

1 SUPREME COURT OF THE STATE OF NEW YORK.
2 COUNTY OF QUEENS: TRIAL TERM PART: 23
3 -----X

3 DAYRA GONZALEZ,

4 Plaintiff,

5 - against -

Index No.
719084/2018

6 995 FIFTH AVENUE OWNERS, CORP., and
7 995 FIFTH AVENUE LLC,

8 Defendants.

9 -----X
25-10 Court Square
10 Long Island City, New York 11101
June 27, 2025

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12 B E F O R E : HONORABLE KARINA E. ALOMAR
Justice of the Supreme Court

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15 (Appearances of counsel as previously noted.)

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21 MELISSA JIMENEZ-DE ARMAS
22 Senior Court Reporter

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24 CAROLINE MANDATO
Senior Court Reporter

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1 COURT CLERK: We are back on the record, case on
2 trial 719084 of 2018, Dayra Gonzalez versus 995 Fifth
3 Avenue Owners Corp., et al.

4 THE COURT: We're going out of order with Dr.
5 Toriello?

6 MR. SUBIN: As discussed.

7 THE COURT: Doctor, please come take the stand.
8 You're still under oath.

9 Off the record for a moment.

10 (A brief discussion was held off the record.)

11 COURT OFFICER: All rise, jury entering.

12 THE COURT: Please be seated. Counsel, resume
13 inquiry.

14 CONTINUED CROSS EXAMINATION

15 BY MR. SUBIN:

16 Q. Good morning, Dr. Toriello.

17 A. Good morning.

18 Q. On Wednesday I asked you questions about how much money
19 you earned in your career as a medical legal consultant, I
20 believe you estimated 10 to \$12 million, is that correct?

21 A. Yes.

22 Q. Now, can we agree that that number is actually millions
23 of dollars less than you've actually earned in your career?

24 A. You mean from surgery and the rest of my work?

25 Q. No, only from doing things such as you're doing here

1 today, examining people who have been injured, who claim to have
2 been injured in accidents, to testify?

3 A. The estimate that I made on Wednesday was just that, an
4 estimate, best guess. It could be more, certainly, and I
5 offered to do the math with you, but, you know, we can do that
6 now.

7 Q. So, let me ask you a different question. Isn't the
8 number over \$16 million that you have actually earned in your
9 career from medical legal work?

10 A. Once again, it's the same answer. Whatever the number
11 is, it's a large number, yes, but I can't tell you yes or no
12 that's accurate.

13 Q. Dr. Toriello, have you testified in the past, more than
14 two years ago, that your career earnings from medical legal work
15 was in excess of \$15 million, yes or no?

16 A. I don't recall.

17 Q. Okay. May I approach, Judge?

18 THE COURT: You may approach.

19 Q. Dr. Toriello, I had mentioned the case --

20 THE COURT: Did you give me those transcripts
21 before?

22 MR. SUBIN: No, Judge. I have a copy for you,
23 Judge.

24 Q. Dr. Toriello, first of all, can you look at the very
25 last page of that document in front of you. Is that signature

1 and certification from the court stenographer saying that's a
2 true and accurate copy of the testimony?

3 A. According to her, Nancy Silberger, yes.

4 Q. Can you look at the front of the document? What's the
5 date?

6 A. January 9th, 2023.

7 Q. And turning to Page 1, please.

8 A. What page?

9 Q. One, the first page. Who is the witness that gave
10 testimony?

11 A. Myself.

12 Q. I'm going to ask you to go to Page 809 of that
13 document. Are you there?

14 A. Okay.

15 Q. And I'm going to ask you to look at that. When you
16 would testify, every time you would take an oath to tell the
17 truth under the penalty of perjury, true?

18 A. Yes.

19 Q. And this testimony that you gave in 2023, would have
20 been true, correct?

21 A. The testimony was true, I don't know if the
22 transcription is accurate though.

23 Q. Well, let's read through it and you tell me if it's
24 accurate. On line 4:

25 Question: Okay, so if we did the math, over

1 forty-five exams a week, \$250 an exam, that's about \$8,750 a
2 week. And if you do forty-eight weeks for thirty years, how
3 much would that be, sir?

4 Answer: I don't know. You have the transcript there,
5 I don't recall the exact number. It was a large number though,
6 it's no question.

7 Question: So it would be about \$420,000 a year, and
8 it would be about \$12.6 million, correct, for doing that defense
9 work?

10 Answer: Whatever the answer, whatever the number is,
11 yes.

12 Question: That's just doing the exam. You told us
13 that you would testify about five hundred times, so that would
14 be about 15.3 million doing this defense work?

15 Answer: I, you know, they went through it with a
16 calculator, so whatever number that's there is the number.

17 Question: Because I have the transcript if you want
18 to look at it so we can agree when I say \$10 million it really
19 is \$15 million, right?

20 Answer: Yes.

21 Were those set of questions accurate, yes or no?

22 A. Well --

23 Q. Just yes or no.

24 A. I can't tell you they were accurate. The math is what
25 the math is. If that's accurate, \$15 million is fine, if that's

1 what the number is. For some reason you're resistant to doing
2 the math, I don't know why. We can do the math to know for
3 sure. I'm not saying it's wrong, and I'm not saying it's right.

4 Q. Doctor, let's go on. So -- wait a second. So if you
5 earned \$15 million in 2023 --

6 MR. SUBIN: Withdrawn.

7 Q. If you earned \$15.3 million from your work on behalf of
8 defendants in 2023, we would be well over \$16 million currently,
9 true?

10 MR. BRODY: Objection.

11 THE COURT: What's your objection?

12 MR. BRODY: My only objection is he did testify
13 his medical legal evaluations also included some, although
14 a small amount, of plaintiff and other work. And I'm
15 asking that this question be limited to defendant as
16 opposed to medical legal.

17 THE COURT: Rephrase your question.

18 MR. SUBIN: Sure.

19 Q. Doctor, you said that 95 or more percent of your money
20 comes from defendants, is that what you testified to on
21 Wednesday?

22 A. Yes, that's correct.

23 Q. So if we take off the -- let's take off point 3, let's
24 say \$15 million was the number in 2023. Can we agree that
25 you're over \$16 million in your career on behalf of defendants

1 at this juncture?

2 A. So we're talking about the last year and a half,
3 basically.

4 MR. SUBIN: Two and a half. January of '23.

5 A. Yeah, so in the last two and a half years, I don't know
6 exactly how much we brought in. However, we can certainly do
7 the math again, I'm happy to do that.

8 Q. Okay, what math are you doing? If you don't know the
9 numbers, what math are you doing?

10 A. Well, I know how many examinations I do a week, I also
11 know about what we charge for them. The same way we did it here
12 in this case. And we can add in two or three testimonies a
13 year, and we can see what that number is. It's more than
14 whatever number was here. Certainly more because we're a couple
15 of years later.

16 Q. Okay. Now let's move on. Do you have a calculator on
17 your computer or phone?

18 A. I do, yes.

19 Q. Doctor, I want you to tell us how many defendants exams
20 you've done in your career. You said you want to do the math,
21 please do the math.

22 MR. BRODY: Objection.

23 THE COURT: What's your objection?

24 MR. BRODY: We're really here to do calculations?

25 THE COURT: Overruled. You can answer the

1 question.

2 MR. SUBIN: Go ahead, answer the question.

3 THE WITNESS: I just have to do the calculations.

4 THE COURT: Sure. Do you have a calculator?

5 THE WITNESS: I do, yeah.

6 A. So, I'll just ask you to hold this number in your head.
7 2020 and the number I get is \$50,400. And then from 2000 [sic]
8 to now, I have to do separate calculations.

9 MR. SUBIN: \$50,400 for '20.

10 A. Right. Do I need the rest of the calculation from 2020
11 until now?

12 MR. SUBIN: Sure.

13 THE WITNESS: Okay.

14 A. About 500.

15 Q. The 51000 accident victims you've examined, let's say
16 50,000, 50,000 accident victims that you have examined on behalf
17 of defendants during the course of your career, is that your
18 testimony?

19 A. That is, yeah.

20 Q. You understand the people who hire you are the people
21 who are defending the claim, you understand that, yes?

22 A. I don't don't know if that's technically correct, but I
23 think it is accurate for purposes that we're talking about,
24 sure.

25 Q. Those people would be your clients, you're sending them

1 the bill and they are sending you business, true?

2 A. Well, they are not my clients. They are people who
3 have engaged me as an expert to do a particular job, yes.

4 Q. Right, and you send them a bill and they send you money
5 right?

6 A. That's correct.

7 THE COURT: Counsel, I'm going to ask you to hold
8 onto that question, I need to take a brief break.

9 (At this time a short break was taken.)

10 (At this time, a luncheon recess was taken.)

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

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1 THE COURT: For the record, during the recess,
2 Juror Number 3 advised the Court that based on the
3 testimony that they had heard, they believe they would not
4 be able to render a fair decision at the end of trial. As
5 such, Juror Number 3, with the consent of both attorneys,
6 has been excused and the last remaining alternate, which
7 was alternate Number 1, has been substituted and placed
8 instead of Juror Number 3. Is that accurate, Counselor?

9 MR. SUBIN: Correct.

10 MR. BRODY: Yes, your Honor.

11 THE COURT: Thank you. Have a seat, Doctor.

12 MR. SUBIN: Before I start, can I say something to
13 the jury about the morning, or how do you want to do it?

14 THE COURT: I'll apologize to them. That way they
15 won't be mad at either of you.

16 MR. SUBIN: Thank you.

17 COURT OFFICER: Jury entering.

18 (Whereupon, the jury entered the courtroom.)

19 COURT CLERK: Both sides stipulate to the presence
20 and proper seating of the jury?

21 MR. SUBIN: Yes.

22 THE COURT: Members of the jury, I apologize for
23 making you wait earlier today. Unfortunately there was an
24 emergency that required the Court's attention, so we will
25 now continue with the testimony.

1 CONTINUED CROSS EXAMINATION

2 BY MR. SUBIN:

3 MR. SUBIN: Good afternoon, Dr. Toriello.

4 A. Good afternoon.

5 Q. Doctor Toriello, if I can refresh your memory, we were
6 talking about your earnings in medical legal field earlier this
7 morning, do you recall that?

8 A. I do.

9 Q. And the people who send you the cases, you understand
10 that they are defending claims of damages from lawsuits, you
11 understand that, right?

12 A. Yes.

13 Q. And you understand that it's, if your opinion was in
14 favor of the person who is claiming the injuries, those people
15 who hired you would be subject to more damages, can we agree on
16 that?

17 A. I'm not aware of that, no. I just tell the truth,
18 cards fall where they do.

19 Q. Okay. And in this case the cards fell in the
20 defendant's favor, right?

21 A. In this case, what?

22 Q. Dr. Toriello, have you in the past, after a case was
23 over, called up the defendant's lawyer to find out what the
24 result was?

25 A. Occasionally I have, yes.

1 Q. And that's because you want to find out whether you
2 lost, right?

3 A. No, actually I just call because I'm curious, that's
4 all.

5 Q. And have you testified in the past that you call up to
6 find out whether you lost?

7 A. Well, if the case was lost or won, yes.

8 Q. And with regard to -- by the way, yesterday did you
9 testify in court?

10 A. Yesterday?

11 Q. Yes.

12 A. No.

13 Q. Are you being paid here again for your appearance
14 today?

15 A. I don't know.

16 Q. Are you charging? How about that.

17 A. Well, unfortunately all I do is medicine. My wife
18 handles all the office work, it's really up to her as to what
19 goes on in the back office.

20 Q. With regard to -- I want to talk about -- yesterday we
21 talked about range of motion, do you recall that? Not
22 yesterday, Wednesday.

