

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK: TRIAL TERM PART 6

3 - - - - - X
4 IVAN PENA,

Plaintiff,

5 - against - Index No. 162616/2014

6 PINNACLE ASSOCIATES II NY LLC, R&I CONSTRUCTION INC.,
7 PHOENIX BUILDING RESTORER INC., EDGEHILL ASSOCIATES INC.,
8 CENTURY PARKING CORP. and IMPERIAL PARKING SYSTEMS INC.,

Defendants.

9 - - - - - X
10 PINNACLE ASSOCIATES II NY LLC

Third-Party Plaintiff,

11 - against -

12 PHOENIX SUTTON STR, INC.

13 Third-Party Defendant.

14 - - - - - X
November 17, 2022
60 Centre Street
15 New York, New York 10007

16 B E F O R E: THE HONORABLE KATHY J. KING, Justice

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

18 LAW OFFICES OF MICHAEL S. LAMONSOFF, PLLC
Attorneys at Law
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New York, New York 10005
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23 BY: JEFFREY VAN ETTEN, ESQ.

24 Terry-Ann Volberg, CSR, CRR
Monica Martinez
25 Official Court Reporters

1 MR. VAN ETTEN: Your Honor, as we indicated during
 2 our down time, defendants were making a motion to preclude
 3 references to lack of employment or inability of Mr. Pena to
 4 work in the future based on the fact that there's no lost
 5 earnings claim past or future being made in this lawsuit.
 6 That's why when Dr. Carfi testified yesterday I had objected
 7 about future employability and ability to do physical work.
 8 It's not relevant to this case, and in that regard I think
 9 it would be prejudicial --

10 THE COURT: Counsel, we will put this on the
 11 record afterwards. Thank you. We will put defense's motion
 12 on the record at a later time.

13 THE COURT OFFICER: Jury entering.

14 (The jury entered the courtroom and the following
 15 occurred:)

16 THE COURT: Please be seated.

17 Good morning, ladies and gentlemen.

18 Firstly, the Court would like to thank you for
 19 your time and your arrival. Unfortunately we had a little
 20 technical difficulty this morning.

21 You will quickly realize that in real life court
 22 proceedings there are issues, issues arise, and a case is
 23 not tried to completion in an hour like on television where
 24 a case is tried with commercial breaks in an hour. In a
 25 real life court proceeding that doesn't happen. So we

1 apologize for that.

2 The Court yesterday neglected to introduce the
3 court personnel. Since we will be spending a few days with
4 each other it's important that you know everyone's role
5 besides mine.

6 We have Madam Clerk who maintains the Court's
7 calendar. Ms. Santelmo is the Court's principal court
8 attorney and assists the Court with its work by doing
9 research and assisting the Court with any issues that need
10 to be resolved. We have the court reporter whose role you
11 are observing first-hand, and, of course, the court officer
12 who keeps the peace in the court.

13 That being said, at this time, plaintiff, you may
14 call your next witness.

15 MS. TOMINOVIC: Thank you, your Honor.

16 Before calling Mr. Pena to the stand, I would like
17 to put on the record the evidence that is now in evidence
18 pursuant to stipulation by both defense and plaintiff.

19 Plaintiff's Exhibit 1 are the Bellevue Hospital
20 records along with the CD with the radiological films.

21 Plaintiff's 2 are the University Orthopedics or
22 Dr. Touliopoulos records.

23 Plaintiff's 3 are the HealthQuest Physical
24 Therapy/Dr. Stiler records.

25 Plaintiff's 4 are the Lenox Hill Radiology

1 records.

2 Plaintiff's 5 are the Surgicare records.

3 Plaintiff's 6 are the Mount Sinai Queens records.

4 Those are all in evidence, your Honor.

5 MR. VAN ETTEN: We have no objection, your Honor.

6 THE COURT: Thank you.

7 MS. TOMINOVIC: At this time I would like to call
8 Mr. Ivan Pena to the stand.

9 THE CLERK: We have a court interpreter,
10 Ms. Mirella Torres, who will be interpreting for Mr. Ivan
11 Pena.

12 I V A N G U I L L E R M O P E N A,
13 55 Frazer Road, Malvern, Pennsylvania 19335,
14 having been first duly sworn/affirmed, testified as follows:

15 THE COURT: Please be seated.

16 You may inquire, counsel.

17 MS. TOMINOVIC: Thank you, your Honor.

18 DIRECT EXAMINATION

19 BY MS. TOMINOVIC:

20 Q Good morning, Mr. Pena.

21 A Good morning.

22 Q Before we start, have you ever testified in a courtroom
23 like this before?

24 A No.

25 Q Okay. First time?

1 A Yes.

2 Q I'm going to ask you to keep your voice up. I want to
3 make sure that the interpreter can hear you and also that the
4 jurors can hear you. Okay?

5 A Okay.

6 THE COURT: Speak into the microphone, sir.

7 MS. TOMINOVIC: Is it on?

8 THE COURT: Yes, it is.

9 Q Mr. Pena, where were you born?

10 A Bogotá, Columbia.

11 Q And did there come a time that you came to the United
12 States?

13 A Yes.

14 Q When did you come to the United States?

15 A 2013.

16 Q Do you remember what month in 2013 you came to the
17 United States?

18 A May.

19 Q What was the purpose of coming to the United States in
20 May of 2013?

21 A I came with the purpose of improving my daughter's
22 life, doing good for my daughter.

23 Q And your daughter that you mentioned, where does she
24 live?

25 A Bogotá, Columbia.

1 Q What is her name?

2 A Michelle Pena.

3 Q And how old is she today?

4 A She is 13.

5 Q So in and around 2013 she would have been around three
6 years old?

7 A Yes.

8 Q In 2013 were you married?

9 A No.

10 Q Were you in a relationship with the mother of Michelle?

11 A Yes.

12 Q Where was she?

13 A In Columbia, Bogotá.

14 Q When you came to the United States in and around
15 May 2013, did you look for work?

16 A Yes, a male friend recommended me to a job.

17 Q What type of job or what type of work did he recommend
18 for you to do?

19 A Construction.

20 Q Had you done construction in the past?

21 A Yes.

22 Q Was that in Columbia?

23 A Yes.

24 Q When you -- do you remember when you started working
25 construction here in the United States?

1 A In June.

2 Q Was that June of 2013?

3 A Yes.

4 Q Do you recall where you were working in June of 2013 at
5 the construction job?

6 A In The Bronx.

7 Q Was that 2600 Netherland Avenue in The Bronx?

8 A Yes.

9 Q How many days were you working at that location at that
10 construction site?

11 A Four days.

12 Q What type of work were you doing in those four days?

13 A We were tearing down beams that kept the building up.

14 Q These beams, what were they made of?

15 A Metal.

16 Q Can you approximate what they weigh, what one beam
17 weighs?

18 A A thousand pounds.

19 Q And you indicated it's your job, it was your job with
20 your co-workers to take down these beams?

21 A Yes, move them, take them to another place.

22 Q How would you do that?

23 A We would take them down using a machine.

24 Q How would you bring them to the other place that you
25 described?

1 A We would take them down using a machine, place them on
2 the ground, then using another machine we would clip it, we
3 would raise it using another machine, and we would take it over
4 there, we would push it over there.

5 Q Was that the work that you were doing on June 11, 2013?

6 A Yes.

7 Q Can you tell me, on June 11, 2013, did an accident
8 happen while you were working?

9 A A co-worker smashed his finger.

10 Q Did an accident happen with you involved?

11 A Yes, me.

12 Q Can you tell the jury how the accident happened?

13 A I came back at lunchtime. They told me that upon
14 moving the beams, the road was dirty, the ground was dirty, so
15 then they sent me to clean that using a broom, but as I was
16 approaching it, the beam turned all of a sudden, I didn't
17 notice, and the beam fell on me at 12:45.

18 Q When the beam fell on you or rolled over on to you,
19 what body part did it strike or impact?

20 A The left ankle.

21 Q And when the beam impacted your left ankle, did you
22 fall to the ground?

23 A Yes.

24 Q What happened?

25 MR. VAN ETTEN: Your Honor, objection in the

1 future for leading. I let it go to this point, but can we
2 stop the leading?

3 THE COURT: Overruled.

4 You will put counsel's objection on the record.

5 MR. VAN ETTEN: Thank you.

6 THE COURT: Proceed.

7 Q Can you tell us what happened next after you were on
8 the ground?

9 A I fell on the ground, and the beam ended up on top of
10 me. My co-workers realized what was happening, and about 15 of
11 my co-workers came over to help me to lift the beam off me.

12 So I stayed on the ground until 3:30 in the afternoon.

13 Q So you indicated before that the accident happened
14 around 12:45, and you stayed on the ground until 3:30 p.m.

15 Were you able to get up by yourself at any point in
16 time?

17 A No.

18 Q What were you doing at the time when you were on the
19 ground from 12:45 to about 3:30?

20 A Because of the pain I was in, I was just crying and
21 asking them to please call the ambulance, and they kept saying
22 it's coming, it's coming.

23 MR. VAN ETTEN: Objection.

24 THE COURT: Sustained.

25 Please do not testify as to what someone else

1 said.

2 Counsel will ask you another question.

3 Q Sir, when you remained on the ground, you said you were
4 crying and you were asking for an ambulance; is that right?

5 A Yes.

6 Q Did an ambulance come at any point in time?

7 A No.

8 Q Did anybody come to remove you from the area where your
9 accident happened?

10 A Yes.

11 Q Where or who came?

12 A Damien.

13 Q Damien?

14 A Damien, the right-hand person for the company.

15 Q What did he do once he came, got there?

16 A When he came he asked for help so that they could lift
17 me and take me to his car.

18 Q Mr. Pena, did you have a cell phone on that day?

19 A No.

20 Q Did they -- when they picked you up and put you in his
21 car, did he drive you somewhere?

22 A Yes.

23 Q Did he drive you to the hospital?

24 A No, to his private doctor.

25 Q Okay. Do you remember where that private doctor was?

1 A No.

2 Q When you got to this doctor, what did they do for you
3 there?

4 A My co-workers laid me on a stretcher. They took
5 x-rays.

6 Q Did the doctor indicate to you what the x-rays showed?

7 MR. VAN ETTEN: Objection.

8 THE COURT: I'll allow it.

9 A Yes.

10 Q What did they tell him?

11 A That the ankle was totally destroyed.

12 MR. VAN ETTEN: Objection.

13 Move to strike.

14 MS. TOMINOVIC: It's part of his medical
15 treatment.

16 THE COURT: Sustained as to form.

17 MR. VAN ETTEN: May we approach, please?

18 THE COURT: Yes.

19 (Discussion off the record.)

20 (The discussion off the record concluded and the
21 following occurred in open court:)

22 THE COURT: Move to strike the plaintiff's, the
23 sentence of plaintiff's testimony relating to the condition
24 of his ankle.

25 MR. VAN ETTEN: Thank you.

1 Q Mr. Pena, what was your understanding of the situation
2 or circumstances surrounding your left ankle at that point in
3 time?

4 A What do you mean what was my understanding?

5 Q Did you come to learn the reason -- let me withdraw
6 that.

7 Sir, could you tell us what you were feeling in your
8 left ankle at that point in time?

9 A I felt a lot of pain. I felt as though they were
10 sticking needles in me, as though someone was on top of me,
11 jumping on top of me. I felt as if my foot was totally
12 destroyed from the pain that I had.

13 I was sweating. My heart was racing because of the
14 pain.

15 At that moment I was pleading for a doctor, and the
16 pain was like somebody was jumping on top of that area, pain,
17 pressure, pinning sensation.

18 Q From the first doctor that they took you to, what
19 happened next?

20 A Damien told me that it had been too long, the ambulance
21 was not going to come, and he himself would transport me to
22 another hospital.

23 Q Did he take you to a hospital?

24 A Yes.

25 Q What hospital did he take you to?

1 A Bellevue Hospital.

2 Q And when you got to Bellevue Hospital, did Damien stay
3 with you?

4 A No.

5 Q What happened when you got to Bellevue Hospital?

6 A I got to the hospital. My brother came down, saw a
7 stretcher, they laid me on top of that stretcher. They took me
8 inside the hospital. They gave me medication for pain, and the
9 doctor told me he was unable to operate on me that very day
10 because I had arrived there too late.

11 Q Did he tell you why arriving there too late would have
12 prevented you from having the surgery that day?

13 MR. VAN ETTEN: Objection.

14 MS. TOMINOVIC: It's for his medical treatment.

15 THE COURT: I'll allow that.

16 THE COURT INTERPRETER: Repeat the question.

17 Q Did he indicate to you why he could not perform the
18 surgery on that date, why the waiting or time frame was
19 problematic?

20 A That if they had taken me right away to the hospital,
21 the inflammation of the foot would not have been so great and
22 they would have been able to do the surgery.

23 Q Okay. Besides giving you the pain medication, did they
24 provide you any treatment at Bellevue Hospital?

25 A No. He said to me that the foot was twisted. He said

1 that what he could do was straighten the foot and put a cast on
2 it.

3 Q Is that what the doctor did?

4 A Yes.

5 Q And did there come a time that he was released from the
6 hospital that day?

7 A Yes.

8 Q And did you go home or did you go somewhere else?

9 A I went home.

10 Q Did they give you any sort of assistive device in order
11 to walk or move around, anything like that?

12 A Crutches.

13 Q When you got home that night, what did you do?

14 A I took pain medication. I laid down to sleep, but that
15 night I was not able to sleep because of the pain.

16 Q What was the pain? Could you describe the pain?

17 A The pain was so strong. I felt as though someone was
18 jumping on top of my foot, as though someone was stabbing me. I
19 felt stabbing, a stabbing feeling, electricity feeling.

20 Q Mr. Pena, while you were at the hospital, did they tell
21 you that you needed to come back to have the surgery?

22 A Yes, I had to wait 15 days for the inflammation of the
23 foot to go down to enable the doctors to do the surgery.

24 Q In those 15 days or right around two weeks, what were
25 you doing at home or wherever it was that you were going?

1 A I stayed home lying down. The doctor recommended that
2 I keep my foot elevated.

3 Q Is that what you did?

4 A Yes.

5 Q Were you taking pain medication during that 15-day
6 period?

7 A Yes.

8 Q At some point in time did you go back to Bellevue
9 Hospital to have the surgery?

10 A Yes.

11 Q Could you describe for us what your understanding was
12 of the type of surgery that you needed?

13 A They told me that I needed to have screws and a plate
14 put in place.

15 Q And do you remember when you had that surgery?

16 A I don't recall. June.

17 Q June. Okay.

18 A June 2013.

19 Q If I say June 24, 2013, does that refresh your
20 recollection of the date that you had that surgery?

21 A Yes.

22 (Continued on next page.)

23

24

25

1 Q. Thank you. After you had that surgery, were you
2 released from the hospital?

3 A. Yes.

4 Q. And upon your release, were you provided pain
5 medication?

6 A. Yes. They gave me medication to be able to
7 withstand the pain.

8 Q. Okay. Did they give you any sort of assistive
9 devices in order for you to try to be mobile?

10 A. Yes, a crutch.

11 Q. Did they provide you a wheelchair at any point?

12 A. Yes.

13 Q. Okay. Was that after the surgery in 2013?

14 A. Yes.

15 Q. And how long did you use the wheelchair?

16 A. Six, seven months.

17 Q. Okay. And in that time frame, did you also have
18 crutches that you mentioned?

19 A. Yes.

20 Q. And I should have asked this, and I'm sorry, did
21 they put a cast on your leg after the surgery or during the
22 surgery?

