

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF KINGS: CIVIL TERM: PART 30

3 -----X

4 KELVIN COLINDRES FLORES,

5 PLAINTIFF,

6 - against -

7 IRE-NG 1715 E. 13TH STREET, LLC and MJM
8 ASSOCIATES CONSTRUCTION,

9 DEFENDANTS.

10 -----X

11 Supreme Court
12 360 Adams Street
13 Brooklyn, New York 11201
14 August 7, 2025

15 B E F O R E :

16 HONORABLE MENACHEM MIROCZNIK,
17 Justice of the Supreme Court, and a jury,

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

19 GORAYEB & ASSOCIATES, P.C.
20 Attorneys for the Plaintiff
21 100 William Street - Suite 1205
22 New York, New York 10038
23 BY: CHRISTOPHER VARGAS, ESQ.

24 BARTLETT, LLP
25 Attorneys for the Defendants
IRE-NG 1715 E. 13TH STREET
and MJM ASSOCIATES CONSTRUCTION
3 Huntington Quadrangle
Melville, New York 11747
BY: MATTHEW J. MINERO, ESQ.

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FULLERTON BECK LLP
Attorneys for the Third-Party Defendant
U.S. SPRAY NYC, INC.
One West Red Oak Lane
White Plains, New York 10604
BY: JASON AARON, ESQ.
BY: ALEXANDRA SUED, ESQ.

LAURA DELVAC
SENIOR COURT REPORTER

* * *

COURT OFFICER: Come to order.

THE COURT: Be seated, any progress of what we
spoke about yesterday?

Off the record.

(Whereupon, an off the record discussion was held.)

THE COURT: Let's go on the record.

Good morning.

MR. VARGAS: Good morning.

MR. MINERO: Good morning.

MR. VARGAS: Good morning. Plaintiff moves to
discontinue against the owner, IRE-NG 1715 East 13th Street,
LLC with prejudice.

MR. MINERO: Judge, in accordance with 3217(b),
respectfully this Court, since there has been a jury
decision, jury verdict, this Court does not have the

1 authority to grant such an application, it must be done on
2 the consent of the parties, on behalf of IRE-NG, we do not
3 consent to this. This is clearly part of some arrangement
4 between Plaintiff and the Third-Party Defendant. More
5 likely, Third-Party Defendant's excess insurer to arrange
6 for some type of Mary Carter agreement which would be to
7 extinguish our -- my client's contractual indemnification
8 rights.

9 It's respectfully, Judge, I believe it was
10 reversible error to grant such an application without the
11 consent of my client, which is not given.

12 THE COURT: Mr. Aaron, Miss Sued.

13 MR. AARON: Your Honor, we would consent to the
14 discontinuance.

15 THE COURT: I'm sorry.

16 MR. AARON: We would consent to the discontinuance.

17 THE COURT: As Mr. Minero is pointing out, the CPLR
18 requires universal consent, not merely your consent, if I'm
19 reading, Mr. Minero, correctly.

20 MR. MINERO: I don't know of that, I know it would
21 need consent of my client, and we do not consent.

22 THE COURT: "Universal" means your consent isn't
23 sufficient, unless you're agreeing to concur with that
24 concept.

25 Any rebuttal?

1 MR. VARGAS: I can't, it's hard for me to believe
2 we need the consent of the GC.

3 Do they have cross-claims against the owner? I
4 don't believe so.

5 MR. MINERO: It's not the GC, it's the --

6 MR. VARGAS: I mean the GC against the owner.

7 MR. MINERO: No, it is the owner is not consenting
8 to the dismissal of the claims against it.

9 MR. VARGAS: I'm the one who brought the lawsuit, I
10 don't need the owner's consent.

11 MR. MINERO: Yes, you do.

12 MR. VARGAS: No, I don't, why would I need their
13 consent?

14 MR. MINERO: That is what the statute says, after
15 the course has been submitted to the Court or jury to
16 determine the facts the Court may not order an action
17 discontinued upon -- except upon the stipulation of all
18 parties appearing in the action.

19 Judge, respectfully, it doesn't say, may not,
20 that's definitive language, we -- we do not consent to the
21 discontinuance of these claims, period.

22 MR. VARGAS: I am not aware that there needs to be
23 consent, but I don't have case law on me.

24 THE COURT: Can I reserve decision and give learned
25 counsel a chance to brief on this matter or provide some

1 cases?

2 MR. MINERO: Thank you, Judge.

3 THE COURT: Pointing how we can or cannot, decision
4 reserved.

5 On the second issue, I assume the settlement
6 negotiations are at a stalemate at this juncture.

7 MR. MINERO: Yeah, your Honor, you know from my
8 client's perspective, we're, ready, willing and able to be a
9 significant partner in vetting plaintiff to a number that
10 can be acceptable to him and his client.

11 THE COURT: Understood.

12 MR. MINERO: We do not believe that we are, you
13 know, we do not believe we're alone in this matter to some
14 extent, we appreciate primary for U.S. Spray being involved.

15 THE COURT: Understood.

16 MR. VAN ETTEN: Your Honor, if I may?

17 THE COURT: Say who you are.

18 MR. VAN ETTEN: Jeffrey Van Etten, Perry, Van
19 Etten, Rozanski and Kuttner, 14 Wall Street, Suite 4D, New
20 York, New York, 10005, I think.

21 I represent the excess carrier, Holly Insurance, I
22 have been serving as monitoring counsel for, I believe, six
23 of the eight days, then we had other representatives here,
24 and the Court's inquiry as to settlement, when we left
25 yesterday, when understood there was an opportunity to

1 resolve this case for \$3 million, pursuant to the jury
2 verdict apportionment of 80/20, we believe that that
3 settlement would result in a needed contribution from the
4 owner, GC of \$1.9 million, and then \$1.1 million from U.S.
5 Spray. U.S. Spray has \$1 million primary which would be
6 made available, coverage counsel is here, and excess would
7 be willing to contribute the \$100,000 to reach that
8 \$3 million mark.

9 We have been told that the primary carrier, I think
10 it's New York Marine & Coaction is unwilling to tender their
11 \$1.9 million to close this out.

12 There was then an overture made yesterday to the
13 Court they would then try to settle it out, tendering their
14 limits with the one million dollar primary of U.S. Spray.

15 My underlying here, and we have voiced opposition
16 to that, so the question is, as we have that scenario, the
17 tendering of the limits here, we wanted a global settlement,
18 so our \$100,000 would be for a global settlement which would
19 protect the primary, the excess and the insured.

20 They're unwilling to do a global settlement under
21 those terms, they said they were willing to settle out, I
22 don't know if that still holds, they were willing to settle
23 out for the \$3 million.

24 THE COURT: Do we need this on the record?

25 MR. VAN ETTEN: Is that correct, are you guys

1 willing --

2 THE COURT: Wait for a second, do we need this on
3 the record?

4 MR. MINERO: It can be --

5 MR. VAN ETEN: No, I have to put this on the
6 record, yes.

7 THE COURT: Financial, normally, I don't put
8 negotiations on the record.

9 MR. VAN ETEN: This is on the record, but the
10 issue becomes --

11 THE COURT: Thank you, Mr. Minero.

12 MR. VAN ETEN: -- if they were unwilling to settle
13 this globally for \$3 million and intend to pursue an action
14 against the excess carrier, the position the excess carrier
15 will be that \$100,000 owed through the 20 percent allocation
16 under contractual claims will no longer be available.

17 So it will be our position that they're waiving
18 their entitlement to that contribution because they're
19 unwilling to accept a settlement which is at the 80/20
20 split.

21 As counsel for plaintiff just said, he was willing
22 to discontinue against the owner, and counsel referenced the
23 Mary Carter agreement. There is absolutely no Mary Carter
24 agreement in effect. Mr. Vargas and I spoke, and I said
25 would you be willing to discontinue the claim against the

1 owner since you discontinued -- since you did not continue
2 with the discontinued the claims for Section 200 and
3 negligence against the owner at trial.

4 THE COURT: That was last week.

5 MR. VAN ETTEN: That's right, which they accepted.

6 THE COURT: Before the charging conference.

7 MR. VAN ETTEN: Correct, I said would you be
8 willing to do that for the owner now based on the fact
9 there's a judgement. Mr. Vargas said you think that would
10 help settle it, I said yes, he said I would do that.

11 That was the full extent of our conversation, there
12 was no agreement or there was no commitment that we would be
13 giving him money in the event he did that. This in my mind
14 would facilitate settlement, as I understand it, the intent
15 of the primary carrier for the owner and general contractor
16 is to try to use the owner to enforce a right, either as AI
17 or contractual.

18 I believe if this case were to settle, even though
19 they don't want to say globally because of the rights
20 against us, they would still have to discontinue with
21 plaintiff and be paid and they would still then have to
22 discontinue against U.S. Spray. They can't keep the claims
23 open against U.S. Spray, I would like clarification against
24 that to protect the insured.

25 THE COURT: My understanding, correct me, if you

1 settle the case, there is some type of indemnification
2 issues which the Court is not getting involved in, that's
3 between the parties to figure out so no matter what, I don't
4 think I can handcuff that unless you make an agreement, they
5 pay more, pay less and the Court will not get involved in
6 that type of arrangements.

7 The Court's perspective how to globally settle the
8 case regarding the plaintiff, any indemnification issues you
9 preserve for an appeal, you preserve to litigate among
10 yourself however you need to resolve.

11 MR. VAN ETEN: Correct.

12 THE COURT: Am I correct?

13 MR. MINERO: Yes.

14 MR. VAN ETEN: That's why we need to know the
15 purpose that the primary carrier has their coverage
16 counsel --

17 THE COURT: Coverage counsel, you need to go on the
18 record. Please make an appearance, I am encouraging
19 settlement in this matter. The Court finds the dollar
20 amounts that we spoke about fair and reasonable based upon
21 the liability verdict and the facts before the case, we
22 found it reasonable that amount.

23 MR. McKENNA: John McKenna from the Law Firm of
24 L'Abbate, Balkan, Colavita & Contini, 3 Huntington
25 Quadrangle, Melville, New York 11747, we are coverage

1 counsel for Great American Insurance Company, which insures
2 U.S. Spray, with a primary \$1 million commercial general
3 liability policy. Our position doesn't change, well, I will
4 just jump in, Great American's position has remained the
5 same through the settlement negotiations, our million
6 dollars is ready and available for a global settlement based
7 upon the obligations that Great American owes not only to
8 U.S. Spray, but to the owner and GC as additional insured.

9 Our million is available for a global settlement,
10 and we hope that can be reached today.

11 MR. VAN ETEN: Then it is the position, as well
12 as, Judge, we're willing to do this for a global settlement.
13 The preclusion appears to be that the owner and general
14 contractor doesn't want a global settlement and wishes to
15 continue those indemnity rights you discussed.

16 THE COURT: I have no jurisdiction over indemnity
17 rights.

18 MR. MINERO: That's not true. We're willing to
19 have a global settlement, not if the contribution is going
20 to be \$100,000 from U.S. Spray's excess, that's where the
21 disconnect is, we would love to get into a situation where
22 all of this can go away, we just want more money from them.

23 THE COURT: I want to clarify one point, and I want
24 counsel's opinion and correct me if I'm making an error, the
25 Court doesn't have in front of it, the indemnification

1 claim, you made a motion last week.

2 MR. MINERO: Correct.

3 THE COURT: I denied and the Court stands behind
4 that decision.

5 MR. MINERO: Correct.

6 THE COURT: I'm vacating it, I'm not getting
7 involved with it. The only issue I have is plaintiff versus
8 the defendants and globally can we settle that amount.

9 Any claim amongst the defendants is not in front of
10 me, I can't help you, the Court can't help you with, so
11 what's an obstacle to a global settlement that resolving
12 among yourself is indemnity issues or something else?

13 MR. MINERO: The indemnity issues are part of it,
14 we want more, you more of a commitment from the excess
15 carrier for U.S. Spray.

16 THE COURT: What commitment are you looking for,
17 Mr. Minero?

18 MR. MINERO: More than \$100,000, Judge.

19 MR. VAN ETEN: The last offer we made before the
20 Court was at \$2.5 million, which is we were taking the
21 tender there and everything else like that, which is the
22 exact, it was an 80/20 split of the number which is what the
23 jury apportionment, the gap is \$500,000 between the 2.4
24 offer and I believe, acceptable level of \$3 million,
25 20 percent is \$100,000, we have made the agreement to pay

1 that money as to bridge the gap above the coverage loans.

2 THE COURT: Based on the ratio.

3 MR. VAN ETTEN: Yes.

4 THE COURT: Understood.

5 MR. VAN ETTEN: I don't understand where they're
6 looking at, they can settle and sue us in a DJ, sue us in a
7 DJ, settle it out, but you have to discontinue these claims,
8 that's our whole point. I seem to think they think they're
9 going to settle out with plaintiff but continue the
10 indemnity claim which you're not going to be dealing with.

11 THE COURT: It is not uncommon, I have a subro
12 background, when insurance companies do among themselves,
13 they do among themselves for years.

14 MR. VAN ETTEN: Yes.

15 THE COURT: I can't force --

16 MR. VAN ETTEN: Understood.

17 THE COURT: I can recommend the \$3 million after
18 negotiations, and based upon my, the Court's researching the
19 matter as well, that a judgement of \$3 million in a matter
20 like this is not outrageous and reasonable, settle along
21 those lines is proper, considering the facts of this case
22 and jury's determination of liability, the Court stands
23 behind it, it can't coerce you to take it.

24 MR. MINERO: Correct.

25 THE COURT: The Court is more than happy to be 9 to

1 5 to try this case until resolved.

2 All we need to know right now, do we have a
3 settlement at the \$3 million, and do we have in theory,
4 everybody agrees to the dollar amount, the issue over here
5 is, ancillary issues are out of the court's control, that is
6 something I can't control, I can't dictate, I can recommend.

7 MR. MINERO: Yes, sir.

8 MR. VAN ETTEN: Absolutely, so it's clear on the
9 record, we are here willing based upon the jury's
10 determination, based upon the prior coverage commitments
11 which you were aware of before this case and --

12 THE COURT: I have read the contract, it was shown
13 to me, I read the whole agreement.

14 MR. VAN ETTEN: Coverage conditions that existed on
15 tender letters and things like that, you wouldn't be part of
16 it.

17 THE COURT: I only saw what the indemnification is.

18 MR. VAN ETTEN: Based upon the prior jury
19 decisions, we're willing to contribute \$100,000 as a package
20 to resolve this case at the proportionate amount set by this
21 jury and if the case does not settle globally, that \$100,000
22 will not -- will be withdrawn.

23 MR. MINERO: Well, it's based on several fiction,
24 first of all, there is still a coverage issue, again, it is
25 not my cup of tea, I'm not coverage counsel, there has been

1 some kind of declaration that the million dollars of the
2 U.S. Spray's policy is going to be split 50/50, I don't, I
3 don't pretend to understand coverage, but I do understand
4 math slightly, there are three insured, two of them are my
5 clients and one is U.S. Spray.

6 If there's going to be some type of pro rata
7 distribution of this policy, I should get to a third of it,
8 I don't know if that's the -- that's the right thing, but
9 the 50/50 split I know that's wrong, I have been told that's
10 wrong by coverage counsel.

11 Besides that, there are issue of indemnity, there
12 are issues, there's an innocent or a not liable owner here,
13 who has indemnification from U.S. Spray? They don't want to
14 talk about, that's fine, they don't have to talk about it,
15 but it's not just, you know, it's more than just six
16 hundreds being their share, it's who, whose paying the
17 \$600,000, that's really the issue here, you know, where it's
18 coming from and then also whose paying for at least part of
19 ours.

20 It is a lot of issues here.

21 THE COURT: Therefore, we have litigation and
22 procedures and arbitration clauses.

23 MR. MINERO: Correct.

24 THE COURT: Which is not really appropriate for
25 this forum here, it is not in front of me. All I can

1 reserve your right for plenary proceeding or arbitration
2 take it there and resolve this matter, that's all the Court
3 can tell you.

4 MR. VAN ETTEN: We appreciate it. I just wanted
5 the opportunity to put our position on the record so it's
6 there, so the record is clear.

7 THE COURT: Your position is coming from a pure
8 80/20 split, 80/20?

9 MR. VAN ETTEN: Correct.

10 THE COURT: I get it, you're viewing it from three
11 different carriers here. At the end of the day, it is what
12 it is.

13 MR. MINERO: My, initially Mr. Van Etten's approach
14 is much simple, I just don't think it's that simple.

15 MR. VAN ETTEN: Except for the fact he just said I
16 have an owner that is a nonviable owner who plaintiff has
17 already agreed to discontinue against, but he won't accept
18 it, wow.

19 THE COURT: We are left with two things, anyway, I
20 will recommend that the parties get me the case law on
21 Mr. Vargas's motion, because if I do have the discretion
22 with good authority to grant the discontinuance, I'm leaning
23 in that direction.

24 MR. MINERO: Understood.

25 THE COURT: If I have authority to do it, not

1 reversible error, I'm leaning in that issue, I never had the
2 issue before. I need the legal eagles in this room to
3 educate me.

4 MR. MINERO: I found out about ten minutes before
5 in the hallway it's interesting.

6 THE COURT: The other issue is that on this
7 indemnification issue, all I can tell the parties and
8 enumerate the strong point is emphasis, settle the amount
9 with the agreement, deal among yourselves with another
10 forum, whether arbitration or lawsuit, whatever the forum
11 is, that indemnification issue, but really it should not be
12 holding up a settlement, because, again, with Russian
13 roulette, you never know where this can go. The Court has
14 not interest whether it's a zero verdict in money or
15 \$100 million, we know the definite amount of money we can
16 swallow, the reasonable amount we can swallow, so I
17 recommend that we take it and handle your indemnification to
18 another forum.

19 If you say no, we will proceed with the trial.

20 MR. McKENNA: We are, our million dollars is still
21 available, just to conclude.

22 THE COURT: I appreciate that, and the Court notes
23 it. Off the record.

24 (Whereupon, an off the record discussion was held.)

25 COURT OFFICER: All rise, jury entering.

Opening - Mr. Vargas

1 (Whereupon, the jury entered the courtroom.)

2 THE COURT: Good morning, you may be seated.

3 Ready for openings?

4 MR. VARGAS: Yes.

5 MR. MINERO: Yes, your Honor.

6 THE COURT: Any statement we need? Proceed to
7 openings, please.

8 MR. VARGAS: Thank you, your Honor.

9 Good morning, everyone, again, so in a few minutes,
10 I'm going to go through what happened after the accident,
11 and the treatment there Mr. Flores got, I want to give you a
12 roadmap so you know where I'm going, and to get to the point
13 pretty much.

14 So at the end of this case, I will be asking for
15 damages for loss of enjoyment of life, past pain and
16 suffering, from the date of the accident until present day,
17 and future pain and suffering from today going forward to
18 the last day of he lives, no one knows that when it will be.
19 As you will hear during the trial, you will be told the
20 lifespan, the expected lifespan of Mr. Flores, I will also
21 be asking for future medical expenses.

22 You will be hearing from doctors today,
23 Dr. Mandelbaum will be one in a few minutes after our
24 openings he will talk about treatment that Mr. Flores
25 received since the day of the accident up until this point

Opening - Mr. Vargas

1 and he will be making recommendations on treatment going
2 forward in the future, it is not a lot of treatment, but
3 there are expenses with it, and it adds up or over the years
4 it will be larger number than you would expect. As I told
5 you in jury selection, I will be asking for a number to last
6 him the rest of his life.