23 A. Yes.

24 Q. Do you recall that?

25 A. I'm not sure exactly what you're talking about, I do

1 remember we talked about things. Go ahead.

2 Q. Okay, not a problem. When I bent my arm like this
3 that's called flexion?

4 A. It's flexion of the elbow, yes.

5 Q. And if for some reason my elbow was bracketed together
6 I can only flex it, I can only move it from the shoulder, is
7 that a fair --

8 A. When you say bracket, you mean fused?

9 Q. Fused?

10 A. Yes. If the elbow is fused you cannot move it,
11 whatever the fused position is, it can be fused in flexion as
12 well, so, wherever it is you can't move it from that position,
13 no.

14 Q. Same thing, if the shoulder was fused and the elbow was
15 fused, you couldn't move the arm at all, is that a fair
16 statement?

17 A. Fair statement.

18 Q. And with regard to the -- the only way bone can move is
19 if there is a joint to move it, is that a fair statement?

20 A. The only way two bones can move in relation to one
21 another is if there is a joint that's between the two of them,
22 that's correct, yes.

23 Q. Okay, thank you.

24 A. Sure.

25 Q. And with regard to the spine, the reason why we can

1 move the spine is because the spine has joints called facet
2 joints in between the vertebrae, is that a fair statement?

3 A. That's one of the reasons, yes.

4 Q. Okay. And if -- I'm holding up a model of the spine.
5 If we were to fuse all of the vertebrae in the neck to the
6 thoracic, or the vertebrae that attaches to the ribcage, you
7 wouldn't be able to move the neck, true?

8 A. Those fused portions of the neck would not be able to
9 be moved. If you're posturing that they fused the entire neck,
10 none of the cervical spine segments would be able to move versus
11 one another, yes.

12 Q. So in my scenario, if all of the vertebrae in the neck
13 were fused, you wouldn't be able to do flexion, bend down, true?

14 A. If all seven were fused?

15 Q. Yes.

16 A. No, that's not true.

17 Q. They are all fused down to the, down you can move --

18 A. You're talking about fused how far?

19 Q. All the way down to your T10?

20 A. Well, in that case, yes, that's true.

21 Q. And same thing if you're -- if all of them are fused
22 and -- to the T10, you couldn't do lateral bending, true?

23 A. Probably it would be much decreased, and maybe not at
24 all, right.

25 Q. And the same thing with extension, you wouldn't be able

1 to do it because you have, everything is fused, there is no
2 joints, right?

3 A. If it was fused low enough, yes.

4 Q. And same thing with rotation, you wouldn't be able to
5 do rotation?

6 A. It would be either decreased or not at all, yes.

7 Q. Okay. Now I want to talk to you, you did range of
8 motion -- so, yesterday, Wednesday we talked about, I went
9 through the ranges of motion of the cervical spine, I don't know
10 if you recall that, but we did toward the end of the day. And I
11 know that earlier you said that you made a chart, so I made a
12 chart...

13 MR. SUBIN: Can we mark this?

14 (Whereupon, the above-mentioned document was
15 marked as Plaintiff's Exhibit 17 for Identification.)

16 COURT OFFICER: Plaintiff's 17 marked for ID being
17 shown to the witness.

18 Q. I'd like you to look at the left column under where it
19 says normal, do you see that?

20 A. Yes, I do.

21 Q. Were those the normals that you have in both of your
22 reports from 2020 and 2025?

23 A. Yes.

24 Q. Okay, and for flexion you said that's the expected
25 normal, and flexion so we know is when you bring your chin to

1 your chest?

2 A. Yes.

3 Q. You said expected normal would be 45 to 50?

4 A. That's correct.

5 Q. That's for a normal, healthy person that's when you say
6 normal, true?

7 THE COURT: What's your objection, Counsel?

8 MR. BRODY: Actually, other than counsel putting
9 the table together, he actually asked all of these
10 questions the other day, so maybe it would be simpler if he
11 asked do those reflect the testimony you gave the other day
12 and you can move on? He asked every one of these
13 questions.

14 THE COURT: Overruled, continue.

15 MR. SUBIN: Thanks.

16 THE COURT: Can we have that read back?

17 (Whereupon, the previous testimony was read back.)

18 A. Yes.

19 Q. And when you measured -- by the way, in your report,
20 let's talk about the 2020 report, you talk about using measuring
21 devices in your report, right?

22 A. Yes.

23 Q. And do you?

24 A. Yeah, and I have it with me today if you want to see
25 it.

1 Q. Great, we'll talk about that in a second. When we're
2 talking about the neck range of motion, which device do you
3 need?

4 A. Inclinator. I have it with me.

5 Q. Inclinator?

6 Q. And, we haven't done 50,000 of these asking people, you
7 can do range of motion, you can estimate it with your eyes,
8 true?

9 A. I could, yes.

10 Q. But you like to use the device because it's more
11 accurate, true?

12 A. Well, it helps confirm what I suspect, yes.

13 Q. Okay. And you measured with an inclinometer the range
14 of motion of Dayra's cervical spine flexion, chin to chest, what
15 number did you come up with on your inclinometer?

16 A. 50 degrees.

17 Q. It was exactly 50?

18 A. Yes, it was 50 degrees.

19 Q. And that would be -- actually the high end of normal,
20 for a normal healthy person, true?

21 A. According to this list, yes.

22 Q. Well, it's your list.

23 A. Right.

24 Q. For demonstrative purposes --

25 MR. SUBIN: Can I display the chart, Judge?

1 THE COURT: Yes, you may.

2 MR. BRODY: Objection.

3 THE COURT: What's your objection?

4 MR. BRODY: Chart is not evidence.

5 THE COURT: It's demonstrative.

6 MR. BRODY: I understand, just noting my objection
7 for the record.

8 THE COURT: So noted.

9 Q. Doctor, am I showing what you have in front of you?
10 Can you see that?

11 A. Well, you can just represent that it is, it looks like
12 it is.

13 Q. Okay, I'm representing that. So when you measured with
14 this tool, device, you found -- and by the way, this, your first
15 examination was after Dayra's neck operation, true?

16 A. Yes.

17 Q. Okay. And so when you measured her neck flexion it
18 was at the highest level of normal, would you agree on that?

19 A. That's correct.

20 Q. Okay. And when you did extension, nose to the
21 ceiling, what number did you come to?

22 A. 60 degrees.

23 Q. And that was the absolute highest number on the --

24 A. True.

25 Q. And you asked her to turn to the left and right, chin

1 to shoulder, right?

2 A. That's correct.

3 Q. And when she turned her head to the left, you measured
4 it you measured exactly what number?

5 A. 80 degrees.

6 Q. That's on the super high end of normal, right?

7 A. Yes.

8 Q. And you asked her to turn to the opposite direction,
9 and what did you measure?

10 A. When you say the opposite direction.

11 Q. I forget which one I just asked you?

12 A. Rotation in both direction was 80 degrees.

13 Q. Both were exactly 80 degrees. Now lateral bending, ear
14 to shoulder, left and right, did you measure them?

15 A. Yes.

16 Q. What were they?

17 A. 45 degrees.

18 Q. Each. So in every motion of Dayra's spine in 2020,
19 after her three-level cervical fusion, you found that she was
20 actually sort of hypermobile, is that true?

21 A. No. I found she had normal mobility. Hypermobility
22 would be if she was above those numbers. So she's got normal
23 mobility, yes.

24 Q. And, just to speed things along a little. You saw her
25 again in April of this year, April of '25, true?

1 A. Yes.

2 Q. Once again, you measured her flexion and you measured
3 with a device, and what did it come out to?

4 A. 50 degrees.

5 Q. Okay. Exactly, right? And then you measured
6 extension, right?

7 A. That's correct.

8 Q. And what did it come out to?

9 A. 60 degrees.

10 Q. And then you asked her to turn her head to the left and
11 the right, what did you measure in each one of those motions?

12 A. 80 degrees.

13 Q. And then you asked her to -- by the way, when I touch
14 my chin to my shoulder, is that 45 degrees?

15 A. You're not touching your chin to your shoulder right
16 now. You're touching your ear to your shoulder.

17 Q. Thank you very much.

18 A. You're welcome. You don't know what you're doing.

19 Q. Thank you for correcting go me, I apologize. I touch
20 my ear to my shoulder -- this is why you're the professional. I
21 touch my ear to my shoulder, is that 45 degrees?

22 A. It's approximately 45 degrees, 50 degrees, yeah.

23 Q. Okay. And you're saying that on both occasions, Dayra,
24 who has three levels fused, was able to move to the extreme
25 levels of normal for you, right?

1 A. The higher end of normal, that's correct.

2 Q. And with regard, you told us you have your
3 inclinometer, so --

4 MR. SUBIN: Withdrawn.

5 Q. When you do these measurements, you do then what's
6 Called active, you let the person move and you measure. You
7 DON'T move them yourself, or do you?

8 A. No, these are all active ranges of motion. Motions she
9 does, not me.

10 Q. You told us you brought your inclinometer?

11 A. Yes.

12 Q. Can I ask, with the Court's permission, that you get
13 it?

14 A. Can you ask? Yeah.

15 MR. SUBIN: Your Honor -- can you get your
16 inclinometer?

17 THE WITNESS: Sure.

18 MR. SUBIN: Possible to get this marked, your
19 Honor?

20 THE COURT: Sure.

21 THE WITNESS: If you want to put some sticky thing
22 on it that I can't get off, that might be a problem, I need
23 to be able to see it.

24 MR. BRODY: We can deem it marked.

25 MR. SUBIN: That's fine.

1 THE COURT: Yeah.

2 Q. Doctor, to what -- you know what, is that the
3 inclinometer that you used during your examinations, Doctor?

4 A. Yes.

5 Q. May I see it for one second?

6 THE COURT: Yes, you may.

7 Q. I'm looking at this device, and it measures down to
8 individual degrees, is that true?

9 A. Just let me take a look at it before I testify.

10 MR. SUBIN: May I approach, Judge?

11 THE COURT: Yes, you may.

12 A. Yes.

13 Q. Okay.

14 A. You know what, actually individual two degrees.

15 Q. Okay, but it's your testimony when you put that on
16 Dayra, both times when she went chin to chest, it went right to
17 50, true?

18 A. That's correct.

19 Q. Both times when she did extension it went right to 60,
20 true?

21 A. Yes, that's what I measured.

22 Q. And four times when she turned her head to the side, it
23 went right to 80, true?

24 A. That's correct.

25 Q. And four times when she bent her head, ear to shoulder,

1 it went just to 45, true?

2 A. That's correct.

3 Q. Is that something you can do here in the courtroom, to
4 measure her range of motion?

5 A. Range of motion is a voluntary range of motion, so it's
6 not accurate if she's going to be -- I don't know how much she
7 will do today. I can only testify to what I saw that day.

8 MR. BRODY: We're not going to do a physical exam
9 here. It's absurd. All she has to say is I can't move my
10 neck, and that's the end of it.

11 MR. SUBIN: Well, if that's what she does,.

12 MR. BRODY: How do we know? We're not turning
13 this into a circus.

14 MR. SUBIN: He's saying everything is beyond
15 normal.

16 THE COURT: Overruled.

17 MR. BRODY: You're going to overrule it, note my
18 exception.

19 THE COURT: So noted.

20 MR. BRODY: Are we able to do the measurements
21 when we see the video of her?

22 THE COURT: You're going to have your moment to do
23 your part.

24 MR. BRODY: I will, Judge, don't worry.

25 MR. SUBIN: Can you do it in a way for the jury to

1 see the numbers?

2 THE WITNESS: Face me, and -- you understand
3 English right? Yes, let's start with flexion, bend your
4 head and touch your chin to your chest. Okay.

