

# EXHIBIT A

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF BRONX : CIVIL TERM : PART IA-14  
-----x

2 DARCY BOTTEX,

3 Index:  
4 801134/2022E

5 Plaintiff,

6 -against-

7 **TRIAL**

8 CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS  
9 AND RECREATION, NEW YORK CITY DEPARTMENT OF  
10 SANITATION, and JOHN DOE,

11 Defendants.  
-----x

12 851 Grand Concourse  
13 Bronx, New York 10451  
14 October 20, 2025

15 **JURY INSTRUCTIONS**  
16 **OPENINGS**  
17 **TESTIMONY OF DR. GERLING**

18 **B E F O R E:**

19 THE HONORABLE JOHN HOWARD-ALGARIN,  
20 Justice of the Supreme Court & jury

21 **A P P E A R A N C E S:**

22 KRENTSEL GUZMAN HERBERT  
23 Attorneys for the Plaintiff  
24 40 Wall Street, 45th Floor  
25 New York, New York 10005  
BY: JASON T. HERBERT, ESQ.

26 CITY OF NY LAW DEPT  
27 Attorneys for the Defendants  
28 1 Pierrepont Plaza, 10th Floor  
29 Brooklyn, New York 11201  
30 BY: STEVEN DISTLER, ESQ.  
31 and MARK SAUCEDO, ESQ.

32  
33  
34 Joanna Garcia  
35 Senior Court Reporter  
36

## Proceedings

2

# 1 || MORNING SESSION

2 (Whereupon, Kingsbrook Jewish Medical Center

3 records, previously Plaintiff's Exhibit 1 was received in  
4 evidence.)

5 (Whereupon, Lenox Hill Radiology records,  
6 previously Plaintiff's Exhibit 2 was received in evidence.)

7 (Whereupon, video, previously Plaintiff's Exhibit 3  
8 was received in evidence.)

9 (Whereupon, photograph of plaintiff's arm,  
10 previously Plaintiff's Exhibit 4 was received in evidence.)

11 (Whereupon, photograph, previously Plaintiff's  
12 Exhibit 4-A was received in evidence.)

13 (Whereupon, photograph, previously Plaintiff's  
14 Exhibit 4-B was received in evidence.)

15 (Whereupon, photograph, previously Plaintiff's  
16 Exhibit 4-C was received in evidence.)

17 (Whereupon, photograph, previously Plaintiff's  
18 Exhibit 4-D was received in evidence.)

19 (Whereupon, photograph, previously Plaintiff's  
20 Exhibit 4-E was received in evidence.)

21 (Whereupon, photograph, previously Plaintiff's  
22 Exhibit 4-F was received in evidence.)

23 (Whereupon, photograph, previously Plaintiff's  
24 Exhibit 4-G was received in evidence.)

25 (Whereupon, photograph, previously Plaintiff's

## Proceedings

1 Exhibit 4-H was received in evidence.)

2 (Whereupon, photograph, previously Plaintiff's

3 Exhibit 4-I was received in evidence.)

4 (Whereupon, photograph, previously Plaintiff's

5 Exhibit 4-J was received in evidence.)

6 (Whereupon, photograph, previously Plaintiff's

7 Exhibit 4-K was received in evidence.)

8 (Whereupon, photograph, previously Plaintiff's

9 Exhibit 4-L was received in evidence.)

10 (Whereupon, photograph, previously Plaintiff's

11 Exhibit 4-M was received in evidence.)

12 (Whereupon, photograph, previously Plaintiff's

13 Exhibit 4-N was received in evidence.)

14 (Whereupon, photograph, previously Plaintiff's

15 Exhibit 4-O was received in evidence.)

16 (Whereupon, photograph, previously Plaintiff's

17 Exhibit 4-P was received in evidence.)

18 (Whereupon, photograph, previously Plaintiff's

19 Exhibit 4-Q was received in evidence.)

20 (Whereupon, photograph of truck, previously

21 Plaintiff's Exhibit 5 was received in evidence.)

22 (Whereupon, photograph of truck, previously

23 Plaintiff's Exhibit 5-A was received in evidence.)

24 (Whereupon, photograph of accident location,

25 previously Plaintiff's Exhibit 6 was received in evidence.)

## Proceedings

4

1 (Whereupon, photograph of accident location,  
2 previously Plaintiff's Exhibit 6-A was received in  
3 evidence.)

4 (Whereupon, photograph of accident location,  
5 previously Plaintiff's Exhibit 6-B was received in  
6 evidence.)

7 (Whereupon, photograph of accident location,  
8 previously Plaintiff's Exhibit 6-C was received in  
9 evidence.)

10 (Whereupon, photos of injury, previously  
11 Plaintiff's Exhibit 7 was received in evidence.)

12 (Whereupon, photos of injury, previously  
13 Plaintiff's Exhibit 7-A was received in evidence.)

14 (Whereupon, photos of injury, previously  
15 Plaintiff's Exhibit 7-B was received in evidence.)

16 (Whereupon, photos of injury, previously  
17 Plaintiff's Exhibit 7-C was received in evidence.)

18 (Whereupon, photos of injury, previously  
19 Plaintiff's Exhibit 7-D was received in evidence.)

20 (whereupon, photos of injury, previously  
21 Plaintiff's Exhibit 7-E was received in evidence.)

