment. It was on its roof and its front end  
21 was facing in a northbound direction.

22 Q Is it your understanding now that that was  
23 the vehicle that my client Matthew was in?

24 A Yes.

25 Q Was Matthew in the vehicle when you

1 B. HUNTER

2 arrived at the scene?

3 A No, he was not.

4 Q Was he at the area of the accident  
5 location or had he been taken away for medical  
6 treatment at the time that you arrived?

7 A He was taken away for medical treatment.

8 Q Did you become aware that there was  
9 another vehicle involved in the collision?

10 A Yes, I did.

11 Q What kind of vehicle was that?

12 A It was a tractor, a freightliner tractor.

13 Q Was the operator of the tractor at the  
14 scene when you arrived?

15 A I believe he was at the scene and speaking  
16 with troopers.

17 Q Did you speak with the operator of the  
18 tractor?

19 A Not that I recall.

20 Q What were your duties, as far as you knew,  
21 at the accident scene at the time that you arrived?  
22 What were you charged with doing?

23 A I was charged with forensically mapping  
24 the evidence in the roadway.

25 Q Were there other members of the CRU

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B. HUNTER

performing any other tasks as part of any type of  
reconstruction of this accident?

A Yes.

Q Who else was there?

A Investigator Smith.

Q Anyone else?

A Yes. Trooper Chris Jackson.

Q Anyone else?

A From the Reconstruction Unit?

Q Yes.

A No.

Q For what purpose, if you know, was  
Investigator Smith at the scene?

A He was taking photos at the scene.

Q Do you know what, if any other duties, he  
had with regard to CRU's involvement of this  
accident other than taking photographs?

A At the scene?

Q Yes.

A Just assisting us.

Q What about after the scene; anything else?

A Yes.

Q Could you tell me about that?

A He went with myself, and I believe Trooper

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Jackson was there as well, and inspected the Dodge.  
I believe it was the next day. And he also imaged  
the air bag control module for the Dodge.

Q Did you say the air bag control module?

A Yes.

Q Anything else that you're aware of as far  
as Investigator Smith's involvement in this case?

A He did the peer review.

Q What is the peer review?

A When we do a report, whether it's a full  
report or a summary report, it goes to a -- first it  
goes to a peer review which is another Collision  
Reconstruction member and then after it goes through  
that peer review, the final goes up to Albany to a  
senior investigator who does the second peer review.

Q So Investigator Smith would have done the  
initial peer review before it went up to Albany?

A I believe he's the one that did that, yes.

Q I believe I saw in Plaintiff's Exhibit 1  
that there was a draft version of the report that  
you authored; is that correct?

A Yes. There's drafts.

Q And there was some notations and edits on  
that draft; is that correct?

1 B. HUNTER

2 A That's correct.

3 Q Would it have been Investigator Smith that  
4 made those, to your knowledge?

5 A I would have to look just to --

6 Q Okay. We'll get to that. I don't want to  
7 take up the time.

8 Anything else, to your knowledge, that  
9 Investigator Smith was involved in as part of this  
10 accident?

11 A No.

12 Q Let's talk about Trooper Jackson. What is  
13 your understanding of what his duties were relative  
14 to CRU's involvement at this accident?

15 A At this particular collision, I remember  
16 him walking around with Investigator Smith. I  
17 believe he was probably documenting on our field  
18 notes. There could have been some stuff he was  
19 documenting.

20 Q Was there any type of seniority at the  
21 scene between you and Trooper Jackson?

22 A Well, I'm senior to him, but he, at the  
23 time, he was not a full reconstructionist. What  
24 that means is he was able to come and assist, but he  
25 did not have all the proper required courses.

1 B. HUNTER

2 Q At the date of this accident of  
3 May 17, 2016, were you a full reconstructionist?

4 A Yes.

5 Q Other than forensically mapping at the  
6 scene, what were your duties relative to this  
7 accident? In other words, were you to do an  
8 accident reconstruction to determine exactly how the  
9 accident occurred; were you required to, as part of  
10 your duties, to determine if anybody was at  
11 particular fault? If you could explain for me,  
12 what, if anything, you're required to do?

13 A With this requirement, there was no  
14 criminal charges which is decided by, not the  
15 reconstructionist, there was an investigator that  
16 actually -- a case agent that was handling this  
17 case.

18 Q Okay.

19 A Which it was determined that there's no  
20 criminal charges. If it was determined that, then  
21 we do a summary which isn't a full reconstruction  
22 which consists of documenting all the evidence,  
23 doing a scale diagram.

24 Q What else?

25 A And the summary itself.

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Q Is the summary specifically to determine how the accident occurred, to recreate the accident, like an accident reconstruction or something else?

A No. A full report would analyze all the evidence that was documented. In some cases there would be a particular piece of evidence that was analyzed, being the summary report.

But a full reconstruction report would be a full reconstruction documenting and analyzing all the evidence in the report which could consist of mathematics.

Q In a summary, if you can just again articulate for me the difference between what is expected to be contained within a summary report that's different from a full report?

A A summary report basically sums up what happened, usually what you're briefed, what you did. Sometimes they will put a person, a contributing factor, who is at fault within the collision.

Q And again, the reason that a summary report was done here as opposed to a full report was why?

A There was no criminal charges.

Q Is a full report usually done if there's a

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death in the accident or it only --

A Not necessarily. There could be a death with no criminal culpability.

Q I'd like to draw your attention to your report, which to make it easy, I put a sticky on there. It says "Report" and "No. 1." If you could turn to it.

Could you please take a moment and look through from the first part to the end of this and let me know if this is, in fact, the report that you generated, the final report in connection with the accident of May 17, 2016?

A Yes. This is the final report.

Q Now, I noticed after the typed part where the last sentence starts with, "Full reconstruction report will not be completed," do you see that?

A Yes.

Q I then see a diagram after that?

A Yes.

Q Is that still part of the report?

A Yes, it is.

Q Then I see a section entitled "Measurements" which is three pages. Is that part of your report?

1 B. HUNTER

2 A It's not part of the report.

3 Q It's not? Okay. After that I see "Raw  
4 Measurement Data" at the top. Do you see that?

5 A Yep.

6 Q Is that part of the report?

7 A No, it is not.

8 Q Are the measurements that you just looked  
9 at in the raw measurement data, are these items of  
10 information that you obtained as part of your  
11 investigation, even if not actually part of the  
12 report?

13 A Yes.

14 Q Then afterwards, do you see, it's under  
15 Tab No. 3 where -- right behind it -- where the  
16 crash data retrieval information starts?

17 A Okay.

18 Q Was the crash data retrieval information  
19 part of your report?

20 A Are you asking if this report itself was  
21 included with the report or are you asking for  
22 content of it?

23 Q I'm asking you if that's included as part  
24 of your report. In other words, when you submit a  
25 report, does it have attachments to it that comprise

1 B. HUNTER

2 your full report or would this be one of those  
3 attachments?

4 A No, it's not.

5 Q Now, in preparation of your report, did  
6 you personally speak with any of, perhaps the  
7 drivers involved or any witnesses?

8 A No.

9 Q Is there a reason that you didn't speak  
10 with anybody as part of your report?

11 A That we don't normally speak to -- that's  
12 the job of the investigating trooper or the  
13 investigating investigator. Our part is just the  
14 reconstruction.

15 That type of information, we obtain from  
16 the trooper or the investigator. But we normally do  
17 not. We allow them to do their job and then we do  
18 our job.

19 Q Do you utilize information that the  
20 investigating troopers or investigator obtains as  
21 part of your summary?

22 A Yes.

23 Q What type of information do you rely upon,  
24 generally?

25 A We look at the supporting depositions,

1 B. HUNTER

2 there are MV-104 which is the New York State  
3 Accident Report. We will, you know, usually we'll  
4 speak to the investigator.

5 Q Who was the investigator on this case?

6 A The investigator on this case was  
7 Investigator Eric Haydt.

8 Q Was there an investigating trooper as  
9 well, to your knowledge?

10 A Yes.

11 Q Who was that?

12 A Trooper Desmond Lewin.

13 Q Could you tell me, generally, as far as  
14 the division of duties amongst you and Trooper Lewin  
15 and Investigator Haydt, who was responsible for what  
16 relative to the investigation of this accident?

17 A I'm responsible for the reconstruction  
18 portion, whether we're going to do a full  
19 reconstruction summary.

20 The trooper is responsible for  
21 investigating the collision. He's responsible for  
22 doing the motor vehicle accident report as well as  
23 interviewing witnesses.

24 And when the investigator is involved in  
25 the case, he usually notifies the investigator. And

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the investigator will do all the back work,  
interviewing witnesses, and if there's much more  
involved as far as if there's, you know, if there  
was alcohol involved, getting warrants and so forth  
for establishments. If there was something more  
that needed to be done interviewing, he would be --  
he's responsible for doing that part.

Q That would be Investigator Haydt in this  
case?

A Correct.

Q To your knowledge, does Investigator Haydt  
render some type of investigator's report in  
connection with his work?

A I believe he does.

Q Do you know what that's generally called  
or what document that would be?

A I believe it would be his SJS, is the word  
for report.

Q Do you recall reviewing an SJS report from  
Investigator Haydt relative to this case as part of  
your work?

A I reviewed the initial. I never review  
the actual final of what he submits.

Q What about any reports generated by

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Trooper Lewin? Did you review those as part of your work on this case?

A I did. Both.

Q What did you review?

A I reviewed his accident report. I believe I reviewed it during the time that I did it and actually I just reviewed it again when this came to that I was coming here.

Q As part of doing your summary, did you speak with Trooper Lewin about his findings that he put in his report?

A I don't recall if I did.

Q When you got to the scene of the accident, can you walk us through what you did while you were there?

A The first thing, as I always do is, I walk and look at all the evidence, look at the vehicles to try and have understanding of what happened.

And in this case, at that point, after I had done that, I had set up the total station and I had forensically mapped the scene and the evidence.

Q Is that the Leica device?

A Yes. That's the Leica device.

Q Can you tell me about that, what that is?

1 B. HUNTER

2 A That is a total station. It's a Leica. I  
3 believe I was using the robot which would have been  
4 a TCRP 1205 R400 and it's a robot that will track a  
5 prism. It uses infrared. And I'm able to map each  
6 point. It uses triangulation.

7 Q I'm going to show you a photograph that's  
8 been marked as Plaintiff's Exhibit 2M.

9 A Okay.

10 Q It looks like, if you look on this  
11 photograph, there's looking down road, some type of  
12 yellow tripod device. Do you see that?

13 A Yes, I do.

14 Q Is that the total station?

15 A Yes, it is.

16 Q Is that you with it, by any chance?

17 A Yes, it is.

18 Q Then using this total station, is there  
19 some other device that's used for markers as a  
20 reference point to register back, like a pole with a  
21 reflector or some other device that's placed at  
22 points of interest relative to the total station  
23 yellow unit that we see in Plaintiff's 2M?

24 A Yes. A prism is used. It's on a pole and  
25 it shoots the infrared to the actual prism to

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wherever point I want or I feel that's important.

Q Did the total station stay in one place  
and then relative to that, the pole would be placed  
in different spots to get the measurements?

A Yes.

Q Did somebody assist you with going to the  
different locations for those measurements?

A I don't recall. Sometimes you do need  
help. Sometimes there's obstacles and they can't  
track you. I don't recall in this particular case  
if somebody had to manually assist me.

Q The measurements that you obtained as a  
result of the total station, were those contained in  
a printout that you see in Plaintiff's Exhibit 1  
which looks like it's right behind the diagram  
that's entitled "Measurements."

A Yes.

Q Can you tell me, looking at this page  
entitled "Measurements," what everything means?  
First of all, starting with the categories across  
the top.

A The point is the actual point. So that's  
the first point.

Q Is point 1 where the total station is

1 B. HUNTER

2 placed?

3 A Yes.

4 Q What is the difference between the X, the  
5 Y, and the Z inputs on this chart?

6 A Those are the actual measurement. One's  
7 the X-axis, one's the Y-axis, and one's the Z-axis.

8 Q And what's the difference between an  
9 X-axis, a Y-axis, and a Z-axis?

10 A One goes horizontal, one goes vertical,  
11 and the other one basically goes straight up in the  
12 air. It measures the distance in the air.

13 MR. LIMA: That's the Z-axis?

14 THE WITNESS: Yes.

15 Q The X-axis is what direction?

16 A That's going to be the horizontal.

17 Q And would that be the distance on a  
18 horizontal plane from where the machine is set up at  
19 point 1 to the various points?

20 A Yes.

21 Q And the Y-axis is what again?

22 A That would going up the Y-axis. That  
23 would be the vertical.

24 Q So relative to where the total station is  
25 set up, the number next to any given point would be

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either above, equal to or below the position of the  
unit, the total station unit?

A Correct.

Q Does a negative for that number, for  
example in point 2 where it's negative 15, would  
that be 15 feet below the total station setup?

A That, I'm not sure of which way I did  
magnetic north. I'm not sure if it's -- I believe  
that is going to be below.

Q Are these numbers in feet, by the way? I  
assumed that, but I don't want to assume.

A These are feet and inches.

Q So on the X-axis, are the numbers feet?

A Those are feet.

Q On the Y-axis, those numbers are feet?

A Those are feet.

Q And the Z, when you said that's going up  
in the air, can you explain what you mean by that?

A That would be the rotation going up. It  
would be going in a, I guess you could say, vertical  
from the ground up.

Q How is that different --

A Height.

Q How is that different from the Y-axis?

1 B. HUNTER

2 A One, the Y-axis is going to be going,  
3 that's going to be all relative with the ground.  
4 The Z-axis is going to be with the height.

5 Q When you say the Y-axis is relative to the  
6 ground, do those values in that column reflect from  
7 ground level what the difference is to those  
8 reference points?

9 A No. I believe those are going to be --  
10 it's all going to be relative, the Z, Y, and X,  
11 putting it together for each point.

12 Q Let me take a step back. When you set up  
13 the total station, is there a certain height above  
14 the ground that's used as the reference point?  
15 Because I see that it's like a big yellow tripod.  
16 Or is that total station referencing the point from  
17 where its feet of the tripod are touching the ground  
18 or something else?

19 A The set point, which the height is  
20 measured from the ground up to the total station.  
21 There's a set point below it.

22 Q So when a number is showing that  
23 something, for example, is let's say 5 feet below  
24 the set point, is that 5 feet below the ground where  
25 the total station is set on or is it 5 feet below

1 B. HUNTER

2 the height of the tripod?

3 A I believe that's going to be the height  
4 the tripod.

5 Q Do we know how high up that reference  
6 point was off the ground from point 1?

7 A No, I don't.

8 Q Now, the Z-axis -- and I apologize for my  
9 ignorance. That's why I'm asking these questions,  
10 because I'm hoping to understand. Can you  
11 articulate for me how those values, the Z values are  
12 different than the Y-axis values?

13 A No. I can't give an accurate -- there's  
14 understanding the fundamentals, but I can't give you  
15 a complete accurate looking at these numbers.

