

COPY

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF QUEENS : CIVIL TERM : PART 16

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3 KAREEM DAVIS,

4 Plaintiff, Index No. 724812/2021

5 -against-

6 JURY TRIAL

7 THE CITY OF NEW YORK, THE NEW YORK CITY HOUSING AUTHORITY,

8 Defendant.

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9 Supreme Courthouse
88-11 Sutphin Boulevard
Jamaica, New York 11435
January 23, 2025

10 B E F O R E:

11 THE HONORABLE CLAUDIA LANZETTA,

12 SUPREME COURT JUSTICE

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

14 For the Plaintiff:
MILLS & EDWARDS, LLP
15 14 Penn Plaza, 21st Floor
New York, New York 10122
16 BY: DONTE MILLS, ESQ.

17 For the Defendants:
18 GOLDBERG & SEGALLA
711 3rd Avenue, Ste 1900
19 New York, New York 10017
BY: EMILIO F. GRILLO, ESQ.
20 BY: RICHARD J. FEMIA, ESQ.

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MONICA JENKINS
VICTORIA BIFULCO
SENIOR COURT REPORTERS

1 THE COURT: Still on the record with Index 724812
2 of 2021. Today is January 23rd. Same appearances by the
3 counsel and just in terms of a continuation of yesterday
4 afternoon, to make the record full and complete and because
5 you know, I'm not infallible.

6 I like to double check myself as well. I did do
7 some research and I'm citing from a case, it is from the
8 Third Department but quick research citation is 307 AD 2D
9 507, A-M-O-D-E-O versus town of M-A-R-L-B-O-R-O-U-G-H.

10 Quoting on that decision, the court, I'm not going
11 to go into too much. The court said as to the other fact
12 witness accounted by plaintiffs, Supreme Court's
13 determination to preclude these witnesses falls squarely
14 within its broad discretionary power to regulate the
15 conduct of the trial.

16 And there are citations that follow that and then
17 the other one I found and again it being this was quick was
18 a Fourth Department case 148 AD 3D 1648
19 S-L-O-M-C-Z-E-W-S-K-I V. Ross.

20 Defendant's contention that the Supreme Court
21 aired in a ruling made before the first trial and continued
22 in effect for the second in precluding an individual who
23 repaired and replaced a railing following the accident from
24 testifying as a fact witness with respect to the condition
25 of the railing at the time of the accident.

1 So, in that case the defendants fact witness was
2 precluded and following the trial they contended that that
3 was a reversible error. It was not. That position was
4 rejected.

5 So, I am within my purview to preclude fact
6 witnesses and as far as because this has come up a lot, as
7 far as the requirements for notice and scheduling and
8 providing disclosure regarding witnesses, while 3101 d only
9 covers experts.

10 That's sort of an foregoing conclusion we all know
11 about. 22 NYC 202, I'm sorry, 22 NYCRR 202.37 is
12 specifically addressed at scheduling trial witnesses. That
13 is not only relative to expert witnesses.

14 That is relative to all witnesses and it includes
15 experts and fact witnesses and identifying, it even says in
16 writing for the court witnesses that are intended to be
17 called.

18 It goes on. I'm sure you guys know it and can
19 read it if necessary but it's part and parcel of what has
20 come up a bunch of times as far as the preparation in
21 court.

22 So, again, to conclude yesterday afternoon's
23 discussion precluding a witness is well within the purview
24 of the court for many reasons. So, I think I'm on solid
25 footing with regard to Mr. Brown who is either being

1 classified as a fact witness or a rebuttal witness either
2 way.

3 I wanted to get that all out on the record, again,
4 for a complete record and more solid footing on my end or I
5 should say double checking on my end.

6 MR. MILLS: I did send an email yesterday if I
7 may, for the record.

8 THE COURT: Yes, to what email.

9 MR. MILLS: Judge, the rule that you cited does
10 not create a specific deadline or timeline. The court
11 absolutely has the right to --

12 THE COURT: I'm going to stop you Mr. Mills.
13 You're right. You're talking about 22?

14 MR. MILLS: Yes.

15 THE COURT: It doesn't but guess what does, my
16 part rules and it says at the commencement of trial. I'm
17 not going belabor the point but I didn't get that, none of
18 us and I still haven't technically gotten it but we
19 proceeded with this trial nonetheless.

20 So, you are absolutely correct 22 NYCRR 202.37 has
21 no deadline.

22 MR. MILLS: And the case that you cited I'm not
23 familiar with the third circuit case. The first case you
24 cited the second case that was a retrial in that preclusion
25 of that witness had nothing to do with notice which is the

1 only reason why Mr. Brown here will be precluded or the
2 only reason the court gave in regards to notice.

3 THE COURT: No, he is also being precluded because
4 you classified him as a rebuttal witness in addition to
5 being a fact witness and there's nothing he is rebutting.

6 He is merely bolstering or buttressing testimony
7 that you intend to elicit from your fact witness and that
8 you have essentially elicited from pictures in evidence
9 that your client was fine and fully capable without
10 disability after the incident at Rikers Island.

11 And you will get that in I'm sure with your fact
12 witness and like I said, you have said this, you have
13 pictures in evidence of him operating and videos if I'm not
14 mistaken of him operating very heavy machinery.

15 He was hired to do a heavy labor job. So, that in
16 and of itself supports your theory that he was fully
17 capable of doing that type of work following the incident.
18 The testimony of the court officer is only serving to again
19 buttress that testimony or bolster that testimony.

20 So, one is a notice issue. Two is a cumulative
21 issue. Three is again the fact that he is not a rebuttal
22 witness.

23 MR. MILLS: Judge, in regards to the testimony
24 this witness will provide is not cumulative because there
25 is no testimony from anyone other than the plaintiff about

1 his physical activity after the accident when he was in
2 jail but before he got out of jail when there was an
3 opportunity to do that surgery because the plaintiff says
4 it does not mean I'm precluded from bringing in a witness
5 to confirm that.

6 That's the whole point the witnesses; otherwise,
7 there would be no witnesses if the plaintiff says something
8 and anything else is cumulative testimony. For a car
9 accident or anything else because you would just say the
10 plaintiff already said that.

11 There are no witnesses to testify about that
12 period.

13 THE COURT: Mr. Mills, I know you are an
14 intelligent individual. That's not all I said. You're
15 focusing on one aspect of what I said. I said notice,
16 non-rebuttal, cumulative.

17 There's a whole bunch of things and the reason
18 there's no testimony from that time period is because you
19 chose as part of your strategy to not include that time
20 period in your presentation.

21 And to be quite honest, I don't know, I would say
22 this. The court was confused as to how long that time
23 period was based on the testimony of your client. I don't
24 know and I'm not going to speculate on whether or not you
25 are aware of how long that time period was prior to some

1 clarification I believe that was made while the defendant
2 was testifying because the basis for his failure to undergo
3 the surgery was he did not want, for lack of a better term,
4 jail surgery and he believed he was getting out relatively
5 shortly thereafter.

6 That was the stated reason as to why he refused
7 the surgery. That didn't happen but again I don't -- that
8 was not clear to the Court until well after your client
9 testified.

10 So, the importance of that time period was
11 deprioritized in terms of the presentation of the case. It
12 doesn't matter. There are many other things that support
13 your theory that you do not need the corrections officer.

14 So, having said that he is precluded.

15 MR. MILLS: I understand your ruling but I'm so I
16 can make the record. Also, um, judge in regards to the
17 timeliness I addressed that. The cumulative effect I
18 addressed that and the court does have the discretion and as
19 I said the cases cited by the court are not related to
20 notice.

21 THE COURT: I didn't cite those cases for the
22 premise of notice. You specifically told this Court
23 yesterday that I do not have the right to preclude a fact
24 witness.

25 Don't shake your head.

1 MR. MILLS: I said there was no rules saying you
2 have to. There's no rules saying you have to.

3 THE COURT: That is not what you said, Mr. Mills.
4 And this is specifically why I looked this up. You
5 specifically -- I'm sorry, in addition to saying there's no
6 rule that allows that -- no, you said allow, not require,
7 you said allow.

8 You said that I do not have the right to preclude
9 a fact witness. I will get the minutes if I have to. I'm
10 so positive of that which is why I asked you what I'm
11 allowed to do if you failed to notice a witness correctly,
12 if a witness doesn't show up when they should and you had
13 no answer for me.

14 So, the reason I cited those cases is specifically
15 to show you that preclusionary penalties are well within
16 this Court's discretionary power as the trial court and we
17 are done with that.

18 MR. MILLS: If I can make my record, Judge.

19 THE COURT: You are being repetitive.

20 MR. MILLS: I'm moving on to the final point of
21 the record. The court has the ability to preclude a
22 witness; however, pursuant to the case I provided the court
23 with yesterday 211 A D 3rd 706 public policy strongly favor
24 resolution of actions on the merits.

25 So that preclusion of evidence is not to be

1 imposed absent of clear showing failure to provide
2 discovery was willful and contumacious. There is nothing
3 here that goes above and beyond that would warrant the
4 court impacting the outcome of the case because public
5 policy does strongly favor that resolution is on the
6 merits.

7 If there is additional information that can be
8 provided by a witness that's available that the defendant
9 has now had the opportunity to reach out to and investigate
10 or take a statement from if they wanted to do that which is
11 an easy cure.

12 I do believe that preclusion of that witness is
13 improper and that any testimony that would have been given
14 by this witness, the jury has the right to hear that and
15 the plaintiff has the right to insert that testimony into
16 the case as there is nothing here to suggest that the
17 defendant would be somehow impacted by their ability to
18 question, either question this witness outside of the
19 presence of the jury or to get a statement from this
20 witness because his testimony would not change based on
21 when they had that conversation.

22 So, I don't think anything happened here that
23 would suggest that preclusion of a fact witness in a trial
24 where he can add to the witness to the jury's opportunity
25 to evaluate the facts is proper.

1 THE COURT: I appreciate that. And as far as
2 willful and contumacious, I will say this, it's a 2021
3 case. You most certainly had Preliminary Conference Order.
4 You most certainly had Compliance Conference Order.

5 I don't know this for sure but I will make an
6 assumption that were other discovery issues that might have
7 been boiled down to order stipulation and or so ordered
8 stipulation.

9 You most certainly had knowledge of this person
10 throughout the entirety of this trial and decided never to
11 disclose this person as even a possible witness. So, while
12 it might not be contumacious, it was certainly willful.

13 MR. MILLS: Understood, Judge. For the record I
14 understand that the Court is not inclined to do so but
15 based on the preclusion of this witness, I do believe I
16 have to ask for a mistrial on the record.

17 And in addition to that, there was one other issue
18 from yesterday with the same basis. I believe for a
19 mistrial where the adjudication of an outside body the
20 Worker's Comp Board was allowed to be put before this jury
21 where they made a determination about veracity of Mr.
22 Davis.

23 That determination because it is adjudication from
24 an outside agency is not allowed to be presented to the
25 fact finders here because they have their own obligation

1 and duty to fact find.

2 In allowing a adjudication from an outside body to
3 come in is improper and for those reasons as well I do
4 believe that a mistrial is appropriate.

5 MR. GRILLO: Judge, I'd like to be heard. If you
6 want to -- if I can or if you want to go first, Judge, I
7 would like to address some of this stuff on the record as
8 well.

9 THE COURT: Briefly.

10 MR. GRILLO: Your Honor, with respect to I think
11 Your Honor is completely correct with respect with respect
12 to the preclusion of Mr. Brown. Not only 22 NYCRR 202.37
13 but also CPLR 3101 H as in Harry.

14 Your Honor, that provision basically regulates
15 witness disclosure and under 3101 H a party shall's amend
16 or supplement a response previously given to a request for
17 disclose promptly upon the parties thereafter obtaining
18 information that the response was incorrect or incomplete
19 when made or that the response no correct or complete when
20 made no longer was correct or complete and the
21 circumstances are such that failure to amend or supplement
22 the response would be materially misleading.

23 There is no question Mr. Mills and his client knew
24 about the existence of Mr. Brown and his time in Rikers
25 Island. They made a tactical decision not to call him and

1 they're now trying to get him in through the back door
2 under a disguise he's a rebuttal witness.

3 He's not rebutting anything. Your Honor correctly
4 asserted the testimony of Mr. Brown would simply be nothing
5 more than cumulative or superfluous to the evidence that's
6 already in.

7 So, to permit him to come in and buttress the
8 testimony of Mr. Davis would be improper. So, again, I
9 don't want to belabor the record on that. As far as the
10 two cases cited by Mr. Mills last night in his email
11 Gregorian G-R-E-G-O-R-I-A-N and the other one Warner,
12 W-A-R-N-E-R.