22 (whereupon, photos of injury, previously  
23 Plaintiff's Exhibit 7-F was received in evidence.)

24 (whereupon, photos of injury, previously  
25 Plaintiff's Exhibit 7-G was received in evidence.)

## Proceedings

1 (Whereupon, photos of injury, previously  
2 Plaintiff's Exhibit 7-H was received in evidence.)

3 (Whereupon, photos of injury, previously  
4 Plaintiff's Exhibit 7-I was received in evidence.)

5 (Whereupon, photos of injury, previously  
6 Plaintiff's Exhibit 7-J was received in evidence.)

7 (Whereupon, photos of injury, previously  
8 Plaintiff's Exhibit 7-K was received in evidence.)

9 (Whereupon, photos of injury, previously  
10 Plaintiff's Exhibit 7-L was received in evidence.)

11 (Whereupon, photos of injury, previously  
12 Plaintiff's Exhibit 7-M was received in evidence.)

13 (Whereupon, photos of injury, previously  
14 Plaintiff's Exhibit 7-N was received in evidence.)

15 (Whereupon, photos of injury, previously  
16 Plaintiff's Exhibit 7-O was received in evidence.)

17 (Whereupon, photos of injury, previously  
18 Plaintiff's Exhibit 7-P was received in evidence.)

19 (Whereupon, photos of injury, previously  
20 Plaintiff's Exhibit 7-Q was received in evidence.)

21 (Whereupon, photos of injury, previously  
22 Plaintiff's Exhibit 7-R was received in evidence.)

23 (Whereupon, photos of injury, previously  
24 Plaintiff's Exhibit 7-S was received in evidence.)

25 (Whereupon, photos of injury, previously

## Proceedings

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1 Plaintiff's Exhibit 7-T was received in evidence.)  
2 (Whereupon, photos of injury, previously  
3 Plaintiff's Exhibit 7-U was received in evidence.)  
4 (Whereupon, photos of injury, previously  
5 Plaintiff's Exhibit 7-V was received in evidence.)  
6 (Whereupon, photos of injury, previously  
7 Plaintiff's Exhibit 7-W was received in evidence.)  
8 (Whereupon, poster of shoulder, previously  
9 Plaintiff's Exhibit 8 was marked for identification.)  
10 (Whereupon, poster of neck, previously Plaintiff's  
11 Exhibit 9 was marked for identification.)  
12 (Whereupon, poster of shoulder, previously  
13 Plaintiff's Exhibit 10 was marked for identification.)  
14 (Whereupon, poster of shoulder, previously  
15 Plaintiff's Exhibit 11 was marked for identification.)  
16 (Whereupon, poster of neck, previously Plaintiff's  
17 Exhibit 12 was marked for identification.)  
18 (Whereupon, Langone records, previously Plaintiff's  
19 Exhibit 13 was received in evidence.)  
20 (Whereupon, Facebook photograph, previously  
21 Defendant's Exhibit A was marked for identification.)  
22 (Whereupon, Facebook photograph, previously  
23 Defendant's Exhibit B was marked for identification.)  
24 (Whereupon, Facebook photograph, previously  
25 Defendant's Exhibit C was marked for identification.)

## Proceedings

7

1 (Whereupon, Facebook photograph, previously  
2 Defendant's Exhibit D was marked for identification.)

3 (Whereupon, Facebook photograph, previously  
4 Defendant's Exhibit E was marked for identification.)

5 (Whereupon, Facebook photograph, previously  
6 Defendant's Exhibit F was marked for identification.)

7 (Whereupon, Facebook photograph, previously  
8 Defendant's Exhibit G was marked for identification.)

9 (Whereupon, Facebook photograph, previously  
10 Defendant's Exhibit H was marked for identification.)

11 (Whereupon, Facebook photograph, previously  
12 Defendant's Exhibit I was marked for identification.)

13 (Whereupon, Facebook photograph, previously  
14 Defendant's Exhibit J was marked for identification.)

15 (Whereupon, Facebook photograph, previously  
16 Defendant's Exhibit K was marked for identification.)

17 (Whereupon, Facebook photograph, previously  
18 Defendant's Exhibit L was marked for identification.)

19 (Whereupon, Facebook photograph, previously  
20 Defendant's Exhibit M was marked for identification.)

21 (Whereupon, Facebook photograph, previously  
22 Defendant's Exhibit N was marked for identification.)

23 (Whereupon, Facebook photograph, previously  
24 Defendant's Exhibit O was marked for identification.)

25 (Whereupon, Facebook photograph, previously

## Proceedings

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1                   Defendant's Exhibit P was marked for identification.)

2                   (Whereupon, Facebook photograph, previously

3                   Defendant's Exhibit Q was marked for identification.)

4                   (Whereupon, Facebook photograph, previously

5                   Defendant's Exhibit R was marked for identification.)

6                   (Whereupon, pleadings, previously Court's Exhibit I

7                   was received in evidence.)

8                   THE COURT: It is October 20th of the year 2025.

9                   We're in Part 14, Justice John Howard-Algarin presiding over  
10                   the matter of Darcy Bottex versus City of New York, Index  
11                   No. 801134 of 2022E. Counsel are assembled. We are about  
12                   to commence the trial.

13                   Counsel, place your appearances on the record  
14                   starting with counsel for the plaintiff. Good morning.