23 A. Yes.

24 Q. Okay. After you had the surgery, how were you
25 feeling; what was the pain like after the 2013 surgery?

1 A. The pain continued the same. I felt as though
2 there were stabbing me, that electricity feeling, sensation.

3 Q. Did you return to Bellevue for follow-up's after
4 your surgery?

5 A. Yes.

6 Q. And when you returned to Bellevue, what did they do
7 for you in the follow-up appointments?

8 A. They would remove the cast and examine the foot to
9 see how it was doing.

10 Q. After they removed the cast, did they put another
11 cast on, or were you given something else for the foot?

12 A. Another cast.

13 Q. Did you go back another time where they removed the
14 cast and provided you with something else on your, for your
15 foot?

16 A. Yes.

17 Q. And what was that?

18 A. A boot.

19 Q. A boot, yes.

20 Sir, that -- those visits happened right around
21 July and August of 2013; is that accurate?

22 A. Yes.

23 Q. In August of 2013, did you stay in the United
24 States?

25 A. Yes.

1 Q. Okay. Did there come a point in time when you
2 returned back to Columbia?

3 A. Yes.

4 Q. Okay. And do you remember how long you stayed in
5 Columbia?

6 A. Almost one year.

7 Q. And during that time, did you have any treatment
8 for the left ankle?

9 A. Yes.

10 Q. Did you see a doctor?

11 A. Yes.

12 Q. When did you see that doctor?

13 A. September.

14 Q. Of 2013?

15 A. Yes.

16 Q. Okay. Besides seeing that doctor, did you have any
17 additional treatment for that one-year period?

18 A. No.

19 Q. Why not?

20 A. I didn't have money.

21 Q. Was there a reason that you went back to Columbia
22 and didn't stay in the United States?

23 A. Yes.

24 Q. What is the reason?

25 A. That I went back to Columbia?

1 Q. Yes?

2 A. I went back because my daughter had a kidney
3 infection. Her mom called me and said I needed to be there
4 to help her.

5 Q. Did you eventually come back to the United States?

6 A. Yes.

7 Q. And when you came back to the United States, did
8 you see any doctors for your foot, your ankle, excuse me?

9 A. Yes.

10 Q. Do you remember who the doctor was?

11 A. I think it was a lady doctor, Papathomas.

12 Q. Papathomas?

13 A. Yes.

14 Q. Okay. And Dr. Papathomas's office was also
15 Dr. Touliopoulos there?

16 A. Yes.

17 Q. Okay. When you began treating with
18 Dr. Touliopoulos and Dr. Papathomas, what did you tell them
19 about how your left ankle was feeling; why did you seek
20 treatment with them?

21 A. I told him that I was seeking help from them
22 because the pain that I felt the very first time I was still
23 feeling it the same, stabbing pain, electricity sensation
24 continue.

25 Q. And at that point when you told them that that is

1 what you were feeling in the left ankle, what did they
2 instruct you to do, if anything?

3 A. They ordered an MRI.

4 Q. Did they also send you for physical therapy?

5 A. Yes, they sent me for physical therapy.

6 Q. And did you do the physical therapy?

7 A. Yes.

8 Q. What type of things or -- withdrawn.

9 During the physical therapy sessions, what types of
10 things would the doctors do?

11 A. They would give massage to the foot. They would
12 use elastic bands so that I could move the foot. They would
13 have me do a bicycle to be able to move the foot. They
14 would place my foot over this machine, sort of a cold boot
15 for the pain.

16 Q. Did it help?

17 A. Sometimes it would help, sometimes not.

18 Q. Did you get the MRI that Dr. Touliopoulos asked you
19 to get?

20 A. Yes.

21 Q. Okay. And once you had the MRI, did
22 Dr. Touliopoulos indicate to you if there was any issue with
23 your left ankle?

24 A. Yes. That I, that there were problems with the
25 tendons.

1 Q. Tendons. Did he indicate to you anything about the
2 ligaments?

3 A. Yes. That I had both tendons, torn tendons and
4 ligaments.

5 Q. Okay. And did he tell you what, if anything he
6 could do for you to try to help or fix what is wrong with
7 your ankle, at that time?

8 A. Yes. He said that I would be having another
9 surgery.

10 Q. Okay. Did you have that surgery?

11 A. Yes.

12 Q. Okay. The second surgery, um, do you recall the
13 month and the year that you had it?

14 A. October 15. October 2015.

15 Q. Was the surgery, the second surgery sometime in
16 2015?

17 A. I didn't understand.

18 Q. That is okay. The second surgery with
19 Dr. Touliopoulos, so the first surgery was with the
20 hospital. The second surgery with Dr. Touliopoulos. Did
21 that happen sometime in 2015?

22 A. Yes.

23 Q. Okay. And the surgery that you had afterwards,
24 or before the surgery, did he indicate to you what type of
25 surgery you would need in order to try to help you with the

1 problems you were having with your left ankle?

2 A. Yes. The ligaments.

3 Q. Did he describe to you what he would be doing
4 during the surgery?

5 A. Yes. He said that he would need to put me under
6 and reconstruct the ligaments.

7 Q. Okay. And after the surgery, were you released
8 from the surgical center?

9 A. Yes.

10 Q. And was your leg in a cast again?

11 A. Yes.

12 Q. Were you provided anything in order to be able to
13 ambulate with a wheelchair, crutches, something else?

14 A. Crutches.

15 Q. Okay. And after the second surgery, did you have a
16 follow-up with Dr. Touliopoulos?

17 A. Yes.

18 Q. Okay. What did you tell him about how your left
19 ankle was feeling after the second surgery?

20 A. I told them -- I told him that the pain continued,
21 that I still felt that there was something in me, that the
22 foot at nighttime gets hot as though it has a fever. That
23 it was still hurting, that I still felt the stabbing pains,
24 sensation. That when I start to walk the pain would twist,
25 it lacked stability.

1 MS. TOMINOVIC: You said it lacked stability?

2 THE INTERPRETER: Yes.

3 A. Yes, stability. I could not hold it correctly on
4 the ground.

5 Q. After you communicated that to Dr. Touliopoulos,
6 did he recommend anything else for you?

7 A. Yes. That they would do another MRI and that they
8 needed to do another surgery.

9 Q. Did they tell you what the surgery would involve?

10 A. Yes, the tendons.

11 Q. And do you remember the month and the year of when
12 you had that surgery?

13 A. In January of 2020.

14 Q. The surgery that you had, the third surgery to
15 repair the tendon, could it have been in January of 2017?

16 A. January 20th of '17?

17 Q. Just January 2017?

18 A. Yes, 2017.

19 Q. Okay. Mr. Pena, are you a little nervous?

20 A. Yes.

21 Q. It is okay. It is okay. It is okay.

22 After the third surgery, did they put you in a cast
23 again?

24 A. Yes.

25 Q. Did they provide you with wheelchair, crutches

1 anything else to move around?

2 A. Crutches.

3 Q. And did there come a time when you followed up with
4 Dr. Touliopoulos's office, Dr. Papathomas?

5 A. Yes.

6 Q. And what did they tell you about the third surgery
7 and how your ankle was?

8 A. They said that I needed to do therapy and then come
9 back to see them to see if there had been any improvement as
10 far as the pain, and to see if the foot regained strength.

11 Q. Did you go to therapy to try to do that?

12 A. Yes.

13 Q. And after going to therapy, can you tell us today
14 what does your ankle feel like; what do you experience in
15 your ankle on a daily basis?

16 A. My ankle still hurts. I still lose stability. I
17 continue having the same pain. I feel at night that the
18 foot gets hot. I have to apply ice packs around the top and
19 on the bottom, and I take medication on a daily basis.

20 Q. Now, Mr. Pena, who do you live with today?

21 A. With my wife and my children.

22 Q. Okay. Who are your children?

23 A. Ian, Destiny, John, Scarlet, Michelle.

24 Q. Okay. Michelle, does she still live in Columbia?

25 A. Yes.

1 Q. The other four children that you mentioned, is Ian
2 your and Cynthia's son?

3 A. Yes.

4 Q. And the other three children you mentioned,
5 Destiny, John, Scarlet, those are Cynthia's children?

6 A. Yes.

7 Q. You are their stepfather?

8 A. Yes, and I consider them my own children.

9 Q. Okay. Mr. Pena, can you tell this jury what type
10 of things or what type of activities you like to do or you
11 love to do before this accident that you can either no
12 longer do or that you have to do differently now because of
13 the injuries you sustained in this accident?

14 A. Before the accident I liked running, playing
15 football.

16 Q. Hold on. Football or soccer?

17 A. Soccer.

18 Q. Okay. Please?

19 A. Bicycle riding, I ran. I would go out to play with
20 my daughter, at that time. I would go to parks. I would go
21 to family gatherings. I would go out with my friends as
22 well.

23 Q. Okay. Would you also work?

24 A. Yes, I worked. I felt capable to do any job.

25 Q. And can you tell us now that you described to us

1 what you were, did before, can you tell us how that is
2 different now?

3 A. I no longer have friends. The friends I had
4 started to bully me because I could no longer go out to
5 dance or to play football with them.

6 Q. Soccer?

7 A. Soccer with them. I attend gatherings with my
8 family, but we also used to go play volleyball, basketball,
9 but I cannot do any of that anymore.

10 Q. What about interacting with your children?

11 A. I don't go out with my children.

12 Q. Why not?

13 A. I've wanted to go out with them, but when I do I
14 feel the lack of stability on my foot and I fall.

15 Q. Mr. Pena, what about work, are you able to work?

16 MR. VAN ETTEN: Note my objection.

17 THE COURT: So noted.

18 Q. Go ahead.

19 A. No, I've applied in various places, but they say
20 no.

21 Q. How does that make you feel?

22 A. Bad.

23 Q. Why?

24 A. Because I'm unable to help my family. I already
25 lost a relationship because of what happened, and now I feel

1 like I'm a burden to them.

2 Q. Mr. Pena, if you were able to go get physical
3 therapy, would you?

4 A. Yes.

5 Q. Why?

6 A. Because I would like to recuperate somewhat from my
7 foot, get some type of improvement.

8 Q. Had you seen a doctor recently who evaluated your
9 foot?

10 A. Yes.

11 Q. And what did he indicate to you after he examined
12 your ankle?

13 MR. VAN ETTEN: Note my objection.

14 THE COURT: Overruled.

15 A. That I need therapy.

16 MS. TOMINOVIC: Thank you, your Honor.

17 I have nothing further. Thank you, Mr. Pena.

18 THE COURT: Okay.

19 Cross-examination.

20 MR. VAN ETTEN: Sure. Thank you, your Honor.

21 CROSS-EXAMINATION

22 BY MR. VAN ETTEN:

23 Q. Mr. Pena, I know you were nervous when you were
24 being asked questions by your attorney. She makes me
25 nervous too, so don't worry. Okay.

1 A. Uh-huh.

2 Q. Now, sir, you told everybody at the beginning you
3 never testified in court before; is that true?

4 THE INTERPRETER: Sorry. Could you repeat
5 that?

6 Q. Sure. You told everybody you never testified in
7 court before; is that true?

8 A. No.

9 Q. Have you testified in court before?

10 A. No.

11 Q. Okay. But during this lawsuit you did come in
12 twice before and testify with lawyers in, and a court
13 reporter that was taking down information, correct?

14 A. Yes, but not as a witness.

15 Q. Were you asked questions -- let me ask this: When
16 you first came in today, you raised your hand to swear to
17 tell the truth, correct?

18 A. Yes.

19 Q. And when you were asked questions that time, you
20 raised your hand to swear to tell the truth, correct?

21 A. Now, yes.

22 Q. At the time when you did the deposition with your
23 attorneys, and someone for the defendants asking you
24 questions, you also told the truth that time, true?

25 A. No.

1 THE COURT: The Court is going to give an
2 instruction to the jury.

3 MR. VAN ETTEN: Thank you, your Honor.

4 THE COURT: Okay. At some time prior to the
5 trial today, the plaintiff was asked questions by the
6 attorneys. These questions and answers were taken under
7 oath and transcribed by a court reporter. They are to
8 be considered as if the witness is testifying from the
9 witness stand today. Okay.

10 Proceed, Mr. Van Etten.

11 MR. VAN ETTEN: Thank you.

12 (Transcript continues on the next page.)
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1 A I don't recall.

2 Q Okay. Sir, what I'm going to do is, I am going to read
3 you just a couple of questions and ask you if you remember
4 giving those answers, okay?

5 THE INTERPRETER: Your Honor, I had asked if I
6 could have a copy of the transcript he is reading from or
7 that they will be reading from, but I guess none are
8 available. I would ask that you go slowly, please.

9 MR. VAN ETTEN: I will go very slowly, and I will
10 do that starting on page 116, your Honor.

11 THE COURT: Thank you, counsel.

12 MS. TOMINOVIC: Which date?

13 MR. VAN ETTEN: The first one, from January 17,
14 2017, starting on line 16.

15 Q Okay.

16 "Question: When did you take that trip?

17 "Answer: 2014."

18 Line 18:

19 "Question: How long did you stay in Columbia?

20 "Answer: About three months."

21 Line 20:

22 "Question: Did you have any treatment for your
23 injuries while in Columbia?

24 "Answer: Not that I remember."

25 Line 23:

1 "Question: Did you visit any doctor in Columbia
2 for the injuries from the accident?

3 "Answer: No."

4 Sir, do you recall being asked those questions and
5 giving those answers?

6 A Today?

7 Q Do you remember when I just read those questions if you
8 had been asked that in 2017 and you gave those answers?

9 A But I gave those answers today.

10 Q Right. Well, sir, the reason I asked you about the
11 prior questions is because in 2017, on January 17, 2017, you
12 said you never visited any doctors in Columbia and today you
13 told the jury that you did.

14 A Yes, I did visit.

15 Q Okay. So when you testified in 2017 under oath that
16 answer was incorrect?

17 A I don't know. I don't recall that day.

18 Q Well, you also said today that you were in Columbia for
19 about a year after you had your surgery, and back in 2017 you
20 said you were there for three months.

21 Was the answer given five years ago incorrect?

22 A No.

23 Q Okay. When you went to Columbia -- in fact, you just
24 said today that you saw the doctor one time in Columbia; is that
25 correct?

1 A Yes.

2 MR. VAN ETTEN: Your Honor, I'm going to show the
3 witness two documents marked Defendant's A and B for
4 identification.

5 I will show counsel first before giving them to
6 the witness.

7 (Handing.)

8 MS. TOMINOVIC: No objection, your Honor.

9 (Handing.)

10 Q Before I show it to you, the place you went in
11 Columbia, was that Clinica San Rafael?

12 A Yes.

13 Q Did you see Dr. Gonzalez Palomino Luis Gabriel?

14 A Yes.

15 Q I will show you first Defendant's A for identification,
16 and ask you to look right at the top, and ask you if that
17 document refreshes your recollection if you saw the doctor on
18 August 27, 2013?

19 (Handing.)