13 In both instances, in Gregorian, Your Honor, that
14 was a wrongful termination employment case where in
15 pleadings were stricken during discovery for failure to
16 properly provide discovery.

17 Nothing about trial or trial protocol in that
18 case. Similarly in the Warner case that he cited, that was
19 where a party's conduct was found to be willful or
20 contumacious because they refused to go to jury selection.

21 I it's rather ironic that that's the case Mr.
22 Mills cited in light of the fact that he and his client
23 forced us out to trial on December 17th because as you
24 remember this case had to go because he was waiting a long
25 time for it.

1 Your Honor's reasoning is sound and it's supported
2 by the law. Whether it's 3rd department, 4th department,
3 we have here is we've had a pattern throughout this
4 litigation if you look at the motion practice, it's a
5 pattern of evasiveness and last minute change.

6 THE COURT: I'm sorry, we have more than enough on
7 the record.

8 MR. GRILLO: I just wanted to the make a record on
9 that. Secondly, these claims about this decision is in
10 plaintiff's exhibit that he's admitting into evidence, the
11 worker's comp records without objection.

12 MR. MILLS: Subject to redaction we know that.

13 MR. GRILLO: But it's a decision, Judge.
14 Moreover, when we approached on this objection you knew
15 that this, I didn't put the document into evidence, I very
16 well could ask Your Honor to take judicial notice of the
17 fact but that decision, I will state for the record, bears
18 correct and all I did was read the conclusion of it but
19 that decision, Your Honor, bears directly on the lack of
20 credibility of Mr. Davis.

21 He testified, oh, well, that's when I didn't tell
22 them about the assault in Rikers. No. What they said,
23 Judge, for the record is that his false statements and
24 material misrepresentations were clearly influenced a
25 determination regarding benefits.

1 In addition, they found that the egregious nature
2 of his misrepresentations warranted a discretionary penalty
3 and that he was disqualified from receiving further
4 benefits.

5 Judge, this is his credibility. This entire case,
6 this entire processes turns on his lack of credibility.
7 That's been our defense all along. We've conceded well not
8 conceded, we told this jury from hello we are responsible
9 for the accident but the nature and the extent of the
10 injury and his lack of credibility and reporting the
11 circumstances of the accident, the fact he's had a
12 simultaneous lawsuit for the same injuries going on, that
13 were involved in this accident, Judge, it all bears to his
14 credibility.

15 There is no prejudicial impact to this plaintiff
16 in any way. I didn't use the term Worker's Compensation.
17 I didn't use the term worker's compensation. I didn't just
18 say Worker's Compensation Board.

19 I said a judicial panel and I used limited
20 language from the decision.

21 THE COURT: Thank you, Mr. Grillo. I'll address
22 the basis as far as the preclusion. Preclusion of a
23 witness especially discussions regarding that preclusion
24 that have most certainly not happened in the presence of a
25 jury is not a basis for a mistrial.

1 I can't imagine under any circumstances how that
2 would be a basis for a mistrial. Again, going over
3 mistrial it has to manifestly necessary and I do not see
4 preclusion of a witness as something that rises to that
5 level warranting a mistrial.

6 As to the request regarding the, I'm not even
7 going to say the admission of evidence because Mr. Mills is
8 part of your packet, thank you for pointing that out but as
9 far as reading the determination on the record.

10 I can understand your point as to how that may be
11 prejudicial for a jury to hear but given the issues of
12 credibility I think it was necessary and again speaking of
13 mistrials, alternatives to a mistrial must be considered
14 before I grant a mistrial.

15 So, as an alternative the Court will formulate a
16 curative instruction as to how the jury is to consider that
17 determination. I will do so. I will run it by you guys
18 before I instruct the jury on it.

19 It will be part of the closing instructions and
20 we'll try to work together to come up with language that is
21 agreeable to all parties. If we can't, I will come up with
22 the language that's agreeable to the Court but I will
23 provide a curative instruction regarding their
24 consideration of that determination and the determination
25 itself which was I believe to deny or cease benefits.

1 MR. GRILLO: Suspend benefits.

2 THE COURT: Suspend benefits, should not influence
3 the jury's determination as to damages. That will be part
4 of the curative instruction. So being that there is an
5 alternative, one that might not rise to what you would like
6 it to but there's an alternative.

7 Both of your requests for a mistrial are denied.

8 MR. GRILLO: Just for the record, Judge, the
9 actual language in the order was that there was a
10 discretionary penalty and the claimant, the plaintiff was
11 disqualified from further, receiving further compensation
12 benefits.

13 THE COURT: As I said, that the fact he was
14 disqualified should not influence the jury's determination
15 on his entitlement to damages and the amount of those
16 damages if they feel he is entitled to.

17 It's a separate determination. The basis for the
18 determination goes to his credibility and that they are
19 supposed to consider it.

20 MR. MILLS: Judge, they could have heard what he
21 told them or not but hearing a judicial board's
22 determination impacts the jury.

23 THE COURT: Mr. Mills, I get it which why I said
24 to you I'll provide a curative instruction as to how that
25 is to be handled.

1 MR. GRILLO: I will state for the record there
2 were no questions by Mr. Mills of Davis following that on
3 his redirect, not one question.

4 MR. MILLS: Because they shouldn't come in. I'm
5 not going to make a bigger issue than what it should be.

6 THE COURT: I think we're on square footing.
7 Let's line up the jury and get them out.

8 COURT OFFICER: All rise. Jury entering.

9 (Whereupon, the jury entered the courtroom and
10 upon taking their respective seats, the following
11 occurred:)

12 THE COURT: Good morning, ladies and gentlemen.
13 You guys maybe seated. Mr. Mills, you may call your next
14 witness.

15 MR. MILLS: Plaintiff calls David Sparks to the
16 stand.

17 THE COURT: Mr. Sparks come on up here and remain
18 standing.

19 THE WITNESS: Yes, Ma'am.

20 (Whereupon, the witness took the stand.)

21 THE CLERK: Good morning, Sir. Raise your right
22 hand, please. Do you swear or affirm the testimony you are
23 about to give is the whole truth and nothing but the truth
24 against all penalties of perjury?

25 THE WITNESS: Yes, Ma'am.

1 THE CLERK: You maybe seated. Can you please
2 state your first and last name for this record?

3 THE WITNESS: My name is David, first name Sparks
4 is my last name.

5 THE CLERK: And your address, please?

6 THE WITNESS: I reside at 109-15 Merrick Boulevard
7 at the amount in time Jamaica, Queens.

8 THE COURT: Thank you, Mr. Sparks. If you can
9 speak slowly and clearly, make sure you listen to the
10 questions that are asked and answer those questions. If
11 you don't know or if you don't understand, perfectly good
12 answers and the attorneys will just accordingly, okay?

13 THE WITNESS: Yes, Ma'am.

14 THE COURT: Mr. Mills.

15 DIRECT-EXAMINATION BY MR. MILLS:

16 Q Mr. Sparks, I'm going to ask you some questions here
17 today about an incident that occurred on December 3, 2015. I
18 know it was almost 10 years ago but we're going to continue in a
19 question and answer format until we're done.

20 I ask you to keep your voice up so the jury can hear
21 you. The court reporter is taking down everything, so we have
22 to speak one at a time to make it easy for her. Are you
23 employed?

24 A Yes.

25 Q Where at?

1 A I work for UPS.

2 Q Do you know a Kareem Davis?

3 A Yes.

4 Q How do you know him?

5 A We worked together and we lived in the same
6 neighborhood.

7 Q Worked together where?

8 A In Pomonok.

9 Q And was that in or around 2015?

10 A Yes.

11 Q So, tell me about the job that you had with Mr. Davis?

12 A Okay. Our job consisted of hot tar roofs. Well, our
13 labor was to get rid of debris, um, help move stuff around, fix
14 the roof the best we can and anything else that came in along
15 with the jobs.

16 Q And do you recall when you started working there?

17 A Around 2015.

18 Q You remember what month?

19 A Not really but it was like Summer, Winter, something
20 like that around that time.

21 Q Okay. And do you recall an incident that occurred on
22 December 3rd of 2015 involving Kareem Davis?

23 A Yes.

24 Q Before we talk about that incident, did you observe
25 while you were working at that site but before December 3rd of

1 2015 Mr. Davis performing his job duties?

2 A Yes, he worked very well.

3 Q What do you mean by that?

4 A Well, everything that we was asked to do was done as
5 far as the job consisted, Sir.

6 Q And those activities include heavy lifting, moving
7 things?

8 MR. FEMIA: Objection.

9 THE COURT: Overruled.

10 THE WITNESS: Could I speak?

11 MR. MILLS: Yes.

12 A Everything that we dealt with was dealt with bulks of
13 weight, a lot of weight was being dealt with, Sir.

14 Q Before December 3rd of 2015 did you see Mr. Davis
15 limited in any capacity, was he limited at all in what he could
16 do?

17 A No. He works very well.

18 Q I want to talk about December 3rd of 2015; you said an
19 accident happened on that day with Mr. Davis?

20 A Yes.

21 Q Tell me about it?

22 A Okay. We, um, we have it's a, um, tarp, like a big
23 tarp where they put stuff in and they lower it down. Okay. The
24 tarp had snapped at this time in moment as we was lowering it
25 down.

1 It's two ropes. One person on one side, other person
2 on the other side. All right. We have to balance it to come
3 down. Okay. The tarp rope snapped. When they snapped, I seen
4 it snap and I said run. By that time I was already in flight.
5 Mr. Davis turned to run and the thing hit him.

6 Q What thing?

7 A The wheel barrel, with the whole wheel barrel hit him
8 with the wheel and everything had popped off.

9 Q So the wheel popped off the wheel barrel?

10 A Yes.

11 MR. FEMIA: Objection.

12 THE COURT: Hold on one second. What's the
13 objection.

14 MR. FEMIA: Mischaracterization of the witness'
15 testimony.

16 THE COURT: Clear up the question.

17 Q If you could just describe for me what hit Mr. Davis?

18 A The wheel, the wheel came off the barrel and it hit and
19 it hit him.

20 Q What happened after that?

21 A He fell down.

22 Q And just describe for me what was going on, what
23 happened, what you saw?

24 A Well, when he fell I ran over to him to make sure he
25 was okay to see what had happened and he was in pain at that

1 time and kind of a little unconscious, a little dizzy and stuff.
2 So we and my partner Will grabbed him and took him to the
3 office.

4 We get to the office. I'm talking to one of the
5 supervisors. So, I can't remember his name exactly. So he was
6 like what happened. I told him exactly what happened and we
7 moved on from there.

8 They going to ask him if he want pills like asprins,
9 Tylenols and water and stuff like that which was not necessary
10 at the time because he was hurt.

11 Q And what do you mean not necessarily at the time?

12 A Because it was more important that they call the
13 ambulance to try to figure out what was wrong with him. All
14 they worried about is he okay can he come back to work the next
15 day.

16 Q So what happened after you guys got back to the office
17 with Mr. Davis?

18 A Well, when we got back to the office with him, we went
19 inside, we talked to two supervisors that was there. One
20 supervisor maintain dealing with us personally asking me what
21 happened.

22 I told him exactly what happened and stuff. After that
23 they got into they own little personal stuff. I don't know what
24 it was about but they had a little talk and that was the end of
25 that situation for that moment.

1 Q And what did you do afterwards, if anything?

2 A I was outside waiting while they was inside talking
3 with Mr. Davis.

4 Q And at some point did Mr. Davis come out?

5 A Yes, he came out.

6 Q And what happened?

7 A I can't remember at all exactly what happened.

8 Q At any point after December 3rd of 2015 did you see Mr.
9 Davis working?

10 A No.

11 MR. MILLS: Nothing further, Judge.

12 THE COURT: Thank you. Mr. Femia.

13 CROSS-EXAMINATION BY MR. FEMIA:

14 Q Good morning, Mr. Sparks.

15 A Good morning.

16 Q I have followup questions for you, Sir. You have known
17 Mr. Davis for a number of years; is that correct?

18 A Yes.

19 Q How many?

20 A Years. Since he was young, younger, I mean 15 years or
21 better.

22 Q Would you consider him a friend of yours?

23 A Friend, partly family.

24 Q You consider him family?

25 A Yes, like friend of the family. I watched him grow up,

1 Sir.

2 Q You socialize together?

3 A Not really but we, you know, had little moments we hung
4 out and stuff with the family.

5 Q But you have seen each other and commiserated outside
6 of work is what I'm asking?

7 A Yes. We seen each other hi, bye, stop talk for a
8 minute.

9 Q And you know Mr. Davis started a lawsuit in that he's
10 suing the defendants in this case, right?

11 A Yes, I found out.

12 Q And you know they're being sued for money damages here,
13 right?

14 A Yes, I found out, Sir.

15 Q And you would like to help him, wouldn't you?

16 A Well, as part of the procedure, Sir, I was a witness to
17 what happened.

18 Q But you're here to help him, right?

19 A Yes, Sir.

20 Q You don't want to see him loose this case, right?

21 A No, sir.

22 Q And you would like to help your friend through your
23 testimony, right?

24 A Yes.

25 Q And you would like to see a successful outcome for him,

1 right?