15                   MR. HERBERT: Good morning, Your Honor, for the  
16                   plaintiff, Jason Herbert from the law firm of Krensel,  
17                   Guzman, Herbert, 40 Wall Street, New York New York 10005.

18                   Good morning, Your Honor.

19                   THE COURT: Good morning. Counsel for the  
20                   defendants.

21                   MR. DISTLER: Good morning, sir, my name is  
22                   Steve Distler, New York City Law Department, address is  
23                   1 Pierrepont Plaza, 10th Floor, Brooklyn, New York.

24                   Thank you, sir.

25                   MR. SAUCEDO: Good morning, Your Honor. Also for

## Proceedings

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1                   the defendant, my name is Mark Saucedo, New York City Law  
2                   Department sharing the same address as previously stated by  
3                   counsel.

4                   THE COURT: Thank you. Good morning. We are ready  
5                   to commence the trial of this matter. Administratively, we  
6                   have been dealing with evidence in anticipation of moving or  
7                   so moving some of the documents into evidence where  
8                   required. Let's go down the list of what plaintiff's  
9                   evidence or proposed evidence that is being stipulated into  
10                  evidence consists of.

11                  MR. HERBERT: Yes, Your Honor. Number 1 is  
12                  Kingsbrook Hospital records.

13                  MR. DISTLER: That's the emergency room record from  
14                  September 8th, 2021.

15                  THE COURT: Number 2?

16                  MR. HERBERT: Lenox Hill Radiologist film.

17                  THE COURT: And there are multiple films or just  
18                  one?

19                  MR. HERBERT: It's a disk.

20                  THE COURT: Okay. Go ahead.

21                  MR. HERBERT: Number 3 is the video of the  
22                  accident.

23                  THE COURT: Okay.

24                  MR. HERBERT: Number 4 is 18 Facebook photos.

25                  THE COURT: That's going to be plaintiff's evidence

## Proceedings

10

1 then; is that correct?

2 MR. DISTLER: I marked the photos, Facebook photos.

3 I believe they've been marked as Defendant's A through R,  
4 sir.

5 MR. HERBERT: I marked them in through mine. He  
6 marked in blowups on his case.

7 THE COURT: It gets really strange -- well, the  
8 blowups aren't going to go into evidence but when we're  
9 referring to the blowups as different or referring to them  
10 differently than the photos, I don't understand what the  
11 point is but --

12 MR. DISTLER: Judge, I would ask as far as the  
13 blowups that I at least be allowed to use them for  
14 demonstrative purposes.

15 THE COURT: Are they carrying the same labels?

16 MR. DISTLER: Yes.

17 THE COURT: So you're saying Plaintiff's 1 is  
18 Kingsbrook, Plaintiff's 2 is Lenox Hill Radiology,  
19 Plaintiff's 3 is a video of the accident, Plaintiff's 4 are  
20 18 Facebook photos, so is this 4-1 through 4-18 or 4-A  
21 through -- how is it going?

22 MR. HERBERT: It's 4 and then 4-A through Q.

23 MR. DISTLER: I have defendant's A through R, sir.

24 THE COURT: We'll come to Defendant's A through R.  
25 Do they not match what the plaintiff is offering in?

## Proceedings

5 MR. HERBERT: The only discrepancy is my first one  
6 starts off at 4 and second one starts off as 4-A.

10 MR. HERBERT: Number 5 is two photographs, 5 and  
11 5-A, of the truck, defendant's vehicle.

12 THE COURT: Okay.

13 MR. HERBERT: Number 6 is four photographs of the  
14 accident location.

15 THE COURT: How are they labelled?

16 MR. HERBERT: They are 6, 6-A, 6-B, 6-C.

17 THE COURT: All right. Understood. What else?

18 MR. HERBERT: Number 7 are injury photographs.

19 THE COURT: How many?

22 THE COURT: So, in other words, the one label  
23 covers all of those photographs?

24 MR. HERBERT: Yes, Your Honor.

25 THE COURT: For the record, it would be difficult

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1 to distinguish which ones you're talking about without  
2 labeling them individually somehow. How many are there?

3 MR. DISTLER: Judge, I have four photos under the  
4 packet of Plaintiff's 7.

5 THE COURT: We're not going to use those today  
6 probably, correct?

7 MR. HERBERT: Correct.

8 THE COURT: So we'll label them later and it will  
9 be 7 through X or Y because it's just short of the 26  
10 letters of the alphabet.

11 Anything else for plaintiff?

12 MR. HERBERT: Yes, Your Honor. Eight through  
13 twelve are medical demonstrative blowups.

14 THE COURT: They're not going in evidence, correct?

15 MR. HERBERT: Correct.

16 MR. DISTLER: Judge, as far as I do want to have a  
17 clarification that Dr. Gerling is not going to talk about  
18 the shoulder so I'd ask that any demonstrative evidence of  
19 the left shoulder go through Dr. Wert.

20 MR. HERBERT: Yes. He's not talking about the  
21 shoulder.

22 THE COURT: All right. So what is 8? A  
23 demonstrative of what?

24 MR. HERBERT: Some are shoulder, some are neck.  
25 They're mixed in between. Some are shoulder, some are neck.

## Proceedings

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1                   THE COURT: Okay. Anything else, Plaintiff?