5 MR. SUBIN: What's the numbers?

6 THE WITNESS: 26.

7 MR. SUBIN: So you want to do extension, please,
8 Doctor.

9 THE WITNESS: Bring your head, I want you to look
10 all the way up, look straight ahead. Okay. And now turn
11 all the way back as far as you can.

12 It's 50.

13 MR. SUBIN: Okay. And how about rotation? Let's
14 see rotation.

15 THE WITNESS: Turn your head and touch your chin
16 to your shoulder. Just do this, hold on. Okay, turn your
17 head as much as you can.

18 MR. SUBIN: What's the number, Doctor?

19 THE WITNESS: 35.

20 MR. SUBIN: That's 35? Can we see that one more
21 time?

22 THE WITNESS: This is 0, this is 90, and one third
23 of 90 is 35.

24 Q. Doctor, do you use also a goniometer?

25 A. Right.

1 Q. Can you show us 35 degrees on a goniometer?

2 MR. BRODY: Note my objection.

3 THE COURT: So noted. Is that now, is it your
4 testimony she just went that far?

5 THE WITNESS: Yeah. Do it again, turn that way.
6 Easily, easily. It's 35 right here.

7 MR. SUBIN: What we were doing, rotation? So
8 rotation is 35, we'll take the 35. The other way. Okay
9 let's see rotation, do the other side, rotation, please?

10 THE WITNESS: So I'm going to have you turn your
11 head as much as you can this way.

12 Actually that's a little -- about 50.

13 MR. SUBIN: Now lateral bending.

14 THE WITNESS: I'm going to ask you to bring your
15 ear to the shoulder. Hold on.

16 Go ahead as much as you can. That comes to about
17 26.

18 MR. SUBIN: And the other side, please.

19 THE WITNESS: Now, bring your head as much as you
20 can, ear to the shoulder. About 26.

21 MR. SUBIN: Thank you, Doctor.

22 THE WITNESS: That's it?

23 MR. SUBIN: That's it. Ready, Doctor?

24 THE WITNESS: Just about. Okay.

25 Q. Now, Doctor, yesterday -- I keep saying yesterday.

1 Wednesday we talked about that this exam takes four or
2 five minutes for you to examine her neck, her shoulder, her
3 elbows, her wrists, and her low back, do you recall that? Yes
4 or no.

5 A. What we said was it doesn't take very long. What you
6 testified was that your person who was here, or there at the
7 office, measured it to be four or five minutes. So I'm saying
8 it doesn't take very long. I'm not saying it's five minutes,
9 but I don't know how much it was.

10 Q. And with -- you told us that you take notes and later
11 on you go and you use your notes and you create the report,
12 true?

13 A. That's correct.

14 Q. Okay. And with regard to the 2025 report, you took
15 notes, true?

16 A. Yes.

17 Q. And you have those notes with you, true?

18 A. I do, yes.

19 Q. And on those notes did you record any of the numbers
20 that you included in your report on the range of motion of the
21 cervical spine, sir?

22 A. No.

23 Q. And back -- it's your testimony that two different
24 times, when Dayra came to your office, you measured her ranges
25 of motion, she coincidentally did the high end of normal on each

1 one, you didn't write it down, but you recorded it in your
2 report, is that the testimony?

3 A. Yes, she displayed higher end of normal, and it's my
4 custom and practice not to write into my notes normal ranges of
5 motion. If they were different from 50 or 60 or 45, whatever is
6 there, then I would write it into my note, otherwise I know when
7 I'm dictating that it was normal at 50, or normal at 60.

8 Q. Well, you using a device that goes to two degrees, if
9 you know it's normal, you don't need to use the device you just
10 say normal, right?

11 A. We use the device so that I can give you the numbers.
12 If all I need to do is normal, all I would do is say normal, but
13 I'm doing it to give numbers.

14 Q. And -- by the way, when you send in these records, you
15 send them to people who have obviously paid you in these,
16 retained you in these litigations?

17 A. My office sends it to everyone, everyone gets a copy.
18 I don't send it to anybody in particular myself.

19 Q. Okay. And you have a long-standing relationship with
20 the people who hired you in this case?

21 A. Before yesterday, I didn't even know who the people
22 were, so, no, I don't know. I don't know if I ever had another
23 case with them, I have no idea. I don't look at who it is that
24 sent an individual.

25 Q. Dr. Toriello, I'm going to show you what I have

1 received in this case.

2 A. Yes.

3 Q. I want you to assume that I received that in this case.
4 At the top of that resume, is there a fax header with your name
5 on it?

6 A. Yes.

7 Q. And was that fax a 2017 fax?

8 A. Yes -- well, I don't know who it was faxed to.

9 MR. BRODY: I'm going to object that copy of the
10 resume was not sent by the doctor, and was not sent to us
11 in --

12 MR. SUBIN: Judge, I object to the speeches.

13 THE COURT: Approach, please.

14 (Whereupon, a sidebar discussion was held at the
15 Bench, out of the hearing of the jury.)

16 Q. Doctor, when --

17 MR. SUBIN: Withdrawn.

18 Q. Would you expect somebody who has a fusion of the
19 cervical vertebrae in their neck to have a loss of range of
20 motion? Yes or no.

21 A. That could happen.

22 Q. Would you -- listen to my question, please, Doctor.

23 Would you expect that there would be a loss of range of
24 motion for somebody who had a cervical fusion in their neck?

25 A. Once again, that could happen. It doesn't happen one

1 hundred percent of the time, but it could be expected, sure. It
2 could happen, that's what I mean by it could be expected. Sure,
3 it could happen.

4 (Whereupon, Senior Court Reporter Melissa
5 Jimenez-De Armas was replaced by Senior Court Reporter
6 Caroline Mandato.)

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1 (Whereupon, Senior Court Reporter Caroline Mandato
2 relieved Senior Court Reporter Melissa Jimenez De Armas.)

3 Q. Have you testified under oath in court that you would
4 expect somebody who had a two level cervical fusion to have some
5 loss of range of motion?

6 A. My response is the same; it could happen. It doesn't
7 have to happen but it could, yes.

8 Q. Doctor, do you still have the transcript up there?

9 A. No.

10 MR. SUBIN: Could we hand it to him.

11 THE COURT: What page, counsel?

12 MR. SUBIN: Give me one second, Judge. Page eight
13 forty five.

14 Q. Doctor, I want you to go there so you make sure I'm
15 reading it right. Are you there, Doctor?

16 A. I'm at eight forty six, hold on one second.

17 Q. Eight forty four. My apologies, eight forty four.

18 A. Okay.

19 Q. And in that case in front of that jury were you asked
20 these questions under oath and did you give these answers:

21 "Question: Do you have an opinion whether any of
22 the loss of range of motion is permanent or don't you have
23 an opinion?"

24 "Answer: I expect that she should have some
25 decreased range of motion because she had a fusion of her

1 neck, yes. Is it ten degrees, that I can't tell you."

2 "Question: We can agree that if you fuse C4 and
3 C5 and C5 and C6 that there's a permanent loss of range of
4 motion?"

5 "Answer: You would expect that, yes."

6 Were you asked those questions and did you give those
7 answers under oath, sir?

8 A. Once again, I have no independent recollection of it
9 and I never saw this transcript, so I can't tell you it's
10 accurate.

11 Q. Is it true?

12 A. My answer is the same. It's not unexpected. One could
13 expect it but it doesn't have to happen. That's my answer.

14 Q. I'm putting up --

15 By the way, in this case you've never seen any original
16 radiological film of the inside of Dayra's neck; true?

17 A. To my knowledge, that's correct, yes.

18 Q. Okay.

19 MR. BRODY: Your Honor, just before counsel
20 continues, can I now have a copy of that transcript to see
21 since counsel didn't provide me one.

22 MR. SUBIN: I don't have to provide you with it.

23 MR. BRODY: I'd like to see it, I may want to ask
24 him questions on it.

25 MR. SUBIN: I'm in the middle of a question. Can

1 I continue?

2 THE COURT: Come up here.

3 MR. BRODY: Thank you, your Honor.

4 (Whereupon, the following took place at the side
5 bar off the record in the presence of the Court and
6 counsel.)

7 Q. So, Dr. Toriello, as far as you know and as part of
8 your review, you've never seen an actual film of any part of
9 Dayra Gonzalez's body whether it be an x-ray, an MRI or a CAT
10 scan; true?

11 A. That's correct.

12 Q. Okay. And I wanted to show you an x-ray that's in
13 evidence. So this will be the first time that you see it,
14 right, Doctor?

15 A. I have to look at it first to tell you.

16 Q. So, Doctor, are you able to tell which cervical
17 vertebrae are fused by looking at this x-ray?

18 A. Could I approach that?

19 Q. Sure, with the Court's permission.

20 THE COURT: Yes.

21 Q. If the judge says okay, I'm fine with it.

22 (Whereupon, the witness stepped down from the
23 witness stand.)

24 A. Yes, I can.

25 Q. And what are they?

1 A. Can you hear me? There you go.

2 Q. If you can answer, that's the only thing I'm going to
3 ask you. With the Court's permission, can you please go back
4 and just answer the question.

5 (Whereupon, the witness stepped up to the witness
6 stand.)

7 Q. So which levels were fused, Doctor?

8 A. C4 to C7.

9 Q. So that would include C4-C5, C5-C6; true?

10 A. That's correct.

11 Q. And you testified in the other case that you would
12 expect a loss of range of motion. We've already agreed on that,
13 right?

14 A. It could happen, yes. It doesn't happen in every case
15 but we've agreed that it could happen, yes.

16 Q. And in this case, in Dayra's case, it's not only two
17 levels that are fused, it's a third level; true?

18 A. Yes.

19 Q. And that would --

20 And it's still your testimony that she had a high range
21 of normal range of motion when she came to your office in both
22 '20 and '25; true?

23 A. Yes.

24 Q. Now, I think --

25 When did you believe that this operation on Dayra's

1 neck happened?

2 A. When do I believe it happened --

3 Q. Yeah.

4 A. -- or when was it written in the notes?

5 Q. When did you testify to on Wednesday?

6 A. I believe -- I don't recall exactly but I believe it
7 happened on March 28, 2019.

8 Q. Okay. Didn't you testify on Wednesday that the surgery
9 was November 22nd of 2019?

10 MR. BRODY: Objection, your Honor.

11 THE COURT: What's your objection?

12 MR. SUBIN: I can show you.

13 MR. BRODY: He testified to it and corrected the
14 date a few lines down.

15 MR. SUBIN: Okay.

16 MR. BRODY: And if your Honor has the transcript,
17 I'll find it.

18 THE COURT: You have the transcript.

19 MR. SUBIN: Here, I'll show it to him.

20 MR. BRODY: Okay.

21 THE COURT: What page?

22 MR. SUBIN: It's page two eighty three of the
23 transcript, Judge.

24 Q. Can you go to page two eighty three, Dr. Toriello.

25 A. Of this transcript?

1 Q. The one that was just -- Not the old one, the one that
2 was just handed to you.

3 MR. SUBIN: Did you hand it to the judge?

4 THE COURT OFFICER: I handed it to the judge.

5 MR. SUBIN: Sorry, I wanted it for the witness.
6 Here you go.

7 A. What page are you asking?

8 Q. Two eighty three, it should be marked with a sticky.

9 A. Okay.

10 Q. Were you asked this question by Mr. Brody on line
11 nineteen of two eighty three?

12 "Question: Did Dr. Gerling ultimately perform
13 surgery on the plaintiff?"

14 "Answer: Yes, Dr. Gerling did surgery on November
15 22nd of 2019 at which time he removed the disc from the
16 three levels C4-C5 C5-C6 C6-C7, three levels, and fused
17 those levels as well."