2 A Yes, Sir.

3 Q You weren't served with a subpoena to be here, right?

4 A No, I wasn't served with nothing.

5 Q You came here voluntarily?

6 A Yes.

7 Q And Mr. Davis asked you to be here, right?

8 A Yes, Sir.

9 Q And based on your friendship and relationship with Mr.
10 Davis you said you would come, right?

11 A Yes.

12 Q When did he ask you to come to court?

13 A Um, I can't exactly remember but it was a little while
14 ago.

15 Q He only had to ask you once, right?

16 A Yes.

17 Q And you said you would be happy to help him out?

18 A Yes.

19 Q How did you get to the court today?

20 A I left my job and took the train here.

21 Q You came here and you walked into court with Mr. Davis
22 just before?

23 A Well, yeah, he was in the out there in the hallway.

24 Q Did you ever discuss the case with Mr. Davis?

25 A No.

1 Q So, he asked you to come to court and testify on his
2 behalf and you knew that he was suing the defendants in a
3 lawsuit but you never once discussed this case with him?

4 A No because I already knew the situation, Sir. I told
5 you I was a witness there when it happened?

6 Q And did you ever discuss the case with Mr. Mills, Mr.
7 Davis' attorney?

8 A No. This was first time I'm meeting him.

9 Q You never spoke with him on the phone?

10 A No, sir.

11 Q You never discussed this case with Mr. Mills or Mr.
12 Davis?

13 A No, sir.

14 Q Did you get that job through something called the --

15 MR. MILLS: Objection, Judge.

16 THE COURT: What's the objection.

17 MR. MILLS: Relevance.

18 THE COURT: Sustained.

19 Q Mr. Sparks, it's fair to say that you had been
20 convicted of 15 or 20 crimes?

21 MR. MILLS: Objection, Judge.

22 THE COURT: Sustained.

23 MR. FEMIA: Can we sidebar on this?

24 THE COURT: No.

25 MR. FEMIA: I think that's critical.

1 Q Was the wheel barrel broken when it was being placed
2 into the tarp?

3 A No, sir, it wasn't broken. Everything that we lowered
4 from up off the roof before we attached everything.

5 Q And how many wheel barrels were at that site?

6 A Sir, it's uncountable. The roof's is big. We have
7 wheel barrels in different positions.

8 Q If Mr. Davis testified previously that there was only
9 one wheel barrel there that would be incorrect, right?

10 A Well, in the section we was in, yes.

11 Q So, before you were talking about the project and now
12 you're talking about just the section you were in. Understood.
13 Did the entire wheel barrel or just the wheel fall out of the
14 tarp?

15 A The entire wheel barrel fell out and hit the dumpster
16 and the wheel popped off, Sir.

17 Q And if Mr. Davis previously testified that the entire
18 wheel barrel struck him, would that be incorrect?

19 MR. MILLS: Objection, Judge. Mischaracterization
20 of the evidence.

21 MR. FEMIA: He was impeached by his prior
22 deposition regarding this point.

23 THE COURT: Sustained.

24 Q I believe you said before when you saw the materials
25 falling you were already in flight running away, right, you said

1 run?

2 A Yes, I did.

3 Q You had your back to what was falling?

4 A No. I was facing it because I was facing like this
5 when I seen the thing popped I turned and said run.

6 Q So you were running towards the materials that were
7 falling?

8 A No, I was.

9 Q Let me finish my question. You were running towards
10 the materials that were falling or running away from the
11 materials that were falling?

12 A We was running way from the material, Sir.

13 Q So, is it fair to say that your back was to the
14 materials that were falling?

15 A At the time it was at the back because we had to turn
16 to run but I seen the stuff when it was falling. When it was
17 falling I said run and I turned.

18 Q I understand that, Sir. So, you saw the materials
19 start to fall?

20 A Yes, Sir.

21 Q And then you turned?

22 A Yes, Sir.

23 Q And then once you were already in flight, thereafter
24 the materials struck Mr. Davis?

25 A Yes, Sir.

1 Q So, it's fair to say you never witnessed Mr. Davis get
2 hit?

3 A Sir, how you going to say I never witnessed this when I
4 explained to you when the stuff fell --

5 Q It's a yes or no question. Did you see Mr. Davis get
6 hit with the materials?

7 A No but I heard him get hit because he yelled out.

8 Q But you didn't see him?

9 A No, I seen. I knew he got hit with it.

10 Q I didn't get that?

11 A I knew he got hit with it because he yelled out.

12 Q But specifically my question is did you see it, did you
13 see it with your eyes?

14 A No, sir, I didn't see it with my eyes.

15 MR. FEMIA: I would like to have something marked
16 as M for ID please.

17 THE COURT: Mr. Mills, have you had an opportunity
18 too see?

19 MR. MILLS: Yes.

20 (Whereupon, the document was marked for
21 identification as Defendant's Exhibit M.)

22 COURT OFFICER: Defendant's Exhibit M marked for
23 identification and being shown to the witness.

24 Q Mr. Sparks, you have an opportunity to review what's
25 been marked as Defendant's Exhibit M for identification?

1 A I fully don't understand it. Can you explain it a
2 little better?

3 Q I sure can. Do you see the top-right-corner, you see
4 something --

5 MR. MILLS: Objection. Judge, if we may?

6 THE COURT: Yes.

7 (Whereupon a discussion was held off the record.)

8 Q Mr. Sparks, again --

9 THE COURT: One moment. As to the sidebar, Mr.
10 Mills your objection is noted and overruled. The court
11 will allow the affidavit to be used.

12 Q You had an opportunity to review Defendant's Exhibit M
13 for identification, it's the same document you looked at before,
14 Sir?

15 A I'm just making sure. Okay.

16 Q Do you see that it's a, something that's entitled
17 Affidavit, see the top-right-corner, Sir?

18 A Yes.

19 Q And it's your affidavit, right, David Sparks being duly
20 sworn deposes and says and then list several items, right?

21 A Yeah.

22 Q And then on the second page that's your signature,
23 right?

24 A Yeah.

25 Q And this document is something that you signed back in

1 2017, right?

2 A Yeah, that was a long time ago.

3 Q It was a long time ago?

4 A Yeah.

5 Q But you signed it back in 2017?

6 A Yes, Sir.

7 Q Is that a fair, accurate copy of what you signed back
8 in 2017?

9 A I don't remember, Sir. I know whatever you got here is
10 what it is. I don't remember but I know I signed something.

11 Q Where were you when you signed this?

12 A I think I was in the office.

13 Q In whose office were you in?

14 A I was in Mat work for Mat Group to APS I was in they
15 trailer.

16 Q So, you were at AP, your former employer's office when
17 you signed this affidavit? Is that a yes, sir?

18 A Yeah. We was in our former employer office.

19 Q So at the time you weren't working for APS?

20 A No, we was working for APS, I was still working for
21 them.

22 Q So in 2017 you were still working for APS?

23 A Yes.

24 Q And you went to your former employers office to sign an
25 affidavit that was used in a motion in a law lawsuit suing them?

1 A I can't remember. I don't remember.

2 THE COURT: Rephrase that question?

3 A Yeah because I don't remember.

4 Q That affidavit is your attestation as to what happened,
5 you were deposed and sworn that the facts contained within that
6 affidavit were true, right?

7 A Yeah.

8 Q And that was used in support of Mr. Davis' lawsuit
9 against the defendants, right?

10 A Yes.

11 Q And your testimony is that you went to your former
12 employer's office to sign this?

13 A That's where I had to go. That's where I was at.

14 Q Are you sure it wasn't Mr. Davis' attorney's office?

15 A No, it wasn't. I never met no attorney.

16 Q Okay. Do you know who Heracles Dotel (ph)?

17 A Heracles Dotel.

18 Q I'm asking you to take a look at the second page of
19 this document?

20 A I'm looking at the second page.

21 Q Do you see there's a notary public?

22 A Yeah.

23 Q I believe it says Heracles Dotel is the name?

24 A Yeah.

25 Q Do you know that individual?

1 A No.

2 Q Do you know who Willie Kelly is?

3 A Yeah.

4 Q Who is that?

5 A He worked with us.

6 Q He was a former working at APS?

7 A Yes, Sir.

8 Q Do you know if he also signed an affidavit?

9 A I don't know, Sir, I wasn't with him.

10 Q Do you know if he signed an affidavit that was nearly
11 identical to the one that you signed?

12 A I don't know, Sir.

13 Q Do you know if Heracles Dotel was also the individual
14 who notarized that affidavit?

15 A I don't know, Sir.

16 Q Well, you didn't type up that affidavit, right?

17 A No, I didn't.

18 Q It was handed to you and you signed it, right?

19 A Yes, Sir, it was handed to me.

20 Q And in that affidavit it reads, Paragraph 1:

21 My name is David Sparks. I reside at 65-77 160th
22 Street --

23 MR. MILLS: Objection, Judge.

24 THE COURT: Counsel it's not in evidence yet.

25 MR. FEMIA: At this point based on testimony

1 already elicited I seek it's admission into evidence?

2 THE COURT: Any objection to that, Counsel?

3 MR. MILLS: Yes, Judge. This document is --
4 there's no reason for this document to go into evidence.
5 There's no basis for it to go into evidence. It's an
6 out-of-court statement. It can be used to either impeach
7 or refresh your recollection if that's what he's attempting
8 to do but not to be introduced into evidence.

9 THE COURT: True. So, let's not read from it.
10 You can use it for those purposes but you don't have to
11 read from it.

12 Q Okay. Well, Mr. Sparks, did the material fall out of
13 this tarp at 50 feet, 60 feet or 70 feet or something else?

14 A It fell from between the 5th floor right off the 5th
15 floor. I don't know how many feet that is because I'm not good
16 with measure. It fell from the 5th floor. That's where it
17 popped at.

18 Q Is that consistent with what your affidavit says?

19 MR. MILLS: Objection, Judge.

20 A I don't know.

21 THE COURT: What's the objection.

22 MR. FEMIA: I'm using it for exactly for the
23 purpose to address impeachment.

24 MR. MILLS: It's not how impeachment works.

25 THE COURT: He's asking him if it consistent. If

1 it's inconsistent it's a prior inconsistent statement. He
2 is allowed to ask him for that purpose.

3 MR. MILLS: It's essentially entering the document
4 if you're saying there's a document say this. That's not
5 how impeachment works if he's saying something different.

6 THE COURT: Overruled.

7 Q Is that consistent with what your affidavit says?

8 A Can you repeat the question again, please.

9 Q So, I believe you just testified that the materials
10 fell out around the 5th floor?

11 A Yes.

12 Q Is that consistent with what your affidavit says that
13 you signed back in 2017 less than 2 years after the accident?

14 A I don't remember.

15 Q I'm asking you if, it's in front of you, I'm asking you
16 if that is consistent?

17 A Not that I can comprehend on this. I don't know what
18 you talking about. Can you come point it out?

19 Q Does your affidavit state that it was at the 7th floor
20 that the materials?

21 A It says off the roof, it don't say nothing about no 6th
22 floor no 5th floor. It says it was -- what I had put --

23 Q Paragraph 5, Sir?

24 A Yeah, that's the roof.

25 Q 7th floor, correct?

1 A It's like 6, 7 floors. That's the roof. I heard it
2 pop and yeah.

3 Q So, your affidavit is inconsistent with the materials
4 falling out of the 5th floor because in your affidavit it states
5 the materials fell out of the 7th floor, correct?

6 A Could have been the 7th floor. Like I told you, I just
7 mentioned what I seen from that part of the moment, Sir, I can't
8 remember everything.

9 Q And your testimony is that the entire wheel barrel or
10 just the wheel made contact with Mr. Davis?

11 A It could have been the hole wheel barrel. Like I said,
12 when I was running I looked and the thing fell. I turned.
13 That's all I can remember.