2                   MR. HERBERT: Yes. Number 13 is NYU Langone  
3                   Hospital.

4                   THE COURT: That's going in, right?

5                   MR. HERBERT: Yes.

6                   MR. DISTLER: Judge, I would just say subject any  
7                   self-serving bolstering statements.

8                   THE COURT: Are they going to be used today?

9                   MR. HERBERT: Potentially in the afternoon with  
10                   Dr. Gerling where the surgery took place.

11                  THE COURT: Well, I foresee in your lunch break  
12                  redactions happening to the extent they need to happen, and  
13                  you're going to have to address to me what the redactions  
14                  are. If they just repeatedly state plaintiff injured by MVA  
15                  incident or accident, is that what you're looking to redact?

16                  MR. DISTLER: I don't think there's any dispute MVA  
17                  9721. Just any kind of bolstering statements by the  
18                  plaintiff himself about nature of pain, limitations.

19                  THE COURT: If it's used for treatment, why would I  
20                  redact that?

21                  MR. DISTLER: It's still self-serving bolstering  
22                  statements from Mr. Bottex.

23                  THE COURT: If it's part of his treatment and he  
24                  arrives for medical treatment and they say what's your  
25                  complaint and he says what it is, I don't see how that's

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1                   bolstering anything. I think it is a responsive  
2                   characterization of what his complaints are so that  
3                   treatment can be addressed in a directed manner, but we'll  
4                   come to that as needed.

5                   MR. DISTLER: Thank you.

6                   THE COURT: Anything else, Plaintiff?

7                   MR. HERBERT: Not in terms of the evidence, Your  
8                   Honor.

9                   THE COURT: All right. In other words, there are  
10                   motions?

11                   MR. HERBERT: Just to make sure all the motions we  
12                   discussed off the record, I'd like to just put them on the  
13                   record just so it's preserved.

14                   MR. DISTLER: Not to jump the gun, the blowup  
15                   photos, if the jury asks for the blowup photos and they are  
16                   identical to the smaller ones, would I be allowed to show  
17                   them during deliberations for demonstrative purposes?

18                   THE COURT: Are you asking about during  
19                   deliberations?

20                   MR. DISTLER: Well, demonstrative purposes and  
21                   during deliberations so they can see blowups.

22                   THE COURT: The jury has to see demonstratives  
23                   because they're called demonstratives and we're identifying  
24                   them as such. You mean should they be in evidence?

25                   MR. DISTLER: The blowups, yes, sir.

## Proceedings

15

1                   THE COURT: Is there any reason why the eight and a  
2 half by elevens don't suffice or are you trying to line the  
3 jury room with them on the walls or something? I think they  
4 can get the message from the marked photographs.

5                   MR. DISTLER: I can use them on cross though?

6                   THE COURT: Oh, yes. Down here, you can  
7 demonstrate them. NYU Langone is the last thing I'm hearing  
8 from the plaintiff. Is there any evidence from the  
9 defendant?

10                  MR. DISTLER: Other than the Facebook photos, Your  
11 Honor, no.

12                  THE COURT: You're using the blowups for  
13 demonstrative purposes. And those are labelled with what  
14 identifying markers?

15                  MR. DISTLER: Defendant's A through R.

16                  THE COURT: And they correspond with the Facebook  
17 photos?

18                  MR. DISTLER: Yes, sir.

19                  MR. SAUCEDO: Yes, Your Honor.

20                  THE COURT: Is there anything else from defendants?

21                  MR. DISTLER: No, Your Honor.

22                  THE COURT: All right. Fantastic. Having handled  
23 the evidence, let's bring the jury down and begin with --  
24 oh, you want to discuss -- I'm very sorry -- some of the  
25 motions in limine. We're encroaching on everyone's time. I

## Proceedings

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1       have to give instructions, you have to do openings. We have  
2       two hours before 1:00. Let's get going.

3                    MR. HERBERT: One of the motions I brought up was  
4       regarding the defendants IME Dr. Ira Chernoff. I just  
5       stated that he was an orthopedic surgeon. He's not an  
6       economist, he's not a voc expert, he's not a neurologist and  
7       his testimony should be limited to his specialty, and I  
8       believe Your Honor said that we'll deal with it as the  
9       questions come up and when he's on the stand at that point.  
10      But you understand my concerns of what his specialty is,  
11      that he should be limited to his specialty.

12                  THE COURT: All right. Defendants?

13                  MR. DISTLER: Thank you, Judge. I intend to call  
14       Dr. Chernoff as a spinal surgeon to talk about objective  
15       findings on the film, permanency, causation and it may -- I  
16       don't plan on getting into with Dr. Chernoff the suitable  
17       alternative employment that might come from a voc rehab but  
18       I think depending on what the direct testimony is, he should  
19       be allowed to opine as Mr. Bottex's ability to live his  
20       life, certain daily activities.

21                  THE COURT: Well, exactly. Insurance Law 5102 puts  
22       to the defendant and places in central issue, in some  
23       respects, the ability of a claimant to perform their usual  
24       and customary daily activities and we'll see where the  
25       evidence goes from there, but he should be able to comment

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1 as an orthopedic surgeon of -- based on the record  
2 established as to what the extent of the limitations are  
3 that the plaintiff is experiencing. In fact, that is also  
4 at least two of the categories from Insurance Law 5102-D  
5 which I'm sure is going to be part of the closing  
6 instructions to the jury.