20 A Yes.

21 Q I will show you Defendant's Exhibit B for
22 identification, and ask you to look at the same spot, and does
23 that say that you also saw him on September 27, 2013?

24 (Handing.)

25 A Yes.

1 Q Okay. So you actually saw the doctor twice, fair?

2 A No, once.

3 Q Okay. So those records don't refresh your recollection
4 that you saw the doctor twice even though they have two
5 different dates?

6 A No.

7 Q Okay. Do you have problems sometimes with your memory?

8 A Yes.

9 Q Okay. I know you said you're nervous, right?

10 A Yes.

11 Q If when you continue answering my questions you are
12 nervous or you don't understand me, you will let me know so that
13 I can make sure that you understand; is that fair?

14 A Okay.

15 Q I want to take you back right now to the date of the
16 accident, okay.

17 You said earlier that there was a beam, and the beam
18 fell on to your foot, correct?

19 A Yes.

20 Q I don't know if you had said this, but the beam that
21 fell, that beam was already on the ground, correct?

22 A Yes, but it had two supports.

23 Q Did it have rocks and debris underneath it?

24 THE INTERPRETER: I am sorry, I have to look up
25 the word debris.

1 Q Like garbage, rubble.

2 A Yes.

3 Q And so this wasn't the beam when you said with the
4 equipment being lifted up in the air and falling down, this was
5 already on the ground and fell over, correct?

6 THE INTERPRETER: Can I have that read back in two
7 parts, please, your Honor?

8 THE COURT: Yes, please.

9 (The question as requested was read by the
10 reporter.)

11 A Yes.

12 Q And you had only been working construction for four
13 days, correct?

14 A Yes.

15 Q When you were working in Columbia before coming to the
16 United States, you were working in a factory doing sewing,
17 correct?

18 A Yes, I was making military clothing.

19 Q That's not construction, correct?

20 A No, but I did work in construction.

21 Q What did you do?

22 A Demolition -- tablet [sic], demolition.

23 Q I forgot to ask you: Damien, who you described before,
24 he worked for Phoenix, your employer, correct?

25 A Yes.

1 Q And you don't know Pinnacle Associates, the owner of
2 the building, correct?

3 A No.

4 Q Now your accident was right after lunch?

5 A Fifteen minutes after.

6 Q I think you said 12:45, correct?

7 A Yes.

8 Q And then you said that Damien did not come until around
9 3:30; is that what you said today?

10 A Yes.

11 Q I am going to go back and ask you questions again from
12 page 80 of the January 17, 2017, deposition.

13 THE INTERPRETER: January what, sir?

14 MR. VAN ETTEN: 17, 2017.

15 Q Page 80, line 20:

16 "Question: About what time did Damien arrive?

17 "Answer: At around 4:00."

18 Do you recall giving that answer and saying Damien came
19 at 4:00 o'clock?

20 A Yes, the time, yes.

21 Q Okay. And then you said before that Damien and some
22 workers got you and took you to a car, correct?

23 A Yes.

24 Q And how long did it take them to help you off the
25 ground, bring you to the car and put you in the car?

1 A About 20 or half an hour.

2 Q Twenty to 30 minutes, fair?

3 A Yes.

4 Q Then you went to a doctor's office, and I think you
5 said you didn't remember. If I read your transcript and I told
6 you it was Brooklyn, do you remember that it was Brooklyn where
7 the doctor was?

8 A No, I don't know.

9 Q Okay. Starting on page 85 to page 86, I will start on
10 line 23:

11 "Question: Did this woman have an office?"

12 THE INTERPRETER: Repeat that, please.

13 Q Sure.

14 "Question: Did this woman have an office?"

15 "Answer: Yes."

16 Line 25, going to the next page:

17 "Question: Was the office in The Bronx, was it in
18 Manhattan? Where was it?"

19 "Answer: Brooklyn."

20 Does that refresh your recollection that in January of
21 2017 you remembered that you were driven to Brooklyn from the
22 accident site?

23 A Yes.

24 Q Okay. How long did it take you to drive -- withdrawn.

25 How long did it take Damien to drive you from The Bronx

1 to the doctor's office in Brooklyn?

2 A About 45 minutes, an hour.

3 Q Okay.

4 A Around that time. With the pain I was having, I wasn't
5 really aware.

6 Q All right. Then you got to the doctor's office, and
7 she examined you and took x-rays, and then you left, correct?

8 A Yes, Damien took me.

9 Q Right. How long did it take the doctor to examine you
10 and take the x-rays before you left?

11 A About 20 minutes, half an hour.

12 Q And then Damien drove you to Bellevue in New York City,
13 correct?

14 A Yes.

15 Q How long did that take?

16 A I don't know.

17 Q More than ten minutes?

18 A I don't know. With the pain I wasn't --

19 Q More than an hour?

20 MS. TOMINOVIC: Objection.

21 THE COURT: I'll allow it.

22 THE INTERPRETER: I'm sorry?

23 THE COURT: I'll allow it.

24 A I don't know. With the pain that I was having, I was
25 in pain, my heart was -- I was focused on the pain, not how long

1 is this going to take.

2 THE COURT: Move on now.

3 Q What I am trying to understand, sir, is if Damien got
4 to the site at 4:00 o'clock, and that took 20 to 30 minutes to
5 get you out of the building, and then 45 minutes to an hour to
6 drive to Brooklyn, and then another 20 to 30 minutes to be
7 examined, and then you had to drive back to New York, that would
8 have been minimally two hours or more; would that be fair?

9 A Yes.

10 Q Okay. If there was two hours or more, you would not
11 have gotten to the hospital until after 6:00 o'clock at night,
12 correct?

13 A Yes.

14 Q We have marked in evidence as was noted by counsel your
15 hospital records. Exhibit 1 for plaintiff are the Bellevue
16 Hospital records, and that has you arriving at triage at
17 4:47 p.m.

18 Do you know if your recollection of the timing may not
19 have been accurate?

20 A No.

21 Q No. Do you think what you just told the jury about
22 that time line is accurate?

23 A No, I'm estimating something. I cannot tell you how
24 long we took inside the car.

25 With the pain that I had in my foot I was not saying,

1 oh, from here to here will take me a half an hour. I just kept
2 crying and saying I need a hospital, nothing else.

3 Q Well, sir, part of what, and I don't know if you
4 understood it, your attorney said is that your attorney said to
5 the jury during openings --

6 MS. TOMINOVIC: Objection, your Honor.

7 THE COURT: Yes, that's sustained.

8 Q Sir, what you testified before is that you were lying
9 on the ground for three hours, three and a half hours in pain.

10 MS. TOMINOVIC: Objection, that wasn't the
11 testimony.

12 THE COURT: Okay. Do you want to rephrase it
13 utilizing the testimony?

14 Thank you.

15 Q You testified to the jury earlier in the morning that
16 it was 12:45 when the accident happened, and then you first said
17 Damien came at 3:30, and then when you saw and we read your
18 transcript you said that refreshed you that it was at
19 4:00 o'clock.

20 A No, 3:30.

21 Q Okay. 3:30 would be two hours and 45 minutes, and
22 4:00 o'clock would be three and a half hours. So would it be
23 fair to say it was between two hours and 45 minutes and three
24 hours, three and a half or three hours and 15 minutes?

25 THE INTERPRETER: What's the last thing you said?

1 MR. VAN ETTEN: Three hours and 15 minutes.

2 A I did not understand.

3 Q What I'm trying to find out, sir, is if maybe the
4 amount of time that you are claiming you were on the ground was
5 either, number one, exaggerated, number two, something you don't
6 remember accurately or something you're not sure of?

7 A No. I recall that I remained on the ground until 3:30.

8 Q Now, you were talking about pain, that is something
9 that affects your ability to remember the time it took to get
10 you to and from the hospital?

11 A No.

12 THE COURT: Okay, Mr. Van Etten, you really need
13 to ask direct questions.

14 MR. VAN ETTEN: Okay.

15 Q Sir, during the time that you have been treating for
16 your injury, doctors would ask you what your pain level is; do
17 you recall that?

18 A Yes.

19 Q When you go to your physical therapist, they ask you
20 what is your pain level, correct?

21 A Yes.

22 Q And when you went to the hospital on the day of the
23 accident when you were hurt, they asked you what your pain level
24 was, correct?

25 A Yes.

1 Q At that time did you tell the hospital as per the
2 triage record that your pain level was three on a scale of ten?

3 A (There was no verbal response.)

4 Q Did he answer?

5 A I didn't understand.

6 Q Did you tell the people at the hospital when you first
7 got there that your pain level was three?

8 A No.

9 Q When you first saw a nurse after they checked you in,
10 did you tell her your pain level was three?

11 A No.

12 Q You said you didn't have a phone at the time of the
13 accident, correct?

14 A Yes.

15 Q But at some point your brother went to Brooklyn and was
16 there when you saw the doctor, correct?

17 A Yes, he got to that private doctor's office.

18 Q That's because one of the people you worked with called
19 him for you, correct?

20 A Yes.

21 Q And that person was on the job site when you got hurt,
22 true?

23 A Yes.

24 Q And did you ask to use his phone to call 911 for an
25 ambulance?

1 A No, I wrote down my brother's cell phone number so he
2 would be able to call him.

3 Q Was your leg bleeding?

4 A No.

5 Q When you treated at Bellevue after your surgery, did
6 they tell you that you needed physical therapy?

7 A Yes.

8 Q So that would have been in July or August of 2013,
9 correct?

10 A Yes.

11 Q And despite being told by your doctors to get physical
12 therapy, you did not do so until 2014 in December, true?

13 A No. When they told me so and they made the
14 appointments, the medical appointments for me, from that moment
15 I started to attend.

16 Q But I'm talking, sir, about physical therapy. Once you
17 got out of the cast, did you ever get physical therapy before
18 December of 2014?

19 A No.

20 Q Now you also talked earlier, you said that Bellevue
21 gave you a wheelchair, that's what you told the jury this
22 morning; do you remember that?

23 A No, they gave me crutches.

24 Q You weren't asked the question by your counsel, did you
25 have a wheelchair, and you said that Bellevue gave you a

1 wheelchair?

2 A No, I said that they gave me crutches.

3 Q Did you use a wheelchair?

4 A Yes.

5 Q Where did you get it from?

6 A My family chipped in, they all chipped in to gift it to
7 me.

8 Q Page 93, January 17, 2017, line 13:

9 "Question: Where did you get the wheelchair
10 from?"

11 Line 15:

12 "Answer: A friend had it and he gave it to me."
13 Isn't that what you testified in 2017, sir?

14 A No, because it was my relatives that gave me the chair.

15 (Continued on next page.)
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1 Q. Well, sir, relatives gave you a chair, but the
2 doctors treating you never told you to use the wheelchair,
3 correct?

4 A. No.

5 Q. The doctors told you to get physical therapy and
6 instead you got a wheelchair, correct?

7 A. Yes, to be able to ambulate.

8 Q. Do you do home exercises now?

9 A. Now the doctor told me to attempt to move the foot
10 a little.

11 Q. When you first started getting physical therapy
12 after seeing Dr. Touliopoulos --

13 THE INTERPRETER: Sorry, can you repeat that?

14 Q. When you first started to go to physical therapy
15 after you saw Dr. Touliopoulos, did they at some time give
16 you home exercises to do?

17 A. No.

18 Q. You never have been given home exercises by your
19 therapist?

20 A. No.

21 Q. You said you played soccer before the accident or
22 football?

23 A. Yes.

24 Q. Were you good at it?

25 A. Yes.

1 Q. Did you play a lot?

2 A. Yes.

3 Q. Did you ever hurt your ankles while playing soccer
4 where you would sprain an ankle?

5 A. No.

6 Q. After your accident and surgery, did the doctors
7 ever recommend for you to put supports in your shoes?

8 A. No.

9 Q. Were you ever told that you needed to wear shoes
10 such as sneakers to give you support in your ankle?

11 A. No.

12 Q. Did you ever get a brace for your ankle; do you
13 know what I meant by brace?

14 A. No.

15 Q. Okay. You said you had gotten a cast, right, the
16 hard cast; do you remember that?

17 A. Yes, the cast.

18 Q. And you also had used a boot, correct?

19 A. Yes.

20 Q. And did you ever get something that it was metal
21 to wear around your foot or elastic to wear around your
22 foot?

23 A. A bandage, ace bandage.

24 Q. Did the doctors give you that or did you do that
25 for yourself?

1 A. The doctor gave me the ace bandage so that I can
2 bandage my foot and then wear the boot.

3 Q. Okay. So that is when you were wearing the boot?

4 A. Yes.

5 Q. And when you stopped wearing the boot, did you stop
6 wearing the ace bandage?

7 A. Yes.

8 Q. And currently, when you take pain medicine it is
9 Ibuprofen, correct?

10 A. Advil.

11 Q. Okay. And I think Dr. Carfi testified --

12 THE INTERPRETER: Doctor what?

13 Q. Dr. Carfi, C A R F I, that you had only been taking
14 Advil two times a day, one pill at a time; is that correct?

15 A. Yes, I take two pills at night.

16 Q. Okay. And after your surgery you went to Columbia
17 to visit your daughter, correct?

18 A. Yes.

19 Q. And then you came back in 2014, correct?

20 A. Yes.

21 Q. And you've gone back how many more times to
22 Columbia to see Michelle?

23 A. Two more times.

24 Q. Two more times. And you fly down there I take it?

25 A. Yes.

1 Q. And when you go, you have to go through customs
2 every time?

3 A. Yes.

4 Q. Do you make any special arrangements for yourself
5 in order to fly to Columbia?

6 A. What do you mean; what kind of arrangements?

7 Q. When you go there, do you just go and check-in?

8 A. Yes.

9 Q. You walk to the screen?

10 A. I walk slowly and it is my wife who carries the
11 suitcases.

12 Q. Fair enough. But then when you get to the other
13 country, whether it is Columbia and come back to the United
14 States, you have to stand in line for customs, true?

15 A. Yes.

16 Q. And that takes a long time, right?

17 A. Yes.

18 Q. You can stand for half hour, an hour, maybe two
19 hours waiting in line for customs, true?

20 A. No, because I sit. My wife gets on the line and
21 once she is drawing close, I draw close.

22 Q. Were you referred to Dr. Touliopoulos -- I will
23 have to learn that for this afternoon.

24 Were you referred to Dr. Touliopoulos by your
25 attorneys?

1 A. Yes.

2 Q. And he is the doctor that did your second surgery?

3 A. Yes.

4 Q. And Dr. Papathomas is also in his office?

5 A. Yes.

6 Q. When you came to the United States in 2013, did you
7 come by yourself?

8 A. What year?

9 Q. 2013?

10 A. Yes.

11 Q. And you had your accident, and then you went back
12 within five or six months; is that fair?

13 A. Yes, I don't recall but.

14 Q. Okay. When you came back in 2014, at some point I
15 think you said earlier you had another relationship,
16 correct?

