SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY : CIVIL TERM : PART IA-4

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EDITH TANNEN and EUGENE TANNEN,

Plaintiffs,

-against-

Index #
24105-2003

THE HEBREW HOME FOR THE AGED AT RIVERDALE, INC., A/K/A PALISADE NURSING HOME,

Defendants.

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851 Grand Concourse
Bronx, New York 10451
June 4, 2010

Continued Jury Trial Excerpt
Testimony of Perry Starer, M.D.

B E F O R E: HON. HOWARD SHERMAN,
JUSTICE

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Senior Court Reporter

(Whereupon, Juror Number 4 entered the courtroom.)

THE COURT: So you are having a problem staying on the jury?

JUROR NUMBER 4: It's not staying on the jury that's the problem, your Honor. My problem is I normally would have gotten paid on Tuesday, it's the beginning of the month, and my job, because it's under ten people there, they don't pay you for jury duty. It's a small, new company.

THE COURT: Right.

JUROR NUMBER 4: So they don't pay you for going here.

THE COURT: Right.

JUROR NUMBER 4: The State is required to pay me, so my question was, how does it work when someone -- because it's the beginning of the month. You know, rent, bills, I need to be able to purchase diapers and things like that, so my question was about how long does it take for the payment for jury duty to come? Because the longer I wait, they stack up late fees on me, because I live in --

THE COURT: Let me just -- I thought you had a problem staying. Here is the thing.

JUROR NUMBER 4: No.

THE COURT: I can give you an idea of how long this trial is going to go. It's going to be over by the middle of next week.

JUROR NUMBER 4: It's not --

THE COURT: Now, does that mean Wednesday, Thursday, Tuesday --

JUROR NUMBER 4: Right. It's not the trial.

THE COURT: Give or take a half a day.

JUROR NUMBER 4: Okay, your Honor. It's not the trial.

THE COURT: No, no. I appreciate that. The answer to your question is --

THE CLERK: It's about eight weeks.

JUROR NUMBER 4: That's my question, because --

THE COURT: I have no idea, but my guess would be we are not talking days we are talking weeks, and probably several weeks.

JUROR NUMBER 4: Is there a letter I can get or something I can get to give to Housing so they don't stack up the late fees until I get my next payroll check?

THE COURT: I can't control whether Housing puts late fees. There's definitely something we can give you, something to document that you have been on jury duty since, two weeks whatever it was.

JUROR NUMBER 4: Right.

THE COURT: And it will be through next Friday, it will roughly be the whole next week. We can give you that.

JUROR NUMBER 4: I just want to have something to be able to give to the Housing Authority. This way they understand that I'm not trying to skip out on my rent, because I'm a single --

THE COURT: No, no. I appreciate that. We'll give you proof that you have been on and continue to be on jury duty.

JUROR NUMBER 4: Perfect.

THE COURT: And I can't say in the paper that you work for a company of less than ten, but we can put in there that if you do work for a company of less than ten employees, you are not getting paid.

JUROR NUMBER 4: That's perfect.

THE COURT: Whatever the rule is.

JUROR NUMBER 4: Right.

THE COURT: Okay. So we'll give you something documenting that you are here for three weeks not getting paid if, in fact, you work for a company of less than ten, or whatever the law is.

JUROR NUMBER 4: That's exactly what I need.

THE COURT: I appreciate that, and I feel bad for you and I understand.

JUROR NUMBER 4: I mentioned it because Housing sent me a letter already, I got it in the mail yesterday. When I went to my house this morning, it was sitting there waiting for me. They just slide it underneath your door and they said my rent was late and, you know, they start that whole eviction process.

THE COURT: No, I understand. I know how that works.

JUROR NUMBER 4: Being a single father and having my daughter to take care of, and it's just --

THE COURT: I absolutely appreciate that.

JUROR NUMBER 4: It's just the two of us.

THE COURT: And I apologize, to the extent I have anything to do with this.

JUROR NUMBER 4: Oh, no.

THE COURT: Trials do present a hardship and jury duty is not easy and I really appreciate it and will give you whatever we can give you to help cover you.

JUROR NUMBER 4: That covers me. The letter that you just stated covers me completely, and that will take care of the problem. It will stop the problem with the Housing, because I called the social worker for Housing Authority and she told me to talk to you guys.

THE COURT: We'll give you something to document you're here, have been here, will be here, and if you work

for a company of less than ten, the law does provide they don't have to pay you.

JUROR NUMBER 4: That covers it.

THE COURT: And I will -- next time I go to Dunkin Donuts at lunchtime, you got one.

JUROR NUMBER 4: Awesome, thank you, your Honor.

THE COURT OFFICER: Okay. Just go upstairs. Thanks.

(Whereupon, the Juror Number 4 was excused from the courtroom.)

THE COURT OFFICER: All rise. Jury entering

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning. Have a seat.

THE JURORS: Good morning.

THE COURT: We are back to one of the witnesses that testified earlier in the week, the doctor, who is still under oath and is still being questioned on direct by Plaintiff's Counsel.

P E R R Y S T A R E R M. D., having been previously duly sworn, was examined and continued his testimony as follows:

MS. BERNSTEIN: Just a moment. Sorry.

(Whereupon, there was a pause in the proceedings.)

CONTINUED DIRECT EXAMINATION

BY MS. BERNSTEIN:

Q Good morning again, Dr. Starer.

A Good morning.

Q Now, when you last came in the other day, we had spoken about two particular incidents, two particular incidents that had occurred with respect to Ms. Tannen's stay at the Hebrew Home, and we also talked about the failure of the Hebrew Home to administer effective pain management for Ms. Tannen. Now, can you explain to the jury, are there any effects on the condition of a dementia patient and their experience of their environment, being in chronic pain?

MS. LOMBARDI: Objection to the word chronic. We had zeros too,

THE COURT: Overruled.

A Yes.

Q And can you explain what that effect is?

A As I think we talked about last time, the mind does many, many things for us, and it organizes our understanding of the world, and if we begin to lose parts of it, it becomes hard to interpret certain stimuli such as pain, and it has been described in the records that Ms. Tannen was prone to delusions as part of her disease, and a delusion is a misinterpretation of what is happening to you, so when there are painful stimuli, unpleasant stimuli which the individual cannot explain, it

becomes disruptive to them and it can lead to mental anguish, it can lead to agitation, so the answer is, yes a demented patient who experiences pain without explanation is going to suffer.

Q Okay. And by the way, just for the record, can we assume today, as it was true the other day, that all the opinions you expressed are to a reasonable degree of nursing home physician certainty?

A Yes they will be.

(Whereupon, an exhibit was displayed to the jury.)

Q And when we were last here we spoke about an incident report, in fact, that was prepared, that was dated for an incident of September 22nd, 2001, and that was the one where Ms. Tannen was found on the floor with a with a noted hematoma on the back of her head on the occipital area and slight bleeding. Now, do you have an opinion as to what kind of trauma would have caused that injury?

A More likely than not this is blunt trauma to the head.

Q And can you explain to the jury why it is your opinion that it is more likely than not blunt trauma to the head?

A Well, when we make a diagnosis we look at the most likely thing, and you have to take into account the patient

themselves, and here is somebody who is prone to imbalance. In fact, there are descriptions in the records that she is prone to falling backward, moving backward. I couple that with the injury itself, which is a collection of blood, the hematoma, which is almost like a tumor of blood, a ball of blood in the back of the head, so knowing that the patient has a propensity for falling backward and seeing that the lesion actually is in the spot and knowing in order to have this much of a wound, you really have to hit hard, the most likely diagnosis is the back of the head hit the ground in an abrupt manner. You didn't gently lay onto the floor. You have to actually hit pretty hard to get that kind of a wound.

Q And do you have an opinion as to whether or not this injury where Ms. Tannen was found lying on her back on the floor with the injury to the back of her head, as to whether or not that injury resulted from a fall?

A Yes.

Q And what is your opinion?

A That's the most likely explanation here. More likely than not, she felt onto the back of her head, hit something hard and had the injury.

Q An can you explain to the jury the -- well, whether or not it's important for doctors, and especially nurses in the nursing home setting to investigate the likely cause of an injury such as the one from September 22nd?

A It's absolutely important.

Q And please explain to them why it is.

A The patient is under your care, and something happened while she's under your care, so it is essential that you determine what took place. In order to protect her from it happening again you need to know what took place, but also you have to be able to treat her now. If you don't know how the injury occurred, you are not going to be able to make the next step to get her past this healing period. You really have to know what happens when something happens in your house, and here it did.

Q Now, when Ms. Tannen came into the Hebrew Home she received a physical therapy and occupational therapy assessment; right?

A That's true.

Q And did you see any notes in the record with respect to what was characteristics of Ms. Tannen's gait or posture as she was walking around the Hebrew Home in the early months that she was there?

A Well, they continue to describe her gait as unsteady.

Q And did you see any notes as to whether or not she was leaning, she tended to lean in any particular direction?

A It's mentioned that she would lean backward.

Q And so putting all of that together, the fact that

she was noted in the chart to lean backward, that she had an unsteady gait, and that she was found by staff in the middle of the hallway on her back with a big bump on the back of her head that had to be a result of a blunt trauma of some force, what would be the process of the nurses in conducting an investigation to assess what the cause of this injury was?

A Well, here they would describe that pre-existing condition which is the unsteady gait. They would put it into a connection with the injury itself and come up with the conclusion that she fell backward. They could even stand her up and check her balance at that time if they were uncertain about it, just to see if she is steady or unsteady when standing, but that would be the process. The nurses certainly can do that.

Q And I want you to assume that there has been testimony, and of course in this investigative report, that nobody actually saw Ms. Tannen fall but she was last seen sitting in a wheelchair, and then next thing anybody knew she was on the floor in a supine position with that big bruise that was bleeding on the top, on the back of her head. If no one actually saw her fall, does that mean that the presumption should be that she didn't fall?

A Oh, no. No, no, no, not at all. There's a broken window, you know, you have to investigate and you look for the most likely thing. Something happened that shouldn't have

happened, and even though it wasn't witnessed, even if the window was broken and you weren't there, you look for the rock that might have gone through, and here you have the evidence which clearly points to a fall, and it's important to make sure that you capture that. If you dismiss it, then you are not going to be able to protect her from the next injury.

(Whereupon, an exhibit was displayed to the jury.)

Q Okay. Now, I have certain diagrams, and I would like to put them up on the visual presenter, and first of all, I ask you if this is a diagram that can help you explain to the jury what the injuries might have been that Ms. Tannen sustained as a result of this accident.

MS. LOMBARDI: Objection.

THE COURT: To what? The injuries might have been?

MS. LOMBARDI: Might have been.

MS. BERNSTEIN: Okay.

Q What the injuries were as a result of this incident.

THE COURT: Okay.

Go ahead. What injuries were there?

Q Well, first of all, let me ask you, will this diagram assist you in explaining to the jury what her injuries were?

A I could probably use it, yes.

Q Okay.

A All right. The diagram you just put up here just shows you what a complex organ the brain is. It is showing different areas that are felt to control different aspects, and everything in that brain is needed. So you see, there's actually a part that allows to you experience emotion. There's a part that you see in the back of the head which is your balance center, so any sort of injury, even a very small one, can knock out a large part of function. There's part there that has language that allows you to read and to understand what somebody else says, so the brain is just packed with important function, so of course you want to protect the brain, and that's why it's in the skull, so you sort of see how the brain sits there and the skull is going to wrap around it. It would be in the blue part.

If you slide it over the other way, I want to see what's --

Q I'm sorry. Which way?

A There's another view of the brain.

(Whereupon, an exhibit was displayed to the jury.)

Q Okay.

A So the side we just saw tells what you it does. The side here names it, and you actually see over to the right the occipital lobe, and I think we used the word occipital the

other day, so that's the back of the head, so that's how we name things. The frontal lobe is in the front, the occipital lobe is in the back. The brain is protected by sitting in a hard shell which is your skull, and also it floats in a little bit of fluid.

For the most part we do pretty well with that on day-to-day activity, however, if you get banged in the head it's going to rattle a little bit, and as you get older, you are less resilient and you sort of know that as we have all gotten older and the brain also becomes less resilient and it takes more of a hit, and it take this hit in a funny way, it actually bounces inside the skull, so if you bang it from the back, the thing, just as physics, it's going to boom and then back again, and it bruises, and the brain --

MS. LOMBARDI: Objection. Is that what happened here? Somebody bangs, now we are banging from the back?

MS. BERNSTEIN: Isn't that what happened, your Honor? She bruised --

MS. LOMBARDI: No. He is saying --

THE COURT: Well, let me just add, Doctor, I understand part of what you are doing is just teaching, but is this in the context of the fall and the injury to Ms. Tannen on that date?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: Because there is such a phenomenon.

THE COURT: Okay.

Q And can you explain to the jury, do you actually need a direct contact on the head in order to have this phenomenon where the brain shakes up inside of the skull?

A Well, you have to hit the head in order to have the rattling.

Q Well, what about if you're in an automobile accident and you don't actually hit the head, but you have -- like a shaken baby syndrome, for example?

MS. LOMBARDI: Objection, your Honor. That's not what this is.

THE COURT: Shaken baby syndrome has nothing to do with this case. Let the doctor explain --

MS. BERNSTEIN: Fair enough.

THE COURT: -- what happened in this case.

MS. BERNSTEIN: Okay.

Q And we do have direct contact. Let me move this back

(Whereupon, an exhibit was displayed to the jury.)

Q I'll ask you, you know, there's obviously -- this obviously has -- I mean, the title is motor and sensory function, and it has in the occipital area, "vision," and then

right below it, "posture, balance and coordination." Now, when somebody sustained a hit to the occipital area as Ms. Tannen did, and the brain is shaken up and there's impact --

MS. LOMBARDI: Objection. There's no evidence the brain is shaken up.

MS. BERNSTEIN: That's --

MS. LOMBARDI: Judge, we are assuming that happened. That's an assumption.

MS. BERNSTEIN: This is what the doctor just said.

THE COURT: Just describe the testimony in this case --

MS. BERNSTEIN: Yes.

THE COURT: -- whether by document or otherwise, as to what happened to Ms. Tannen's head on that day, and then let the doctor explain what could or could not have happened.

MS. BERNSTEIN: I will, your Honor. Thank you.

(Whereupon, an exhibit was displayed to the jury.)

Q Let me just show you one of the medical notes. These are the doctor's notes, and do you see where it says, "on call M.D."?

A Yes.

Q Okay. And it says, "Referred for small occipital

hematoma sustained after an accidental fall." Do you see that?

A Yes.

Q Okay. So --

MS. LOMBARDI: What date is that?

Q Obviously --

MS. BERNSTEIN: That's 9/22.

Q Now, that's the medical, the doctor's notes, so obviously somebody in the nursing home, the doctor who examined her, did form a conclusion that it was related to a fall.

A That's a correct conclusion. The correct conclusion.

Q Okay. Now, I want to show you the notes for September 27th, and these are now the interdisciplinary notes.

(Whereupon, an exhibit was displayed to the jury.)

Q This is a note by the rehab nursing department, rehab nursing, where it says, "A significant change, MDS two zero revised, revision is done for decrease in ADL's"?

A Yes. I see that.

Q Now, I want you to assume that there was testimony and that it's also in the records that there was an MDS or a minimum data set performed for Ms. Tannen on September 20th, just two days before the fall and just seven days before this note. Do you have an opinion as to whether or not it would just be standard operating procedure to perform another MDS

assessment seven days later on a patient unless there was some significant change?

A I do have an opinion.

Q And what is your opinion? Explain to the jury.

A As you probably heard already, the minimum data set is a very rigorous listing of all aspect of a patient's condition, and it's done periodically during the stay. However, if there is a change, and the change would more likely be a change for the worse, then the staff needs to repeat the study. So as that's written there, I agree that it is probably done, more likely than not, because there has been a decline in the function, and they actually tell you what the decline is, the little arrow going down and next to the words "activities of daily living". That would take into account bathing, dressing, toileting, feeding.

Q Okay. Now, can you tell me, or more importantly please tell the jury, what is the significance of the fact that Ms. Tannen -- or let me withdraw that. Do you have an opinion as to whether or not this noted decline in Ms. Tannen's ability to perform her activities of daily living was related to this fall on the back of her head of September 22nd, five days earlier?

A Yes, I do have an opinion.

Q And can you explain to the jury what your opinion is?

A My opinion is that they are related. When you are making a diagnosis, when you are trying to understand a patient, you take into account whether or not it is possible that such an injury can do this, and then whether it's probable, and of course the mechanics of it suggest that it is more likely than not. Then in the time course after the trauma to the head and the injury to the brain, Ms. Tannen is showing that she is not doing as well as she had done prior to the injury, so the most likely explanation is the injury caused the decline in function.