7 MR. HERBERT: Yes, Your Honor.

8 THE COURT: Anything else?

9 MR. HERBERT: Yes, Your Honor. There was a motion  
10 regarding marijuana conviction years ago that's not going to  
11 be touched upon by the defense, precluding any mention of  
12 any marijuana misdemeanor from years ago.

13 THE COURT: I recall off the record we had a  
14 comment or at least exchanged some discussion about the  
15 photograph in which he appears to be holding what looks like  
16 a hand-rolled cigar of some sort which could be a marijuana  
17 cigarette.

18 It is to this Court's view without getting into any  
19 legalities of marijuana and any prior issues in that regard  
20 in affecting the plaintiff that it's a nonissue. We  
21 shouldn't go into it but the photograph itself is going to  
22 be seen by the jury because the same way he is depicted with  
23 legal cocktails, he could be depicted with a legal cigarette  
24 whether it has marijuana or not. Anything else?

25 MR. HERBERT: The last one was Dr. Gerling, no

## Proceedings

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1       mention regarding any of his past civil suits that have been  
2 discontinued against him. That is off limits for defense  
3 counsel to go in that area.

4                   THE COURT: There have been no convictions and no  
5 legal findings, therefore, it's not to be brought up before  
6 the jury because as we all know, anyone can sue anyone and  
7 make allegations about anything about another person.  
8 Allegations can't be admissible unless there's been some  
9 legal determination that is relevant to the claims before  
10 the Court.

11                  Yes, Counsel?

12                  MR. DISTLER: Nothing, Judge.

13                  THE COURT: Oh, you were standing up.

14                  MR. HERBERT: My client is outside. Can I go get  
15 him?

16                  THE COURT: Yes. Go get him and let's bring down  
17 the jury.

18                  MR. DISTLER: Oh, Judge, I think Mr. Saucedo had a  
19 motion in limine.

20                  THE COURT: Let's rewind for a brief second.

21                  MR. DISTLER: Sorry.

22                  THE COURT: Mr. Saucedo, make your motion.

23                  MR. SAUCEDO: Yes, Your Honor. I'd like to  
24 preclude the mentioning of Alen Ortiz' driver's license  
25 being suspended as a result of being in arrears of child

## Proceedings

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1 support payment as it's simply not relevant to the case in  
2 chief.

3 THE COURT: We spoke about this off the record.  
4 Plaintiff knows how I'm going to rule, but he has a chance  
5 to make his record.

6 MR. HERBERT: Your Honor, this is a special license  
7 he's been given. This is not a regular driver's license.

8 THE COURT: That really doesn't matter. He wasn't  
9 or the status of his license at the time of this incident  
10 was not in any way impacted. He had a full license for one  
11 and for two, it was suspended for reasons wholly and  
12 completely unrelated to how he controls and operates a  
13 vehicle. It had to do with child support so it's not  
14 relevant as to his purported conduct on the day of the  
15 incident and I won't make any suppositions if the facts were  
16 different because they're not. It's not relevant. It  
17 shouldn't be mentioned.

18 MR. HERBERT: Your Honor, this is the first time  
19 I'm hearing about this motion in limine just maybe 30  
20 minutes ago. He's not going, to my understanding, until  
21 Wednesday. I would like an opportunity at least to go back  
22 to my office to see if I could look up any case law to help  
23 me on this so I have an opportunity if I --

24 THE COURT: On what issue? Let's be clear.

25 MR. HERBERT: On the driver's license issue. It

## Proceedings

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1                   was just brought to my attention maybe 20 minutes ago about  
2                   this motion. It's never been exchanged to me. He never  
3                   told me about it. I would just like an opportunity because  
4                   their witness is not going until Wednesday, can I at  
5                   least -- I want the opportunity to bring this up to Your  
6                   Honor if I could find case law that says that it is  
7                   applicable because I was never told about this. I'm being  
8                   sandbagged right now.

9                   THE COURT: I want to reiterate the topic we're  
10                  discussing. You, it appears, might be interested in  
11                  bringing up a prior suspension of his driver's license which  
12                  was not in effect at the time of the accident and was  
13                  brought about by delinquent payments in child support to the  
14                  extent we all agree that that is the underlying fact. You  
15                  can do all the research you want. At this time, unless you  
16                  want to renew the argument based on something you find, my  
17                  determination is that it's not relevant in any fashion and,  
18                  therefore, it should not come in.

19                  MR. HERBERT: Yes, Your Honor.

20                  MR. SAUCEDO: Thank you, Your Honor. Additionally,  
21                  the City would like to preclude per Alen Ortiz' EBT  
22                  testimony of any reprimand he received as a result of the  
23                  incident as the probative value is substantially outweighed  
24                  by the effect of prejudice as a result of any internal  
25                  agency findings. Additionally, it speaks to a subsequent

## Proceedings

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1                   remedial measure as a result.

2                   THE COURT: Okay. We did broach this subject off  
3                   the record. I haven't heard from plaintiff on it, but I'll  
4                   issue a ruling unless plaintiff wants to be heard.