16 Q Okay. Is the idea that when you put the  
17 X-axis, the Y-axis and the Z-axis together that that  
18 gives you the actual location of the item that  
19 you're trying to reference?

20 A Yes. It triangulates everything.

21 Q To the right, it says, "Code." There's a  
22 column for code. Do you see that?

23 A Yes.

24 Q I'd like to go through these and if you  
25 can tell me what those codes mean.

1 B. HUNTER

2 A Okay.

3 Q Let start with "BS" at point 1. What does  
4 that mean?

5 A The back site.

6 Q What is back site?

7 A It's usually a reference marker. It's  
8 when we set up the set point, we set the -- which is  
9 right below and in this particular case, usually I  
10 measure out 10 feet and put a P2K nail into the  
11 asphalt and that's the back site. And that's  
12 checked at the beginning and at the end.

13 Q So the back site, if I understand you, is  
14 a point about 10 feet away from the total station  
15 device where you put a nail into the asphalt?

16 A I would have to look and see if I did that  
17 in this particular case, but normally that's what I  
18 do.

19 Q Does that nail location, does that become  
20 the reference point or is it the tripod location  
21 that's the reference point?

22 A They both do. The set point and the back  
23 site.

24 Q What is a P2K nail?

25 A It's a surveying nail that goes into the

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asphalt. It also allows the prism pole to sit into it. There's an indentation that allows the pole to sit in so you're able to hold it level, accurately.

Q Is that just hammered into the ground?

A Yes.

Q Below there's several codes for "CL." Can you tell me what the letters CL represent?

A I believe that's going to be center line.

Q Then we have "FL"?

A That's going to be fog line.

Q "GR"?

A I believe that's going to be the guide rail.

Q Then the letter "G"?

A That, I'm not sure what that is.

Q Do you know if that might represent the damaged portions of the guide rail?

A I would have to look into the actual within --

Q Is there anything in your report that assists you in determining that?

A In my report, no.

Q How were those codes determined? Is that inputted by you or someone else into the machine?

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A Yes.

Q Do you know who inputted those?

A I did.

Q But you don't recall what the "G"  
represented?

A No, I don't.

Q Going to the next page, do you see "TM"?

A Yes.

Q What is that?

A That's tire mark.

Q Do you see the letter "S"?

A Yes.

Q What does that represent?

A Those are going to be scrapes or  
scratches.

Q Do you see a "GOU" on the following page?

A Yes. That's going to be gouge.

Q Do you see the word "tree" in this column?

A Yes.

Q Do you know what that's referencing?

A That is a tree that was off the shoulder  
down by the earth embankment.

Q Was that tree knocked over in this  
accident, to your knowledge?

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A I believe it was.

Q Do you see where it says "tire"?

A Yes.

Q What is that representing?

A The vehicle tires.

Q Do you know which vehicle and which tires  
those are referencing?

A Those are going to reference the Dodge.

Q Are those the location of the Dodge Dart's  
tires while it was at rest or is it referencing  
something else?

A No. That would be final rest.

Q What about the "VEH" code?

A I don't know if that's either vehicle  
parts or that's actual profile of the vehicle.

Q How about "W"? Do you know what that  
means?

A No, I do not.

Q Do you know if that might represent the  
windshield?

A Possibly could.

Q And "RP", the last one?

A That's actually the reference point.

Q What specifically is that referring to?

1 B. HUNTER

2 Is that to the P2K nail?

3 A Yes. These numbers are different than  
4 when we actually -- they print out differently, the  
5 numbers. I believe this is going to be the set  
6 point and the first point is the back site.

7 Q What is the difference between the set  
8 point and the back site?

9 A The set point is where the total station  
10 is and the back site is where -- where -- again, in  
11 that particular case, it could be 10, 20. It  
12 doesn't matter. That's the second point.

13 Q That would be where the nail was set?

14 A Correct. Well, in both particular cases,  
15 there's a nail set; one below it and then one at the  
16 back site and that's what allows it to triangulate.

17 Q Is there any type of permanent reference  
18 point or marker that you use when doing the mapping  
19 such that if you had to go back there today you  
20 would then be able to recreate the location of all  
21 these items?

22 A Yes. There's again, the reference point  
23 which is the set point which is the P2K nail is  
24 nailed below it and then the back site which is --  
25 it looks like in this particular case it was 10 feet

1 B. HUNTER

2 out the P2K nail was into the asphalt.

3 Q Are those left on site, those P2K nails or  
4 some item if you needed to go back there or not? Or  
5 are those removed?

6 A No. They're there so long as there's  
7 nothing damaged to the road.

8 Q If you go to the page following what we've  
9 just been looking at which is "Raw Measurement  
10 Data," how is this data, if at all, different than  
11 the X, Y, Z-axis codes that we were just looking at?

12 A The ones that gives the actual  
13 measurement, and this is the actual raw data from  
14 the file. And I do not know how to interpret that.

15 Q Do these numbers have any significance to  
16 you on the four pages of raw measurement data?

17 A I'm sorry. I didn't understand the  
18 question.

19 Q That's okay. On these four pages of raw  
20 measurement data, do the numbers listed here  
21 alongside the various codes have any significance to  
22 you?

23 A To me?

24 Q Yes.

25 A No. It's just the actual raw data.

1 B. HUNTER

2 Q Were they used by you or anybody in CRU,  
3 to your knowledge, for any purpose in reconstructing  
4 this accident?

5 A Well, we take the raw data and import it  
6 into a CAD program, in this particular case, EdgeFX.

7 Q Was this data put into the CAD program in  
8 this case?

9 A Yes.

10 Q Did it create a rendering as a result of  
11 this?

12 A Well, it brings in the points and then I  
13 need to render the actual diagram.

14 Q Was the diagram created by you as a result  
15 of the data from the total machine?

16 A Yes.

17 Q Is that the diagram that's at the end of  
18 your report?

19 A Yes.

20 Q Now, the diagram that we see at the end of  
21 your report, I'd like to draw your attention to  
22 that.

23 A Sure.

24 Q Does that show the reference point?

25 A No.

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Q Does it show the tree?

A No, it does not.

Q Does it show the guide rail points that were referenced in the data obtained?

A No, it does not.

Q Is there a reason that the diagram doesn't have all of these reference points that were obtained as part of your measurements?

A That, I don't know why they're not.

Q Did you have the option of choosing just particular pieces of data that you wanted to appear on the diagram?

A Yes. All the points come in and you actually use the CAD program to make the diagram.

Q So did you just select these particular ones to make the diagram as opposed to generating a CAD automatically from all of the data?

A A CAD won't do it automatically. We have to go in and take the individual points. For instance, you know, the fog line, we would have to connect all the points to make the fog line.

Q Is there any particular reason you didn't do the fog line and the guide rail reference points on this diagram?

1 B. HUNTER

2 A Well, I did do -- looks like the fog line  
3 is there.

4 Q Which line is the fog line?

5 A The fog and the hazard, those are the two  
6 lines to the east and west.

7 Q Okay, so --

8 A If you could see, the solid line.

9 Q Okay. So just for orientation, while  
10 looking at this diagram, we see the dotted lines  
11 down the middle of the lane, to the west of that we  
12 see a line. Is that the fog line?

13 A Those are to the -- I would have to -- to  
14 the west is the fog line.

15 MR. LIMA: Just so we're clear. To the  
16 west of the white dotted line, that would be to  
17 the left on the picture, that's the fog line?

18 THE WITNESS: To the left of it, it would  
19 be the fog line, which is -- I'm sorry. That's  
20 going to be the west, to the left in the  
21 picture. That's the fog line.

22 Q Is that the same line you would see riding  
23 along the shoulder indicating the shoulder?

24 A Yes.

25 Q Then to the east, which would be to the

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right of the dotted marks on this diagram where we  
see a solid line, what does that represent?

A That's going to be the hazard line.

Q What is the hazard line?

A It's a solid yellow line.

Q Is this solid yellow line, is that to the  
left or to the west of the guide rail?

A That would be to the west of the guide  
rail.

Q Where is the guide rail depicted in this  
diagram?

A Would be the east. I don't see any  
notation.

Q Is there a reason that the guide rail is  
not indicated on this diagram?

A There's no notation of it. I don't know  
if it's actually, looking at this diagram itself,  
the picture, I don't know that it's not in there.  
But it is not notated.

Q Can you see it in here?

A I can't. Normally it's a color photo.

Q In the color photo that it normally is,  
are there different colors representing different  
parts of the diagram?

1 B. HUNTER

2 A Yes.

3 Q Do you indicate, on this diagram, the  
4 collision location?

5 A No, I do not.

6 Q Did you attempt to determine the location  
7 of the collision of this accident?

8 A At the scene and so forth, yes, I did.

9 Q Did you determine the location of where a  
10 collision occurred?

11 A Where I thought it did, yes. Do you want  
12 my opinion?

13 Q Yes. And where did you believe that a  
14 collision occurred?

15 A I believed it occurred in the -- in the  
16 area over by the left-hand lane if you're going  
17 south or the far -- the left-hand lane if you were  
18 going southbound. If you were looking at this  
19 actual diagram, it would be on the right-hand side.

20 Q So would that be a collision occurred  
21 between the Dodge Dart and the tractor, those two  
22 vehicles collided in the left lane of this highway?

23 A Well, I'm not a hundred percent sure  
24 exactly where within the highway. I just can go by  
25 what the evidence shows that day and obviously, the

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2 diagram.

3 Q What did the evidence indicate to you  
4 specifically as to where the Dodge Dart and the  
5 tractor collided?

6 A Well, I can say just, at some point,  
7 looking at the tire mark, I believe that the  
8 evidence there of the tire mark shows that at some  
9 point there was contact there.

10 Q Where? I'm asking specifically.

11 A I'm sorry. In the left-hand lane.

12 Q If you could describe to the middle, using  
13 the middle of the lane as a reference point, all the  
14 way to the east towards the guide rail as a  
15 reference point and west to the right lane, do you  
16 know where within that left lane the collision  
17 occurred?

18 A I don't know the exact where the start of  
19 the collision occurred. I can tell you that where I  
20 believe that part of -- what the evidence shows that  
21 part of a collision had occurred.

22 Q That's what I'm asking you for, just what  
23 the evidence showed where part of that collision  
24 occurred.

25 A The evidence shows the tire mark in the

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2 left-hand lane.

3 Q Where in the left lane; in the middle of  
4 it, more towards the east towards the guide rail or  
5 more towards the right towards the right lane?

6 A From what I recall, it was more in the  
7 middle of that left lane.

8 Q Did that evidence indicate to you that for  
9 that collision to occur at that location in the left  
10 lane that a portion of the tractor had to physically  
11 be towards the middle of the left lane at the time  
12 of that collision?

13 A Well, I don't know if at the time of the  
14 collision that tractor was there or if it moved to  
15 that lane during the collision and that tire mark  
16 was created.

17 I could not find anything other than the  
18 tire mark and scrapes.

19 Q Does the tire mark indicate to you that  
20 the tractor trailer was, at some point, in the  
21 middle towards the middle of the left-hand lane when  
22 it collided with the Dodge Dart?

23 A My opinion is at some point, yes.

24 Q I'm going to show you what we marked as  
25 Plaintiff's Exhibit 2A. If you could take a look at

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that photograph and also 2B, those two photographs.

Do the photographs that I've just handed you depict the tire mark that you identified which is located in the diagram next to your report?

A Yes.

Q Do those photographs depict the tire mark that you were just referencing in your response to my questions about the location of the collision?

A Yes.

Q Based on your training, looking at these photographs, what, if any, information are you able to obtain regarding what occurred based on that tire mark?

A Based on my opinion, that's a tire that is locked up and to the left of that is scrapes.

Q The tire that you're saying is locked up, that would be what looks like the black mark there?

A Correct.

Q Could you tell me, approximately, the length of that?

A I cannot. I do not know it offhand.

Q Would that be something you'd be able to determine looking at the measurements that you obtained, the length of that tire mark?

1 B. HUNTER

2 A I could not just looking at these  
3 measurements. I would have to go in.

4 Q Can you approximate knowing the dimensions  
5 of the roadway or looking at the photograph what the  
6 length of that black tire mark is?

7 A I'd say approximately 2 feet if I were to  
8 guess. That's without -- that's guessing.

9 Q In your training, what would cause a tire  
10 mark of that length and size as depicted in 2A and  
11 2B?

12 A That would be a tire locked up. It could  
13 be possibly skidding or could be completely intact  
14 with another object that wasn't allowing it to free,  
15 that was heating up and causing that friction to the  
16 roadway.

17 Q The white marks that we see on the roadway  
18 to the left of that, are those what you've  
19 referenced in your measurements as scrape marks?

20 A I believe I put them in as -- on the  
21 diagram as scratch marks. But, yes.

22 Q Do you know what caused those?

23 A I believe that's going to be the  
24 undercarriage of the Dodge.

25 Q Do you know how it is that the

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undercarriage of the Dodge would create marks on the pavement in that location?

A Yes. The Dodge right front wheel was dislodged. I believe the vehicle, at that point, had dropped to the pavement on the right-hand portion of it.

Q Does this indicate to you looking at these photographs based on what you've said that during the course of the creation of this tire mark, that the right front tire was being dislodged?

A I'm sorry. You have to repeat that.

Q Looking at these photographs, 2A and B, and based on the fact that you said that you believed that the tire was dislodged causing the vehicle to come down and put white scrape marks on the pavement, is that an indication to you that the black tire mark was being created as a result of being dislodged at that point or some mechanism that was causing it to be dislodged?

A Not necessarily.

Q Did you come to learn that the right front tire came completely off of the Dodge vehicle?

A Yes.

Q Did you learn that part of the axle came

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with it as well?

A Yes.

Q Do you know how that occurred?

A From the collision.

Q So when the two vehicles came into contact, that is what caused the tire and part of the axle to become dislodged from the Dodge Dart?

A Yes. Well, that's my opinion, yes.

Q How does that happen, if you could tell me, if you know, where two vehicles can collide in a manner that a tire and part of an axle would be dislodged off of one of the vehicles?

A What my opinion is is the force with the speed, striking something.

Q The collision of the two vehicles?

A The collision. In this particular case, the collision of that right front end striking the left rear of that tractor.

Q You said it struck the right rear of the tractor. What part of the tractor are you referring to?

A No. I'm sorry.

Q The left rear.

A The left rear.

1 B. HUNTER

2 Q I'm sorry. I misspoke.

3 What part of the tractor are you referring  
4 to specifically that you believe that collided with  
5 the right front tire of the Dodge?

6 A The left outer rear wheel.

7 Q What is the basis for your opinion that it  
8 was the left outer rear wheel that collided with the  
9 right front tire of the Dodge?