17 A. Yes. I was with my daughter's mother.

18 Q. Right. But when you came back to the United States
19 you met a woman, Karen Galliano?

20 A. Uh-huh.

21 MS. TOMINOVIC: Your Honor, I object. Ask
22 for an offer of proof as to where we are going with
23 this.

24 MR. VAN ETTEN: Next question. I will get
25 there.

1 THE COURT: Okay. Overruled. Subject to
2 connection.

3 MR. VAN ETTEN: Sure.

4 Q. Did you meet that woman?

5 A. Yes.

6 Q. And you met her socially, correct?

7 A. Yes.

8 Q. You were able to meet somebody, go out with her,
9 and socialize with her, correct?

10 MS. TOMINOVIC: Objection, your Honor.

11 THE COURT: Overruled.

12 A. Yes. She was a friend.

13 Q. And you were able to do that despite your injuries,
14 correct?

15 A. I don't understand. Like, what I could do?

16 Q. How long were you together with Ms. Galliano?

17 A. Three years.

18 Q. Okay. Then you broke up, true?

19 A. Yes.

20 Q. And then you met Ms. Santana?

21 A. Yes.

22 Q. And how long have you been in a relationship?

23 A. Five years.

24 Q. And how did you two meet?

25 A. Through a male friend.

1 Q. Did you meet her in your apartment, did you go
2 out to meet her, did you meet her at a bar, club; how did
3 you meet her?

4 A. In my apartment.

5 Q. So, she came to visit you?

6 A. Yes. She came over with a male friend of mine.

7 Q. Okay. And then after you met, did you start to
8 date?

9 A. Yes. We would always see each other in the
10 apartment.

11 Q. Well, you met her children, correct?

12 A. Yes.

13 Q. Did you ever have to go to her apartment with her
14 children to meet her children?

15 A. No.

16 Q. So, you still go to family gatherings?

17 A. No, sometimes.

18 Q. Okay. When you go to family gatherings, you go as
19 a family, correct?

20 THE INTERPRETER: Sorry?

21 Q. When you go to family gatherings, you go as a
22 family, correct?

23 A. Yes.

24 Q. Because family is important to you?

25 A. Yes.

1 Q. And after you met, you and Ms. Santana had Ian,
2 correct?

3 A. Yes.

4 Q. And at that time the two of you decided to expand
5 your family from her children to having one together,
6 correct?

7 A. Yes.

8 Q. And again that is because family is important to
9 you?

10 A. Yes.

11 Q. And you may not be able to do things physically as
12 much as you would like, but you still are able to do things
13 with the family, have birthday parties, and do things like
14 family people do; is that true?

15 THE INTERPRETER: Sorry. I need you to
16 repeat.

17 Q. Sure. Though you may not be able to do things
18 physically as much as you would like, you are still able to
19 get together and do things, family, for birthday parties,
20 holidays, things like that, right?

21 A. Everything that we celebrate we do it at home,
22 watching television, um, movies.

23 Q. You said before you applied for jobs.

24 Do you go out to apply for jobs?

25 A. Yes, I go out in a car.

1 Q. And you drive a car, correct?

2 A. Yes.

3 Q. Okay. And at times you park cars on the street and
4 you have to move your cars, right?

5 A. I almost always find a garage.

6 Q. Has that always been that way?

7 A. Yes.

8 Q. Live in Pennsylvania now?

9 A. Yes.

10 Q. When did you move there?

11 A. One year ago. Where I live now, I've lived there
12 for one year, but almost three years, about three years.

13 Q. About three years. And so the doctor that you just
14 saw, I think your attorney asked you a few months ago, was
15 that doctor in Pennsylvania, close by?

16 A. No, it is here in New York.

17 Q. Okay. So, you drove all the way back to New York
18 to see a doctor, correct?

19 A. Yes.

20 Q. And the last time you had seen Dr. Touliopoulos,
21 Dr. T and people in his office was in 2018, correct?

22 A. Yes.

23 Q. And the doctors that gave you the physical therapy,
24 the last time you had seen them was in 2018, correct?

25 A. No.

1 Q. Were they the ones that you just saw in August,
2 September, October of this year?

3 A. Yes.

4 Q. Okay. Until August, September, October, you hadn't
5 seen them since 2018, correct?

6 A. Yes.

7 Q. So, you stopped treating in 2018 and you just
8 started again right before the trial, correct?

9 MS. TOMINOVIC: Just, let us approach for one
10 second?

11 MR. VAN ETTEN: Can he just answer the
12 question?

13 MS. TOMINOVIC: No, give us a second.

14 THE COURT: Step up. Step up.

15 MS. TOMINOVIC: Thank you.

16 (Whereupon, a discussion is held at the bench.)

17 THE COURT: Madam interpreter, do you want to
18 step up.

19 THE INTERPRETER: Yes, ma'am.

20 (Whereupon, a discussion is held at the bench.)

21 THE COURT: Please be mindful of the time,
22 counsel.

23 Okay Mr. Van Etten.

24 MR. VAN ETTEN: Just waiting for her -- she is
25 instructing him.

1 MS. TOMINOVIC: Yes.

2 (A brief pause.)

3 THE COURT: Okay. Mr. Van Etten.

4 MR. VAN ETTEN: Sure.

5 Q. We -- you were asked about wanting to go to
6 physical therapy. If you were to go for physical therapy,
7 you are not going to travel all the way from Pennsylvania to
8 New York for physical therapy, are you?

9 THE INTERPRETER: Can I have that read back?

10 THE COURT: Okay. Madam Court Reporter.

11 (Whereupon, the record was read back by the
12 reporter.)

13 A. If I must do that, even if it takes moving from
14 Pennsylvania to here, I would.

15 Q. Who do you live with in Pennsylvania?

16 THE INTERPRETER: I'm sorry?

17 Q. Who do you live with in Pennsylvania?

18 A. My wife.

19 Q. And your children?

20 A. Yes.

21 Q. And is this in a home, an apartment, or something
22 else?

23 A. In an apartment.

24 Q. How long have you been driving to court everyday?

25 A. No.

1 Q. How long does it take to drive from Pennsylvania to
2 New York City?

3 A. Two hours twenty minutes.

4 Q. Oh, last thing. I almost forgot that. You were
5 talking -- withdraw that.

6 When you were first asked questions by your
7 attorney and you were discussing the pain after your second
8 surgery, and you were describing the pain with the stabbing
9 and the heat in your foot, was there anything different
10 about the pain, at that time, from when you were first
11 hurt?

12 THE INTERPRETER: From what with, first what?

13 Q. From when you were first were hurt?

14 A. I didn't understand the question.

15 Q. Sure. You talked about the different pain that
16 you had in your left foot. You had stabbing pain
17 originally, correct?

18 A. Yes, the needling.

19 Q. Needling. After the surgery at Bellevue when you
20 complained to Dr. Touliopoulos, was the pain any different?

21 A. No.

22 Q. After Dr. Touliopoulos did his surgery, was the
23 pain any different?

24 A. No.

25 Q. And after Dr. Papathomas did her surgery, was the

1 pain any different?

2 A. No, same.

3 MR. VAN ETTEN: Thank you.

4 MS. TOMINOVIC: I have nothing further.

5 Thank you, your Honor.

6 THE COURT: You can step down, at this time,

7 Mr. Pena.

8 (Whereupon, the witness steps off the stand.)

9 THE COURT: Counsels, please step up.

10 MS. TOMINOVIC: Sure.

11 (Whereupon, a discussion is held at the bench.)

12 THE COURT: Ladies and gentlemen, that
13 concludes this morning's proceedings.

14 Please report back so that we can resume at
15 2:15. Thank you. Enjoy your lunch.

16 THE COURT OFFICER: All rise. Jury exiting.

17 (Whereupon, the jury exits the courtroom.)

18 (Whereupon, there is a luncheon recess taken
19 and the case adjourned to 2:15 p.m.)

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

THE COURT: Good afternoon.

THE COURT OFFICER: Jury entering.

(The jury entered the courtroom and the following occurred:)

THE COURT: Please be seated.

Thank you.

MS. TOMINOVIC: The plaintiff calls Dr.

Touliopoulos.

S T E V E N T O U L I O P O U L O S , M . D . ,

23-25 31st Street, Astoria, New York, 11105,

having been first duly sworn/affirmed, testified as follows:

THE COURT: Plaintiff, you may inquire, please.

MS. TOMINOVIC: Thank you, your Honor.

DIRECT EXAMINATION

BY MS. TOMINOVIC:

Q Good afternoon, Dr. Touliopoulos.

A Good afternoon.

Q Thank you for being here with us.

A You're welcome.

Q Prior to this afternoon, where were you this morning?

A I was performing surgery close by at New York-Presbyterian Downtown Hospital.

Q What type of surgery do you do?

1 A I perform orthopedic surgery.

2 Q Could you describe for the jury what the speciality of
3 orthopedics or orthopedic surgery entails?

4 A Yes.

5 Orthopedic surgery is a branch of medicine that studies
6 and treats disorders of the musculoskeletal system which
7 includes the bones, joints, tendons, ligaments and cartilage,
8 and I'm board certified both in orthopedic surgery as well as
9 orthopedic sports medicine which is a subdivision of orthopedics
10 that treats sports injuries, that would limit it to sports
11 injuries, but disorders of the joints including ligaments and
12 tendons.

13 Q Doctor, before becoming a physician, could you tell us
14 about your educational background?

15 MR. VAN ETTEN: Would you please ask the doctor to
16 speak into the microphone, move forward?

17 THE WITNESS: Yes.

18 A I did my undergraduate studies at Columbia University.
19 I majored in chemical engineering. I received a bachelor's
20 degree in chemical engineering.

21 I stayed on at Columbia University to receive a
22 master's in bioengineering before entering medical school at
23 SUNY Downstate.

24 Upon graduation from Downstate Medical School I stayed
25 on at Downstate to do my orthopedic residency.

1 After I graduated, I went on to Lenox Hill Hospital
2 where I did a fellowship in sports medicine before entering
3 private practice in New York in 1997.

4 Q You mentioned earlier that you're board certified.

5 Could you just tell the jury what it means to be board
6 certified?

7 A Yes.

8 To be board certified you have to pass -- first you
9 have to complete an accredited residency program and then pass a
10 two-stage exam. The first part is a written exam based on your
11 fundamental knowledge in orthopedics, and the second part, which
12 is two years later, is an oral exam where you're tested on
13 surgeries that you performed.

14 After passing those two exams, you become board
15 certified, and then you have to maintain your certification by
16 taking an exam every ten years.

17 Q And since becoming board certified initially to today,
18 any issue with the reexamination process?

19 A No. I am currently board certified in both orthopedic
20 surgery and orthopedic sports medicine.

21 Q Thank you, Doctor.

22 Doctor, did there come a time where Mr. Ivan Pena came
23 under your care?

24 A Yes.

25 Q Do you recall around what year that was, a month and

1 year?

2 A That first visit was in December of 2014.

3 Q When he presented to you in December 2014, did you both
4 take a history and examine Mr. Pena?

5 A Yes.

6 Q As part of your history, what information did Mr. Pena
7 provide to you?

8 A When he presented he was 26 years of age. He was
9 involved in a work accident where a metal beam fell on to his
10 left lower extremity resulting in a fracture of his left ankle.
11 More specifically, it was a medial malleolus fracture which is a
12 fracture of a bone on the inner aspect of the ankle. He
13 required surgery for this injury, and the operation is called an
14 open reduction and internal fixation. It's an operation where
15 the fracture is opened and then affixed in this case with metal
16 screws.

17 He presented at this point in time with continued
18 symptoms of pain in his ankle and difficulty ambulating for
19 prolonged periods of time, with frequent episodes of rolling and
20 giving out of his ankle, difficulty going up and down steps, and
21 walking on uneven surfaces.

22 He remained out of work due to the injuries he
23 sustained in this accident.

24 Q Doctor, before you go on with your examination of
25 plaintiff, you indicated that when he began treating with you he

1 had already had that ORIF surgery, open reduction/internal
2 fixation surgery?

3 A Yes.

4 Q Where did he have that done, if you recall?

5 A That was done at Bellevue Hospital.

6 Q You were not the surgeon at Bellevue Hospital that
7 performed that surgery; is that correct?

8 A That's correct.

9 Q Do you in your practice perform these surgeries?

10 A Yes, I do, and I have.

11 Q How often do you perform such surgeries?

12 A I would say that I perform this type of surgery
13 hundreds of times in my career.

14 Q Would you be familiar upon reading an operative report
15 of the procedure that is detailed in an ORIF type procedure?

16 A Yes.

17 MS. TOMINOVIC: Your Honor, at this time for
18 demonstrative purposes only I would like to have the doctor,
19 if he could, step off the stand, and I will position myself
20 differently so he can use Plaintiff's 7 for identification
21 only.

22 MR. VAN ETTEN: I have no problem with that, your
23 Honor, for the purposes of exhibit, but just, if we can,
24 when the doctor is referring to notes, can we know that he
25 is referring to notes, or if he is testifying from memory, I

1 would appreciate that.

2 THE COURT: Okay. So moved.

3 Doctor, you can step down at this time.

4 Q Doctor, I think what's best is I will take your spot
5 over there, and you will come take my spot because we do have
6 alternate jurors that are seated here (indicating). I think
7 that would be best.

8 A Okay. (The witness complies.)

9 MS. TOMINOVIC: Your Honor, before we proceed,
10 could we take a jury poll? Are they able to see the
11 demonstrative?

12 THE JURY: Yes.

13 Q Doctor, before you is Plaintiff's Exhibit 7 for
14 identification only.

15 Do you recognize what's depicted there?

16 A Yes.

17 Q What is it?

18 A It's the image -- on the right is an x-ray of the left
19 ankle of Ivan Pena from June 11, 2013.

20 Q Sorry. Go ahead.

21 A And these are illustrations of the x-ray image.

22 Q Based on your review of this x-ray here, could you
23 denote or can you see where those fractures are that you
24 indicated before?

25 MR. VAN ETTEN: Objection.

1 Foundation.

2 THE COURT: Sustained.

3 Q Doctor, do you review x-rays in your profession?

4 A Yes.

5 Q How often do you review x-rays?

6 A Whenever I am in the office.

7 Q How often is that?

8 A Two or three times a week.

9 Q Have you in your education, medical school, reviewed
10 and learned how to interpret x-rays?

11 A Yes.

12 Q And do you do that on a daily basis with your patients?

13 A Yes.

14 Q Doctor, now having reviewed that x-ray that's before
15 you, could you indicate where, if any, where you see those
16 fractures that you commented on before?

17 MR. VAN ETTEN: Your Honor, I hate to -- I object.

18 That's an exhibit not evidence he is looking at to review.

19 That's the problem.

20 MS. TOMINOVIC: Your Honor, the demonstrative is
21 part of the Bellevue records that are in evidence as
22 Plaintiff's Exhibit 1. The CDs are in evidence as
23 Plaintiff's Exhibit 1.

24 THE COURT: Okay. Do you want to make a statement
25 for the record tying together this exhibit with the records

1 in evidence?

2 MS. TOMINOVIC: No problem.

3 For the record, the Bellevue Hospital record noted
4 as Plaintiff's Exhibit 1 in evidence includes CDs, and on
5 those CDs there are x-rays. The x-rays that are depicted in
6 Plaintiff's Exhibit 7 for identification are exact replicas
7 of the x-rays on the CDs.

8 MR. VAN ETTEN: My question was had he reviewed
9 these x-rays prior to testifying. I thought that was the
10 foundation.