5                   MR. HERBERT: Your Honor, I would like to go into  
6                   the area of reprimand by his internal -- by his job. He  
7                   stated on the record under oath that as a result of this  
8                   accident, he was reprimanded by the driving because of this  
9                   accident. That's not in dispute. He admits it and it's  
10                  fair game to go there.

11                  THE COURT: There's been no concession of  
12                  liability. That's stated. For one, the two case cites you  
13                  gave me are wholly irrelevant. One has to do with the scope  
14                  of disclosure during the discovery process involving a claim  
15                  by a plaintiff to disclose the inspector general's  
16                  investigative files. I think that was Lawrence versus  
17                  State.

18                  MR. SAUCEDO: To the extent permissible, Your  
19                  Honor, I'm more than happy to upload a motion in limine,  
20                  should you allow.

21                  THE COURT: You haven't uploaded it. You haven't  
22                  even served it on the other side. That's another reason  
23                  your motion should be denied but on its substance, I don't  
24                  find that the cases that you cited were on point. They were  
25                  both off and irrelevant. I'm trying to remember the other

## Proceedings

22

1 case. Standby.

2 That said, there's another ground why the reprimand  
3 should not come in. The internal standards of the  
4 Sanitation Department by review is not the same as the  
5 standards of the law necessarily. It's really not relevant  
6 as to whether he was negligent at this time. This Court  
7 finds -- and we don't know enough about the processes of the  
8 internal investigation that led to the reprimand. I don't  
9 find also that this reprimand constitutes a subsequent  
10 remedial measure as it more historically received in the  
11 courtroom.

12 That line of case, though there could be an  
13 arguable logical extension of such cases, really implicate  
14 the public interest in having landlords in different  
15 property cases generally make repairs that could harm the  
16 public and not refrain from making repairs that would allow  
17 a hazardous condition to persist based on the admissibility  
18 of such a repair as casting of a chilling effect on  
19 landlords or property owners from remediating things that  
20 could harm other people.

21 In any event, the underpinning cases that you  
22 relied on were not on point and I don't believe that the  
23 subsequent remedial measure doctrine applies. Nonetheless,  
24 I don't think that the remedial action or any kind of  
25 reprimand taken by sanitation should come in.

## Proceedings

23

1                   Are we going to concede liability here, which might  
2                   be another reason why it's irrelevant? I don't think  
3                   conceding liability precludes anyone from using any of the  
4                   evidence that's been stipulated in.

5                   MR. DISTLER: I'd have to respectfully say no at  
6                   this juncture as to the concession of liability.

7                   THE COURT: Okay. All right. Is there anything  
8                   else?

9                   MR. HERBERT: I just want to get my client, Your  
10                   Honor.

11                   THE COURT: Get your client. Bring down the jury.

12                   COURT OFFICER: All rise, jury entering.

13                   (Whereupon, the sworn jurors enter the courtroom  
14                   and take their respective seat.)

15                   THE COURT: All right. You all may be seated.  
16                   Welcome back, everyone. As the first order of business, I  
17                   want to thank you for taking the time to interrupt your  
18                   lives to be here. This is the beginning of a very important  
19                   process by which we resolve all of our disputes in this  
20                   country in a really orderly and just fashion and you are the  
21                   key to how that proceeding resolves.

22                   I want to apologize at first for the delay in  
23                   bringing you down but now because of the time we took this  
24                   morning. Though there will be other times where we have to  
25                   have legal arguments outside of your presence, I'm hoping

## Jury Instructions

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1       things will go smoothly. It's similar to seeing a Broadway  
2       play insofar as you don't want to see what happens backstage  
3       between scenes. Well, here we were trying to prepare the  
4       scenes so that there wouldn't be long pauses between  
5       everything that happens so the first order of business will  
6       be my instructions to you about the case and how you are  
7       going to participate.

8               Members of the Jury -- and before I say anything  
9       else, Plaintiff's Counsel, Defense Counsel, you see the  
10       jury; are they acceptable to you?

11              MR. HERBERT: Yes, Your Honor.

12              MR. DISTLER: Yes, sir. Thank you.

13              MR. SAUCEDO: Yes, Your Honor.

14              THE COURT: All right. We're about to start the  
15       trial of this case about which you've heard some details  
16       during jury selection. Before the trial begins however, I  
17       will provide you with certain instructions to help you  
18       understand what you will hear and see and to guide your  
19       conduct during the trial.

20              Initially, the party who brings a lawsuit is called  
21       the plaintiff. In this case, the plaintiff is Darcy Bottex  
22       who is suing for negligence and the party being sued is  
23       called the defendant. In this case, the defendant is the  
24       City of New York.

25              Now, Mr. Bottex is represented by Jason Herbert.

## Jury Instructions

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1                   Mr. Herbert. And Mr. Bottex is also sitting in the gallery.  
2                   That is Mr. Darcy Bottex there. And the defendants, the  
3                   City of New York, are represented by Steve Distler and  
4                   Mark Saucedo.

5                   MR. DISTLER: Thanks again, Your Honor. Good  
6                   morning.

7                   MR. SAUCEDO: Thank you, Your Honor.

8                   THE COURT: Now, when I've completed these  
9                   instructions the attorneys will make opening statements in  
10                   which each will outline for you what they expect to prove.  
11                   The purpose of opening statements is to tell you about each  
12                   party's contention so you'll have a better understanding of  
13                   the evidence as it is introduced.