18 "In my opinion, the surgery was based on what I
19 just told you about the emergency room and the way
20 Ms. Gonzalez acted and also the medical records."

21 "The surgery was not causally related to any of
22 the injury that occurred to Ms. Gonzalez's neck as a result
23 of the slip-and-fall that we saw on the video dated June
24 20th of 2017."

25 Is that your testimony?

1 A. I don't recall saying that but if I did, I was
2 mistaken. It was March 28, 2019. It's in my report. I know
3 what date it was.

4 Q. Did you also testify that Dr. Gerling was a
5 neurosurgeon?

6 A. I thought he was. I don't know what he is exactly. I
7 just said it, yes.

8 Q. You just said it.

9 You didn't know the answer, you just said it? For what
10 purpose did you just say something on the stand under oath that
11 you didn't know to be true?

12 A. As far as I'm concerned, as far as I know, that's what
13 he is. He's a neurosurgeon.

14 Q. Okay. In hospitals there's different services.
15 There's the orthopaedic service, there's the neurology service,
16 there's all sorts of services; true?

17 A. Yes.

18 Q. And when you're in the orthopaedic service you're an
19 orthopaedist; true?

20 A. I am an orthopaedic surgeon -- Yeah, sure.

21 MR. SUBIN: Okay. I'm going to go to the
22 operative report from NYU, Judge.

23 Q. Did you ever see the operative report from NYU, Doctor?

24 A. I believe, yes, I did.

25 Q. Okay, first of all, the date was March 29th not

1 November 20th, right? We know that, correct?

2 A. Yes.

3 Q. And the operative report it says Michael Christopher
4 Gerling, MD; service orthopaedic spine. Wouldn't that mean he's
5 an orthopaedist, Dr. Toriello?

6 A. He's an orthopaedic surgeon who does spine surgery. In
7 my opinion, that's the same as being a neurosurgeon as well.

8 Q. Now, Doctor, we talked a little bit about your
9 qualifications yesterday. I want to --

10 While we're here, I just want to read this to you to
11 see whether you agree with it or not. An indication, first of
12 all, that's a reason why the patient presents for the treatment
13 right; is that true?

14 A. That's the reason why the treatment's being done.

15 Q. Okay. And the surgeon in the operative report in the
16 NYU record writes: The patient presents with cervical disc
17 herniation after a traumatic injury to the cervical spine.

18 Do you agree with that statement by the surgeon in the
19 operative report of Dayra Gonzalez; yes or no?

20 A. Well --

21 Q. No, no, no, no. Just yes or no.

22 A. I can't answer that yes or no.

23 Q. Okay. Did Dayra Gonzalez have a traumatic disc
24 herniation from this incident; yes or no?

25 A. No.

1 Q. Okay. And if we assume -- We actually don't have to
2 assume.

3 I'm showing you that the surgeon says that it was. Do
4 you agree with that statement; yes or no?

5 A. I would disagree.

6 Q. Okay. So let's talk about your qualifications, Doctor.
7 Took you five years to go through college, sir?

8 A. I'm sorry, say it one more time.

9 Q. It took you five years to go through college?

10 A. I did, yes. I started out at seminary school. I was
11 going to be a priest.

12 Q. Okay. And then you applied to medical school in the
13 United States; true?

14 A. Yes.

15 Q. Didn't get into any; true?

16 A. That's correct.

17 Q. You went to Italy for five years?

18 A. That's correct.

19 Q. And then you came back and did another three years in
20 medical school?

21 A. Two years. The last two years.

22 Q. Okay. So you did seven years of medical school, right?

23 A. That's correct.

24 Q. Okay. And five years of college. So what ordinarily
25 takes eight years took you twelve; true?

1 A. That's correct.

2 Q. And with regard to when you got out of your training,
3 you did not choose to do a fellowship, correct?

4 A. That's correct.

5 Q. And a fellowship is additional training that an
6 orthopaedist can do to become a specialist in a subfield of
7 orthopaedics; is that a fair statement?

8 A. Yes.

9 Q. And then after your twelve years of school, you went
10 and you decided that you were going to take the boards for the
11 American Academy of Orthopaedic Surgery; true?

12 A. The American Board of Orthopaedic Surgeons, yes.

13 Q. Okay. And when you took that written test you failed
14 it the first time; true?

15 A. The first time I failed it, yes.

16 Q. Okay. And as an orthopaedic surgeon, once you became a
17 board certified orthopaedic surgeon, I'd like you to tell the
18 jury from 1988 until -- which is when you became a board
19 certified orthopaedic surgeon; true?

20 A. Wait, I didn't understand the question.

21 Q. Okay. 1988 you became a board certified orthopaedic
22 surgeon; true?

23 A. That's correct.

24 Q. And you stopped doing surgery you told us in 2006,
25 eighteen years later; true?

1 A. Right.

2 Q. And I want you to tell the jury from 1988 to 2006 how
3 many --

4 MR. SUBIN: Withdrawn.

5 Q. The surgery that Dayra had on her neck was an anterior,
6 the front, cervical, neck, discectomy, taking out the disc, and
7 fusion; is that correct?

8 A. Yes.

9 Q. And it's sometimes called an ACDF?

10 A. Yes.

11 Q. Okay. I want you to tell this jury the total number of
12 single level ACDFs you performed from 1988 until you stopped
13 surgery in 2006?

14 A. I chose not to do any surgery on the spine, so I did
15 not do any.

16 Q. Okay. And as far as two levels of an ACDF, you also
17 did zero during your career as an orthopaedic -- board certified
18 orthopaedic surgeon; true?

19 A. Once again, I chose not to do any spinal surgery and so
20 I did not do any spinal surgery on the neck, no.

21 Q. Now, Doctor, I want to talk about the diagnosis, okay.
22 And can we agree on this definition of diagnosis: The act or
23 process of identifying or determining the nature and cause of a
24 disease or an injury through the evaluation of patient history,
25 examination of a patient and review of data? Do you agree with

1 that?

2 A. Diagnosis doesn't always determine the cause. It does
3 determine the nature of the injury or the nature of the disease,
4 yeah.

5 Q. Okay. And you did that in this case, right? You came
6 up with a diagnosis; true?

7 A. Yes.

8 Q. Okay. And that diagnosis is your opinion as to what's
9 wrong with Dayra when you examined her; true?

10 A. No. That's my opinion is what happened as a result of
11 the accident on June 20, 2017.

12 Q. So your diagnosis --

13 By the way, in your report you just put the word
14 diagnosis as a header; true?

15 A. During which report?

16 Q. In your report. I think it's the same in both but you
17 can confirm that.

18 A. That's correct.

19 Q. Okay. And diagnosis, obviously that's probably the
20 most important part of your opinion as to what's wrong with her,
21 right?

22 A. Well, a diagnosis is find, you just find it as what's
23 wrong with her. So that's the only thing that is part of this
24 definition that you gave me, yes.

25 Q. Okay. And in regard to your diagnosis on November 4th

1 of 2020 --

2 MR. SUBIN: Withdrawn.

3 Q. Usually diagnosis by a doctor are listed by most
4 important first and then go in descending order; is that a fair
5 statement?

6 A. No.

7 Q. So if somebody's having a stroke and they have an
8 ingrown toenail you'll put ingrown toenail up top?

9 A. I'm just saying it's not always done. It's sometimes
10 done that way, not always.

11 Q. Isn't it usually done that way, Doctor, the most --

12 A. Once again, sometimes it is and sometimes it isn't.

13 Q. So let's go to your November 4, 2020 report. Do you
14 have it?

15 A. Yes.

16 Q. I want you to --

17 And you have a heading for diagnosis; true?

18 A. That's correct.

19 Q. And number one, the number one diagnosis that you made
20 on November 20th next to the number one is?

21 A. Resolved cervical strain.

22 Q. No, that's number two, Doctor.

23 A. I'm sorry.

24 Q. Can I see your report.

25 Doctor, you see there's a number one and you read

1 number two.

2 A. Oh, I see.

3 Q. Oh, you see.

4 I asked you just to read number one and you chose to
5 read number two. Why'd you do that, Doctor?

6 A. I just looked at the first diagnosis that was there was
7 resolve cervical strain. First one just says claimant reveals
8 evidence of and then it lists the diagnosis. It's a typographic
9 error, that's all.

10 Q. So the number one diagnosis, number one diagnosis is an
11 error. Can we agree on that that's not a diagnosis the claimant
12 reveals evidence of? That's not a diagnosis, is it, yes or no?

13 A. No. It's a typographic error.

14 Q. Okay. So your diagnosis of Dayra Gonzalez is not
15 accurate in full; true?

16 A. No, that's not true. My diagnosis is resolve cervical
17 strain, resolve low back strain, resolve left shoulder contusion
18 and resolve right knee contusion.

19 Q. Okay, let's get to that. Doctor, contusion, can we
20 agree that athletes in contact sports have many opportunities to
21 get a muscle contusion or also known as a bruise; true?

22 A. Yes.

23 Q. And the cause of a contusion is a contusion occurs when
24 a direct blow or repeated blows by a blunt object strike part of
25 the body crushing underlying muscle fibers and connective tissue

1 without breaking the skin. Is that a correct definition?

2 A. That is one of the ways a contusion occurs. It's not
3 all of the ways.

4 Q. Well. If I told you that that is the definition --
5 Okay. Well, and a contusion can also result from
6 falling or jamming a body part against hard surfaces; true?

7 A. From falling, yes, it can occur from falling and from
8 jamming, those two things, sure.

9 Q. So it's your opinion in January of 2020 that Dayra
10 Gonzalez had a contusion or a direct blow to her right knee?
11 That was your opinion as an orthopaedic surgeon, is that --

12 THE COURT: Counsel, I'm sorry, could you please
13 approach me.

14 (Whereupon, the following took place at the side
15 bar off the record in the presence of the Court and
16 counsel.)

17 THE COURT: I apologize. Would you like the
18 question read back, counsel?

19 MR. SUBIN: Yes, please.

20 THE COURT: Madam Reporter, would you read the
21 question back.

22 (Whereupon, the last question was read back by the
23 Court Reporter.)

24 MR. SUBIN: Can I withdraw that question, Judge.

25 THE COURT: Yes, okay.

1 Q. Dr. Toriello, moments ago you told us that your
2 diagnosis comes from not what the condition is but what happened
3 to Dayra in this incident; is that correct?

4 A. No. I think I told you the exact opposite. I told you
5 I think the diagnosis is what a condition is not how it
6 happened.

7 Q. So wait, let me see if I can get this down. The
8 diagnosis that you provide is that the condition that occurred
9 to Dayra on June 20th of 2017; yes or no?

10 A. In my opinion, if she injured her right knee it was a
11 contusion, yes.

12 Q. Doctor, Doctor, objection.

13 A. That's my --

14 Q. Doctor, I asked you --

15 Doctor, you've done this five hundred times, five times
16 with me. You know if I say yes or no that's not an opportunity
17 to start a speech, don't you?

18 A. I didn't hear you say yes or no, I apologize then.

19 Q. Okay, Dr. Toriello, yes or no, did --

20 MR. SUBIN: Withdrawn.

21 Q. When you write diagnosis in this report, is that
22 diagnosis what happened to Dayra as a result of the trauma of
23 June 20, 2017; yes or no?

24 A. If indeed she injured her right knee --

25 Q. Dat, Dat, Dat, Dat, Dat.

1 A. Well, I can't answer it just yes or no.

2 Q. No.

3 Did you write, let's try it that way, the diagnosis for
4 the purpose of saying what happened to Dayra Gonzalez on June
5 20th of 2017 or not; yes or no?