Q And. What is it specifically, in your opinion, about -- what is it, more likely than not, what happened to Ms. Tannen's brain in that fall that caused the decline in her ability to carry out her activities of daily living?

A Well, the brain is a very important organ, as we talked about before, and that's why it gets that extra special protection in the body, because nothing else really has that helmet that's built in, and there's no reserve. It's not like the kidneys, where you have an extra kidney. Everything is needed, so anything that's gets injured or bruised or knocked out will be lost, and the brain doesn't even regenerate, and when you hit the head, then the soft stuff inside moves, and the soft stuff is the brain, and it hits the front and it bounces and it hits the back, and that's what I was talking about. it's called coup contrecoup, and I can't spell it, but

it's French and it's back and forth and the brain gets rattled, really.

Q And is that a known phenomenon in the area of head injuries, coup contrecoup?

A Yes, closed head injury, traumatic brain injury, it's known.

Q And isn't it true, actually, that when someone has a coup-contrecoup, that when you are looking at imaging, neuroimaging studies, that you tend to see damage at the point of the impact and also at the opposite point, to compensate for the brain moving back and forth because of the laws of physics?

A That's where you would see it, but it may not show up on the study.

Q Because sometimes the damage is molecular; right?

A It could be small, so small you won't be able to see it on an x-ray, but remember, everything in there, all these little wirings in the brain are very tiny, so although the patient might change, you are not going to see it on a picture.

Q But in any event, the Hebrew Home didn't do any kind of CAT scans or MRI's of Ms. Tannen's head to see if she had sustained any kind of traumatic brain injury?

A I did not see that, any evidence that they evaluated her for that.

Q And I think we may have covered this last time, but I hope you will bear with me. I want you to assume that there

was testimony from Nurse Jeanette Sandor that this incident of Ms. Tannen falling on the back of her head was the result of departures from acceptable standards of nursing care, violations of the policies and procedures of the Hebrew Home, and regulatory, State and Federal regulatory violations, and then I want you to further assume that there's been testimony that those various violations and departures were the direct cause of Ms. Tannen's sustaining this fall.

So do you have an opinion as to whether or not this brain injury, and her accident five days later, noted decline in her ADL's resulting -- or is a substantial factor caused by the fall?

A Yes, I do have an opinion.

Q And can you tell the jury what that is?

A That the injury that we are describing is directly related to the violations and departures.

Q Okay. Now, let's move forward, and let's move forward to October 11 of 2001.

(Whereupon, an exhibit was displayed to the jury.)

Q There was an incident report for this incident, and in this one, the bed alarm went off, and when Ms.-Somebody-CNA responded, she found resident lying on the floor near her bed with her head resting on the side rail.

MS. LOMBARDI: I'm sorry. What's the date?

MS. BERNSTEIN: October 11th.

(Whereupon, there was a pause in the proceedings.)

Q Okay, now, I want you to further assume that in this incident report there was just one investigative statement, and it was by the CNA. "When I heard Ms. Tannen's alarm went off, by the time I got to the room she was laying by the bed on her back." According to this incident report, there were no recognizable injuries; that they examined her and they didn't find any injuries.

Do you have an opinion as to whether or not this incident of her falling is more likely than not to have contributed to her sense of pain and suffering and trauma, from what you testified to before, while she was --

MS. LOMBARDI: Objection your Honor.

THE COURT: Sustained.

MS. BERNSTEIN: I'll rephrase, your Honor.

(Continued on the next page.)

Q. Do you have an opinion as to whether or not this fall had any effect on Mrs. Tannen's pain and suffering caused by her pain that she experienced during the time that she was in the Hebrew Home?

MS. LOMBARDI: At what point?

MS. BERNSTEIN: At the point of this incident.

MS. LOMBARDI: Oh, come on. Objection.

THE COURT: Why don't you refer to something in the testimony or record previously if you are asking him an opinion about it.

BY MS. BERNSTEIN:

Q. All right. Doctor, you had previously explained that when, especially when, a dementia patient undergoes repeated traumas and they don't understand the source of the trauma, that they can develop, and that it is more likely than not, in fact, that Miss Tannen developed, a sense of fear and foreboding about her very environment and that that added to her pain and suffering.

So I'm asking you if this incident where she was found again on her back on the floor with her head resting against the side rail, if you have an opinion --

MS. LOMBARDI: Which day is that? I'm sorry.

MS. BERNSTEIN: 10/11.

Your Honor, can counsel not keep interrupting. I said the date.

THE COURT: Go ahead.

MS. BERNSTEIN: It is very important that I not let this interfere with my train of thought. So let's continue.

Q. -- as to whether or not this incident contributed to that phenomenon that Miss Tannen suffered when she was in the Hebrew Home?

MS. LOMBARDI: Objection. There's no foundation for that.

THE COURT: Sustained as to -- I'm not clear what phenomenon are you talking about?

MS. BERNSTEIN: Okay. I just, I'll attempt to rephrase it again. I think it's because of the interruption.

THE COURT: I think you ought to establish first something about this time frame and pain.

I don't know that this record demonstrates she was in pain every day all day.

MS. BERNSTEIN: I will rephrase and ask another question.

Q. Doctor, would you characterize this event where Miss Tannen was found lying on the floor with her head resting against the metal side rail of her bed, would you classify this as a trauma?

A. Yes.

Q. And, if you heard that Miss Tannen slid as opposed to falling over or some other way of getting into that position, would that change your opinion as to whether or not this is a trauma?

A. No.

Q. And do you have an opinion as to whether or not this trauma is that -- whether or not you consider this to be one of the many traumas that you testified to before that added to Mrs. Tannen's pain and suffering because of being a trauma coming from her environment that she didn't understand the cause of?

MS. LOMBARDI: Your Honor, objection to the many traumas. This is October 11. She came in in July. We haven't had many traumas.

THE COURT: I will remove the word "many" and say "other" traumas rather than "many" traumas. We will change the words.

Q. The other traumas?

A. Yes, I have an opinion.

Q. Can you explain to the jury, please, what your opinion is and the basis for it.

A. Caring for someone who has the cognitive impairments that we have seen Miss Tannen has, what's essential is predictability, and I think that's recognized in the Hebrew Home as well, and that the environment has to be predictable.

I have seen demented patients who will get upset if you

change their room. I have seen demented patients who get upset if they see a coat sitting in the corner, that they think it's a man there.

The care has to be the same every day, the care givers every day familiar faces, familiar routine.

Falling down disrupts the routine and it's more disruptive if you are already demented. It would be disruptive for any of us. To have another day where she lands on the floor adds to the suffering, adds to her ability to feel that she's in control, and, when you feel a loss of control, it has an impact on you.

Q. And, when somebody falls in a nursing home where you've been employed, can you tell anything about the severity of the injury or at least what the doctors involved thought was the severity of the injury based upon the diagnostic tests that they choose to perform or they order for the patient?

A. Well, that's part of what we use.

Q. Well, in other words, if somebody just slides down and they really -- they seem to just be perfectly fine, will the nursing home routinely order x-rays anyway?

A. It will be based upon the physical examination. If there's pain, if something moves a little differently, they may not order an x-ray every single time, but you have to do a comprehensive assessment to determine whether or not you are going to do the x-ray.

Q. And so, if the doctors at the Hebrew Home, in fact, on October 11, 2001, ordered a number of x-rays for various body parts of Mrs. Tannen's, does that tell you anything about how they perceived her injury as a doctor working in nursing homes?

MS. LOMBARDI: Objection to the form of the question, how they perceived.

THE COURT: Overruled.

A. The practice is we are not going to perform unnecessary tests. So, if the doctor is x-raying the patient, the doctor strongly suspects that there was trauma to that area and wants further evidence that nothing was broken.

Q. Let's move on to October 19th, and this is an incident where it says on the incident report that, during care, CNA noted pink and discoloration on right forearm. Swelling also noted on fingers of left hand.

Okay. And you read these incident reports, didn't you?

A. Yes, I did.

Q. An investigation was performed and the, it looks like Carmen Henriques -- I'm sorry -- this is -- that's '02. I took that one out of order. I'm sorry.

10/27. I apologize. Okay. On 10/27/2001, at 3:30 p.m. reported by Mr. Tannen that his wife stated she fell this morning.

On examination, patient complained of pain on her left hip and also noted a small ecchymotic area on left hip. All

extremities noted moving freely and then no external rotation or shortening of left leg noted but they ordered an x-ray of the left hip and pelvis, right?

Now, do you see where it says "family notified by"?

A. Yes.

Q. And that box is not checked, and it says reported by husband, Mr. Tannen?

A. Yes.

Q. Do you see that?

Now, so an x-ray was ordered for Miss Tannen on that date and that was ordered, that was performed at the Hebrew Home of Riverdale. It says Hebrew Home, Riverdale, Dr. Abraham.

And do you see where it says radiologic examination demonstrates a non-displaced acute fracture of the superior ramus of the left pubic bone. The left hip is otherwise negative and then, as an addendum, it says, on further review of the left hip and pelvis, there is no evidence of osteoporosis.

Do you see that?

A. I do see that.

Q. Now, can you explain to the jury why in an x-ray report how this could appear. Addendum, what that means? You can go.

A. When we review x-rays, the x-rays are taken and you look at the report. Sometimes the x-ray is looked at a second time and additional material may be added, so that's all that is, is a second look and they added another statement.

Q. They added that there was no osteoporosis on the left side?

A. That's all they have there, yes, is just the left side.

Q. And I have a diagram, and perhaps if you wanted to come up here to explain to the jury where that fracture was, where is the superior ramus of the left pubic bone?

A. Okay. Just to orient everybody, you can feel most of this. This is behind, the tailbone. You can feel that's the part of the spine this is going be to in front. It is two-dimensional, but that part is over here so you can actually feel your pubic bone.

So this is going to be left; this is going to be right. The break is in there.

When they say it is non-displaced, it means it is broken. Because of the nature of this, it is kind of a circle. It is not going to move anywhere and there is going to be a crack in the bone right there.

So the pubic bone is here on me and it is here on the x-ray. You can probably find it on yours.

Q. Okay. Please have a seat again.

Now, in the incident report that we were just looking at, I know we were just looking at it, I want you to assume that there were witness statements and nobody saw Miss Tannen fall and nobody admitted to picking her up.

The first time anybody noted anything about a fractured

pelvis was when Mr. Tannen spoke to her in the afternoon at 3:30 p.m. Okay.

And I want you to further assume that Miss Tannen even told the nurse that she fell this morning and someone picked her up.

Here it says, resident said they picked me up, okay, but nobody will admit to having seen that and nobody --

MS. LOMBARDI: Objection, your Honor. Objection. This is a demented patient.

THE COURT: Sustained.

Q. I will rephrase it. Nobody reported having seen her fall, nobody reported seeing her on the floor, and nobody reported picking her up. And Miss Tannen was the only one who reported that she had fallen.

What is your conclusion as a doctor in a nursing home as to how Miss Tannen sustained the fracture of her pelvis?

A. Most likely the chain of events, considering her own report that she fell, considering that she has pain in that area, and knowing, of course, that it's broken, more likely than not, she fell.

Q. And that's your opinion to a reasonable degree of nursing home medical certainty, right?

A. That is true.

Q. Now, if you were -- if an event like this happened in your nursing home and you saw that the resident who had dementia

but that the resident was the only one who said that she fell and someone picked her up, would you dismiss that out of hand because she has dementia or would you take it into account in coming to your conclusion, or something else?

MS. LOMBARDI: Objection.

THE COURT: Sustained. Why don't you just ask him how he would conduct an investigation or come to an opinion.

MS. BERNSTEIN: Yes, your Honor. I have another suggestion for a question.

Q. What importance or what emphasize, if any, would you place on the dementia patient's report that they had fallen that morning and been picked up?

A. I take it very seriously.

Q. And why is that, even though the patient has dementia?

A. Dementia doesn't mean the person is unable to tell you certain things, and there was nothing that I've seen in any of the records that said Miss Tannen is unable to report that she may be on the floor. There are times she will say things that actually make perfect sense.

Just because you are demented, doesn't mean you have lost all abilities. People can tell you that they are hungry.

So I would take it seriously and, certainly in light of what I find, I would believe it.

Q. Now, do you have an opinion as to what kind of force would be necessary for a patient to sustain a fall in order to

sustain a fractured pelvis when the pelvis is not osteoporotic?

A. It would have been a tough bone to break with just a light tap. So it would have to be a strong force.

Q. And is a fractured pelvis a painful injury?

A. Yes. It's a broken bone. It hurts.

Q. Well, why is it? Can you explain to the jury why is it that broken bones hurt?

A. There are nerve endings there. This is something that does not want to be disrupted and, you know, the reason we have pain, of course, is a warning system so that you know not to do something.

Pain says, stop doing that, and the unfortunate thing about this bone is it takes a lot of weight. So it's going to be hard to stay off of that.

You know, it's not like you can just avoid putting weight on it. You are going to see that yourself. Even sitting up, you are going to be putting force on the pelvic bone. So it's a bad place to have a break like that.

Q. And what is the treatment that should be given to a patient who, a nursing home patient, who has a fractured pelvis?

A. Time and pain medications, because no operation was going to be done here. When we do operations, it's usually because the bone has moved, we try to get it back into place, hold it there so it can heal.

Here it was not displaced so it is just going to have

to heal on its own, but we want to make sure that this person is not putting unusual forces on it, and we really want to keep them comfortable during the healing period.

Q. Okay. So, in the time period of October 27, 2001, did you see any, anything, anywhere in the chart that there was any kind of pain assessment records kept by the nurses treating Miss Tannen?

A. I did not see any evidence of a proper pain management plan.

Q. And I want to show you a page of the medication charts for Miss Tannen, and the date on this is -- actually, the date on this is cut off.

Well, it says, okay, date, it was reviewed by somebody on 11/9 of 2001, which is about two weeks after the broken pelvis was discovered. I'm sorry. Let me put this page up first.

And this is the medication chart for Miss Tannen for 10/28, the day after the fractured pelvis was brought to the attention of the nurses.

And you reviewed these medication charts, didn't you?

A. Yes, I did.

Q. And we can agree that this was the first time that Tylenol was ever prescribed for Miss Tannen for pain or any medication, in fact, for pain at the Hebrew Home?

A. That's what I recall.

Q. She was taking some aspirin?

A. Different reasons.

Q. And, now, I want to show you the first page of that record, an earlier page of the record -- well, here is a note for November 9, 2001, and do you see at the bottom where it has diagnoses and comments?

A. Yes.

Q. And it says glaucoma, SDAT, Lewy body disease comma?

A. I see that.

Q. What does SDAT mean?

A. S is for senile, D is for dementia, A is Alzheimer's, and type of disease.

Q. Did you see that SDAT/Lewy body/Lewy body disease/Lewy body disease throughout the medical records of Mrs. Tannen's stay at the Hebrew Home?

A. Yes, it turns up more than once.

Q. So, going back, this is on 10/28 of 2001. Sorry.

Also, do you see where there are Mrs. Tannen's drug allergies are listed at the bottom?

A. Yes.

Q. Sulfa codeine, Hycodan, Aricept, sulfa Bactrim, Septra, codeine, Hycodan, again, and Aricept again.

In determining an adequate pain management protocol for a patient who is allergic to codeine, Hycodan, what can you do for a patient like Miss Tannen who's sustained a painful pelvic fracture and the only treatment that you can really give her is

pain medications?

A. Well, there is still room to move. There's different types of medicines that would relieve pain. You want to avoid the ones that she's allergic to.

Q. Do you agree or disagree with the doctors giving her Tylenol? I think they started with 650 milligrams as needed or they said, while awake, times 24 hours for pain in the left lower extremity.

Do you agree or disagree with that prescribing of medication?

A. I would not disagree with the choice of Tylenol.

Q. Do we know if the Tylenol worked for Miss Tannen?

A. Well, see, that's the problem. Once you have chosen a drug, for whatever reason, you are giving it to a person, you want to know whether it is working or not.

If you don't know whether it is working, what's the point of giving it or continuing it. So there we have a bit of a problem, a serious problem.

Q. But, in any event, Tylenol was the only pain medication that was given to Miss Tannen throughout her stay, whether she was being adequately assessed for pain or not.

Is that your recollection of the record?

A. Yes.

Q. Now, I want you to assume that there was testimony by Nurse Sandor that there were numerous violations of standard of

care regulations that and that those violations of the standard of care, the rules and regulations of the nursing home and the Federal and State regulations, that they were a proximate cause, a substantial causative factor, in Miss Tannen sustaining this fall that lead to her fractured pelvis.

So, do you have an opinion as to whether or not Mrs. Tannen's fractured pelvis was caused by those departures that lead to her fall?