14                   Now, the evidence upon which you will base your  
15                   decisions will come from the testimony of the witnesses here  
16                   in court or in sworn testimony given before trial or in the  
17                   form of photographs, documents or other exhibits admitted  
18                   into evidence.

19                   In this case, the plaintiff, Mr. Bottex, first  
20                   makes an opening statement followed by the defendant, the  
21                   City of New York. After opening statements, the plaintiff,  
22                   Mr. Bottex, will introduce evidence in support of his claim.  
23                   Usually a party must present all the witnesses and complete  
24                   their entire case before the opposing party introduces  
25                   evidence, although exceptions are sometimes made to

## Jury Instructions

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1 accommodate schedules of experts and the like.

2 Now, after the opposing party has finished  
3 introducing all its evidence, the other party may, meaning  
4 the defendants in this case, but is not required to present  
5 witnesses and exhibits. If it does so, then that party may  
6 but is not required to offer additional evidence for the  
7 purposes of rebutting what has been presented up to the  
8 moment. A witness is examined by the party who calls that  
9 witness to testify and may be questioned by the opposing  
10 party in cross-examination. Additional questioning may  
11 follow.

12 Now, during the trial an attorney may object to a  
13 question or to the introduction of an exhibit or make  
14 motions related to legal issues in this case. Arguments  
15 about objections or motions are sometimes made outside of  
16 the presence of the jury. Any ruling I make will be based  
17 solely on the law so you must not conclude from any ruling  
18 or from anything I say during the trial that I favor either  
19 side or either party to this lawsuit.

20 Now, after all of the evidence is in, the attorneys  
21 will give closing statements or summation. In this summary,  
22 the lawyers will explain what they believe the evidence has  
23 shown, what inferences or conclusions they want to you to  
24 draw from the evidence and what conclusions they contend you  
25 should reach as your verdict. What attorneys say in

## Jury Instructions

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1 summation like what they say during jury selection and  
2 opening statements or during objections or motions at trial  
3 is only argument, it's not evidence.

4 Under our system, the defendant, the City of New  
5 York, will offer its summation first then followed by the  
6 plaintiff, Darcy Bottex. After the summations, I will  
7 instruct you on the applicable law. You will then retire  
8 for your deliberations.

9 Your role as jurors is to decide what has or has  
10 not been proven and to apply the rules of law I provide to  
11 the facts as you determine the facts to be. The decisions  
12 you make will be your verdict. Your decision will be based  
13 on the testimony you hear and the exhibits admitted into  
14 evidence during the trial. You and you alone are the sole  
15 and exclusive judges of the facts and nothing I say or do  
16 should be considered as an indication of my opinion about  
17 the facts.

18 When I say you are the responsible for the  
19 determining the facts, you would consider what facts you  
20 believe to be true and what facts you believe may be less  
21 true or not true at all.

22 Now, my role is to preside impartially and not to  
23 express any opinion on the facts. Any opinion I might have  
24 on the facts, in any event, would be irrelevant because the  
25 facts are for you to decide. On the other hand and with

## Jury Instructions

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1       equal emphasis, I instruct you that in accordance with the  
2       oath you took as jurors, you must accept the rule of law as  
3       I give it to you whether or not you agree with the laws.  
4       You're not to ask anyone else about the law and you must not  
5       consider or accept any advice about the law from anyone but  
6       me.

7               Now, as the only judges of the facts, you see  
8       you're judges too in some way, you must decide which  
9       witnesses you believe, which parts of their testimony you  
10      accept and how much weight you want to give to their  
11      testimony.

12              During the trial, I may sustain objections to  
13      questions and you might hear no answer and if an answer is  
14      given I may instruct that it be stricken or removed from the  
15      record and tell you that you have to disregard it. You  
16      can't draw any inference or conclusion from any unanswered  
17      question nor should you consider testimony that has been  
18      stricken or removed from the record when you make your  
19      deliberations. The law requires that your decision be based  
20      solely on the evidence presented to you. Any items I  
21      exclude from your consideration are excluded because they're  
22      not legally admissible.

23              Now, a lawsuit is a civilized method of resolving  
24      disputes. It is basic to the administration of any system  
25      of justice that the decisions on both the law and the facts

## Jury Instructions

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1       be made fairly and honestly. You as the jurors and I as the  
2       judge have a heavy responsibility to act without bias and to  
3       ensure that a just outcome in resolving the dispute between  
4       the plaintiff and the defendant in this case is obtained.

5               As a fair and impartial juror you must avoid  
6       applying any stereotypes or attitudes about people or groups  
7       that could influence your decisions. Remember that biases  
8       isn't always obvious or conscious. When evaluating the  
9       testimony and other evidence, you must not be influenced by  
10       any of those stereotypes or attitudes.

11               The law does not require you to accept however all  
12       the evidence I will admit. When deciding what evidence to  
13       accept, you must evaluate the testimony of each witness,  
14       carefully and determine how much weight, if any, to give it.  
15       A witness's testimony may not match the facts as they  
16       occurred because the witness may be intentionally lying, may  
17       not have seen or heard what they're testifying about  
18       accurately, may have a faulty memory or may not have  
19       expressed themselves clearly.