10 A From examining the tractor, its left rear  
11 tire.

12 Q Did you personally examine the tire?

13 A Yes, I did.

14 Q What did you observe?

15 A I observed scuff marks to the outside of  
16 that left rear tire as well as to the inside of the  
17 tire.

18 Q When you say "the inside of the tire,"  
19 what are you referring to?

20 A The inside tire wall. It would be the  
21 side that's facing inside towards the center of the  
22 vehicle.

23 Q Closer to the rim?

24 A No. What I mean by the outside is there's  
25 a -- there's a tire, there's the outside that you're

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looking at and then there's the inside that you would not be able to see unless you went underneath the car and looked. But -- I'm trying to explain it in --

Q Okay. I'm going to show you a picture that perhaps can assist you. I'm going to hand you Plaintiff's 2K and part of 2L for identification. Do you recognize what's depicted in those photographs?

A Yes.

Q What do you recognize is depicted in photographs 2K and 2L?

A 2L and 2K both, these are the tractor that was involved in the collision. 2K is the tire that I was referencing before.

Q What evidence are you referring to that you saw on that tire as depicted in 2K that indicated to you that it was involved in the collision?

A On the upper portion you can see the transfer and the scuffing at the top, above the rim.

Q Can you describe that by color or specific location relative to the wheel if the top of the wheel, like a clock, would be 12 o'clock?

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2 A You could see it between 12 and 1 and 10  
3 and 12 at the top there. And right below it, right  
4 above the rim at 12 o'clock, there's a lightish  
5 brownish.

6 Q And using the bolts in the rim, the one  
7 closest oriented to the top as the 12 o'clock and  
8 the one immediately to its left is 11 and the one to  
9 that left is 10; would that be fair?

10 A Yes.

11 Q What, if any, other evidence did you  
12 observe on the tire to indicate that that was a  
13 point involved in the collision?

14 A The picture doesn't show it, but on 2L --

15 Q Okay.

16 A You see, I guess, the mud flap --

17 Q Okay.

18 A -- there was, you can tell there was  
19 contact to the mud flap. I believe it was towards  
20 the bottom left of it.

21 Q Do you see that as depicted in this  
22 photograph, any evidence of the contact on the mud  
23 flap?

24 A I can't see it clearly in this photo.

25 Q Do you know if what you observed on the

1 B. HUNTER

2 mud flap was as a result of anything in this  
3 collision?

4 A Yes. It looked consistent with being  
5 involved in this, part of this collision.

6 Q What is it that you saw that led you to  
7 that belief?

8 A I saw some scraping to the mud flap.

9 Q Did you see, other than some scraping, any  
10 actual damage to the mud flap? Was it torn or  
11 dislodged in any way?

12 A I don't recall if it was torn or  
13 dislodged. I just remember seeing scrapes to it.

14 Q You said previously that you saw something  
15 on the inside of the tire?

16 A Correct.

17 Q Are you able, using either 2K or 2L, to  
18 indicate what you're referring to?

19 A No.

20 Q Would it have been, looking at 2L, if you  
21 look above the left mud flap, you see two rear  
22 tires? Would it be to the right of the left tire  
23 that you see damage?

24 A It would be the left tire. It would be in  
25 between those two tires on the visual side of the

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2 inside of that tire.

3 Q What damage did you observe in that  
4 location?

5 A I observed, in that one, a transfer as  
6 well, a little scuffing.

7 Q Do you know how a transfer scuff mark  
8 would be created on the inside of that tire as a  
9 result of this collision?

10 A My opinion, it's from the Dodge pushing  
11 into that tire, some sort of part of the vehicle  
12 touched that inside of the tire.

13 Q Can you explain for me how the Dodge could  
14 touch the inside of the tire? It seems to be on the  
15 other side of where the location of where the impact  
16 would be.

17 A Sure. I believe that the Dodge struck  
18 that tire and not on the outside, but struck the  
19 actual whole tire of which part of the vehicle, part  
20 of the Dodge, and I don't know what part of the  
21 vehicle, somewhere in the front struck or touched  
22 the inside of that tire.

23 Q Do you know how that actual contact could  
24 occur, the position of the vehicles for that to  
25 occur, where the Dodge's tire could touch an inside

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2 part of the rear left tire of the trailer?

3 A Well, I don't know if it was the actual  
4 tire of the Dodge. It could have been any part of  
5 the front, right front part of that Dodge that  
6 touched during the collision.

7 Q Do you know how that could occur, how any  
8 part of the right front part of the Dodge could make  
9 contact with an inside part of the rear left tire of  
10 the tractor?

11 A Sure. Depending on where the Dodge struck  
12 that, if it's pushing in, any part could continue  
13 or -- and strike it.

14 Q Can you give me any idea of how that could  
15 occur, what part of the car could -- how that could  
16 happen?

17 A I believe that the right front bumper or  
18 possibly the hood could have done that.

19 Q How would the impact be positioned between  
20 the two vehicles so that the right front bumper or  
21 the hood could impact the inside of the back left  
22 tire?

23 A If the Dodge was coming in -- one possible  
24 way is if the Dodge was coming in on an angle and  
25 strikes in there, rotates, which in my opinion, the

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2 vehicle did rotate in a clockwise manner.

3 Q What kind of angle? Would it have to be  
4 angled towards the right lane for that to happen or  
5 angled towards the left lane?

6 A In my opinion, it would be coming in and  
7 angled towards, coming in towards the left lane.

8 Q Would it have to go through the mud flap  
9 to make that contact?

10 A Sure.

11 Q Is there evidence that the vehicle went  
12 through the mud flap that you observed in order for  
13 that to occur?

14 A From what I recall, on the left portion of  
15 the vehicle, there was evidence of scrapes. I don't  
16 remember if on the center.

17 Q So wouldn't the Dodge vehicle somehow have  
18 to go through the middle of that left mud flap in  
19 order to make contact with the inside rear left  
20 tire?

21 A I don't know if the mud flap is able to  
22 lift. Again, I didn't examine to see if it would do  
23 that.

24 Q Do you know how it could be that there  
25 could be the damage as shown on 2K at 12 o'clock,

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2 sort of right above the sidewall as well as damage  
3 on the inside of the tire, how you could get damage  
4 in both locations from an impact?

5 A Again, my opinion would be if a vehicle is  
6 wrapping around the actual tire or could be vehicle  
7 parts dislodging that's striking in there.

8 Q Do you think that's what occurred in this  
9 case, that a vehicle part dislodged and struck in  
10 there?

11 A I don't know.

12 Q Do you know how an impact between the rear  
13 left tire of the truck could cause the right front  
14 tire and axle to completely dislodge off of the  
15 Dart?

16 A I believe because of the speed.

17 Q The speed of what?

18 A The speed and the weights, the speed of  
19 the Dodge Dart and the weight of that tractor.

20 Q Do you know what the speed of the Dodge  
21 Dart was at the time that the collision occurred?

22 A I believe it was 82.

23 Q What is that based on?

24 A The crash data retrieval.

25 Q Do you know which direction, if any, the

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tractor was moving in an east/west perspective at  
the time that this collision occurred?

A No.

Q Do you know if it was moving straight at  
the time of the collision; if it was moving west at  
the time of the collision or if it was moving east  
at the time of the collision?

A I know it was moving south. As far as  
moving east or west, I do not know.

Q Do you know if it was in the process of  
changing lanes at the time of the collision?

A That, I do not know.

Q Is that something that you attempted to  
determine?

A I just went by the evidence of the tire  
mark.

Q Does that give you any evidence, looking  
at the tire mark, as to whether the tractor was  
moving east or west at the time of collision?

A I believe, at some point, the tractor was  
moving to the east or west, whether after the  
collision began or prior to the collision.

Q Can you explain what you mean by that?

A Meaning I do not know if the tractor was

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2 struck and reacted and then moved to the left or it  
3 was starting to move towards the shoulder or if, in  
4 fact, it was changing lanes prior and was struck.

5 I can just only go by the evidence as the  
6 tire marks and scrapes that are there.

7 Q Does the evidence indicate to you that the  
8 tractor was moving in the direction of the guide  
9 rail, which would be moving eastward at the point of  
10 the collision?

11 A Yes.

12 Q What is the evidence that shows that to  
13 you?

14 A Just the tire mark.

15 Q Because you see in the tire mark it looks  
16 like a movement towards the east, towards the guide  
17 rail?

18 A It's running -- yes, it's -- there's a  
19 slight movement towards the guide rail.

20 Q Do you know the width of these lanes, sir?

21 A I do not without going into the CAD  
22 program.

23 Q Do you know the width of the tractor, what  
24 that was?

25 A I would have to go into the CAD program.

1 B. HUNTER

2 In fact, I don't believe that the tractor was  
3 mapped. The tractor was pulled to a controlled stop  
4 down the road.

5 Q Was the weight of the tractor taken?

6 A The Commercial Vehicle Inspection Unit  
7 inspected the vehicle and I don't know if they  
8 weighed it.

9 Q What about that data information? Was  
10 that obtained from this tractor?

11 A No, it was not.

12 Q Do you know why?

13 A That, I do not know. That would be the  
14 investigator who obtains that, consents and so  
15 forth.

16 Q Do you know what the speed was of the  
17 tractor at the time of impact?

18 A No.

19 Q Would that have been of any significance  
20 to you?

21 A Yes.

22 Q Why is that?

23 A It could determine many different factors.  
24 It could determine the distance between the two  
25 vehicles, stopping distance and so forth.

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Q Are you able to tell if the tractor was accelerating at the time of impact?

A No, I'm not.

Q Are you able to tell if it was going the same speed at the time of impact as it was prior to impact as opposed to accelerating?

A No, I cannot.

Q Based on the forensic evidence, would it be consistent that at the time of the collision that the vehicle was moving from the right lane to the left lane based on the forensic evidence? Would that be a consistent interpretation of that?

A Based on the evidence of the tire mark, yes.

Q Is there anything in the evidence that would indicate that this tractor was not accelerating as it was going from the right lane to the left lane at the time of the collision?

A I do not know if it was accelerating or decelerating.

Q Does the evidence indicate that the tractor trailer is what collided into the Dodge Dart or does the evidence indicate it was the Dodge Dart that collided and moved into the tractor or

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2 something else?

3 A I believe by the damage profile of the  
4 Dodge that the Dodge struck or collided with the  
5 back of the tractor, the tire.

6 Q Do you believe this was a rear-end  
7 accident as opposed to a side impact accident?

8 A I believe it was a rear-end collision.

9 Q Do you believe that any part of the side  
10 of the Dodge Dart collided with any part of the side  
11 of the tractor?

12 A I believe as it rotated or as it struck,  
13 that it did collide with the left portion of the  
14 outer -- the tire.

15 Q How is it that a rear impact could cause  
16 an impact with the side of the left tire of the  
17 tractor?

18 A It's my opinion that the vehicle, the  
19 Dodge drove through the back of that tire and  
20 dislodged the tire and then rotated.

21 Q How does a Dodge Dart drive through the  
22 back of a tractor trailer?

23 A Speed. I'm sorry. The two different  
24 speeds.

25 Q Do you know what the different speeds were

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2 at the time of collision?

3 A Again, I don't know the speed of the  
4 tractor. I just know what the crash data retrieval  
5 said on the Dodge, what that speed was.

6 Q If the speed was the same or greater of  
7 the tractor trailer, would that have changed your  
8 opinion?

9 A Yes.

10 Q Based on that, was there any reason you  
11 didn't attempt to try and determine the speed of the  
12 tractor trailer?

13 A Well, just based on the evidence, again, I  
14 didn't -- it was my opinion that the Dodge drove  
15 through the tractor and it was -- by the damage  
16 profile to the Dodge and the way the front was  
17 pushed back, it was my opinion that the Dodge was  
18 traveling faster and drove through the tractor.

19 Q Were you able to distinguish the damage  
20 the Dodge sustained as a result of the impact as  
21 opposed to the damage it sustained after the impact  
22 and when it came to final rest?

23 A Yeah, the initial -- I looked at the right  
24 front end of the Dodge and saw everything, where the  
25 first, initial contact everything was pushed back

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2 which to me was an indication that it struck, where  
3 it struck the tractor's tire. There was a lot of  
4 other damage to the vehicle that was, in my opinion,  
5 post-collision.

6 Q I'd like to draw your attention to  
7 Plaintiff's 2N. Do you know where that picture was  
8 taken?

9 A That was taken at the tow yard of where  
10 the Dodge was towed to, which I believe was Jan's.

11 Q Were you present when this photograph was  
12 taken?

13 A Yes.

14 Q Is this when you did your inspection of  
15 the damage to the vehicle relative to your analysis  
16 of this accident?

17 A Yes.

18 Q Can you tell me from looking at this  
19 photograph how you were able to determine, what, if  
20 any, damages depicted on the front right side of  
21 this vehicle was from the collision at the time that  
22 it collided with the tractor as opposed to an impact  
23 following the collision with the tractor such as  
24 with either the roadway, the guide rail, flipping  
25 over onto the ground or otherwise?

1 B. HUNTER

2 A I believed when looking to where the right  
3 front rear well, everything was pushed back, and I  
4 believe based on that evidence, that that was from  
5 the contact with the tractor, the way it was pushed  
6 back.

7 Q So the way that you see the metal sort of  
8 tin canned back on the right front side as depicted  
9 in photograph 2N, you believe that all occurred  
10 during the collision with the truck, tractor?

11 A Well, I believe that there was other parts  
12 of the vehicle, really from what I recall was also  
13 pushed back, that I really can't see in this photo.

14 Q Would you expect that if such damage was  
15 caused as a result of the impact with the Dodge and  
16 the tractor, that you would see some more evidence  
17 of impact damage on the 2L, photograph 2L on the mud  
18 flap?

19 A I didn't believe so.

20 Q Based on the relative damage that you see  
21 on 2N to the front right side of the Dodge, if that  
22 did come as a result of collision with the tractor,  
23 wouldn't you expect to see some more evidence of  
24 damage to the tractor other than what's been  
25 depicted in these photos?

1 B. HUNTER

2 A No. I mean my opinion is on the angle and  
3 the way it struck it, struck the tire, that that  
4 doesn't necessarily have to be the case.

5 Q Did part of the Dodge Dart get lodged  
6 under the tractor when it collided?

7 A That, I don't know.

8 Q In this photograph on 2N, there appears to  
9 be, it looks like an axle and an attached maybe rim  
10 or brake system in front of the car. Do you see  
11 that?

12 A Yes.

13 Q Is that from this vehicle, the right front  
14 part?

15 A I believe that's the right front wheel  
16 assembly, the shocks.

17 Q Have you ever seen something like that  
18 come off in a collision before in your experience?

19 A I have seen wheels come off. I don't know  
20 shocks, but I have seen wheel assemblies come off in  
21 collisions.

22 Q Have you seen a whole unit like this ever  
23 come off before, a wheel unit all the way connected  
24 through to the shock system?

25 A And I don't recall whether it's a whole

1 B. HUNTER

2 system or just part.