MS. LOMBARDI: Objection.

THE COURT: Overruled.

A. Yes, I do.

Q. And can you please explain your opinion to the jury.

A. The fractured pelvis was caused by the violations and the departures.

Q. And why do you say that?

A. I think what's most disturbing here is she's falling away from people's sight. I mean, we spoke about it before last time, she's known when she has come in to be at risk of falling and yet more, than once even, in the sequence. So early on she's discovered on the floor.

From the beginning, they should have been watching her and certainly by now, they should have been watching her.

Why are they walking into a room and seeing her on the floor? This is just -- it is sloppy and it is terrible.

Q. But can I ask you, and it may just seem so obvious, but

what is the basis for your opinion that this fall caused the fractured pelvis?

A. I'm sorry. Because the bone, where it's located, is not going to break on its own. It doesn't -- it didn't happen that way. She had to hit it on something and she had to hit it with great force and, because she is known to fall, in fact, she has been actually described as falling prior to this, this is the most likely thing which happened, that the bone had an impact on another surface and it broke.

Q. Okay. So let's move on now to November, I'm sorry, October 16th, for which there was not an incident report but there is a note, a nurse's note.

Let's see, on 10/16, that the patient was found lying on the floor with superficial skin tear of the right forearm -- and that was ten/26 it says. They must have written the wrong date perhaps. It's 11/16 -- but with a superficial skin tear on the right forearm and the resident claimed she fell off the bed -- I'm sorry. I think I'm a little -- but okay.

This is going back just a little bit but that's the nursing note that Miss Tannen fell off the bed and she reported that she fell off the bed and that she was complaining of pain in her left hip.

Is there any note in there that a bed alarm went off?

A. No, I don't see one.

Q. Is it your experience in the nursing homes where you

work and have worked that, if a bed alarm goes off, it's noted, it's a very important factor, in fact, to note in the records?

A. If a bed alarm is being used, yes, we have to document what happened at the time of the incident.

Q. Now, can you explain to the jury, what is a skin tear?

A. It's exactly that; it's a rip in the skin.

Q. And can you explain, when you say a rip in the skin, I mean, what's the difference between a skin tear, say, and a laceration, which is also a rip in the skin or a gash in the skin?

A. I would actually describe them in the same way. These are all interchangeable terms. It's not just a little scratch, a little mark. The skin has now opened up and you can see the next layer, usually along a line.

(Continued on the next page.)

Q. And what causes skin tears in elderly nursing home dementia patients?

A. Well, different things that can cause it. But in order for something to rip, one part of the body is moving one way and the skin is moving the other way and it tears like you would tear a piece of paper, quickly moving against the surface, sometimes with a sharp edge can tear the skin.

Q. And is a skin tear painful?

A. Yes. The skin is one of the most sensitized area we have.

Q. And do you remember seeing any note as to how big the skin tear was?

A. I don't recall seeing a description of the length of the tear.

Q. Let's go back to November 14, 2001 at 5:20 p.m. called CNA to check resident on the floor, check resident on the floor. When checked, found resident laying on the floor on a supine position in her room near the bed. So, again, the supine position that is on her back, right?

A. That's correct.

Q. And in the continuation of this note at 5:20 p.m. it says: Noted skin laceration 2.5 centimeters in size over the left eyebrow with a small amount of bleeding and skin tear one-half centimeter on right forearm.

Now, it says about a bed alarm. Do you remember seeing

that the bed alarm actually went out. There's no description, is there, to how the bed alarm operated?

A. Correct.

Q. I want you to assume there was no incident reports so nobody investigated to get any reports from anyone.

Now, this seems like a fairly uneventful incident. She has a small skin tear. Do you have an opinion as to whether or not that Mrs. Tannen suffered any pain as a result of this incident?

A. Yes, I do.

Q. And what's your opinion?

A. That she did. I wouldn't minimize this. This is tears in the skin, on the head and on the arm at the same time as a fall. This is painful. It's not something to be dismissed.

Q. And then going on to 11/21, November 21st for which there is also no incident report and it says: Noted small skin tear, left elbow area and then it was cleansed by nursing. And that the resident remains in bed with ecchymosis to both arms.

Now, can you explain to the jury what ecchymosis is? I think you went into it the other day but how is ecchymosis different from a hematoma, how about that?

A. Okay. They are both caused by bleeding. You shouldn't be bleeding under the skin. The ecchymosis would be flat. It's a black and blue mark so the blood is going to move out under the skin creating a discoloration but the hematoma actually begins to

collect and makes a bump.

Q. A raise?

A. A little pocket of blood.

Q. So the only difference between the two is that in the hematoma it's like a raise, what we would characterize as lay people, as a bruise whereas the other is a black and blue mark with no swelling?

A. Yes. It's just which way the blood decides to flow. Sometimes it actually can move out and sometimes it can't. It will collect in an area.

Q. Okay. I want you to see right here where it says: skin is fragile and easily gets bruised. Okay. If you have a patient, such as Mrs. Tannen who is elderly and has fragile skin, easily gets bruised, what recommendations do you make, if any, as a doctor for a change in the care plan?

MS. LOMBARDI: Objection. It's to the form of the question, Judge.

THE COURT: Why don't you just ask him in the context of his experience in the nursing home more general in terms of what would happen to the care plan.

MS. BERNSTEIN: Okay, more general.

Q. Well, let's say generally, not Mrs. Tannen, another patient just like her who would be in a nursing home that you are working in and you're her the attending physician, what recommendations, if any, would you make as the doctor for a

change in her care plan?

MS. LOMBARDI: Objection to the form of the question. Same objection.

THE COURT: Overruled.

A. Her skin, as described here, is more likely to be traumatized to be injured so the care plan has to take into account that sensitivity she has and really what you're doing is you are protecting her from additional injuries to the skin but this still goes under the same heading of preventing accidents and injuries. I would treat any patient whether they showed bruises or not the same way. I don't want people bumping into things, scraping into things.

Q. And when a patient of yours has a care plan for arm-and-arm assistance with ambulation at all times, you want that patient to be having arm-and-arm assistance with ambulation at all times, fair to say?

A. If I have a care plan, a doctor's order that says that I expect that to be carried out.

Q. And, by the way, I want you to -- just getting back for a moment to the pelvic fracture and I know that Mrs. Tannen's left pelvis and left hip were found to have osteoporosis. Have you ever heard of something called a pathologic fracture?

A. Yes.

Q. Please explain to the jury what is a pathologic fracture?

A. It's a description of a bone that will break without there being any trauma, which means there's something structurally wrong with the bone in the spot that breaks aside from just falling down on the ground. Actually, the bone is so poorly put together that it just snaps on its own accord.

Q. And in your opinion, was Mrs. Tannen's pelvic fracture, is there any possibility at all that it was of that kind, pathologic fracture that might have happened without trauma?

A. There's no description anywhere in the chart of this being the case. No one at that time had given such an opinion. There's no evidence to support that diagnosis.

Q. And the skin tears that Mrs. Tannen developed on her arms that you just testified about, I want you to assume again that there was testimony by Nurse Sandor that there were numerous violations of the nursing standard of care, the nursing home rules and regulations and federal and state regulations and that they those violations lead directly to and were a direct cause of the incidents and the injuries that Mrs. Tannen sustained.

Do you have an opinion as to whether or not those skin tears were caused by these incidents that Mrs. Tannen sustained?

A. Yes.

Q. And what is your opinion and please explain the basis for it?

A. The skin tears were secondary to the incident which was caused by the violations. If Mrs. Tannen was getting supervision

that she was supposed to, which the facility knew they were supposed to be doing and actually even wrote what they were doing, they wouldn't be discovering her with bruises of unknown origin to them. They should have really been taking better care of her.

Q. Were the skin tears caused by the departures and were those injuries caused by the departures in your opinion?

A. Yes.

Q. Now, I want to show you notes from November 25th and -- at 3, it looks like 3 p.m. where resident received sleeping in her low bed or 3:30 p.m. that means the beginning of the shift, fair to say? That's when they say patient was received?

A. Yes. It's a hand-off notification.

Q. It's not like Mrs. Tannen went away and came back and they received her back. It's the change of the shifts.

A. That's right.

Q. That's in your lingo, right?

A. Yes.

Q. And that she was in bed with her bed alarm in place and that she was taken out of the bed for dinner in a wheelchair by a CNA Miss Burk and that the CNA reported to nurse that the resident was in pain?

Now, let me ask you, first of all, prior to the time when Mrs. Tannen fractured her pelvis just about exactly a month earlier, was she in a wheelchair for ambulation from her room to

the dining area?

A. No, I don't recall that being the case.

Q. Do you remember seeing any notes about a wheelchair being ordered or a change in Mrs. Tannen's status on her care plan that she now needed to be in a wheelchair because of being treated for her pelvic fracture?

A. I don't recall seeing documentation of that.

Q. When somebody has a pelvic fracture, especially an elderly person with an unsteady gait who is noted to be at the risk for falling before she had the pelvic fracture, is a resident like that to be treated with not only pain medication but also wheelchair ambulation for -- until the pelvic fracture heals?

A. You have to be very careful about allowing them to bear weight on the area of the fracture.

Q. And, in fact, bearing weight, as you said before, at the very least would be painful, if not, dangerous, right?

A. Of course, it would be painful but it also may cause a shift in the bone while it's trying to heal itself.

Q. Okay. So Mrs. Tannen a month later is still in a wheelchair and by CNA Mrs. Burk and then was reported to be in pain and she was complaining of pain in her right leg. As you know, there was no incident reports at all for this incident, so I want you to --

MS. LOMBARDI: Objection. It's not an incident.

She is complaining of pain. You're assuming there was an incident. There was no incident. This is 11/25. We're talking about --

MR. KELLY: Judge, could we approach please?

THE COURT: Yes.

(Discussion off the record.)

THE COURT: It's just about time for a break unless you want to sneeze again. All right. We'll take a ten-minute break. Please don't discuss the case.

COURT OFFICER: All rise. Jury exiting.

(Jury exits courtroom.)

THE COURT: You can step down.

THE WITNESS: Thank you.

(A recess was taken.)

MS. BERNSTEIN: I was engaging in taking testimony from the witness. That's the reason why my co-counsel got up to object. But I really have to say that throughout the trial, and it's been getting worse rather than better, defense counsel has been jumping up. She's been making improper speaking objections. She's been calling out asking for dates and page numbers when she already knew what they were. She has been -- and just now she was testifying and it just couldn't be more inappropriate and --

THE COURT: I'll just say that to the extent she's making objections -- and the last thing she did was an

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objection, it did include more than enough information for an objection -- to the extent she makes objections, I'm not going to -- both sides make objections; both sides are making a lot of objections in this case. I'm not even going to comment on that but both sides are doing what they have do. But I will ask both sides to limit their objections to the word "objection". And if I ask for the reason, you can then give me the reason. And if I don't ask -- for the most part, I think I've been ruling relatively quickly, it's keeping me a wake if nothing on a number of objections, so I will just -- if you wanted to object, I probably would have asked you on the last one what the reason was and then if you want to say it because counsel referred to it is as an incident --

MS. LOMBARDI: Incident.

THE COURT: However, but I'll ask you that you might have to come up here to say what the reason for the objection is so the jury doesn't hear it but I will ask that you don't just blurt out and voluntarily start stating there is no incident report because there's no incident because. That's factual testimony the jury will decide whether that November 25th constituted an incident or not. So I have to remember to rule on your objections before we finish --

MS. BERNSTEIN: And, Your Honor --

THE COURT: -- which I will do now. The objection is overruled. You'll get a chance to cross examine him as to

whether what makes him think there was even an incident on that day when someone says reported hip pain. But to the extent that it's been characterized previously in this case as an incident, maybe it didn't necessitate an incident report. That's all questions in this trial and you'll get a chance to cross him on that. I'm not going to preclude anybody from objecting. I'll ask you from now on, both sides, just object. If I want a reason and if I ask you for a reason in front of the jury, just to do a typical hearsay or something that's right out of the TV show. If it involves more than when you start going into detail of what things say or your opinion, then just say can we approach? I understand there's a reasonable chance I'll say no any way but just ask if you can approach. And with that, the other part about asking for the dates, I can understand.

MS. LOMBARDI: I'm sorry, Judge. She went from one and then the next.

THE COURT: It does get annoying if you get interrupted constantly about what date, what page, et cetera and you're right. At the same time, I don't have any reason to think that Ms. Lombardi is having any intentional strategy other than she's having difficulty hearing.

MS. BERNSTEIN: Could Ms. Lombardi ask Mr. Kelly, who is sitting right next to her?

THE COURT: That's a great idea. If you are not

sure, just lean over and ask co-counsel what dates she's talking about.

MS. LOMBARDI: Okay.

MS. BERNSTEIN: Thank you, your Honor.

(A recess was taken.)

COURT OFFICER: All rise, jury entering.

(Jury enters courtroom; the following occurred:)

THE COURT: Have a seat.

Go ahead.

Q. I just want to refer back to the medical progress notes now and I just want to refer your attention, and I'm going to try to move more quickly, that on November 10th, going back a couple of days, November 10, 2001 that the MD on call was called to examine Mrs. Tannen for status post fall found on the floor and that she complained of pain in her left hip. And that was after her fracture of the left superior ramus of the cubital bone.

Do you have an opinion as to what effect this fall of November at the present time, 2001 that did not result in an incident report or investigation, do you have an opinion as to what effect that may have had on Mrs. Tannen, what effect did that, if any, have on Mrs. Tannen her state of health and wellbeing?

A. Well, it certainly is causing her pain so this is going to be similar to what I said before. One is the disruption of her daily routine she was trying to keep as constant and

predictable as possible. Number two, there's also pain which is a detrimental affect.

THE COURT: Doctor, can I just ask, number one, you keep your voice up and I know you're trying to speak directly to the jury. You're sort of focusing on this, just speak out, keep your voice up so everybody can hear you.

THE WITNESS: Okay.

THE COURT: I think some of the jurors at the end are having trouble and counsel for the defendant may have. Just speak out to the room and keep your voice up.

Go ahead.

MS. BERNSTEIN: Thank you, your Honor.

Q. And the pain that Mrs. Tannen was reporting in that incident, do you have an opinion as to whether or not that was caused by the various departures testified to by Jeanette Sandor during her testimony?

A. Yes, I do.

Q. What is your opinion?

A. That the pain was related to the departures that you just spoke of.

Q. Now, and, again, these are the medical notes. So on October 29, 2001, it says patient seen and examined after patient was reported to have a huge bleeding scab or scabs on her forearms by the family. And there's a plan to conduct x-rays of both arms to rule out fractures of the left and right arms,

right?

A. Yes.

Q. Can you read that? Okay?

A. Yes, I can.

Q. And then going back to two days earlier October 27, 2001 and it says asked to evaluate -- I'm sorry -- I'll just move on. I was just a few minutes ago asking you about an incident on 11/25, November 25th of 2001 where the on-call MD was called because the patient was complaining of pain in her right leg. And this was the one we spoke about the other day where he conducted an examination and the patient was screaming out in pain.

And I want you to further assume that there was no incident report for this incident and so there were no -- there was no investigation done and no one stated, ever stated that they saw Mrs. Tannen fall. They saw some trauma occur to her that she was ever picked up, nothing except that the patient is complaining of pain.

Is it your opinion then in that case that because nobody --

MS. LOMBARDI: Objection to the form.

MS. BERNSTEIN: I'll rephrase.

THE COURT: Sustained.

Q. Do you have an opinion as to what caused this incident? Can you form an opinion if nobody reported how she -- nobody gave

a statement about where she was last seen, what position she was found in, whether she fell or was picked up or anything of that nature?

MS. LOMBARDI: Objection to -- sorry, objection.

THE COURT: Do you have an opinion or can you form an opinion if there's no incident report, no report at all concerning any of those as to what happens?

THE WITNESS: Yes.

Q. And how is it that you can do so?

A. Similar to what we spoke about before. You take a look at the context which is the patient's risk of fall. You take a look at the injury and the most likely explanation is that the patient fell and broke her right hip.

Q. All right. Now, let me show you an x-ray report -- and by the way, they sent -- they wanted to do an x-ray immediately of Mrs. Tannen that night and they had to send her out to the hospital to take the x-ray, right?

A. Yes.

Q. And it says rule out right hip femur fracture and now here's an x-ray report. This is after the hip replacement that was taken on the premises of the Hebrew Home and now here I want you to show that it says the impression of osteoporosis. Good alignment. So we have a situation where Mrs. Tannen was noted to have no osteoporosis in her right hip?

MS. LOMBARDI: Left hip.