7 So when talk about enjoyment of life, we're talking
8 about everything, how it affects his family, how it affects
9 him being able to go back, he wants to go back to do his job
10 in construction, he can't he tried to go back to work, he's
11 working with a friend of his working on a food cart, but
12 that's, when we're talking about, that's what we're talking
13 about loss of enjoyment of life.

14 So the date of the accident Mr. Flores falls
15 15 feet off a ladder, lands, Mr. Perez then calls 911 plans,
16 fire department comes, we have some pictures, that you saw
17 before, but these ones will show actually the firemen
18 carrying him out of the scene, putting him in an ambulance
19 he goes Maimonides Hospital, immediately on the day of the
20 accident, he's complaining about his back when he gets to
21 the hospital, he's complaining about his left shoulder, his
22 left elbow, his left ankle.

23 Now, there are a lot of injuries immediately after
24 the accident, but as the years go by, some of these injuries
25 get better, some get worse, he also complaints about his

Opening - Mr. Vargas

1 right shoulder, right knee, you will hear from the evidence,
2 from some of the doctors who will come in here, MRIs, and
3 X-rays, and CAT scans were all taken of him, there were
4 tears of ligaments in his left shoulder, tears of ligaments
5 in his left ankle, a tear what's called a meniscus in his
6 right knee, and ultimately a herniation in his lower back.

7 I will get to the anatomy in a few minutes, but the
8 doctors, of course, will explain away better, and some of
9 these injuries got better, it doesn't mean all of them are
10 going to bother him in the future, but, for example, the
11 left ankle gets better, the left elbow gets better, the left
12 shoulder gets better, the right shoulder gets better; the
13 right knee gets worse and lower back gets worse, eventually
14 necessitating surgeries.

15 He goes to Maimonides when he gets there, there's
16 not a Spanish translator provided, a nurse who knows
17 somewhat Spanish is communicating with him when he gives his
18 complaints, they do document he's complaining about his back
19 and the complaints on the left side of the body, they do
20 X-rays, CAT scans, but as you'll hear from the doctors who
21 testify, X-rays and CAT scans don't show the injuries that
22 we're talking about. MRIs are the gold standard when
23 talking about soft tissues, herniations, discs torn
24 ligaments. So the hospital, they do diagnose a fracture of
25 the bone in his back, but that turns out to be a mistake.

Opening - Mr. Vargas

1 For whatever reason, mistake, the radiologist misread it,
2 because when he goes to doctors afterwards, they don't see
3 the fracture and instead they find herniated discs.

4 So they diagnose a broken bone in his back, they
5 then find out that he doesn't have money for treatment, and
6 they send him home and tell him to follow-up with
7 preliminary care physician. Now Mr. Flores doesn't have a
8 preliminary care physician in 2018, he has the sniffles or
9 he gets sick, if it's bad enough, he just goes to the
10 emergency room, so he goes home, over the weekend, the pain
11 is getting worse, the back is excruciating, he can barely
12 walk, and, U.S. Spray, Mr. Marino, they don't call to offer
13 any assistance, they don't ask how he's doing, they don't
14 offer to pay for his medical bills, he hears nothing from
15 them.

16 So after the weekend, he comes to my office and
17 asks for our help and we then start this lawsuit he says he
18 doesn't have a preliminary care physician, we recommended a
19 Dr. Jeffrey Kaplan, an orthopedic doctor, who has a practice
20 in Upper East Side of Manhattan called New York Ortho Sports
21 Medicine & Trauma, he goes to Dr. Kaplan, three days after
22 the accident, and Dr. Kaplan will be here later in
23 afternoon, and Dr. Kaplan examines him, he's complaining
24 about his back, the left side, his left shoulder, Dr. Kaplan
25 recommends conservative treatment to start, I recommend

1 physical therapy for you, he then goes at several
2 facilities, he recommends MRIs, he goes to Kolb Radiology to
3 get the MRIs done, you will hear from a Dr. Thomas Kolk, he
4 will come in on next Tuesday to testify, and he will tell
5 what you found on the films.

6 They do MRIs of the left shoulder and lower back,
7 and they find tears of the rotator cuff, and the
8 supraspinatus in his left shoulder, and as far as the
9 herniation, they find a herniation L5-S1. Now, some people
10 may be familiar with anatomy, some may not, I will give you
11 my take, I'm not a doctor, they will explain it better.

12 As far as the spine goes, you have the cervical
13 spine, C1 at the very base of your skull to C7 is at the
14 lower end of your neck, then you have what's called the
15 thoracic spine, which is T1 to T12, which is the middle part
16 of your back, when you get to the lumbar spine, L1 to L5,
17 which is at the very bottom and then you get what's called
18 S1, which is pretty much your tailbone, he had a herniated
19 disc at L5-S1 at the very bottom.

20 Now, as far as herniations and what they do, there
21 will be many doctors you will hear from both sides,
22 defendants and plaintiffs, you have your vertebra and in
23 between each vertebrae, let's say L5-S1, you have what's
24 called a disc, like a shock absorber, and when you have a
25 herniation, that disc is leaking out and it has been causing

Opening - Mr. Vargas

1 your vertebrae to compress down and inside those vertebrae,
2 of course, are nerve roots coming out spreading out to legs.
3 If it's the lower lumbar spine, if you have a herniation in
4 your neck, then it goes down to your arms and classic
5 symptoms, shooting pain, for example. If you have a
6 herniation in your neck, it shoots down your arms into your
7 fingers. If you have a herniation in the lumbar, it shoots
8 down into your legs, and so he's diagnosed with that.

9 Dr. Kaplan after seeing the MRIs, refers him to a
10 pain management doctor, Dr. Matthew Grimm to help him with
11 the pain for the back, Dr. Grimm then starts seeing him,
12 Grimm practices with Dr. Kaplan, and he prescribes to him
13 some muscle relaxers, antiinflammatories and pain medicine,
14 along with those, as he comes back and sees Dr. Kaplan and
15 Grimm, he then also offers trigger point injections, which
16 is pretty much locating the pain, injecting steroids into
17 that area, trying to relieve the pressure of the compression
18 on the spine onto the nerve.

19 He also does what is called epidural injections,
20 which is a more invasive injection of steroids, where they
21 put the patient unconscious, and then inject the steroids
22 into the spinal canal.

23 Now, he had three of those over the next eight
24 months, from March of 2018 up until April of 2019, and each
25 epidural did help, but eventually the pain came back. After

Opening - Mr. Vargas

1 treating with Dr. Grimm and Dr. Kaplan and the back wasn't
2 getting better, Dr. Grimm then recommended him to a spinal
3 surgeon, a Dr. Joseph Weinstein, who you will hear from
4 tomorrow morning, he goes to see Dr. Weinstein in January of
5 2019, and Dr. Weinstein orders another MRI, orders a CAT
6 scan, he then reviews the MRI, confirms the herniation,
7 hears the complaints from Mr. Flores and recommends what's
8 called a spinal fusion of the L5-S1.

9 Again Dr. Weinstein will explain it better than I,
10 it's taking out the damaged portion of a disc and put like
11 what's called a filler where that disc would have been
12 inside in between the disc and then you put metal around it
13 and lock it into place, and the fusion part of it is
14 eventually your bone grows into that metal part.

15 Now it doesn't fix the problem, it's meant to
16 alleviate a lot of the pain and the discomfort, but it's not
17 a fix, and any surgery is not always a fix.

18 So as you will hear from Mr. Flores eventually he
19 will tell you the surgery helped, but he still has lingering
20 pain and limitations because of that injury.

21 As far as the knee, that right knee got worse over
22 time and he continued to see Dr. Kaplan for it, Dr. Kaplan
23 eventually recommended arthroscopic surgery, and that
24 surgery was to go into -- well, the knee, you know, if this
25 was your knee, you get what's called a meniscus around the

Opening - Mr. Vargas

1 knee in between your knee joint and begin, it's a cushion
2 between your bones and if you have a tear of a meniscus,
3 what it is, it is a fraying of that cushioning underneath
4 your knee, and a lot of times it will either break off and
5 it will be frayed and when your knee touches it, it gives
6 way, buckles or you get pain.

7 So when they do the arthroscopic surgery, they go
8 in and trim off that damaged portion, but it's not going to
9 grow back, so it's to give him more mobility, less pain, but
10 again, it's not going to fix it, and as you will hear from
11 Mr. Flores, the surgery did help but he still has difficulty
12 with that knee, he still has pain with it, it is not as good
13 as it was before.

14 Recently, I'm sorry, that surgery was in 2021 to
15 the knee and for the back surgery, it was June of 2019, back
16 surgery. Recently, Mr. Flores has changed his pain
17 management doctor to a Dr. Chaim Mandelbaum, and that's why
18 you will hear from him today, but the recommendations are
19 almost still the same, going forward, he's going to need,
20 because of the knee surgery not completing fixing it, he
21 will need injections to his knee, he will need steroid shots
22 to his back when pain flares up. It is not a pain in these
23 kind of injuries and with nerves, it comes and goes, it gets
24 better some days, worse other days, depending on what
25 they're doing, so going forward, the recommendations for

Opening - Mr. Vargas

1 steroid injections the need for joint injections, lubricant
2 for the knee and a possibility of a spinal court stimulator
3 may help, as Dr. Mandelbaum will talk about in a few minutes
4 and he will also lay out the costs of those, along with the
5 medications that I have talking about, the
6 antiinflammatories and the pain meds, and then lastly, we
7 have, because of those costs, we have an economist coming
8 in, Dr. Fred Goldman, and he's going to talk about what to
9 expect those costs will, what will happen to those costs
10 over time, ten, 20 years down the road, because you will
11 hear about his lifespan, it's approximately about 30 years,
12 what will those costs be as you go forward, not shocking
13 healthcare will be more expensive in the future, that's the
14 sum of what he will tell you, but he will put it with an
15 economist's theories and why he thinks prices will be at
16 where they are when they get there, it's called growth
17 rates, but it resembles inflammation when he comes here on
18 Monday, you will hear about that and what he expects the
19 costs will be for this future treatment.

20 Other than that, the could have, you're going to
21 hear from some doctors that were hired by the defendants,
22 and of course, they're going to disagree with everything I
23 just told you, and with that, at the end, I believe you will
24 find that Mr. Flores was injured, and that he deserves fair
25 compensation for the past pain and suffering, and the future

1 pain and suffering and the future medical expenses.

2 Thank you.

3 MR. MINERO: May I your Honor?

4 THE COURT: Yes, thank you, good morning again,
5 everybody, nice to see you. Like when started the last
6 time, I'm going to ask you please, listen to all of the
7 evidence that comes in, make your determinations based on
8 what you hear around and what you do not hear about the
9 injuries that Mr. Flores claims he suffered when he fell on
10 March 24th of 2018.

11 Now, as we all know, everyone has pain, everyone
12 has aches, not every injury, not every ache, not every pain,
13 not every medical finding necessarily that Mr. Flores has is
14 automatically the result of what happened that day. You're
15 going to hear a lot of evidence both from plaintiff's
16 doctors, and then also from doctors that myself and the
17 co-defendants, we had our problems during the liability
18 phase as you know, but we agree when it comes to the
19 injuries and the severity of the injuries whether or not
20 there were actually injuries that happened that day.

21 Remember, during liability, we heard that
22 Mr. Flores fell 15 feet unexpectedly and suddenly onto a
23 concrete floor. You heard about the injuries that he's
24 alleged to have suffered, but what didn't you hear about it,
25 there's no broken bones, there's no lacerations, there's no

Opening - Mr. Minero

1 bruising, there's no bleeding, you're going to hear all of
2 that. When we get to the medical records from Maimonides
3 Hospital that day, I know there was a comment made he was
4 rushed through Maimonides Hospital because he didn't have
5 any money.

6 Folks, Mr. Flores was there because of a workplace
7 accident, the incident would be something where he could not
8 be denied treatment because of not having resources, not
9 having insurance, not having resources. You're not going to
10 hear any talk about any complaint made about Maimonides
11 Hospital about how they treated or did not treat Mr. Flores
12 that day.

13 The reason why they didn't treat him more
14 thoroughly than what they did is because they didn't deem
15 the injuries to be that severe, they certainly didn't deem
16 them to be pressing that they required immediate emergency
17 room, emergency care that morning and afternoon, so they
18 released him.

19 Now, as you heard, did Mr. Flores find other
20 doctors, no, he found an attorney and you will hear and see,
21 that his course of treatment, has been orchestrated from
22 beginning to where it is now, for the purposes of this
23 lawsuit.

24 We know there are other injuries, mostly the
25 injuries are the back and the knee you heard that from

Opening - Mr. Minero

1 Mr. Vargas, there will be witnesses both for the plaintiff
2 and by the defendants, we will have a spinal surgeon come in
3 and tell you that there really was no need for the surgery
4 to begin with, this was a fusion.

5 A fusion, you will hear is an intrusive surgery.
6 There are other types of back surgeries which we believe
7 should have and could have been done if even necessary to
8 treat Mr. Flores, something not as severe as a fusion.

9 But in any event, a fusion has become a surgery
10 where many people have them, and they go about after
11 recovering living full and complete lives as they did before
12 they had their surgery. We believe that the medical
13 evidence will show you that Mr. Flores's right knee has
14 fully resolved, that his back is fully resolved, and that
15 there is no objective medical evidence that he cannot return
16 to all daily activities.

17 Now at the end of the day, plaintiff is going to
18 ask you to award him money, and the money that you award is
19 not money that will enrich Mr. Flores, it's money that's
20 meant to punish my client and punish co-defendants's client.
21 The award, whatever it may be, is solely to put Mr. Flores
22 in the position that he would have been now and in the
23 future if this incident didn't happen. Nothing less than
24 that, but nothing more.

25 Thank you.

Opening - Mr. Aaron

1 Counselor.

2 MR. AARON: Thank you, your Honor.

3 THE COURT: Proceed, please.

4 MR. AARON: Good afternoon, everyone, all right
5 we're back to the fresh new white board, and here is this
6 guy again with his white board in the first part of the
7 trial, we were limited what we can talk to you about, we can
8 only talk about one thing and that was liability, who was
9 responsible for what happened, alright, we couldn't give you
10 the whole picture, we couldn't talk about the injuries and
11 damages that Mr. Flores is claiming now, but what we can
12 talk to you about now is what we think the case is really
13 about, okay, what we think it has been about all along, you
14 will see in the evidence in his deposition, Mr. Flores
15 testified that he fell from a height of between 15 and
16 17 feet, now I'll also see in his medical records
17 immediately after the accident at the hospital, which by the
18 way is in Brooklyn, New York to think there wasn't someone
19 speaking Spanish there, I don't know, but he said to them at
20 the hospital, that he fell 20 feet, then later at the
21 hospital he said he fell 25 feet, okay, but what's common is
22 that in this story, he says he plummeted to the ground from
23 a ladder so high up, it was practically on the roof, that's
24 how high he says he was when he fell, he didn't say he
25 tripped, he didn't say he stumbled, fell, unobstructed on to

Opening - Mr. Aaron

1 a slab of concrete.

2 Now I ask you what happens to somebody when they
3 fall from that high up on to concrete? What would you
4 expect to see? Broken bones, fractures, abrasions,
5 dislocations, bruising cuts, blood, trauma, bumps, even a
6 black and blue, yet here, there wasn't even a scratch, the
7 emergency room records you will get a chance to see those
8 for yourself, they show no abrasions, no bruising, no
9 bleeding no fractures, no cuts, no nothing that says how
10 cow, this guy just fell 15 feet onto concrete. Shouldn't we
11 have seen something, something that tells us what happened,
12 and just so we're not clear, this isn't because the ER
13 didn't do their job, no, they did their job, they ran ten
14 different tests, ten different tests, a full workup and not
15 one of those tests came back with any evidence of a
16 traumatic injury, kind of strange.

17 Strange is also the fact that as you'll see in his
18 testimony, Mr. Flores said when he fell, he fell on his left
19 side, his left side, and yet, three years later, somehow he
20 ends up getting a surgery on his right knee, at the
21 hospital, there wasn't one complaint about his right knee,
22 not a word, and yet, the surgery he does end up getting he
23 wants you to believe it was caused by this accident, a fall
24 that left him without a single bump, bruise, scratch,
25 scrape, nothing.

Opening - Mr. Aaron

1 You'll see in the medical records as Mr. Minero
2 said, that when Mr. Flores was at the hospital, he was
3 discharged just a couple of hours later that day, and he was
4 discharged not because he couldn't pay, but because by his
5 own words, and you'll see these in the records, he was
6 feeling much better. You're going to hear from doctors who
7 review medical records, they reviewed MRIs films, CAT scans,
8 X-rays, they examined Mr. Flores, and they're going to tell
9 you something very simple and important, the surgeries that
10 he had were not caused by this fall, they were caused by
11 something that we go through every day, aging, degeneration,
12 the normal wear and tear, we feel on our bodies every single
13 day, our bodies age and that's normal, it doesn't mean it
14 was caused by an accident.

15 The experts will show you what's in Mr. Flores'
16 knee and back, have nothing to do with a fall, especially
17 from as high as the height he claims, but everything to do
18 with years of walking, and living, and bending and working
19 just like the rest of us.

20 When we're asked to believe something as
21 extraordinary as a fall from 15 feet, wait, no, 17 feet, no,
22 wait, 20 feet, no wait, 25 feet, we have every right to say,
23 that doesn't pass the smell test, that doesn't add up, he
24 has the burden to prove to you that it does add up, make him
25 do that, thank you.

Dr. Mandelbaum - Plaintiff - Direct

1 THE COURT: Do you have a witness?

2 MR. VARGAS: Yes, your Honor.

3 THE COURT: Go ahead, counsel.

4 MR. VARGAS: I call Dr. Chaim Mandelbaum, should I
5 go get him?

6 THE COURT: Yes, sir.

7 (Whereupon Dr. Mandelbaum took the witness stand.)

8 THE CLERK: Please raise your right hand, do you
9 solemnly swear or affirm that the testimony you're about to
10 give court will be the truth, the whole truth and nothing
11 but the truth?

12 THE WITNESS: Yes, I do.

13 THE CLERK: Please be seated. Please state and
14 spell your name for the record, occupation and address?

15 THE WITNESS: It's Chaim C-H-A-I-M, Mandelbaum
16 M-A-N-D-E-L-B-A-U-M, address is 75 Maiden Lane, Suite 1206,
17 New York, New York 10038, and I'm a physician.

18 DIRECT EXAMINATION BY

19 MR. VARGAS:

20 MR. VARGAS: May I inquire, your Honor?

21 THE COURT: Yes, sir.

22 Q Good morning, doctor, could you start off by telling
23 the jury your educational background?

24 A Yes, I am a board certified anesthesiologist and also
25 board certified in pain medicine, I attended State University of

1 Health Science Center in Brooklyn for medical school, graduated
2 in 1992, I then did a year at Staten Island University Hospital
3 in internal medicine, followed by three year residency at Mount
4 Sinai Hospital in New York, followed by a pain management
5 fellowship in New York, then went into practice.

6 Q And doctor, do you have your own private practice?

7 A Yes.

8 Q What is the name of your private practice?

9 A Comprehensive Pain Management & Spine.

10 Q How long have you had that practice?

11 A For the past five years.

12 Q And doctor, how did you, how did you acquire that
13 practice?

14 A Well, I was employed by a physician, Dr. Thomas, prior
15 to establishing my own practice, for almost 20 years, and
16 unfortunately, he passed away in 2018, and subsequently, I,
17 there was an asset purchase and then I started my own practice,
18 in 2019.