11 THE COURT: Okay.

12 Do you want to ask the question, please?

13 Q Doctor, did you have a chance to review these x-rays
14 before you came to testify today?

15 A Yes.

16 MR. VAN ETTEN: Thank you.

17 Q Based on your review of those x-rays, based on what you
18 are seeing before you, could you tell the jury where, in fact,
19 those fractures are that you denoted prior in your testimony
20 here today?

21 A Yes. There's a fracture of the medial malleolus.

22 The ankle is made up of three bones, the lower part of
23 the shinbone which is the tibia, the low part of the fibula and
24 this bone which is the talus, and this is the ankle joint here
25 (indicating). And there's a fracture that goes across here

1 (indicating), and this is the medial malleolus which is the bone
2 on the inside of the ankle. It's fractured. It's illustrated
3 here (indicating) where the fracture goes across and is
4 completely detached from the main bone which is the tibia
5 (indicating).

6 And in the illustration you can also see, which you
7 can't see on the x-rays, what's depicted here are the ligaments
8 that are attached to the bone and the cartilage that's in the
9 ankle joint (indicating).

10 Q Okay. Doctor, what I'm going to put forth now is
11 Plaintiff's Exhibit 8 for identification only.

12 So we are going to have Exhibit 9 for identification
13 only first and then we will go on to Exhibit 8.

14 A JUROR: I can't see.

15 Q Doctor, did you have a chance to review the operative
16 report for this open reduction/internal fixation procedure?

17 A Yes, I have.

18 Q And in reviewing the report, does Plaintiff's Exhibit 9
19 accurately depict the stages or the process of the procedure
20 that was performed on Mr. Pena's left ankle?

21 A Yes, it does.

22 Q With the demonstrative evidence, could you tell the
23 jury and describe exactly what was done to Mr. Pena's ankle as
24 part of the order of procedure?

25 A Yes.

1 So ORIF is short for open reduction and internal
2 fixation, ORIF procedure. Basically you have to open, expose
3 the fracture site, to fix it.

4 So an incision is made on the inside of the ankle
5 overlying where the fracture is. The dissection continued
6 through the skin and through the fat down to the bone exposing
7 the bone. Retractors are used to retract the skin while the
8 fracture is reduced. Reduced means putting it back into place.
9 It's held in place with pins and a clamp while screws are
10 placed, and these are compression screws so that as the screw
11 goes in, it actually pushes the fracture up and compresses it
12 back which helps in the healing process.

13 This is done both by direct visualization by the
14 surgeon as well as fluoroscopic pictures which are x-ray
15 pictures during the surgery. Once the surgeon is happy with the
16 way it looks, it's irrigated and the skin is closed in layers.

17 Q Doctor, with the assistance of what's been marked as
18 Plaintiff's Exhibit 8 for identification only, have you had a
19 chance to review plaintiff's postoperative x-rays after he had
20 this procedure done at Bellevue Hospital?

21 A Yes.

22 Q Does the demonstrative that's before you, does that
23 accurately depict the postoperative x-ray of Mr. Ivan Pena after
24 he had the ORIF procedure?

25 A Yes.

1 Q How do you know that?

2 A Sorry?

3 Q How do you know that? How is that an x-ray of Mr.
4 Pena?

5 A Yes, because I compared it to the x-rays I have.

6 Q Okay.

7 A So this shows, again, the x-ray post-op, after they are
8 done, showing that the fracture is reduced, it's in place. I
9 believe they did a good job. The hardware, the two screws, are
10 also well placed. And, again, this is, in this illustration,
11 it's showing the fracture is in place, and the location of the
12 screws in the medial malleolus of the ankle joint.

13 Q Doctor, you mentioned before that with an x-ray you're
14 not quite able to see ligaments.

15 Could you tell or describe for the jury what ligaments
16 are, what purpose they serve, things like that?

17 A Yes.

18 So x-rays are really good at seeing bones, but they are
19 really very poor at seeing soft tissues. Soft tissues can
20 include skin, fat, ligaments, tendons, cartilage, and we rely
21 more on an MRI to show structures versus an x-ray.

22 Throughout the ankle there are ligaments. There's the
23 deltoid ligament which is on the inside of the ankle which I
24 alluded to before, earlier. There are the lateral ligaments of
25 the ankle, and the lateral ligaments include the anterior

1 talo-fibular ligament the calcaneo-fibular ligament, and the
2 posterior talo-fibular ligament, and then there's also the
3 syndesmosis ligaments, and they are the ligaments that are
4 between the tibia and fibula, and those can also be injured when
5 an ankle is fractured. Those, the syndesmosis ligaments, were
6 checked intra, during the surgery, by the operative surgeon and
7 he found them to be intact.

8 Q Why is that significant to you in your treatment of Mr.
9 Pena?

10 A Well, injury to the syndesmosis is something that needs
11 to be addressed early on and so that's why whenever I perform an
12 ankle fracture surgery I always test for those ligaments during
13 the surgery. There's a particular test that's performed called
14 an external rotation stress test where you check for widening of
15 this gap with fluoroscopy. It can also be assessed clinically
16 by the physician and noticing how much motion there is in the
17 syndesmosis.

18 Q Just so I'm clear, with the stress test that was done
19 as part of Mr. Pena's operation, what ligament was that sought
20 to test?

21 A That was testing the syndesmotic ligaments.

22 Q That was not testing any other ligaments in Mr. Pena's
23 left ankle, correct?

24 A That's correct.

25 Q Doctor, I will have you come sit back down.

1 (The witness complies.)

2 Q Now, Doctor, you testified when Mr. Pena came to you it
3 was right around December 2014 and he presented with some
4 complaints.

5 Did you at that time have an opportunity to examine, do
6 a physical exam of Mr. Pena?

7 A Yes, I did.

8 Q Doctor, are you referring to your notes to testify?

9 A Yes, I am referring to my office notes from December 9,
10 2014.

11 Q Very good.

12 If you could, tell the jury the physical examination
13 that you did and what you found?

14 A Examination of the ankle revealed a healed incision
15 over the medial malleolus. There were no signs of infection.

16 His range of motion was limited. His dorsiflexion was
17 15 degrees. Dorsiflexion, if this is the ankle, it's the
18 ability to bring the ankle up (indicating). And normal
19 dorsiflexion is 20 degrees.

20 Q Doctor, I don't mean to interrupt you, but could you
21 explain to the jury when you say range of motion, what do you
22 mean in layman's terms?

23 A Range of motion is the motion of a joint. So with the
24 elbow, for instance, your range of motion would be your
25 extension and your flexion, your pronation and supination

1 (indicating).

2 Every joint has different norms for range of motion.
3 The ankle has dorsiflexion, bringing it up, plantar flexion,
4 bringing it down, inversion, swinging it inward, and eversion,
5 swinging it outward (indicating). Those are the four ranges of
6 motion in the ankle joint.

7 Q Can you tell us how Mr. Pena performed or was assessed
8 during this part of the testing?

9 A Yes.

10 Again, his dorsiflexion was 15 degrees and normal is
11 20. His plantar flexion, bringing his foot downward, was
12 15 degrees and normal is 40 degrees.

13 Of most significance during his examination were the
14 positive anterior drawer test and the positive talar tilt test.
15 So these are tests performed by the examiner to assess stability
16 of the lateral ankle ligaments and so we are testing for joint
17 instability, a loose joint.

18 You may have heard of patients whose shoulders pop out
19 of place. You can have, anybody can have a joint that can
20 become loose, pop out, especially after a traumatic event. One
21 of the best ways to assess stability of a joint is clinically by
22 examination. Actually, it's more accurate than an MRI is.

23 This test is an objective test where the examiner has
24 complete control of the examination, and one hand is placed on
25 the shin, and the other hand is placed on the foot, and the

1 ankle is kind of moved back and forth (indicating), and an
2 assessment is made as far as how loose it is. That's usually
3 compared to the contralateral side.

4 The anterior drawer test for the anterior talo-fibular
5 ligament, that test was positive signifying that the ligament
6 was not working properly, and the talar, talar tilt test is
7 testing for the calcaneo-fibular ligament, and that was also
8 positive signifying that that ligament was not working properly.

9 Now for a ligament not to work properly it may be
10 completely torn, it may be partially torn, and the part that's
11 not torn is stretched or it may not be torn at all, but is
12 stretched out, and, therefore, sometimes it may not be picked up
13 on an MRI scan because when it's stretched, it's not torn, and
14 the MRI may say it's intact which is true, but what the MRI
15 can't assess is how loose it may be, and that's why the
16 examination is very critical.

17 So based on his examination I noted dysfunction of
18 these two ligaments. The other test performed was the valgus
19 stress test which tests for the deltoid ligament, and the
20 posterior drawer test which tests for the posterior talo-fibular
21 ligament were normal, and the Achilles tendon was intact.
22 Again, the most you could find was limited motion and loose
23 ligaments on this examination.

24 Q Doctor, upon assessing Mr. Pena, both his medical
25 history and also your exam, did you recommend a course of

1 therapy or anything else that would help you in determining or
2 diagnosing were Mr. Pena was experiencing the pain that he was
3 experiencing?

4 A Yes, I did recommend an MRI scan of the ankle, and in
5 the interim I did instruct him on a home exercise program and on
6 the use of antiinflammatory medications to help with his
7 symptoms.

8 Q And, Doctor, when you asked him to go get an MRI, did
9 he go get the MRI?

10 A Yes.

11 Q Did he come back to your office to discuss the findings
12 on the MRI?

13 A Yes.

14 Q Now, Doctor, the MRI we are talking about, do you
15 yourself get an image, do you get a report, or is it both or
16 something else?

17 A We get both.

18 Q When you get the MRI image and the report, which one do
19 you review?

20 A I review both for comparison purposes.

21 Q But you, yourself, set your eyes also on the actual
22 image, correct?

23 A Yes.

24 Q Why is that important?

25 A Well, the radiologist that reads the films is usually

1 correct, but it's not unusual that I may have a disagreement
2 with my interpretation versus the radiologist's interpretation
3 of the images. I have the benefit of being able to examine the
4 patient and actually seeing where things hurt whereas a
5 radiologist does not examine the patient so he is a little bit
6 at a disadvantage in reading the images.

7 Q Doctor, based on your reading of the images and looking
8 at the report, did you agree or disagree with the radiologist
9 that read it?

10 A No, I basically agreed with his reading.

11 Q And once you had the MRI, did you speak with Mr. Pena
12 as to the circumstances surrounding his left ankle?

13 A Yes.

14 Q What did you indicate to him?

15 A At this point in time, you know, he was two years
16 post-injury and had ongoing symptoms of pain and dysfunction and
17 instability. I didn't believe anything short of an operation
18 would really help him, and I did recommend surgery for his
19 ankle.

20 Q Did there come a time when Mr. Pena underwent surgery
21 for his ankle?

22 A Yes.

23 Q What was that surgery going to entail?

24 A That surgery was going to entail removing the two
25 screws on the inside of his ankle because they were actually

1 causing him some symptoms, and performing an arthroscopy of the
2 ankle where we go inside the joint and look inside the joint as
3 well as perform a lateral ligament reconstruction or repair to
4 fix the loose ligaments in his ankle.

5 Q Doctor, I will ask you to do a seat change one more
6 time. Come over here.

7 A Sure.

8 Q I will put what's been marked as Plaintiff's Exhibit 10
9 for identification up here.

10 (The witness complies.)

11 Q Doctor, using what's been marked for identification
12 only as Plaintiff's Exhibit 10, could you describe for the jury
13 the surgery you performed on Mr. Pena's left ankle?

14 A Sure.

15 He was brought to the operating room. He received
16 anesthesia. One of the first things we do under anesthesia is
17 examine the ankle because the patient is completely relaxed and
18 we can sometimes get a better examination because there's no
19 longer pain that may limit the examination, and, again, we found
20 that the, those two tests, the anterior drawer test and the
21 talar tilt test, were positive.

22 We performed an arthroscopy where -- an arthroscopy is
23 when we go into a joint with a camera. That's performed in this
24 case through two small incisions in the front of the ankle. We
25 performed a diagnostic arthroscopy meaning we looked inside the

1 ankle.

2 When there is an ankle fracture there is a high
3 incidence of damage to the cartilage inside the ankle at the
4 time of the injury, and that's actually what we found, we did
5 find an area where there was damaged cartilage that we cleaned
6 involving the tibial plafond which is the lower end of the
7 shinbone.

8 (Continued on next page.)

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1 A. The doing cleaning in the ankle, we move forward
2 with the ligament surgery. Now, again, just to -- if you
3 are looking at Image A, this structure here is the deltoid
4 ligament. This structure here is the syndesmotic ligament.
5 That was tested by the surgeon who did the first surgery.
6 And then this ligament, lateral ligaments which are the ones
7 that were injured. And we performed what we call a Brostrom
8 reconstruction. The partially torn ligaments were divided,
9 cleaned, and then implicated.

10 So, in other words, they are loose, so we
11 divide them and we kind of bring them over and sew them so
12 they are tighter. Then we use some of the extensor tissues
13 to reinforce that repair, and we use anchors in the bone to
14 help tack the repair.

15 When we are done with that, we actually move
16 forward and remove the screws from the inside of the ankle
17 joint.

18 Q. Okay. Doctor, I know this maybe almost a silly
19 question, but when you are performing the surgery, is
20 Mr. Pena under anesthesia?

21 A. Yes.

22 Q. It is general anesthesia?

23 A. Yes. Well, actually, let me review that and let
24 you know.

25 Q. Sure.

1 A. He had general anesthesia and a nerve block, yes.

2 Q. Okay. Doctor, I'll have you sit back down.

3 A. Sure.

4 (Whereupon, the witness returns to the stand.)

5 Q. Doctor, did Mr. Pena come back to your office after
6 the surgery you performed on his ankle?

7 A. Yes.

8 Q. And did you again speak with him about how he was
9 feeling and do an exam?

10 A. Yes.

11 Q. And what were your findings?

12 A. Um, when he came back, let's see. Finding, first
13 post-op visit I believe in May --

14 MR. VAN ETTEN: April 29th.

15 A. On May 12, 2015, referring to my note, he came
16 back for a post-operative visit. He had expected symptoms
17 following a surgery. And at this point in time, was still
18 on crutches. But examination of his ankle did reveal that
19 it was stable and no signs of infection.

20 Q. And at some point did you prescribe Mr. Pena
21 physical therapy?

22 A. Yes.

23 Q. And was he able to attend physical therapy?

24 A. I believe he did attend sessions of physical
25 therapy.

1 Q. Now, during the time that you are overseeing
2 Mr. Pena's care, did he return back to your office regarding
3 any symptomology that he felt in his left ankle?

4 A. Yes. Um, he was having symptoms in his ankle, but
5 more in the back of the ankle, and he came under the care of
6 a podiatrist that was working in my office. Her name was
7 Erica Papathomas who indicated him for surgery for partial
8 tendon tear.

9 Q. Before he was indicated for the surgery, was there
10 an MRI done, additional MRI done of his left ankle?

11 A. Yes.

12 Q. Could you tell from your notes and office notes
13 what that MRI showed?

14 A. It showed the significant findings was partial tear
15 of the peroneus brevis tendon.

16 Q. Now, doctor, when you reviewed the MRI in 2015 of
17 Mr. Pena's left ankle, did you see that tear?

18 A. No.

19 Q. Is that uncommon for a tear to develop later on?

20 A. It is not uncommon.

21 Q. Why not?

22 A. This tendon injury is more of a consequential
23 problem and arises from an abnormal gait over a period of
24 time which stresses the tendon and results in partial tear
25 of the tendon.