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Q. In left hip one month early when she broke her pelvis. Now a month later in her right hip, she was noted to have osteoporosis and was sent to undergo surgery. Can you explain that seeming discrepancy?

MS. LOMBARDI: Objection to the form of the question.

THE COURT: Can you explain that question mark? Everything after was stricken.

MS. BERNSTEIN: Okay, thanks, Judge.

A. I can explain the difference. The x-ray is not the best way to determine whether someone has osteoporosis or not. So one of the explanations can just be how the x-ray was taken, how it was read. This is really not -- as I said, the optimal way to determine whether there's osteoporosis one side or the other. The best way if you're going to use the x-ray is to take pictures of the hips and put them side by side but I don't think that was done.

Q. Did we do this the other day?

THE COURT: We have already gone through the hip.

Q. Okay. Now, Mrs. Tannen actually went to Mt. Sinai Medical Center for a hip replacement and there is a three-page operative report by a Doctor Lichtblau. Can you explain to the -- first of all, is a fractured hip painful?

A. Yes.

Q. Can you describe how it compares, say, to a fractured

pelvis or any other way you would have of explaining to someone who's never had one?

THE COURT: In terms of the pain?

MS. BERNSTEIN: Yes.

A. It would be hard to tell somebody's pain they're going to have. I'm going to say it's going to be painful. You're not going to like this but I don't think I can say this. One is a better one to have than the other one.

Q. Fair enough. Everybody is different. Let me ask you this. For a dementia patient who has been having a number by this time, a number of falls and traumas and incidents of injury in a four-month period at this point, July 30th when she came in until now 11/25, can you explain or, first of all, do you have an opinion as to what effect this pain from this hip fracture had on Mrs. Tannen?

MS. LOMBARDI: Objection from his last answer.

THE COURT: Overruled.

A. Yes, I do.

Q. And please explain to the jury your opinion and the basis for it?

A. The same thing that we spoke about before. It's pain which Mrs. Tannen is going to have difficulty understanding but she'll have no difficulty feeling it and it's now on top of the previous injuries, so it has an added effect plus this actually affects her ability to walk, to stand. This is going to -- it's

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another setback. Now, you add on to this she requires a surgical intervention. She's going to be going to the operating room.

Q. And can you, using this diagram, can you explain to the jury and perhaps referring to Doctor Lichtblau's operative report, can you explain to the jury what surgery was performed on Mrs. Tannen as a result of, you know --

A. The operative report is going to go for several pages. they do step-by-step anesthetizing and then cleaning the area and then cutting it open, peeling away. There's a lot of muscles that holds everything into place. Things have to be peeled away and then the bone has to be fixed and in this case they actually have to replace it with another piece which is not normally from a human being. They are putting in appliances. They are going to go back and close it up again and it's a pretty significant procedure.

Q. Now, would you expect to see in a surgeon's report whether or not a bone was osteoporotic if it was because the surgeon actually goes inside?

A. The surgeon, if they find something unexpected or something which is going to interfere with the surgery or the recovery, is going to make a notation of that. If when they open it up something unexpected is there, they will write about it or something which would interfere with the surgery itself.

In order to fix the bone, the bone has to have a certain amount of strength. They're going to be putting things in.

There's nails and things that have to be held in order to drill it in. The surgeon certainly will tell you if the bone is weak or this holds or it's spongy or something. It will be written about.

Q. And, in fact, the pathologic fracture, if a fracture was considered pathologic, where it just could have been spontaneous without trauma, would that show up in an x-ray report?

A. Yes, there will be evidence of that.

Q. If somebody had such brittle bones that they were so weak that they could break just by walking, would a hip like that in that condition be amenable or be able to sustain the insertion of an appliance and a hip replacement surgery?

A. It would have been difficult to have done the procedure which they did on Mrs. Tannen.

Q. And why is that?

A. Because it's not going to -- remember, we're talking about a bone which is so weak, so destroyed that it just snaps on its own. So now you're in there and you're putting in these really strong pieces, these are strong. They are bending and holding and nailing and the bone will not be able to withstand that procedure.

Q. And do you have an opinion as to whether or not the departures testified to by nurse Sandor were a competent producing cause of Mrs. Tannen's hip fracture and the surgery that she had to undergo as a result of it.

A. Yes, I do.

(Continued on the next page ...)

Q And what is your opinion?

A The departures were a cause of the fracture and they required surgery.

Q And -- okay. And required surgery. All right. So let's move on. December 8th, 2001.

(Whereupon, an exhibit was displayed to the jury.)

Q Again, Ms. Tannen was observed on the floor on her left side, and it says she apparently attempted to get out of the wheelchair unassisted, and I want you to assume that there was, in fact, testimony that Ms. Tannen's care plan was changed as a result of this incident.

Now, in this case, you see that the box for whether or not the doctor was notified is left blank?

A Yes.

Q That's at the top. And do you feel that this incident required, or should have required a doctor to examine Ms. Tannen?

A Yes.

Q And what is the reason for your opinion?

A One, the doctor should be informed of a incident where somebody falls, because once again, the doctor brings something to this that is necessary. If there is a cardiac, a heart problem, a blood problem, a medication -- but also, this is now within the time period of recent surgery, so the doctor

also should be involved with that to make sure that nothing has been disrupted as part of the surgical repair, and also to make sure that nothing which was done since the surgery has affected her to make her fall, a medication that may be given after the surgery.

Q So in fact, the fact that she had just -- she was recovering from hip surgery -- made it more so that a doctor should have been involved?

MS. LOMBARDI: Objection, your Honor.

MS. BERNSTEIN: I'll withdraw it.

THE COURT: Sustained.

MS. BERNSTEIN: I'll withdraw it.

Q Okay. January 7th, 2002, "Undersigned called," I can't quite read the signature, but, "Undersigned called secondary to --" when it says two degrees, that means secondary to?

A Yes.

Q Okay. More nurse lingo?

A That's the abbreviation.

Q "Resident fell, found resident sitting on the floor with the CNA standing next to her. Assessed her injury," and then what's PROM? That doesn't mean they went to the prom; does it?

A We actually spoke about this the other day. That's passive range of motion, where you move the person's limbs.

Q All right. If you -- it says that she was assessed for injury, but the doctor wasn't called, and do you have an opinion as to whether or not you would expect, in an incident like that, for the doctor to be called?

A Yes, I do.

Q And why is that?

A It's the same thing. The doctor has to know what's going on with the patient, and doctor will then make the determination based on the report they receive from the nurses whether the doctor needs to examine the patient, whether the doctor needs to order another test, but if you don't tell the doctor, the doctor cannot participate in this.

Q And here it says a small skin abrasion on the right forearm. Now, you know, would it be necessary for a doctor to actually be called in for what's called here a small abrasion on the right forearm?

A Well, they don't have to be called in, but they should know that their patient has been injured.

Q And in this case the doctor was not notified?

A The doctor was not notified.

Q Okay. Okay. So that was January 7, 2002, and now March 5th, 2002 and in this one -- it says that the resident was found sitting on the floor in Room 162 bathroom, the resident again apparently got up from the bed and went to the toilet and sustained a bump on the back of the head on the left

side, and at this time Dr. Makajani was called. When you see the note -- and by the way, as part of your duties, you read these incident reports when they refer to your patients?

A Yes.

Q Always?

A If they tell me there's an incident -- I don't think they are hiding it. If there's an incident I say, "Where is the incident report?" We need to see it. Sometimes I actually need to sign it.

Q Under what circumstances would you need to sign it?

A I would need to sign it if I'm the doctor directly delivering care to the patient.

Q Okay. You mean as part of the incident report?

A Yes.

Q Now, what conclusion do you draw --

MS. LOMBARDI: Objection.

Q -- as somebody --

MS. LOMBARDI: Can we approach, please?

(Whereupon, an off-the-record discussion took place at the bench between the Court and Counsel.)

THE COURT: Overruled.

MS. BERNSTEIN: Thank you, your Honor.

Q What conclusion do you draw, if any, as to the fact that this is worded this way that the resident apparently got up from bed and went to the toilet?

A Well, this was another incident of her undertaking an activity she should not have done unsupervised.

Q And is there any note there of the bed alarm going off?

A There's no documentation of that.

Q And this bump on the back of Ms. Tannen's head, what effect if any did this have on Ms. Tannen's condition at that time in the Hebrew Home?

A Here it happens again. I mean, she just got hit on the head a second time and it's not supposed to happen, and it's going to contribute to her suffering. It's just terrible that it just keeps happening and happening.

Q Um, have you ever been aware of any situation such as this happening in any nursing home where you have worked?

MS. LOMBARDI: Objection, your Honor.

THE COURT: This situation? Sustained.

Q Meaning somebody falling this many times and sustaining these injuries, or severity of injuries?

MS. LOMBARDI: Objection.

THE COURT: Sustained.

MS. BERNSTEIN: That's all right. I'll move on.

Q Do you feel or do you have an opinion as to whether or not the doctors at the Hebrew Home responsible for Ms. Tannen's care should have become involved at all in the care plan process at this point?

A Well, the doctor should always be involved, but we are still talking about basic nursing care monitoring, supervision, assistance, anticipation. That really is the backbone of the care plan.

Q Okay. Let's move on to June 19th, 2002, and in this incident that did result in a report, Ms. Tannen is found -- oh. I'm sorry. Let me just ask one last question about the March 5th, 2002 incident. Do you have an opinion as to whether or not the departures, the multiple departures testified to by Nurse Sandor were a competent producing cause of the incident of March 5th, 2002, or rather the injury that Ms. Tannen sustained on March 5th, 2002?

A Yes, I have an opinion.

Q And what is your opinion?

A The departures were the cause of the injuries.

(Whereupon, an exhibit was displayed to the jury.)

Q All right. June 19th, 2002 at 5:50 p.m., "Resident found on the floor sitting in between two beds of Room 167 with her head resting on the wall. Moderate bleeding from the occipital area on exam --" and by the way, the occipital, that's the same area we were talking about?

A The back of the head.

Q "On exam, an X-shaped superficial laceration noted on the left occipital posterior area."

Can you explain to the jury what is a superficial laceration?

A A supervision laceration is exactly that is. It's on the surface. It's not going any deeper into muscle or bone.

Q Can you tell how deep into the skin it is when they say superficial?

A Well, it doesn't give you an exact number, but it's just on the surface.

Q And do you have an opinion as to what caused that X-shaped so-called superficial laceration as far as was it a blunt trauma, a more direct trauma, an instrumentality?

A Well, I have an opinion.

MS. LOMBARDI: Objection.

THE COURT: Overruled.

Q And what is your opinion?

A That there was trauma to that part of the head.

Q And can you explain to the jury, I mean, if somebody has a blunt trauma, like if their head goes against a floor or if it goes against a wall -- in this case, Ms. Tannen's head was resting on the wall, how can a blunt trauma cause a cut into the skin?

A Well, you would have to actually take a look at the scene, you know, and somehow the bed must have been involved. I think she's found between two beds, so more likely than not as she's hitting, there might have been something sticking out

of the bed or the wall, which kind of caught on her head as, you know, she was sliding down.

Q And what about when she was found on the middle of the hallway, blunt trauma on the back of her head, the one in 2001 where there was a small cut, but a hematoma?

A Sometimes there may be a little piece of sharpness that cuts, and sometimes you can just hit so hard that the skin will pop open.

MS. LOMBARDI: Objection. Move to strike the last portion.

THE COURT: Denied.

MS. BERNSTEIN: Thank you.

Q And do you have an opinion as to whether or not the departures testified to by Nurse Sandor were a competent producing cause of Ms. Tannen sustaining this injury on 6/19/2002?

A Yes, I do.

Q And what is your opinion?

A The departures caused the injury.

Q And how is it that this jury was caused by this fall?

A She's bleeding from the head, so it's a fall. It's the same as the other two head traumas: Fall, hit something hard, and there's an injury.

(Whereupon, an exhibit was displayed to the jury.)

Q All right. Now, on July 25th, 2002, "Resident was found on the floor kneeling by her bed side by the CNA. Assigned resident at time refused to get up, claims, "I can't get up." Assisted by two and transferred back to bed. Slight ecchymosis noted to both knees and elbows."

Do you have an opinion as to whether or not the departures testified to by Nurse Sandor were a competent producing cause of these ecchymoses noted to both of her knees and her elbows?

A Yes, I do.

Q And what is your opinion?

A The departures were a cause of these injuries.

Q And again, you know, here it says slight ecchymosis noted, so what effect, if any, did these so-called slight injuries have?

MS. LOMBARDI: Objection.

THE COURT: Sustained as to so-called.

MS. BERNSTEIN: I will rephrase, your Honor.

I'll withdraw that word.

Q Do you have an opinion as to what effect, if any, these slight injuries or slight ecchymoses on both of Ms. Tannen's knees and both of her elbows had on her condition?

A Yes.

Q And what is your opinion, and please explain the basis for it?

A It's the same pattern. Once again, she's finding herself on the floor and she shouldn't be, and once again the impact of having her body hit a surface has lead to bleeding, so you have the pain and you also have the loss of control over the environment.

Q Now, I want to call your attention, also on that incident report it says, "Unable to explain secondary to impaired memory cognitive impairment." Is this something that you often see with dementia parties on the incident reports, where the resident cannot contribute to the information or the investigation into how the accident occurred?

A I have seen it with patients who have cognitive impairment, yes.

Q Now, earlier, in the earlier incidents Ms. Tannen was able to state, in certain of them, "I fell, they picked me up, I fell," and do you have any opinion as to what it means that she was unable to explain how this incident happened?

A Yes. Sometimes there's variability in an individual's ability to report. She may have better days than others, so she may have gotten confused after falling down and was not able to actually describe it.

Q Okay. Now, I want to move on, then, to October 14th, 2002.

(Whereupon, an exhibit was displayed to the jury.)

Q By the way, I want you to assume that there was testimony that Ms. Tannen's room number was 160, so when she's found in rooms 162, 175, 172, it's a room, not her room, and in this one, "Found on the floor in Room 175 face down, sustained a laceration of the left forehead, complains of pain in the left elbow, swelling noted." First, let me ask you if you have an opinion as to whether or not it was appropriate to call a doctor in on this incident?

A Yes, it was appropriate.

Q Now, on this one there is, in fact, a statement from Ms. Tannen that says, "I tripped and I fell down. I saw bars on the floor. I fell down." What does that tell you as a doctor engaging in an investigation of how this incident occurred? What does that tell you about the patient's credibility, or about what may have actually happened?

A Well, her report matches her injuries, the part about the bars does show you that at times she has difficulty interpreting what she sees. I don't know what the bars actually are, but I certainly believe that she tripped and fell down.

Q Okay. And she was -- would the bars, or thinking that she saw bars on the floor be consistent with somebody who had, you know, hallucinations or saw visualizations or something of that nature?

A Well, this is consistent with what's been described

with her before, that she's seeing, either seeing things that aren't there or seeing something and not understanding what it is.

Q Okay. And I want to just show you two of the statements -- I'll just move on from that.

Did you notice in the records that Ms. Tannen sustained or was diagnosed shortly thereafter with an injured -- in fact, a fractured left elbow?

A Yes.

Q And I want you to assume that nobody reported seeing Ms. Tannen fall, that there was a report that she was taken to the dining room and then the next report was somebody went back to -- the one CNA left the dining room, another CNA came to the dining room five minutes later and Ms. Tannen wasn't there. What would be your opinion as to whether or not this incident and the injuries that happened as a result of it, if they happened as a result of a fall or something else, or spontaneously? Do you have an opinion?

MS. LOMBARDI: Objection.

THE COURT: Overruled.

A Yes, I have an opinion.

Q And what is your opinion? What is the basis for it?

A Most likely the fracture of the bone in the left elbow was secondary to a fall, and the basis is the same that we have seen discussed before. It is somebody who was known to

be at risk of falling who needs supervision. She was not supervised at that period of time. She's found with an injury. The most likely explanation is she falls, hits her elbow, the bone breaks.

Q Okay. Now, this was reported at 10:30 a.m. on October 14th, and an orthopedic consultation was called for on October 15th, the next day. Would you -- you know, is that a departure to not call in a radiological consultation until the next day?

MS. LOMBARDI: Objection to the form.

THE COURT: Overruled.

A It would be a departure if they were not protecting the elbow and providing pain relief while waiting for the consultation.

Q And, in fact, were there any pain assessment records or pain management records, other than the various prescriptions for Tylenol?

A I don't recall seeing that.

(Whereupon, an exhibit was displayed to the jury.)

Q Now, Dr. Lichtblau, who was the surgeon who performed Ms. Tannen's hip surgery, Dr. Lichtblau came to a conclusion that the patient fell and injured her left elbow, and then her x-ray showed a fractured -- what is a word?

A Olecranon.