3 Q Do you know or have any opinion as to how  
4 that all came dislodged from this Dodge Dart in this  
5 accident?

6 A Other than the collision? I have -- I  
7 believe it was from the collision.

8 Q Looking at Plaintiff's 20 and 2P, do you  
9 see where there appears to be a cut-out in the top  
10 of the roof of the vehicle?

11 A Yes.

12 Q Do you know how that was created?

13 A That, I do not. That was, at some point  
14 when the vehicle was rotating, overturned, I believe  
15 it caught onto something and tore it. I don't know  
16 what particular object it hit.

17 Q Do you know if there was any type of  
18 hydraulics like Jaws of Life used to extricate  
19 Matthew from this vehicle?

20 A That, I do not know.

21 Q Do you know if this opening was man made?

22 A That, I do not know.

23 Q Do you know if the red part on the car  
24 shown in Plaintiff's 2P, if that was blood from  
25 Matthew?

1 B. HUNTER

2 A I believe it's blood by looking at the  
3 picture and looking at that day.

4 Q Do you know how the blood ended up on the  
5 outside of the vehicle like that?

6 A That, I do not know.

7 Q Can you take a look at 2D please? Does  
8 that photograph depict the vehicle as it came to  
9 rest?

10 A Yes.

11 Q Do you see the front right part of the  
12 vehicle as depicted in this photograph?

13 A Yes.

14 Q Are you able to tell what, if any, damage  
15 as depicted on the front right part of the vehicle  
16 is from the collision with the truck as opposed to  
17 subsequent to the collision with the truck?

18 A With this photo?

19 Q Yes.

20 A I can't tell from this photo.

21 Q Can you please look at photograph 2F?

22 A Okay.

23 Q Do you see what's depicted in this  
24 photograph, 2F?

25 A Yes.

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B. HUNTER

Q Does that show the tire mark where the collision occurred as you previously testified?

A Yes.

Q Do you see where there's some white paint to the right of the yellow line with arrows on the ground, the pavement?

A Yes.

Q Was that placed -- and it's also seen in 2G a little bit closer if you look at the next photograph, 2G. Do you see it there as well?

A Yes.

Q Was that paint mark created as part of this investigation, to your knowledge?

A It wasn't created by me, no.

Q Right before the black tire mark, there appears to be some white paint right on the roadway south of the black tire mark, maybe an S or a 2 and a zero and a D. Do you see that marking?

A Yes.

Q Was that mark part of this investigation, to your knowledge?

A It wasn't created by me.

Q Do either of those white paint marks look like anything that would be created by the State

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B. HUNTER

Police as part of its investigation?

A No. It does not look like anything --  
that doesn't look like anything the collision  
reconstruction team would have done.

Q Can you look at 2I please?

A Okay.

Q Do you see where it appears that the front  
right tire shock system is located on the grass  
there?

A Yes, I do.

Q Was that mapped out during your  
investigation?

A That, I don't recall.

Q Do you know how far that was away from the  
vehicle as you can see depicted in this photograph?

A I don't know the exact measurements.

Q Was that of any significance to you that  
the tire ended up in that location relative to where  
the Dodge Dart ended up?

A Yes.

Q What significance did that have for you?

A That it was dislodged prior to the other  
events or prior to it going down the embankment.

Q And to the right front of this photograph,

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B. HUNTER

2I, do you see, looks like some type of material,  
maybe like a little black post or a pole, maybe  
sticker, a silver sticker on it?

A I see that, yes.

Q Do you know what that is?

A No, I do not.

Q Do you know if that has any connection to  
the Dodge Dart as to this accident?

A No, I do not.

Q Now, 2J, if you can look at that. It's a  
close up of 2I. Do you see where there seems to be  
some type of white material beyond the tire  
assembly?

A I'm sorry. The --

Q It's all right. Do you see the tire  
assembly on the ground there?

A Yes.

Q Do you see right adjacent to that, there  
might be some type of material?

A Yes.

Q Whitish in color?

A Yes.

Q Do you know if that's part of the vehicle?

A That, I do not know.

1 B. HUNTER

2 Q And the orange cone that's on the ground  
3 in this, do you know if that was placed there as  
4 part of this investigation?

5 A That, I don't know.

6 Q Do you know if it was knocked down from  
7 already having been on the roadway during this  
8 accident?

9 A That, I don't know.

10 Q Going back to the location of the vehicles  
11 at the time of impact, would it be fair to say that  
12 the tractor would have had to have been straddling  
13 the dotted line and part of it in the left lane and  
14 part of it in the right lane at the point of the  
15 collision?

16 A I'm sorry. Repeat. Going back to which  
17 photos?

18 Q Sure. We can look at 2A or 2B.

19 A Okay.

20 Q You testified previously that that black  
21 tire mark would indicate the point of the collision  
22 between the two vehicles; correct?

23 MR. LIMA: Objection. You can answer.

24 A Correct.

25 Q If that was the point of the collision, is

1 B. HUNTER

2 it fair to say that the tractor would have had to  
3 have been straddling the broken white line so that  
4 part of the tractor was in the left lane and part of  
5 the tractor was in the right lane at the time of the  
6 collision?

7 A I don't know what straddling, whether --  
8 my thought of straddling is somebody that's staying  
9 in between the two lanes. I don't know if the  
10 tractor is riding between two lanes or if the  
11 tractor is actually making a lane change.

12 Q In either event, would it be fair to say  
13 that part of the tractor would have to have been  
14 towards the middle of the left lane and part of the  
15 tractor would then have to also have been in the  
16 right lane at the time of the impact?

17 A Based on the evidence, yes.

18 Q Do you know how wide the tractor was?

19 A No, I do not.

20 Q Did you attempt to find out if the tractor  
21 was, in fact, attempting to change lanes at the time  
22 of the accident?

23 A The -- me, particularly, no. I went by  
24 the depositions and interviews.

25 Q I want to turn to the deposition of the

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B. HUNTER

driver of the tractor and I believe I numbered that  
as -- it's toward the back of your packet. It will  
have a sticky with No. 7 on it.

A Okay. This is the driver, you said?

Q Yes. No. 7.

A Okay.

Q Do you see in front of you -- this is part  
of Plaintiff's 1 -- a supporting deposition for  
Richard Taft?

A Yes.

Q Did you read this as part of your  
investigation?

A Yes, I did.

Q Other than reading this, did you obtain  
any other information in any way about Mr. Taft's  
version of what occurred?

A Other than speaking with the troopers and  
investigator and this deposition, not that I'm aware  
of. I didn't obtain anything else.

Q Did you obtain any information from the  
trooper or investigator about what Mr. Taft had to  
say about what happened in this accident that in any  
way was different or not contained within this  
deposition? If you want to take a moment to read

1 B. HUNTER

2 that.

3 A No. This is what was conveyed to me by  
4 the troopers that day.

5 Q So other than what's contained within this  
6 deposition, you have no other information with  
7 regard to Mr. Taft's version of the accident; is  
8 that fair to say?

9 A Mr. Taft's version?

10 Q Yes.

11 A No.

12 Q Now, do you see in his deposition here  
13 where he states -- six lines down -- that he was  
14 traveling in the right lane when a white passenger  
15 vehicle struck the rear end of his tractor?

16 A Yes.

17 Q Would it be fair to say that the evidence  
18 shows that his truck was not solely in the right  
19 lane and that it was certainly towards the middle of  
20 the left lane at the time that there was a collision  
21 between the two?

22 MR. LIMA: Object to the form of the  
23 question.

24 A Yes.

25 Q In fact, would there be any way, based on

1 B. HUNTER

2 what the evidence shows, that this collision could  
3 have occurred with the tractor remaining solely in  
4 the right lane?

5 A I did not find any evidence to support  
6 that.

7 Q Where he indicates that he was going at  
8 50 miles an hour; do you see that?

9 A Yes.

10 Q Do you know if there's been any attempt to  
11 corroborate his version of the speed he was  
12 traveling by any of the State Police including  
13 yourself in this investigation?

14 A No. Not that I'm aware of.

15 Q Did you observe Mr. Taft at the scene when  
16 you were there? Do you recall seeing him?

17 A I believe he was there, but I don't recall  
18 where or what he was doing.

19 Q When you were looking at the damage to the  
20 tractor, did you talk with him about it at all or  
21 ask him to point anything out?

22 A I don't recall. It's not normally  
23 something I do.

24 Q Was anybody else with you when you were  
25 looking at the damage to the tractor, either

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B. HUNTER

Investigator Haydt or Trooper Jackson?

A That, I don't recall. I remember I looked at the vehicle, but I also remember Investigator Smith went up with Trooper Jackson and were taking photos and looking at the damage while I was forensically mapping the scene.

But I believe I went up on my own. There were other troopers up there from the Thruway. I believe the Commercial Vehicle Inspection Trooper Nally, I believe was up there when I went up there.

Q Did you look at the supporting deposition of Jesus Perez Ramos as part of your evaluation? And that would be, I put a sticker on there with the No. 8.

A Yes, I did.

Q Did that have any significance in your conclusions about how this accident occurred?

A I'm sorry? Did it have any significance?

Q Yes. Any information you obtained from that deposition.

A No; other than that he had a seat belt on.

Q Did you look at the supporting deposition of Josephine Scimeca as part of your investigation? And I believe I have a sticky on there as well for

1 B. HUNTER

2 her.

3 A Yes.

4 Q Did you find anything in her deposition  
5 that was of any significance in your investigation?

6 A Yes.

7 Q Could you tell me what that was?

8 A That the white car moved from the right  
9 lane into the left lane attempting to pass the  
10 tractor. The passenger side rear bumper of the  
11 white car strikes the driver's side rear of the  
12 truck. All of a sudden, the white car went into the  
13 air, flips about two or three times, strikes the  
14 left guide rail, and rolls down the embankment.

15 Q In her statement she indicates that it was  
16 the rear bumper of the white car that collided with  
17 the driver's side rear of the truck. Do you see  
18 that?

19 A I do.

20 Q Did you attempt to see whether that could  
21 have been some type of scenario where the rear  
22 bumper of the passenger's side of the Dodge Dart  
23 collided with the driver's side rear of the truck?

24 A Yes. And I believed that this was  
25 inaccurate. The evidence that I observed, I

1 B. HUNTER

2 believed didn't support that.

3 Q Do you know if this accident could have  
4 occurred such that the right rear part of the Dodge  
5 Dart could have contacted the left rear part of the  
6 tractor at the same time that the right front tire  
7 could somehow have engaged with the side of the  
8 tractor?

9 A Did the right rear tire, you're asking,  
10 strike at the same time as the right front tire?

11 Q Yes. The right rear bumper strike at the  
12 same time?

13 A No, I do not believe that.

14 Q Why not?

15 A Because I believe that just on the  
16 evidence, the damage profile of the front bumper,  
17 where you could see the front bumper of the Dodge,  
18 you could see tire transfer to it that that is where  
19 the collision occurred at the front of the right  
20 tire.

21 Q So you saw evidence of the transfer from  
22 the rear left tractor tire on the front bumper,  
23 right front bumper of the Dodge Dart?

24 A Yes.

25 Q Was that depicted in the photographs, any

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B. HUNTER

of the photographs we've looked at? Take a look  
at --

A Sure. We're missing part of it, but you  
could see, in 2N you could see a transfer of the  
tire on the right front bumper right at the corner  
of the right front of the bumper.

Q Could you just circle that in red, the  
part that you're referring to?

A Yes.

(Whereupon, witness complies.)

Q Everything within that circle, you're  
saying, that's depicted on the right bumper, was  
from the collision with the tractor?

A I believe so.

Q And none of that would have been from the  
collision with either the roadway, the rail or the  
ground when the vehicle was rolling?

A No. I believe that's a tire mark. I'm  
sorry, a tire transfer.

Q You indicated that there was a vehicle  
inspection done?

A Yes.

Q I believe I have that marked as 11 with a  
sticky in your packet.

1 B. HUNTER

2 A Okay.

3 Q Did you review this as part of your  
4 investigation?

5 A I did.

6 Q What, if any, information was of  
7 significance to you from this document entitled  
8 "Driver slash Vehicle Examination Report"?

9 A Just that the damage or the violations or  
10 what have you was the result of this collision, not  
11 something previous.

12 Q What does that violation that it's  
13 referring to, the 393.75A?

14 A I could only read what they wrote. I'm  
15 not familiar with the commercial vehicle, the  
16 sections, the laws, but it says, "Flat tire or  
17 fabric exposed." It says, "Left axle three outer  
18 sideswiped by passenger car causing tire bead to  
19 separate from wheel."

20 Q What is the tire bead?

21 A The bead is what attaches to the rim that,  
22 I guess you could say, keeps the tire rim together  
23 and the air.

24 Q Is that depicted in Plaintiff's 2K, the  
25 damage that they're referring to in this examination

1 B. HUNTER

2 report?

3 A I don't know exactly what the tire -- I  
4 would assume that he's talking about separating from  
5 the rim, the tire. The bead runs around the actual  
6 rim and I would assume he's talking about the tire  
7 breaking away from the rim. I don't know exactly,  
8 based on his wording, what exactly he's trying to  
9 say.

10 Q Do you know what the purpose is of this  
11 report, why this is generated?

12 A Sure. They check the vehicle to see if  
13 there's any type of violations. They'll look it  
14 over, see if there's any type of violations that  
15 maybe could have contributed to this collision.

16 Q And this is different than a damage  
17 report? So in other words, they're not walking  
18 around assessing what, if any, damage was caused to  
19 this tractor in the accident? They're just looking  
20 to see if there's any violation that may have  
21 existed?

22 A No. They look at damage to see if damage  
23 is, I guess you could say -- well, damage, a lot of  
24 damage would be a violation, so they look at that  
25 type.

1 B. HUNTER

2 I would say looking at every piece of  
3 damage to the actual vehicle that doesn't  
4 fundamentally interfere, I guess, with the driving,  
5 perhaps they would not do that.

6 Q What about like the mud flap? For  
7 example, I noticed there's no reference to any mud  
8 flap damage. Is that something that would be  
9 generated in this report if they observed that?

10 A That, I don't know.

11 Q I'd like to draw your attention to a  
12 document in there I've marked with a sticky as  
13 No. 12. It's the "Administrative Message Report."  
14 It's in Plaintiff's 1.

15 A Okay. Yep.

16 Q Do you know what this is?

17 A Yes. It's an admin message that when  
18 there's, I guess, a serious event, a serious  
19 personal injury -- well, could be for a bunch of  
20 different reasons, but this is a message that is  
21 sent to Albany.

22 Q Would this have been generated before you  
23 appeared at the scene?

24 A That, I don't know. Could have been  
25 generated before or after.

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B. HUNTER

Q Do you know what time you got there, sir?

A I believe I got there around 10 a.m.

Q This indicates a time of 8:39 on the top left?

A I believe that's going to be the time of the collision. I don't believe that's any -- you know, the -- well, it was sent in the afternoon because the person that sent it, the sergeant was actually at the scene, that I spoke to at the scene, so he sent it at, looks at 1:40 p.m.

MR. LIMA: Looks like 2:40.