1 Q. And did there come a time where Mr. Pena underwent
2 a third surgery?

3 A. Yes.

4 Q. And that was to repair the tendon?

5 A. Yes.

6 Q. Okay. What I'll put up now is Plaintiff's Exhibit
7 11 for identification only. If you could use the
8 demonstrative to describe the surgery and what
9 Dr. Papathomas did?

10 A. Yes.

11 (Whereupon, the exhibit is displayed in open
12 court.)

13 (Whereupon, the witness steps off the stand.)

14 A. Again, patient is given anesthesia and then an
15 incision is made. So, this incision is more in the back,
16 outside part of the ankle where the incision I made was more
17 in the front, outside part of the ankle. And again, this
18 surgery was aimed more towards the partial tear of the
19 peroneal tendon. The tendon is in a sheath, so the sheath
20 needs to be opened to get access to the tendon. Then the
21 tear is sutured, and in this case Dr. Papathomas also used a
22 graft to reinforce the repair, and then the sheath and the
23 skin are closed and the patient is awoken.

24 Q. Okay. Thank you, Doctor. You can have a seat.

25 (Whereupon, the witness returns to the stand.)

1 Q. Doctor, after Mr. Pena's final surgery, was he
2 casted?

3 A. Sorry?

4 Q. Was he casted, was his foot put in a cast?

5 A. Let me just review that record. Yes, he wasn't
6 casted, he was splinted. A splint is half a cast basically.

7 Q. And was he provided any sort of devices to
8 ambulate?

9 A. He had crutches.

10 Q. Did he follow-up with you or your office after his
11 2017 surgery?

12 A. Yes.

13 Q. And did he make complaints at that time about that
14 left ankle?

15 A. Yes.

16 Q. And what were some of the complaints that he made?

17 A. Complaints to Dr. Papathomas.

18 Q. Sure, yeah?

19 A. Let me review some of those notes. He -- I'm
20 looking at notes from Dr. Papathomas from June 15, 2017.
21 And patient did report improvement and pain since the time
22 of the surgery. He had been elevating his foot and icing
23 it. Was able to wear sneakers without stiffening pain.

24 Q. Doctor, now, I would like you to assume that
25 plaintiff testified today, and part of his testimony

1 indicated that he had recently seen a doctor at a physical
2 therapy location that indicated to him that his injury or
3 his symptomology was getting worse; is that possible?

4 MR. VAN ETTEN: Objection.

5 A. Yes.

6 MR. VAN ETTEN: Hearsay.

7 THE COURT: Overruled.

8 A. Yes, that is possible.

9 Q. How so?

10 A. Um, again, there are different findings that I
11 mentioned during the surgery that had been noted, but one of
12 the findings was the damage to the cartilage and that --
13 whenever there is a fracture of any joint and the fracture
14 was into the joint there is damage to the cartilage and that
15 is predecessor to getting arthritis. We find an area where
16 the cartilage covering the bone in the ankle was damaged and
17 that is irreversible damage.

18 Over a period of time, that will progress into
19 arthritis and, in fact, when I did x-rays in 2018 I, I noted
20 early findings of osteoarthritis in the ankle.

21 Q. What is osteoarthritis?

22 A. Osteoarthritis is basically wearing away of the
23 joint and it is, could be part of a normal aging process as
24 you get older. If you live long enough, we're all going to
25 have arthritis. Sometimes you develop arthritis from

1 autoimmune problems, but in a 27 year old person we don't
2 expect to see arthritis unless there is some sort of
3 traumatic incident to the joint.

4 Q. And, Doctor, the ankle is known as a weight-bearing
5 joint?

6 A. Yes.

7 Q. Could you describe for our jury what the
8 difference between a weight-bearing joint and non-weight
9 bearing joint?

10 A. Yeah. So, weight-bearing means you walk on it.
11 So, weight-bearing joints are the hip, knee and ankle, and
12 nonweight-bearing joints are the shoulder, elbow and wrist.
13 And if you have, you know, an arthritic condition in a
14 weight-bearing joint it is more likely to bother you because
15 you are walking on it versus maybe nonweight-bearing joint
16 such as a shoulder may still bother you, the shoulder too.

17 Q. Doctor, in one of your records in and around 2018,
18 you indicate that Mr. Pena had reached maximum medical
19 improvement. What did you mean by that?

20 A. Yeah, so, at that point in time I didn't believe
21 that he required anymore surgery or specific treatments.
22 That his ankle was as good as it was going to get, and I
23 did assess scheduled loss of use of the ankle, a percentage
24 I thought he lost for the function of the ankle.

25 Q. What percentage was that?

1 MR. VAN ETTEN: Note my objection.

2 A. That was --

3 THE COURT: Noted. Proceed.

4 A. Thirty percent.

5 Q. Okay. So, 30 percent, he lost 30 percent of
6 function in his left ankle?

7 A. Yes.

8 Q. Okay. And, Doctor, I want you to assume that
9 Dr. Carfi testified yesterday and part of his testimony he
10 prescribed or recommended that Mr. Pena will need lifetime
11 care, including physical therapy.

12 Do you disagree with that?

13 MR. VAN ETTEN: Objection. Form. Prescribed.

14 THE COURT: Okay. Sustained, as to form.

15 MR. VAN ETTEN: Thank you.

16 Q. Doctor, I want you to assume that Dr. Carfi
17 testified yesterday, and it was his opinion based on
18 examining Mr. Pena and also reviewing the medical records
19 that he required physical therapy and additional medical
20 treatment for the remainder of his life.

21 Do you disagree or agree with that?

22 A. I would say that I would defer to this doctor. I
23 have not seen this patient in almost four years, and it
24 would not surprise me that he had that finding because again
25 I found arthritis four years earlier. At this point in

1 time, I'm sure it is worse.

2 Arthritis is a progressive problem. It is not
3 going to get better. So, I can't comment on the present
4 condition. Obviously, I haven't seen him in a long time.
5 This finding and issues are fairly expected.

6 Q. So, I understand the ligament injury, cartilage
7 injury you testified to previously, is it your opinion to a
8 reasonable degree of medical certainty that injury was
9 present at the same time as the fracture?

10 A. Yes. It is my opinion that the damage to the
11 cartilage -- let me take that back.

12 Damage to the cartilage occurs at the time of
13 the fracture, okay, but can also occur whenever the ankle
14 rolls. He had a loose ankle. So, every time the ankle
15 rolls out of place, back into place, it can also damage the
16 cartilage. So, there are two mechanisms where the cartilage
17 can be injured.

18 Q. That rolling of the ankle, would that be caused by
19 that fracture?

20 A. Caused by the loose ligaments from the injury.

21 Q. Okay. And Doctor, all the opinions you rendered
22 here today, are they to a reasonable degree of medical
23 certainty in your field of orthopedics and orthopedic
24 surgery?

25 A. Yes.

1 MS. TOMINOVIC: Thank you, Doctor. I have
2 nothing further.

3 THE COURT: Thank you. Cross-examination.

4 MR. VAN ETTEN: Thank you, your Honor.

5 CROSS-EXAMINATION

6 BY MR. VAN ETTEN:

7 Q. First and foremost, please tell me how to pronounce
8 your name since I butchered it all morning long?

9 A. Most people tell me I don't pronounce it correctly.

10 Q. Touliopoulos?

11 A. I say Touliopoulos. It is actually Touliopoulos.

12 Q. Okay. Dr. T.

13 A. Yes.

14 Q. Start you where you ended off. You said you would
15 have to defer to what Dr. Carfi said because you haven't
16 seen the patient in over four years; that is what you just
17 said?

18 A. Yes.

19 Q. And Dr. Carfi is not an orthopedist, are you aware
20 of that?

21 A. I am aware of that, yes.

22 Q. Are you aware he no longer treats patients and is
23 no longer a practicing physician?

24 A. Um, I don't know his current status, but I believe
25 he is licensed.

1 Q. I understand that. I want you to assume he also
2 testified and told this jury he no longer sees patients, no
3 longer has admitted privileges, essentially what he does is
4 provide expert opinion, were you aware of that?

5 A. I'm not aware of that. If that is what he
6 testified to.

7 Q. Because in your practice, sometimes you go to other
8 orthopedists, and you guys make referrals, you have
9 consults, correct?

10 A. Refer to other orthopedic surgeons?

11 Q. Yes?

12 A. Yes, that's correct.

13 Q. And you consult with fellow orthopedists when you
14 have cases that need somebody else's eyes on it, fair?

15 A. I would say, yes, if it is an area of orthopedics
16 that I don't manage I would say, such as a spine, I would
17 refer to the specialist.

18 Q. Okay. So, when you are dealing with an ankle and
19 making recommendations of the ankle, the appropriate
20 specialist would be you, right?

21 A. Well, obviously orthopedic surgeon isn't qualified,
22 but also physiatrist should be qualified to make
23 recommendations.

24 Q. Practicing physiatrist should be qualified?

25 A. Well, if -- he is a very experienced gentleman. I

1 would say he is more than qualified to make the
2 recommendations.

3 Q. Okay. When you talked about the presence of the
4 cartilage damage, again, right at the end there, said could
5 have been from the fracture, could have been from subsequent
6 rolling of the ankle, correct?

7 A. No, I said that, when I corrected myself, I said it
8 was from the fracture because the fracture goes into the
9 ankle joint, so it actually damages the cartilage. But also
10 from repetitive episodes of instability, that can also cause
11 the damage to the cartilage.

12 Q. Okay. And I want to go back and jump here.

13 If you need to look at the note, not look at the
14 note, when you made your initial recommendation for surgery
15 and you did it, you stated it was based upon failed
16 conservative care, true?

17 A. Um, I said that today or?

18 Q. No, in your notes?

19 A. If it is in my notes, then it is true, yes.

20 Q. January 15, 2015 plan, um -- where is it? Right
21 here. Now, I can't find it. Sorry. Due to -- and
22 severity, as well as, the MRI findings despite conservative
23 management, patient continues to be symptomatic?

24 A. Yes.

25 Q. Okay. What was the conservative treatment he

1 received?

2 A. Well, from my initial instructions to the patient,
3 um, and when I saw him in December, I did recommend home
4 exercise program and antiinflammatory medications. I do
5 believe that initial following injury and fracture he also
6 had received treatment.

7 Q. I want you to assume that Mr. Pena testified to
8 this jury this morning and asked specifically whether he
9 ever received a home exercise program, and he said he did
10 not receive a home exercise program, and he does not do, nor
11 has he done home exercises; were you aware of that?

12 A. Well, it is not in my notes that he didn't do
13 them.

14 Q. Well, you say he failed conservative care. If the
15 conservative care was your recommendation for home exercise
16 and he didn't do it, he actually never underwent
17 conservative care, correct?

18 A. Well, conservative care includes antiinflammatory
19 medications, and I would say that in my note on January 20th
20 I don't have anything that states that he did not, was not
21 complying with conservative care.

22 Q. I want you to also assume that Mr. Pena testified
23 earlier today that following his surgery in the initial
24 post-operative treatments at Bellevue Hospital, he then went
25 back home to Columbia for approximately a year or maybe even

1 more than a year, and at that time he had no interim
2 treatments other than one visit to an orthopedist.

3 Were you aware of that?

4 A. Again, I can look back at my notes. I was not
5 aware of it.

6 Q. You said you are familiar with, I guess you call it
7 ORIF, correct?

8 A. Yes.

9 Q. And after someone has an open reduction internal
10 fixation surgery, physical therapy would be required
11 following that, correct?

12 A. I wouldn't use the word required. Is it something
13 that I prescribe, yes. I prescribe physical therapy for my
14 patients after they have surgery for ankle fracture. Is it
15 necessary? In a young patient that is healthy and active,
16 that can perhaps work on his own, that is also an option.
17 So, it is not a requirement, but usually is a
18 recommendation.

19 Q. Okay. Again, assume that Mr. Pena testified that,
20 yes, at Bellevue they told him to get physical therapy and
21 he never did. If he didn't get physical therapy as
22 recommended, and he didn't do home exercises as might be
23 recommended, wouldn't that be a failure to make sure that he
24 healed properly?

25 A. Well, again, when I saw this patient two years

1 later, I didn't really expect home exercises to make a
2 difference. He has torn ligaments. The therapy in the
3 exercises are not going to fix the tears. It can help
4 strengthen the muscles around the ankle. Help you recover
5 from the surgery, but at this point in time it would not
6 have made a difference as far as his need for surgery.

7 Q. Let's go to the tears then. You talked about what
8 surgery was done by Dr. Tejwani at Bellevue, correct?

9 A. Yes.

10 Q. You are familiar with Dr. Tejwani?

11 A. I know the name. I don't know him.

12 Q. So, Bellevue Hospital, he does the surgery and he
13 did the internal stress test, correct?

14 A. Yes.

15 Q. And the reason to do that is to check and see if
16 there is ligament damage, correct, and instability -- sorry.
17 My bad. Ligament instability?

18 A. You are right. Ligament damage leads to
19 instability. Again, that was -- there are multiple
20 ligaments in the ankle and he stressed the one ligament.
21 Not the ligament that I actually operated on. He stressed
22 the syndesmotoc ligament which is a ligament that is between
23 the two main bones, and that was normal stress test.

24 Q. And that is to make sure that the ankle mortise
25 doesn't widen because when it widens that is the loosening

1 you are talking about sometimes, correct?

2 A. That is different loosening. Again, different
3 ligaments in the ankle, and they require different tests and
4 different treatments.

5 Q. In the -- sorry.

6 A. So, again, he was evaluating the syndesmotic
7 ligament and I was testing the lateral ligaments.

8 Q. You were testing the lateral later. When you are
9 in there operatively, after this surgery or during the
10 course of the surgery, when you do that type of stress test,
11 while you may focus on one, once you are moving that ankle
12 and performing and doing that stress test internally, all of
13 the ligaments are in a sense being pressured and moved to
14 see if there is instability, correct?

15 A. No. Again, that stress test is focused on the
16 syndesmotic ligaments. He did not stress the -- I read his
17 op report. He did not do the anterior draw test or the
18 other tests I performed. He only performed the syndesmotic
19 stress test.

20 Q. Now, the lateral ligaments, and getting way ahead
21 of myself here, and probably well beyond my knowledge. The
22 fracture itself was on which portion of the ankle?

23 A. The medial.

24 Q. Which is the?

25 A. Inside.

1 Q. The inside of it. You went and operated on the
2 outside --

3 A. Yes.

4 Q. -- correct? Okay. And I'm going to jump around
5 here.

6 When you look in the ankle, I think you said
7 sometimes -- you mentioned the clinical examination, that
8 clinical examination is good to follow-up on an MRI,
9 correct?

10 A. The -- for -- to assess stability the best test is
11 a clinical examination, as well as, operative findings,
12 where as MRI scan can, may or may not be helpful with the
13 diagnosis.

14 Q. Let me ask you this: Some of what you operated on,
15 okay, was not seen in the MRI from prior to your surgery,
16 fair statement?

17 A. What the main focus of the surgery was the lateral
18 ligaments which was seen in the MRI scan. Cartilage damage
19 was not picked up on MRI scan.