19 Q And when you took over that practice, how was the
20 transition?

21 A It was difficult, I mean I had to deal with his estate,
22 and there were issues, like when I took over my practice, there
23 was, I got, I got a call by Medicare, because they had issues,
24 because Dr. Thomas had a Medicare violation, because he had
25 hired a physical therapist that wasn't licensed, and he was

1 prescribing physical therapy for that particular
2 physial therapist.

3 Subsequently, there was a fine, which, because he had
4 passed away, that fine, I ended up paying that fine, which is
5 more of a business decision at that time.

6 Q Doctor, have you ever been found to be an expert in
7 court before?

8 A Yes.

9 Q Approximately how many times?

10 A 15 to 20 times.

11 Q And doctor, at some point did you examine a Mr. Kelvin
12 Flores?

13 A Yes.

14 Q When was that?

15 A That was on April, let me just look at the right date,
16 April 28th of 2025.

17 Q Did you bring some of your records with you today?

18 A Yes, I have my office notes from that particular, I had
19 seen him subsequent to that as well, three times.

20 Q If you need to refer to those, with your Honor's
21 permission, we will allow it.

22 THE COURT: You may do so.

23 Q When you saw Mr. Flores, did you review anything before
24 examining him?

25 A Yes, so I had the opportunities to review prior medical

1 records, I mean he had an injury in 2018, and he was already
2 seeing other physicians, and including an orthopedist, another
3 pain management doctor, it was a Dr. Grimm, Dr. Kaplan,
4 Dr. Weinstein, so I did have the opportunity to review those, as
5 well as, imaging studies that were done at that time.

6 Q Can you tell the jury what records you reviewed?

7 A So I had notes from Dr. Weinstein whose the orthopedic
8 surgeon, he did subsequently have surgery to his spine, I had
9 notes from Dr. Kaplan, and for which he did have knee
10 arthroscopy as well, and I had notes from Dr. Grimm, who was the
11 treating pain management physician during that time period, as
12 well as physical therapy notes and radiology imaging and
13 reports.

14 Q Did you review any of the films in this case, in this
15 matter?

16 A Yes.

17 Q What films did you review?

18 A Well, I had an opportunity to review all of the films,
19 especially of the lumbar spine, he had MRI imaging of the
20 lumbar spine, as well as a CAT scan of the lumbar spine, he had
21 imaging of his knee, his shoulder, there were X-ray imaging and
22 reports that were also done.

23 Q Did you review the hospital record?

24 A Yes, so I actually did, I did have emergency room
25 record, I think there was a record from EMS, initial records

1 that was in there as well, as well as the Maimonides Medical
2 Center, which he went to, there were hospital records, and they
3 did some scans, I had reports of those scans, those I did not
4 review, those initial scans.

5 Q And did you review the operative report?

6 A Yes.

7 Q And after reviewing those records, did you examine
8 Mr. Flores?

9 A Yes.

10 Q And what were your findings on exam, well, when you
11 first see a patient let me back up, do you usually take a
12 history?

13 A Yes.

14 Q What is a history for the jury?

15 A So the, so, again we always, you know, initially we get
16 a long history we try to get the medical records at that time or
17 before, at least after, so that gets reviewed, the history at
18 that time was that he was involved in an accident on March 24,
19 2018, when he had fallen from a ladder, more on left side.

20 He was subsequently taken to the -- to Maimonides
21 Medical Center, where he was -- where he was evaluated and
22 treated at that time.

23 When he came to me, he already had lower back, as well
24 as right knee surgery and he was complaining of lower back pain,
25 pain radiating into his lower extremities, difficulty standing,

1 walking, bending, he also had still ongoing right knee pain. If
2 you are aware at the time of the accident he also had, I think
3 initially there were complaints of shoulder pain, he had left
4 elbow pain, left ankle pain, those areas he was not complaining
5 at the time when I had seen him.

6 Q And you then did an exam of Mr. Flores?

7 A Yes.

8 Q And what were your findings?

9 A So the findings on examination were one, he was still
10 having spasm, mild spasm along the lumbar paraspinal muscles,
11 which are the muscles that are on both sides of the spine, and
12 he did have pain on extensions and flexion, and he was able to
13 extend his back up to 15 degrees, with more pain along the left
14 side, which is below normal, flexion up to 45 degrees, which is
15 bending forwards, which is not normal, he still had pain on
16 lateral bending to the right and left, as well a positive
17 straight leg raise at 45 degrees on the left side, and
18 60 degrees on the right side, and he had mild loss of sensation
19 into the left lower extremity.

20 All of that is characteristic of someone, he's still
21 having spasm as a result of the surgery and still having pain
22 shooting into his lower extremity, which is the result of nerve
23 damage or compression that is ongoing despite having the
24 surgery.

25 To his knee, he did have some mild tenderness over the

1 patella, and lateral tenderness, basically all around the knee,
2 and crepitations, which are like cracking sensations with
3 movement, and he did not have full range of motion of that knee.

4 Q Was there any swelling of the knee?

5 A I think there was some mild swelling, yes, moderate
6 swelling.

7 Q This jury, this is the first doctor they have heard
8 testified, some of the terms might fly over their head.

9 Can we talk about, are you familiar with the term
10 subjective and objective findings?

11 A Yes.

12 Q And what are those in medical terms?

13 A So a subjective finding is, basically a patient's
14 complaint, they can complain of pain, they complain of spasm,
15 nerve pain and that's what you're hearing a complaint from the
16 patient and objective finding are more physical examination
17 findings, maybe MRI findings, CAT scan findings, but we do try
18 to corroborate what the patient is complaining of with our
19 physical examination.

20 The objective findings in this case were one, he was
21 having spasm in his lower back that can be palpated when you do
22 certain maneuvers, such as lifting his leg up, when he's either
23 sitting or laying down or both, when he has pain and you
24 reproduce pain shooting into the leg, that is an objective
25 finding, there are some nerve compressions, and we try to

1 understand why that's happening.

2 So he did have surgery to his spine, he had a lumbar
3 fusion at L5-S1, I don't know, I'm trying to explain some of it,
4 okay.

5 Q Okay.

6 A So he did have a lumbar fusion and he's still having
7 symptoms radiating into his lower extremity, despite the surgery
8 which unfortunately can happen after surgery, so those objective
9 findings went along with his complaints as well.

10 Q And you had mentioned crepitus; correct?

11 A Yes.

12 Q Okay.

13 A Yes, so that's objective, that's basically, range of
14 motion of knee, and, which is, with that range of motion,
15 there's cracking sensation, also there's some swelling, which is
16 noted and we do compare right and left side, so there's swelling
17 which is objective as well.

18 Q What causes crepitus?

19 A There are arthritic changes that occur to the knee, a
20 lot of times, you know, someone has trauma, let's say, they
21 didn't have any prior issues with their knee, they have trauma,
22 things tends to wear much quicker more rapidly after a traumatic
23 events he did have an MRI.

24 He had, areas of meniscus, he had some other changes in
25 his knee and subsequently had surgery, typically patients who

1 have had the arthroscopy, they have more rapid progression of
2 arthritic changes to a joint or a knee, certainly crepitations,
3 which are that cracking sensations are fairly common.

4 Q What causes spasms in the back, why does that occur,
5 why is that significant?

6 A So spasms are a reaction to some type of inflammation,
7 so when your back goes out on you, everything tightens up and
8 that's really an a protective maneuver of your body and it's
9 involuntary. Your body has a spasm to minimize movement and
10 things tend to be really tight and a lot of times when it's more
11 chronic and it happens for a long period of time, it's very
12 difficult to get it to relax.

13 A lot of physical therapy, a lot of things that we do,
14 as far as the pain management physician, sometimes we do
15 injections, trigger point injections to help loosen up those
16 muscles and facilitate more physical therapy.

17 Q And as far as the injuries when you're reviewing these
18 records, what's the best tool for diagnosing, what diagnostic
19 tool is best for diagnosing these injuries, we're talking about
20 the meniscus and herniations in the back?

21 A Well, really MRI of the body parts, the lumbar spine
22 and MRI gives you a lot more information regarding soft tissue.
23 For instance, a herniated disc, you can see that disc much more
24 clearly with an MRI, much more than an X-ray.

25 The same thing with the knee, you can see the meniscus,

1 you can see the soft tissue that's around the knee, the tendons,
2 the ligaments, more with MRI.

3 There are or studies as well, you can have a nerve
4 study, which may or may not be helpful, but you can have a nerve
5 study to see if there are nerves in the back that are, that are
6 damaged that are radiating to the lower extremity, I believe he
7 had one as well, which was consistent with one of the nerves
8 called the sacral nerve, the first sacral nerve being compressed
9 going into the lower extremities.

10 Q And doctor, after the examination of Mr. Flores, did
11 you have recommendations for treatment for him?

12 A Yes.

13 Q What were those?

14 A So there was, I mean, there was a whole host of
15 treatments and I know he did have treatment beforehand, but
16 there was specific treatments that I had recommended, one,
17 ongoing physical therapy, to help with the spasm, to help with
18 strength of his, and range of motion, for instance, with his
19 knees, strength of his back to help loosen up the spasm.

20 There are medications that are helpful as well, and
21 different medications are used for different areas of pain, for
22 instance, I recommended a muscle relaxant, Tizanidine used for
23 spasm, I recommended a medication for nerve pain, so some of
24 that shooting pain some of the numbness and tingling feeling in
25 his leg, there's a medication gabapentin, especially the

1 long-acting gabapentin helps with nerve pain into the lower
2 extremity. There's oral antiinflammatory medication,
3 diclofenac, which is used to help with inflammation, and then
4 there are topical gels, there are different topical gels, one is
5 diclofenac gel, another compounded gel I had recently given him,
6 which helps, especially for joint like the knee, you can rub it
7 around the knee; therefore, maybe he doesn't have to take as
8 much of the oral antiinflammatory medication, every medication
9 unfortunately has side effects we try to minimize the
10 side effects of all of this.

11 There are also injections that are very helpful, there
12 are epidural injections, which he will need in the future or,
13 even now, but it does help an epidural, I can explain it a
14 little more, an epidural is basically a space near where the
15 nerves come out from the spinal cord, and we can take a needle
16 and place it in that space, called the epidural space and inject
17 a small dose of steroid medication which decreases medication
18 and helps with shooting pain into the lower extremities, this is
19 commonly done, even in a patient who has had a lumbar fusion
20 already, and, that is something, especially for exacerbation of
21 pain going into the future.

22 He will likely, he will need, there's also a more
23 invasive type of treatment, which I discussed with him called a
24 spinal cord stimulator, which is an implanted device in the
25 lower back, and there's a wire placed in the same early space

1 but a bit higher and it gets hooked up into a pacemaker like
2 battery, a small battery, this device gets implanted in the
3 patient. First you do a test trial to see if it works, then the
4 permanent device gets totally implanted and when you turn only
5 the battery, he has a handheld TV type remote, and he can turn
6 it on and it causes a nerve stimulation to -- those nerves in
7 the spinal cord that blocks the signals of pain that comes from
8 the back that goes into the leg.

9 There's a lot of different type of programming that can
10 be done, so, a bit complicated, but, some of the programming,
11 you can have sensations in the leg, that kind of cover up what
12 he feels or you can actually block the pain signals totally
13 without him feeling anything, and that's something that is
14 actually very commonly used in somebody who has had surgery and
15 probably the best modality that's out there for someone who has
16 had a failed fusion, which he has --

17 Q And as far as the medications you listed, was he
18 already taking medications?

19 A He was on some medication prior to, or when I had seen
20 him and then we restarted, he was on gabapentin.

21 Q And had he had epidural before seeing you?

22 A He had three epidurals prior to seeing me.

23 Q Had he had trigger point injections prior to seeing
24 you?

25 A Yes.

1 Q And he had physical therapy prior to seeing you?

2 A Yes, correct.

3 Q After seeing that first time, did you see him after
4 that?

5 A Yes.

6 Q When was the next time you saw him?

7 A We saw him on June 23rd of this year, 2025.

8 Q And again, you did an exam?

9 A Correct.

10 Q And was there any change from the first exam?

11 A No.

12 Q And was it the same recommendations as the first exam?

13 A I think we tweaked the medication a little bit and give
14 him a slightly different gel I mentioned before, a compounded
15 gel, but the rest of the medication was the same.

16 Q Did you see him again after June 23rd?

17 A Yes.

18 Q When did you see him next?

19 A On July 30th.

20 Q And at that time, you examined him?

21 A Yes.

22 Q And was there any change?

23 A No.

24 Q Same recommendations?

25 A Correct.

1 Q And doctor, do you have an opinion, with a reasonable
2 degree of medical certainty, as to a future medical care that
3 plaintiff will need?

4 A Yes.

5 Q What is that?

6 A So, it is, within a reasonable medical certainty, he
7 will need future care because of his ongoing chronic pain and
8 symptoms related to his back and his knee, one he will continue
9 to need medication, I can go into the more specific, if you
10 want?

11 Q Yes, please, if you can start out with the medications
12 how often and how much?

13 A He will need medication on a daily basis, to help with
14 this pain, the medication which I mentioned before, including
15 gabapentin, tizanidine, topical gel, the oral, an inflammatory
16 medication, the costs is \$450 per month, for the rest of his
17 life, he will need to continue to follow-up with pain management
18 physicians, cost of \$200 per visit, once per month, he will need
19 to follow-up with his is orthopedic and spine physicians, a cost
20 of \$300 per visit every six months, for life, and he will need
21 trigger point injections at a cost of \$300 per set of
22 injections, and we're talking one set of injections every three
23 months, and these are to help with spasm, those are the -- for
24 instance, along his lower back, and he will need the epidural
25 injections which I mentioned before and described the costs of

1 that is thousand dollars per injection, plus \$2,000 facility
2 fee, these injections are done under fluoroscopic guidance,
3 we're talking three injections every two years for life.

4 And he will need lubrication injections, which I did
5 not mention before, but these are injections such as Synvisc,
6 Orthovisc, Euflexxa. The cost of these injections into the knee
7 are \$400 per injection, most of these injections are series of
8 three injections, and every 12 months, which is fairly
9 conservative going forward.

10 Q Can I interrupt you, had he had knee injections prior
11 to seeing you?

12 A Yes, so Dr. Kaplan who was seeing him did some Euflexxa
13 injections for his knee.

14 Q There are several different types of joint lubrication
15 drugs; correct?

16 A Yes.

17 Q Is there any difference really between any of them or
18 are they all the same or something else?

19 A Most of them are the same, there's not studies on these
20 medications, there are some injections that are a three series
21 injection, there are some injections that are one time
22 injections. Usually that's more expensive and cost prohibitive
23 and more difficult to get covered, so the three series are very
24 commonly done, there's not a huge, I mean it's really physician
25 preference on what they want to use and also dealing with

1 logistics of what's covered.

2 There's also for spinal fusion pain in his knee he
3 made, he will need a steroid injection to the right knee, \$300
4 every 18 months, going forward, there is the spinal cord
5 stimulator, which I mentioned in detail, but, first, you do a
6 trial which is a temporary wire in the back, and that would be a
7 cost of \$16,020, once within the next 15 years, and then the
8 cost of a permanent implant is, with reprogramming is \$55,559,
9 and that would be after the temporary one goes in, and the
10 stimulator, especially the generator needs to be changed every
11 eight or nine years, the cost of that generator change is
12 \$24,094, and again, there are facilities, there is the
13 physician, that's just the cost of the generator itself, but
14 there are also fees associated with the doctors' fees, the
15 surgeon's fees, the facility, and he does need that as well.

16 Q As far as the spinal cord stimulator, how likely is it
17 he would have that?

18 A Very likely, it is probably the best modality today,
19 especially in today's age where we're trying to stay away from
20 stronger medications, stay away from opium medication.
21 Inflammatories are helpful, but they do lead to gastric
22 irritation, ulcers, some patients can't take any an inflammatory
23 medication because of bleeding and long-term use of an
24 antiinflammatories are somewhat, can cause side effects, so the
25 stimulator kind of minimizes the uses of other medications.

1 Q Do you know if the stimulator had been recommended to
2 him prior to seeing you?

3 A Yes, Dr. Grimm, had also, his prior pain management
4 manages had recommended a stimulator.

5 Q Do you know why it hasn't been done yet?

6 A Not exactly why, but usually, it's -- I mean sometimes
7 it's just cost prohibitive, timing, so.

8 Q And as far as the trial that's in the next five years,
9 the permanent was within the next five years and the battery
10 replacement is every ten years; is that correct?

11 A Yeah.

12 Q I'm sorry, you can continue, sorry to interrupt you?

13 A Sure, yes, I agree, it's every ten years, sometimes
14 nine, ten years, depending on what the settings are of the
15 generator.

16 Q As far as office visits, the injections, and the joint
17 lubrications, that's for lifetime, the series you gave us for
18 whether it was months or every couple of years, it's for the
19 lifetime; correct?

20 A Yes, yes.

21 Q And, I'm sorry, continue on.

22 A He will need physical therapy going forward, again, for
23 the rest of his life at periodic intervals to treat exacerbation
24 for pain, cost \$120 per visit, twice per week for six months,
25 and then twice a month for 18 months, and then on average about

1 ten sessions per year, again, this is to maintain the strength
2 range of motion.

3 Q And doctor, if I can interrupt you, again, sorry,
4 physical therapy, have you heard some doctors say once you've
5 had a fusion or once you're had a surgery, you don't need
6 physical therapy anymore; have you ever heard that?

7 A I have never heard of that, so.

8 Q Assume we're going to have some doctors from the
9 defendants who are going to say that?

10 MR. MINERO: Objection.

11 MR. AARON: Objection.

12 MS. SUED: Objection.

13 THE COURT: Basis?

14 MR. MINERO: It's speculating what's going to be
15 testified.

16 THE COURT: Overruled.

17 A No, I mean the reality is patients who've had spinal
18 fusion, even if they didn't have a fusion, is spinal fusion
19 that's not a curative surgery, the patient still have pain and
20 symptoms and exacerbation of symptoms and their back will go out
21 in the future, and the reality is physical therapy is very
22 helpful especially when they have exacerbation of pain, which
23 happens quite often, because I see these patients all the time,
24 they come in, you know, we will do injections, we will do
25 epidural, trigger point injection, give them medication, and

1 start physical therapy, and this happens, routinely, like every
2 year, every other year, but it very frequently happens.

3 Q Sorry, you can continue on?

4 A And he will need in the future, MRIs of his right knee
5 and his spine, at an interval of one MRI to each body part every
6 five years, the cost of that is \$1300 per MRI.

7 Q And that's --

8 THE COURT: Counsel, hold a second.

9 Q That's for the lower back and the knee?

10 THE COURT: I got a note that the juror needs a
11 break, we will take a two-minute recess, quick two-minute
12 recess.

13 COURT OFFICER: All rise, jury exiting.

14 (Whereupon, the jury exited the courtroom.)

15 (Whereupon, Dr. Mandelbaum exited the witness
16 stand.)

17 (Whereupon, a short break was taken.)

18 (Whereupon, Dr. Mandelbaum resumed the witness
19 stand.)

20 THE COURT: You may be seated, the trial resumes.

21 COURT OFFICER: All rise, jury entering.

22 (Whereupon, the jury entered the courtroom.)

23 THE COURT: You may be seated.

24 Counselor, the trial resumes as soon as you're
25 ready.

1 MR. VARGAS: Thank you, your Honor.

2

3 CONTINUED DIRECT EXAMINATION BY

4 MR. VARGAS:

5 Q Dr. Mandelbaum, do you have an opinion, with a
6 reasonable degree of medical certainty, as to a future prognosis
7 for Mr. Flores?