6 A. And the answer is that I have to answer that fully.

7 Q. No, Doctor.

8 A. All right.

9 Q. Doctor --

10 A. So then I can't answer it, I'm sorry. I'd love to
11 answer.

12 MR. SUBIN: Judge --

13 THE COURT: Doctor --

14 THE WITNESS: Yes.

15 THE COURT: -- listen to the question.

16 MR. SUBIN: Can I have it read back.

17 THE WITNESS: I know it's a yes or no question but
18 I just can't answer.

19 THE COURT: Madam Reporter, please read back the
20 question.

21 MR. BRODY: Your Honor, I think we need to
22 approach.

23 THE COURT: Approach.

24 (Whereupon, the following took place at the side
25 bar off the record in the presence of the Court and

1 counsel.)

2 THE COURT: Madam Reporter, please read back the
3 question.

4 (Whereupon, the last question was read back by the
5 Court Reporter.)

6 THE COURT: Counsel, can you reword that question.

7 MR. SUBIN: Sure.

8 Q. On June 20th -- sorry.

9 The report is dated when you examined Dayra on November
10 3rd of 2020; is that a true statement? That's when you examined
11 her first?

12 A. Yes.

13 Q. Did she have on that day a contusion on her right knee;
14 yes or no?

15 A. No.

16 Q. Okay. So when you wrote contusion of the right knee it
17 was not because she was currently having blood under the skin of
18 her right knee on November 3rd of 2020; true?

19 A. That's correct.

20 Q. And the reason why you wrote contusion of the right
21 knee is because in your expert orthopaedic opinion she had a
22 direct blow to the right knee on June 20th of 2017; yes or no?

23 A. No.

24 Q. Well, you also said in June 20th --

25 MR. SUBIN: Withdrawn. I apologize.

1 Q. In your report of November 4th of 2020 was it your
2 opinion and your diagnosis that Dayra had a left shoulder
3 contusion? Did you write that, first of all?

4 A. I wrote those words, yes.

5 Q. Okay. Those words that you wrote under the penalties
6 of perjury, did you believe they were true; yes or not?

7 A. Yes.

8 Q. Okay. And so you believed that Dayra Gonzalez --

9 MR. SUBIN: Withdrawn.

10 Q. When you wrote your first report of November of 2020
11 you had reviewed the video of the incident; true?

12 A. That's correct.

13 Q. And after viewing the video of the incident you wrote
14 the words that she had a left shoulder contusion; is that true?

15 A. I did, yes.

16 Q. Okay, that's fine.

17 And you also in the first one opined that Dayra had a
18 resolved cervical strain; true?

19 A. That's correct.

20 Q. Okay. And can we agree now, can we agree that a strain
21 is a stretching of the ligaments? Is that what a strain is?

22 A. You're saying sprain or strain because I wrote strain.

23 Q. So you wrote strain. Strain is a stretching of the
24 muscles, right, partial tear of the muscles?

25 A. Yes, that's what it is.

1 Q. Can we agree that although initially a strain may seem
2 like partial tearing of the muscles that some symptoms may
3 indicate a more serious neck injury? Can we agree on that?

4 A. That could occur at times, yes.

5 Q. Okay. And one of the things it would indicate that a
6 neck strain is a more serious injury is if the pain is
7 consistent and persistent, it doesn't go away and lesson over
8 time? Are those one of the symptoms that would be an indicator
9 that a strain might be something more serious?

10 A. Yes.

11 Q. And can we agree that a strain if it's accompanied by
12 pain that radiates down the arms and legs could be more serious
13 than just a strain can? Can we agree on that?

14 A. It might be.

15 Q. And can we agree that a strain that's accompanied by
16 headaches and numbness, tingling or weakness in the arms could
17 be symptoms that show that it's more serious than just a strain?
18 Can we agree on that?

19 A. If those symptoms fit certain parameters it could be,
20 yes.

21 Q. And now I want to talk to you about cervical --

22 First of all, herniated discs you're familiar that
23 according to the surgeon Dayra had herniated discs in her neck
24 which he saw during surgery? You're aware of that, right?

25 MR. BRODY: Objection.

1 MR. SUBIN: What? Why?

2 I'll withdraw, Judge.

3 Q. You reviewed the operative report; true?

4 A. Yes.

5 Q. And one of the things that the surgeon said that he
6 visualized during the operation was herniated discs at four
7 five, five six, six seven of the cervical spine; true?

8 A. I believe you're right. I don't have it memorized but
9 I believe you're right.

10 Q. Okay. And a herniated disc often occurs with lifting,
11 pulling, bending or twisting movements, can we agree on that
12 statement?

13 A. Those are some of the ways it occurs, yes.

14 Q. And can we agree the symptoms of a herniated disc in
15 the neck that it's pain --

16 MR. SUBIN: Withdrawn.

17 Q. Do you know what cervical radiculopathy is, right,
18 Doctor?

19 A. Yes.

20 Q. And in cervical radiculopathy the pain of the cervical
21 radiculopathy starts at the neck and travels down the arms and
22 the areas served by the damaged nerve; is that a correct
23 statement?

24 A. Yes.

25 Q. Other symptoms of cervical radiculopathy include

1 tingling or feeling of pins or needles in the hands also known
2 as paraesthesia yeah; is that correct?

3 A. Yes, that can happen.

4 Q. And a symptom of cervical radiculopathy can be weakness
5 of the muscles of the arms, shoulders or hands; true?

6 A. That can happen again in the areas that are serviced by
7 that -- yeah.

8 Q. And the same thing in the areas that are served by the
9 cervical radiculopathy you can have loss of sensation or
10 numbness; true?

11 A. That could happen, yes.

12 Q. And your -- did --

13 At any time after this incident --

14 MR. SUBIN: Withdrawn.

15 Q. At any time after June 20th of 2017 did Dayra Gonzalez
16 have any cervical radiculopathy; yes or no?

17 A. That's not a yes or no answer. I'd have to answer that
18 fully.

19 Q. Did you testify on Wednesday that Dayra Gonzalez had
20 cervical radiculopathy; yes or no?

21 A. I think I testified that the EMG showed signs that were
22 consistent with a right sided C5-6 radiculopathy.

23 Q. And I think you have a copy of the testimony. Can you
24 go to page two eighty two. Is there a highlighted area on line
25 thirteen, Doctor?

1 A. Yes.

2 Q. And does that refresh your recollection that --

3 So in this case she has a mild right C5 radiculopathy
4 but it does not need to be treated. Does that refresh your
5 recollection; yes or no?

6 A. We were talking about the EMG nerve conduction velocity
7 study which is what I just said. The EMG was noted to be
8 consistent with a C5-6 radiculopathy. However, there was no
9 other signs of C5-6 radiculopathy.

10 Q. Okay. So and that was --

11 You were relying on the EMG I believe of -- let me just
12 get it. So you were talking about the EMG of June 11th of '18,
13 I believe that was the one you were talking about yesterday?

14 A. That's who we were referring to at the time, yes.

15 Q. And that doctor who did that EMG was of the opinion
16 that Dayra presented with a prolonged history of post-traumatic
17 neck pain radiating to the right arm. You reviewed that record;
18 true?

19 A. Yes.

20 Q. Okay. And do you agree with that doctor that this pain
21 was post-traumatic in nature; yes or no?

22 A. I disagree if what you're trying to tell me is it is
23 due to the trauma.

24 Q. No, no, no, Doctor.

25 A. It happened after a trauma, yes, but not due to that

1 trauma.

2 Q. So wait a second. Now you're saying that she developed
3 cervical radiculopathy after the trauma but not due to the
4 trauma; is that what you just said? Yes or no.

5 A. No. I'm saying that he did a nerve conduction velocity
6 study after the trauma and that showed a finding that was
7 consistent with a right C5-6 radiculopathy. We don't know when
8 she had it. She may have had it beforehand, she may have had it
9 four months after the trauma not related to the trauma. So we
10 can't say when that EMG nerve conduction velocity occurred.

11 Q. Well, Doctor, let's look at it this way.

12 A. Sure.

13 Q. We looked, and I think you did it with Mr. Brody, at
14 records three months before this incident and Dayra had no
15 complaints of neck pain, had no limitations in her neck
16 whatsoever. Were you aware of that record; yes or no?

17 A. Yes.

18 Q. Okay. You're aware that when she went to the hospital
19 she was complaining of the worst possible neck pain, ten out of
20 ten? You're aware of that, too, right?

21 A. Yes.

22 Q. And it's your testimony that perhaps something else
23 happened after that that caused the cervical radiculopathy that
24 you don't know about; is that your testimony, yes or no?

25 A. My testimony is that we don't know when she may have

1 developed a mild right C5-6 radiculopathy and my testimony is
2 that even Dr. Gerling's physical examination did not find
3 anything that would corroborate a right C5-6 radiculopathy. So
4 that calls into question how significant that finding of a mild
5 right C5-6 radiculopathy is.

6 Q. You keep using the word mild.

7 By the way, do you read EMG tracings?

8 A. I read the report.

9 Q. The report?

10 A. Yes. I don't do the tracings.

11 Q. And you don't read the tracings?

12 A. I don't. I'm not a technician, no.

13 Q. Okay. And you keep using the word mild so let's look
14 at what the --

15 So this is evidence of, as it doesn't use the word
16 mild, does it, yes or no?

17 A. The doctor -- The technician, yes, the word mild does
18 not appear there.

19 Q. Thank you.

20 A. We know it's mild because it doesn't have symptoms even
21 for Dr. Gerling that are consistent with C5-6 radiculopathy --

22 Q. Dr. Toriello --

23 A. -- but that's my characterization.

24 Q. Dr. Toriello, are you here to give your opinion in an
25 impartial manner or are you here to try to win the case for the

1 defendants? Just yes -- Which one is it?

2 A. Okay. I'm here to give you my opinion and if my
3 opinion requires a full answer I will give you a full answer and
4 the jury will decide if my answer makes sense or not. I'm not
5 going to give half answers if that's what you're asking me.

6 Q. I wasn't asking that at all.

7 A. Okay, good.

8 Q. And then, have you ever seen this EMG of January 28th
9 of 2020? Have you ever seen that one before?

10 A. I'm not sure. I'd have to look at my report.

11 Q. I don't think you did but if you want to look, feel
12 free.

13 A. It's an EMG of what, the upper or lower extremities? I
14 can't see.

15 Q. Upper extremities.

16 A. And this is January 28, 2020?

17 Q. January 28, 2020.

18 A. After the ACDF, right? After the surgery on her neck?

19 Q. Yep.

20 A. I saw an EMG of the upper extremities from 2025.

21 Q. The question is --

22 A. I'm looking. I'm looking. And what was the date of
23 that? I can't see.

24 Q. January 28 2020 you just told me.

25 A. Okay. I just wanted to know if I need to look at my

1 other report. Hold on one sec. No, I did not see that EMG
2 nerve conduction velocity report.

3 Q. And are you aware that in this EMG --

4 Well, first of all, an EMG can rule out plexopathy.
5 Doctor, what's plexopathy?

6 A. Plexopathy that's a disorder of the plexus, the nerve
7 plexus.

8 Q. And polyneuropathy, Doctor, what's polyneuropathy?

9 A. Well, polyneuropathy is an affliction that occurs in
10 the peripheral nerves system, that is the outside -- the areas
11 outside the central nervous system, and it affects many many
12 different nerves. Usually caused by things such as diabetes and
13 other problems.

14 Q. And carpal tunnel syndrome we know is when you get
15 inflammation of the area in the wrist that would cause some
16 inflammation and nerve problems, right?

17 A. I'm sorry, could you define that again because your
18 definition -- What was it?

19 Q. You'll probably do a better job. Carpal tunnel define.

20 A. So carpal tunnel syndrome is a process that occurs
21 affecting the median nerve in the carpal tunnel which is an area
22 in the wrist, in the palm of the wrist and the median nerve
23 becomes squeezed by different reasons, it doesn't have to be
24 inflammation, causing a very specific symptom pattern.