20 Q. Understand that. So what you are saying is you as
21 an operating surgeon went inside, saw the ankle, and then
22 even though it wasn't on MRI, you saw cartilage damage,
23 fair?

24 A. Yes.

25 Q. Okay. When you did that surgery, you observed

1 other structures within the ankle, correct?

2 A. I observed other structures, but not all the
3 structures.

4 Q. Did you observe the ligament that had the
5 subsequent tear that Dr. Papathomas operated on?

6 A. Um, it was not a ligament. It was a tendon.

7 Q. Excuse me, tendon?

8 A. Yes.

9 Q. Did you observe that tendon?

10 A. I observed portions of the tendon was noted at the
11 time of surgery and was found to be normal.

12 Q. In fact, not only normal, you found it to be intact
13 and normal and you put that in your operative report?

14 A. That's correct.

15 Q. Okay. So, when you went in, and looked inside the
16 ankle, 18 months we'll say before the surgery of
17 Dr. Papathomas, the tendon which was deemed torn was not
18 torn, true?

19 A. As far as I could tell, yes.

20 Q. Okay. So at some point after your surgery in 2015
21 that tendon became torn, correct?

22 A. I believe so, yes.

23 Q. All right. And you talked about maybe even
24 sometimes that is something that could arise from altered
25 gait I think you said?

1 A. This particular case I believe it is a result of an
2 altered gait, yes.

3 Q. Okay. Alter gaits can be corrected for injured
4 party by taking physical therapy, correct?

5 A. Physical therapy can help an altered gait depending
6 on the causes of it, but when there is limited motion, um,
7 sometimes therapy may not even help that.

8 (Transcript continues on the next page.)

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1 Q When you observe the patient, you also check out their
2 gait, correct? When you are looking at them, examining them,
3 they come to your office, you sit there and you see whether or
4 not they have an altered gait, correct?

5 A I sometimes make notations as to their gait, yes.

6 Q I didn't see any altered gait notations in your notes
7 for your treatments of him up until that time of that subsequent
8 tear, correct?

9 A Again, I would have to review my records.

10 Is there a date that you are referring to?

11 Q If there are not any notations, there wouldn't be a
12 date, right?

13 Let me ask you another question.

14 There were recommendations by people in your office
15 about supportive shoe gear and ankle supports to be utilized by
16 Mr. Pena, correct?

17 A I believe Dr. Papathomas did recommend them, yes.

18 Q Did he undertake that recommendation for supports and
19 supportive shoe gear?

20 A I'm not certain.

21 Q That would be -- if that's recommended by your office,
22 that would be contrary to and not following doctor's
23 instructions, correct?

24 A If that was recommended, it would be something that Dr.
25 Papathomas would have liked the patient to do. If he wasn't

1 able to, I'm not certain of the reasons.

2 Q Well, I want you to assume again that he testified this
3 morning, Mr. Pena, and he said he was never told to get any
4 supports or any devices.

5 Would that be contrary to what the records of Dr.
6 Papathomas said?

7 A If she had put that in her records, then that would
8 have been the recommendation that she made to him at the visit.

9 Q Look to April 7, 2016, please. Could you look to
10 April 7, 2016?

11 A Yes.

12 Q Is that recommendation made?

13 A Yes, she recommended the use of a supportive shoe gear
14 with ankle support.

15 Q She made it again the next visit on June 23rd, correct?

16 A That's correct.

17 Q She made it again on September 29, 2016, correct?

18 A That's correct.

19 Q Then on May 4, 2017, supportive shoes were recommended
20 again?

21 A Yes.

22 Q And then on August 10, 2017, she also said arch
23 supports should be utilized, correct?

24 A What date was that?

25 Q Arch supports.

1 My bad. I'm going fast. I told you I would get you
2 out of here on time.

3 That would be August 10, 2017.

4 A Yeah, over-the-counter arch supports.

5 Q That didn't even require a prescription, that just
6 required going to the store and buying Dr. Scholl's arch
7 supports, right?

8 A It could be Dr. Scholl's or any other brand, yes.

9 Q I want you to assume again that Mr. Pena said he was
10 never told by any of his doctors to get arch supports. Would
11 that be an indication that Mr. Pena is not following up with the
12 proper care to get himself well?

13 A Again, I'm not certain of the reasons why it was not
14 carried out, but it was recommended by Dr. Papathomas.

15 Q Very important question: When you did your surgery,
16 you made a decision to take out the two pins, correct?

17 A Yes.

18 Q I've got to take a step back. I apologize.

19 Did plaintiff have a plate put in?

20 A No plate.

21 Q And we saw that on the x-rays and the diagrams,
22 correct?

23 A Yes.

24 Q So if plaintiff testified that he had a plate in his
25 foot, and that had been put in at Bellevue Hospital, that would

1 be in error, correct?

2 MS. TOMINOVIC: Objection.

3 Q I want you to assume that plaintiff testified earlier
4 today that he had a plate and screws put in his foot.

5 MS. TOMINOVIC: Objection.

6 THE COURT: Overruled.

7 MS. TOMINOVIC: That wasn't his testimony.

8 Q If that was his testimony, the jury can have it read
9 back, would that be in error because he did not actually get a
10 plate?

11 A He did not have a plate.

12 Q And plates are used sometimes when there's much more
13 significant damage to an ankle, correct?

14 A I would say that could be one reason to use it, but
15 usually with a medial malleolus fracture a plate is not
16 necessary although it is sometimes used.

17 Q Okay. I am not just discussing now medial malleolus
18 fractures, I am talking all ankle fractures for now. Plates can
19 be used when there's significant damage for an ankle fracture,
20 correct, sometimes trimalleolar fractures?

21 A Plates can be used for various fractures. It may not
22 be a significant fracture, but significant fractures sometimes
23 do require plates in addition to screws.

24 Q The amount of displacement of the fracture, if the
25 fracture comes off the bone, and things like that, and more

1 substantial surgery may be required, correct, he may need more
2 than two screws?

3 A Again, it depends on the fracture configuration. So
4 with a medial malleolus fracture you usually do not need a
5 plate, but if the fracture is vertical, in other words, his
6 fracture was transverse, so two screws. You want the screws to
7 be perpendicular to the fracture to get compression, but if the
8 fracture is not vertical, but it's a shear fracture, it's not
9 horizontal, it's vertical, it's shear, then sometimes you have
10 to put a plate against it to buttress it. So even though it may
11 be the same severity, it's fixed in a different way.

12 Q What's it called -- it wouldn't be, I guess, then for
13 this, but sometimes wiring is put in, as well, into the ankle
14 when there's fractures?

15 A Sometimes wires are used, sometimes internal fixation
16 devices are used. There are different forms of fixation
17 depending on the fracture configuration.

18 Q And now I will get back to the point where I was
19 before, and I am sorry I digressed, it's what happens when I
20 don't go off my notes.

21 So you went and started your surgery, and as part of
22 your surgery you removed those pins, correct?

23 A Correct.

24 Q And prior to making the decision to remove those pins,
25 you had to determine whether the medial malleolus fracture had

1 healed, correct?

2 A Yes.

3 Q Because you would not remove those pins if it had not
4 healed, fair?

5 A That is correct.

6 Q That's a decision you make as an orthopedic surgeon,
7 that you have to make that call, and how do you do that?

8 A Clinically if there's pain on the fracture site there's
9 an indication it may not be healed.

10 Q You take x-rays, correct?

11 A Yes.

12 Q You took x-rays before the surgery, correct?

13 A Yes, I believe so, yes.

14 Q Your x-ray reports indicate that there had been proper
15 healing and anatomical alignment, correct?

16 A Yes, we did x-rays actually on the first visit which
17 revealed it healed in good alignment.

18 Q So on the first visit then the actual fracture itself
19 was healed?

20 A Yes.

21 Q And you have not really made much mention of it, but
22 there was also a distal fibular fracture too, correct?

23 A I believe so, but it did not require attention.

24 Q You believe so.

25 You treated this patient for four years. You don't

1 know if he had a distal fibular fracture?

2 A It was -- when I treated him there was no evidence of a
3 fibular fracture although a fibular fracture would be in the
4 area of the ligament tears. That would be in his initial
5 hospital records.

6 Q Plaintiff's 7 you were looking at showing the films,
7 the examples, distal fibular, right up there, right
8 (indicating)?

9 A Yes. Yes, I'm sorry.

10 Q You said you reviewed the x-rays?

11 A Yes, I did.

12 Q And I guess by the example, and I will try to make sure
13 you all see this, and we have the area here, we have the area
14 here, that's the medial malleolus fracture, that area there
15 (indicating)?

16 A Yes.

17 Q Okay. The distal fibular is up there, correct
18 (indicating)?

19 A Yes.

20 Q On the opposite side?

21 A It's on the lateral side where the ligaments are
22 injured.

23 Q That did not require pinning?

24 A That is correct.

25 Q And that fracture was, I won't try to mischaracterize

1 it offensively to Mr. Pena, I won't say insignificant, but it
2 was not significant enough for you to recall, fair?

3 A Yes. I had reviewed it earlier and I had forgotten,
4 but if there is a fracture it's somewhat above the ankle, and it
5 did not require surgery, and it healed on its own accord without
6 any sequelae.

7 Q Four to five weeks, did you say?

8 A I didn't say weeks. It healed on its own accord
9 without intervention.

10 Q Going back again, your operative report also indicated
11 that you did a fluoroscopy during your operative report?

12 A Yes.

13 Q And during the operative report you did the fluoroscopy
14 and you noted that the medial malleolus was completely and
15 firmly united?

16 A Yes, that's correct.

17 Q When you took that initial history on December 9, 2014,
18 did you ask about prior treatments other than, sorry, the
19 operation that you talked about?

20 A Again, in reviewing my notes it mentioned the surgery.
21 It doesn't refer to any treatment other than the operation.

22 Q Did you bring the chart in? What did you bring in
23 today?

24 A I brought my office notes.

25 Q Could I see them, please?

1 A Yes.

2 MR. VAN ETTEN: May I approach the witness and see
3 them, please?

4 I apologize, Judge.

5 THE COURT: You may.

6 (Handing.)

7 Q I am going to ask you to look at, there's an intake
8 sheet. I will put it this way, I will make this fair to you.
9 There's your report. You make reference to various
10 documents that says "see attached."

11 A Yes.

12 Q Would that be the intake sheet you are referring to?

13 A Yes.

14 Q I would put the intake sheet there.

15 On the initial intake sheet from the day of the first
16 treatment -- by the way, that four pages of documents, five
17 pages of documents, five pages of documents, they were signed in
18 various places by Mr. Pena, correct?

19 A Yes.

20 Q Okay. And in that intake sheet he indicated that in
21 order to get to your office he was able to do so by train?

22 A That's correct.

23 Q And when asked if anybody needs to help him on daily
24 tasks he said nobody?

25 A That's correct.

1 Q And when he said what his problems were that interfere
2 with normal functions, he said when walking the foot gets very
3 tired?

4 A Yes.

5 Q Did he sit there and say -- did he sit there, that's a
6 terrible thing -- did he put down in the writing in the initial
7 form that was taken on the intake that he was having
8 instability?

9 A He did not, no.

10 Q But he did say the burning sensation on the foot right
11 above that, correct?

12 A Correct.

13 Q And with all the other treatments there is no mention
14 of any physical therapy being done since the accident, correct?

15 A I'm looking at the bottom of that, of that note that
16 you just referred to, and there's a question are you undergoing
17 physical or occupational therapy, and he checked yes in that
18 box.

19 Q Which box? Could you show me that?

20 A Yes, here (indicating).

21 Q Which page is that? I took my glasses off.

22 A I don't know if there's a number on the page.

23 Q That's December 4, right, the initial date?

24 A December 9, 2014.

25 Q I want you to note that plaintiff began treating,

1 Plaintiff's Exhibit 3, at HealthQuest with Dr. Stiler, and the
2 first date of treatment was December 3, 2014, for physical
3 therapy.

4 Would that be the occupational therapy or physical
5 therapy you are referring to there?

6 A More than likely, yes.

7 Q That would have been six days before he first saw you?

8 A Yes.

9 Q In your surgery notes you stated that there was a
10 lateral ankle ligament deficiency that was present?

11 A Yes.

12 Q By lateral ankle deficiency is that what you mean by
13 instability?

14 A Yes. Basically deficiency or insufficiency or laxity,
15 instability, looseness, they are all kind of interchangeable
16 terms.

17 Q By the way, I have got to go back, I forgot it, but
18 when we were talking about the stress test, and I can't
19 pronounce the word, syn --

20 A Syndesmotic.

21 Q -- syndesmotic, when you talk about that stress test,
22 and you run that stress test, does that not stress the other
23 ligaments in the ankle when you perform that test?

24 A It stresses the syndesmotic ligament, and if the
25 syndesmotic ligament is deficient it would also stress the

1 medial deltoid ligament, but it does not stress the lateral
2 ligaments.

3 Q And from the initial examination at Bellevue, from the
4 initial testing at Bellevue that was done, the diagnostic films,
5 because I think they did both x-rays and CAT scans at Bellevue;
6 is that correct?

7 A I believe so. I don't have the Bellevue records in
8 front of me to refer to.

9 Q They found no evidence of any lateral instability at
10 the hospital before the surgery, correct?

11 A As far as I recall, that is correct.

12 Again, the best way to find a ligament injury on a
13 diagnostic test is an MRI scan which I don't believe was
14 performed, and, again, the best way overall to find laxity is to
15 do this particular stress test which was not performed.

16 I don't blame, fault the surgeon because initially, you
17 know, if there is a lateral ligament injury it's not really a
18 priority. The priority is the fracture and the syndesmotic
19 ligaments, and with the swelling associated with the fracture,
20 examining the lateral ligaments would be difficult initially in
21 the hospital setting.

22 Q Well, that's interesting because you say the immediacy
23 there. You said in your notes that the surgery was done on
24 June 11, 2013, correct?

25 A Yes.

1 Q Actually the surgery wasn't done until June 23, 2013,
2 true?

3 MS. TOMINOVIC: June 24th.

4 Q June 24th, even better.

5 A The procedure date was June 24, 2013, yes.

6 Q In your notes, if you look at your second note and your
7 third note, those are all the wrong dates that you listed for
8 the surgery, correct?

9 A The date is off a little bit, yes.

10 Q Are you aware that on the day after Mr. Pena went back
11 to Bellevue Hospital and had another visit?

12 A Again, I don't have the hospital records in front of
13 me.

14 Q So do you know if they performed any additional
15 hands-on clinical testing to check for instability laterally if
16 you don't know those records?

17 A I would say that it probably was not done because he
18 had a fracture, and to do the test you would have to pull up,
19 yank on the ankle, and that's something I would not do in a
20 patient that has an acute fracture that's not healed yet.
21 Again, I personally do not examine the lateral ligaments in
22 someone that has a fresh fracture of the ankle.

23 Q Well, when you did your surgery you were able to
24 observe the tendons and the other structures within the ankle,
25 correct? You also, in addition to the tendon that we talked

1 about previously, you looked at other ligaments, correct?

2 A I looked at the two ligaments that I operated on
3 actually. Those ligaments I looked at. I did not see the
4 syndesmotic ligament, I did not see the deltoid ligament, but I
5 did see and treat the lateral ligaments.