8 A Yes.

9 Q And what would that be?

10 A That within a reasonable degree of medical certainty,
11 his prognosis is poor.

12 Q Why do you say poor or what does poor mean?

13 A Poor means he's going to unfortunately continue to have
14 chronic pain and continue to need treatment which is what I laid
15 out before, as far as injections, therapies, stimulator,
16 ongoing.

17 Q And doctor, do you have an opinion, with a reasonable
18 degree of medical certainty, as to whether the herniation to
19 L5-S1 and the subsequent surgery, and the injury to the right
20 knee torn meniscus are causally connected to the accident?

21 A Yes.

22 MR. MINERO: Note my objection, your Honor.

23 MR. AARON: Objection.

24 THE COURT: Overruled.

25 A Yes.

1 Q Yes, what is that opinion?

2 A So with a reasonable degree of medical certainty, given
3 the history as identified by the patient, no prior injuries, the
4 subsequent fall, with the subsequent injury to the back and the
5 right knee and the subsequent surgery, is causally related to
6 that fall.

7 Q And, doctor, do you have an opinion, with a reasonable
8 degree of medical certainty, as to whether Mr. Flores can return
9 to work?

10 A Yes.

11 Q And what is your opinion?

12 A That it's going to be very difficult for him to return
13 to work, certainly within construction, he does have limitations
14 and he is need ongoing treatment currently, but he still has
15 ongoing pain with sitting, standing walking, and yes, the pain
16 is dynamic, it comes and goes, but I meaningful job, in any
17 capacity would be difficult.

18 MR. VARGAS: Thank you, no further questions, I'm
19 sorry.

20 Q I'm half awake, today, sorry, Judge.

21 Are you board certified?

22 A Yes.

23 Q And what does bothered certification, you are the first
24 doctor to testify today?

25 A I'm board certified in anesthesia and subspecialty

1 board certification in pain management medicine. I did meet the
2 criteria doing the residency in anesthesia, and I stated before
3 at Mount Sinai, followed by a fellowship, and have taken the
4 testing qualifications that award me to be board certified in
5 that field, so, and there's a retesting constantly, actually,
6 every ten years, they changed it a little bit, now it's ongoing
7 certification.

8 Q And you're licensed to practice medicine in New York
9 State?

10 A Yes.

11 MR. VARGAS: Now I have no further questions.

12 THE COURT: Okay, counselor.

13 CROSS-EXAMINATION BY

14 MR. MINER:

15 MR. MINERO: Your Honor, before we begin, we would
16 like to review the doctor's notes?

17 THE COURT: Yes, you may.

18 MR. MINERO: Thank you.

19 MR. VARGAS: Do you want me to grab them?

20 COURT OFFICER: Counsel.

21 (Handing.)

22 MR. MINERO: Maybe we can take a few minutes.

23 THE COURT: A recess?

24 MR. MINERO: Yes.

25 THE COURT: We will give the attorney a quick

Dr. Mandelbaum - Plaintiff - Cross/Mr. Minero

1 recess to refresh some notes, we will take another few
2 minutes, please.

3 COURT OFFICER: All rise, jury exiting.

4 (Whereupon, the jury exited the courtroom.)

5 (Whereupon Dr. Mandelbaum exited the witness
6 stand.)

7 COURT OFFICER: All rise, jury is entering.

8 (Whereupon, the jury entered the courtroom.)

9 THE COURT: You may be seated, the trial resumes.
10 Counselor, please inquire.

11 MR. MINERO: May I inquire?

12 THE COURT: Yes, sir.

13 Q Good morning, doctor.

14 A Good morning.

15 Q Doctor, is it, the first time -- strike that. I'm
16 sorry.

17 The first time you examined the plaintiff was in April
18 of 2025; is that correct?

19 A Correct.

20 Q And before that, did he have a pain management doctor?

21 A Yes.

22 Q That was Dr. Grimm?

23 A Yes.

24 Q Do you know why you were asked to take over as the pain
25 management doctor for Mr. Flores?

1 A I do not.

2 Q Was it because you could then testify instead of
3 Dr. Grimm?

4 A No.

5 Q You had mentioned earlier that there were certain tests
6 that you performed that were subjective versus objective;
7 correct?

8 A Correct.

9 Q And your opinion, the range of motion testing that you
10 performed, are those a subjective or objective tests?

11 A It's a combination, because I to range of motion, I'm
12 observing the patient, I'm feeling body parts as well and try to
13 get, for instance, extension, flexion of the spine, and, yes, it
14 is patient moving as well my observation of the patient.

15 Q Is it fair to say that's not just with any patient, but
16 subjective testing can be manipulated; correct?

17 A Yes.

18 Q So if a patient chooses to be, they can be dishonest
19 about their range of motion?

20 A There's no indication of that in this case.

21 Q I'm asking in general, not about this case, in general?

22 A It's possible.

23 Q The first time that you examined Mr. Flores, did you do
24 an intake of his regarding his medical history?

25 A Yes.

1 Q Does Mr. Flores have any condition that were of note to
2 you?

3 A He has some medical issues, yes.

4 Q What are they, if you recall?

5 A He does have diabetes.

6 Q Do you know what type of diabetes he has?

7 A Type II, he's on metformin.

8 Q What are some of the effects that diabetes has on the
9 body?

10 A There is -- I mean a lot of issues with diabetics.

11 Q Sure.

12 A Once that are under control, should hopefully have any
13 little issues, uncontrolled diabetes can lead to changes, they
14 may have neuropathy, I mean the hypertension.

15 Q Let's talk about that neuropathy, what is neuropathy?

16 A Neuropathy is nerve damage in the -- diabetes have
17 specific type of neuropathy.

18 Q That can be pain in parts of the body, in particular
19 the legs; correct?

20 A It's a very unique distribution of pain typically in
21 both feet, typically, diabetic patients, typically don't have
22 pain during the day, the pain comes out very much at night
23 that's just a general characteristic of diabetics, his
24 particular pain does not make him diabetic neuropathy.

25 Q Are there certain drugs prescribed to persons who have

1 diabetic pain?

2 A Yes.

3 Q Is one of them gabapentin?

4 A It is.

5 Q Do you know if Mr. Flores was on the gabapentin at the
6 time that you first examined him?

7 A I believe he was.

8 Q You didn't review his pharmacy records; correct?

9 A I did not see, I don't believe it was in the packet.

10 Q Okay. You had a report that was on April 28th, of
11 2025, that's your first report?

12 A Correct.

13 Q Issued?

14 A Yes.

15 Q Is it fair to say that the records that are listed here
16 are the ones you reviewed are the totality of the records that
17 you reviewed in preparing this report?

18 A You're talking about the narrative report?

19 Q Yes, sir.

20 A I believe so.

21 Q And it's fair to say, there's no indication of pharmacy
22 records; correct?

23 A Correct.

24 Q In fact, throughout this report, there is no indication
25 that Mr. Flores was currently taking any medications; is that

1 correct?

2 A I only have it in the history, as far as him taking, I
3 believe metformin and gabapentin were on my initial intake.

4 Q That's neither metformin or any other drug is actually
5 listed in your initial report?

6 A It is.

7 Q Are you show us where?

8 A Under is, it says taking metformin and gabapentin under
9 current medication on the 4/28/25 office note. You're looking
10 at the narrative, I'm looking at my office notes, we're looking
11 at different.

12 Q That's fair, I'm looking at your report, is it fair to
13 say it's not listed in the report?

14 A I have to go over the report again, but it certainly
15 what was on the office note was done prior to the report.

16 Q Now, is it, you had mentioned that among the things
17 that you believe that Mr. Flores would need is an MRI every five
18 years; is that correct?

19 A Correct.

20 Q And that would be of the knee and of the back; correct?

21 A Yes.

22 Q What is the purpose of getting an MRI every five years?

23 A So that is very typical of patients who have ongoing
24 condition, for instance, a fusion and ongoing pain in the knee,
25 they will have worsening of their symptoms, it's an

1 approximation, but roughly every five years, patients do get new
2 scans of their back because of a reason which may be
3 exacerbation of pain, which is what is expected.

4 Q It is also possible an MRI would show there had been no
5 change; correct?

6 A Well, we want to make sure things are stable, it's not
7 uncommon for someone to have a spinal fusion to have the disc
8 above the fusion herniate, and we want to make sure that things
9 are status quo.

10 Q You want to be clear that what you're seeing in the
11 back or in the knee is current; correct?

12 A Correct.

13 Q That's so you can make then a proper diagnosis as to
14 what to do next; yes?

15 A Why there are any further changes, yes.

16 Q In looking at the medical records that you reviewed, it
17 appears that Mr. Flores's last MRI's were 2019; is that fair?

18 A I believe so, because I believe he did not a more
19 recent one, I can look specifically.

20 Q Since you started treating Mr. Flores, have you
21 requested that he undergo an MRI?

22 A Now, but I did bring it up, it is something I need to
23 be done, as I mentioned the spinal cord stimulator, one, we have
24 a recent MRI in the past year and then go forward from there.

25 Q You mentioned that it was a significant tool was the

1 imaging that's what Mr. Vargas said in his opening statement to
2 the jury, that you would like to see imaging of the body parts;
3 correct?

4 A Correct.

5 Q And is it fair to say that a more current image would
6 be, would put you, as the doctor in a better position, to see
7 what was going on in his back or in his knee so when you came,
8 one, a course of treatment you would have the most current
9 films; correct?

10 A It wouldn't change treatment, because the treatment
11 would be the same, but they would still get an MRI to make sure
12 things are status quo, by the way he had X-rays done that were
13 more recent, and that was after the fusion ordered by
14 Dr. Weinstein on multiple office visits.

15 Q Those were in 2019 as well?

16 A I believe there are later ones.

17 Q I'm sorry?

18 A I believe there are later X-ray imaging, I don't have
19 the dates. Every time he went to Weinstein, I think after the
20 fusion, he had X-ray imaging.

21 Q Do you have those with you now?

22 A But I did --

23 Q Did you review them?

24 A Yeah. They're on the website, Lenox Hills Radiology.

25 Q You testified earlier about certain prices for drugs

1 and other treatments.

2 How do you come to those conclusions?

3 A Well, these are the set price, not set prices, but
4 these are the general prices for these type of medications that
5 we prescribed, so I deal with a lot of pharmacies, I do get a
6 lot of questions about the costs of medication, so that's how I
7 come.

8 Q This is data you have collected?

9 A It's not collected, I mean it's freely available, if
10 you want to look them up.

11 Q Do you recall where you came up with the cost of \$450 a
12 month in the drug care?

13 A Well, there's the retail cost of the medications that I
14 prescribed, one the muscle relaxant, tizanidine, the
15 antiinflammatory, long-acting gabapentin, these tend to be a
16 little pricier and the compound gel you mentioned before, tends
17 to be, just that gel before is a little over \$425 for the
18 compounding gel, depending how much of it, it comes out to be,
19 approximately \$450.

20 Q These are approximates, they're not actual cost?

21 A They're pretty close.

22 Q Earlier you had mentioned because of the -- the wrong
23 doing of, I guess, a prior owner of your company, you had to pay
24 some sort of fine; is that correct?

25 A If correct.

Dr. Mandelbaum - Plaintiff - Cross/Mr. Minero

1 Q What was that about?

2 A As I stated before, that when I was an employee of
3 Dr. Thomas, he had hired a therapist, and was prescribing
4 physical therapy for this therapist who turned out to be
5 unlicensed.

6 Q So this is at a time when you were employed at the
7 company?

8 A Yes, correct.

9 Q Was the fine issued in the name of the company or your
10 name?

11 A Their, the truth is, I don't know offhand, I know that
12 I ended up paying the fine, because Dr. Thomas had passed away.

13 Q Did you pay it or did the company pay it?

14 A Well, the company didn't exist, it was an estate, and
15 that estate owned the practice, the practice was dissolved.

16 Q There was a big lawsuit about that; correct?

17 A There was a big lawsuit about the estate?

18 Q No, I mean there was a lawsuit about trying to get
19 control of the company, that's correct?

20 A Nothing became of it, but I had to file against
21 Dr. Thomas, it was not an easy transition to say the least.

22 Q So then you became the owner of the company?

23 A No, the estate owned the company, it was an asset
24 purchase, I don't know if you want to go into legalities.

25 Q I don't, but help me out here, I'm trying to figure out

1 if it was only an asset purchase?

2 A Correct.

3 Q And these misgivings, these misdeeds were done by
4 Dr. Thomas under a company that you were not owned by while you
5 paid the fine?

6 A It was a settlement that was done with Medicare, it was
7 more of a business decision instead of fighting.

8 Q There were no accusations against you personally?

9 A There were no accusations, it was against the practice,
10 but there was no admission of fault or guilt --

11 Q But the practice didn't exist anymore you said yes?

12 A Exactly.

13 MR. VARGAS: Your Honor, he's interrupting the
14 witness.

15 THE COURT: Please let him finish his response.

16 MR. MINERO: I'm sorry, doctor, please finish.

17 A Medicare wanted to recoup the costs, and this is
18 already after the practice dissolved and that particular
19 practice did not exist then, the name did not exist.

20 MR. MINERO: I have no further questions, thank you
21 sir.

22 THE COURT: Counselor.

23 MR. AARON: Thank you, Judge.

24 THE COURT: Please inquire.

25 CROSS-EXAMINATION BY

1 MR. AARON:

2 Q Good morning, Dr. Mandelbaum.

3 A Good morning.

4 Q So the first thing that happened with you and
5 Mr. Flores was getting the referral from his attorneys; correct?

6 A I don't know exactly how he came to my office, but he
7 was seen initially on 4/28, his initial visit.

8 Q Well, do you know if he was referred by another doctor?

9 A I don't know offhand.

10 Q Well, your report, that's an addressed to plaintiff's
11 counsel; right?

12 A Yes.

13 Q So when you first treated him, that was April 28, 2025?

14 A Correct.

15 Q And that's also the date of your report?

16 A That was the date, because we were asked by his
17 attorney after we had seen the patient to write up an narrative
18 report which is, you know, I see a lot of injured patients, this
19 is fairly routine and every report is based on the first
20 examination of 4/28.

21 Q At the time that you first saw him, did you know he was
22 already involved in a lawsuit?

23 A No.

24 Q But you knew he was when you wrote the report?

25 A Correct.

1 Q The first time you ever examined Mr. Flores that was
2 approximately seven years after the accident; right?

3 A Correct.

4 Q And the first thing that you do as a doctor is you take
5 a history?

6 A Yes.

7 Q And that's important for you as a doctor to take a
8 history from the patient?

9 A Yes.

10 Q And that's for accuracy purposes?

11 A Yes.

12 Q When did you learn that Mr. Flores had diabetes?

13 A Well, he told us during that initial office visit.

14 Q And is the word "diabetes" listed in your initial notes
15 from the first visit with him?

16 A Yes.

17 Q And is it also listed in your report that was prepared
18 for this case?

19 A I -- I have to look back.

20 Q Do you have it in front of you?

21 A I do. I don't particularly see that, certainly he told
22 us, it's in my office notes.

23 Q Part of the treatment plan you came up with for
24 Mr. Flores was steroid injections; correct?

25 A Correct.

1 Q And even though steroid injections can be bad for a
2 diabetics, you still recommended them to him?

3 A Yes, it's very routinely done even in diabetic patients
4 especially if their diabetes is under control.

5 Q Have you reviewed records from Dr. Grimm?

6 A Yes.

7 Q That he's a pain management doctor like yourself?

8 A Correct.

9 Q And did you see records that Mr. Flores could not
10 receive an epidural steroid injection in October of 2018,
11 because it had to be cancelled so he could get his diabetes
12 under control?

13 A He had three epidurals with Dr. Grimm and that may have
14 been one particular incident, and we do like it when patients
15 have their diabetes under control before doing a steroid.

16 Q But going back to when you said it's important for the
17 history to be accurate, do you have anywhere in your note that
18 say Mr. Flores has a history of not controlling his diabetes?

19 A I have the history of him having diabetes and being on
20 metformin.

21 Q But you don't have anywhere in your note that says he
22 already had to have these procedures cancelled in the past,
23 because he couldn't control his diabetes; yes or no?

24 A It wouldn't change the fact that he can use epidural
25 injections in the future, we were going to assess at that time.

1 With what was six, seven years ago is not today, so, that type
2 of information is not necessarily as relevant as what it is
3 today.

4 Q If a diabetic is receiving steroids, can that increase
5 the diabetes bloods glucose level?

6 A Absolutely, that's why we would make sure that the
7 patient, we would either adjust medication, one thing or have
8 them monitored during that time period and typically with these
9 especially injections the sugar level goes up 24 to 48 levels
10 and then comes down, that's pretty typical, we don't want
11 them -- under descent control. We would expect a small rise in
12 the glucose level and then it to come back down again, it's very
13 routinely done in diabetic patients.

14 Q You project that Mr. Flores will need a series of
15 lumbar steroid injections, three injections every two years for
16 life?

17 A Yes, correct.

18 Q You reviewed the epidural injections he has had since
19 this accident?

20 A Yes.

21 Q Do you have the dates of those injections?

22 A Yes.

23 Q What are they?

24 A 8/27/18, 12/11/18, and March 18, 2019.

25 Q Are you aware he also had one April 22, 2019?

1 A It wasn't an epidural injection.

2 Q That was a different kind of injection?

3 A It was a sacroiliac joint injection.

4 Q All of those injections he had, all of those predate
5 his back surgery?

6 A Yes.

7 Q You agree he hasn't had a single epidural injection
8 since his surgery in June of 2019; right?

9 A Yes.

10 Q That's over six years ago; correct?

11 A Correct.

12 Q If he hasn't had a single injection in over six years,
13 and you're telling the jury he needs three injections every two
14 years, what's changed in those six years?

15 A One, he did have surgery, he had a fusion in 2019, so
16 his spine was quite different after the surgery, there was a
17 recovery period after that, and there are a lot of reasons why
18 patients may not have epidural injections, there is cost
19 involved, coverage, patient's current pain, but these are very
20 commonly done in patients who've had back surgery that continue
21 to have pain and that's what I had discussed with Mr. Flores, I
22 don't even know how often he followed up with Dr. Grimm, I
23 didn't see any recent notes in there, so I believe he probably
24 even missed a few appointments.

25 Q Sew doctor, have you seen anywhere in his medical

1 records that any injections have even been recommended to him
2 since his back surgery?

3 A I don't recall.

4 Q So if we already know that steroid epidural injections
5 had to be cancelled in the past because of his diabetes, you
6 cannot say, to a degree of medical certainty, that he's going to
7 have three epidural steroids for his back every two years for
8 his back if he's diabetic; correct?

9 A I can say with reasonable degree of medical certainty
10 he will need epidural injections going forward, despite having
11 diabetes, and of course, we would want it under good control,
12 there's no contraindication to the epidural, there's no
13 contraindication.

14 Q Right.

15 A And the nature of this type of pain is, patients get
16 epidural injections.

17 Q So you say he may need them in the future, there's no
18 guarantee he will get them; correct?

19 A This is with a reasonable degree of medical certainty,
20 that he will need, and we're trying to put it out there, what he
21 will need in the future and this is very reasonable approach, do
22 I do epidural injections, I have patients come every three
23 months for epidural injections, we try to limit it every year,
24 they almost want it every month, it depends on the patient, I'm
25 trying to --

1 Q You would agree with me then that Mr. Flores hasn't
2 wanted one in over six years; correct?

3 A I don't know if he hasn't wanted one.

4 Q He certainly hasn't gotten one?

5 A There is a lot of reasons why someone may not get an
6 epidural injection.

7 Q Have you seen anything in the medical records that
8 tells you why he hasn't gotten one?

9 A I will leave that to ask the patient.

10 Q The answer is no then, you haven't seen anything in the
11 medical records that says he hasn't gotten one; right?

12 A I don't know if he -- I mean he didn't have one after
13 his surgery, and it's something I would have offered him, yes.