Q Olecranon, because you know I can't get the pronunciation right, and I would like to ask you if you would look at this x-ray which is in evidence, and was taken at the Mount Sinai Hospital where Dr. Lichtblau was on staff, and ask you if you can visualize the fractured olecranon in this x-ray.

(Whereupon, an exhibit was displayed to the jury.)

A I can see it from here, yes.

Q And is it this bone that's the bulb of the bone that's jagged and separated from the rest of the bone?

A You see how it look -- it's, like, open, like an open mouth. That piece should actually be together. That's the bone, you can feel that one, also, here, (indicating), and it's not only broken, but it's split apart.

Q And do you have an opinion as to whether or not, or what kind of force of impact was required to cause the bone to break in that fashion?

A That's a tough area of the body, the elbow, so it would have been a pretty strong force.

Q And is this -- is it your opinion that this is a painful injury?

A Yes.

Q Is this what's called a displaced fracture, by the way?

A Right. The displaced fracture is when the pieces

are not together. You can almost, in your mind, put them together and see how it matches up nicely, but it's spread apart.

Q And after Ms. Tannen was diagnosed with this fracture, a day later, she underwent surgery. Again, she was taken out to Mount Sinai Hospital and underwent surgery for the fracture, again by Dr. Lichtblau; right?

A Correct.

(Whereupon, an exhibit was displayed to the jury.)

Q Can you explain what they would do, or what Dr. Lichtblau did, just generally, in order to repair this fracture? Like what kind of -- you know, what kind of surgical tools does he have to use, what kind of hardware, if any?

A Well, the long version would take you through every one of those lines. I mean, you can see on the procedure that, you know, they are putting on tourniquets, they are prepping and draping, but the short answer is just -- well, there's the long answer, so you can see what's happening there. They are drilling, if you get that. They drilled holes, holes are being drilled, wires are being put in, fragments are being -- they are trying to put the pieces back in. You know, they are squirting water into it, irrigation, and then they have to, you know, close it all up again.

It's actually -- the short answer is she had open

reduction internal fixation, which means the only way to get the bones back together is to open the body. A closed reduction, you can try and manipulate it through the skin but here you can't, because it's such a big fracture, so you have to open them up and that requires surgery, then you have to reduce the fracture, put the pieces back together, and then fixate it, so open reduction internal fixation is what it's called, and then sew everything up again.

Q And then would that be a painful surgery, and obviously Ms. Tannen was under anesthesia during the surgery, but after she woke up, would that be a painful surgery?

A Right. There will be -- anesthesia was provided during the procedure itself, but because so many cuts have been made and things have been done, it becomes painful.

Q And is it painful, in fact, when you have to drill through bone?

A Well, she shouldn't feel the drilling itself, but after there will be certain -- a feeling that something has been disrupted, and also this is an area that needs to be moved and you really have to protect it. It will hurt if you move it.

Q It's also an area, this can be bumped or knocked very easily; isn't it?

A Well, it's out there, yeah.

Q And do you have an opinion as to whether or not the

departures testified to by Nurse Sandor were a competent producing cause of Ms. Tannen's fractured olecranon and the surgery that she had to undergo as a result, and all the pain and suffering that were attendant to that injury?

A Yes, I do.

Q And what's that opinion?

A The departures were a cause of the fracture, and the required surgery for the fracture.

Q And do you remember seeing a note, actually, in the record that in the days following the surgery, that one of the wires that were used to repair Ms. Tannen's elbow actually poked out through the skin?

A Yes, I did.

Q And what makes that happen?

A Well, they actually are really wires that they use to tie everything in, and sometimes it can break through the skin.

Q And is that painful when a wire sticks out through the skin?

A Yes.

Q And in fact they had to remove that?

A They had to correct that, yes.

Q And are there any pain assessment records or pain management records telling you, a doctor reviewing the chart, as to how effective were the pain killers that they were giving

Ms. Tannen?

A I don't recall seeing any when I reviewed the charts.

(Whereupon, an exhibit was displayed to the jury.)

Q Okay. And finally on October 19th, which is two days after Ms. Tannen got back from Mount Sinai on the 17th, and there's an incident report saying that during care, CNA noted pink and discoloration on the right forearm, swelling also noted on the fingers of the right hand, do you recall looking at this incident report?

A Yes, I do.

Q Okay. And do you recall that x-rays were taken of Ms. Tannen's wrist --

A Yes.

Q -- or right forearm as a result of that incident?

A Yes.

(Whereupon, there was a pause in the proceedings.)

Q Do you recall seeing an extra report that found a fracture of Ms. Tannen's wrist?

MS. LOMBARDI: Wrist?

(Whereupon, there was a pause in the proceedings.)

A Yes.

Q Okay. And do you recall anything about the report of the fracture, about what it said about the timing of the fracture, or when it happened?

A I think specifically the fracture was what they call the right ulnar area, so there's two bones that you can also feel through your skin, and the ulna is a smaller one. It's on the outside of the arm, and there was a question as to the age of the fracture.

(Whereupon, an exhibit was displayed to the jury.)

Q Here we go. This may not be the most --

A -- detailed.

Q -- detailed, but can you show the jury, or give the jury an idea of which bone it was, and --

A Yeah. I mean, without walking up, I can -- I think you can see the part that looks like a hand, and under that are two bones, and the narrower one is the ulna bone. The bigger one is the radius, so it's the little, the skinnier one is the one that broke.

Q Now, do you have an opinion as to whether or not this fracture of the ulnar styloid occurred as a result of departures by the nurses at the Hebrew Home that were testified to by Nurse Sandor?

A Yes.

Q And what is your opinion?

A More likely than not, the fracture was a result of the departures.

Q And when you say more likely than not, why do you put it that way?

A Well, that is the standard that we are using when we said earlier, to a reasonable degree of medical certainty, which is greater than fifty percent.

(Whereupon, an exhibit was displayed to the jury.)

Q And I just wanted to show you the final discharge summary for Ms. Tannen that shows that she was admitted on July 30th, 2001, and her diagnoses on original admission were -- there were six of them, and Alzheimer's disease is the first; fair to say?

A Yes.

Q And do you see Lewy body disease up there at all?

A I do not.

Q And what significance does that have for you, if any?

A Well, you have to compare the top list and the bottom list. The top list is the diagnosis she had entering. The final diagnosis is after they have done all their evaluations, they have been with her for a while. This is what they believe to be the case, so the top one is the diagnosis they are handed. The final diagnosis is now, after they have

done their work with the patient?

Q Okay. Does Lewy body disease appear anywhere under the list of final diagnoses?

A It does not.

Q Okay.

MS. BERNSTEIN: Your Honor, may I just have a moment, or maybe we can brake now and I can just leave it open until after lunch so I can check my notes.

THE COURT: Okay. We'll brake now for lunch. It's a little after one. We'll resume back here at 2:15. I believe Counsel, if not done, is getting close to done.

MS. BERNSTEIN: I'm probably there, but I just want to make sure.

THE COURT: Okay. So we'll spend most of the day, afternoon, with cross examination, and then any follow up counsel thinks of during lunch.

Enjoy your lunch. Please don't discuss the case.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury was excused from the courtroom.) Now.

(Whereupon, a recess was taken.)

(Continued on the next page.)

A F T E R N O O N S E S S I O N

THE COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Welcome back. Everyone can have a seat. Okay.

Counsel reviewed her notes and is finished with direct examination, and we are now going to have cross examination.

CROSS-EXAMINATION

BY MS. LOMBARDI:

Q. Dr. Starer.

A. That's correct.

Q. I think you mentioned when Miss Bernstein had talked about your qualifications, that you said that, you said you were an assistant professor at Elmhurst?

A. At Mt. Sinai School of Medicine.

Q. And what that means, sir, that's not a professor of medicine at the medical school, right? You don't teach in the medical school, do you?

A. No, absolutely I teach in the medical school.

Q. You teach in the medical school. And you are affiliated with Elmhurst Hospital in Queens. Is that correct?

A. That's correct.

Q. That is a city hospital, correct?

A. That is a public hospital, Health and Hospitals

Corporation, yes.

Q. And the last time you worked in a nursing home was 11 years ago. Is that true?

A. 1999.

Q. 1999. And do you recall being asked by Miss Bernstein when you did work in a nursing home what your typical day was like?

A. I recall that question, yes.

Q. And I think you answered that, that a good part of the interaction that you receive is verbal with patients, with other doctors and nurses. Do you remember that?

MS. BERNSTEIN: Objection to mischaracterization of testimony.

MS. LOMBARDI: I will read it.

Q. Page 677, line two: "What was a typical day like as an attending physician in nursing homes?"

By the way, it was only one nursing home you worked at, right?

A. I had worked -- well, medical director of the nursing home at Elmhurst Hospital Center and then the Jewish Home and Hospital in Manhattan, the Jewish Home and Hospital in the Bronx.

Q. "What was the typical day like?"

Your answer:

"Answer: There was no -- I wouldn't say it was a typical day but...

"Question: What were your duties?

"Answer: Well, the predictable part of it is you would show up and find out what had happened from the previous day. That's how it works in medicine, being that there's always going to have to be someone in charge. You come in in the morning and you see what happened to our patients overnight and then, based on that, we would implement some treatment plan, change something, but you want to know the condition of the people since you were last there the day before, and then during the course of the day there will be conferences and rounds, you know, lectures that you may attend, teaching, and then you will see the patients or be apprized of their condition before you would leave for the day and make sure they are in good condition and then go home, and go back the next day and start again."

Was that your answer?

A. That sounds right, yes.

Q. And so I take a lot of what you just described, the interaction and knowing about the patients, would be verbal, true?

A. There is a verbal component, yes, that's correct.

Q. Not just a verbal component, a lot of it was verbal, as you described it.

A. I didn't give an actual percentage but, yes, there's a good amount of verbal.

Q. And that's what physicians do when they come on shift, the new shift, they speak with the other physicians that they have taken over the shift, and they get a history of the patients and how they presented that day, true?

A. True.

Q. And you might get information from the nurses; how the patients presented that day, true?

A. True.

Q. And nurses do the same thing, true?

A. True.

Q. Each shift would tell each other how the patient was doing on that shift?

A. Absolutely.

Q. So not everything is written in a record, true? It's verbalized?

A. Well, some of what is verbalized is also written in a record.

Q. And some of it isn't, true?

A. Maybe some things don't need to be written in a record, that's correct.

Q. Now, Doctor, what exactly did Miss Bernstein send you to review before coming in to this court in court to testify?

A. I believe it's all contained in these records here. I made some notes. I have the records. I received the records in the Nursing Home for the Aged at Riverdale, Palisade Nursing Hold

and that encompassed the time period from July 30, 2001 to January 6, 2003.

I also received records from Montefiore Medical Center pertaining to an admission of Edith Tannen's material from the Mount Sinai Medical Center admissions, some material from Castle Senior Living at 80th Street, and I don't have it listed, but I believe there was also some physicians' records as well.

And then there was a collection of incident reports which seem to be separate from the records.

Q. Did you get -- how much of the Castle Hill Senior Living did you get?

A. Well, I put down the dates. The admission time was January 6, 2003, and I know I had some material going up to 2005.

Q. Since you reviewed the Castle Hill --

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Let her finish the question. Go ahead.

Q. I am going to ask some questions about that.

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Why don't you come up here.

(Whereupon, a sidebar conference was held off the record.)

THE COURT: Go ahead.

Q. Since you reviewed the Castle Hill records --

MS. BERNSTEIN: Your Honor, over my objection, and

I maintain an exception, please. Thank you.

Q. You know that the diagnosis of Lewy body disease was made at Castle Hill as well, don't you?

A. I actually don't recall seeing that.

Q. Okay. I will show you to refresh your memory.

MS. BERNSTEIN: Objection, your Honor. It's not in evidence. It can't be shown to the expert.

Q. I can show him that to refresh his memory.

MS. BERNSTEIN: He can't testify to something that isn't in evidence.

THE COURT: He said he doesn't recall. She is going to show it to him and I will let her ask if he now recalls.

Doctor, just look at it. Don't read it out loud. Read to yourself.

THE WITNESS: Yes.

Q. I can direct your attention, Doctor, so I could show you what I am referring to.

A. I've looked at it.

Q. May I have it back?

A. Yes, you may.

Q. Thank you. Now, does this refresh your recollection, that additional pertinent information that was -- excuse me -- that a diagnosis at Castle Senior Living, the assisted living facility where Mrs. Tannen went after she left the Hebrew Home,

had the diagnosis of senile dementia with agitation, question mark, Alzheimer's versus Lewy body?

MS. BERNSTEIN: Objection.

Q. Does that refresh your recollection?

THE COURT: Overruled.

A. Yes, it does.

Q. And so yesterday, when we looked at Dr. Abrams' psychiatric evaluation form --

THE COURT: This is amazing. The whole jury has become efficient in technology. Okay.

Q. Do you see up there, Doctor, this is Dr. Abrams' psychiatric evaluation that he gave to the Hebrew Home, diagnosis dementia, in parentheses, Lewy body disorder or Alzheimer's variant.

Do you see that?

A. Yes.

Q. That's consistent with what was diagnosed at Castle Living, right? It's consistent, is it not?

A. I just want to be clear. I think that's a transfer form, so I don't know if that was actually -- I had to look at the other side. I think that actually is coming over from Hebrew Home. I don't know if they made the diagnosis at Castle Hill or that actually is a piece of paper sent at the time of admission.

Q. Okay. But you said this morning, if that's the case, you said this morning, that there was no discharge diagnosis at

the Hebrew Home --

MS. BERNSTEIN: Objection, your Honor.

Q. -- of Lewy body versus Alzheimer's?

MS. BERNSTEIN: Objection, your Honor.

Q. It was --

MS. BERNSTEIN: It was a document.

THE COURT: That's not exactly what he said. You looked at the discharge document from the Hebrew Home and pointed out that there was no Lewy body diagnosis either at discharge or at admission. Is that correct?

THE WITNESS: There are two different documents.

One, I believe the first one from this morning, was signed by a physician.

This one, I don't recall seeing if it was signed by a physician.

Q. It says, "Signature of physician." Would you like to see it?

A. Can I? Because I didn't see it.

MS. BERNSTEIN: I'm sorry, your Honor. I just have to register an objection.

THE COURT: You have a continuing objection to this line.

A. It says, "Signature of physician or nurse" and it doesn't have M.D. after the signature.

Q. Doctor, are -- well, let's do it this way: Did you

review the records of Dr. Abrams, the treating psychiatrist for Mrs. Tannen, before she went into the Hebrew Home and after she left?

Did you read those records?

A. Yes.

Q. Then you know that the diagnosis was exactly what he wrote there; Lewy body disease or Alzheimer's variant?

A. I agree it's that or something similar to that.

Q. And there's no question in your mind, based on her symptoms as she presented throughout the Hebrew Home time, that she had a degenerative dementia that could have been either Lewy body or an Alzheimer's variant. True?

A. I have the same question that Dr. Abrams had, that it may be one or the other or a combination.

Q. Right. Okay. And, Doctor, I think when we broke yesterday, whenever it was, you told this jury that Dr. Abrams was -- the diagnosis was -- I forget your exact word -- that it was a confusing or wasn't sure? Do you remember that?

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Is that what you testified?

MS. BERNSTEIN: Counsel is reading from notes, not from the transcript.

MS. LOMBARDI: I will read from the transcript.

Your Honor, I will come back to that. I apologize to the jury.

THE COURT: That's all right.

BY MS. LOMBARDI:

Q. Did you review any records or did Miss Bernstein give you any records that indicate whether Mrs. Tannen fell at home before she came to the Hebrew Home even with 24-hour care, nurses aides?

MS. BERNSTEIN: Objection, your Honor. It refers to --

THE COURT: Why don't we break that up into two questions. Maybe that will make it easier.

Did you review any records, overruled. Regarding Mrs. Tannen fell at home before the Hebrew Home.

A. Yes. I saw records at the Hebrew Home which referenced a fall prior to arriving at the Hebrew Home and my assumption was she was coming from her own home.

THE COURT: Did that record or any other records indicate that that fall or any other fall with one-on-one care at home?

A. I don't recall seeing any documentation of the circumstances of the fall.

THE COURT: Okay.

Q. I'll if I can -- did you get the deposition of Mr. Tannen? Is that something that you reviewed?

A. Yes, I did.

Q. Then reading from the deposition taken of Mr. Tannen on

December 9, 2004 at 10:30 a.m., Mr. Tannen was asked on page 33 on line 18:

"Question: What were the reasons that you made the decision to admit Mrs. Tannen to the Hebrew Home?

By Mr. Tannen:

"Answer: And I felt that at home, despite the fact that I had nurses round the clock, she required full time professional care.