14 Q Could have been but you don't know, is that fair?

15 A Yeah, that's fair.

16 Q And I believe on your direct-examination when Mr. Mills
17 was asking you some questions, you said that Mr. Davis was
18 unconscious when you ran over to him. If Mr. Davis --

19 MR. MILLS: He didn't say unconscious.

20 MR. FEMIA: Is there an objection?

21 MR. MILLS: It's a mischaracterization of the
22 testimony.

23 MR. FEMIA: We can cite the testimony.

24 THE COURT: Can you repeat the question?

25 MR. MILLS: He said he was woozy.

1 THE COURT: And you are testifying. Again, that's
2 not evidence. I have admonished everybody for doing it.
3 That's not evidence. What was your question?

4 Q Mr. Sparks, we all heard you say that Mr. Davis was
5 unconscious when you ran over to him?

6 A No. I said he was dizzy. I did not say he was
7 unconscious.

8 Q Well, after -- do you want to change your testimony
9 after hearing what Mr. Mills says?

10 THE COURT: Unnecessary.

11 Q If Mr. Davis testified that he never lost
12 consciousness, would that be inconsistent with what you're
13 saying right now?

14 A No.

15 Q And I believe you also testified that you carried him
16 to the office?

17 A Yeah. We was leaning like leaning on shoulder.

18 Q So, you didn't carry him though?

19 A No, you right.

20 Q And you also testified that offering him water and
21 Tylenol was not the thing to do at the time, correct?

22 A It wasn't the thing to do. This man got hit in the
23 head.

24 (Whereupon, Senior Court Reporter Victoria Bifulco
25 began recording the following proceedings:)

D. Sparks - Plaintiff - Cross

1 Q So there wasn't blood, guts; did you see any sort of
2 injuries?

3 A There was no blood, no guts hanging out of his head,
4 sir.

5 Q So you didn't see any bumps, bruises, scrapes,
6 lesions?

7 A His head was swollen. His head was kind of bruised.
8 That's all I could see at the time.

9 Q You saw it?

10 A Yes, I saw. I was in the office with him.

11 Q Did you take any pictures of him?

12 A No. I didn't take any pictures of him, sir. At that
13 moment in time between two bosses, and everything what was
14 going on, it was a bunch of confusion going on. Everybody was
15 trying to do this, trying to do that. There was just a bunch
16 of confusion.

17 Q Do you know if anyone took any pictures of these
18 alleged injuries?

19 A No.

20 Q And you said that you thought it was important that
21 an ambulance was called?

22 A Yeah. That's part of the procedures when you get
23 hurt on a construction site, sir, or contracting site. That's
24 automatic. Safety come first.

25 Q Did you call one?

1 A No. They supposed to have took care of that inside
2 the office. They told us anything happen at all, you come to
3 the office. That's what we do. We follow the protocol.

4 Q So even if you thought they were doing something
5 wrong, to yourself you thought, I am not going to call
6 anybody, sir?

7 A I shouldn't have to when I am there with my superior.
8 That's their job to do.

9 Q But nonetheless you made your own decision not to
10 call the ambulance because the supervisor was supposed to call
11 them.

12 A Yeah. Because we was all in the office. Everybody
13 was in the office.

14 Q Was anyone else with you, Mr. Kelly?

15 A Yes, he was there.

16 Q Did he call an ambulance?

17 A None of us called the ambulance, sir.

18 Q Did Mr. Davis call an ambulance?

19 A He wasn't capable of calling an ambulance. They was
20 too busy dealing with what was wrong with him, sir. The main
21 attraction was about him.

22 Q That's fine.

23 If Mr. Davis' version of the events is different than
24 your version, would Mr. Davis be lying?

25 MR. MILLS: Objection, Judge.

D. Sparks - Plaintiff - Cross

1 THE COURT: Sustained.

2 MR. FEMIA: I have nothing further, your Honor.

3 MR. MILLS: Nothing further, Judge.

4 THE COURT: Thank you very much, Mr. Sparks.

5 THE WITNESS: Do I keep this or no?

6 THE COURT: No.

7 THE WITNESS: Thank you, your Honor. Thank you
8 very much.

9 (Whereupon, at this time the witness exits the
10 stand.)

11 THE COURT: Mr. Mills, do you have anything
12 further?

13 MR. MILLS: The plaintiff rests, Judge.

14 THE COURT: Thank you.

15 Mr. Grillo.

16 MR. GRILLO: Your Honor, before we commence, we
17 have some motions that we are going to make outside the
18 presence of the jury.

19 THE COURT: Okay.

20 Let's take ten minutes, guys. Thank you.

21 THE COURT OFFICER: All rise. The jury is
22 exiting.

23 (Whereupon, at this time, the jury exits the
24 courtroom.)

25 THE COURT: You may be seated.

D. Sparks - Plaintiff - Cross

1 Mr. Grillo, you may proceed.

2 MR. GRILLO: Thank you.

3 Give us one second, Judge.

4 (Whereupon, at this time, a brief recess was
5 taken.)

6 MR. GRILLO: Your Honor, at this time the
7 defendants would make a motion for a directed verdict
8 specifically with respect to the damages component of
9 this case.

10 Your Honor, there was a lot of evidence that was
11 not put into this case, and specifically let's start with
12 the lost wages component.

13 Thus far we have no tax returns. We have no W-2
14 forms. We have nothing in evidence on the plaintiff's
15 case in chief to substantiate a lost wages claim. The
16 two purported economic witnesses who came and testified,
17 Dr. Provder, who put forth a life-care plan, coupled with
18 the economist, Miss Kucsma, relied according to their
19 testimony on a W-2 form from 2015.

20 Plaintiff has advanced a substantial lost wages
21 claim through the testimony of both Mr. Provder and Miss
22 Kucsma without any basis, with nothing in evidence, not a
23 tax return, not a W-2 to substantiate these claims.

24 Their expert testimony is unsupported by any
25 documentary proof, whether they are tax returns or W-2's

D. Sparks - Plaintiff - Cross

1 or pay stubs for that matter.

2 And in light of that, your Honor, I don't
3 believe, that the plaintiff established a prima facie
4 case for either past lost wages or future lost wages, and
5 we believe in that regard any claims for wages past or in
6 the future should be precluded, given the plaintiff's
7 failure to establish that prima facie case.

8 Secondly, your Honor, the testimony of Dr.
9 Provder regarding the multiple modalities and life care
10 and medical treatment that the plaintiff was required
11 from the date of accident from December 3, 2015, to the
12 present time and into the future has not been
13 substantiated at all by way of documentary proof.

14 In addition, and more importantly, Judge, Miss
15 Kucsma rather skillfully yesterday omitted any mention in
16 her projections about any medical treatment or lost wages
17 from the date of the accident until the present time, and
18 she only based her opinions on documents that she didn't
19 have in court, that were not put into evidence, and were
20 based simply on her opinion, and, your Honor, so in light
21 of that, we make a motion to have the medical portion of
22 this precluded as well.

23 Yes. There are records in evidence, but there
24 are medical records, but there is nothing that's been
25 substantiated as far as bills or anything that has been

1 confirmed.

2 When I spoke and questioned Mr. Provder, have
3 you gone back and confirmed between the date of the
4 accident of December 3, 2015, to the present time if, in
5 fact, Mr. Davis had, in fact, secured home health care,
6 if he had, in fact, had the multiple epidural injections
7 that he contended that were required pursuant to the
8 life-care plan, if, in fact, Mr. Davis had the multitude
9 of medications that Mr. Provder had anticipated him
10 needing in his life-care plan, Mr. Provder said quite
11 simply, no, I didn't confirm any of it from the date of
12 loss to the present time, and there has been nothing put
13 on the record to demonstrate the need for these items in
14 the future.

15 So for that regard, your Honor, both from the
16 pecuniary standpoint and plus a medical care standpoint,
17 at this time we would be seeking a directed verdict, your
18 Honor, with respect to the medical claims and the
19 financial claim.

20 If plaintiff wants to put forth a pain and
21 suffering claim, Judge, I can't get away from that, but
22 with respect to his inability and failure to establish a
23 proper prima facie case for both the monetary component
24 of this case as well as the medical component of this
25 case, we seek their preclusion in their entirety.

D. Sparks - Plaintiff - Cross

1 Thank you.

2 THE COURT: Thank you.

3 Mr. Mills.

4 MR. MILLS: Judge, I think my response was
5 included in defense counsel's argument. He talked about
6 the records that are in evidence including medical
7 records and billing, which clearly show what was
8 necessary and needed from the time of the accident to the
9 present, and in those evaluations done by my experts,
10 they are looking towards the future, and they had the
11 opportunity and ability to make opinions based on their
12 expertise for the future.

13 So the fact that we have the medical records for
14 all of his treatment and the billing for all of that
15 treatment covers that basis.

16 There was testimony about the amount of earnings
17 that Mr. Davis was making. My experts testified about
18 where that information came from. It was further
19 testified to by the plaintiff himself in regards to the
20 amount he was making.

21 In addition to that, the expert, the economic
22 expert used statistical data that she testified to that
23 is used in her field to determine the economic values and
24 the amount that anyone would be entitled to in a take
25 field and she included those numbers as well.

D. Sparks - Plaintiff - Cross

1 So all bases have been covered with regards to
2 damages, and I ask this case be allowed to move forward
3 to the jury pursuant to whatever case the defendants
4 decide to put on in response.

5 THE COURT: Thank you.

6 Anything further?

7 MR. GRILLO: Your Honor, again I'll just
8 reiterate the fact that there is nothing to be put into
9 evidence regarding Mr. Davis' employment and salary.
10 Nothing is in evidence, no W-2, no tax returns. That
11 is -- those are required elements of a damages case, if
12 you are going to pursue a lost wages claim.

13 It's one thing to have -- this witness
14 purportedly -- Miss Kucsma based her entire testimony
15 from a financial perspective on a purported W-2 in which
16 she artfully put in as a W-2/tax form. She never seen a
17 tax return of Mr. Davis'.

18 Mr. Davis never paid taxes since 2015, and by
19 virtue of that, their lost wages claim fails.

20 There is not, you know, experts can come in and
21 opine about anything they want, but they need a basis,
22 they need a hard evidence to extrapolate an opinion, and
23 when it comes to lost wages, it goes without question,
24 they need a basis for it.

25 Miss Kucsma, who I questioned yesterday,

1 routinely comes to court without her file. She just
2 gives opinions.

3 There has been nothing entered into evidence for
4 lost wages by the plaintiff to demonstrate a sustained
5 loss or that he was, in fact, making the \$55,000 and
6 change that he made in 2015. It was incumbent upon the
7 plaintiff to at least put a W-2 in or something to give
8 foundation to this expert testimony.

9 They have not done it, so the lost wages claim
10 should be eliminated completely, your Honor.

11 And, again, as far as the medical records, it's
12 calling for speculation, judge. Dr. Provder's testimony,
13 he didn't confirm any of it, and Miss Kucsma confirmed it
14 by leaving out the medical testimony or the medical costs
15 from the date of loss up until the time of trial.

16 Her projections start on February 1 of 2025, so
17 in essence, as I said yesterday, that portion of the
18 medical care plan of Mr. Provder coupled by the lack of
19 support by the economist from 2015 to the present time
20 should be precluded as well.

21 So those are my opinions and thank you for
22 allowing me to make the record, your Honor.

23 THE COURT: Thank you.

24 Decision reserved.

25 MR. GRILLO: Could we get two minutes before we

D. Sparks - Plaintiff - Cross

1 call our next witness?

2 THE COURT: Yeah.

3 (Whereupon, at this time, a brief recess was
4 taken.)

5 THE COURT: Ready, gentlemen?

6 MR. GRILLO: Yes, Judge.

7 THE COURT: Bring them in.

8 THE COURT OFFICER: All rise. The jury is
9 entering.

10 (Whereupon, at this time, the jury enters the
11 courtroom.)

12 THE COURT: Thank you, guys.

13 You may be seated.

14 Mr. Femia, you may call your first witnesses.

15 MR. FEMIA: Let me get him from the hallway.

16 (Whereupon, at this time, the witness enters the
17 courtroom.)

18 THE COURT OFFICER: Remain standing and be sworn
19 in by our clerk.

20 THE CLERK: Raise your right hand.

21 Do you swear or affirm to tell the truth, the
22 whole truth, and nothing but the truth, under penalty of
23 perjury?

24 THE WITNESS: Yes.

25 V L A D I M I R S T O J K O S K I, a witness called on

V. Stojkoski - Defendants - Direct/Mr. Femia

1 behalf of the Defendants, after having been first
2 duly sworn by the Clerk of the Court, took the
3 witness stand and testified as follows:

4 THE CLERK: You may be seated.

5 Can you state your first and last name, spelling
6 the last name for this record?

7 THE WITNESS: Vladimir Stojkoski,
8 S-T-O-J-K-O-S-K-I.

9 THE CLERK: Address.

10 THE WITNESS: 2360 East 29th Street, Brooklyn,
11 New York 11229.

12 THE COURT: Okay. Thank you. You may be
13 seated.

14 DIRECT EXAMINATION

15 BY MR. FEMIA:

16 Q Good morning, Mr. Stojkoski.

17 A Good morning.

18 Q I'll try not to step on your name.

19 THE COURT: I'll try to do the same thing.

20 Speak slow and clear so the court reporter can
21 take what you have to say down.

22 Listen to the questions that are asked and
23 answer those questions. If you don't know or you don't
24 understand, perfectly good answers. The attorneys will
25 adjust, okay.