14 Q You also recommended that he's going to need a steroid
15 injection to his knee every 18 months for the rest of his life;
16 corrected?

17 A Correct.

18 Q Have you ever reviewed any records that say he has had
19 any such injections?

20 A He has knee injections.

21 Q What kind of injections has he had?

22 A I believe he had lubrication injections.

23 Q Is that a steroid?

24 A No.

25 Q So if he hasn't had a steroid injection, how can you,

1 with a reasonable degree of medical certainty, say he's going to
2 need that for the rest of his life?

3 A Because there's a difference between lubrication
4 injection and the steroid injections, so the lubrication
5 injection, which by the way, was my approach was very
6 conservative, I said you need three injections every 12 months.

7 In realty he can have it every six months and I believe
8 Dr. Kaplan has been doing injections, I don't know if he's
9 testifying, he can testify to the Euflexxa injections, there are
10 times when the knee is inflamed, and it's within a reasonable
11 degree of medical certainty, he would need a steroid injections
12 to help with the inflammation which is quite different than the
13 Euflexxa, which is kind of a lubricant, you can think of it like
14 an oil lubricant that goes into the knee, that cushions the
15 knee, so they both work very differently and sometimes I'll even
16 do a lubrication with the steroid at the same time, that's not
17 uncommon as well.

18 Q Have you reviewed any records that any such injections
19 have even been recommended to him; yes or no?

20 A I believe he's gotten Euflexxa infections by
21 Dr. Kaplan.

22 Q I'm talking about injections you just said; yes or no?

23 A I don't know, I don't recall seeing.

24 Q You also reviewed Dr. Weinstein's records?

25 A Yes.

Dr. Mandelbaum - Plaintiff - Cross/Mr. Aaron

1 Q And Dr. Weinstein, he's an orthopedic spinal surgeon?

2 A Yes.

3 Q He's the doctor Mr. Flores saw for his back?

4 A Yes.

5 Q He did his back surgery?

6 A Yes.

7 Q And those records, that's from the comprehensive
8 orthopedic and spinal care practice?

9 A Yes.

10 Q You are aware that Mr. Flores hasn't seen Dr. Weinstein
11 in over five years; correct?

12 A Okay, yes. I didn't see any recent notes.

13 Q In fact Mr. Flores stopped treating with him in July of
14 2020; right?

15 A Okay.

16 Q Would it be proper for an orthopedic spinal surgeon who
17 does a surgery that successful to not see the patient anymore?

18 A You have to speak to Dr. Weinstein.

19 Q Okay. Well, when Mr. Vargas was asking you, you said
20 Mr. Flores will need to see a spine doctor every six months; do
21 you recall that?

22 A Yes, I think it's a good idea for him to continue to
23 see Dr. Weinstein, one, to evaluate the fusion, I mean there are
24 things that can go wrong with fusions, and which I've seen
25 before, I mean there's, titanium metal that's placed in a

1 patient's spine between L5-S1, I've seen the metal crack and
2 break, and you know, patients have further herniations, and
3 there's certainly that potential for that going forward it's a
4 good idea for him to have contact with, with an orthopedic
5 spinal surgeon going forward.

6 Q Dr. Weinstein clearly didn't think that was necessary
7 if he hasn't seen his own patients since July of 2020; correct?

8 MR. VARGAS: Objection form.

9 THE COURT: Overruled.

10 A He, I mean, again I will leave that to Dr. Weinstein,
11 maybe he had an appointment with Dr. Weinstein, missed his
12 surgery and didn't follow up.

13 Q You're not a spinal surgeon?

14 A No.

15 Q You're projecting that Mr. Flores will also need a
16 spinal cord stimulator; correct?

17 A Correct.

18 Q And there fact Mr. Flores was recommended to get a
19 spinal cord stimulator over two years ago; correct?

20 A Correct.

21 Q But he hasn't gotten it yet; right?

22 A Correct.

23 Q And you haven't scheduled him for that, have you?

24 A No, but I gave him a lot of information regarding that,
25 and it is something that I would definitely pursue, first get

1 the MRI that I mentioned and then go ahead with the stimulator
2 trial.

3 Q In your experience some patients decline that
4 procedure; right?

5 A Yes.

6 Q Given that Mr. Flores hasn't gotten it yet when it has
7 been recommended to him two years ago, you can't say whether or
8 not he ever will; right?

9 A The typical patient to give the jury an idea, I always
10 mention this for patients who have spinal surgeries, almost
11 99 percent of the time I mention spinal cord stimulator to
12 patients, I don't push it, it is an implanted device that
13 technically is permanently implanted in somebody, I get
14 patient's information appeared a lot of times they're reluctant,
15 a year, or two later, three or four years they still have pain
16 the pain gets worse, we reevaluate get an MRI see if there are
17 any change and then they go ahead with the estimator, so the
18 general course of this type of senior why someone had a lumbar
19 fusion and has a failed back, they will get a spinal cord
20 stimulator, as I mentioned, before it is the best modality out
21 there that minimizes oral medication.

22 MR. AARON: Your Honor, I move to strike as not
23 responsive, my question was tailored to Mr. Flores, not only
24 people.

25 THE COURT: The response is stricken.

1 Q Doctor, my question was, given that Mr. Flores hasn't
2 gotten the procedure you can't say he ever will; yes or no?

3 A This is my recommendations, yes did not get the
4 procedure, there's certainly a cost involved, that could be
5 certainly one reason, it also, it's surgery, and he would have
6 to be surgically cleared, there are logistics, my recommendation
7 are he should get a spinal cord stimulator.

8 Q Well, if he doesn't get it, right, then there's no need
9 for the future replacement of the symptom for; correct?

10 A Correct.

11 Q And there's no need for a replacement battery; correct?

12 A Correct.

13 Q All of those things you claim he will need, those costs
14 he wouldn't incur them; correct?

15 A If he doesn't have it, correct.

16 Q You project he'll need medication for the remainder of
17 his life?

18 A Correct.

19 Q Well as a pain management specialist is a part of your
20 to do blood work or monitoring whether your patients are taking
21 the prescribed medications?

22 A It depends on the medication, but the answer to that
23 would in general be no unless they're on narcotic medications.

24 Q Are you prescribing his narcotic medications?

25 A No, we're trying to minimize it by injections and the

1 stimulator.

2 Q But you say he's also going to need medications, do you
3 specify which medications he's going to need?

4 A Yes.

5 Q Which are those?

6 A As I testified before, there were tizanidine, and the
7 diclofenac, the gabapentin, and the compounded gel.

8 Q And I know it was already asked of you didn't review
9 any pharmacy records; correct?

10 A Correct.

11 Q Are you aware he hasn't filled out a prescription since
12 20 23?

13 A I don't recall when he filled the last prescription.

14 Q Well, have you verified with Mr. Flores whether he's
15 even taking medication?

16 A It's on my list.

17 Q You haven't done any blood work or testing to confirm
18 whether he has been taking it?

19 A That's not routinely done.

20 Q But you haven't seen any pharmacy records that say he's
21 been filling his prescriptions, have you?

22 A I don't typically review pharmacy records only if
23 they're on narcotic medication, I don't even review the pharmacy
24 records I check the New York State database for opiate
25 prescriptions.

1 Q You project that Mr. Flores will also need physical
2 therapy for the rest of his life?

3 A Correct.

4 Q And isn't it true that Mr. Flores hasn't had any
5 physical therapy since July of 2022?

6 A Again, there may be many reasons why he has not had
7 physical therapy, but going forward, yes, he will need physical
8 therapy.

9 Q But it's true he hasn't had any since July of 2022;
10 correct?

11 A Correct.

12 Q Have you ever reviewed his physical therapy records?

13 A I did.

14 Q But you're recommending physical therapy to him when
15 you've never reviewed, how he responded to it in the past?

16 A I did see his physical therapy records, which he had
17 certainly prior to the surgery which he ended up having surgery
18 despite the epidurals and the physical therapy, and then
19 subsequent physical therapy after his surgery.

20 Q Well no doctor told him he couldn't go back to physical
21 therapy; correct?

22 A Who told him?

23 Q No doctor told him he couldn't go back?

24 A Oh, no, I think he should have physical therapy.

25 Q In fact, it was Mr. Flores who voluntarily stopped

1 going; correct?

2 A There may be many reasons for that.

3 Q You say that Mr. Flores will need an MRI on his right
4 knee once every five years; correct?

5 A Correct.

6 Q But you hasn't had an MRI in seven years; correct?

7 A Correct.

8 Q And so if he's already two years late for an MRI, you
9 can't say to a reasonable degree of medical certainty he's going
10 to get one every five years; right?

11 A He should get an MRI.

12 Q But you can't say that he will; correct?

13 A There are a lot of reasons that he may not, I mean
14 there's a cost involved, and he has to seek funds to get these
15 MRIs and scans, it doesn't mean he doesn't need it.

16 Q Are you aware Mr. Flores was treating with a different
17 pain management doctor before you; correct?

18 MR. VARGAS: Objection, this has already been
19 covered.

20 THE COURT: It was asked and answered already.

21 Q Are you aware that Mr. Flores was treating exclusively
22 with that other pain management specialist?

23 A Those were the only notes, I believe it was Dr. Grimm.

24 Q Well, did you see anywhere in the records he was
25 treating with anyone other than Dr. Grimm for pain management?

1 A No.

2 Q Did you ever consult with Dr. Grimm about Mr. Flores's
3 prior course of treatment?

4 A No.

5 Q Any reason why?

6 A I didn't see any reason to consult with him.

7 Q You just relied on what's in the records?

8 A I had his records, and I was able to discuss with
9 Mr. Flores, with an interpreter and he understands what has
10 happened and will happen in the future.

11 Q Hypothetically, if you were seeing a cardiologist for
12 seven years and all of a sudden you switched cardiologists,
13 wouldn't you expect your new one to talk to your old one to get
14 a clear picture of what's going on?

15 A I'm glad you're comparing pain management to
16 cardiology, certainly not evenly close to the same, but I have a
17 clear course of treatment by Dr. Grimm's notes and from the
18 patient and certainly, and I had his imaging and MRIs, there was
19 no reason for me to reach out to Dr. Grimm in particular.

20 Q You didn't think it was necessary to talk to him in
21 person or over phone I have a new patient coming in, he has been
22 seeing you for seven years?

23 A That's so not done.

24 MR. AARON: Thank you, that's all I have.

25 THE COURT: Any redirect.

1 MR. VARGAS: Yeah, I just have a couple.

2 REDIRECT EXAMINATION BY

3 MR. VARGAS:

4 THE COURT: Go ahead, counsel.

5 Q Doctor, Mr. Flores' diabetes, would you characterize it
6 as severe or mild?

7 A It's mild.

8 Q And everyone was, you know the defendants were asking
9 you why he hasn't had steroid shots and the MRIs and the cost of
10 everything, the MRI machine, they don't give those out for
11 entry; correct?

12 A No.

13 Q And doctors don't work for free; correct?

14 A Correct.

15 Q And you charge your patients when they come in;
16 correct?

17 A Correct.

18 Q So everything you listed costs money?

19 A Correct.

20 Q And if you don't have money you can't get that
21 treatment; correct?

22 A Correct.

23 MR. VARGAS: No further questions.

24 MR. MINERO: May I, your Honor?

25 THE COURT: Yes.

1 RE CROSS EXAMINATION BY

2 MR. MINERO:

3 Q Doctor, did Mr. Flores ever specifically and expressly
4 tell you that the reason why he did not get any of the
5 treatments, the injections, the MRIs, the medications, was
6 because he didn't have the money to do so?

7 A I don't recall that conversation.

8 Q So far as you know he never told you that; correct?

9 A Correct.

10 MR. MINERO: Thank you.

11 THE COURT: Counselor.

12 MR. AARON: Just two, your Honor.

13 RE CROSS EXAMINATION BY

14 MR. AARON:

15 Q Doctor, what's specialist treats diabetes?

16 A Endocrinologist typically or just his medical doctor.

17 Q You're not an endocrinologist?

18 A No.

19 Q How can you say whether or not his diabetes is mild,
20 severe or otherwise?

21 A Based on his history and there's no reason to not
22 accept his statement.

23 Q Well, did you review any records from answer
24 endocrinologist?

25 A You're assuming he's seeing an endocrinologist.

1 Q I'm assuming you reviewed something to say it was a
2 mild case of diabetes, what is it?

3 A It's all based on the medical history I got from the
4 patient.

5 Q Part of the medical evidence was his diabetes was so
6 out of control he had to have a steroid injection cancelled;
7 correct?

8 A That was as you stated, that was a four years or five
9 years prior to him coming to my office.

10 MR. AARON: Thank you.

11 THE COURT: Any further redirect?

12 MR. VARGAS: No, your Honor.

13 MR. MINERO: No, Judge.

14 THE COURT: Miss Sued.

15 MS. SUED: Nothing, your Honor.

16 THE COURT: This concludes this witness for this
17 morning's session.

18 MR. MINERO: Yes.

19 MR. VARGAS: Yes.

20 THE COURT: Members of the jury, we're breaking for
21 lunch until 2:15.

22 COURT OFFICER: All rise, jury exiting.

23 (Whereupon, the jury exited the courtroom.)

24 THE COURT: Doctor, you're good to go.

25 (Whereupon, Dr. Mandelbaum exited the witness

1 stand.)

2 MR. VARGAS: If your Honor I may, on the subject
3 ever putting records into evidence, to make this afternoon
4 go faster I wanted to put Dr. Kolb's MRI of the right knee
5 into evidence, so that Dr. Kaplan would put it up on the
6 screen and he can review it.

7 THE COURT: Counselors, any objection?

8 MR. MINERO: No, Judge.

9 MR. AARON: No, Judge.

10 MR. VARGAS: I just want to make sure we wouldn't
11 have a problem.

12 THE COURT: On consent no problem, 2:15.

13 MR. VARGAS: Thank you.

14 THE COURT: Also, you can start working on the
15 damages charges like we did for last week off the record.

16 (Whereupon, an off the record discussion was held.)

17 (Whereupon, a lunch break was taken.)

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

19 COURT OFFICER: All rise, jury entering.

20 (Whereupon, the jury entered the courtroom.)

21 (Pause in the proceedings.)

22 THE COURT: Before we call in the jury, we had a
23 motion whether we can voluntarily discontinue this matter I
24 asked for some case law, there was a decision on, I saw and
25 reviewed the Appellate Division for authority 2022, if you

Proceedings

1 give me the case, be so kind I will read it into the record
2 do you have the case in front of you.

3 MR. MINERO: May I, your Honor?

4 THE COURT: Yes, this was a novelty to me, to be
5 honest I didn't know what the rule of law on this is, I'm
6 honest enough to say I don't know and I need to rule, the
7 case of Emigrant Bank versus Louis Solimano, 209 A.D. 3d 153
8 2022 case, Appellate Division Second Department, it deals
9 with foreclosures, I deal with foreclosures, this is
10 officially a foreclosure part job and it says, the action
11 given to the trier of fact for consideration at that
12 juncture the summary judgement motion for oral reference at
13 that time trier of fact is holding it, everybody has to be
14 in agreement, leave of court, concept of all parties, so
15 unless I get a case over which is, saying otherwise, if you
16 come up with a case, Mr. Vargas saying otherwise, if it
17 wasn't for this case I would have granted the motion, I only
18 hold, because of this decision, you come with the Appellate
19 Division going the other way I will reconsider this ruling
20 and allow you to discontinue.

21 MR. VARGAS: Thank you, Judge.

22 THE COURT: You can make an exception, make an
23 exception on the record.

24 MR. VARGAS: I will take an exception, your Honor.

25 THE COURT: Okay.

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 MS. SUED: Please also note our exception, in case
2 we find case law later.

3 THE COURT: Off the record.

4 COURT OFFICER: All rise, jury entering.

5 (Whereupon, the jury entered the courtroom.)

6 THE COURT: You may be seated, good afternoon, and
7 the it trial resumes, back on the record.

8 MR. VARGAS: You were I call Dr. Jeffrey Kaplan to
9 the stand.

10 THE COURT: Please do so.

11 (Whereupon, Dr. Jeffrey Kaplan took the witness
12 stand.)

13 THE CLERK: Please remain standing and raise your
14 right hand, do you solemnly swear or affirm that the
15 testimony you're about to give will be the truth, the whole
16 truth and nothing but the truth?

17 THE WITNESS: Yes.

18 THE CLERK: Thank you, please be seated, please
19 state and spell your full name for the record, address and
20 occupation?

21 THE WITNESS: My name is Jeffrey Kaplan,
22 J-E-F-F-R-E-Y K-A-P-L-A-N. Office is 160 East 56th Street
23 in Manhattan, 10022, I'm an orthopedic surgeon.

24 THE COURT: Counsel, you may inquire.

25 MR. VARGAS: Thank you, your Honor.

1 DIRECT EXAMINATION BY

2 MR. VARGAS:

3 Q Doctor, if you can tell the jury your educational
4 experience?

5 A I went to college at Yale University. When I graduated
6 to college I went to medical school here in Columbia University.
7 Following that I did a training program in orthopedic surgeon,
8 and I did that at a place called the Campbell Clinic which is in
9 Memphis, Tennessee first orthopedic training program in the
10 United States, and following that, I practiced in Tennessee for
11 a short period of time, and then moved back to New York in 1994,
12 where I have been in private practice ever since.

13 Q Can you tell the jury the name of your practice?

14 A It's called New York Ortho Sports Medicine & Trauma,
15 P.C.

16 Q And doctor, are you board certified?

17 A I am.

18 Q And you're licensed to practice medicine in New York?

19 A Yes.

20 Q And doctor, to come here today, from your practice, did
21 you, what would you be doing if you weren't here testifying?

22 A Today, I would be continuing to see patients in my
23 office.

24 Q Are you being compensated for your time?

25 A I am.

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 Q How much are you being paid?

2 A My office receives a fee of \$8500, and which is
3 partially pays my salary as well as my staff, rent.

4 Q And for the record, in front of you, doctor, is your
5 chart that you brought today, it's marked into evidence as
6 Plaintiff's Exhibit 6?

7 A Okay.

8 Q And there's also a model of the knee, marked for ID, as
9 Plaintiff's 5, and if you want to refer to your chart, you may
10 do so while you testify.

11 A Thank you.

12 Q Did there come a time when you treated a Mr. Kelvin
13 Flores?

14 A Yes.

15 Q And when was that?

16 A Let's see I first saw him on 3/27 of 2018.

17 Q And when you first see a new patient, do you take a
18 history?

19 A Yes.

20 Q What was the history?

21 A I received a history of an accident that occurred at
22 work, following a fall from a height, Mr. Flores indicated that
23 he fell injuring multiple body parts including the low back,
24 left shoulder and right foot, he told me he was initially
25 treated at Maimonides Hospital, where he was taken by ambulance,

1 multiple studies were performed, and he was advised of a small
2 fracture in his low back, he was advised to follow-up with
3 physicians, and he was prescribed multiple medications,
4 including antiinflammatory medications, muscle relaxant and
5 narcotic pain medications.