THE WITNESS: Oh, 2:40. Yes. My correction.

Q Now, in the middle of the narrative paragraph, do you see where it says, "This shoulder has an approximate decline of 100 feet to the bottom of the embankment"?

A Yes.

Q Do you know what that specifically is referring to? Is that the decline, for example, of the grass as it's going down or does that have anything to do with the curvature of the road at that location?

A I don't know what he's referring to.

1 B. HUNTER

2 Q Then it says, "apparent cause" in the  
3 middle. Underneath it says, "Pending  
4 investigation." Right in the middle of the first  
5 page.

6 A Okay.

7 Q Do you know what that's referring to?

8 A I believe pending the investigation of  
9 everybody involved that's investigating it.

10 Q If you can look for your field notes. I  
11 believe they're yours. I put a sticky there, No. 2.

12 A I don't have a 2.

13 Q You don't have a 2?

14 A Oh, I see it. Okay.

15 Q Are those your field notes?

16 A They're my field notes, but it doesn't  
17 necessarily mean I filled out everything here.

18 Q Can you tell me what this packet is all  
19 about? It looks like it's a total of ten pages.

20 A This is just field notes where we document  
21 certain things at the scene, after the scene.

22 Q Is this your information that's contained  
23 in here?

24 A It's -- it would be mine and the other,  
25 whoever assisted. I believe on this, was done

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B. HUNTER

myself. It would have been either myself, Trooper Jackson or Investigator Smith. I believe filling it out was Trooper Jackson helped me, but it would have been we're there both together doing it.

Q On the back when it has -- I guess it's actually towards the middle of the back, there appears to be damage diagrams.

A What page?

Q It's 5 of 10, there's one.

A Okay.

Q Which vehicle is that referring to?

A I believe page 5 of 10 would be the Dodge and then page 8 of 10 would be the tractor.

Q Now on page 6 of 10 where it says, "Exterior damage slash observations," do you see that?

A Okay.

Q It shows contact damage. Can you read that?

A What page? I'm sorry.

Q 6 of 10.

A Okay. "Left rear tire."

Q Would that be your notes on this page?

A That looks like my handwriting.

1 B. HUNTER

2 Q Does it indicate damage to the mud flap  
3 anywhere here?

4 A No, it does not.

5 Q Does it indicate in your notes, damage to  
6 the tractor trailer anywhere other than the left  
7 rear tire?

8 A No, it does not.

9 Q On page 10 of 10, can you tell me if  
10 that's your field sketch?

11 A That looks like my handwriting again.

12 Q What's the purpose of doing this sketch  
13 here?

14 A Just, I would say to refresh someone's  
15 mind. To be honest, it's something that we do. For  
16 me, it really doesn't serve any purpose.

17 Q Okay.

18 A I guess if there was something, if we  
19 weren't doing a total station and documenting  
20 evidence, I guess this would be relevant. But for  
21 me in particular, it's not really relevant.

22 Q I'd like to go to the MV-104.

23 A Okay.

24 Q I think I put a sticky there for you. Do  
25 you have it?

1 B. HUNTER

2 A Yep.

3 Q Is the MV-104 something that you would  
4 have reviewed as part of your reconstruction?

5 A Normally we do. In this particular case,  
6 I did see in my notes that I did review, but there  
7 was some errors to this report.

8 Q So let's take a look. And can you tell me  
9 what errors you found to this report?

10 A Most important was the accident  
11 reconstruction was not checked off and the police  
12 photos was checked as no.

13 Q Anything else?

14 A Yes. There was another. I believe where  
15 they had the restraints. Just knowing this off the  
16 top of my head, 7, I believe is lap belt and  
17 harness. It should have been A for air bag  
18 deployment, lap belt, harness.

19 Q Anything else that you observed that is in  
20 error in the MV-104?

21 A I wrote -- not necessarily an error. I  
22 would say that this is his investigation  
23 interpretation. As far as errors, I would just say  
24 the accident reconstruction, police photos, and just  
25 looking at this, I also would need a code to

1 B. HUNTER

2 decipher this.

3 Q I have a code sheet if you need it.

4 A But I believe that as far as errors, I  
5 can't speak for why he wrote the narrative the way  
6 he did or what his attributing factors are.

7 Q Are there things that you have a  
8 difference of opinion with regard to his narrative  
9 based on your investigation of the scene?

10 A Yes.

11 Q Could you tell me what that is please?

12 A Unsafely changing from the right to the  
13 left lane.

14 Q You're referring to the narrative where it  
15 says, "Vehicle 1 unsafely changes from the right  
16 lane into the left lane"?

17 A Yes. And I believe he also made the  
18 contributing factor as -- again I would have to  
19 decipher. If you have the chart?

20 Q Yes. I'll give that to you.

21 A I believe he had that, also, as the cause  
22 as an unsafe lane change.

23 Q What do you disagree with about the  
24 narrative that states, "Vehicle 1 unsafely changes  
25 from the right lane to the left lane"?

1 B. HUNTER

2 A Vehicle 1 didn't strike somebody in the  
3 left lane. Vehicle 1, in my opinion, struck another  
4 vehicle in front of him. My opinion is if he was  
5 unsafely changing lanes, there would have been  
6 another vehicle. I believe it was wasn't unsafely  
7 changing lanes. I believe it was speed.

8 Q So you don't believe that Matthew was  
9 unsafely changing lanes from the right to the left  
10 at the time of impact?

11 A No. I believe, again, Matthew didn't  
12 strike anybody in the left lane. And my opinion is  
13 when you're unsafely changing lanes, it would be  
14 that you move to the opposite lane and you cut  
15 somebody off or you struck somebody that was in the  
16 other lane. I don't believe that is the case in  
17 this particular incident.

18 Q You said you could use a code sheet. I'm  
19 just handing that to you so you could point out  
20 anything else of significance.

21 A Yes. He has the human contributing factor  
22 as 20, unsafe lane changing. I believe that it,  
23 it's in my opinion, it should have been 19, unsafe  
24 speed.

25 Q Which box was that for?

1 B. HUNTER

2 A That was for box 19. He has 20. I  
3 believe box 19 should be 19.

4 Q Anything else in this MV-104 report that  
5 you would have either, if not an error, that you  
6 have difference of opinion about based on your  
7 evaluation?

8 A No.

9 Q Did you see the diagram that Trooper Lewin  
10 made as part of the MV-104?

11 A Yes.

12 Q Do you feel that this diagram fairly and  
13 accurately represents the point of impact between  
14 the two vehicles?

15 A Based on the evidence, yes.

16 Q Do you believe that this diagram fairly  
17 and accurately depicts the position of the tractor  
18 at the time of the collision?

19 A Yes.

20 Q Are you aware that there was a draft of  
21 the MV-104 report that had a different narrative and  
22 diagram before this final version?

23 A Yes. That would have been in my case  
24 folder and that might be the one where I have, I  
25 believe, a notation of the air bag.

1 B. HUNTER

2 Q If you look through, I think I made it as  
3 No. 11, perhaps on the sticky there. It says,  
4 "Draft." It's pretty much right after the notes.

5 A Yes.

6 Q Did you, as part of your investigation,  
7 compare this draft with the final MV-104, by any  
8 chance?

9 A I don't know that I did prior to  
10 submitting this. I know I did, like, a couple of  
11 weeks ago when I noticed the accident reconstruct  
12 and the police photos not checked off.

13 Q Do you see, looking at the narrative in  
14 the draft where it says, "Vehicle 1 traveling south  
15 on I-87, Exit 15." Do you see that part?

16 A Yes.

17 Q Are you aware that that change, whereas in  
18 the final report it said, "Vehicle 2 was traveling  
19 south partially in the right and left lane on I-87"?

20 A Yes.

21 Q Did you speak with Trooper Lewin to ask  
22 him why he made that change between the two MV-104's  
23 from the draft to the final version?

24 A No. I don't recall if I had spoken to him  
25 after the collision date with -- again, I don't know

1 B. HUNTER

2 if I spoke to him after I looked at the first  
3 report. I don't recall. I honestly don't think I  
4 did, but I may have. But I don't think I spoke to  
5 him when I saw the difference.

6 The only thing I did notice, like I said,  
7 two weeks ago when I did send him an email and his  
8 sergeant, that there was the error with the accident  
9 reconstructed and police photos, that know that he  
10 had that incorrect and he actually advised me that  
11 they amended this report to reflect that.

12 Q Okay.

13 A That was two weeks ago. As far as his  
14 narrative and his apparent cause, I did not discuss  
15 that with him or I don't believe I discussed that.  
16 I don't believe I put that in the email about that  
17 difference. I think it was more of the, to me what  
18 I think is more important -- I mean, this is his  
19 investigation. That's his -- what he deems.

20 But the accident reconstructed not checked  
21 off and the police photo, "no," I thought was  
22 something that needed to be rectified. If somebody  
23 was looking at this report and didn't know that we  
24 had documentation.

25 Q I understand. Did you see the diagram

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B. HUNTER

that was part of the draft MV-104 prepared by Trooper Lewin? If you go just back to where you just were, the draft. I think I have a sticky there for you.

A Is it the draft or is it --

Q Yes, it's draft. I think I put No. 11, draft. It should be sort of in the middle. I think you have to back up a little bit. You just had it.

A Are you talking about the final or the draft?

Q The draft. It's right after the field notes. You got it right there.

A Okay.

Q So do you see the diagram that has the stamp "Draft" on it?

A Yes.

Q Do you see how that's different as far as the way Trooper Lewin orients the vehicles from the final MV-104 diagram?

A I noticed, yes, two differences between the two.

Q What are the differences you noticed?

A One, he's got it as a full tractor trailer. And the other one, he has it completely in

1 B. HUNTER

2 the right-hand lane.

3 Q To your knowledge, did the diagram in the  
4 final MV-104 as well as the narrative both  
5 reflecting the impact in the left lane, do you know  
6 if that was changed as a result of your  
7 investigation and findings of the evidence?

8 A I don't know if that was changed based on  
9 mine or based on him speaking with the investigator,  
10 Investigator Haydt or speaking with the sergeant  
11 that was at the scene.

12 Looking at the date and time of the final  
13 report submitted in, that's -- it looks like that's  
14 June 4th at 2:44. I don't believe my report went in  
15 until July. So my report was after this report was  
16 submitted.

17 Q Do you know if Trooper Lewin based the  
18 draft on the supporting deposition given by Mr. Taft  
19 where he claims he stayed in the right lane and then  
20 the final version changed after there was more of an  
21 investigation?

22 A I don't know what he based it on.

23 Q I'd like to draw your attention to the  
24 CDR, the Crash Data Retrieval. I think I marked  
25 that as -- it's more towards the front. I marked it

1 B. HUNTER

2 for you as No. 3. This is in Plaintiff's Exhibit 1  
3 as well.

4 Am I correct, sir, that as a result of  
5 your training, you know how to interpret this data?

6 A Yes.

7 Q Did you see, in this data, that Matthew  
8 had the cruise control on prior to, at some point  
9 prior to the impact?

10 A I'd have to look through. But at the time  
11 of my report, I was not an analyst. Investigator  
12 Smith was. But it's something I can look in.

13 Q If it helps, if you --

14 A No, I'm on it.

15 Q You got it?

16 A Yep. Okay.

17 Q Do you see whether or not he had the  
18 cruise control engaged at any time prior to the  
19 impact?

20 A It says "engaged," but I would have to --  
21 each vehicle has different data limitations, so --  
22 without reading five pages of data limitations, it  
23 says "engaged," and I would assume that that means  
24 it was on, but it could be incorrect.

25 Q I know that now you can do the analysis of

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B. HUNTER

the data and when you did the report, I think you  
said it was Investigator Smith who did the analysis?

A Well, he -- we had imaged the vehicle.  
Again this wasn't a full report, so -- if it was a  
full report, there'd be a lot more analysis of it.

There wasn't a full analysis. I believe  
it was more of looking through it, if anything  
standing out.

Q Is it fair to say you didn't attempt to  
determine what speed the cruise control was engaged  
in prior to the incident?

A Well, it's -- I would say we looked to see  
what the speed of the vehicle was, not necessarily  
what the cruise control, what the actual vehicle was  
traveling at.

Q Do you know if it was at one speed for a  
period of time with the cruise control on and then  
there was a point of acceleration immediately prior  
to the impact?

A That, I don't know. And even looking at  
this, it looks like there's seven events. It's  
probably only recording a couple of these seven  
events. And, again, I don't know if the seven are  
all related to this collision.

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B. HUNTER

It's -- the timetables are going to be different. One 5 seconds is going to be different than the next 5 seconds. To do an accurate analysis of those two, you would have to put them in a spreadsheet and line them up to see which one falls with which.

Q Was that done as part of the evaluation of this case by anyone, to your knowledge, where they did an analysis of the time, speed?

A I believe that the speed was, but I don't know if it was put into a spreadsheet. But the speed was that when we imaged it, Investigator Smith looked at it and gave the speeds.

And then, of course, when my final report, my superior in Albany had me add in the 5 seconds prior from the acceleration. And again, I'd have to look, but I believe it was from 74 to 82.

Q If you look at the top of page 6 of the CDR data please.

A Okay.

Q You see how it indicates "most recent event" at the top?

A Okay.

Q And event number is No. 7. All the way to

1 B. HUNTER

2 the right. Do you see that?

3 A Yes.

4 Q In my review, I just want to see if I'm  
5 correct, there appears to be, again, reference to a  
6 first prior event and a second prior event as you  
7 get through the data. So that would be three events  
8 addressed by this set of data. Was it your  
9 understanding that it was possibly three events that  
10 were recorded?

11 A I'd have to look at the data limitations  
12 and how many it would record, and first event  
13 doesn't necessarily --

14 Q Let me ask another question, if I may.

15 MR. LIMA: Let him finish his thought.

16 MR. SMILEY: Oh, sure.

17 A The first event doesn't -- you have to --  
18 there's data limitations and to be honest, it's a  
19 very reading-intensive sport. There's a lot of --  
20 and each vehicle is different. And without getting  
21 too in depth -- so I don't want to provide  
22 information that's incorrect.

23 Q Did you finish answering?

24 A Yes.

25 Q Is it your understanding that the most

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B. HUNTER

recent event in this type of report would be the last event recorded in the sequence of events until the vehicle came to rest, that the most recent event would be the latest or last event? Is that correct?

A Again, I don't know. I would have to really read the data limitations. I don't know. Some vehicles, things could record over another if it's more severe. And I don't want to be incorrect.

Q Do you know if this event, the most recent event was the collision? Are you able to determine whether that was the case? The collision, I should say, between the two vehicles.

A I'm going to say that looking at this quickly, that the most recent event would be the last one recorded.

Q Do you know what event that was? In other words, was it when the vehicle rolled or when it came to rest or hit a guardrail or anything?

A That, I don't know. I'd have to really go through it and figure out.

Q Do you know if any of the events as depicted in the CDR data references the collision between the two vehicles?