25 And that can be sometimes also diagnosed with an EMG

1 nerve conduction velocity study but the diagnosis is most often
2 made clinically with physical examination.

3 Q. Okay. And so this is what the doctor's looking to
4 figure out whether there's cervical radiculopathy or those other
5 conditions at least according to this record, can we agree on
6 that?

7 A. What doctor are we talking about now?

8 Q. Gondolo.

9 A. So that doctor is a doctor that did the EMG?

10 Q. Yeah.

11 A. I don't think the doctor who did the EMG actually
12 examined him. I don't know, they just did the EMG. So why
13 don't you ask me the question again. I'm not sure I understood
14 your question.

15 Q. Impression, that's the opinion of the person who's
16 performing the test; is that correct?

17 A. I can't see it.

18 Q. Doctor, listen to my question.

19 A. Yeah. That is, yes.

20 (Whereupon, Senior Court Reporter Melissa Jimenez
21 De Armas relieved Senior Court Reporter Caroline Mandato.)

22

23

24

25

1 CONTINUED CROSS EXAMINATION

2 BY MR. SUBIN:

3 Q. And in this case, in 2020, you begin with this is an
4 abnormal EMG/NCV study on the upper extremities consistent with
5 electrodiagnostic evidence of a right C5 C6 radiculopathy. Did
6 I read that correctly?

7 A. Well, I can't see it that well, but if you're
8 representing it is, I have no problem with that. That's the
9 usual way they phrase it. It's consistent, it isn't diagnostic
10 of, it's consistent, meaning --

11 THE COURT: The question was if he read it
12 correctly. Answer the question.

13 THE WITNESS: Okay.

14 THE COURT: Stand up and look at the screen so you
15 can answer the question.

16 THE COURT: Okay.

17 Q. Doctor, I ask you again. After this incident did Dayra
18 Gonzalez have cervical radiculopathy, yes or no?

19 A. According to the EMG nerve conduction velocity study,
20 she did, yes.

21 Q. Okay, great. So Doctor, can we agree on this
22 definition? An injury is damage to your body, it's a general
23 term that refers to harm caused by accidents, falls, hits,
24 weapons and more, can we agree on that definition?

25 A. It seems fair to me.

1 Q. And somebody who has surgery after an injury, the
2 implication is that the surgery was as a result of the injury,
3 is that a fair statement?

4 A. No, that's, I'd say, a major jump, it could be due to
5 the injury, it may not be. So just because someone has surgery
6 after a particular injury doesn't mean that it's due to that
7 injury, of course not. You're not trying to say that, are you?

8 Q. No.

9 A. I didn't think so.

10 Q. Doctor, what I'm trying, in a medical record if a
11 doctor writes, surgery after an injury, that would be an
12 indicator that the doctor was attributing the surgery to injury,
13 is that a fair statement, yes or no?

14 A. It might be, yeah.

15 Q. And if I show you something from Dr. Gowdi, is
16 concerned -- you probably can't read it, I'll read it to you.

17 MR. BRODY: Judge, I'm going to object.

18 THE COURT: What's your objection?

19 MR. BRODY: It's hearsay. Dr. Gowdi is writing
20 down --

21 MR. SUBIN: Your Honor, these are speeches --

22 MR. BRODY: Can we approach?

23 (Whereupon, a sidebar discussion was held at the
24 Bench, out of the hearing of the jury.)

25 Q. Doctor, the note from 2/24/2020, see that?

1 A. Yes.

2 Q. And it's for Dayra Gonzalez, do you see that?

3 A. Yes.

4 Q. And she recently had cervical spine surgery following
5 an injury, do you see that?

6 A. Yes.

7 Q. And do you agree with that, yes or no?

8 A. That she had surgery following the injury? Clearly.
9 She had surgery after she was born. She had surgery after a lot
10 of things. One of the things she had was an injury, and she had
11 surgery. It doesn't attribute the surgery to the injury.

12 Q. Doctor, did you say on Wednesday, that -- did you
13 testify on Wednesday that it was your belief that Dayra
14 Gonzalez's anxiety caused her to bend her knee less, and the
15 doctor, without any objective findings, performed a meniscectomy
16 on her after that examination, was that your testimony?

17 A. Now, you're taking a whole bunch of other things that I
18 said and put them into one thing. I'll tell you what I was
19 saying.

20 MR. SUBIN: You know what, I'll withdraw the
21 question.

22 Q. Can you go to Page 294? Tell me when you're there,
23 please?

24 A. I'm there.

25 Q. You see the highlighted area on that page?

1 A. Not on 294.

2 MR. SUBIN: It starts with Dr. McCullough.

3 A. Okay.

4 Q. Isn't it true that it's your testimony Dr. McCullough
5 saw her in March of 2018, and in a physical examination, she
6 does have some abnormalities, that they were subjective in other
7 words. Remember what I say, subjective meaning it's under the
8 patient's control. And I'm not saying she's lying or anything,
9 I'm just saying to her disorder, her anxiety disorder, she may
10 be so anxious that she can't bend her knee after a certain
11 amount. Did he testify to that?

12 A. She may be, yeah that's accurate, it could have
13 happened.

14 Q. And I want to go to that note. This is Dr. Gowda we're
15 referring to -- by the way, on top of the page, ulnar nerve
16 distribution, what nerve root is that?

17 A. I believe it's C5.

18 Q. C5 C6?

19 A. Right.

20 Q. So she has decreased sensation in the ulnar nerve root,
21 which would be consistent with the C5 C6 radiculopathy, true?

22 A. I can't see where you're reading it from, so maybe you
23 can... what's, which? Which note are we referring to?

24 THE COURT: Doctor, you can stand up.

25 MR. SUBIN: Make yourself comfortable.

1 MR. BRODY: Judge, it's cut off in the middle of a
2 sentence. Can he see the transcript?

3 THE COURT: He's got the transcript.

4 THE WITNESS: No, that's not the transcript.

5 MR. SUBIN: I'm asking, I am asking a question.

6 Q. Is decreased sensation to the ulnar distribution a
7 symptom that is consistent with cervical radiculopathy, yes or
8 no?

9 A. Cervical radiculopathy of what side, and what side is
10 the ulnar distribution?

11 Q. Same side.

12 A. Same side, it could be, yes.

13 Q. Now, you told us your testimony was, in your mind, Dr.
14 McCullough, I guess saw Dayra bend her knee, not enough because
15 of anxiety, and it was his assessment that she had a traumatic
16 right knee medial meniscal tear and cervical disk herniations
17 with radicular -- would you agree with that assessment?

18 A. Can we just go back to the first question? I didn't
19 see that very well. Can we just go back to that again? I want
20 to make sure I answer it correctly, or at least clearly, can we
21 go back to the first? I didn't see it, I really need to look at
22 it.

23 THE COURT: No, Doctor, you have already answered
24 that question.

25 THE WITNESS: It may not have been accurate.

1 MR. BRODY: Your Honor, objection.

2 THE COURT: Your objection is noted.

3 Q. Now, Wednesday you told us that Dr. McCullough, Dayra
4 may not have bent her knee because she was, had anxiety and
5 panic disorder, and we just went through that earlier?

6 A. It could be a reason, yes.

7 Q. And I want you to assume that after examining Dayra on
8 March 30th of 2018, the surgeon came to the conclusion that this
9 is a thirty-nine-year old female with traumatic right knee
10 meniscal tear and cervical disk herniation at multiple levels,
11 with radicular symptoms as well, and my question to you is do
12 you agree or disagree with the content of that sentence? That's
13 a yes or no.

14 A. Could you read it one more time, please?

15 Q. Sure. This is a thirty-nine-year old female, with
16 traumatic right knee meniscal tear and cervical disk herniations
17 at multiple levels, with radicular symptoms as well. Can you
18 agree with the content of that sentence, yes or no?

19 A. No, I disagree with that.

20 Q. Doctor, in your 2020 report, you examined Dayra's neck
21 and her low back, true?

22 A. That's correct.

23 Q. And you didn't write anything down about examining her
24 thoracic or the spine in the middle that's attached to the
25 ribcage, is that true?

1 A. That's correct.

2 Q. And you told us on Wednesday that you examined the same
3 body parts on both examinations, do you recall that testimony?

4 A. That's correct. Well, I don't remember that, but if I
5 said that, that's what I said.

6 Q. Okay. And I want to go -- I want to go through all of
7 the diagnoses from the 2020 report that you gave, okay?

8 A. Sure.

9 Q. Number 2, resolved cervical strain. Number 3, resolved
10 low back strain. Number 4, resolved left shoulder contusion.
11 And Number 5, resolved right knee contusion. Did I read those
12 correctly?

13 A. Yes.

14 Q. Now, we just noticed that you did not examine the
15 thoracic spine in 2020?

16 A. No, I didn't say that. I said I didn't write that
17 down. I examined the thoracic spine, you have to when you
18 examine the neck and the back, you obviously, you'll examine the
19 thoracic spine as well. You asked me if I wrote it in the
20 report, and I didn't, no.

21 Q. Do you have notes from your 2020 exam?

22 A. I do, yes.

23 Q. May I see them?

24 A. Sure.

25 THE COURT: I have them.

1 Q. Did you write in your notes on the examination of
2 November 3rd, 2020, that you examined Dayra's thoracic spine,
3 yes or no?

4 A. I wouldn't have -- I wouldn't put those notes in there.
5 I don't write anything that's normal, I put abnormal notes, but
6 not normal notes. Not necessary.

7 Q. And in the 2025 report, you noted --

8 A. I'm sorry. Did you ask a question? I didn't hear.

9 Q. I'm asking you to please pick up your 2025 report.

10 A. Sure.

11 Q. Tell me when you have it.

12 A. I'm here.

13 Q. Go to Page 3.

14 A. Yes.

15 Q. First full paragraph, do you have a heading,
16 examination of the thoracic spine reveals.

17 A. Yes.

18 Q. And that's not anything that you had in the 2020
19 report, correct?

20 A. Correct.

21 Q. You're telling us despite that, you did evaluate her
22 thoracic spine in 2020?

23 A. It's impossible to examine the neck and the back
24 without examining the thoracic spine.

25 Q. Now, you went through the four diagnoses in 2020 of the

1 cervical strain, low back strain, left shoulder contusion, and
2 right knee contusion, right?

3 A. Just hold on one second. Yes.

4 Q. And now I'm still trying to get down, when you said
5 diagnosis, what are you saying? Are you saying --

6 A. Okay.

7 Q. Go ahead, I want you to tell me.

8 A. So when I write diagnosis, there are certain things
9 that are alleged by the person who was injured. Alleged means
10 they are saying that's what they hurt, and it's listed in
11 something called the Bill of Particulars.

12 So I looked at what's being alleged, written by her
13 attorney, but I look at all the allegations, and then I'm asked
14 to address each one of those allegations, and I address those
15 allegations. And what I mean when I say diagnosis is this:
16 If, in fact, the individual did injure the neck, the back, the
17 left shoulder, the right knee, in my opinion this is the most
18 probable injury that occurred. In this case a relatively minor
19 injury.

20 I'm not saying that she didn't injure those areas, left
21 back, left shoulder, right knee, but if indeed she did, this is
22 what I think happened.

23 Q. Okay, now, Doctor you could also just say, either
24 lawyer is saying that she injured her pinkey, but there is no
25 medical record whatsoever to indicate any injured pinkey. You

1 could just say no jury to the pinkey is your diagnosis, couldn't
2 you?

3 A. No, I can't write that. What I can write is there is
4 no medical evidence that would support an injury to the pinkey,
5 but I can't say she didn't injure her pinkey, because she's the
6 only one who knows if she had pain, or injured her pinkey, you
7 and I don't.