1 THE WITNESS: Okay.

2 THE COURT: Thank you.

3 Q We never met before, Mr. Stojkoski; is that fair?

4 A Yeah.

5 Q And you were subpoenaed to come to court today,
6 correct?

7 A Yes.

8 Q Are you employed?

9 A Yeah.

10 Q Where do you work now?

11 A Pandonos, LLC.

12 THE COURT: You might to spell that.

13 THE WITNESS: P-A-N-D-O-N-O-S.

14 Q Is that a construction company?

15 A Yeah. It's a construction company.

16 Q In 2015 were you employed?

17 A Yes.

18 Q Where did you work in 2015?

19 A APS Contracting.

20 Q And what was your job title for APS Contracting?

21 A I was site super.

22 Q And what were the job responsibilities of a site
23 supervisor?

24 A Basically overlook the job site, make sure everything
25 is running on time. There were multiple subcontractors. We

1 had to coordinate where everybody is working and basically
2 make the project move along in a timely fashion.

3 Q And in December of 2015 was there a particular job
4 that you were working on?

5 In December of 2015 was there a particular job that
6 you were working on?

7 A Specific to?

8 Q Well, December 2013, were you on a project?

9 A Yes.

10 Q What was the project?

11 A The Pomonok Queens housing project.

12 Q And as a site supervisor, was one of your
13 responsibilities completing --

14 MR. MILLS: Objection, Judge. Leading.

15 MR. FEMIA: Foundational question, your Honor.

16 THE COURT: Just rephrase.

17 Q Are you aware of incident investigation forms?

18 A Yes.

19 Q Does your job as a site supervisor involve completing
20 them?

21 A Yeah. Or coordinate because it was the site super --
22 I mean, the site safety coordinator. He is the one if
23 anything happened, it would go through him, but we would
24 assist. I would.

25 Q You as a site supervisor, you are one of the

1 individuals this assists in completing --

2 MR. MILLS: Objection, Judge. It is leading.

3 I want to hear the testimony from the witness.

4 THE COURT: With the understanding that they are
5 foundational questions, I know that's what you are trying
6 to get out, but please rephrase.

7 Q Who is involved in completing incident investigation
8 forms?

9 A It would be the safety, site safety coordinator.

10 Q And who else?

11 A And me and also the project manager.

12 Q Thank you.

13 Was an incident investigation form completed
14 regarding an alleged incident on December 3, 2015?

15 MR. MILLS: Objection, Judge.

16 It is not an alleged incident. They are
17 responsible for it. It happened.

18 THE COURT: Again, I am assuming you're
19 objecting to the use of the word alleged.

20 MR. MILLS: Yes.

21 THE COURT: The incident happened. We all know
22 it happened.

23 Let's proceed.

24 MR. FEMIA: Well know -- okay.

25 Q Was an incident investigation form completed

1 regarding an incident on December 3, 2015?

2 A Yes.

3 Q I'm going to show you what we will have marked as --

4 MR. FEMIA: What are we up to? N for

5 identification?

6 THE COURT OFFICER: N.

7 Do you want to see it, Judge?

8 THE COURT: Yes, and Mr. Mills as well, if he

9 has not already.

10 THE COURT OFFICER: (Handing.)

11 MR. MILLS: Thank you.

12 (Whereupon, at this time, Defendants' Exhibit N
13 was marked for identification.)

14 THE COURT OFFICER: Defendants' Exhibit N marked
15 for ID and shown to the witness.

16 Q Mr. Stojkoski, I would just ask that you take a look
17 at what has been marked as Defendants' Exhibit N for
18 identification.

19 A Yes.

20 Q Is this the incident report that you helped complete
21 on December 3, 2015?

22 A Yes.

23 Q And it was completed on December 3, 2015?

24 A I believe, yes.

25 Q As a super on the job site, completing this incident

1 investigation form was part of your regularly conducted
2 activity at APS Contracting?

3 A Yes, when incidents happen.

4 Q Is that your signature on the bottom of the page?

5 A Yes.

6 Q Is it a fair and accurate copy of the incident report
7 you had to complete on December 3, 2015?

8 A Yes.

9 MR. FEMIA: At this time I would ask that
10 Defendants' Exhibit N be moved into evidence.

11 THE COURT: Any objection?

12 MR. MILLS: No, Judge.

13 THE COURT: Without objection that is in
14 evidence as Defendants' Exhibit N.

15 (Whereupon, at this time, Defendants' Exhibit N
16 was marked into evidence.)

17 THE COURT OFFICER: Defendants' Exhibit N marked
18 into evidence.

19 Q At the top there is a section called description of
20 incident, correct?

21 A Yes.

22 Q And for the record and brevity purposes, I will read
23 that.

24 "Employee was working on ground floor with rope
25 pulling a hoisted material unloading the material and

1 equipment on ground.

2 While unloading material on the ground around the
3 fourth floor a hook from the hoist somehow unhooked and caused
4 two material to fall on the ground, probably from the impact
5 of the wheels on the wheel barrel attached and alleged hit
6 employee in the back, shoulder, head area. He was asked by
7 roofing super if he needs to go to the hospital and said he
8 was okay.

9 I escorted the employee in the trailer where I
10 repeatedly asked him if he was okay, and he said he was okay.
11 I asked if he was in pain and offered him Tylenol. After I
12 insisted to rest for about ten M-I-N-S, mins, employee signed
13 out and went home.

14 Later we got information he went to hospital.
15 Hospital record indicates he has a mild concussion. More
16 information will be provided once obtained."

17 Is that an accurate reading of the narrative in that
18 form?

19 A Yeah. Yes.

20 Q And this is the form that you helped complete?

21 A Yes.

22 Q That information, who did that come from?

23 A All of this?

24 Q The description of the events contained therein, who
25 did that come from?

1 A Pretty much when the incident happened, the safety
2 coordinator went over and this information is from the person
3 who was injured and the people who are near that area that saw
4 it, like the supervisor of the roofing crew.

5 Q When you say the person who was injured, you are
6 referring to Mr. Davis?

7 A Yes.

8 Q And you saw Mr. Davis that day?

9 A In the trailer.

10 Q Okay. You saw him in the trailer, right?
11 Can you describe any injuries that you saw?

12 A Visually, no. There was no injuries.

13 Q And what emergency medical services were called?

14 A None.

15 Q Why not?

16 A Because he didn't -- he refused. He didn't want.

17 Q He didn't want any?

18 A Yeah.

19 Q But he was asked?

20 A Yes.

21 Q And what did he say?

22 A No. He is okay.

23 Q How did Mr. Davis get into the trailer?

24 A Walked.

25 Q He wasn't carried?

1 A No.

2 Q Who was he with?

3 A I believe he came with site safety.

4 MR. FEMIA: I have nothing further, your Honor.

5 THE COURT: Thank you.

6 Mr. Mills.

7 MR. MILLS: Nothing, Judge.

8 THE COURT: Okay.

9 Do you want to step down?

10 THE WITNESS: Do you need this?

11 THE COURT OFFICER: Thank you.

12 THE WITNESS: Thank you very much.

13 (Whereupon, at this time, the witness exits the
14 stand.)

15 THE COURT: Okay. Gentlemen, are we ready with
16 our next witness.

17 This is the one that was scheduled for the
18 afternoon, correct?

19 MR. GRILLO: Correct.

20 THE COURT: So, ladies and gentlemen, we are
21 going to have a longer lunch today because the witness
22 that was coming next was scheduled for this afternoon.

23 I believe it was a medical expert, correct?

24 MR. GRILLO: Yes.

25 THE COURT: So the scheduling for the doctors is

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1 a little bit tricky. That's why he was specifically
2 slotted for this afternoon. He is not ready here this
3 morning for that reason.

4 So we'll come back at 2:00 o'clock.

5 We'll proceed with that witness.

6 The other thing I want to mention is you will
7 notice this afternoon that one of the attorneys is going
8 to be missing from that table. There is an issue that
9 has to be taken care of. You are not to be -- there is
10 to be no inference drawn from that.

11 Mr. Femia is going to proceed and surely can
12 proceed in the absence of Mr. Grillo, but you will notice
13 that. So I want to address it now so everyone is under
14 the same expectation. Okay.

15 Thank you once again and as always for your
16 patience and understanding, and I'll see you back here at
17 2:00.

18 THE COURT OFFICER: All rise. The jury is
19 exiting.

20 (Whereupon, at this time, the jury exits the
21 courtroom.)

22 THE COURT: Okay. See you at two.

23 MR. MILLS: Yes.

24 (Whereupon, at this time a lunch recess was
25 taken.)

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A F T E R N O O N S C H E D U L E
* * * * *

THE COURT: What do you have for me?

MR. FEMIA: I was under the assumption that since there was a properly served 4532 disclosure of the films that we intend on using, now with the radiologist there would not be and there has not been an objection to the use of these previously noticed films.

The one set of films which we don't see in court which have been exchanged and there was a 4532 again served, I plan on using with the radiologist.

I just learned that Mr. Mills has an objection to their use.

THE COURT: Okay.
What's the objection?

MR. MILLS: He hasn't met the qualifications to bring them in and present them to a jury.

That's the basic objection. He said he was going to use them. I asked him if they came in through the proper channels. His response was no.

MR. FEMIA: It's not. I never said that they were not --

MR. MILLS: They were not subpoenaed. They didn't come through the subpoenaed records room.

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1 MR. FEMIA: The proper channel is noticing them
2 via 4532-a, which we have done.

3 MR. MILLS: If it he have someone from there
4 that is going to authenticate it.

5 MR. FEMIA: That's the opposite of 4532. 4532
6 is so you don't need someone from the facility.

7 MR. MILLS: That's why you bring them subpoenaed
8 from the subpoenaed records.

9 MR. FEMIA: No.

10 MR. MILLS: My objection is they were not
11 through the subpoenaed records room. They are not
12 properly authenticated.

13 This expert did not participate in the films.
14 He was not at the facility where the films were taken.
15 He can't authenticate them.

16 So I am going to object.

17 MR. MILLS: He is an expert. He didn't take any
18 of the films, as any radiologist or expert who has ever
19 testified.

20 THE COURT: All right. Hold on.

21 I'm reading rule 4532-a.

22 A graphic, numerical, symbolic or pictorial
23 representation of the results of a medical or diagnostic
24 procedure or test is admissible in evidence provided the
25 name of the injury party, the date when the information

1 constituting the graphic, numerical, symbolic or
2 pictorial was taken, and such additional identifying
3 information as is customarily inscribed by the medical
4 practitioner or medical facility is inserted on such
5 graphic, numerical, symbolic or pictorial representation,
6 that the representation has been previously received or
7 examined by the party or parties against whom it is being
8 offered or at least ten days before the date of trial of
9 the action, the party intending to offer such graphic,
10 numerical, symbolic or pictorial representation as a
11 proposed exhibit serves upon the party or parties against
12 said proposed exhibit is being offered, a notice of
13 intention to offer such proposed exhibit in evidence
14 during the trial and that the same is available for
15 inspection.

16 And the notice aforesaid is accompanied by an
17 affidavit or affirmation of such physician identifying
18 such graphic, numerical, symbolic or pictorial
19 representation and attesting to the identifying
20 information inscribed thereon, attesting that the
21 identifying information inscribed thereon and nothing
22 contained shall prohibit the admissibility where it was
23 otherwise admissible.

24 MR. FEMIA: Thank you, Judge.

25 THE COURT: Well --

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1 MR. MILLS: No. You are missing the part.

2 MR. FEMIA: What was missing?

3 THE COURT: Hold on a second.

4 Well, I am assuming as they comport, they have
5 the name of the injured party, the date when it was
6 taken.

7 MR. FEMIA: There was an expert exchange in
8 2018, in 2023. There was a 4532 which plaintiff never
9 served, so if ever plans on using a radiological exam,
10 that's why I am assuming that's why he didn't use the
11 radiological exam, excuse me.