6 Q Did you perform an exam on Mr. Flores that day?

7 A I did.

8 Q What were your findings?

9 A My findings at that time mostly centered about his
10 lower back, he had severe low back pain, he had tenderness,
11 limited motion of his lumbar spine. In fact, he was able to
12 demonstrate 15 degrees of forward flexion, normal is about 85 to
13 90, and about five degrees of extension, which is leaning
14 backwards, and normal is about 45 degrees, he had pain with
15 what's called facet loading, which is loading or putting
16 pressure on some joints in the smaller joints in the back called
17 the facet joints when he leaned back.

18 He had a positive straight leg raising test on the
19 right, that's an associated with pain in the right leg, when the
20 knee is extended, usually indicates stretching with a back
21 injury, usually indicates stretching of the nerves that run down
22 the leg from the lower back, he complained of some numbness on
23 the bottom surface of the left foot, plantar surface of the left
24 foot.

25 Q And so on the very first visit, he was complaining of

1 pain in his right leg; correct?

2 A Yes.

3 Q But it wasn't specific at that time; correct?

4 A That is correct.

5 Q And upon your examination, did you make recommendations
6 to Mr. Flores?

7 A I did. I took some X-rays I did not see a fracture
8 that had been reported previously, in his foot nor his low back,
9 I placed him a custom molded lumbar brace, low back brace, and
10 at that time, as I tried to do what we call triage, which is to
11 sort out the complaints and the injuries in this case, try to
12 garner some medical records and things like that.

13 Q Did you have any recommendations for future treatment
14 for him?

15 A He would have been -- excuse me, starting with the
16 physical therapy, starting conservative treatment he would have
17 been referred to a pain management specialist for his low back
18 pains, and just see how he did.

19 Q And were any MRIs recommended?

20 A I don't believe on the first visit I recommended MRIs,
21 I don't recall, let's see. I don't believe anything was
22 recommended at the first visit with Mr. Flores.

23 Q Okay, and the next time you saw Mr. Flores?

24 A Let's see, it looks like I next saw him on 4/19/18.

25 Q And at that time, did you do an exam?

1 A I did.

2 Q And what were your findings?

3 A He continued to have tenderness, but tenderness is pain
4 complaints when you push on certain areas, and that was along
5 the about the shoulder on the right, he had tenderness at the
6 bottom of the foot, at the heel, X-ray was taken of the foot,
7 and again, no fracture was noted.

8 So my assessment at that time was continued
9 posttraumatic low back, lumbar pain with disc herniation and
10 symptoms of radiculopathy. A radiculopathy means pain which
11 radiates, radiates from the bottom down a nerve root, and I felt
12 he had a contusion of his foot, some right shoulder pain, and
13 partial tear of the -- what's called the rotator cuff, which is
14 a tenderness in the shoulder.

15 Q And you had mentioned you referred him for pain
16 management?

17 A Yes.

18 Q Was there a particular doctor you had referred him to?

19 A I generally refer people to one of my associates,
20 Dr. Grimm, who works in my office.

21 Q And he's an employee of yours; correct?

22 A Yes, sir, yes.

23 Q And would Mr. Flores see Dr. Grimm the same times he
24 would see you or see him at different times or something else?

25 A You mean the same day?

1 Q Yes.

2 A No, no, Dr. Grimm is an independent physician he would
3 see him at different times.

4 Q And the next time you saw Mr. Flores?

5 A Let's see, I next saw him on 5/31/18.

6 Q And --

7 A That actually looks like it was just a medication
8 refill, I next saw him on 6/14/18.

9 Q And at that time, you examined him?

10 A I did.

11 Q And what were your findings?

12 A At that time, I noted he had continued pain in his
13 right knee, and so the pain which we initially attributed to
14 radicular pain in the right leg had coalesced into right knee
15 pain which he was complaining about, and this was primarily what
16 I noted was over the upper outer quadrant of his knee, so upper
17 outer quadrant which can be confused with radiculopathy that
18 pain going down the leg, because it's in the muscle belly, but
19 on exam, he had a repeatable click, which flexion of the knee,
20 and he had no gross instability, that is a test of the ligaments
21 to see if the ligaments which stabilize the knee are holding up,
22 and he had some fullness in the back of the knee, which usually
23 indicates a collection of fluid, and additionally I noted
24 tenderness in the lumbar paraspinal musculature, the muscle of
25 the spine at the sciatic notch, which is in the buttock that was

1 on the left and he had a positive straight leg raising as well,
2 and he had some decreased sensation over the lateral aspect of
3 the knee, the outside part of the knee on the right, and which
4 would go along again with the radiculopathy, which we had noted
5 before, and I reviewed some MRI findings with him.

6 Q And these MRIs, what body parts were they?

7 A I believe that was the low back at that time, let's
8 see.

9 Q I see a knee on 6/8/18 and a left foot on 6/18.

10 A Let's see --

11 Q I can hand you a copy.

12 A That's okay, I have it here, let's see I have a lumbar
13 MRI from 4/6/18, which showed a disc herniation, with central
14 and bilateral foraminal narrowing, that is a disc herniation,
15 and which is encroaching or in the space where the nerves
16 usually live, I have an MRI of his shoulder, which again showed
17 a partial tear of lateral patella and the soft tissues of the
18 muscles and tendons in the shoulder.

19 Q That's the left shoulder; correct?

20 A That is the left shoulder, correct, and a right knee
21 from 6/8/18, and shows a partial tear of the lateral patella
22 retinaculum, that's is some soft tissue over the outside part of
23 the knee, as well as a tear in the medial meniscus, which is a
24 piece of cartilage within the knee.

25 Q And, doctor, do you usually treat backs?

1 A I do not usually treat backs.

2 Q Your specialty is usually what?

3 A I do what's called extremity orthopedics, which means
4 the arms and legs, so, hips, knees, ankles, shoulders, elbows,
5 sometimes hands.

6 Q And this MRI of the knee, did you personally review it?

7 A I did.

8 MR. VARGAS: Your Honor, and your Honor, with your
9 permission, can we put the MRI on the screen, the MRI is
10 marked into evidence as Plaintiff's Exhibit 1.

11 THE COURT: Granted, proceed.

12 Q And doctor, if you don't mind stepping down to point
13 out what's relevant?

14 THE COURT: Yes, please, if the Court Officer is
15 okay, let counsel.

16 (Whereupon Dr. Kaplan exited the witness stand.)

17 A So, so this is an MRI picture of a knee, it's marked
18 with plaintiff's name, it is a right knee, an MRI is a series of
19 images that's taken, a solid body part and it has the ability to
20 take a solid piece and then open it up, just like you're
21 flipping through the pages of a book, so, can you flip through
22 some of these just to see, those different, if you think of
23 those as different pages of the book as you flip through, it
24 helps you conceive of what this is, and if you hold it right
25 there, so what we're looking at here, this is a right knee,

1 right knee, which would be reversed in the -- like a mirror
2 image, we're looking at the large and small bone of the lower
3 leg here, this is the large bone, this is the small bone, tibia
4 and fibula, above that, is the knee joint, the joint is where
5 the two bones come together, and the kneecap would be on the
6 front, and inside the knee you'll see a series of soft tissues,
7 and those are things that we will be looking at called the
8 meniscus, which is the cartilage that lives inside the joint and
9 helps center the joint and allow for smooth motion of the joint.

10 If you go to, yeah, keep going, going, okay, so I look
11 at these all the time, what we've done is gone from the outside
12 part of the knee where the small and the large bone are seen
13 across the knee to the -- what's a called the medial part of the
14 knee or the inside part of the knee, and we're looking at the,
15 I'm sorry, the end of the thigh bone, we're looking at the
16 joint, and we're looking at the lower leg here, and if I recall
17 to open this, again, that meniscus, that cartilage, you can see
18 part of it is in front and part of it is in back, and if we were
19 to open this up like a book, and see one page, we would see the
20 front and the back, right, so that's what you're seeing here
21 this is the meniscus, the front part of it and the back part of
22 it, this is the back of the knee, this is the front of the knee,
23 and on the MRI, this shows a tear in the back part, posterior
24 part of this meniscus, and this, again, is the medial, inside
25 meniscus, this is a fairly normal looking meniscus, you're

1 looking again at this portion of the knee, and very normal
2 looking dark black triangle, the white, the bright white is
3 fluid, so there's a little joint fluid around the meniscus
4 outlining it making it show up really well.

5 In the back, rather than the dark black contour, you've
6 got sort of a grayish contour and then a fluid line that comes
7 in the knee all the way down to the joint surface, so this is a
8 solid body, so the only way there's fluid in there, if there's a
9 tear in the fluid sneaks in like a leak, so this is a tear, what
10 we're looking at is a tear of the posterior horn of the medial
11 meniscus, they call these horns, if you look at them like this,
12 this look sort of like bullhorns.

13 So this is the posterior horn of the medial meniscus
14 has a tear all the way through it here, and if you skip through
15 the pages, you can see it here, you can see it again here, as
16 opposed to this dark black, you have this fluid look, so that's
17 a fairly large tear, and this actually is when we're getting
18 over all the way to the side here, so you're seeing, a cut like
19 this, you're seeing not the front and the back, but this side,
20 and you can see this tear comes all the way to almost the front
21 of the knee, that's a big tear.

22 Q Is that it, doctor?

23 A Yes.

24 Q You can take your seat.

25 (Whereupon, Dr. Kaplan resumed the witness stand.)

1 Q After reviewing that film, did you have recommendations
2 or did your recommendation for Mr. Flores change?

3 A At that point, I still was recommending conservative
4 treatment, with physical therapy, we discussed or we would have
5 discussed things like taking medications, possibly injections,
6 or other things if, if conservative treatment failed.

7 Q And the next time you saw Mr. Flores, I see is
8 September of 2018?

9 A That is correct.

10 Q And could you tell me, you examined him at that time?

11 A I did.

12 Q And your findings at that time?

13 A He was complaining of what he was describing as
14 numbness over the outside part of the knee. Again, it's a
15 confusing picture, he has a tear inside the knee, but he's also
16 got this radiculopathy, which is a nerve problem, a pinched
17 nerve in the back, which can cause the numbness, so it's hard to
18 sort out his pathology.

19 Q And did he have crepitus at that time?

20 A On exam he did have crepitus, he also have a positive
21 straight leg raising test, and he had some limited flexion,
22 normal knee flexion is 135 to 145 degrees, he can only get to
23 130 degrees.

24 Q And next you saw him on October 26, 2018?

25 A Yes.

1 Q And at that time, you examined him?

2 A I did.

3 Q And were your findings any different at that time?

4 A He was mainly complaining of low back pain at that
5 time, it was really bothering him a lot. The exam is
6 essentially the same, still has crepitus at the right knee, in
7 addition to marked tenderness over the low back.

8 Q I see in your note he's given a lumbar trigger; is that
9 by you or somebody else?

10 A That was by me.

11 Q Trigger point injections, why did you give it?

12 A Trigger point injection is an injection that you can
13 give into the muscle, and I will occasionally do that if a
14 patient is in distress, which is why I'm noting he likely had
15 rather marked pain at that time, just to try to relieve some of
16 the musculature spasm due to the back injury.

17 Q Then you next saw him January 2019, and then
18 February 22, 2019?

19 A Let's see, February 22, 2019, yes.

20 Q At that time, you examined him; correct?

21 A I did.

22 Q And your findings then?

23 A At that time, he was complaining primarily of low back
24 pain, shoulder pain my findings included stiffness in the left
25 shoulder, limited motion of the left shoulder, particularly in

1 raising out to the side, and limited lumbar motion, including
2 60 degrees of flexion, as I told you, it's usually 85 to 90 and
3 15 degrees of extension, and continued to have a positive
4 straight leg raising test, and so at that time, mainly
5 concentrating on his, on his low back, which was quite
6 symptomatic at the time.

7 Q And then you saw him in 2020, in January and February?

8 A Yes.

9 Q And then you saw him on December 22, 2020?

10 A Let's see.

11 Q Sorry to jump around.

12 A That's okay, yes, December 22nd of 2020.

13 Q Yes.

14 A Yes.

15 Q And this is now two years after the accident; correct?

16 A This is two years after the accident, correct.

17 Q And you examined him at that time?

18 A Yes.

19 Q What were your findings?

20 A He was continuing to have pain about the knee and he
21 told me it was constant pain, and he was having episodes of
22 buckling of the knees, which is a mechanical finding when the
23 knee catches and gives out, and, and on exam, at that time he
24 had what's called a positive McMurray's test, which is bending
25 the knee up, moving it side to side, if there's a click, a

1 repeatable click or pop that's associated with a torn meniscus,
2 and at that time, he exhibited a positive McMurray's test, he
3 had tenderness in the joint line of the knee and crepitus with
4 motion on the right, he did not have crepitus with motion on the
5 left. Crepitus is popping and cracking that you hear with an
6 abnormal joint.

7 His knee flexion was even further diminished to
8 120 degrees on the right, on the left it was 140 degrees, so
9 that would be his normal, he had full extension, able to
10 straighten his knee okay, he had some boggy swelling of the knee
11 at that time, and I noted he walked in an antalgic gait, that
12 means he had a limp.

13 Q He also reported his left shoulder was improving; is
14 that correct?

15 A Let's see.

16 Q First paragraph four lines down.

17 A It says left shoulder has been improving, and he has
18 had pain with certain activities, such as reaching over head and
19 attempting to lift things, continues to complain of pain of the
20 left shoulder at the acromioclavicular joint.

21 Q At this time did your recommendation were they the same
22 for Mr. Flores?

23 A I noted I felt he was a candidate for a knee
24 arthroscopy, that's a surgical procedure to address the torn
25 meniscus, and specifically to address the mechanical symptoms

1 buckling and locking of the knee, which again, I felt was likely
2 due to the torn meniscus.

3 Q Did he agree to that procedure?

4 A We had to get authorization for that, he eventually
5 agreed to that procedure, yes.

6 Q When was that done?

7 A The procedure?

8 Q Yes.

9 A That was done.

10 Q 5/26/21?

11 A 5/26/21.

12 Q What kind of procedure is it called?

13 A This is a surgery called an arthroscopy, artho is the
14 word for joint like after arthritis or things like that,
15 anything with artho in front of it means joint, arthroscope is
16 to look inside the joint with a telescope, the scope is the size
17 of a ballpoint pen. You can address things like ligaments,
18 cartilage, ligaments, tendon injuries inside the joint.

19 Q When do you a procedure like this, do you take
20 pictures?

21 A I do.

22 Q Do you have those pictures in your chart?

23 A I do.

24 Q And do the pictures show the torn meniscus?

25 A Absolutely.

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 Q If you could, do you have a pen or do you need a pen?

2 A Say again?

3 Q Do you have a pen?

4 A I don't have a pen, it's in my bag.

5 MR. VARGAS: If I may approach the witness?

6 THE COURT: Yes.

7 MR. VARGAS: (Approaching.)

8 Q If you can circle where the torn meniscus is, or if you
9 need a marker?

10 MR. MINERO: Can we have a side bar?

11 THE COURT: Sorry, I can't hear you.

12 MR. MINERO: Side bar, side bar.

13 THE COURT: Yes.

14 (Whereupon, an off the record bench discussion was
15 held.)

16 THE COURT: Members of the jury, we are going to
17 take a five-minute recess.

18 COURT OFFICER: All rise, jury exiting.

19 (Whereupon, the jury exited the courtroom.)

20 MS. SUED: Can we ask the witness to step down?

21 MR. VARGAS: You want the witness to step down?

22 THE COURT: Yes, please instruct your client.

23 (Whereupon, Dr. Kaplan exited the witness stand and
24 the courtroom.)

25 THE COURT: Okay, take a second, back on the

1 record.

2 MR. AARON: Your Honor, with respect to the
3 testimony just now about intraoperative photographs that the
4 expert relied on and spoke about in front of the jury
5 indicating the presence of a meniscal tear, in comparing the
6 subpoenaed records that were received in the courthouse for
7 the witness's facility, those intraoperative photographs are
8 not contained within the subpoenaed records.

9 Moreover, back on February 11, 2025, NYSCEF
10 document Number 176 for this case, my office filed a notice
11 for discovery and inspection specifically seeking
12 inoperative photographs.

13 THE COURT: What date?

14 MR. AARON: Of the date, the date of the e-filing
15 was February 11, 2025.

16 THE COURT: Okay, and do you know the NYSCEF
17 number?

18 MR. AARON: I do, 176, your Honor, and within that
19 demand for authorization, my office specifically demanded
20 authorizations for the release of intraoperative photographs
21 pertaining to May 26, 2021, knee surgery, and so this is
22 discovery that had been demanded months and months before
23 trial, it was discovery that was subpoenaed from the
24 doctor's office, and it was never provided to us.

25 THE COURT: You didn't receive any response in that

1 discovery demand?

2 MR. AARON: Not having the actual red welled with
3 me, I don't know, I'm reading from what we demanded back
4 then, but I can tell you, your Honor, the fact that our
5 expert disclosures, Dr. Gidumal, who examined Mr. Flores and
6 reviewed the records, he doesn't have these intraoperative
7 photographs, my office never received them when we
8 subpoenaed Dr. Kaplan's records in comparing what the
9 courthouse now has, those inoperative photographs he just
10 testified to, they're not here and so, we feel it's
11 incredibly prejudicial to us at this point to learn about
12 the existence of intraoperative photographs during this
13 witness's testimony and for that reason, your Honor, we
14 can't unring the bell now that he's testified that these,
15 that the photographs show a meniscal tear when we've never
16 had this evidence before despite demanding, first we
17 demanded it when we sent out the first discovery demands for
18 release of all medical records and medical authorizations, a
19 very specific demand months and months before trial as well
20 as a subpoena to the courthouse for those records.

21 For that, your Honor, we believe that the testimony
22 should be stricken in its entirety as it's incredibly
23 prejudicial to the defendants at this point. Our experts
24 don't have that opportunity where the jury has already heard
25 there is this tear there, and we find that it's, at this

1 point, we don't believe a curative instruction on this would
2 be sufficient.

3 MR. MINERO: Yes, Mr. Aaron, your Honor, we really
4 can't unring the bell, I'm not sure what, if any. Curative
5 instruction could truly have the jury take this out of their
6 heads. There's a picture there, there are pictures of a
7 meniscus tear, the operative report was placed into response
8 to the subpoena, I don't know why it wasn't included, but it
9 wasn't, the request for specific for inoperative photos,
10 they were never provided either to Mr. Aaron.

11 I admittedly I'm late to the game, I got copies of
12 copies of documents, I have never seen them, they're also
13 not in the subpoenaed records, which, I don't know what the
14 cure can be, Judge, other than as Mr. Aaron said,
15 Mr. Kaplan's testimony has to be stricken.

16 THE COURT: Dr. Kaplan.

17 MR. MINERO: Dr. Kaplan's testimony has to be
18 stricken, I'm sorry, completely from the court's record.

19 THE COURT: Mr. Vargas.

20 MR. VARGAS: Well, two points; number one, I showed
21 counsel, three attorneys sat there and looked through this
22 chart, the photographs were right there, so if they had an
23 objection, they should have stated before it was marked into
24 evidence, but they missed it, okay, three sets of eyes
25 couldn't see it, plain as day.

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 I have a way of fixing it, their expert can comment
2 on it, I won't cross him saying you didn't review the
3 inoperative reports, he can say he reviewed them, we will
4 take it as his word, there won't be any cross here saying he
5 never looked at them providing to coming in to testify and
6 he can, I doubt he would change his opinion anyway, they
7 have looked at the MRIs, they have examined the plaintiff
8 and as far as they're concerned, he has no injury and if he
9 ever did have one, it's brand spanking new, just because
10 there's some photographs won't change his opinion, but
11 technically they are in evidence, because counsel looked
12 through the file and consented to it. I'm willing to be
13 nice and let their expert comments on it, like he looked at
14 them back when he examined the plaintiff.