8 Q. Okay. And five years, four and a half years went
9 between the two exams and reports, true?

10 A. It looks like, yes.

11 Q. And in your 2025 report, you added a new diagnosis,
12 Number 5, correct? Just, yes or no.

13 A. Yes.

14 Q. And for the first time now, you added the diagnosis of
15 resolved thoracic strain as a result of the trauma of June 20th,
16 2017, yes or no?

17 A. Yes.

18 Q. And Doctor, if somebody perceives pain, is it
19 appropriate for them to go and get medical care?

20 A. Not always, no, depends on the type of pain. There's
21 a lot of factors that go into that.

22 Q. Would there be anything wrong with somebody who's
23 experiencing pain for an extended period of time to go and see a
24 doctor?

25 A. Is there anything wrong? No.

1 Q. Okay. And for somebody who is in pain for an extended
2 period of time who goes to a doctor, are they, is it okay for
3 them to follow their doctor's advice?

4 A. Is it okay? I don't understand -- I mean, that's what
5 you expect them to do, yes, sure.

6 Q. Okay. And if a patient had pain and you prescribe them
7 a certain type of treatment, you would hope that they would get
8 that treatment to help themselves, true?

9 A. It would be my best opinion, yes.

10 Q. Okay. And if a doctor prescribed a treatment that
11 they said would help, the patient is entitled to follow that
12 opinion, true?

13 A. Entitled, sure. They can do whatever they want, they
14 can do it or not, yes.

15 Q. And now it's your opinion, Doctor, that Dayra suffers
16 no residuals of any kind right now -- withdrawn?

17 Q. It's your opinion in your two reports that Dayra
18 suffered no residual problems from anything that happened in the
19 incident of June 20th, 2017, true?

20 A. That's correct.

21 Q. And it's also your opinion that she suffered no
22 residuals of any kind, even as a result of either surgery, isn't
23 that true?

24 A. No, it's not. I don't have any opinion regarding that.
25 I have an opinion regarding whether the surgeries were causally

1 related to the accident, but I don't have an opinion as to
2 whether she has any residuals following the surgeries that were
3 performed.

4 Q. What residuals did Dayra sustain as a result of the
5 surgery -- by the way, the surgery was March of 2018, so about,
6 is that about a year, March '19 -- sorry. It's about a little
7 more than a year and a half after the event she had the neck
8 surgery, right?

9 MR. BRODY: March 28th, 2019.

10 MR. SUBIN: Okay, so a year and nine months after
11 the surgery, right, after -- the surgery of her neck was a
12 year and nine months after the accident, true?

13 A. I believe so. I mean, whatever you say, but I think
14 it's probably about right.

15 Q. My question to you is, what residuals does Dayra
16 Gonzalez have as a result of that surgery? You examined her
17 twice after the surgery, I'd like to know what residuals she has
18 from the surgery?

19 A. Once again, I have no opinion as to what residuals she
20 may have as a result of the surgery. The surgery was not
21 causally related to this accident, and therefore I have no
22 opinion regarding that.

23 Q. Doctor, you examined her twice, true?

24 A. That's true.

25 Q. Okay. You went through and she had perfect normal

1 range of motion of her neck, true?

2 A. She did, yes.

3 Q. As a matter of fact, Doctor, did you make any abnormal
4 findings in November of 2020 with regard to Dayra Gonzalez's
5 neck, other than the scar?

6 A. No.

7 Q. So everything that you did to her in 2020, she did like
8 a normal person who didn't have surgery, true?

9 A. That's correct.

10 Q. And then you examined her in 2025, you found that she
11 had no abnormal findings, true?

12 A. In her neck, yes.

13 Q. And at that time you didn't even write down that she
14 had a scar, true?

15 A. My typist didn't write it down. I dictated it. We
16 already went through that.

17 Q. Right. So according to you she has zero residuals,
18 that you outlined, from your examinations of both 2020 and 2025,
19 is that a fair statement?

20 A. Once again, I'm not giving you any residuals regarding,
21 or any opinion rather, regarding residuals as a result of the
22 surgery that was not causally related to this accident. It's
23 outside of the scope of what I'm here for.

24 Q. You're here to tell the truth, right? That's the
25 scope.

1 A. That's what I am doing.

2 Q. You told us that her neck has perfect motion, whatever
3 tests you performed came out perfectly normal. Doctor, can't
4 you just say that there is no residual from the surgery?

5 MR. BRODY: Objection.

6 THE COURT: What's your objection?

7 MR. BRODY: He's not here to define her condition
8 is related to anything other than the accident and --

9 MR. SUBIN: No speeches.

10 MR. BRODY: The Judge asked me a question.

11 THE COURT: Approach, please.

12 (Whereupon, a sidebar discussion was held at the
13 Bench, out of the hearing of the jury.)

14 THE COURT: Could you ask your next question?

15 MR. SUBIN: Sure.

16 Q. Doctor, can we agree that a meniscal tear can be caused
17 by an awkward twist, from getting up from a chair, enough to
18 cause a tear in the meniscus?

19 A. That's one of the ways a meniscus can tear, yes.

20 Q. And Doctor, you're aware that a history here, in both
21 the medical records you've provided us, her right knee -- she
22 never had any complaints of pain or any problems in her right
23 knee before June 20th of 2017, you're aware of that, right?

24 A. That's what I have been told, yes. I don't know that
25 for sure, I don't have any documents that would, you know.

1 Q. Dispute that?

2 A. Dispute that, yes.

3 Q. And you're aware -- and you're also aware that Dayra
4 has no history, both in the medical records and by testimony, of
5 any problems to her cervical spine, any radicular symptoms prior
6 to the event of June 20th of 2017, you are aware of that, right?

7 A. I have no documents that would refute that as well.

8 Q. And is it your opinion that based on that history that
9 --

10 MR. SUBIN: Withdrawn.

11 Q. Returning to her neck, Doctor, I want to go to the
12 Lenox Hill -- when somebody has normal disk spacings, when the
13 disk spaces are normal, that's a good thing, right?

14 A. Yes.

15 Q. Okay. And the disk, when we're born is filled with
16 water and gives a good, generally if we're healthy, a space
17 between the vertebrae, right?

18 A. That's correct.

19 Q. And over time, as some of us get older, we lose some of
20 the water in the disk, and that's called desiccation, true?

21 A. That's correct.

22 Q. And that's the beginning of the aging process, if we
23 live long enough, most of us will go through?

24 A. If we live long enough, what?

25 Q. We will go through.

1 A. We're born, we'll go through the aging process, yes.

2 Q. So if somebody has normal disk space, that's a sign
3 that they don't have any degenerative condition, can we agree on
4 that?

5 A. No, it doesn't mean you don't have degenerative
6 condition, it just means you can't see anything on X-ray that
7 would indicate that they have it. It doesn't mean they don't
8 have it.

9 Q. It's a good sign for the patient if they have normal
10 disk space, true?

11 A. Yes, that's good.

12 MR. SUBIN: I have nothing further.

13 THE COURT: Any redirect?

14 MR. BRODY: Thank you, your Honor, if I could have
15 one moment, please?

16 THE COURT: Sure.

17 REDIRECT EXAMINATION

18 BY MR. BRODY:

19 Q. It's late, Doctor, I am going to try to be quick and
20 try to be direct. There was a lot of cross examination about
21 the issue of a C5 C6 radiculopathy. You heard all of these
22 questions from counsel, correct?

23 A. Yes.

24 Q. I want you to assume that someone had a test, EMG and
25 they were positive for a C5 C6 radiculopathy. What complaints

1 would they have?

2 A. Well, the complaints would be on the side of the
3 radiculopathy. You have right and left nerve roots, and so on
4 the side that's affected with the radiculopathy, a C5-6 you can
5 expect you'd have pain in the shoulder, you can have decreased
6 sensation in the shoulder, as well as the thumb and index
7 finger -- and that's where I wanted to correct what I said
8 before, because I think I was asked if loss of ulnar sensation
9 is a sign of C5-6 radiculopathy. Ulnar sensation is on the
10 other side of the arm, the other side of the hand, fourth and
11 fifth fingers, so that's not a sign of C5-6. C5-6 thumb, is on
12 this side as well as up in the shoulder.

13 And finally, the biceps tendon reflex, which is also an
14 objective finding would be decreased compared to the other side.

15 Q. So Doctor, if you had a patient who had an MRI which
16 showed some level of a herniation or degenerative condition at
17 C5-6, they had right-sided radiculopathy complaints, and they
18 failed conservative care, physical therapy didn't help,
19 medication didn't help, that person might be a candidate for
20 surgery to remedy that condition, correct?

21 A. If the MRI is consistent with the objective findings on
22 clinical examination, as during the time I examined the person
23 in the office, they might be a candidate for surgery, yes.

24 Q. Okay. I want to read to you from Dr. McCullough's
25 report that counsel read to you from earlier, and it says, if I

1 can get to the exact spot. She reports numbness and tingling
2 radiating from the neck, to the left upper extremity, to the
3 fingers. Did you say that a right C5 C6 radiculopathy affects
4 the right side of the body, right?

5 MR. SUBIN: Judge, I know it's redirect, but it's
6 not cross. It's a little --

7 MR. BRODY: This is what you asked him.

8 Q. Doctor, would you agree with me that Dr. McCullough's
9 finding is absolutely inconsistent with a C5-6 radiculopathy?

10 A. On the right, it's inconsistent.

11 Q. Right side C5-6 radiculopathy?

12 A. Sure. Because her complaints are on the left side.
13 Like I told you, if you turn on the switch for the kitchen, you
14 expect the kitchen lights to go on, not the dining room lights.
15 Same thing with the human body.

16 Q. And Doctor, I want to go back to what I call the
17 collateral, you were asked about how many of these reports you
18 have written in the past, correct?

19 A. Yes.

20 Q. And you have been asked about how many times you've
21 come to testify, correct?

22 A. Yes.

23 Q. And would it be fair to say that when you come to
24 testify, whether it's --

25 MR. SUBIN: Some these are either statements or

1 cross-examination, not part of a redirect. I'm objecting
2 to the form of these questions.

3 THE COURT: Overruled.

4 Q. Okay. You expect that one of these attorneys in the
5 case is going to attack what you're saying, correct?

6 A. Well, they might. I mean, it's possible, but many
7 times no, they don't.

8 Q. Okay. In this case did you expect there to be some
9 disagreement between you and one of the attorneys?

10 A. It's possible, yes.

11 Q. And you came anyway, right?

12 A. Came here?

13 Q. Yeah.

14 A. Oh, yeah definitely. In this case, yes, I expected it,
15 sure.

16 Q. Were you aware that neither Dr. McCullough or Dr. --

17 MR. SUBIN: Counsel -- Judge, objection. Come on.

18 THE COURT: Counsel, move on.

19 Q. Did you review any testimony --

20 MR. SUBIN: Judge, objection. Same thing.

21 THE COURT: Approach.

22 (Whereupon, a sidebar discussion was held at the
23 Bench, out of the hearing of the jury.)

24 Q. Doctor, when you were asked questions by counsel
25 regarding things such as the surgeon said this, and the surgeon

1 only said that, the only thing that you were able to review in
2 this case were records that have been submitted to the Court
3 from these various doctors, correct?

4 A. That's correct, yes.

5 Q. Okay. You were asked -- the first thing you were
6 asked, the very first thing you were asked was about the word
7 Dr. Gonda. You dictate your reports, you said correct?

8 A. I dictated my report, yes.

9 Q. Could that have been Dr. Gondolo?

10 A. It could have been, yeah.

11 Q. And you knew when you wrote your report in this case
12 that there could potentially be a time where you could be
13 cross-examined, correct?