"I was advised by Dr. Friedman, I was advised by Dr. Abrams who implemented that decision and I agreed and took her to the home."

Does that refresh your recollection that Mrs. Tannen had round-the-clock care at home?

MS. BERNSTEIN: Objection, your Honor. There was no testimony or information about the time period. It may have been --

MS. LOMBARDI: Before she went.

THE COURT: Overruled. Does that refresh your recollection as to whether or not she had round-the-clock care at home before she went to the Hebrew Home?

A. At that point there was some round-the-clock care according to that testimony, yes.

Q. And, as Mr. Tannen stated under oath, the reason he decided to, after consultations with physicians, that after he could not manage her at home and she had fallen at home, that he

decided to put her into the home?

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Sustained.

MS. BERNSTEIN: The testimony speaks for itself.

THE COURT: You read -- now, you are asking him to agree with what you just read, that you read it. You read it.

Next question.

Q. By the way, when did you first look at this case?

A. Approximately April of 2010.

Q. And do you know how it was that Miss Bernstein contacted you?

A. I know she contacted me by phone. I'm not sure if that's what you mean.

Q. Yes.

A. Yes, she called me.

Q. Do you know how she knew who you were?

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Do you know how Mrs. Bernstein got to you?

A. I don't know how she found me.

Q. Well, Doctor, isn't it a fact, that you have spent a good deal of time reviewing cases for plaintiffs' lawyers? And I could cite them.

A. Oh, yes. I have done this kind of work before, sure.

Q. This kind of work. Okay. And, am I correct, that, according to an IDEX expert with the information directory?

MS. BERNSTEIN: Objection, your Honor.

Q. You have review --

THE COURT: Sustained. Why don't you ask him the next question. The last question is stricken.

What's your --

MS. BERNSTEIN: Your Honor, I must bring this to the Court's attention on the record.

There is a document that has the word IDEX that your Honor had just stricken on my objection, and Ms. Lombardi is standing next to the jury and holding it up so the jury can see. It is just improper.

THE COURT: Why don't you either move closer this way or go behind the podium and hold the papers down and don't show them to the jury and ask them whatever you want to ask them without referring to any source of information you may.

MS. BERNSTEIN: Thank you, your Honor.

Q. You have been involved in a testimonial history either reviewing a case or coming into court to testify for the plaintiff only in at least 74 cases, true?

THE COURT: True?

A. I don't know the exact number, but that sounds right.

Q. Would that surprise you, that would be fair?

A. That's fair.

Q. And, am I also correct, that you have been involved in cases throughout the United States. True?

A. Not every State, but yes.

Q. One, two, three, four, five six, seven, eight, nine, 10, 11 states, and they are Texas, Pennsylvania, Arizona, New Jersey, New York, Ohio, Arkansas, Florida, Connecticut, Virginia, Maryland?

THE COURT: Is that true?

A. I don't remember the Connecticut case, but it does sound right.

Q. And you're not licensed in any of those states other than New York. True?

A. Only licensed in New York, that is correct.

Q. And you feel competent to comment on the care of a nursing home that is licensed by a State in which you are not licensed?

A. Oh, absolutely. It's a national standard of care.

Q. I'm talking, weren't you asked State regulations in those cases?

A. In most of those cases, if not all, the State regulations echo those of the Federal government.

Q. And you've never treated any patient or resident in any of those states?

A. Not in those states, no.

Q. And am I correct, sir, that -- by the way, you do this in addition to whatever salary you get for your position at Elmhurst Hospital, right?

A. That is correct.

Q. This is extra money, right?

A. That is correct.

Q. Am I correct, that in 2007 at least, you made a minimum of $40,000? Did you ever testify to that, sir?

A. I don't remember the exact number, but that does sound about right.

Q. I will see if I can refresh your recollection. I will get the exact quote.

MS. BERNSTEIN: Can I just, I see counsel is referring, again, to her handwritten notes.

MS. LOMBARDI: No.

MS. BERNSTEIN: I would just like to request, if she's going to refer to prior testimony, that it be the actual testimony.

MS. LOMBARDI: I was just getting it.

THE COURT: I am not sure what she is getting, the exact testimony.

Q. I'm getting the actual testimony in the case in the matter of Patricia Coffee versus --

MS. BERNSTEIN: Objection, your Honor.

Q. I have to read the transcript.

MS. BERNSTEIN: May we approach?

THE COURT: Yes.

(Whereupon, a sidebar conference was held off the record.)

Q. In the matter of Patricia Coffee versus Centers for Long-Term Care, a deposition that was conducted of you, Dr. Starer, on April 28, 2008.

Did you give this testimony, on page 12, beginning at, I'll start at, line eight:

"Question: Do you have an estimate of how many dollars you earned in a given year working as an expert witness?

"Answer: A rough estimate, yes.

"Question: What's your rough estimate?

"Answer: Well, it depends on the --

"Question: 2007.

"Answer: It may have been around $40,000."

Does that refresh your recollection, that at least in 2007 a rough estimate of your earnings were $40,000 from reviewing cases for plaintiffs?

A. That sounds like a rough estimate, yes.

Q. And, am I correct in assuming -- am I correct in presuming, that that income has increased since 2004?

MS. BERNSTEIN: Objection to the form.

THE COURT: Has increased since --

Q. Since 2004?

MS. BERNSTEIN: I thought it was 2008.

THE COURT: You want to know if the 40,000 was an increase over 2004. Overruled.

Was 40 you made in 2007 an increase over what you made in 2004 from your expertise on these matters?

THE WITNESS: I don't remember.

Q. Okay. See if I can refresh your recollection.

In the case of Lawson, James D Lawson and Donna Lawson plaintiffs versus Health Management Associates, a deposition taken of you on April 4, 2005, were you asked these questions and did you give these responses. On page 47, line 21:

"Question: For 2004, how much money did you make from your reviews?

"Answer: I'm going to estimate because it's in the hands of my accountant now. I don't know if it's 15,000 or $20,000. I will -- it will be certain on April 15th."

Did you give that testimony?

A. I don't recall giving that, but it sounds, the number, sounds right.

Q. Now, Doctor, Alzheimer's is a progressive disease, is it not?

A. That is correct.

Q. So is Lewy body, true?

A. Lewy body manifests slightly differently.

Q. That's not what I asked you. My question is, however it manifests, is it a progressive disease process?

A. In order to be clear on this, I would have to explain the trajectory of Lewy body dementia, if I may.

Q. If it answers my question.

A. Yes. Where Alzheimer's has, the Alzheimer's patient has a progressive decline in ability, the Lewy body dementia patient actually has a very interesting phenomenon. They will improve for awhile and decline and improve again.

So I don't want to be misleading by saying it is relentlessly progressively downward. There actually are moments of improvement.

Q. Yes, but, Doctor, at some point, the two become indistinguishable, true, whether somebody has Lewy body or Alzheimer's, right?

A. I don't know if I can say that.

Q. You would disagree with Dr. Robert Abrams, the psychiatrist, whose specialty is dementia?

MS. BERNSTEIN: Objection, your Honor. First of all, Dr. Abrams is a treating doctor and not an expert.

MS. LOMBARDI: Whose expertise is --

THE COURT: Overruled. Overruled. Would you agree with that?

A. I don't know what he said so I don't know how I can agree or disagree.

MS. BERNSTEIN: That's my next objection.

THE COURT: That's sustained. Why don't you use his testimony and then ask him what he thinks about it.

Q. On page 610, on line seven:

"Question: Did you draw any conclusion from that in terms of her condition?

"Answer: It's consistent with a progression of Lewy body dementia.

"Question: Now, Doctor, you had diagnosed presumed Lewy body and you explained that and Alzheimer's variant."

Can you explain to the jury what you meant?

"Answer: Both Lewy body and Alzheimer's are in the category of neurodegenerative diseases."

Do you agree with that?

A. Yes.

Q. "Which means that the nerve cells themselves fall apart and they do so in slightly different areas."

Do you agree with that?

A. Yes.

Q. Continuing on line 17:

"Question: The nerve cells in the brain or somewhere else?

"Answer: In the brain, and the difference between Alzheimer's and Lewy body, as far as the brain is concerned,

is that the degeneration is in different areas and with different structures, but they are both neurodegenerative diseases."

Do you agree with that?

A. Yes.

Q. "And so the symptoms, picture and course is a little bit different. By the end of the course, they are indistinguishable."

Do you agree with that?

A. It's difficult to agree with that because he's not specific when he says indistinguishable. I don't know if he means indistinguishable as far as symptoms and signs or how the brain looks.

Maybe he went on to explain it further.

Q. Well, you agree that they are both neurodegenerative diseases, right?

A. Absolutely, yes.

Q. And they are progressive, are they not?

A. Well, progressive as far as the degeneration, but not necessarily as how the patient functions.

Q. Now, a person who has dementia, degenerative dementia -- they are both types of degenerative dementia, are they not?

A. That's correct.

Q. And a person who has degenerative dimension has a loss of function over time, true?

A. People will -- who progress in a functional way differently more likely than not they are going to decline in function or not.

(Continued on the next page.)

Q. Over time, right?
A. Correct.
Q. Okay. And that's what happens to Mrs. Tannen, true?
A. Yes.
Q. Okay. Do you know her condition now, sir?
A. As of 2010, no, I do not.
Q. Would you expect her to be much more progressed by now?
MS. BERNSTEIN: Objection, your Honor.
A. Compared to --
MS. BERNSTEIN: Objection. He said he doesn't know.
Q. Now, based on the fact that it's a progressive degenerative dementia, would you expect as a physician working in the field of geriatric medicine, would you expect more likely than not to quote a phrase that she would be much more progressed in terms of degenerative dementia?
MS. BERNSTEIN: Objection.
THE COURT: Overruled. You understand the question.
A. It's a little general but I would like -- I could say avoid, not be surprised if there had been additional changes since when I saw in the records.
Q. Now, Doctor, we talked about the November 25th finding of the possibility to rule out the hip fracture. Do you remember those questions asked of you by Ms. Bernstein?

A. November 25th of which year? 2001?

Q. Yes.

A. Yes.

Q. Okay. Now, you do know that the x-ray report show that Mrs. Tannen had osteoporosis of the right hip, the same hip which was where a fracture was found, true?

MS. BERNSTEIN: I'm sorry. Can the question be read back?

MS. LOMBARDI: I'll rephrase.

MS. BERNSTEIN: Thank you.

Q. Based upon your review of the record, did Mrs. Tannen have osteoporosis in her right hip which is the same hip where a fracture was found?

A. There was an x-ray report that described that, yes.

Q. Now, I want you to look at the doctor's note for that date October 25, 2001 -- I'm sorry. I apologize -- November 25, 2001. Could you find a copy in there, Doctor? Maybe we can just read it together. November 25, 2001 doctor's note.

A. It's going to be in the doctor's section or the nurse's?

Q. The doctor's note.

A. Let me see the heading on the other side. Medical progress notes.

Q. Now, let's read along to the jury. October 25th on call MD -- oh, by the way, in the nursing home where you were affiliated 11 years ago, whenever it was, was there a physician

at the home 24/7?

A. Yeah. I was one of those physicians.

Q. You were?

A. Yes, all those homes. The one in the Bronx, the one in Queens, yes, and the one in Manhattan, yes.

Q. So this is an on-call physician 7:30 p.m., right?

A. Correct.

Q. There was a complaint of pain in the right leg. Do you see that?

A. Yes.

Q. No history of fall or trauma per evening nursing staff. Do you see that?

A. Yes.

Q. Now, by the way, the blood pressure is taken 120 over 70?

A. Yes.

Q. And that's within normal limits?

A. Yes.

Q. And also says afebrile, correct?

A. That is correct.

Q. That means she had no fever, right?

A. That is correct.

Q. And then going on it says: Alert and, Doctor, alert lying in bed with no acute distress. Do you see that?

A. Yes.

Q. Now, it also says poor historian secondary to underlying advanced dementia, okay?

A. Yes.

Q. Now, further down where it says: Rule out right hip fracture, femur fracture stat x-ray. That means the doctor wanted to do an x-ray right away, right?

A. Yes.

Q. Stat means right away?

A. Urgently, yes.

Q. He orders no weight bearing, right, until he gets the x-rays?

A. Yes.

Q. And then further down he said: Case discussed with family proxy. Proxy is husband. What does that mean, proxy husband?

A. The proxy as written here is the husband and the proxy is somebody who will make decisions on behalf of the patient if the patient does not have the ability to do so themselves.

Q. Okay. He has to consent to whatever is being done, right?

A. That is true.

Q. Okay. Now, Case spoke with family proxy, husband Mr. Gene Tannen and advised transfer to Mt. Sinai ER for urgent x-ray and orthopedic consult of right -- to rule out fracture. Okay. Mr. Gene Tannen, proxy, requests to wait until tomorrow morning.

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Case discussed with orthopedist Doctor Lichtblau and arrangements to be made for orthopedic evaluation and x-ray tomorrow morning at Mt. Sinai hospital ER Doctor Lichtblau. Okay, and then it goes on: Transfer form completed. So according to this note --

MS. BERNSTEIN: Keep reading.

MS. LOMBARDI: Yes, I am. Just a minute.

Q. According to this note so far, the doctor who was seeing this patient wanted to transfer Mrs. Tannen that night to Mt. Sinai for x-ray and for consultation by Doctor Lichtblau and had already spoken to Doctor Lichtblau and arrangements were made, correct? Did I read that correctly?

A. That's correct.

Q. Okay. Then doctor called the husband to notify him of patient morning orthopedic consult by proxy, husband, now requesting for x-ray and orthopedic evaluation tonight to rule out fracture, right?

A. Correct.

Q. He doesn't want to wait until the morning call. Doctor Lichtblau informed him of the transfer, right?

A. Correct.

Q. And she was transferred that night, was she not?

A. Yes.

Q. Okay. And --

MS. BERNSTEIN: Objection, your Honor. Is there a question coming?

THE COURT: I assume there is. I think she just asked is that correct.

Q. That is correct?

A. And I answered yes.

Q. Do you know that when you're transferring a patient, a resident to a hospital, it takes some amount of time, correct?

A. Well, yes, it does take some time and --

Q. And so that if Mrs. Tannen actually was transported by ambulance by an ambulette to Mt. Sinai until 12:30, do you have an opinion as to whether any of this delay was caused by Mr. Tannen's first wanting to do it in the morning?

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Sustained.

Q. Well, Doctor, according to this note, the doctor was ready to transfer Mrs. Tannen when he wanted to rule out the fracture that he saw, right and, in fact, he spoke with the husband, he told him and even called Doctor Lichtblau, right?

A. True.

Q. Then I had to get permission from the husband because he's the proxy?

A. That's correct.

Q. Mr. Tannen at first said wait until the morning, right?

A. That is correct.

Q. Now later he said, well, no, do it tonight?

MS. BERNSTEIN: Objection, your Honor. How much

later, it's all in the same note.

THE COURT: Well, overruled. I mean, you'll get to redirect.

Q. Right?

A. That is the sequence, correct.

Q. And I want you to look at the nurse's note that it was the nurse's note at 10 p.m. transfer form filled out awaiting for Empress Ambulance will come around 11:30 p.m. Do you want to see the note?

A. I have the same one here.

Q. Okay?

A. Okay.

Q. And it says -- you see that note?

A. Yes.

Q. And she was transferred that evening, correct?

A. That is correct.

Q. And it also says: Total care patient dry and clean. Do you see that?

A. Yes.

Q. Now, Doctor, what does that mean as a geriatric physician? What does that mean when a nurse writes "total care given"?

A. As a geriatric physician, I'll say it's actually not clear.

Q. All right. How about when you've seen through those

notes, the nurse's notes things like a.m. care given. Do you know that what means?

A. I would have to then correlate it with their care plan and see what was to be given at a.m. It's a general statement, so isolation would be difficult for me.

Q. Let me see if you can do it this way. RAM in the nursing homes. You were involved in, what, AM? How do the CNA's -- what do they do with the residents in terms of the morning? What do they do? Do they get them up from bed?

A. They get them up.

Q. They --

A. Clean them.

Q. Clean them. Now, what do they do when they clean them? Give us some idea what these people do?

A. Each patient, of course, has their own care plan. Some patients are very independent. They will do it themselves. Other patients have to be lifted and put into the location. It will vary.

Q. Somebody like Mrs. Tannen.

A. Well, Mrs. Tannen, you know, is going have to be carefully worked with because she's not going to be able to organize her cleaning regimen independently. She's going to need a lot of help.

Q. These nurses aides, am I correct, that they have to help watch the patient or shower the patient?

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MS. BERNSTEIN: Objection.

Q. Wash their hair?

MS. BERNSTEIN: Objection.

Q. You have to say yes or no.

A. Yes.

THE COURT: What's the objection?