15 THE COURT: The curative instruction works for the
16 defense?

17 MR. AARON: I mean, your Honor, how is my expert
18 going to get the original photographs to review them before
19 he testifies?

20 MR. VARGAS: You can use your phone, scan it and
21 email.

22 MR. AARON: You know it's not sufficient when
23 Dr. Kaplan is referring to photographs, hard copy films
24 color copy and everything in front of him.

25 THE COURT: What is your request, to strike the

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 testimony in its entirety, what are you looking for here?

2 MS. SUED: Strike the testimony.

3 MR. AARON: I believe the curative instruction
4 would be to strike his testimony as to the photos and any
5 further reliance on them.

6 THE COURT: Because there's an interesting and
7 unique situation with this case which the equities balance
8 out not to strike the testimony, this case goes before
9 Covid, an interesting roller coaster back and forth not like
10 a standard case.

11 If discovery was easily available in this situation
12 we did review the photographs in advance, I could have
13 missed it also, with three sets of eyes I could have missed
14 it, and your expert physician, could have, will have ample,
15 when are they coming in to testify, tomorrow, next week?

16 MR. AARON: I believe's he is coming next week.

17 THE COURT: Should be sufficient time to review it,
18 I can reserve decision now on the motion, and I can give you
19 a chance to do some briefing if you want to, give me cases
20 that would be sufficient, I can read it.

21 Right now I'm inclined not to strike it because,
22 due to the nature of the length of this case and the history
23 of this case and the procedural posture of this case, I
24 wouldn't be comfortable striking something, the unique
25 characteristics surrounding this case; however, case law is

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 compelling like the other case, you give me a case, by the
2 book.

3 MS. SUED: Your Honor, the problem is if you
4 reserve your decision now, is that then we're going to have
5 a witness continue his testimony relying on those photos.

6 So, in the event that you grant our application,
7 we're going to have an entire testimony about this, this
8 photos and that's highly prejudicial, we, your Honor, this,
9 we have my office has tons of cases with Dr. Kaplan, this is
10 a common practice, this is specific.

11 THE COURT: I can't pass judgement on a top of
12 anything, I understand you have your own experiences, the
13 court's barometers are cases that come before it or after
14 it, the Court's barometer is the case at hand now.

15 MS. SUED: But, your Honor, just so this is
16 specifically why we sent this discovery demand back in
17 February of 2025, because we wanted those photos and they
18 were not provided.

19 Plaintiff's counsel gave us an authorization for
20 Dr. Kaplan, we processed that authorization months after the
21 surgery, we received the operative report and the photos
22 were not included. After that, we processed the
23 authorizations again, so that Dr. Kaplan would give us the
24 operative reports, and we did not receive them.

25 MR. VARGAS: Your Honor --

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 MS. SUED: Then what we did, we sent a discovery.

2 THE COURT: Let her finish, let her finish.

3 MS SUED: To plaintiff --

4 MR. VARGAS: My investigator says the Manhattan
5 Surgical records should have the photographs.

6 THE COURT: What is that?

7 MR. VARGAS: That's where he does the surgery. If
8 they served a subpoena and they served an authorization for
9 that, they should have gotten it.

10 MS. SUED: Your Honor, the Manhattan Surgery
11 records have the operative photos for the injections, I came
12 myself to the courtroom to look at the subpoenaed records
13 room a week ago.

14 THE COURT: I signed an order for everybody.

15 MS. SUED: Right, right.

16 THE COURT: You accessed.

17 MS. SUED: The inoperative photos there are the
18 injection photos, not the surgery photos, so, we can look,
19 you know, I may have missed them, I missed them today when I
20 reviewed.

21 THE COURT: Let's take one more hard look, there is
22 certain equities that balance on this case that don't apply
23 to a normal situation.

24 MR. AARON: Your Honor, in the event my expert will
25 need to view these records, the only way he can review them

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 is through the subpoenaed records, so he would need access
2 to view them as well, outside the presence of everybody else
3 as he's preparing for his testimony.

4 MR. VARGAS: I will consent if they want to take
5 the photos and go show them.

6 MR. AARON: First, I need to know what the Court
7 rules are for subpoenaing records, that is my issue.

8 THE COURT: With the Court Officer in the room, I
9 have no issue setting that out, I can't cart blanche say
10 take them out of the building, you can't. I don't have
11 authority.

12 MR. MINERO: I don't know about taking the evidence
13 out of the chain of custody.

14 THE COURT: I don't have the authority to do it.

15 MR. MINERO: No.

16 (Whereupon, an off the record discussion was held.)

17 THE COURT: It has to be here in the courthouse I
18 will definitely give you that, if that's a courtesy, that's
19 a legal right to remedy, it goes back to the equities in
20 this case.

21 MR. MINERO: Review in the courtroom without anyone
22 around.

23 THE COURT: With a Court Officer present to review
24 it.

25 MR. AARON: Of course.

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 THE COURT: Before lunch or time when the officer
2 is on call, we don't want to burden them with that.

3 Look, quite frankly, cases like this, I have dealt
4 with this, with however the discovery went, we changed
5 counsel back and forth. I'm not comfortable striking
6 testimony so easy, I might have done it in another case in a
7 heartbeat.

8 MS. SUED: Your Honor, how do you want to proceed
9 then, because if you're reserving your decision are we going
10 to allow the witness to continue testimony on the photos?

11 THE COURT: He gave me the cure, you can have him
12 come in at a convenient time to review the photos, he has
13 the operative report, doesn't he?

14 MS. SUED: Yes.

15 THE COURT: So the operative report, he's an expert
16 in the field, how much time would he need to review it, not
17 a whole day, I gather, he would need from 15 minutes to a
18 half-hour, we can custom tailor the time for him, if
19 necessary.

20 MR. MINERO: Judge, one of the issues is, we
21 currently have a, you know, a strategy that we plan on
22 utilizing, or we're going to effectively have a situation
23 where you know our doctor is looking at these photos for the
24 first time, and then depending on what he sees, doesn't see,
25 what his opinions are, we may have a very different

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 strategy, we're going to kind of plan on the fly.

2 MR. AARON: Essentially, I don't want to speak for
3 Mr. Minero, but the -- due to the fact that the expert has
4 already prepared a report, right, I'm sure Mr. Vargas is
5 going to cross-examine him on his report could potentially
6 change his opinion based on what he sees in these photos, so
7 had he had them like he should have had them at the time
8 he --

9 THE COURT: I understand.

10 MR. AARON: What would be in this record would be a
11 much accurate of his opinion than seeing inoperative photos
12 15 minutes before he testifies at trial, for that reason,
13 your Honor, I think it adds to the overall prejudicial
14 nature of the case, of this particular issue.

15 THE COURT: Mr. Vargas.

16 MR. VARGAS: It's bigger reversible error to have
17 something in evidence and then all of a sudden you're
18 altering what's in evidence, they consented, that's the
19 problem, they all looked at it, I gave them ample time to
20 look at, it I wasn't trying to sneak it in, I didn't know
21 anything about it.

22 THE COURT: No one is accusing you of that.

23 MR. VARGAS: That's why I'm saying I showed it to
24 them, we marked it in evidence. Once it's in evidence, you
25 start tampering with it, that's definitely reversible error.

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 MS. SUED: Your Honor.

2 MR. VARGAS: I'm willing to help them out, they
3 want to look at, if they can take it home, if it's
4 allowable.

5 THE COURT: It's not allowable, a chain of custody
6 issue.

7 MS. SUED: Your Honor, we consent to the records
8 absolutely in good faith. We're not saying Mr. Vargas hid
9 this from us, I would never say that, we consented to this
10 coming in with the understanding that we were going to
11 compare his chart with the chart that was in the subpoenaed
12 records room if the jury asked for to review it, and it's
13 precisely because of that, because a doctor comes with a
14 chart, we have five minutes to look at whatever, hundreds of
15 pages, and then we come into this, this is the problem.

16 So we consented to those coming in, in good faith
17 with the understanding that we were going to compare it to
18 the chart that is in the subpoenaed records room, subject to
19 any, also redactions.

20 I just to add to what Mr. Aaron just said, it is, I
21 mean, there might be a tear in those photos, we don't know,
22 and our expert doesn't know, so it is --

23 THE COURT: Here is the question to ask, I don't
24 mean to cut you off, my apologies the question, can we keep
25 the testimony on the record, but not admit the photos in

1 front of the jury?

2 MR. VARGAS: We will redact the photos, how about
3 that, no photos.

4 THE COURT: Does that work?

5 MR. AARON: If they're in evidence.

6 MS. SUED: And the problem is the jury has the
7 testimony saying that there are tears in those photos. If
8 we redact them, how is my expert going to say one way or the
9 other, I agree or don't agree.

10 MR. VARGAS: I won't bring up it up in the photos.

11 THE COURT: At this point the photos are over, how
12 does that work?

13 MR. VARGAS: You just instruct the jury, disregard
14 the photos that were mentioned, only focus --

15 THE COURT: Focus on the testimony itself.

16 MR. VARGAS: Yes.

17 MR. MINERO: Judge, we can't agree to that.

18 THE COURT: I don't expect you to agree to it.

19 MR. MINERO: With the Court's going to do what the
20 Court believes is right.

21 THE COURT: Under these set of circumstances, it is
22 a lengthy old case with a long history, with changed
23 counsel. Yes, this is not your typical case with
24 stereotypical, a world turned upside down a hundred times
25 over on this case.

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 MR. MINERO: We have been proceeding, Judge, in a
2 case there's no photos and the pathology is what the
3 pathology is.

4 THE COURT: That might be a solution, settle the
5 case.

6 MR. VARGAS: That's great idea.

7 MS. SUED: What was that?

8 THE COURT: Settle, I'm not saying to force a
9 settlement.

10 MR. MINERO: But it's a bit --

11 THE COURT: Arbitration can handle those issues
12 over here, but in all sincerity a case of this length and
13 old you're blending many different levels of people, I have
14 to balance out in a way that's fair to everybody.

15 So we will having the photographs reviewed is not
16 an option because they're claiming trial strategy, I
17 understand that, the cat is out of the bag, you can't unring
18 the bell, I agree the damage is done that way.

19 The testimony is the testimony, so no more
20 photographs, we're not going to give the photos, we will
21 strike the photographs from the evidence, and your expert
22 will deal with the other issues.

23 MR. VARGAS: I will tell Dr. Kaplan right now not
24 to mention the photos.

25 MS. SUED: Just so I understand, your Honor, so the

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 testimony of Dr. Kaplan telling the jury that there are
2 tears in those photos is that stricken from the record.

3 THE COURT: We're striking any language referring
4 to the photos. If we're referring to tears, just his bear
5 testimony of what he observed, he could observe a tear in
6 the leg as a physician, and that your doctor could fight it
7 back, your argument is his strategy might have been
8 different if he had the pictures showing the tear from the
9 get-go, I get it.

10 However, as an expert he doesn't need an expert to
11 come to an opinion. If he's saying that there's a tear, I
12 treated the tear, I have a picture that's fine.

13 Anything referencing the word "photograph," we will
14 move to strike. I'm not trying over here to make it unduly
15 prejudicial for anybody, I'm trying to find the proper
16 balance based on the length of this case.

17 Does that work for you, Mr. Vargas?

18 MR. VARGAS: Yes, your Honor.

19 THE COURT: You don't have to consent, you can take
20 an exception.

21 MR. MINERO: I understand, I respectfully disagree
22 and reserve the right to potentially move for a mistrial at
23 the end, if need be.

24 THE COURT: We will deal with that issue at the
25 end. Right now the ruling will be that any reference in the

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 testimony from Dr. Kaplan, I won't tell this to the jury, we
2 will strike it, sustained, never say why, we just say
3 sustained, we're going to strike from the record any
4 reference to photograph, any testimony as a physician he
5 sees a tear over there, he can say it, there's nothing wrong
6 with that.

7 Had he testified from the get-go, it was a tear
8 that would have been sufficient also without a photograph.

9 MS. SUED: Your Honor, he says he sees the tear in
10 the MRIs, that's fine.

11 THE COURT: But the photograph.

12 MS. SUED: But if he says he sees a tear in the
13 photos, that's --

14 THE COURT: Thrown out, we're striking that portion
15 of those words from the testimony.

16 MS. SUED: Right, because we are -- the whole case
17 is the Plaintiff's treating physicians sees a tear in the
18 MRIs, my expert sees the MRIs and sees degenerative, so
19 that's fine, if he's referring to the MRIs, but not to the
20 photos.

21 THE COURT: Yes, MRI is different, MRI, everybody
22 has and it's standard fair to give over, we're striking what
23 needs to be stricken and keeping what needs to be retained
24 and go further.

25 The Court instructs counsel not to inquire anymore

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 on the photographs, and the photographs will not be given to
2 the jury, they are removed from the evidence, I don't know
3 how the marking is done, it's up to the clerk to make that
4 determination and the, we will go on.

5 MR. AARON: Real quick, I don't mean to belabor the
6 point, I think for clarity sake, I think the comment was
7 that he can testify that he saw it during surgery, he can't
8 really testify to that, he can only see it by the
9 photographs in the surgery.

10 MR. VARGAS: Come on.

11 THE COURT: Anything he saw during surgery and he
12 was there as a physician, he has to see --

13 MR. AARON: Fair enough.

14 THE COURT: -- with the naked eye, with the scope
15 saw it or the glass, saw what he humanly saw or the computer
16 saw, he can't say this is a picture of what it looked like,
17 that he can't do.

18 Any photograph is stricken from the record, you
19 mention the word, the photographs are not coming into
20 evidence. Basically, we're tailoring and carving out for
21 the testimony what you consider to be tainted testimony.

22 MR. AARON: Thank you.

23 THE COURT: It works for everybody?

24 MS. SUED: Thank you, your Honor.

25 MR. MINERO: Thank you.

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 THE COURT: Do you want me to make any mention to
2 the jury at this stage or leave it alone, keep it sustained
3 like it was sustained.

4 MR. AARON: Maybe before the jury comes in, if I
5 can put my exception to the ruling along with Mr. Minero.

6 THE COURT: Please, I want you to put it, I expect
7 you to take an exception.

8 MR. AARON: Thank you.

9 THE COURT: I won't mention anything, leave it as
10 sustained, I will only confuse them more, unless you
11 disagree, Mr. Vargas?

12 MR. VARGAS: I don't think it's that big of a deal,
13 I guess there are people that think it's that big of a deal.

14 THE COURT: Leave it sustained, we will go forward,
15 15 minutes I guess to wrap up, alright.

16 MR. MINERO: In light of this, we will finish with
17 the direct and then start cross?

18 THE COURT: That's what I think makes sense much
19 more is starting cross.

20 MR. MINERO: Yes, we have some things we want to,
21 you know with, what's there, what's not there, we have to
22 consult and just make sure we're ready.

23 THE COURT: Alright.

24 MR. VARGAS: So we have to bring Dr. Kaplan back?

25 THE COURT: The problem is coming the timing,

Dr. Jeffrey Kaplan - Plaintiff - Direct

1 starting the cross until we finish, do you want to close by
2 4:30; do you have enough time?

3 MR. VARGAS: I will finish in like five minutes.

4 THE CLERK: Judge.

5 MR. VARGAS: I just want to get it done.

6 THE COURT: Let's start the cross around 4:30.

7 MR. AARON: If the Court is willing to go to 4:30.

8 THE COURT: I will go to six o'clock, I want to get
9 this over already, we will do what we want to do, I can't,
10 they will kill me for that. First, they will shut the air
11 conditioner off as a symbol to leave, it happened to us the
12 other day.

13 (Pause in the proceedings.)

14 COURT OFFICER: All rise, jury entering.

15 (Whereupon, the jury entered the courtroom.)

16 THE COURT: You may be seated. The trial resumes.

17 Q Doctor, during the surgery, did you observe, what did
18 you observe?

19 A During the surgery, looking through the telescope, I
20 saw a -- what's called a complex tear of that cartilage called
21 the medial meniscus which you demonstrated on that MRI, and I
22 also saw an injury to the joint surface of the thigh bone, and
23 multiple, what are called loose bodies, which are pieces that
24 form sort of peals, when there's damage to the joint surface,
25 and synovitis, which is inflammation in the joint, due to an

1 abnormality.

2 Q Were any of those findings you saw, was that more than
3 what you saw on the MRI?

4 A Some of the things you don't see on the MRI they don't
5 show up well, particularly damage to the joint surface, it
6 doesn't have a blood supply so it doesn't get inflamed.

7 Q For a surgery such as this, how long would your
8 expectation be for healing of the leg or the knee?

9 A Surgery like this, usually six to 12 weeks for things
10 to start to normalize it.

11 Q Going back to your chart, you next saw him postop visit
12 on June 3, 2021; correct?

13 A Yes.

14 Q And then July 21, 2021?

15 A Yes.

16 Q And then September of 2021, and February of 2022, and
17 I'm going to skip ahead to 2023, January 11th, to 2023?

18 A Okay.

19 Q Did you examine him at that time?

20 A I did.

21 Q This is more than two years after the surgery; correct?

22 A It is -- approximately two years later.

23 Q What were your findings when you examined him?

24 A At that time, he had motion with 130 degrees of
25 flexion, full extension, he had tenderness of the joint line

1 over the patella tendon, continued to have crepitus, with
2 positive patella grind test, which means the joint between the
3 patella and the end of the thigh bone is what was grinding, he
4 had a negative McMurray's test, that's for the torn meniscus and
5 no ligamentous instability.

6 Q Now, based on the surgery performed on him, these
7 findings you found in January of 2023, is that consistent with
8 what you would expect from this surgery or is it different?

9 A No, it is what we would expect, he has crepitus, which
10 is a result of the abnormal surface of the joint, that's the
11 cracking and popping of the joint, it's consistent with what's
12 called posttraumatic arthritis in the joint, negative
13 McMurray's.

14 We cleaned out the meniscus tear, and some limited
15 flexion, because of the posttraumatic arthritis and the change
16 of the anatomy in the joint.

17 Q And based on that exam at that time, did you have
18 different recommendations for him for treatment?

19 A At that time I treated him with a medication called
20 Euflexxa, which is basically a joint lubricant, and it's a
21 viscoelastic fluid, it's called, and helps separate the bones of
22 the joint and allow for them to move a little more smoothly to
23 reduce the arthritic symptoms.

24 Q Is there a standard for how you're supposed to
25 administer this drug, is there a certain amount of time, or --

1 A It's given as a series of three injections, we give
2 three injections over approximately three weeks, and you can
3 give that medication every six months, generally, it lasts six
4 months to a year, but, depending on the amount of arthritis
5 that's present and where it's present in the joint.

6 Q Why is it three injections?

7 A It's three injections, because it's a big volume of
8 medications, and if you gave all of the volume at once, it would
9 stretch the joint and be very painful and difficult to
10 administer.

11 Q Did you give him three injections in 2023?

12 A Yes, I did.

13 Q What was the result or did he report back if it helped,
14 I'm looking at March 18, 2024, I think it was after the three?

15 A Let's see, the third injection was given on 3/25/23,
16 and then the next visit, let's see, on that date he said he said
17 he's getting some relief from the second injection, so we
18 administered the third injection.

19 Q And did you ever give him joint lubrication injections
20 again?

21 A If I recall --

22 Q I'm looking at, April 17, 2024?

23 A So April 2024, he was complaining of pain in the knee
24 with stair climbing and he -- when he -- we received
25 authorization and administered another series of injections to

1 the knee.