6 Q Well, the area that you are testing, that was being
7 tested for the syndesmotic ligament, --

8 A Yes.

9 Q -- that's on the lateral side?

10 A The syndesmotic ligament is the ligament between the
11 fibula and the tibia so it's more central, it's more central,
12 but somewhat central lateral in the ankle.

13 Q So the test that was done for stress, to check for
14 instability in the ankle intraoperatively at Bellevue by Dr.
15 Tejwani was towards that lateral side where you subsequently did
16 your procedure, correct?

17 A Again, the ligament was more central, and the test that
18 he performed was fairly focused to the syndesmotic ligament,
19 it's not a test for the lateral ligaments. The test for the
20 lateral ligaments are the anterior drawer test, the talar tilt
21 test, and the posterior drawer test. I don't see any notation
22 that those tests were performed by the doctor.

23 Q You are basing that on the fact that the operative
24 report states that an intraoperative stress view was performed
25 and there was no widening of the syndesmosis because that's the

1 only thing that he referenced, not that he referenced any other
2 tests he may or may not have done, correct?

3 A His intraoperative stress view was for the reference to
4 the syndesmosis, yes.

5 Q Based on the brevity of the note you've made the
6 assumption that he did not do those other tests?

7 A Well, I'm basing that on the fact that it's not noted
8 in his operative report that they were performed.

9 Q Let's go -- I have to go right back now.

10 At the time of his surgery and then again at the time
11 of your surgery the tendon tear that was done by Dr. Papathomas
12 in 2017 on January 30th, that tendon tear was not present after
13 this accident on the day of the accident, correct?

14 A That is correct, yes.

15 Q Also, just belaboring and beating a dead horse, on
16 October 10, 2017, Dr. DeMarco in your office, when he looked at
17 additional MRI films, there was even then another subsequent
18 tear in the ankle, correct, a subsequent new tear?

19 A They did note again tearing of the peroneal tendon.

20 Q That was on October 10, 2017, three months later,
21 that's when you determined that Mr. Pena had reached maximum
22 medical benefits, and, as you said earlier today, did not
23 require any additional immediate treatments, correct?

24 A That's correct.

25 Q I want you to also, you mentioned about Dr. Carfi, I

1 want to you assume there's been references in some of the notes
2 that there might have been some atrophy. Dr. Carfi's initial
3 examination of Mr. Pena was in 2020, and he found no atrophy
4 within the left ankle, and he examined him about a month and a
5 half ago and found no atrophy.

6 Would that not be significant of the ability of Mr.
7 Pena to be continuing to be able to ambulate and walk since he
8 had not gotten physical therapy for four years?

9 A I'm sorry, I don't know if I understand the question.

10 Q Because it was horribly, horribly worded.

11 You're familiar with atrophy, correct?

12 A Yes.

13 Q Okay. Atrophy develops because, in a sense, disuse.
14 If you don't use your arm, you said before, you gave the example
15 with the arm, the elbow, if you have some type of injury, you
16 break your shoulder or something, you have your arm strapped
17 together for a while, you lose the muscle tone and your arm can
18 atrophy, fair?

19 A Yes.

20 Q If you don't use your left leg and you are favoring
21 your left leg, the chances are you may develop atrophy, correct?

22 A Yes.

23 So atrophy is when you are not using the muscle enough,
24 and it actually gets smaller, and it's usually compared to the
25 other side. Some people are just muscular, some people are

1 thin. So usually you want to compare it to the contralateral
2 side to see if there's a side-to-side difference. That can
3 signify that the muscle is not being used as much as the leg on
4 the other side.

5 So atrophy can be present with injury, but it may not
6 be present with injury depending on how the patient is using his
7 leg.

8 Q Well, in 2018 the last time you saw the patient you
9 made reference to him having some atrophy in the left ankle,
10 correct?

11 A Yes.

12 Q So, two years later after physical -- I want you to
13 assume that physical therapy had stopped according to Mr. Pena's
14 testimony, at that point two years later when Dr. Carfi saw him
15 there was no longer any atrophy, make that assumption, and then
16 now two years after that, in October of this year, he examined
17 again and there was no atrophy.

18 A Yes.

19 Q That would be evidence of use of the muscles in the
20 ankle, correct?

21 A That would be evidence that he is using the muscles
22 more than when I had seen him which, again, I believe the
23 surgeries did help him to walk better, and that would be overall
24 a good sign that the atrophy that I noted was not present in the
25 subsequent visits.

1 Q That would be indicative of continuing improvement
2 which was the purpose of the surgery, correct?

3 A It would indicate that his muscle mass improved which
4 is a sign that he is using, he is walking on the foot. It does
5 not signify an absence of pain or stiffness, but that he was
6 using it better than when I had seen him.

7 Q I understand that completely. I did not address pain.

8 What I am saying is if he is able to use it more --
9 when he first came to you he was complaining of difficulty using
10 the ankle because of the circumstance, correct, and that's why
11 you operated?

12 A Yes, he had difficulty. There was a combination of
13 things, the fracture, the ligament, the cartilage damage and
14 tendon injury, and overall with the treatment that he received
15 and the three surgeries I would say that there had been some
16 improvement in his ankle.

17 Q In fact, in your report of January 30, 2018, you say
18 patient's left ankle was improved with respect to pain relief,
19 function and stability; correct?

20 A Correct.

21 Q And that the patient told you he denied any rolling or
22 instability, correct?

23 A That's correct.

24 Q And all of the various testings that you had done
25 before that you said would be indicative of instability were all

1 normal, there were no positives at that point, correct?

2 A That is correct. The two tests that I referred to
3 earlier, the interior drawer test and the talar tilt test, were
4 now negative so I no longer felt the ankle was loose when I
5 pulled on it.

6 Q When you did that test and pulled on it, you did not
7 elicit pain, you elicited tenderness; is that correct?

8 A There was tenderness when I palpated along the interior
9 aspect of the ankle, and that is the area where there was
10 cartilage damage, and on the x-rays that I did at that date
11 that's also the area that I noted the early stages of arthritis
12 in the ankle joint.

13 Q Arthritis is something -- now, again, we know he had a
14 traumatic injury, I am not going to play around with you,
15 Doctor, but arthritis is something that people develop over time
16 from non-traumatic things, right, people get that and have the
17 aches, the pains, and a lot of times that's arthritis?

18 A Yes. As I said earlier, you get arthritis with the
19 normal aging process, but, again, we don't expect to see
20 arthritis in this age group without a traumatic injury.

21 Q And in this particular instance I want you to assume
22 that Mr. Pena is saying that he is treating by taking two Advil
23 at night every night.

24 Would that be a significant amount of pain medication
25 that he is using?

1 A Well, he is taking Advil which is an antiinflammatory
2 which is a good idea if you are having arthritis pain. Two at
3 night, I wouldn't say it's not a high dose, but, again, it's not
4 something you want to be on a high dose for, for a prolonged
5 period of time if you can avoid it.

6 Q And you also put a plan in effect which we discussed
7 that he reached maximum medical benefits, correct?

8 A Yes.

9 Q And you stated that he ambulates without a cane,
10 correct?

11 A Yes.

12 Q Without a brace, correct?

13 A Yes.

14 Q And he only needs over-the-counter medications, not
15 something like a prescription medication, correct?

16 A That's correct.

17 Q And you also then say he only has to come back on an
18 as-needed basis, correct?

19 A That is correct.

20 Q And since you have not examined him at any time since
21 then you cannot make a prognosis that he needs to be treating
22 with you right now, correct?

23 A Needs to be treating with me?

24 Q Yes, as an orthopedic surgeon.

25 A I would say as a surgeon, I would say that at this

1 point in time he probably does not need to see me if it's a
2 matter of just medications and exercises, and that unless and
3 until it becomes more of a surgical problem, then he would need
4 to come back to see me.

5 Q The last thing that I have, I think, if I can find it.
6 let's see if I can find it -- I completely lost my train of
7 thought. I apologize.

8 (Continued on next page.)

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1 Q. Did you ever have the opportunity to review the
2 HealthQuest records for Mr. Pena?

3 A. No.

4 Q. Okay. I'm not going to ask you any questions if
5 you haven't looked at them.

6 So, at this point then, and I just, probably just
7 said it, so I'm probably going to be redundant, I apologize.
8 The judge will yell at me.

9 Unless there is worsening of his condition, based
10 on what you said from back in 2018, and your lack of
11 treatments, you are not going to be treating him unless he
12 comes back with some type of worsening effect, fair
13 statement?

14 A. Um, he's welcome to come back and see me. If he
15 is having symptoms, he should see a physician, but it
16 doesn't have to be me. It could be any physician that is
17 qualified to treat his problem, and if he is having issues,
18 should probably see someone on a regular basis, but does not
19 basically have to be me.

20 Q. Okay. I have a question that -- I actually told
21 the jury I wasn't going to do this in this case, but I have
22 curiosity, because things happen.

23 Are you being compensated for testifying here
24 today?

25 A. Yes.

1 Q. And how much are you being compensated?

2 A. It is arranged by my office manager and the law
3 firm. I have not been compensated at this point in time. I
4 hope to be. I did cancel my half day of surgery, so.

5 Q. Okay. Do you know what the amount is?

6 A. I don't know the amount, but it is an amount that
7 is usually between six and ten thousand dollars.

8 Q. Okay. Fair enough. Just had to figure that out.

9 MR. VAN ETTEN: Nice meeting you.

10 THE WITNESS: Likewise. Thank you.

11 MS. TOMINOVIC: Just one question, your Honor.

12 REDIRECT EXAMINATION

13 BY MS. TOMINOVIC:

14 Q. You indicated at some point that Mr. Pena's
15 symptoms had improved.

16 Doctor, does improvement mean resolved?

17 A. No. No, in fact, I think what I said is at that
18 point in time I said he is as good as he is going to get
19 right now, and we know about the cartilage damage and
20 prognosis of getting arthritis, but you know for -- everyone
21 progresses at different rates. Sometimes it is very quick,
22 rapid and sometimes it is very slow, over many, many years.
23 And again, no surprise that he is having issues for the
24 reasons I said earlier, if the findings on the time of
25 surgery, um, and most of the x-rays I did in the office, but

1 again I never said that he is normal. I just said that this
2 is as good as he is going to be for, at this point in time.

3 MS. TOMINOVIC: Thank you, your Honor, I have
4 nothing further.

5 MR. VAN ETTEN: Just one follow-up.

6 RECROSS-EXAMINATION

7 BY MR. VAN ETTEN:

8 Q. Doctor, just heard you say you never said -- I
9 don't think I asked you any questions to say whether or not
10 he would be normal. I just said improved. That is how you
11 understood my question, correct, that the surgery improved
12 him?

13 A. I wasn't responding to what you said. I just
14 wanted to clarify that that is not what my statement said in
15 the records.

16 MR. VAN ETTEN: Fair enough, Doctor. Thank
17 you.

18 MS. TOMINOVIC: Nothing further.

19 THE COURT: Thank you, Doctor. You are
20 excused.

21 THE WITNESS: Thank you, your Honor.

22 (Whereupon, the witness steps off the stand and
23 exits the courtroom.)

24 THE COURT: Counsel, step up, please.

25 (Whereupon, a discussion is held at the bench.)

1 THE COURT: Okay. Today's proceeding is now
 2 concluded. I am going to excuse you, at this time, and
 3 we will reconvene tomorrow morning at ten. Okay.

4 Thank you. Have a nice evening.

5 THE COURT: All rise. Jury exiting.

6 (Whereupon, the jury exits the courtroom.)

7 THE COURT: Okay. Mr. Van, at this time, we
 8 can go on the record regarding that motion.

9 MR. VAN ETTEN: Sure, your Honor.

10 The motion that we had started and addressed
 11 before making a motion, if I can remember now, um, on
 12 the issue of references to the inability of Mr. Pena to
 13 work, actually I appreciate that counsel did not address
 14 it with this particular expert that just came, but as
 15 we've indicated there are no lost earnings being claimed
 16 for past or future consideration and at the time
 17 Dr. Carfi was asked to opine about the ability, do you
 18 have an opinion as to whether or not Mr. Pena could work
 19 or do physical labor in order to go back to work. And
 20 as I said, I believe because of the lack of lost
 21 earnings claims that is irrelevant, and also because of
 22 the fact that it was made known to us there would not
 23 be a lost earnings claim about that, defendants did not
 24 go out and retain a rehabilitation expert, someone of
 25 that ilk in order to refute the fact that Mr. Pena may

1 or may not be able to work in some alternative field.

2 So to have Dr. Carfi come in and make an
3 opinion on issue of inability to be employed, I made the
4 motion to strike it, at the time. I believe it should
5 be stricken from the record at some point, possibly jury
6 knows there is no lost earnings claim being made. I
7 think the manner it happened, I don't necessarily think
8 anything untoward to counsel. I do believe our clients
9 will be prejudiced by that.

10 THE COURT: Okay. Plaintiff.

11 MS. TOMINOVIC: Your Honor, the comments about
12 plaintiff's inability to work go strictly to his pain
13 and suffering. Inability as a father and husband to
14 provide for his family. His feelings about feeling like
15 he doesn't matter because he can't provide, and he
16 almost feels useless in that way. Those are the only
17 reasons that that testimony was elicited. There is no
18 wage claim, no quantifiable number that will be put
19 forth before this jury, but the idea or the processes
20 by which the person is suffering do come into play when
21 it comes to the ability to go back to work and engage in
22 activity that he was once able to engage in before this
23 accident.

24 MR. VAN ETTEN: Well, what that does, Judge,
25 and what part -- plaintiff actually on his direct at one

1 point said he had gone out and looked for jobs, okay.
2 And to sit there and say he is doing that when you have
3 a doctor say he is not going to be able to work and do
4 physical labor, now you are putting that in for that
5 pain and suffering in a sense by inference making this
6 potential permanent injury for a future award. That is
7 an issue that can't be contested because of the nature
8 of the pleadings and how they presented it. That is why
9 it is prejudicial.

10 THE COURT: Okay. Um, Mr. Van Etten, um,
11 though you are a zealous advocate and you made a very,
12 your argument is compelling, but not persuasive to the
13 Court. The Court -- I'm sorry, the plaintiff testified
14 that he is unemployable and cannot help his family and
15 the Court agrees with plaintiff that that opinion can
16 be, it can be inferred that it goes to the pain and
17 suffering of plaintiff as it relates to his family and,
18 therefore, your objection is noted, but overruled.

19 MR. VAN ETTEN: Your Honor, thank you very
20 much. Appreciate it. I almost feel like Joe Pesci in
21 My Cousin Vinny right there, that I made a cogent,
22 logical argument, and it is denied. Thank you. I'll
23 leave it.

24 I may just subject that to renewal, subject
25 to my life care planner's testimony, or possible to

1 recall Mr. Pena based on my life care plan expert's
2 testimony to address that issue.

3 THE COURT: Okay. You're thinking out loud.
4 You may or may not do it. So, um, we'll revisit it, if
5 at all, when the time comes.

6 MR. VAN ETTEN: Thank you, your Honor.

7 THE COURT: Okay. The record is closed for the
8 day.

9 (Whereupon, court is recessed and the case
10 adjourned to November 18, 2022 at 10 a.m.)

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