MS. BERNSTEIN: Outside the scope.

THE COURT: Overruled.

Q. Wash their hair if they need washing of the hair?

MS. BERNSTEIN: Your Honor, the duties of the CNA's for a medical doctor it's outside the scope.

THE COURT: Overruled.

A. Yes.

Q. And they have to, you know, if Mrs. Tannen was incontinent, correct?

A. They would have toileted.

Q. If it says toileted today, they have to change their diaper, right?

A. If she had a diaper, yes.

Q. They would have to clean her in, you know, private areas?

A. If she soils herself, yes.

Q. Make sure she's clean, right?

A. That is correct.

Q. And they have to dress her --

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A. Correct.

Q. -- right? And then they have to give her breakfast, feed her?

A. Yes.

Q. And the same thing goes on at night, right, where they have to get them ready for bed, correct?

A. Yes. Certain things would be similar at night?

Q. And they brush their teeth?

A. If they have teeth.

Q. Well, if they have teeth, okay. But whatever care that you and I would do ourselves, an aide has to assist with someone who has dementia like Mrs. Tannen, right?

MS. BERNSTEIN: Well, objection, your Honor. It's on the care plan, right?

THE COURT: Overruled.

A. Yes.

Q. Okay. Now, you would agree with me, would you not, somebody like a nurse's aide that's with a patient like Mrs. Tannen they get to really know that aide intimately, true?

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Overruled.

Q. You see them naked?

THE COURT: Do you know the answer to that question?

A. I would say it would be variable depending on the

individual.

Q. If Mrs. Tannen needed assistance in bathing, the aide would have to see her naked?

A. To be bathed fully would require nudity.

Q. Wouldn't you agree with me that a nurse's aide who sees a resident everyday and does these kinds of things for that resident if they see something unusual they would tell that to the nurse?

MS. BERNSTEIN: Objection, your Honor. May we approach?

THE COURT: No, overruled.

Would you agree with that?

A. If there is a change, they should report it to the nurse?

MS. BERNSTEIN: They should.

Q. And, Doctor, do you have an opinion -- I believe you said it -- but do you have an opinion that it would be a good thing for a nursing home if they had nurse's aides that were there for long periods of time so that they get to know the resident and the resident gets to know them?

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Sustained. I gave you some leeway to this. I think we got to go into things that he's a little more closely testifying about.

Q. Well, you were a director of a nursing home. Would you

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like to have nurse's aides and nurses that have longevity at their job?

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Sustained. I'm sure you can get this out with another witness but, like I said, I gave you some leeway. We're going way, way far afield from this witness' testimony.

Q. Now, you talked about one of the incident reports where Mr. Tannen reported that his wife told him that she had fallen?

A. Yes.

Q. Did you see anything like that -- well, in reading the Castle Hill records, did you see any information where Mr. -- Mrs. Tannen told Mr. Tannen something which he felt was due to her hallucinations?

MS. BERNSTEIN: Objection.

THE COURT: Sustained.

MS. LOMBARDI: Can I show him the record then?

THE COURT: No.

Q. Doctor, do you have an opinion as to whether the hip fracture for Mrs. Tannen was -- did you say you believe more likely than not it was caused by trauma. Was that your opinion?

A. That's what I said, yes.

Q. Okay. Did you review the Mt. Sinai records? You said you did, right?

A. I did.

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Q. These are in evidence.

Now, Doctor Lichtblau was the doctor who actually performed the surgery on the hip, true?

MS. BERNSTEIN: Objection. Can I look at that again?

MS. LOMBARDI: You subpoenaed these.

THE COURT: I'm at a disadvantage because you objected before she even asked the question so I'm not that good at mind reading. Let her ask the question and then object if you want.

MS. BERNSTEIN: The reason for my objection was Doctor Lichtblau did not produce that particular page if there was going to be a question about Mr. Doctor Lichtblau.

THE COURT: I don't know where the question is going to be until it be. Go ahead. What's you're question?

Q. I show you a page from the Mt. Sinai record pain -- at 1:01, pain location, right leg pain, sent in for, agreed to rule out right hip fracture. No history, fall or injury. Does it indicate that in the Mt. Sinai records?

A. I think some of it is actually cut off on the side.

Q. Doctor, what I read to you did I read it correctly?

A. No, you didn't. It got cut off. It was probably going to sent in from Hebrew Home for the Aged.

Q. Sent in from Hebrew Home for the Aged to rule out right hip fracture. No history, fall or injury. Is that cut off?

A. No, it is not.

Q. By the way, Doctor Lichtblau was the treating surgeon true, Sheldon Lichtblau?

A. Yes.

Q. And I'm going to show you his discharge summary. By the way, a discharge summary is done in a hospitalization when the patient leaves the hospital and the physician or it could even be a resident but in this case was the treating physician writes a summary of the patient's course and in what was done for the patient in the hospital, fair statement?

A. Always has to be signed by the attenting physician.

Q. Does it look like Doctor Lichtblau's signature?

A. Sheldon Lichtblau, MD, yes.

Q. And am I correct that a discharge summary is done by a physician when a patient leaves the hospital and it's a summary of what occurred in the hospital, treatment of the patient received any kind of problems, things of that nature. It summarize the hospital stay, right?

A. That is true.

Q. Does Doctor Lichtblau, who signed this very discharge summary, state patient was relatively pain free?

A. It says that, yes.

Q. Not only does it say that but it says it by the physician who did the surgery?

A. It reads right there, yes.

Q. Now, we talked about in, I think it was October when Mrs. Tannen went to Mt. Sinai for treatment of a forearm or elbow fracture, do you remember that?

A. Elbow.

Q. Elbow. Okay. And do you know whether Mrs. Tannen had a fracture of her wrist before she went to the Hebrew Home?

A. I don't recall seeing an x-ray taken of her wrist before original entry into the Hebrew Home.

Q. I'm going to show you a progress note from the Mt. Sinai hospital record.

MS. BERNSTEIN: May I see it?

Q. Now, by the way, when a patient comes in and this is an orthopedic surgery, right?

A. That is correct.

Q. And the orthopedist would do what's called an H&P, right?

A. H&P.

Q. That's a history and a physical, right?

A. That is true.

Q. And why is history important?

A. To know the patient's previous problems.

Q. Now, to show you a history and physical by the orthopedist states under history PSH means previous surgical history?

A. Yes.

Q. Now, she had an angioplasty at Mt. Sinai three years ago and doesn't this say left wrist fracture three years ago?

A. May I hold it a little closer?

Q. Sure. As per husband?

A. There's a question mark in there. But that, yeah, it says question mark wrist fracture three years ago.

Q. And it also says with no question mark, status post right hip fracture several years ago, does it say that?

A. It does say that.

Q. By the way, what I just read to you three years ago that note was written in 2002, so three years before that would be 1999, true?

A. Three years before 2002?

MS. BERNSTEIN: Objection, your Honor, the Court could take judicial that we don't need an expert to testify.

THE COURT: He was in the middle of the answer.

Q. 1999 was before Mrs. Tannen went to the Hebrew Home, true?

A. That is true.

Q. Doctor, would you agree that the better way to assess a patient would be with the physician actually seeing the patient, speaking to the patient or the family, if the patient is unable, and actually putting their hands on the patient and examining the patient? Would you agree that would be better than filling out a form with -- withdrawn.

Doctor, in order to assess whether a patient has pain, would you agree that it would be better for a physician to actually see a patient and assess the patient rather than relying on a form with happy and sad faces, would you agree?

A. Better than -- I'm not understanding the question. Better than the physician using the form?

Q. No, no. Do you think a physician would be better off using some form that has happy and sad faces to assess whether a patient has pain or it would be better to actually see the patient?

A. I don't think that one excludes the other. The faces show you the patient's expression and gives you an incredible amount of information.

Q. Okay. The Mt. Sinai record that you reviewed, did you see any form of expression with a pain scale form like what Ms. Bernstein was showing you with happy faces and where --

MS. BERNSTEIN: What was that?

Q. In the Mt. Sinai records.

A. I don't recall seeing a similar form.

Q. Now, you talked this morning about the fall in the incident of September 22. Do you remember that September 22, 2001?

A. Yes.

Q. Did you find the interdisciplinary notes starting with September 22, 2001?

A. Yes.

Q. Okay. Now, I'm going to read and read along with me. By the way, was it your testimony that in this incident she fell and hit her head. Do you remember that?

A. Yes.

Q. And you said there was some type of a brain injury?

A. Yes.

Q. And, Doctor, am I correct that the brain is protected by a very hard skull, right?

A. That is true.

Q. Am I correct?

A. That is true.

Q. And not only is the skull protecting the brain but the brain is surrounded by fluid that also protects it, true?

A. That is true.

Q. And, Doctor, on 9/22/01 it says: Resident remains in bed resistive to taking medication. See that?

A. Yes.

Q. And she was observed, observation for injury, alert and responsive. No change in mental status. Do you see that?

A. Yes.

Q. Could you read the rest of it? Neuro check, neuro check done. Do you see that?

A. Yes.

Q. What is a neuro check?

A. Neurological examination. They're not specific but --

Q. What is the --

MS. BERNSTEIN: Doctor, keep your voice up.

Q. What do you take a neuro check to mean?

A. Check neurological examination of somebody whose had head trauma. You want to take a look at the eyes to make sure the pupils are reacting to light, that they are able to move, that the patient can follow commands, they could stick out their tongue with cranial nerves which go to all parts of the face so it allows you to smile, allows you to smell something, allows you to taste something. You test as much as possible. Also you just want to make sure that the arms are able to move and the legs are able to move.

Q. And there's no indication after that neuro check of any problems, right

A. No, not there.

Q. And then her vital signs are taken, right?

A. Yes.

Q. And why would that be important if you're looking for a brain injury?

A. You just want to make sure that the patient is not having any compromise of breathing or of heart function.

Q. And those are all normal, are they not?

A. Yes.

Q. And the next date 9/23, slept fairly well, calling out

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name at times. Do you see that?

A. That is true.

Q. And that's no different than Mrs. Tannen had been throughout her hospital stay at Hebrew Home. There were times she called out, true?

A. That is correct.

Q. That's not a change, right?

A. That is correct.

Q. She awoke at 6 a.m. awoke and responsive to all stimuli. What does that mean?

A. If they actually did it, because all stimuli is a lot of stimuli and that would be touching her with a pin, touching her with something like a feather, touching her with temperature, but probably what they did was just if she responded to voice and --

Q. Doctor, does it say responded to voice. It said responsive to all stimuli, does it not?

A. That's what I'm saying. It really would be a very extensive examination if they had done that.

Q. Okay. Any indication that she had any brain injury that would prevent her from responding from all stimuli?

A. No.

Q. It says hematoma occipital area status post call on 9/22/07. No neurodeficit. Does that say that again?

A. Yes, it does.

Q. And then again her vital signs are taken, right?

A. That is correct.

Q. And they're all normal, are they not?

A. The respiratory rate is a little fast. Other than that, I would say it's normal.

Q. And then next day or the same day at 3 p.m. -- that was at 6 a.m -- at 3 p.m. resident alert with periods of confusion. Do you see that?

A. I do.

Q. She has dementia. She would always have periods of confusion, true?

A. There will be periods of confusion, correct.

Q. That's not any different from a brain injury that you spoke about, true?

A. They are not describing the periods of confusion. I can't say one way or another how this applies.

Q. Doctor, you saw periods of confusion throughout the Hebrew Home stay before she fell on September 22nd, true?

A. That's true but it doesn't really explain what the confusion is. It's a very general term. I don't know if she's confused as to who she is or confused as to where she is. As it's written there, I cannot really give an opinion.

Q. She had periods of confusion before she came into the Hebrew Home, true?

A. I have no disagreement with that.

Q. What?

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A. I don't disagree with you.

Q. Okay. Out of bed, OOB, to wheelchair in TV lounge, true? It says that?

A. Yes, it says she was in the TV lounge.

Q. She's able to go in the TV lounge. There isn't any brain injury there, is there?

A. I'm not sure what that actually indicates that she can be taken to the TV lounge but it says she went to the TV.

Q. And, again, calling out names of family members, okay?

A. True, it says that.

Q. Now, again, on the bottom line of that, I'll show you. The vital signs or some of the vital signs are taken.

A. Temperature is the temperature, pulse and respiratory rate are listed there.

Q. They are normal?

A. Yes.

Q. And 9/24 it says again AM care given, right?

A. It says that, yes.

Q. By the way, you've seen those notes throughout the chart AM care given P.M. care given, toileted to date, toileted this shift. You've seen notes like that throughout the chart, throughout that chart, right?

A. That's correct.

Q. Any indication that the nurse's aides didn't do their jobs? You have no indication of that do you, sir?

A. As far as what? Which jobs?

Q. As far as the care that the nurse's aides give to the residents. You have no indication anywhere that the nurse's aidds did not do their jobs.

A. Well, if part of their job was to supervise Mrs. Tannen, then they absolutely didn't do their job.

Q. Doctor, I'm talking about what the nurse's aide does cleaning, washing, brushing teeth, doing hair, changing diapers, feeding, all of the nurse's aides -- there's no indication anywhere throughout that chart that the nurse's aides did not do their job, true?

A. As you defined it, no, there is no indication that they did not do the basics of grooming and feeding and toileting?

Q. And, by the way, are you familiar at all with the Hebrew Home for the Aged?

A. I've heard the name.

Q. Do you have any knowledge of where it is? I know you know it's in Riverdale or what it's about?

A. I've never seen it. I've heard it's in Riverdale.

Q. You have what?

A. I heard it's in Riverdale.

Q. Now, continuing on it says --

THE COURT: Counsel, let me just ask you roughly about how much longer? I think we'll take a short break.

MS. LOMBARDI: Maybe a half hour. I'm almost

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finish, maybe less.

THE COURT: Let's take a five-minute break and we'll finish it in a half an hour.

COURT OFFICER: All rise. Jury exiting.

(Jury exits courtroom.)

(A recess was taken.)

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THE COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

Now.)

THE COURT: Have a seat.

MS. BERNSTEIN: Thank you, Judge.

CONTINUED CROSS EXAMINATION

BY MS. LOMBARDI:

Q Doctor, I know you will be upset, but I'm almost finished. We are up to 9/24. Now, this is two days after the incident with the bump on the head; okay? "A.M. care given," see that?

A Yes.

Q "Out of bed to wheelchair and fluids encouraged. Verbally disruptive." Nothing new; right?

A That's true.

Q Okay. "One-to-one staff interactions given with poor results. Family visited." Do you think if she had some type of a brain injury that was apparent, her family would have said something?

A I can't say one way or another what the family is able to detect.

Q "Closely monitored, no ill effects noted from previous incident." That means incident with the bump on the head; right?

A That is correct.

Q And it says "in no distress;" right?
A It does.
Q And, in fact, the vital signs are taken again; true?
A That is correct.
Q Now, Doctor, it's true, is it not, throughout this chart there are vital signs taken daily; true?
A That is true.
Q And the vital signs were always within normal limits; true?
A I don't remember every vital sign.
Q And Doctor, one way, besides a happy face, to assess if a patient is in pain, if you are in pain would your blood pressure go up?
A It might.
Q And 9/24/01, another note, ten p.m., "Remains very noisy." Nothing new; right?
A Correct.
Q "Yelling on top of her voice, very disruptive, refuses to brush her teeth tonight. CNA Burke and nurse present. Was argumentative, uncooperative." Now, the next line, "Pushes staff hard," see that?
A Yes.
Q Doctor, I want you to assume, or maybe you know it's in the record, that Ms. Tannen was a petite woman, approximately 105 pounds. Do you remember that from reading

that in the record?

A I don't remember exactly.

MS. BERNSTEIN: Objection, your Honor. There was a time had her weight was way down, but that was not her --

THE COURT: I'll sustain to the time frame.

MS. LOMBARDI: Okay.

THE COURT: That she might have --

Q Okay, Doctor. Where it says "pushes staff hard," is here any indication of a brain injury with that?

A That doesn't tell you one way or the other whether there's a brain injury, because she's pushing somebody.

Q She's pushing the staff hard. That means people. She's pushing them. You are telling this Court and Jury she has a brain injury, she would still be able to push people hard?

A Sure.

Q Now, Doctor, are you at all -- you told us -- did you read the deposition of, excuse me, the trial testimony of Souretha Browne? She was a CNA who testified.

A From this trial?

Q Yes.

A No. I have not seen that.

Q Doctor, did you read any trial testimony?

A In this trial, no.

Q Don't you think it would be important to read the trial testimony before you come in to give your opinion --

MS. BERNSTEIN: Objection.

Q -- to this Court and Jury?

MS. BERNSTEIN: Objection, your Honor. It's not medical records.