2 Q And then jumping ahead to February, I'm sorry, July 8,
3 2024?

4 A Okay.

5 Q This is after you gave him another series of three
6 injections; correct?

7 A This was, after his second series of injections.

8 Q And did he report back as to how it felt after the
9 injections?

10 A My note says he had great improvement following the
11 series of injections, he was able to walk longer tolerating
12 stairs better and bending his knees with more ease.

13 Q And these injections, are they intended to fix the
14 problem?

15 A They're intended to treat the problem, they don't cure
16 the problem, that's why you have to normally give them every six
17 months to a couple of years.

18 Q And doctor, I want you to assume earlier today, there
19 was testimony from a Dr. Mandelbaum, pain management doctor?

20 A Yeah.

21 Q Where he recommended joint lubrication injections, a
22 series of three to the right knee every 12 months, a lifetime;
23 would you agree with that?

24 A I think that's a good guess, these things, again, last
25 every six months to a year, in general, depending on where it

1 is, usually the timeframe in between each injection lasting
2 decreases as because as arthritis progresses over time, but I
3 think that's a reasonable guess.

4 Q And he also recommended steroid injections to the right
5 knee once every 18 months for a lifetime?

6 A Steroid injection is done for inflammation in the knee,
7 it's not for the arthritis, but for the symptoms of arthritis,
8 and again, I think that's a reasonable hypothesis.

9 Q And physical therapy for the knee, would that be any
10 help?

11 A Physical therapy is always helpful, at this point it
12 would just be sort of maintenance, and so, physical therapy
13 every now and then is certainly reasonable.

14 Q What about visits to orthopedic doctors, once --

15 A So ideally.

16 Q -- once every six months for life?

17 A That's once or twice a year, yes, six months to a year
18 would be reasonable, yes.

19 Q And doctor, do you have an opinion, with a reasonable
20 degree of medical certainty, as to whether the tear of the
21 meniscus in the right knee is causally connected to the
22 accident?

23 A It is my opinion that it is causally related to the
24 accident, this gentleman reported no prior knee problems, he
25 started having buckling of the knee, which is a symptom of a

1 meniscus over time, which likely was related to his initial,
2 initial leg pain which we interpreted initially as
3 radiculopathy, but as he continued to walk on it, continued to
4 tear, he became symptomatic. It is my opinion since he had no
5 prior problems it's likely related to the accident.

6 Q Do you have an opinion, with a reasonable degree of
7 medical certainty, as to a future prognosis?

8 A Future prognosis means he would have in the medical
9 future based on what you know, we have already said he has
10 posttraumatic arthritis, posttraumatic arthritis is permanent
11 and gets worse over time. We have addressed meniscal problem,
12 the problem with the meniscus that changes the anatomy of the
13 joint, we know he has damage to the joint surface which leads to
14 arthritis.

15 So it's a relatively poor prognosis, he will always
16 have knee symptoms, limited motion he has had for years and
17 likely progress over time.

18 MR. VARGAS: Thank you doctor, no further
19 questions.

20 THE COURT: Counselor.

21 CROSS EXAMINATION BY

22 MR. MINERO:

23 Q Good afternoon, doctor.

24 A Hi.

25 Q When you first examined Mr. Flores, did you ask him the

1 particulars of the accident that he was involved in?

2 A I don't recall specifically 2018, so he told me he had
3 a fall from a height, and that's what I recorded.

4 Q Did you ask him how he landed, meaning which parts of
5 his body hit the ground?

6 A Again, I can, I don't have an independent recollection
7 of that, and I just reported a fall from a height.

8 Q There was testimony that Mr. Flores landed on the left
9 side of his body?

10 A Okay.

11 Q Would that be consistent with the initial complaints
12 that he made to you; correct?

13 MR. VARGAS: Objection to the form, I think's
14 assuming, he has not testified yet.

15 THE COURT: Please rephrase the question.

16 Q I believe that there's going to be, hypothetically
17 testimony that Mr. Flores landed on the left side of his body in
18 that the initial medical records from Maimonides Hospital will
19 show that he landed on the left side of his body; was that ever
20 told to you?

21 A Not that I recall.

22 Q But that information would be consistent with the
23 complaints that he initially made to you at your first visit
24 with him; correct?

25 A He certainly complained more of left-sided pain when

1 he, when I saw him, but he also had right leg symptoms when I
2 saw him.

3 Q Now, you mentioned that radiculopathy can sort of, I
4 guess, hide some of the symptoms of a knee issue; correct?

5 A They can certainly confuse the issue, correct.

6 Q But there are tests that can be done to determine
7 whether the pain is radiculopathy or knee pain; correct?

8 A Those tests were eventually done.

9 Q Was it done that day?

10 A No, because he had severe back pain, we're trying to
11 sort it out. Listen, the first visit, that's the way it goes
12 with multiple trauma.

13 Q That McMurray test, that was not done?

14 A I don't recall doing it the first day.

15 Q But if you had done it, is it fair to say that test
16 would have concluded whether or not there was a meniscus tear?

17 A No, it's positive when there's a large tear in the
18 meniscus, it's an indication there's one there, a negative
19 McMurry test doesn't rule out a meniscus tear.

20 Q Was part of your examination the manipulation of the
21 knee joint?

22 A I did a straight leg raising which is to straighten the
23 knee joint, yes.

24 Q Did you do the turning and the twisting?

25 A I don't recall.

Dr. Jeffrey Kaplan - Plaintiff - Cross/Mr. Minero

1 Q Was there any sign of crepitus at that time?

2 A I don't recall, I didn't note it.

3 Q Did you check for crepitus?

4 A Again, I don't recall, I did not note it in my note.

5 Q Okay. So as of the first visit, there's no indication
6 that he had a knee injury; correct?

7 A The thought was he had a radiculopathy, but he had
8 right leg pain.

9 Q There's no diagnosis of the first attempt --

10 A Correct.

11 Q -- immediately after --

12 A Correct.

13 Q -- there's no indication of a knee injury?

14 A That's correct.

15 Q In fact, there's a couple of visits right, before
16 there's a finally a determination there was a knee injury?

17 A I believe on the third visit, we were able to look at
18 the knee.

19 Q Now, at the same time as he was being seen by you, he
20 was also being seen by Dr. Grimm; correct?

21 A Yes.

22 Q And Dr. Grimm is an employee not a co-owner of the
23 company; is that correct?

24 A That is correct.

25 Q And that was true back then too?

1 A Yes.

2 Q Since you were both treating Mr. Flores, did you share
3 your notes?

4 A We shared them over time, yes, not the day of.

5 Q Right.

6 A Yes.

7 Q But if Dr. Grimm had examined Mr. Flores in between one
8 of your visits, would it be your custom and practice to review
9 his notes before your next examination of Mr. Flores?

10 A It varies, it varies.

11 Q Do you know if any of Dr. Grimm's notes indicated knee
12 pain early on in your examination of Mr. Flores?

13 A I haven't reviewed those recently.

14 Q You didn't believe it was important to review what your
15 colleague had said about his treatment of Mr. Flores when you
16 were going to examine Mr. Flores again?

17 A I said I haven't reviewed them recently, I don't -- I
18 don't recall.

19 Q You don't know what's in there.

20 With respect to the meniscus tear, do you believe
21 that's fully resolved as we sit here today?

22 A We took out a good portion of the meniscus, so yes.
23 That has other effects on the joint, it decreases the cartilage
24 padding, decreases the mechanics of the knee.

25 Q At some point in time, Dr. Grimm was no longer treating

1 Mr. Flores for pain management; is that correct?

2 A I just understand that Dr. Mandelbaum was here, so, I
3 guess so.

4 Q You don't know the particulars of that?

5 A I don't.

6 Q Was it because Dr. Grimm -- strike that.

7 Was it because they didn't want Dr. Grimm to testify in
8 court here?

9 A I have no idea, I don't know why they wouldn't.

10 Q Is Dr. Grimm still authorized to conduct medical
11 examinations for Worker's Compensation?

12 A Is this a Worker's Comp case?

13 Q That is not my question.

14 MR. VARGAS: Objection, your Honor.

15 THE COURT: Overruled.

16 A The answer is Dr. Grimm has resigned from Workers'
17 Comp. He no longer wants to treat Workers' Comp. patients.

18 Q Do you know the reason why?

19 A He doesn't want to treat Worker's Compensation patients
20 any longer.

21 Q It has nothing to do with allegation against him?

22 MR. VARGAS: Objection, your Honor.

23 THE COURT: Sustained.

24 MR. MINERO: No further questions.

25 THE COURT: Counsel.

1 CROSS-EXAMINATION BY

2 MR. AARON:

3 Q Good afternoon, Dr. Kaplan.

4 A Hi.

5 Q The first time you saw Mr. Flores that was on March 27,
6 2018?

7 A That was on May 27, 2018, yes.

8 Q And that was, shortly after the accident, maybe about a
9 week or so?

10 A Yes, three days after the accident.

11 Q And you told us before when Mr. Vargas was asking you
12 questions that Mr. Flores reported right leg pain at that time?

13 A On examination, yes.

14 Q On exam?

15 A Yes.

16 Q You don't see that anywhere in your notes; is that
17 correct?

18 A Yes, it is in my note he had straight leg raising,
19 positive on the right, that's what that is.

20 Q When you look at your notes, the report from that
21 visit, you see the history of present illness?

22 A You're asking me about the subjective transcription.

23 Q I'm asking what it says under "History of Present
24 Illness"; do you see that section?

25 A I do not.

1 Q Subjective transition?

2 A That's what I was asking about.

3 Q Subjective transcription is that a note?

4 A Yes.

5 Q Does it say anywhere in that subjective note that
6 Mr. Flores fell from a height injuring his right leg?

7 A It does not. As I noted before, I read Mr. Flores fell
8 from a height injuring his low back, left shoulder and left
9 foot.

10 Q And that's subjective transcription, is that something
11 you take from the patient?

12 A That's what "subjective" means.

13 Q Then as the patient is telling you that, you're
14 recording that in your notes?

15 A That is correct.

16 Q So the subjective transcription for Mr. Flores, he
17 wasn't reporting anything wrong with his right leg?

18 A He didn't report his right knee, he reported the pain
19 in his back primarily.

20 Q Alright, you told us before that Mr. Flores was
21 diagnosed with a fracture in his low back at the hospital?

22 A That's what the notes indicated from the hospital,
23 yeah.

24 Q Did you have a chance to review the testing that was
25 done at the hospital?

1 A I did not, no.

2 Q Did you ever come to learn that, what was diagnosed was
3 a suspected L1 pedicle fracture?

4 A What was noted in the chart was indicated a pedicle
5 fracture, so suspected means, they put it down as it was pedicle
6 fracture.

7 Q Did you ever take any independent investigation to
8 determine whether that pedicle fracture was there or confirm it
9 was suspected?

10 A I took a plain X-ray. You don't see a pedicle
11 fracture, that's why you do a CT scans, and I noted no fracture,
12 no acute bony change, that's no fracture there. Obviously, his
13 pain was severe enough they suspected a fracture.

14 Q Did you ever review the CT scans that were done on the
15 day of the accident?

16 A I don't believe I have ever seen those CT scans.

17 Q Are you aware that a CT scan of his lower back was done
18 on the day of his accident?

19 A I believe it was.

20 Q Do you know what the findings were?

21 A I don't know exactly what the findings are.

22 Q Did you refer Mr. Flores to Dr. Grimm?

23 A I believe so.

24 Q And you're aware that Mr. Flores saw Dr. Grimm on
25 June 5, 2018?

1 A I believe you on that.

2 Q And are you aware that at the time that Mr. Flores saw
3 Dr. Grimm on June 5, 2018, he didn't make any complaints about
4 his right knee?

5 A Okay.

6 Q In fact, the first time Mr. Flores made any complaints
7 to you, was on June 14, 2018?

8 A On that date I noted continued complaints of pain about
9 the knee, because as I say, at the first visit, he had severe
10 back pain with a positive straight leg raising, which can
11 overlie the entire leg, which is what we suspected due to the
12 severity of his back pain.

13 Q But you just didn't note down that he had any injury or
14 at least he wasn't reporting any injury to the knee in that
15 first visit; correct?

16 A That is correct, he was complaining of leg pain on
17 exam.

18 Q Sir, can you approximate how many times you saw
19 Mr. Flores in 2018?

20 A In 2018?

21 Q An approximation is fine.

22 A Do you have a count there?

23 Q I don't.

24 A I will go through the notes that's fine, I didn't know
25 if you had a count already, I was going to agree with you, one,

1 two, three, four, five, six, seven, approximately seven times.

2 Q And you were paid for those treatments right?

3 A Sorry.

4 Q You received payment for those treatments?

5 A I don't know the answer to that question, that's a good
6 question, I hope so, I certainly did work on him.

7 Q I hope so too.

8 You said, sir, before Mr. Vargas was asking you
9 questions, you don't necessarily treat backs?

10 A I try to steer clear of treating backs.

11 Q But it's true you have been administering trigger point
12 injection to Mr. Flores' back; correct?

13 A If it's severe pain and I can help the guy that I see
14 him, I do.

15 Q So to an extent, you do backs?

16 A Not really, not my area of specialty.

17 Q Do you makes an exception for Mr. Flores?

18 A I make an exception if the patient has severe pain to
19 help them out. If you have a problem with that, I'm sorry.

20 Q Just to go back to your partner Dr. Grimm, Dr. Grimm
21 was seeing Mr. Flores for pain management care?

22 A Yes.

23 Q For pain that Mr. Flores says he is feeling as a result
24 of this accident?

25 A That is correct.

1 Q And do you have Dr. Grimm's records in front of you?

2 A I have them here, I haven't been through them recently.

3 Q Do you know where Mr. Flores saw Dr. Grimm on August 4,
4 2018?

5 A We have not discussed these, so I have not looked at
6 them recently, but I can.

7 Q You can use them to refresh your recollection, take a
8 look if you need.

9 A What's the date?

10 Q August 14, 2018.

11 A Okay.

12 Q And at that time, Mr. Flores never reported any injury
13 to Dr. Kaplan; is that correct?

14 A He had a fall from a height with injury to the left
15 shoulder, left elbow, right scapula and left foot.

16 Q You're aware Mr. Flores saw Dr. Grimm on September 11,
17 2018?

18 A I'm not aware of, I will be glad to take a look at it,
19 okay.

20 Q And at that time, again, Mr. Flores never reported
21 right knee injury?

22 A At that time, again, he reports low back, left elbow,
23 right scapula and left foot.

24 Q Are you aware that Mr. Flores saw Dr. Grimm on
25 October 22, 2018?

1 A Again, not aware of it, I'm glad to look at it with
2 you, October 22nd, yes.

3 Q At that time, Mr. Flores never again reported a right
4 knee injury; correct?

5 A Let's see, he does report pain radiating down the right
6 and left lower extremities.

7 Q And at that time was Mr. Flores receiving any kind of
8 pain management from Dr. Grimm for his right knee?

9 A He was receiving pain medications, which would have
10 covered any body part.

11 Q But do you know specifically whether Dr. Grimm was
12 advised recommending medications for his knee or something else?

13 A Dr. Grimm is treating his back and his neck, I believe.

14 Q I'm sorry, did you say his neck?

15 A If that was part of the case, he treats spines.

16 Q Okay. When did you learn that Mr. Flores was diabetic?

17 A I don't recall exactly when I knew that, but it would
18 have been preoperative for sure. Actually, that's not true, the
19 first day I saw him he does have diabetes.

20 Q Are you aware Mr. Flores is under the care of Dr. Grimm
21 in 2019?

22 A Okay.

23 Q Yes.

24 A I have his notes here, again, I'm not here to testify
25 for Dr. Grimm.

Dr. Jeffrey Kaplan - Plaintiff - Cross/Mr. Aaron

1 Q Are you aware he saw him on January 17, 2019?

2 A January, 17th, yes, I have his note here.

3 Q At that time, did Mr. Flores report any injury to his
4 right knee?

5 A Let's see, it notes his report was he has pain
6 radiating down the right and left lower extremities, so the
7 right and left leg.

8 Q Do you see under "History of Present Illness"?

9 A Yes.

10 Q And do you see the notation Mr. Flores fell from a
11 height causing injury to his low back, left shoulder, left
12 elbow, right scapular region and left foot; do you see that?

13 A That's not a report, that's from Mr. Flores, that's
14 Dr. Grimm recounting the injury.

15 Q Well, Dr. Grimm is your partner; right?

16 A Dr. Grimm is an employee of the New York Ortho Sports
17 Medicine & Trauma.

18 Q And so whatever he's putting down as a History of
19 Present Illness, do you know if he's taking that directly from
20 the illness or doing that some other way?

21 A I do know, I can tell from his writing, yeah.

22 Q That's coming from Mr. Flores?

23 A No, again, every note starts with the history of the
24 present illness, this is the way Dr. Grimm writes notes, and it
25 notes he had a fall from that height. He's obviously been

1 treating him for nearly a year there, and so he doesn't take the
2 history each time, it forwards through, then he notes the
3 patient, he has pain radiating down his legs, that's a report
4 from the patient, describing pain as electricity like, that's
5 from the patient.

6 Q Do you recall seeing Mr. Flores on July 8, 2024?

7 A Myself? I will look it up for you, July 8th.

8 Q July 8, 2024; yes?

9 A Yes.

10 Q And at that time, Mr. Flores, he reported great
11 improvement?

12 A That's -- we read this note earlier, he has had great
13 improvement following the series of Euflexxa injections, yes.

14 Q He's able to walk for long periods of time?

15 A As I said before, he notes that he's able to walk for
16 long periods of time, tolerate stairs and bend with his knee
17 with more ease, that's following the injections we gave him.

18 Q And then you saw him again on March 31, 2025?

19 A Yes.

20 Q And at that time, he reported that he was doing well
21 with the right knee?

22 A The right knee was doing well, doing well with cold
23 weather and changing weather, he's doing home exercises, going
24 on walks, he finds helpful for the knee.

25 Q Physical exam showed he had normal range of motion?

1 A No, he had 130 degrees of flexion and his full
2 extension, his normal extension is 140 degrees, so he's had
3 consistently loss of motion.

4 Q No instability noted?

5 A He never had instability, he never had a leg tear, that
6 I'm aware of.

7 Q And then you saw him, the last time you saw him was
8 June 30th, this year?

9 A Yes, that's right.

10 Q And at that visit you reported intermittent pain of the
11 right knee after walking?

12 A That is correct.

13 Q And but three months earlier, he reported he was doing
14 well?

15 A That is correct, that's the nature of arthritis, that's
16 he has posttraumatic arthritis of the knee which is a permanent
17 problem, has good days and bad days, progressively worse.

18 Q You recommend he does home exercises?

19 A Correct.

20 Q Followed up with pain management specialist?

21 A That's right, continue with pain management, yes.

22 MR. AARON: Thank you, doctor.

23 THE COURT: Do you have redirect?

24 MR. VARGAS: No, your Honor.

25 THE COURT: Okay, this concludes today's session,

1 members of the jury, you're free to go home, we will see you
2 tomorrow at 9:30, thank you for your service.

3 Thank you for your service, see you tomorrow
4 morning, thank you for your service, have a good nice.

5 COURT OFFICER: All rise, jury exiting.

6 (Whereupon, the jury exited the courtroom.)

7 (Whereupon, Dr. Kaplan exited the witness stand.)

8 (Whereupon, the trial was adjourned to August 8,
9 2025, at 9:30.)

10

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

13

14 Laura Delvac
15 LAURA DELVAC
16 SENIOR COURT REPORTER

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