12 MR. MILLS: That's not true. Subpoenaed records
13 is a substitute for that.

14 What's missing, Judge --

15 MR. FEMIA: I'm not finished yet.

16 But we served a 45 --

17 THE COURT: When?

18 MR. FEMIA: I can provide the Court a copy of
19 it.

20 MR. MILLS: The main point missing, Judge, is
21 there is no one here to certify those records. There is
22 no certification that is included that I am aware of.

23 MR. FEMIA: One month ago, your Honor.

24 THE COURT: So, Mr. Mills, this says that they
25 are admissible if that criteria is followed, and I am

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1 taking it on Mr. Femia's representation that that
2 criteria was followed.

3 MR. MILLS: There is a certification?

4 MR. FEMIA: We served it. I can provide the
5 Court a copy of what we gave you. I believe the Court
6 was also provided a copy.

7 I can email it to your Honor.

8 MR. MILLS: Even so, it requires a
9 certification, your Honor, by somebody at the facility.
10 We don't have that.

11 THE COURT: No, it doesn't. There is nothing
12 about a certification.

13 MR. MILLS: Are you sure?

14 Look at the second part of it.

15 THE COURT: Okay. I'm sorry.

16 It's accompanied by an affidavit or affirmation
17 of a physician identifying the materials to be used and
18 attesting to the identifying information inscribed on
19 that material.

20 MR. MILLS: Yes.

21 MR. FEMIA: Which is in the films that were
22 produced, and I think exchanged. We got them through
23 your authorization.

24 Excuse me. I'm sorry.

25 THE COURT: Is the film accompanied by an

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1 affidavit or affirmation of the physician?

2 MR. MILLS: No.

3 MR. FEMIA: When it came in, of course it was.
4 That's how we got it.

5 MR. MILLS: So where is it?

6 MR. FEMIA: I have it on my computer. It didn't
7 come to court. That's why we are using pursuant to the
8 4532-a. That's the point you are missing.

9 THE COURT: The 4532-a requires the notice which
10 you said you provided a month before.

11 MR. FEMIA: Correct.

12 THE COURT: Which is timely at least ten days
13 before.

14 MR. MILLS: Agreed.

15 THE COURT: So ten days before the date of the
16 trial the party intending to offer the material serves
17 upon the other party a notice of intention to offer that
18 exhibit in evidence during trial, and that same is
19 available for inspection, and that notice is accompanied
20 by an affidavit or affirmation of a physician identifying
21 the material, attesting to the identifying information on
22 the material, attesting that that information inscribed
23 is the same as is customarily inscribed, and further
24 attesting that if as a witness -- if called as a witness
25 in the action. So, whoever the physician is who does the

1 affidavit or affirmation has to also state if called as a
2 witness in the action, he or she would also must testify
3 to that fact.

4 MR. MILLS: It's standard certification as a
5 matter of fact the records from Florida, they didn't
6 agree to those coming in because there was no
7 certification attached, so I had them resend them. They
8 definitely need to have a certification. Something
9 through a notice needs a certification. And the rules
10 specifically says that. There is no certification. It's
11 pretty clear. That's why I didn't offer the records from
12 Florida, because there was no certification, so I would
13 have to send them again with one because you can't get
14 them in without certification.

15 MR. FEMIA: The films came in through your
16 authorization which was then exchanged.

17 MR. MILLS: Where is the certification?

18 MR. FEMIA: They didn't come into court. They
19 came into our office. That's how we have them. That's
20 why they are provided to the expert. That's why the
21 expert opined on them, and that's why they have been part
22 of this litigation for a decade.

23 MR. MILLS: My argument is, Judge, rules have
24 certain requirements and those requirements, they are not
25 met.

Proceedings

1 THE COURT: Were these films part of the
2 subpoenaed records?

3 MR. MILLS: No.

4 MR. FEMIA: They should be but they are not
5 here.

6 THE COURT: Why are they not here as part of
7 subpoenaed records?

8 MR. FEMIA: That's a great question.

9 Some of our subpoenas were not responded to. We
10 understand that plaintiff's subpoenas were responded to;
11 some of ours not. I'm not saying Mr. Mills had anything
12 to do with that, but that's just a matter of course.

13 MR. MILLS: Well, my office does good follow up.

14 THE COURT: Well, like I said, I am reading
15 directly from 4532-a. If that is not followed, I can't
16 let it in. And it specifically talks about the notice
17 that is sent has to be accompanied by an affidavit or
18 affirmation.

19 What you are talking about, the certification
20 that may or may not have come with them, is not part of
21 the notice that you sent. It's separate and apart from
22 that.

23 So I will have an accompanying affidavit or
24 affirmation of the physician.

25 MR. FEMIA: I don't think that's the analysis of

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1 that provision. I believe it's when the --

2 THE COURT: How do you know that?

3 MR. FEMIA: Because this is how 4532-a
4 disclosure always works.

5 MR. MILLS: Judge, if we are talking about
6 legislative intent --

7 THE COURT: I was going to say -- that's a
8 stretch.

9 MR. FEMIA: No. I wasn't talking about
10 legislative intent.

11 THE COURT: I am reading from the statute itself.
12 And the notice is required it says ten days before trial.
13 The accompanying affidavit or affirmation has of the
14 physician has to be attached to that notice.

15 In this case it doesn't sound like it was.

16 MR. FEMIA: So then I should hold this off and
17 get someone from my office to bring over a copy then.

18 THE COURT: Hold what off, the witness?

19 MR. MILLS: Yes, because he needs to testify on
20 it, and this is now being raised when I didn't realize
21 that this was going to be objected to because we
22 addressed this yesterday in court.

23 When there was an issue with one of the films
24 that can't be shown, you offered to use your own device
25 and I said, no, we don't need that. I figured out how to

1 pull up that.

2 MR. MILLS: What does that have to do with this?

3 MR. FEMIA: Because we are going to move in all
4 the films. That's what we talked about yesterday.

5 MR. MILLS: And I told and say every time
6 anything that is through the proper channels. We walked
7 through the films that were in the subpoenaed records
8 room.

9 MR. FEMIA: Yesterday we were assured there is
10 no issue with the films, we are going to be able to
11 display them tomorrow. That's how yesterday ended. I am
12 pretty sure that was in front of your Honor.

13 THE COURT: Hold on a second.

14 MR. MILLS: Anything presented to the Court
15 needs a certification. Anything. Subpoenaed records or
16 otherwise.

17 THE COURT: Mr. Mills, you love to state
18 certainties that turn out not to be certainties, by the
19 way, like I am not allowed to preclude witnesses.

20 MR. MILLS: No. I said there is no requirement.

21 THE COURT: I am sure some of our discussions
22 occurred off the record, and that wasn't included in the
23 discussion.

24 You should always be careful. I say this all
25 will time because I know everyone in this courtroom is

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1 very intelligent of using always and never.

2 MR. MILLS: Agreed.

3 THE COURT: Always and never is usually always
4 and never a thing.

5 MR. MILLS: But certified records is pretty
6 close.

7 THE COURT: Let's see.

8 I am reading specifically from the commentaries
9 here.

10 Failure to satisfy the prerequisites of 4532-a,
11 will not necessarily preclude the use of such images. A
12 technician who produced the picture could be called to
13 authenticate it. Or a physician his or her deposition
14 could be used. It might also be possible to authenticate
15 the image by means of business records, hearsay
16 exception, for example, an x-ray might be included in the
17 records of a hospital or physician and used for the
18 purposes of treating or diagnosing the patient.

19 MR. MILLS: Judge, I don't know if there is a
20 mission to cure this issue, but that's or job, right.

21 MR. FEMIA: This issue was supposed to be
22 addressed yesterday, and I thought it was when we brought
23 up the fact that some of the films were not readable, and
24 you said there is no issue, and I said we are going to be
25 moving in all of the films, and you said there is no

1 issue.

2 MR. MILLS: All of the films that are in
3 evidence.

4 MR. FEMIA: Right.

5 MR. MILLS: Why would I move in a film that was
6 not in evidence? Why are we going on a fact finding
7 mission to fix his --

8 THE COURT: I am not. I am trying to make --
9 because, counsel, I think it's, again, and I just hate to
10 be repetitive, but the amount of issues in this case is
11 alarming, and the amount of issues that are coming up on
12 the fly is even more alarming.

13 MR. MILLS: This is not my issue. He is trying
14 to put a film that's not in evidence.

15 THE COURT: I do recall there being an
16 discussion yesterday between counsel regarding these
17 films.

18 MR. MILLS: Not these films.

19 THE COURT: Excuse me.

20 Starting with the clarity of some of the films
21 that were going to be offered.

22 Now, I was not privy to that discussion, but I
23 did overhear a discussion regarding films. Again, I
24 don't know if it's the same films.

25 MR. MILLS: It is my fault because --

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1 THE COURT: I didn't not say it was your fault.
2 I did not say it was anybody's false.

3 I am relaying on what I recall from yesterday
4 afternoon. That's what I am recalling. But, again, it's
5 just very concerning to me that there are so many
6 evidentiary issues in this case regarding disclosure that
7 essentially should have been dealt with prenote of issue,
8 right?

9 MR. MILLS: But if I am penalized by a witness
10 being precluded, why aren't we going through the
11 commentary trying to figure out a cure.

12 THE COURT: One thing has nothing to do with the
13 other, Mr. Mills. I researched your issues just as I am
14 researching Mr. Femia's issue to ensure that I am making
15 the right decision.

16 MR. MILLS: Understood, Judge.

17 MR. FEMIA: And for clarity purposes, Dr.
18 Toriello will be here on Monday. They will be used with
19 him as well.

20 MR. MILLS: Dr. Toriello didn't take those
21 films.

22 MR. FEMIA: Neither did Dr. Coyne. The only one
23 who took those films was the technician who took them in
24 2009. That's absurd.

25 MR. MILLS: You just read it, Judge.

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1 THE COURT: No, that's not true. I just read
2 the commentary and based on past experience, you do not
3 need an x-ray tech to come in and testify regarding the
4 images.

5 MR. MILLS: Agreed. If it's a certified record,
6 but it's not certified, so somebody has to authenticate
7 it, and the only person who can do that if it's not
8 certified is the person who took the film.

9 THE COURT: Mr. Femia, do you have this doctor's
10 report regarding those films?

11 MR. FEMIA: I do.

12 THE COURT: So why don't we just rely on the
13 report? Why do we have to rely on the films themselves?

14 MR. FEMIA: I planned on showing them to the
15 jury.

16 THE COURT: What is the necessity of doing so,
17 if he has his report?

18 MR. FEMIA: Highlight.

19 MR. MILLS: The report?

20 I don't have the report being in evidence.

21 THE COURT: Is the report not in evidence
22 either?

23 MR. FEMIA: No. The report was not -- Dr. Coyne
24 is testifying now, and apparently there is an objection
25 to his report that we are learning about now.

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1 THE COURT: Well, we can't relay on 4532-a
2 unless you got something else that brings them in.

3 So what are we going to do?

4 MR. FEMIA: So we can either have one -- it's
5 too late now -- call Dr. Coyne at a later date or use
6 them with -- either way, they are coming in. Dr.
7 Toriello will be here on Monday, and we will have the
8 records here.

9 So this is all a waste of time but that's fine.
10 We can do that.

11 So nonetheless they will be in evidence. So we
12 can just have Dr. Coyne come back on Tuesday probably.

13 THE COURT: There is no way for him to testify
14 without these?

15 MR. FEMIA: He can testify without them, but
16 it's Mr. Davis' 2009 films. We have his 2014 films
17 already in evidence.

18 THE COURT: 2009 films from what? What are the
19 2009 films related to?

20 MR. FEMIA: His cervical spine.

21 THE COURT: Of the prior accident?

22 MR. FEMIA: Yes. I would assume.

23 THE COURT: With apologies, the Court is again
24 trying to research to make sure She gets this right and
25 doesn't waste any time.

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1 I should have been notified of this ahead of
2 time, but it never is, so we are going to proceed as we
3 have been proceeding, I guess.

4 Okay. I'm at a loss, guys.

5 So what would you like to do?

6 MR. FEMIA: We could proceed with him, but
7 reserve our right to call him back on Tuesday.

8 THE COURT: Sure. That's the way to proceed.

9 MR. FEMIA: So it will be presenting twice. And
10 Dr. Toriello, again, he will be here on Monday
11 regardless.

12 THE COURT: And that is what we'll do.

13 Let's get him back in here, and we'll line up
14 the jury.

15 THE COURT OFFICER: Ready, Judge?

16 THE COURT: Yes.

17 THE COURT OFFICER: All rise. The jury is
18 entering.

19 (Whereupon, at this time, the jury enters the
20 courtroom.)