THE COURT: Overruled. Do you think that would be important?

A No.

Q Not medical records, but there are medical people who testified before you?

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Overruled.

Q Do you think that would be important to give your expert opinion to this Court and Jury?

A No. My opinion is based upon my experience, my knowledge of the medical literature and my review of the medical records.

Q I want you to assume, Doctor, that Souretha Browne told this Court and Jury --

MS. BERNSTEIN: Objection, your Honor. Counsel is reading from her handwritten notes and not from the testimony.

THE COURT: Well, I don't know that that's objectionable, unless she doesn't quote accurately, so if

you think she's not -- I mean, be careful. Don't summarize, but you can repeat the testimony, and you are going to tell him --

Q I want you to --

THE COURT: -- if she testified, then say exactly what it is she testified.

MS. BERNSTEIN: I would like to get a page, though, and a line. Otherwise how do I know it's exactly --

MS. LOMBARDI: Judge, what I'm going to say, I'm sure --

THE COURT: Okay. Let's wait for the whole question --

MS. BERNSTEIN: Okay.

THE COURT: -- and then maybe it won't be that big of a deal.

Q I want you to assume that Souretha Browne told the Jury some of the activities and services that the Hebrew Home provides; okay?

MS. LOMBARDI: That's all I'm getting at.

THE COURT: Meaning the broad services to residents who --

MS. LOMBARDI: Yes.

MS. BERNSTEIN: Objection, your Honor.

THE COURT: Overruled.

Q And for example, she told the jury that they have a swimming pool and a gym and an art studio and an art museum, and they have things like bingo, and they have outdoor spaces where residents and their families can sit outside on a nice day, and they have provide trips for residents who are able to go shopping, Yankee games, Mets games, opera, theater, movies and things, even movies once a week at the Hebrew Home, and they have a coffee shop and things of that nature.

Now, Ms. Tannen, of course, could not have participated in any of those activities?

MS. BERNSTEIN: Objection, your Honor.

Q Would you agree, based on her -- do you have an opinion as to whether Ms. Tannen could have participated in any of those activities, based on her condition?

A Yes, I have an opinion.

Q What activities could she have participated in?

A She probably could have watched a movie.

Q Okay. Would she have any ability to understand the movie, based on her dementia?

A I don't know whether she would be able to understand it, but she might enjoy it. It might be distracting. It may be a musical. It's hard to say. People with dementia can still enjoy certain things.

Q And I want you to assume that Carmen Henriquez, one of the nurses, told this Court and Jury that Ms. Tannen enjoyed

listening to music, and you know on the dementia floors, they have music, at least at the Hebrew Home, playing all the time for the residents?

A Yes. It's soothing.

Q Soothing. Okay. She listened to music and she liked to walk. I want you to assume that was her testimony, and I want you to assume that Carmen Henriquez told this Court and Jury that to stop her from walking would be taking away whatever quality of life she had. I want you to assume that testimony.

A Okay.

Q Okay. Now, Doctor, do you agree with this sentence: Quote, the prevention of falls should not be achieved at the cost of diminished quality of life, close quote?

A Sounds like something I would have said.

Q It is something you wrote in 1999. So you agree with it?

A I still agree with me.

Q And you still agree with it?

A Yes.

Q So Carmen Henriquez, more than likely, was not true?

A No. False.

Q Thank you. I have no further questions.

MS. BERNSTEIN: Just a couple.

RE-CROSS EXAMINATION

BY MS. BERNSTEIN:

Q Why false, Doctor?

A Because no one is saying that Ms. Tannen couldn't walk and enjoy the walk. What needed to be done was to have her walk under safe circumstances, and since it was recognized that she could walk safely with somebody else that could have continued, but to let her walk alone actually would have disagreed with my statement from 1989, because you are now sacrificing safety, and that didn't need to be sacrificed.

Q By the way, can you just quickly explain to the jury how somebody could have an exam, a neurological exam with no neurological deficits, and still have a traumatic brain injury where their cognitive abilities would be noted to have declined?

A I think -- we have gone over this so many times by now the jury can probably explain it to me, but because the mind needs to organize the world, what we call executive functioning, to be able to plan, to be able to have good judgment can be affected by traumatic brain injury, but will not be detected on the neurologic exam which just looks at how the eyes react, or whether somebody can taste something sweet. That is actually a more extensive examination which was not performed.

Q And in fact, the fact that she had no neurological

deficits a day or two after the fall on the back of her head, does that change your opinion at all as to whether or not she's sustained a traumatic brain injury and that lead to a noted decline in cognitive abilities five days later?

A The --

Q Yes or no. Does it change your opinion?

A No, it does not.

(Whereupon, an exhibit was displayed to the jury.)

Q Okay. And just very briefly, I promise I only have a few minutes, let's look at this patient transfer form that Ms. Lombardi showed you that was purportedly from the Castle Home record, and what is -- first of all, do you see this name up here? A physician in charge at the time of transfer?

A I can't make it out. I see Ernesto in there.

Q Ernesto Espana?

A It looks like, yes.

Q And do you recognize the name of Dr. Espana as one of the doctors at the Hebrew Home?

A I believe that's the case, yes.

Q And in fact, do you have an opinion as to who filled out this patient transfer form?

A I believe this was filled out at the Hebrew Home.

Q And in fact on the back side that you were looking at, it says 77 year-old woman with prior medical history

significant for senile dementia, agitation general question of Alzheimer's versus Lewy body, and then on her congestive heart failure, coronary artery disease and glaucoma, and then it says status post fracture of the olecranon with ORIF, which means open reduction, internal fixation; right?

A Yes.

Q And then the fracture was healed, and then it also says, this should be it here, status post fracture of the superior ramus of the left pubic bone; right?

A Yes.

Q And status pose fracture of the left hip with open reduction internal fixation, And what is your opinion as to what the purpose of this document was when it was filled out?

A This is a transmission of information to tell the next caregiver what Ms. Tannen's situation is.

Q Right. And so this was this does not represent any diagnosis by anybody of the Castle Home; does it?

A No. It's clearly a transfer form. That's what it says at the top.

(Whereupon, an exhibit was displayed to the jury.)

Q And do you see right here it says limits, if I can zoom in on that it says right up there, "Diagnosis at time of transfer"?

A Yes.

Q Just take my word for it. It says "Diagnosis at time of transfer," and it says "Discharge summary"; right?

A Yes.

Q And that's the document you looked at this morning; isn't it?

A That is correct.

Q And so the discharge summary contains the diagnoses that were on this document that was sent by the Hebrew Home to the, Castle, the subsequent residence; fair to say?

A Yes. There's a list of diagnoses.

(Whereupon, an exhibit was displayed to the jury.)

Q And briefly, while you were testifying, I went through the Mount Sinai record a little bit more exhaustively and I found this very interesting -- what do you make of the fact that this says "chief complaint, triage --" that's similar to the document that Ms. Lombardi showed you, but where it says, "Rule out right hip fracture," and then where it said before, "No history of fall or injury," that's crossed out and then underneath it says, "Sent in from Hebrew Home to rule out a hip fracture with frequent history of falls," but what do you make of the fact that somebody crossed out, "No history of fall or injury"?

A Oh, the triage form is a form that's filled out when somebody arrives at the institution and a decision is made

whether to admit to the hospital, whether to send them home, so a lot of information is put in there. What sometimes happens is something is entered into the computer and then after it got printed out, somebody decided to, I guess, to remove it from this form by drawing a line through that phrase.

Q Now, is there a rule of thumb in the medical industry, for the medical profession, I should say, with respect to record keeping? Is there, like, a proper way that's known to make changes if changes need to be made to medical records?

A Yes.

Q And what is that way?

A The way it should be done is you are not allowed to erase. You are supposed to put one line through it, not color it in, and then when you do make the change you have to initial it or sign it, and make a date when you made the change.

Q Okay. Are you allowed to, like, write over something to make it into something else, like sometimes if you write the wrong date on a check and try to turn a two in a four kind of thing?

A You shouldn't be doing that in medical records or on checks. You just shouldn't do that.

(Whereupon, an exhibit was displayed to the jury.)

Q Okay. And let me go on. This page was also shown to you very quickly, but this is the institutional transfer

form that came from the Hebrew Home, so same thing as that Castle residential thing, but this is the one that went to -- I'm trying to get a better -- so this is the one that went from the Hebrew Home to Mount Sinai, and do you see --

A I'm not sure if it's going from the Hebrew Home to the Mount Sinai or from Mount Sinai to the Hebrew Home.

THE COURT: It's labeled on top Mount Sinai Hospital.

MS. BERNSTEIN: Yes. I think it's going the other direction.

Q And, well, it says "79 year-old female resident of Hebrew Home with partial left elbow. Prior medical history dementia, congestive heart failure, cataract, Dr. Espana at Hebrew Home," and then it says, "prior to surgical history angioplasty Dr. Devoric, Mount Sinai three years," and then there's a semi-colon before it says "right hip fracture"?

A That is true.

Q So now looking at it more closely and with more time to look at it, what is your opinion as to what this said about the prior medical history --

MS. LOMBARDI: Objection.

Q -- with respect to --

MS. LOMBARDI: The record speak for itself.

Q -- with respect to whether or not there was a date assigned to the right hip fracture?

THE COURT: Overruled.

A It looked like what they are describing there is that a procedure took place at Mount Sinai involving the heart, it's angioplasty three years ago, and the right hip fracture does not have a time associated with it.

Q And does it say here -- and then it says right here, "10/16 of '02, left elbow fracture"?

A True.

Q Okay. Now, another interesting thing I found.

(Whereupon, an exhibit was displayed to the jury.)

Q The radiology report from Mount Sinai where they did the -- they did the x-rays at Mount Sinai and they read them, and there were two x-rays; right? A normal chest x-ray, and where does it say about the right hip?

A Two views of the right hip were submitted for evaluation, no prior films available for comparison, and then they go onto describe a fracture to the femoral neck of the right hip. It appears to be --

Q It doesn't say where it's located?

A No. It must be a transcription error. The remaining femoral shaft appears superiorly dislocated.

Q And the rest?

A And the rest is unremarkable.

Q Visualize of the remaining bone structures is

unremarkable?

A Unremarkable.

Q Anything in the Mount Sinai radiology report about osteoporosis of the right hip?

A It doesn't speak to that, no.

Q So it's only in the Hebrew Home radiology report? Did you see it anywhere else?

A On x-ray reports, no, I don't recall seeing it.

Q For the right hip?

A Right.

(Whereupon, an exhibit was displayed to the jury.)

Q Now, this one -- I lost my focus.

This one is the doctor's notes. It says dictated physician notes, and this is a 78 year-old resident, Hebrew Home for the Aged, with a history of multiple falls and memory loss from Alzheimer's, complaint of right hip pain. She was found to have pain with rotation of her hip and was noted some deformity of the limb.

Now, do you recall when you were looking at the medical notes where it said no shortening of the leg? Is that inconsistent with this finding where it says that there was deformity noted?

MS. LOMBARDI: Objection. Deformity to be -- objection, your Honor.

MS. BERNSTEIN: Well, that's what I'm asking.

THE COURT: Overruled.

A It is not specific of what they mean by deformity. It might mean shortening, or it might mean that it's externally rotated.

Q Well, was any deformity noted by the doctor who was on call who examined Ms. Tannen at the Hebrew Home that night?

A I remember that they wrote there was no shortening. I don't remember they may have written about there being external rotation, but I don't recall.

Q Mild external rotation right lower extremity. Would that be a potential deformity?

A It can be considered that. The leg should not turn that way naturally.

Q Okay.

MS. BERNSTEIN: That's all.

MS. LOMBARDI: I have just, very briefly.

RE-CROSS EXAMINATION

BY MS. LOMBARDI:

(Whereupon, an exhibit was displayed to the jury.)

Q Doctor, I showed you, and you read it the Mount Sinai history, fall or injury. It's not crossed out; is it?

A No, it's not crossed out.

Q Where's the other one?

And Doctor, isn't it -- when you cross something out in the hospital record, you are supposed to cross it out and initial it?

A That's the way it should be done.

Q And any initials here?

(Whereupon, an exhibit was displayed to the jury.)

A Not next to the line, no.

Q And the history about the status post hip fracture several years ago is what's written there; is it not?

A That's what it says, yes.

Q And three years ago refers to the question mark of the wrist fracture; right?

A Correct.

Q And this information came, if you look at the parenthesis here, as per husband?

A That is correct.

Q So I asked you, all I asked you was whether the husband, Mr. Tannen, gave of history of his wife having a left, questionable left wrist fracture three years ago and a status pose right hip fracture several years ago.

MS. BERNSTEIN: Objection, your Honor. The record speaks for itself.

THE COURT: Overruled.

MS. BERNSTEIN: He doesn't know that Mr. Tannen

actually did.

THE COURT: Is that what your record indicates?

Q Does it say as per her husband?

A That's the way it is written, yes.

Q Thank you?

MS. LOMBARDI: I have don't have any further questions.

MS. BERNSTEIN: Just one. Absolutely, only one.

RE-DIRECT EXAMINATION

BY MS. BERNSTEIN:

Q This says left wrist fracture questionable from three years ago. Was it the right, the right radial ulnar that was fractured at the Hebrew Home?

A Yes.

MS. BERNSTEIN: Okay. That's it.

MS. LOMBARDI: Nothing.

THE COURT: Not just one?

MS. LOMBARDI: No. I don't need anything.

THE COURT: Doctor, you can step down.

THE WITNESS: Are you sure?

THE COURT: If you aren't planted there now.

(Whereupon, the witness was excused from the courtroom.)

THE COURT: And with that, Ladies and Gentlemen, we are breaking for the weekend, so we are not going to

start -- Monday I'm going to ask you to be here at eleven o'clock, a little bit later, because I have another totally unrelated thing to take care of for about an hour, so please be here at eleven, and I indicated I anticipate we'll be done with the testimony.

A JUROR: On Monday, eleven o'clock?

THE COURT: Monday at eleven o'clock, because I have to do something else first. The schedule of definitely finishing, totally finishing by next week is still on, and more than likely by the middle of next week, whether that means Wednesday exactly, late Tuesday or early Thursday I don't know, but that's about where we are, so have a great weekend.

A JUROR: Thank you.

THE COURT: Don't discuss the case.

THE COURT OFFICER: All rise. Jury exiting

(Whereupon, the jury was excused from the courtroom.)

MS. BERNSTEIN: Your Honor, I'm very compelled to make a brief statement on the record.

THE COURT: Ms. Lombardi, she wants to put something on the record.

MS. LOMBARDI: I'm sorry.

MS. BERNSTEIN: In my relatively re-direct of Dr. Starer, I pulled out a record, the same page as

Defense Counsel had shown, but I found another one where "no history of fall or injury" had been crossed out, and as I did that, Ms. Lombardi came over to me and said, "That wasn't like that, you did that," and she did it under her breath, and I said, "Don't you dare," and I wish to present this to the Court. I have only blue pens near me. You can tell that this is a -- there's no new mark. I just needed to --

THE COURT: To the next extent, absolutely to the extent you want to put it on the record, it's on the record. If Ms. Lombardi wants to comment -- I'm not going to hold a hearing as to how that line got on that paper or when.

MS. BERNSTEIN: I don't expect your Honor to, because it's clear as day that this is --

MS. LOMBARDI: Here's what happened, Judge. I didn't see that. That's not the one I showed. She asked me to show the one I showed, and the one I showed didn't have any marks and I remember it was clean, so I didn't realize it was something different because she asked me for the one I showed, and I apologize, because it happened that instantaneously. She asked me to give it, "Don't put back, I want to use it," and that's the one.

MS. BERNSTEIN: However, Ms. Lombardi --

MS. LOMBARDI: I didn't see that.

MS. BERNSTEIN: -- shoved it into the middle of the record and said here, and so I was left to my own devices to go through the record to find what I could find and this happened to be what I found, and your Honor, I just wanted to --

THE COURT: I just have one question. Is that -- the page with the crossed out, is that a different, other page?

MS. LOMBARDI: No. It's a different page. I never saw --

MS. BERNSTEIN: Well, it's a duplicate, except it has this handwriting, these numbers on here, and this cross out, but it is the same page, just with handwriting on it.

MS. LOMBARDI: I never saw that one. The one I saw was clean, Judge, and I gave it to her.

THE COURT: You both made your statement for the record. It's out there for the jury. One has a line through it and one doesn't.

MS. BERNSTEIN: Thank you, your Honor.

THE COURT: Okay.

MS. LOMBARDI: And I thought she was using the one you just gave her.

THE COURT: Okay. Off the record.

(Whereupon, the proceedings were adjourned to Monday, June 7, 2010 at eleven o'clock a.m.)