A No. I don't believe -- I believe those --

1 B. HUNTER

2 I believe those events may have been recorded over  
3 by the other events that happened after. The only  
4 thing that I can, just looking at this quickly, get  
5 from this is looking at the 5-second stamp.

6 Q Okay. What page are you referring to?

7 A You could go to page 27.

8 Q Okay.

9 A It just gives me a 5-second time stamp and  
10 I can, by looking at this, I can tell that  
11 there's -- from 5 seconds to -- from this 5 seconds  
12 to minus 3 -- between 3.2 and 3.1, somewhere in  
13 there is where the collision occurred.

14 Q Is it fair to say that as part of your  
15 putting together your report summary that there was  
16 no attempt to match up the events referred to in  
17 this CDR with any specific actions that occurred  
18 from the time of the collision until the resting  
19 point of the Dart?

20 A No. I mean looking at -- there's seven  
21 events and, again, I don't know if -- there could  
22 have been two events from two years ago. I don't --  
23 but it's my opinion that these two events, there's  
24 more than two that are associated with this  
25 collision and just by the time stamp itself.

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B. HUNTER

Q All right. I'm done with the CDR data for now.

Do you know what a delta-v value is?

A For this particular accident?

Q Yes.

A The -- I don't know --

Q I'm sorry. In general, do you know what that means, delta-v?

A Yes. it's the change of speed, the onset, the sudden change of a speed, either acceleration or deceleration.

Q Were those values measured for purposes of this reconstruction?

A No, it was not.

Q Do you know what any lateral speed measurements were in this collision for either the tractor or for the Dodge Dart?

A No, I do not.

Q Was an attempt made to try and measure those?

A No.

Q If the tractor trailer was changing lanes at the time of this accident, in the process of changing lanes, was there a requirement under the

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B. HUNTER

Vehicle and Traffic Law to signal that change in any way?

A Sure.

Q What's the requirement?

A You would have to signal when changing lanes.

Q The failure to signal while changing lanes, is that a violation of the Vehicle and Traffic Law?

A Yes, it is.

Q Do you know if the driver of the tractor violated the VTL in this case by failing to signal when changing lanes?

A That, I do not know.

Q You don't know if he was changing lanes; is that fair to say?

A I don't know if he signaled or if he was changing lanes.

Q Based on the forensic evidence, however, it is possible that he was in the process of changing from the right lane to the left lane at the time of the collision; is that correct?

MR. LIMA: Objection.

A Based on the evidence, yes.

1 B. HUNTER

2 Q If he had, based on the evidence, been  
3 changing lanes from the right to the left and not  
4 used a turn signal and the collision occurred, would  
5 the failure to use a turn signal be a contributing  
6 factor in this accident?

7 A No. I don't believe so.

8 Q Why not?

9 A Because I believe that when changing -- I  
10 believe if you have enough distance from a vehicle  
11 in front of you, if the person didn't use the signal  
12 and you moved over, you wouldn't collide with that  
13 vehicle.

14 Q Do you know if a scenario could have  
15 existed based on the evidence that Matthew and the  
16 Dodge Dart started to change from the right lane to  
17 the left lane and then the tractor trailer moved  
18 from the right lane to the left lane in front of him  
19 and then the collision occurred, would that be  
20 consistent with the evidence?

21 A You're asking -- I'm sorry. I'm not  
22 understanding exactly what you're asking.

23 Q I just want you to assume for the moment  
24 that prior to the accident the tractor was in the  
25 right lane and Matthew, in the Dodge, was in the

1 B. HUNTER

2 right lane behind him.

3 A Okay.

4 Q Okay? At some distance behind.

5 A Okay.

6 Q If the Dodge Dart then started to go from  
7 the right lane into the left lane and as it was  
8 doing so, the tractor in front of him started going  
9 from the right lane and, in essence, got in front of  
10 him in the left lane, could the collision have  
11 occurred that way, based on the evidence?

12 A No. I believe there would have to be some  
13 sort of reaction. If there was enough distance, he  
14 would be able to react and not strike the tractor.  
15 If there was enough room and distance, the reaction  
16 time would allow him to have slowed down or not  
17 strike the tractor.

18 Q Do you know what the average reaction time  
19 is for drivers? Is that part of your training?

20 A Sure. It's anywhere from 1.2 seconds to  
21 1.6.

22 Q If a vehicle is traveling around 74 to 82  
23 miles an hour, does that affect reaction time?

24 A Sure. The faster -- well, it's more of  
25 the faster you're going, obviously, the more

1 B. HUNTER

2 distance you need to stop.

3 Q Or to react?

4 A React, I would say, no. I think  
5 everyone's perception of reaction -- everyone's  
6 perception of reaction time is -- well, the  
7 perception of reaction time, in my opinion, speed  
8 wouldn't -- the reaction is still going to be the  
9 same whether they're going 20 or 30. If they  
10 perceive it within 1.2 seconds and the reaction -- I  
11 don't think that the speed would have relevance on  
12 the perception reaction.

13 Q Do you know if anybody spoke with Matthew  
14 after this accident and asked him what occurred?

15 A I believe Investigator Haydt, just looking  
16 at his report went to -- and I did speak to him. I  
17 believe he went to the hospital that he was at,  
18 Helen Hayes I want to say, and spoke with him. And  
19 then, if I remember correctly, he didn't remember  
20 the collision.

21 Q Do you know if anyone attempted to find  
22 out why the tractor trailer was partially in the  
23 left lane and partially in the right lane at the  
24 time of the collision?

25 MR. LIMA: Objection.

1 B. HUNTER

2 A No, I do not.

3 Q What's the speed limit in this area at the  
4 time?

5 A 65.

6 Q Just showing you, again, Plaintiff's  
7 Exhibit 2K, the tire. If you can look at, there's  
8 an opening in the rim and there appears to be  
9 something protruding out of that. Do you know what  
10 that is?

11 A That's protruding out?

12 Q Yes. It looks like maybe a pin.

13 A I believe that's --

14 Q Or a valve or a nail?

15 A I believe that's the valve stem.

16 Q For inflating the tire?

17 A I believe so. I'm not a mechanic. I'm  
18 just taking a guess.

19 Q Do you know if that was bent as a result  
20 of this accident?

21 A That, I don't know.

22 Q Did you take any of the photographs as  
23 part of this investigation?

24 A I don't believe so. I believe  
25 Investigator Smith. I'm almost positive

1 B. HUNTER

2 Investigator Smith took all the photographs.

3 Q Can you please look in Plaintiff's Exhibit  
4 1 for a tab I marked as 5? It's entitled, "Accident  
5 Information Exchange Form"?

6 A Sure.

7 Q Do you know what the purpose of that  
8 document is?

9 A Sure. The trooper normally hands this.  
10 When there's a collision, the trooper will give this  
11 form to each party. It's the information of each  
12 driver and the vehicle information.

13 It also usually will have the insurance  
14 company. It doesn't do policy, but it will have the  
15 insurance company and code.

16 Q Is this prepared by the State Police, the  
17 information contained in this document?

18 A Yeah. The trooper usually provides this  
19 at any collision at the scene. This is the first  
20 form that's handed. There's no report completed.  
21 This is the form so that they're able to contact  
22 their insurance companies and so forth.

23 Q Is there a program in the trooper vehicle  
24 that allows you to input this and print out copies  
25 for the drivers?

1 B. HUNTER

2 A Yes. This is all part of the actual  
3 MV-104. When you start an MV-104, which is the  
4 Police Accident Report, this is another option to  
5 print off.

6 Q If you look at the second page, there  
7 appears to be Trooper Lewin's signature? It might  
8 be a computer form.

9 A Okay. Yeah. I see that.

10 Q If you can look at the, I believe it's the  
11 third page where it says, "Driver Information" at  
12 the top and then it's our client's last name,  
13 "Izquierdo." It would be the third page of this  
14 form.

15 A Okay.

16 Q Do you have that?

17 A Yes.

18 Q Do you see under vehicle information on  
19 the middle right next to "0.6 at point of impact,"  
20 it says, "rear quarter panel R?"

21 A Yes.

22 Q Is that, to your understanding, Trooper  
23 Lewin indicating that the point of impact upon the  
24 Dodge Dart was the right rear quarter panel?

25 A That's what he has listed here.

1 B. HUNTER

2 Q Then on the next page which at the top  
3 under driver information it says, "Taft." Do you  
4 see that?

5 A Yes.

6 Q And for the point of impact, No. 10, it  
7 says, "rear quarter panel left." Do you see that?

8 A Yes.

9 Q Does that indicate to you that Trooper  
10 Lewin saw damage to the rear left quarter panel?

11 A Yes.

12 Q That's also indicated in the next two  
13 boxes under "most damaged area" and "damaged area",  
14 it says, "rear quarter panel left"?

15 A Yes.

16 Q Then the diagram that's on the last page  
17 of this appears to be the same diagram we looked at  
18 previously with the MV-104.

19 A Okay.

20 Q Does this all just come out from the same  
21 system that Trooper Lewin used and it imports this  
22 to the MV-104 document we're looking at?

23 A It's not an import. It's -- this is just  
24 a different print. I think this is just -- I don't  
25 know what form this is. It kind of looks -- there's

1 B. HUNTER

2 all different forms you can print out once you put  
3 the information in.

4 This looks like a -- this looks like a  
5 rough, non -- a rough draft of a report.

6 Q Okay.

7 A It's -- well, maybe -- I don't know. To  
8 be honest, I don't know when this was done.

9 Q All right. Can I just go back now to your  
10 report which I tabbed towards the front?

11 A Mm hmm.

12 Q On the last page where you indicate that  
13 the primary contributing factor was traveling at  
14 unsafe speed on behalf of Matthew Izquierdo; do you  
15 see that?

16 A Yes.

17 Q Did you consider any other contributing  
18 factors to the happening of this accident other than  
19 that?

20 A The only other contributing factor that I  
21 would have thought of would maybe be following too  
22 closely.

23 Q Could a lane change on behalf of the  
24 tractor been a contributing factor?

25 A I believe a lane change on behalf of

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the -- I believe it's that he was changing lanes and  
it contributed towards the collision, to the  
collision.

MR. LIMA: When you say he, who are you  
referring to?

THE WITNESS: I'm sorry. The tractor  
changed lanes.

A I don't know, necessarily contributed.  
Basically, the speed was listed because it was my  
opinion that if the speed wasn't a factor or that he  
wasn't speeding or following too closely, I believe  
that changing lanes wouldn't have been a factor. So  
I don't really know how to answer that.

Q Could any of the actions on behalf of the  
tractor driver been a contributing factor of this  
accident based on the evidence?

A If he wasn't moving, would the Dodge  
struck the tractor? I don't know. I didn't analyze  
that.

Q Could the speed of the tractor have been a  
contributing factor?

A Speed in -- I would say the speed  
difference between both vehicles would be a factor,  
not necessarily -- I -- speed difference, because

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B. HUNTER

that would be closing the gap and would be a reason why the Dodge would strike the tractor. But I don't know. I really don't know what you're saying as far as speed.

Q Okay. Well, I'm trying to find out, in other words, different scenarios that the evidence could support.

So the evidence that you found, would it support a scenario where the tractor sped up in front of the Dodge Dart and moved in the lane in front of him and slowed down, for example? Could that have been a supporting scenario of what the evidence shows here?

MR. LIMA: Objection.

A Could he have sped up and moved over? Yes, he could have.

Q And if it turned out that the tractor had sped up and pulled over to the left in front of Matthew as he was attempting to change lanes and then slowed down, would that have been a contributing factor?

A If that was the case and there was enough distance, that could be.

Q Did you find any evidence to rule out that

1 B. HUNTER

2 that didn't happen that way?

3 A No, I did not.

4 Q So if you're looking just at the evidence,  
5 it could support the version you've indicated that  
6 it was an unsafe speed on behalf of Matthew  
7 Izquierdo, but it could also support the finding  
8 that the tractor sped up, pulled over in front of  
9 Matthew Izquierdo while he, Izquierdo, was  
10 attempting to go into the left lane. Is that fair  
11 to say?

12 MR. LIMA: Objection.

13 A If there was evidence to support that,  
14 yes.

15 Q But there's no evidence to indicate that  
16 that did not happen; is there?

17 A There's no evidence to support either.

18 Q In other words, you can't rule that out as  
19 a scenario. Is that fair to say?

20 MR. LIMA: Objection.

21 A I can't -- no, I can't rule that out, no.  
22 There's no evidence.

23 Q But the evidence you found at the  
24 location, the skid marks at the location, that  
25 forensic evidence could, in fact, support the

1 B. HUNTER  
2 scenario that I just proffered to you. Isn't that  
3 fair to say?

4 A Yes.

5 MR. SMILEY: I assume Mr. Lima may have  
6 some questions. I may have some follow up.  
7 That's all I have for the moment. Thank you.

8 EXAMINATION BY

9 MR. LIMA:

10 Q Officer, good afternoon.

11 A Hi.

12 Q Counsel has asked you quite a bit of  
13 questions so I'm going to do my best not to be  
14 repetitive.

15 A Okay.

16 Q Let me start off just a little bit with  
17 your training. When you start -- I'm a New York  
18 City kid -- so you basically start at the academy?

19 A Yes.

20 Q When you start, you're taught all about  
21 vehicle and traffic laws and when you give out  
22 tickets and things like that; is that right?

23 A Correct.

24 Q Is one of the things they teach you  
25 responsibility of a driver when passing?

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2 A They teach it necessarily, but it's in the  
3 vehicle and traffic, yes.

4 Q Right.

5 A You have a responsibility, yes.

6 Q It's covered; right?

7 A Yes.

8 Q What do they teach you about the  
9 responsibility of a driver who is passing?

10 A They're supposed to move over safely and  
11 yield to the vehicles that -- if you're passing, you  
12 have to yield to vehicles that are in the left  
13 lane -- or you have to yield while passing to  
14 whatever vehicle -- well, when you're moving from  
15 the right to left lane, you have to safely move to  
16 the lane.

17 Q When you say "safely," what does safely  
18 mean?

19 A I would say that there's no other vehicle  
20 there, that you can move to that left lane or other  
21 lane without causing a collision between you and the  
22 vehicle in the left lane, the lane you're trying to  
23 attempt to get in.

24 Q So when you're trying pass from the right  
25 lane to the left lane, you're responsible to see

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everything that's in front of you?

A You're responsible to see all around you.

Q So if there's, as you're making the move to get from the right lane to the left lane to pass, is it the driver's responsibility, and by that I mean the driver from behind's responsibility to react to what's in front of you?

A Yes.

Q Is it the driver's responsibility of the person in front of you to react to what's behind you?

A That would depend if you saw what was going behind you and you were able to react. I don't know.

Q Fair enough. And if you couldn't see the person from behind you, would that person in front of you still have that obligation to react to the person behind you?

A The person in front of you, if they didn't see?

Q Right.

A No.

Q So let's just be clear. So if the driver of the tractor in front didn't see Matthew from

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2 behind, he doesn't have an obligation to react to  
3 Matthew if he doesn't see him?