21 THE COURT: Thank you, ladies and gentlemen.

22 All right.

23 Mr. Femia, whenever you are ready, you may call
24 your witness.

25 MR. FEMIA: I call Dr. Coyne to the witness

1 stand.

2 (Whereupon, at this time, the witness takes the
3 stand.)

4 THE CLERK: Good afternoon, Doctor.

5 THE WITNESS: Good afternoon.

6 THE CLERK: Raise your right hand, sir.

7 Do you swear or affirm to tell the truth, the
8 whole truth, and nothing but the truth, under penalty of
9 perjury?

10 THE WITNESS: I do.

11 S C O T T C O Y N E, M. D., a witness called on behalf of
12 the Defendants, after having been first duly sworn by
13 the Clerk of the Court, took the witness stand and
14 testified as follows:

15 THE CLERK: You may be seated.

16 Please state your first and last name, spelling
17 your last for this record.

18 THE WITNESS: Yes. My name is Scott Coyne,
19 C-O-Y-N-E, M.D.

20 THE CLERK: Business address.

21 THE WITNESS: 318 Southdown Road, Huntington,
22 New York.

23 THE CLERK: Witness is sworn.

24 THE COURT: Thank you, Dr. Coyne.

25 If you could speak up, slowly and clearly,

1 listen to the questions that are asked and answer those
2 questions.

3 Then if you don't know or you don't understand,
4 those are perfectly good answers, and the attorney will
5 adjust, okay?

6 THE WITNESS: Sure.

7 THE COURT: You may proceed, Mr. Femia.

8 MR. FEMIA: Thank you.

9 DIRECT EXAMINATION

10 BY MR. FEMIA:

11 Q Good afternoon, Doctor.

12 A Good afternoon.

13 Q Doctor, could you tell the jury what your occupation
14 is?

15 A I am a physician.

16 Q And do you have a specialty? Do you particularize in
17 any field?

18 A Diagnostic radiology.

19 Q Thank you.

20 Doctor, can you explain to the jury what radiology
21 is?

22 A Yeah. Radiology, diagnostic radiology is a specialty
23 in medicine that uses imaging procedures of the body to detect
24 conditions, diseases, injuries, typically with x-rays, CAT
25 scans, MRI's, ultrasounds, nuclear medicine. Different ways

1 of imaging the body.

2 And that's what a diagnostic radiologist does. They
3 interpret the tests.

4 (Whereupon, at this time, Senior Court Reporter
5 Victoria Bifulco was relieved by Senior Court Reporter
6 Monica Jenkins.)

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1 Q And you mentioned several tests, there's X-rays, Cat
2 Scans, MRI, since this is what we'll be talking about primarily
3 the Cat Scan and MRI's, can you explain to the jury what a Cat
4 Scan is, what an MRI is?

5 A Sure. So, an X-ray is the oldest procedure, been
6 around for 130 years uses x-rays to penetrate the body to make
7 an image, usually one or two images. However, imaging
8 procedures like Cat Scan and MRI are three dimensional imaging
9 procedures that takes dozens of images per examination and
10 provides almost a three dimensional view of the body part that's
11 being imaged.

12 MRI uses magnetic waves, not X-ray radiation. It's
13 magnetic waves which are safe but it provides very high quality
14 images of the body part. Cat Scan is similar to MRI as far as
15 imaging providing three dimensional images of the patient
16 whatever images but it does use X-rays to penetrate the patient
17 two different forms.

18 The images are different looking of the same body part
19 because one uses X-rays, one uses magnetic but between them we
20 get very high detail quality of the body part we are examining.

21 MR. FEMIA: All right. Thank you for that,
22 Doctor.

23 Q Could you walk us through and I know it might be a
24 little long, start with your college some of your educational
25 background?

1 A Okay. I attended Cathedral College in Queens. I
2 finished my degree in philosophy not science. I then did a year
3 of theology before I changed my desire and my vocation to go to
4 medicine.

5 So, I had to go back to school for about 2 and a half
6 years to get my premedical science accomplished. I then was
7 accepted to medical school at State University of New York
8 Downstate Medical Center in Brooklyn where Kings County Hospital
9 is one of the major teaching hospitals.

10 I was there. I received my medical school there, I got
11 my MD in 1977. Following that I did an internship and residency
12 in diagnostic radiology in Richmond Virginia at the Medical
13 College of Virginia, was very well known.

14 I finished my residency. I became board certified and
15 then I was invited to stay on the faculty and to teach as a new
16 radiologist. So, I taught for about a year before I decided I
17 wanted to come back home.

18 My home is on Long Island so I left after one year to
19 come back, immediately took a position at Glen Cove Community
20 Hospital which was a great independent community hospital. I
21 was there for 20 years. I.

22 It then merged with North Shore, Northwell. I became
23 the director of radiology at that hospital for my last ten years
24 there. Following that I was chairman of RADIOLOGY at St.
25 Catherine of Siena Medical Center in Smithtown and then at Long

1 Island Community Hospital in Patchogue which is now an NYU
2 Langone affiliate.

3 So, I was in hospital practice for 25 years. 911
4 happened and I have pretty broad background in emergency medical
5 as well as diagnostic radiology. Suffolk County police
6 commissioner called me, ask me if I come on as the chief of
7 police surgeon to build programs and to respond to disasters and
8 terrorist events which is what I have been doing for the last 19
9 years I guess.

10 I teach in the academy. I started a lot of programs
11 which have been nationally recognized and I have really enjoyed
12 it very much. As part of that I also oversee as chief surgeon i
13 oversee the Medical Evaluation Bureau.

14 So, we have 5 doctors that work and examine patients
15 everyday in the police headquarters including me, I'm in a
16 schedule examining individuals, police officers, civilians who
17 are hurt to sort of gauge their level of disability, make sure
18 their care is good, when they might come back to work.

19 And that is what I have been doing as chief surgeon of
20 Suffolk County Police.

21 Q You stole one of my questions, Doctor. I was going to
22 ask you to go into your work history and you took it from me.
23 Thank you for offering it. Were you, so there's something
24 called board certification, are you familiar with this?

25 A I am.

1 Q Are you board certified?

2 A I am, yes.

3 Q Explain to the jury what that means?

4 A Specialties in medicine have a credentialing process
5 and certification process where you're certified by a board,
6 specialty board that you are involved in. So, if you are a
7 surgeon there is an American Board of Surgery.

8 Radiology has an American Board of Radiology. They
9 require currently it's five years of training, radiology
10 training after medical school and board certification takes
11 place over 2 years.

12 It's 2 years of written, sorry, 2 days of written
13 examination and if you pass all of that then you're eligible to
14 sit for a one day oral examination, um, where you are
15 interviewed and questioned by the highest scholars I guess on a
16 one-to-one basis.

17 It's rather harrowing event but, um, that's all a part
18 if you pass the written and oral, then you receive your
19 certification from the board. So, I'm board certified in
20 diagnostic radiology.

21 Q And have you been awarded or have any awards been given
22 to you regarding your work?

23 A Yes. Some of the more notable ones in 1990 the Avianca
24 Jet Crash was in Cove Neck near Glen Cove. I was the first
25 doctor at the scene. I ran the triage area all night. We had

1 approximately 60 people who died. Then we saved approximately
2 60 people. There was an all-night affair. It was a, it's been
3 in the paper quite a bit the Avianca Jet Crash.

4 I received awards from the Nassau County executive
5 legislature in the bulk of Suffolk County legislature of
6 proclamations. Then TWA 800 occurred in Suffolk County. So,
7 although we had no, there was 250 people who perished but I was
8 working with the medical examiner using X-rays and other imaging
9 procedures to identify victims and talk to the family's.

10 So, I did that for a couple of weeks, um, very sad
11 event. Approximately 6 years ago I was named as the New York
12 State EMS Physician of the year, emergency medical, and last
13 year in April I received from the American College of Radiology
14 I became a fellow of the American College which is the most
15 prestigious award that a radiologist receives.

16 They only grant it to about 100 radiologist
17 international per year, last April in 2024. I have a bunch of
18 other awards but that's enough.

19 Q It's fine, Doctor, thank you. Have you testified in
20 court before?

21 A I have.

22 Q And over the course of how many years have you
23 testified in court?

24 A Um, probably almost 40 years I guess.

25 Q Approximately how many times have you testified?

1 A I testified about 70 times over 40 years.

2 Q Couple times a year let's call it?

3 A Usually it's 2, 3 times, 4 times, sometimes 1, it
4 varies but over time it's 70 total I would say.

5 Q And The testimony has been mostly on behalf of the
6 defense in those cases?

7 A The cases that I had I testified for the plaintiff, you
8 know, for plaintiff but most of the cases I have testified in
9 are for defense. So, only because I receive cases and those are
10 the cases that go to trial.

11 Most cases don't go to trial. The ones that go to
12 trial I'm called on to be an expert plaintiff or defense but
13 most of the time it's defense.

14 Q And you've been qualified as an expert in the field of
15 radiology before?

16 A I have, yes.

17 Q How many times?

18 A Every trial, 70 times.

19 MR. FEMIA: Your Honor, at this time I offer Dr.
20 Coyne as an expert in the field of radiology and ask that
21 he's qualified as an expert before this court?

22 MR. MILLS: No objection, Judge.

23 THE COURT: Without objection Dr. Coyne is so
24 deemed an expert.

25 Q When your called upon to read and interpret an X-ray or

1 MRI or Cat Scan, is it necessary to meet with a patient?

2 A No.

3 Q Why not?

4 A Because radiologist typically don't meet with patients.
5 They interpret the studies of the patients. The patient comes
6 with a history, clinical history provided by his or her
7 physician and we don't usually meet with the patients but we do
8 interpret the studies of the patients whether its X-ray, Cat
9 Scan, MRI, whatever.

10 Q But in your practice now, do you have a unique
11 experience where you actually do both?

12 A Yes.

13 Q Can you explain that?

14 A Over the years I was also an interventional radiologist
15 back in my earlier years at Glen Cove and then at St. Catherine.
16 So, I did surgical radiology high-tech surgical procedures using
17 Cat Scan or MRI or ultrasound.

18 Now I do meet with patients who are either police
19 officers or civilians in our police department who are injured
20 and there's a good number actually. Um, so, I will examine them
21 and also look at the images of the radiology procedures that
22 have been done.

23 So, yeah, it's just unique in the police department but
24 typically to answer your question in the hospital practice
25 doctors, radiologists read or interpret, you know, dozens of

1 images or studies everyday and they don't meet with a patient,
2 no need to.

3 Q And in your work do you review and interpret radiology
4 studies of the spine?

5 A Yes, oh yes.

6 Q How many have you reviewed if you could estimate in
7 your career?

8 A It's a lot. Between X-rays, Cat Scan, MRI over these
9 years, it's tens and tens and tens of thousands.

10 Q And do you recall being contacted by my office about a
11 matter involving Kareem Davis?

12 A Yes.

13 Q And you were provided with medical records and some
14 diagnostic studies which had been taken of Mr. Davis' spine and
15 his head, right?

16 A That is correct.

17 Q And did you review those films and reports?

18 A I did. I reviewed all the records and all the studies
19 that were provided to me.

20 Q Did there come a point in time where you issued a
21 report?

22 A Yes.

23 Q And what was the date of the report that you issued?

24 A It was the first, I did two reports, the first report
25 which is the most comprehensive extensive was October 23, 2018.

1 Q Do you have that in front of you?

2 A I do.

3 MR. FEMIA: Should we mark this as Defendant's
4 Exhibit --

5 MR. MILLS: For what, Judge, the doctor's report?

6 THE COURT: It would be 0 and you are marking it
7 for identification?

8 MR. FEMIA: Yes.

9 THE COURT: For what purpose?

10 MR. FEMIA: Just in case there is an objection to
11 him reading from it. Take a look at your report, Doctor.

12 A Yes, I have it.

13 Q Did my office compensate you for the time which you
14 spent reviewing and interpreting the films and discussing the
15 findings with us?

16 A Yes.

17 Q And you are also being compensated for the time to be
18 in court here today?

19 A That's correct.

20 Q How much are you being compensated?

21 A For today \$7,000.

22 Q And how much were you compensated in the past, you
23 issued a report?

24 A I don't remember how much the bill was but it's rather
25 extensive report. I would think probably around \$2,000.

1 Q So, in your report I believe the first study that you
2 discussed is an MRI from June 13th of 2014, correct?

3 A That's correct.

4 Q Okay. Would you like to tell the jury about what you
5 saw in that study and I also have the MRI to display if you want
6 to, you tell me what you would prefer to do it first?