14 A. Yes.

15 Q. And you wrote down that, although Ms. Gonzalez's ranges
16 of motion were normal, that might be a subject of
17 cross-examination?

18 MR. SUBIN: Objection, Judge. Objection to this,
19 it's beyond leading and, just not proper.

20 THE COURT: Overruled.

21 A. I'm sorry. Say it one more time.

22 Q. That if you reported that all of the examinations on
23 range of motion were normal, knowing that she had a cervical
24 fusions, that might be a subject of cross-examination?

25 A. It might be, yeah.

1 Q. People who have fusion surgeries can have limited range
2 of motion, but do they always?

3 A. No. In this case she did not.

4 Q. Counsel provided you with a transcript to look at, ask
5 you some questions from the transcript, do you recall that?

6 A. Yes.

7 Q. In that case --

8 MR. SUBIN: Can we approach here?

9 THE COURT: Sure.

10 (Whereupon, a sidebar discussion was held at the
11 Bench, out of the hearing of the jury.)

12 Q. Doctor, would you agree with me that in other cases you
13 have come to court on behalf of the defendant, and in your
14 reports and in your testimony indicated that there were
15 limitations of motion, and even significant limitations of
16 motion?

17 A. Yes.

18 Q. Doctor, how many surgeries have you performed in your
19 career?

20 A. Thousands. I mean I couldn't tell you how many, but I
21 have, I average about three hundred surgeries a year for all the
22 years I was operating, up until 2006.

23 Q. And all of those patients that you operated on, were
24 your patients, correct?

25 A. Oh, yeah, sure.

1 Q. And as a result of those surgeries some had residual
2 limitations, correct?

3 MR. SUBIN: Judge, objection.

4 THE COURT: What's your objection?

5 MR. SUBIN: Nothing to do with this case. Nothing
6 to do with anything I asked, and so it's beyond the scope.

7 THE COURT: Sustained.

8 Q. Doctor, your resume, the last new writing in your
9 resume seems to be from 2006, was that the last time you updated
10 it?

11 A. No. My resume was updated just recently.

12 Q. So it would be fair to say when your resume was
13 produced in this case, whoever produced it didn't have the most
14 recent document?

15 A. It's been updated numerous times between 2006 and now.

16 Q. We can agree the one I produced I didn't get it from
17 you in 2007, correct?

18 A. I don't know when you got it. I don't remember having
19 anything to do with your office in 2007, if that's what you're
20 asking me.

21 Q. By the way, do you remember having anything to do with
22 my office in 2023?

23 A. No.

24 Q. Doctor, Dr. Guy did range of motion measurements --

25 MR. SUBIN: Objection. It's beyond the scope. I

1 didn't ask, that name didn't come up during my --

2 MR. BRODY: He did bring up his range of motion
3 numbers, I can ask about range of motion.

4 THE COURT: Overruled.

5 MR. BRODY: I didn't hear.

6 THE COURT: Overruled.

7 Q. Dr. Guy gave range of motion numbers with regards to
8 Ms. Gonzalez, and he also reviewed some type of measuring thing.
9 If his numbers didn't match today, it doesn't mean that that was
10 not her range of motion on that day, correct?

11 A. That's correct, yes.

12 Q. And so -- withdrawn?

13 Q. You don't -- as you sit here today, you don't
14 remember what, memorized what numbers Dr. Guy came up with, did
15 you?

16 A. No, I did not.

17 Q. Were you aware that after the plaintiff's fusion
18 surgery, her own neurologist found no limitations in her range
19 of motion?

20 MR. SUBIN: Objection.

21 THE COURT: Sustained.

22 Q. But you did review that doctor's records, correct, Dr.
23 Gondolo?

24 A. I believe I did, yes, but I have to look at my report.

25 But I believe I did, yes.

1 Q. Were you aware, from any records that were provided to
2 you, that in 2022 Ms. Gonzalez fell?

3 MR. SUBIN: Judge, objection. I didn't go through
4 any of this.

5 THE COURT: Sustained.

6 Q. I want you to assume for a moment that, unbeknownst to
7 you in --

8 THE COURT: Counsel, no. Approach.

9 MR. BRODY: We need to approach, Judge, we may
10 need to make a record.

11 (Whereupon, a sidebar discussion was held at the
12 Bench, out of the hearing of the jury.)

13 (Whereupon, Senior Court Reporter Melissa
14 Jimenez-De Armas was replaced by Senior Court Reporter
15 Caroline Mandato.)

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1 (Whereupon, Senior Court Reporter Caroline Mandato relieved
2 Senior Court Reporter Melissa Jimenez De Armas.)

3 MR. BRODY: Your Honor, I'll note my exception.
4 I'll make a record outside the presence of the jury.

5 Q. Did Ms. Gonzalez ever tell you that she had any
6 accidents other than the accident of June 20, 2017?

7 MR. SUBIN: Objection.

8 THE COURT: Sustained. Your exception is noted.

9 Q. Doctor, I want you to assume something for the moment,
10 okay. I want you to assume that on June 20, 2017 Ms. Gonzalez
11 had an accident and she claimed that she hit her right knee on
12 the ground and sustained an injury to her right knee, okay.

13 And I want you to further assume that at some point
14 later on, two years, three years down the road, you came to
15 examine her.

16 Would it be fair to say that if she sustained a bruise
17 only on June 20, 2017 three years later you would see no
18 evidence of it, correct?

19 A. Yes, that's correct.

20 Q. Okay. And so if the allegation was that there was
21 bruising and swelling on the date of the accident and there were
22 no residuals three years later, would that be consistent with a
23 diagnosis of right knee contusion resolved?

24 A. Yes.

25 Q. Okay. Doctor, I want you to assume that yesterday

1 Ms. Gonzalez testified that in the emergency room they examined
2 and x-rayed the wrong knee. Based upon your experience as an
3 orthopaedic surgeon, does that seem credible to you?

4 MR. SUBIN: Judge, objection.

5 THE COURT: Sustained.

6 Q. Doctor, isn't it a fact that up until --

7 MR. BRODY: Withdrawn.

8 Q. Isn't it a fact that based upon all of the medical
9 records that you reviewed Ms. Gonzalez claimed that she hit her
10 knee on the floor on the day of the accident?

11 A. Which knee?

12 Q. Right knee.

13 A. And the question is what now?

14 Q. In all the records that you reviewed isn't that
15 Ms. Gonzalez's claim?

16 A. She states that she injured her right knee. I don't
17 know that I saw anything that said specifically that she hit her
18 knee during that time.

19 Q. Doctor, when you looked at the video, did you see
20 anything in the video that mechanically indicated to you a cause
21 of a right knee injury?

22 MR. SUBIN: Objection.

23 THE COURT: What's your objection?

24 MR. SUBIN: Beyond the scope. I didn't go into
25 this at all. He doesn't get to do another direct after I'm

1 done.

2 THE COURT: Sustained.

3 Q. Doctor, have you reviewed records from surgeons who
4 have performed surgery at NYU Langone other than the surgery
5 report in this case?

6 MR. SUBIN: Objection.

7 THE COURT: What's your objection?

8 MR. SUBIN: What's the relevance of reviewing
9 other records of Langone or not?

10 MR. BRODY: It goes to whether or not just because
11 a doctor wrote something in the record he has to accept it.

12 MR. SUBIN: That's a different question.

13 MR. BRODY: I'll rephrase it that way.

14 THE COURT: Rephrase the question.

15 Q. Doctor, merely because some doctor put something in the
16 record about causal relationship that doesn't necessarily mean
17 that you have to agree there was evidence of it, correct?

18 A. No. That's an indication of what the doctor believed
19 that the doctor needs to come before the jury and tell them --

20 MR. SUBIN: Objection. Objection. Objection to
21 this. Ask it be stricken.

22 THE COURT: So stricken.

23 Q. So, Doctor, would it be fair to say that given the
24 information that you had available, the EMG of the C5-6 level
25 did not correlate to the physical complaints that Ms. Gonzalez

1 was making?

2 A. As documented in the medical records by Dr. Gerling and
3 Dr. Gondolo, is that what you're saying?

4 Q. Yes.

5 A. They did not correlate, no.

6 Q. And in fact, Doctor, we can agree that if Ms. Gonzalez
7 was experiencing radicular pain from her neck into the left
8 upper extremity and into her left shoulder whatever was causing
9 that was not picked up by the EMG, correct?

10 A. The EMG found an abnormality on the right side not the
11 left side and so there's an inconsistency and as physicians we
12 need to resolve all the inconsistencies before we go ahead and
13 do surgery and treat because that's very very serious.

14 Q. Now Dr. McCullough found a mechanical injury to the
15 right knee; is that correct?

16 A. I don't recall exactly what he wrote. I mean, you can
17 represent that it's being true.

18 Q. He found a torn meniscus?

19 A. Oh, yes.

20 Q. Okay. And so going back to counsel's questioning that
21 a torn meniscus was found in 2018, okay. I want you to assume
22 for a moment that this accident was June 20, 2017. Would you
23 have expected there to have been within four to six weeks of
24 this accident some evidence of that torn meniscus with regards
25 to Ms. Gonzalez?

1 MR. SUBIN: Objection.

2 THE COURT: Sustained.

3 Q. Doctor, would you have expected that when Ms. Gonzalez
4 went to see the doctor in September of 2017 she would have shown
5 some evidence of the torn meniscus?

6 THE COURT: Sustained.

7 Q. Doctor, does it matter that you haven't performed
8 spinal surgery in connection with determining whether or not
9 spinal surgery was warranted?

10 A. No. I evaluated many many patients and in my opinion
11 when someone requires surgery I'm perfectly capable and educated
12 enough to be able to determine when surgery is indicated. I
13 don't do that surgery but I'm the person who decides when they
14 need to have that surgery.

15 Fortunately, many of my patients, most patients with
16 low back and neck injuries do not need surgery. Those that do,
17 I refer to colleagues that do those surgeries and then they come
18 back to me after the surgery is performed.

19 Q. Doctor, other than a temporal causation, a person who
20 has a herniated disc in 2019 doesn't mean they herniated that
21 disc on June 20th of 2017, correct?

22 A. No. A disc herniation absent any evidence of any
23 trauma, yeah, you cannot tell when it exactly happened. Most
24 discs occur because of the normal aging process.

25 Q. Doctor, involuntarily a person who suffers an injury

1 such as three cervical herniated discs, a torn meniscus in their
2 knee, a tear in their shoulder, herniated discs in their back,
3 would you expect within sixty days after the accident there
4 would be outward signs and symptoms of it?

5 MR. SUBIN: Objection.

6 THE COURT: Sustained.

7 MR. BRODY: I have no further questions.

8 THE COURT: Any recross?

9 MR. SUBIN: No, Judge.

10 THE COURT: Doctor, you're excused.

11 (Whereupon, the witness stepped down from the
12 witness stand.)

13 THE COURT: I'm going to ask that you return on
14 Monday and we are going to continue with the testimony.
15 You still have not heard the entire case, please do not
16 formulate any ideas.

17 (Continued on the next page to include jurat.)

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1 Do not do any research on any topic that you have
2 heard here, nor research on any of the parties, the
3 attorneys or the Court. We want you to have an open mind.
4 Do not discuss this case with anyone. Have a wonderful
5 weekend.

6 THE COURT OFFICER: Jury exiting.

7 (Whereupon, the jury exited the courtroom.)

8 (Whereupon, the trial was adjourned until June 30,
9 2025 at 9:30 a.m.)

10 *****

11 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE
12 ORIGINAL STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

13

14

CAROLINE MANDATO
Senior Court Reporter

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MELISSA JIMENEZ DE ARMAS
Senior Court Reporter

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