4 A Correct.

5 Q From behind.

6 A Correct. But you would have an obligation  
7 with changing lanes with what's in the left lane.

8 Q Right.

9 A Okay.

10 Q Okay. But in this accident, from what  
11 I've heard you testify, the impact occurred from  
12 behind?

13 A It's my opinion that the impact occurred  
14 from behind.

15 Q The area where your opinion is where the  
16 impact first occurred, is that something within the  
17 sights of the mirrors of the driver of the truck?

18 A That, I don't know. That's -- I can't  
19 answer that.

20 Q Fair enough. Let me go through little by  
21 little.

22 At a point in time in the records that  
23 were provided to us, there was a description of  
24 property that was recovered that, I guess, that one  
25 of the parents of Matthew recovered. And they

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recovered a black wallet with a New York State  
driver's license, \$10 in currency, and a black cell  
phone.

Was there ever any inquiry whether Matthew  
was using a cell phone at the time of the accident?

A That, I'm not aware of.

Q Is there any of the data that we've gone  
through in detail and that we'll go through some  
more that would suggest that Matthew may have been  
on his cell phone?

A There's nothing that I know of that he was  
on his cell phone. Nothing was provided to me.  
Again, that wouldn't be my position to -- that would  
be something that somebody, the investigator would  
look into or provide if he was.

Q Is part of your job, either then or now,  
to be able to go through the raw data?

A To go through --

Q Through the raw data?

A I don't normally go through -- you mean  
like --

Q Some of it.

A From the CDR?

Q Yes, from the CDR.

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2 A Oh, from the CDR.

3 Q Yes.

4 A You're asking if there's --

5 Q Let's me jump three steps ahead. Is there  
6 anything in the CDR that would provide information  
7 whether someone was using a cell phone?

8 A No.

9 Q The CDR and this information that we've  
10 gone through, with this data that we've gone  
11 through, was that gotten from, I guess for lack of a  
12 better phrase, the black box that a car has?

13 A That's what it's referred to as, the black  
14 box, yes.

15 Q It was my understanding, and I don't know  
16 if it's applicable to this vehicle or not, that some  
17 black boxes can bring out information that will show  
18 whether somebody has been on a cell phone or not by  
19 the way they're driving. Is that something that  
20 could occur with the data that we have here or not?

21 A I'm not aware of anything or any crash  
22 data reports or what we do that provides anything  
23 that tells you whether or not they were on a cell  
24 phone. I can't -- I can't --

25 Q Not necessarily that they were on a cell

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phone, but that -- I guess it shows that a driver is  
distracted.

A Well, that would be possibly the  
perception reaction. That could be many different  
things. And I don't -- necessarily, I can't say  
whether somebody is on a phone or they're distracted  
by -- in my opinion, by a CDR Report, I don't think  
I, personally, could do that.

Q I want you to -- well, before we go into  
it. You've taken a look at the map of the final  
draft of the MV-104 and the map that's at the end of  
your report and that would be the one that there's  
little tire marks and scratch marks and where the  
Vehicle 1 is at final rest. Is it fair to say that  
there's a discrepancy between one drawing and the  
other?

A Not necessarily. It's my -- I'm not --  
I'm confused because I don't know --

Q Okay.

A There are two different diagrams.

Q Can you explain to me how there are two  
different diagrams?

A Mine is a scale of the scene. Mine  
doesn't actually have the tractor in it because it

1 B. HUNTER

2 was pulled up at a controlled rest ahead.

3 His is an actual diagram showing what he  
4 believes is the actual collision.

5 My diagram doesn't show -- actually, mine  
6 is a final rest, at least the Dodge at final rest.  
7 Again, the tractor is not in there. But my diagram  
8 is showing the post-collision.

9 Q Through looking at the final draft of the  
10 diagram on the MV-104 and looking at the other one  
11 which was the draft version which it was different,  
12 is there one diagram that you would agree with more  
13 than the other?

14 A Based on the evidence I collected, I would  
15 agree with the final draft, his final draft more  
16 than his draft.

17 MR. SMILEY: Can you just clarify because  
18 you said his final draft -- you said his final  
19 diagram --

20 THE WITNESS: His final report.

21 Q So when you, looking at his final report,  
22 the final report has the tractor crossing into the  
23 left lane with Matthew behind striking the tractor  
24 in the left lane. Is that a fair and accurate  
25 representation of what this looks like?

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2 A Yes.

3 Q So is it your opinion from the data and  
4 all the forensic evidence that the contact first  
5 occurred in the left lane or somewhere else?

6 A I believe it's in the left lane.

7 Q When it occurred in the left lane, do you  
8 have any data to suggest that the tractor would be  
9 this far over as we see in this diagram in the left  
10 lane?

11 A No, I don't.

12 Q I realize that you haven't spoken to or  
13 you haven't discussed with Officer Lewin why the  
14 diagram is changed, but could you give us factors of  
15 why the diagram would change?

16 A I can't speak for him. I really can't. I  
17 don't know why. Maybe -- I don't know.

18 Q I'm going to go to the pre-crash data from  
19 the most recent to first event seems to be quite  
20 similar. I'm just going to use one of the tables  
21 and I'm using the table on page 14 of 55.

22 A Okay.

23 Q Going on that, and this is, it says, "time  
24 stamp minus 5.0 seconds." Is it fair to assume that  
25 it's 5 seconds before impact, 5 seconds before an

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2 event, or 5 seconds of what?

3 A It's 5 seconds before a wake up which  
4 would be an event -- it's 5 seconds before algorithm  
5 enable -- it's basically when something, the delta-v  
6 changes and the vehicle wakes up and says, "What do  
7 I need to do? Do I need to deploy the airbags? Do  
8 I not need to deploy the air bags?" So --

9 Q This is 5 seconds before an event, not  
10 just 5 seconds of any moment in time. This is 5  
11 seconds before the vehicle's computer decides  
12 something has to be done, a reaction has to happen,  
13 whether that be an air bag, anti-lock brakes,  
14 anything; is that correct?

15 A Yes.

16 Q If I were to look at minus 5 seconds here,  
17 you have that the vehicle is going at 78 miles an  
18 hour with a hundred percent full accelerator pedal  
19 pressure; is that correct?

20 A Correct.

21 Q So if I'm interpreting this correctly,  
22 whatever is happening at that moment, the driver is  
23 flooring the accelerator and going at 78 miles an  
24 hour?

25 A Correct.

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2 Q As I move down, it continues at a hundred  
3 percent through minus 3.5; correct?

4 A Yes.

5 Q At minus 3.5 I notice that the RPM's of  
6 the engine has increased by maybe 250 RPM's, the  
7 speed has increased from 78 to 82 and the  
8 accelerator is still at a hundred percent; is that  
9 correct?

10 A At 3.5, you're looking?

11 Q Correct.

12 A Yes.

13 Q At negative 3.4 we notice a slight  
14 deceleration, but at negative 3.3, we notice again  
15 full acceleration. Would there be any reason for  
16 that? I guess human pressure?

17 A There's no particular reason. I don't  
18 know why.

19 Q Okay. We notice then at minus 3.1, all of  
20 a sudden the accelerator pressure is at zero.

21 A Correct.

22 Q If we were to assume that that's the  
23 moment of contact, would that be a natural response  
24 of a human being, of a driver, that when the contact  
25 occurs and the car goes out of control, that there

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2 would be such a dramatic decrease in pressure in the  
3 matter of 2/10 of a second, where it goes from 100  
4 to 42 to zero?

5 A Yes, something is occurring at that  
6 moment.

7 Q And something that it is affecting the  
8 driver enough that he is no longer, not only is he  
9 no longer fully accelerating, has full pressure on  
10 the pedal, but he has no pressure on the pedal?

11 A Correct.

12 Q Does it suggest that when you go from  
13 minus 3.1 to the end of the -- which is minus .1  
14 that there is no pressure, that at this point the  
15 driver is no longer doing anything to apply pressure  
16 to the gas pedal?

17 A According to this report, there is no  
18 pressure.

19 Q Would this also be consistent if after  
20 contact the driver has lost control of the vehicle  
21 and is flipping over?

22 A Sure, yes.

23 Q On the very next page, page 15, I want to  
24 go to the same time frame and look at the yaw rate.  
25 As I look at negative 3.5 to negative 3.4 and all

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2 the way down to negative 3.0 and then we see it  
3 again from negative 2.2 to, I guess, negative 1.9,  
4 would that be -- the yaw rate would be the vehicle  
5 turning in one direction or another; is that  
6 correct?

7 A I believe, at this point, there's some  
8 sort of rotation.

9 Q And that rotation, if we were evaluating  
10 this evidence, is a vehicle out of control because  
11 it's happening at such extremes --

12 A I would really have to -- there's rotation  
13 that's -- I mean, I'd have to really look at it and  
14 analyze it. There is rotation.

15 Q But the rotation that we do see here, even  
16 if you can't say that it's out of control, would you  
17 say that it's extreme?

18 A Uh --

19 Q At this speed. If you go back again and  
20 correlate it to the speeds that they were going  
21 at --

22 A I can't -- based on -- I can't. I would  
23 really have to sit down and analyze and figure out  
24 to say -- I don't want to use the words extreme --  
25 but I will say that there's some sort of -- there's

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2 a rotation here.

3 Q Let's define rotation. When you say  
4 rotation, meaning just that the car is moving to the  
5 left or to the right or are you talking rotation as  
6 in 360 degrees?

7 A Well, no. I mean, I have to read the  
8 whole data limitations on what negative and positive  
9 and I mean this is -- you have to analyze this and  
10 for me to sit here right now and -- I don't want to  
11 say it's an extreme.

12 When I see a yaw rate, it seems like  
13 there's some sort of rotation moving left or right.  
14 I don't know which is negative or positive. I have  
15 to read. But there is a rotation there, from my  
16 opinion, just looking at this right now.

17 Q The rotation that you're seeing is because  
18 it's going from negative to positive to negative in  
19 such a small amount of time?

20 A Yes.

21 Q Is it usual for a driver in normal  
22 situations to go from yaw rates at basically a  
23 second apart to have yaw rates that substantially  
24 different?

25 A I don't think so, no.

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2 Q You testified before that you made it a  
3 point when, I guess when there was a second review  
4 of your report, to discuss with somebody else that  
5 Officer Lewin's report had some errors. You  
6 indicated the most important one was photos and  
7 whether there was a report; correct?

8 A Yes.

9 Q Is there a reason why you didn't mention  
10 any of the other errors that were there?

11 A Because it was his report and that was his  
12 investigation. I gave -- one was clerical, in my  
13 opinion, and the other one is his report and that  
14 would be something that he would have to explain as  
15 to why, at this point, as to why he put what he put.

16 Q So one of the things that Officer Lewin  
17 refers to is that the accident happened on something  
18 called a deceleration ramp. Would you agree that  
19 the accident happened on a deceleration ramp?

20 A It's -- you know, it's a ramp that goes  
21 off to 287 and 17. It would be considered -- it is  
22 considered deceleration ramp because it is a ramp  
23 exiting, a straightaway ramp.

24 Q And is a deceleration ramp, by its own  
25 definition, a ramp that you're supposed to start

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2 slowing down a little bit?

3 A Well, it depends because usually there  
4 will be markers indicating what the suggested speed  
5 would be. It would be a yellow marker with whatever  
6 the suggested speed and I don't know if there is one  
7 for there. I don't think there is one.

8 Q Is the speed limit on the deceleration  
9 ramp any different than on the highway itself?

10 A No. There would be a suggested, but the  
11 speed limit there would be 65.

12 Q It continues to be 65?

13 A 65, correct.

14 Q Is the speed limit of 65 just for motor  
15 vehicles or does it also apply to trucks?

16 A It's everyone. The speed limit is 65  
17 unless there's a sign posted.

18 Q But there are parts of the highway where  
19 it's 55 for trucks and 65 for vehicles?

20 A Right. I'm not aware of any signs with  
21 the difference.

22 THE REPORTER: I'm sorry. My computer  
23 just shut down. Give me a minute.

24 MR. SMILEY: This would be a good time to  
25 take a quick break.

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2 (Whereupon, a short recess was  
3 taken.)

4 Q This, counsel may have asked you, and I  
5 just don't remember. At the time of the accident in  
6 this investigation, Officer Lewin, was he also part  
7 of CRU; was he still in training or something else?

8 A No, he was just a uniformed trooper.

9 Q So the expertise of reconstruction falls  
10 on you and your unit; correct?

11 A Correct.

12 Q And that would be Investigator Smith, and  
13 I think it was Trooper --

14 A Trooper Jackson?

15 Q You mentioned Trooper Chris Jackson, but  
16 you said he was the one that was in training at the  
17 time? He was only assisting because he was not a  
18 full reconstructionist like yourself at the time?

19 A Correct.

20 Q And there was somebody else that we  
21 mentioned -- Haydt?

22 A He's the investigator that handles the  
23 investigation part of -- it's the -- there's the  
24 uniformed part -- when the State Police -- and every  
25 agency is different -- but when the State Police

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2 respond to something that requires collision  
3 reconstruction response, there's the uniformed  
4 trooper in the State Police case that will be  
5 handling the actual accident report.

6 Then there will be usually an investigator  
7 that handles the background, so to speak, and then  
8 there's the reconstruction and all we're responsible  
9 for is the reconstruction.

10 We, you know, we don't go and interview  
11 the parties involved. We're provided with that  
12 stuff and we do the reconstruction and the evidence  
13 and so forth. We don't do the accident report; we  
14 don't go do the backgrounds. We just do the  
15 reconstruction.

16 Q Yours is just data analysis?

17 A Yes.

18 Q So whatever conclusions you come to are  
19 from your data analysis?

20 A I'm sorry?

21 Q Any conclusions you come to are basically  
22 from your data analysis?

23 A That's right. And our opinions.

24 Q What's the difference between Investigator  
25 Smith and their responsibilities and Investigator

1 B. HUNTER

2 Haydt?

3 A Investigator Smith is -- does just what  
4 myself, just does collision reconstruction. He's an  
5 investigator that just goes and reconstructs  
6 collisions.

7 Investigator Haydt is an investigator that  
8 does everything. It could be investigating a  
9 burglary; it could be investigating a homicide. He  
10 investigates everything.

11 Q Is there a hierarchy here between Smith  
12 and Haydt?

13 A No. They're both investigators.

14 Q I know that. But I'm just saying when  
15 you're doing a reconstruction thing like this, you  
16 know here, does one get priority over the other?

17 A No. Investigator Haydt does his portion  
18 and Investigator Smith or myself would do my portion  
19 and the trooper would do his portion.

20 Q So it was you, Smith and Jackson on one  
21 side. Then on the other it was Captain Mazzone,  
22 Sergeant Antonelli, Investigators O'Leary, Haydt,  
23 Sergeant Alnwick, Trooper Lee and Trooper Lewin and  
24 Trooper Nally; correct?