7 A Okay. June 13, 2014 before the incident that we're
8 here about today, um, Mr. Davis had cervical spine MRI and it
9 shows extensive degenerative changes of the discs and the
10 joints, um, with a large herniation at C6, 7 which is the lower
11 part of the cervical spine.

12 There was also degenerative, so there was bony spurs
13 and calcification deposits that narrowed the spinal canal as
14 well as the neuro foramina that's where the nerves exit the
15 spine at each level, so C4-5, 5-6, 6-7 each level of nerves come
16 out on the right side and the left side.

17 He had narrowing of the neuro foramina which are the
18 canals where the nerves exit and there was also some high grade
19 narrowing of the central spinal canal. So, the major canal was
20 narrowed primarily at C6-7.

21 Q So, why don't I pull this up?

22 A Sure.

23 Q And doctor you can thumb through?

24 A Okay.

25 Q Just watch your step. It's displayed on the TV behind

1 you, Doctor?

2 THE COURT: What is this being displayed.

3 MR. FEMIA: This is the MRI from June 13th of 2014
4 already in evidence as Defendant's A.

5 A This is an MRI of the cervical spine, the neck in 2014.

6 Q That again Doctor is before this accident on December
7 3, 2015?

8 A Yes. This is a year and a half before and this MRI
9 this is -- so, anatomy sake for orientation this is a side view
10 of the spine looking, the brain is here. The spinal canal is
11 here.

12 The patient jaw and face is up here and this is the
13 back of the neck and we see there are, um, vertebral blocks of
14 bone and the spinal cord runs centrally right down through the
15 spinal canal.

16 Um, what we see on this is, if you see the white area
17 around the spinal cord that's cerebral spinal fluid. That is
18 water signal. When we are born our discs are very hydrated. So
19 our discs are pretty white when we are babies and children.

20 As we get older unfortunately things change and this is
21 degeneration. The disc loses their whiteness and becomes dark
22 or dehydrated and, um, the disc if you look at the disc actually
23 loose height as they dehydrate.

24 This is the disc between 2, 3, 4, 5, 6, 7. The disc
25 actually loose height. They're dehydrated and they create

1 degeneration, creates bone spurs which are little specules of
2 calcium or bone which project into the neuro foramina, projects
3 into the spinal canal, all part of the degenerative process.

4 Um, so, this patient had extensive degenerative changes
5 primarily at C6,7 where there was a better, it was a herniation
6 putting pressure on the spinal cord.

7 Q And Doctor, is that displayed here?

8 A Right. Here is the spinal chord. Here is the disc
9 herniation putting pressure on the spinal cord and also
10 narrowing the spinal canal. So, this is advance degenerative
11 change with a herniation which could be there for a while or may
12 have been due to trauma at the time.

13 I don't know but it was a very abnormal MRI and there
14 are little spicules of bone with the disc that projects into the
15 spinal canal. Okay. Without going into all the images but that
16 was my finding in reviewing this.

17 Um, the vertebral bodies are normal in height and
18 signal. In other words, there's no collapse. There's no
19 fractures. There's no dislocations where one can jump forward
20 or back on the vertebrae above or below.

21 That can be very, very bad. Okay. If there's trauma
22 and dislocation that can be fatal. So, what we have here is
23 degenerative disc --

24 MR. MILLS: I couldn't hear the last part, I'm
25 sorry, Judge.

1 THE COURT: I'm sorry, repeat what you said, the
2 last part?

3 A If there's a dislocation, if somebody has a trauma and
4 has a dislocation, I'm just explaining to the jury we look at
5 the alignment of the spine. There is no dislocation here but if
6 there was, it could be very bad or fatal condition.

7 THE COURT: Thank you, Doctor.

8 MR. FEMIA: Thank you, Doctor.

9 THE WITNESS: I was saying we don't have fracture
10 dislocation --

11 THE COURT: Let him ask a question, thank you.

12 Q Doctor, we could leave that up for now. Watch your
13 back with the laptop. If you want to sit down I'm going to ask
14 you take a look at your report and we'll go through some of the
15 other items you reviewed?

16 A Okay. On this study?

17 MR. FEMIA: No, not on this study. I'm going to
18 ask about other studies. You can have a seat for now.

19 THE WITNESS: Okay.

20 Q Did you also review a Cat Scan of Mr. Davis' brain or
21 head from December 3, 2015?

22 A I did.

23 Q Can you tell us about your findings and your review,
24 you reviewed the actual study itself?

25 A I reviewed the actual Cat Scan of the brain.

1 Q What was your findings?

2 A On December 3, 2015 it was a normal study. There was
3 no evidence of any trauma to the head.

4 Q So, I want you to assume there was testimony that an
5 object fell 50, maybe even 70 feet off a building that weighed
6 approximately 20 pounds; what kind of trauma would you
7 anticipate --

8 MR. MILLS: Objection, Judge.

9 THE COURT: What's the objection.

10 MR. MILLS: Speculation.

11 THE COURT: Sustained.

12 Q What kind of radiology findings would you anticipate
13 there being?

14 MR. MILLS: Objection, Judge.

15 THE COURT: Overruled.

16 A With an object falling?

17 Q 50 to 70 feet weighing anywhere from 15 to 20 pounds
18 and strike someone in the back of the head?

19 A An object 20 or 15 pounds falling from that height
20 would be a --

21 MR. MILLS: Judge, is he about to guess what the
22 injury is in every situation? It's speculation.

23 THE COURT: He's opining on what type of
24 radiological findings might there be in that circumstance.

25 MR. MILLS: What might there be in what

1 circumstance?

2 THE COURT: A 20 pound object falling from a
3 height of I believe it was 50 to 70 feet.

4 MR. MILLS: That can't be anything more than a
5 guess, everything is, depends on if he had on a hard hat,
6 so many variables. You can't guess what kind of injury.
7 It's speculation, Judge, it's my objection.

8 THE COURT: Noted overruled.

9 MR. FEMIA: You can answer Doctor, thank you.

10 A The forces of an object of that weight falling 5 to 7
11 stories would be more or less cause severe head trauma and would
12 probably be fatal if it hit directly into the head or into the
13 body parts near the head.

14 Q And you reviewed the CT from the same day of the
15 accident, correct?

16 A Yes.

17 Q And it was clean as you said?

18 A Yes.

19 Q There were no signs of any trauma?

20 A No. Frequently when we view Cat Scans in the emergency
21 room its from injuries from a fall. People who just fall, you
22 know from their own body height can develop into intracranial
23 trauma. So, in this case --

24 MR. MILLS: Objection, Judge.

25 THE COURT: What's the objection?

1 MR. MILLS: Relevance to what happens with people
2 when they fall?

3 MR. FEMIA: He's objecting to the answer. You
4 didn't object to my question, I'm confused.

5 THE COURT: Thank you. Objection is overruled.

6 A The blunt trauma from the object falling from that
7 height with a direct impact into the upper body would have a
8 high probability of being fatal or causing would be a crushing
9 injury would be severe intracranial trauma to the brain, to the
10 meninges around the brain, to the meninges to the skull.

11 It would be traumatic if not fatal injury.

12 Q If I told you that when Mr. Davis went to the hospital
13 on the day of the accident they didn't even take an MRI, X-ray
14 or any other diagnostic test of the neck, back or shoulder,
15 would that have and medical significance?

16 A Yes.

17 Q What --

18 MR. MILLS: Objection, Judge. Beyond the scope of
19 his testimony. He is a radiology. He reads films.

20 THE COURT: Sustained.

21 Q You reviewed a CT of, Cat Scan of Mr. Davis's cervical
22 spine from December 28th of 2015, correct?

23 A MRI I believe.

24 Q MRI, I'm sorry.

25 A Yes.

1 Q Could you tell us your findings?

2 A The MRI of the cervical spine following the December 3,
3 2015 incident, um, I compared it carefully to the 2014 MRI and
4 basically it showed the same changes of the spine, the same at
5 the same levels, the severe degeneration.

6 There was no evidence of any trauma but actually as I
7 noted in my report that herniation at C6, 7 was putting a lot of
8 pressure on the spinal cord, appeared smaller or actually it was
9 smaller and improved on the studies that we had in 2015.

10 Again, that study December 28, 2015 showed narrowing of
11 the neuro foramina at certain levels C3, 4 and C6, 7 mainly on
12 the left side more than the right. Um, the central spinal canal
13 foramina shows no interval changes from 2014 MRI.

14 There was no evidence of any fracture or dislocation or
15 any trauma to the cervical spine. We basically had an identical
16 study in 2015 compared to the 2014 MRI of the cervical spine.

17 Q And were there also MRI's taken of Mr. Davis' lumbar
18 and shoulder regions in December of 2015?

19 A Yes, December 30, 2015 left shoulder MRI.

20 Q What about the lumbar region?

21 A The lumbar region was December 28, 2015.

22 Q Can you discuss your findings of those films?

23 A Lumbar spine showed normal discs. There was some
24 degenerative changes of the joints as mainly at L4,5 and L5 S1
25 the lower part of the lumbar spine which the most common area

1 for degenerative facet joint change but the discs, there was no
2 herniation.

3 There was no evidence of any trauma whatsoever. The
4 central canal, spinal canal was wide open and the neuro foramina
5 at every level was wide open as well in the lumbar spine.

6 The tissues around the spine were normal. There was no
7 evidence of any bruising, contusion, bleeding or anything,
8 tissues around the lumbar spine normal.

9 Q No trauma in the lumbar or the shoulder?

10 A No. Shoulder, no, I did not find trauma to the
11 shoulder.

12 Q Moving forward to the August 17, 2016 MRI, Doctor, you
13 can choose and explain to the jury and discuss your findings and
14 doctor this is the August 17, 2016 MRI of Mr. Davis's cervical
15 spine?

16 A Yes, it is.

17 Q Before I think you were mentioning some sort of, well,
18 why don't you explain what is shown here?

19 A So, this is very similar to the other images you saw in
20 2014 and again we have disc dehydration. We have bulging in the
21 disc. We have those little osteophytes projecting, specules of
22 bone and again at C6,7 we had that herniation which actually
23 looks some what improved compared to what it was in 2014.

24 Q So, after this accident his spine, the herniation
25 actually improved?

1 A Yeah. The herniation improved. It wasn't putting as
2 much pressure on the spinal cord at all. So, again we see the
3 bone spurs, those little white areas coming off the vertebrae
4 but that is the herniation.

5 It's a lot smaller and it's fairly displacing the
6 spinal cord, so this is in 2016 and the curvature of the spine
7 is normal. No fracture there. No dislocation which I had
8 mentioned earlier.

9 The alignment of the vertebral body is pretty normal.
10 The central spinal canal is pretty wide open except C6, 7 which
11 is narrowed because of that herniation but down below there is
12 also a wide opening.

13 So, there's no evidence of trauma, acute or any delayed
14 finding of trauma. Sometimes you see things that can happen
15 later on but there is no evidence of any new or delayed finding
16 of trauma to the spine. It's basically identical to the 2014
17 study.

18 Q And there came a time when you reviewed Mr. Davis'
19 postsurgical MRI's, correct?

20 A Yes.

21 Q And what were your findings from that?

22 A Which study are you referring to?

23 Q So they're in January of '17, and February of '17?

24 A February '17 at Winthrop Hospital showed there had been
25 surgery at C6,7 and they put in orthopedic hardware for ACDF.

1 Q And the hardware was stable?

2 A Yes. That was the level most degenerated C6,7.

3 Q Did there come a time when you issued a second report
4 on April 20th of 2020?

5 A Yes.

6 Q And you issued that second report because my office had
7 received some additional MRI's which we sent to you for your
8 review?

9 A Yes.

10 Q Are you taking a look at your second report?

11 A Yes, I am.

12 Q What are the dates of those films reviewed?

13 A Cervical spine MRI is September 24, 2009 and --

14 MR. MILLS: Objection, Judge.

15 THE COURT: What the basis?

16 MR. MILLS: What we discussed.

17 MR. FEMIA: This is not what we discussed.

18 THE COURT: Is this an MRI or film?

19 MR. FEMIA: He's talking about his finding?

20 MR. MILLS: His report is not evidence.

21 MR. FEMIA: We're not putting it into evidence.

22 THE COURT: Doctor can we show me what you just
23 read from, please?

24 MR. MILLS: Judge, if we may.

25 MR. FEMIA: This is an entirely separate issue.

1 Can we approach?

2 THE COURT: Come on up guys.

3 (Whereupon a discussion was held off the record.)

4 THE COURT: Guys, we're going to take 5 minutes
5 and be right back.

6 COURT OFFICER: All rise jury exiting.

7 (Whereupon, the trial was adjourned to Friday,
8 January 24, 2025 at 10:00 a.m.)

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