25 A Correct.

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2 Q Trooper Nally, what did he do here, if  
3 anything?

4 A He's the commercial vehicle. He's the one  
5 that inspected the tractor.

6 Q And just so that I'm clear, the conclusion  
7 after the tractor was inspected with whatever  
8 violations it had was because of the accident?

9 A That's what Trooper Nally inferred to me.

10 Q Let me go to what was marked Plaintiff's  
11 Exhibits 2A and B. Now, there was a lot of  
12 discussion of the tire marks here and that the tire  
13 marks are in the left lane; correct?

14 A Correct.

15 Q What is the first instance in this  
16 accident that these tire marks could have been  
17 created? Could have been.

18 A The first time?

19 Q In other words, what we have is at some  
20 point or another, there was contact between  
21 Matthew's vehicle and the truck. And then after  
22 that, Matthew's vehicle rotated. At what point in  
23 that scenario could be the first time that these  
24 marks could have possibly been made?

25 A I believe this is during collision because

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2 the tires locked.

3 Q If the tires locked, does that mean that  
4 Matthew's car was dragging for a little bit before  
5 it rotated?

6 A No. I don't know. I believe that this  
7 is -- the tire locked from impact. The vehicle --

8 Q Whose tire locked?

9 A Well, I believe both tires are locked  
10 because one wheel was dislodged. But I believe also  
11 with the impact that when that bead was broken on  
12 that tractor, that that possibly also was locked.

13 Q Do we know whose tires these are that we  
14 see in 2A and 2B?

15 A No.

16 Q Is there any way to be able to decipher  
17 from the tread, from the width, the length, whose  
18 tires they were?

19 A With measurements perhaps, but looking at  
20 the photo, no.

21 Q Were those measurements ever taken?

22 A I believe there may have been a photo with  
23 a scale in the photo. I don't --

24 Q One of these photos that you've seen  
25 today?

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2 A None of these photos.

3 Q So the scrape mark that we see in A and B  
4 and even in 2C, would they be consistent with the  
5 tire mechanism, the axle and anything there coming  
6 off, or would this just be the vehicle just dragging  
7 it before it ejects?

8 A It could be either or. I don't -- I  
9 just -- the scraping could be, I believe it was the  
10 undercarriage. It could be the wheel it -- it's  
11 some sort of metal on metal which I believe is from  
12 the Dodge that was dragging along that pavement.

13 Q Why do you believe it's the Dodge?

14 A The location and orientation of it.

15 Q If we evaluate the speed of the Dodge at  
16 its maximum speed of impact at 82 miles an hour and  
17 we take the driver of the truck, from his  
18 deposition, that he was going 50 miles an hour, that  
19 speed differential as Matthew was trying to pass,  
20 how much time does Matthew have to react if he's  
21 about to make contact and he needs to shift away?

22 A I would have to -- again, that would be  
23 something that I have to sit down and do a whole  
24 time distance formula with the speeds. I can't give  
25 an answer right here, an accurate one.

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2 Q When contact occurred, and I'm showing you  
3 Plaintiff's 2L, you indicated that the mud flap was  
4 the most likely first contact between the Dodge and  
5 the back of the vehicle; is that correct?

6 A I believe I stated that the mud flap had  
7 made contact with the Dodge and that there was some  
8 scrapes.

9 Q Right. What's the mud flap made out of?

10 A Some sort of plastic, I'm assuming.

11 Q And it gives; correct?

12 A I would assume.

13 Q And so the question then becomes when the  
14 Dodge comes into contact with the tractor, it drives  
15 through the mud flap onto the tire; correct, onto  
16 the rear tire of the tractor?

17 A That's what I believe happened, yes.

18 Q So when it strikes, do you know if it  
19 strikes the outer rear wheel or the inner rear wheel  
20 first?

21 A I believe it wrapped -- as I stated, I  
22 believe it strikes the back and kind of wraps around  
23 it.

24 Q I know you said that before and that's  
25 where -- and forgive me, that's where I'm not

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understanding. When the Dodge cuts through the mud flap, does it hit the wheel, the rear wheel or the rear driver's side wheels? Which one or both at the same time does it strike first; the inner or the outer or can you not tell?

A No. I can't tell. I don't know that it hit the, struck the right one. I know that it struck the left wheel.

Q Was there any damage on the inner wheel?

A Not that I recall.

Q That's what I misunderstood.

Through all the data and all the evidence that you reviewed, as you were writing this report, is there any way that you can definitively state where each vehicle was at the point of the first contact?

A No.

Q Your report ends with you indicating that the primary contributing factor for this collision was unsafe speed. If you had to determine who was at fault in this matter, in terms of this accident, who was it? Was it the Dodge or was it the tractor?

MR. SMILEY: Objection.

A As I put in my report, the Dodge for

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2 unsafe speed.

3 Q You use your words carefully. You said,  
4 "primary contributing factor." Did any of your  
5 evidence that you culled over, whether it's the raw  
6 data, the depositions, anything that you used to  
7 make this report that showed any evidence that the  
8 truck was any type of contributing factor even from  
9 at 1 percent?

10 A Nothing in my evidence has shown that the  
11 truck contributed to the -- based on my evidence, to  
12 the collision.

13 MR. LIMA: I have no further questions.

14 MR. SMILEY: I have a few follow-up  
15 questions.

16 BY MR. SMILEY:

17 Q With regard to your measurements with the  
18 X, Y, Z; were all of those in feet or were any of  
19 those in inches?

20 A I believe -- again, I have to look. I'm  
21 pretty sure everything is in feet and inches.

22 MR. LIMA: Okay. When you say that, when  
23 you read some of these charts and it says  
24 something like minus 3.3, are you talking about  
25 3 feet-3 inches?

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THE WITNESS: I believe so. Again, I have -- this is something that we go out and forensically map and then we put it into a CAD program. I honestly never -- we take that just for this purpose so other people can take that data or that raw data and use it for a diagram. We never use the printout. Again, it gets put into a CAD program so again, I'm pretty sure it's feet and inches.

Q When you measured the X, Y, Z positions of the three tires that were still on the vehicle at rest, do you know what point the measurements were? Was it the center of the tires or is something else used as a marker?

A You know, we usually, with the prism, we go on the center of the vehicle. Again, that could have been done reflectorless, where I didn't have a prism, where I'm just shooting a laser beam. I really don't know as far as those four tires if I used reflectorless or I used a prism.

Q You don't know if you're aiming at the middle of the tire or --

A If I were to use reflectorless, I would most certainly aim to the middle of the tire. If

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we're using a prism, it would be we always center it  
on the center of the tire.

Q What about when you did the X, Y, Z for  
the vehicle, were there specific parts of the  
vehicle that you were using for those points?

A That, I don't know.

Q Do you know if the Dodge Dart flipped over  
before it left the roadway?

A No, I do not.

Q Do you know when it flipped over?

A I know -- when it flipped over, I know  
that it flipped over as it went over the guide rail  
and down the embankment. I don't know prior how  
many times it flipped over, if it did flip over more  
than once. I don't know if I -- I don't recall if I  
figured out how many times or if it did do that. I  
can say here that I know that it flipped over and  
went down the embankment.

Q Do you know if it flipped over at any time  
before making contact with the guide rail?

A That, I don't recall.

Q Do you know what caused it to flip over?

A I would say the speed.

Q But if you were going straight down a road

1 B. HUNTER

2 fast, you're not going to flip over; right?

3 A Okay. Speed and it was already out of  
4 control.

5 Q But was it an impact with something like  
6 the guide rail or an impact with the truck? Do you  
7 know what specifically caused the vehicle to go  
8 into --

9 A It was striking the guide rail.

10 Q The Z direction, did you choose that based  
11 on gravity; did you chose it based on perpendicular  
12 to the road surface or something else?

13 A I'm confused when you say the Z.

14 Q The Z, the X, Y, Z-axes.

15 A These now, again, these are just data  
16 points from my total station. So I'm confused about  
17 what you mean, I selected --

18 Q So you don't choose the Z-axis?

19 A No.

20 Q You don't set it up, in other words?

21 A No. I do set up the total station. I'm  
22 confused as to what you mean as far as when I take  
23 points, if I pick --

24 Q The Z-axis that's listed in the data, do  
25 you set up the Z-axis in any particular way or do

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2 you just set up the total station?

3 A I set up the total station and I level the  
4 total station and at that point, we measure up the  
5 height which if you look in there, it should tell  
6 you the height of the total station. It's usually 5  
7 and change and -- I don't say I'm going to set it  
8 to -- I just -- it's setting it level, measuring the  
9 height of it, and then inputting the data into the  
10 total station and then using the data collector that  
11 collects each point.

12 Q The tree that you mapped out in your  
13 investigation, did the Dodge Dart have contact with  
14 that tree?

15 A From what I recall, yes, it did.

16 Q Do you know what position the vehicle was  
17 in at the point of impact?

18 A That, I don't recall.

19 Q Do you know, what, if any, damage to the  
20 vehicle was caused by impact with the tree?

21 A I don't recall.

22 Q Is that anything you looked into to try  
23 and determine as far as what damage was caused, if  
24 any, by the tree?

25 A I'm sure I assessed the damage, but I

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don't remember if I lined up where the tree struck.  
I don't recall.

Q Did you inspect the tree for specific  
damage to try and determine impact points with the  
tree?

A I did look at the tree that day. That's  
why I mapped it.

Q Did you find anything of significance?

A That I -- just damage to the tree, it had  
been struck. I believe not only struck, I believe  
it was, if I remember correctly, it kind of knocked  
the tree over.

Q Did you attempt to determine that angle of  
either of the vehicles that they were in relative to  
the roadway at the point of impact?

A No, I did not.

Q Did you measure any yaw marks?

A There was no yaw marks that I remember.

Q Did you try and determine whether or not  
the Dodge Dart was in yaw at the point of collision?

A Yes. That's something we always look for.

Q What did you determine?

A I didn't see yaw marks or critical speed  
marks.

1 B. HUNTER

2 Q Where was the tractor when you went to go  
3 inspect it relative to the resting point of the  
4 Dodge Dart?

5 A It was quite a distance up on the  
6 right-hand shoulder. I don't know the exact feet,  
7 but it was -- I believe there was another on-ramp  
8 coming from Hillburn and it was off in there on the  
9 shoulder.

10 Q Do you know if that was where the tractor  
11 pulled over immediately following the happening of  
12 this accident as opposed to having pulled over in  
13 one location and perhaps a trooper saying, "There's  
14 a spot down there where I want you to pull over and  
15 move your vehicle"?

16 A That, I don't know.

17 Q Do you know if Trooper Lewin would have  
18 that information?

19 A He was the -- I would assume the first on  
20 scene, so he would know.

21 Q Counsel had asked you some questions about  
22 whether you were able to determine any cell phone  
23 use. Do you recall that?

24 A Yes.

25 Q Did you look into that, if not for

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Matthew, with regard to the tractor driver, whether he was engaged or using either a cell phone or perhaps any other type of communication device around the time of the accident?

A Again, I particularly don't look into that. That would be an investigator and that was never brought to my attention, that there was any type of cell phone issue or somebody on a cell phone. That would be something that if there was or if they were investigating, they would let me know.

Q I believe I saw some pictures from the police photos of the inside of the cab of the tractor. Do you recall seeing any of those?

A Yes.

Q Do you know why that's looked at by the State Police, the inside of the cab following an accident like this?

A We document everything. We document the inside of all cars. Sometimes there's a question that may arise in our investigation a day later. It allows us to go back. We always -- it's important. We're always going to be taking pictures for the seat belts, the dashboards, any type of lights. Sometimes you're doing an investigation, you don't

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see something and you see it the next day or something. You want to look at something. But we always document and photograph everything.

Q Do you know, in your experience as a trooper, as to whether or not Trooper Lewin would have any other notes, either written-wise or audio recording of anything that the operator of the tractor had to say following the happening of this accident other than the supporting deposition?

A Not that I'm aware of.

Q I have no further questions. Thank you. Appreciate your time. Thank you for cooperating with our subpoena.

(Time noted: 2:38 p.m.)

\_\_\_\_\_  
BRIAN HUNTER

Subscribed and sworn to before me  
this            day of            , 2017.

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STATE OF NEW YORK )

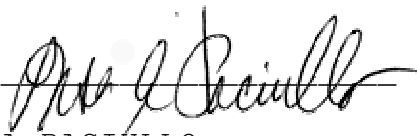
COUNTY OF NEW YORK)

I, LISA PACIULLO, a Notary Public for and  
within the State of New York, do hereby certify:

That the witness whose examination is  
herein before set forth was duly sworn and that such  
examination is a true record of the testimony given  
by that witness.

I further certify that I am not related to  
any of the parties to this action by blood or by  
marriage and that I am in no way interested in the  
outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my  
hand this 21st day of March, 2017.

  
LISA PACIULLO

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## NEW YORK STATE POLICE

THE PEOPLE OF THE STATE OF NEW YORK

-- vs.

Defendant(s)

INCIDENT LOCATION:STATE OF NEW YORK LOCAL CRIMINAL COURTCOUNTY OF ROCKLANDVILLAGE of HILLBURNLOCATION OF DEPOSITION:

STATE OF NEW YORK

COUNTY OF ROCKLANDVILLAGE of HILLBURNOn 5/17/2016 at 06:20 PM I, JOSEPHINE SCIMECA

|                           |                                    |                 |             |
|---------------------------|------------------------------------|-----------------|-------------|
| Date of Birth<br>7/6/1959 | No. and Street<br>18 BAYONNE DRIVE | C/T/V<br>HEWITT | State<br>NJ |
|---------------------------|------------------------------------|-----------------|-------------|

## State The Following:

I am giving my deposition to Troop Lewin and I was not promised anything in return for my statements. On May 17, 2016 at approximately 8:30am I was driving to work on Interstate 87 South Exit 15 ramp to Interstate 287 south. I was traveling in the right lane. I saw a tractor traveling in the right lane and a white passenger vehicle was following behind the truck, a black SUV was following the white vehicle then their was my vehicle. The white car moved from the right lane into the left lane attempting to pass the tractor. The passenger side rear bumper of the white car then strikes the driver side rear of the truck. All of a sudden the white car went into the air flips about two or three times, strikes the left guide rail and roll down the embankment.

Notice

(Penal Law §210.45)

In a written instrument, any person who knowingly makes a false statement which such person does not believe to be true has committed a crime under the laws of the state of New York punishable as a Class A Misdemeanor.

Affirmed under penalty of perjury

this 17<sup>TH</sup> day of MAY, 2016

- OR -

\* Subscribed and Sworn to before me

this \_\_\_\_\_ day of \_\_\_\_\_

*Josephine Scimeca*  
(SIGNATURE OF DEPONENT)

(WITNESS)

*TPR Lewin*  
(NAME OF PERSON TAKING DEPOSITION)

|                                   |
|-----------------------------------|
| Time Ended<br>05/17/2016 06:38 PM |
|-----------------------------------|

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