20               There's no special formula for evaluating  
21       testimony. You bring your own life experience and  
22       background into this courtroom and in your daily life, you  
23       decide on what the reliability of what people tell you all  
24       the time. The same standards apply here. When deciding how  
25       much weight to give a witness's testimony, consider the

1 witness's interest or lack of interest in the case's  
2 outcome, any bias or prejudice they may have, their age,  
3 appearance, the manner and opportunity and the ability the  
4 witness had to observe the facts that they testify about and  
5 how probable or unlikely their testimony seems when compared  
6 to all of the other evidence.

7 If you find a conflict in the evidence, meaning I'm  
8 not sure which way to take this information, decide whether  
9 you can make the various versions fit together or be  
10 reconciled, but if you can't do that, then you have to  
11 decide which version to accept, if any.

12 To help make sure a just result is reached when you  
13 decide the case consistent with the oath you took as a juror  
14 there are several rules that must govern your conduct during  
15 the time you served as a juror. Because this case involves  
16 something that happened at a particular location, you may be  
17 tempted to visit that location. Don't do it. Even if you  
18 live near the location, you must not go to it or pass it or  
19 pass by it until the case is over.

20 In addition, don't attempt to view the scene by  
21 using any computer programs. Viewing the scene either in  
22 person or through a computer program would be unfair to the  
23 parties because the location as it looked at the time of the  
24 accident may have changed and as it looks now, it could be  
25 totally different.

## Jury Instructions

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1                   This case involves a location that existed at the  
2 time of the accident which is an intersection in the Bronx.  
3 Also, in making an unauthorized visit or viewing, you might  
4 get a mistaken impression leading to unfairness to the  
5 parties who need to you to decide this case solely on the  
6 evidence I admit before you for your consideration. Thus,  
7 you must rely only on the evidence admitted here in this  
8 courtroom to determine the circumstances and conditions  
9 under which the accident or the incident which is being  
10 alleged here and the complaint and between the parties took  
11 place.

12                  Now, in fairness to the parties in this lawsuit, it  
13 is very important for you to keep an open mind throughout  
14 the trial. You must reach your decision and verdict solely  
15 on the evidence admitted during this trial and only after  
16 hearing the attorney's summations and my instructions on the  
17 law. Afterwards, you'll discuss your views and opinions  
18 with the other members of the jury to reach your decisions  
19 and, or verdict.

20                  While it is human nature for you to develop  
21 tentative opinions about witnesses while the trial is  
22 underway also about testimony and other evidence and while  
23 there is a strong temptation to discuss those opinions  
24 during the trial, the law doesn't allow it. The reason is  
25 that engaging in premature discussions without all of the

## Jury Instructions

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1                   evidence, the lawyers summations and my final instructions  
2                   on the law may result in an incomplete information. That  
3                   would be unfair to the parties. For this reason, among  
4                   others, do not conduct independent research on any topic you  
5                   hear about or in this case whether by consulting with  
6                   others, reading any material, using the internet. You're  
7                   not to discuss or research the law or any of the issues in  
8                   the case. You must also avoid discussing or researching the  
9                   parties, the lawyers, the witnesses or me.

10                  After you've rendered your verdict and been  
11                  discharged, you will be free to do any research or to share  
12                  your experiences. Now, remember these rules while serving  
13                  as juror whether in the courtroom or elsewhere including  
14                  when using a computer or personal electronic device. It's  
15                  crucial to follow these instructions carefully.

16                  The law requires that you consider only the  
17                  testimony and other evidence admitted at this trial. Not  
18                  only does our law require this but the parties also rely on  
19                  you to fairly and impartially evaluate only the admitted  
20                  evidence. Allowing outside information which may be  
21                  incomplete, inaccurate or unreliable to influence your  
22                  judgment would be unfair and prejudicial to the parties and  
23                  could lead to a mistrial.

24                  All cellphones, smart phones, laptops, tablets or  
25                  any other personal electronic devices must be turned off

## Jury Instructions

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1                   while you're in the courtroom and while you're deliberating.

2                   Juror Number 2, do you need some coffee? I want to  
3                   make sure you're here.

4                   JUROR NO. 2: I'm here.

5                   THE COURT: Do not talk either among yourselves or  
6                   with anyone else about anything related to this case. You  
7                   may tell people you're a jury or inform them about when you  
8                   need to be in court but you must not discuss any other  
9                   matters related to the case with anyone. You must not share  
10                   any information about this case with anyone by any means.  
11                   This means you must not discuss, give or receive any details  
12                   related to the case through telephone, text messages,  
13                   e-mail, internet services or social media platforms  
14                   including, for example, blogs, chat rooms, Google, Facebook,  
15                   Twitter, LinkedIn, Instagram, TikTok or any other platform.

16                   You must not allow anyone who's not a juror to  
17                   discuss this case in your presence and if anyone does so  
18                   despite your instructions, report it to me as soon as  
19                   possible. However, you must also refrain from discussing  
20                   with your fellow jurors either that fact that you're  
21                   reporting something to me or any other matter you feel is  
22                   necessary to bring to my attention.

23                   Although it is common human tendency to talk to  
24                   people you meet, during your time on the jury do not  
25                   communicate with any of the parties, their attorneys or any

## Jury Instructions

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1                   witnesses either in or out of the courtroom. This means not  
2                   only avoiding discussions about the case but also not  
3                   speaking to them at all even casually. This is the only way  
4                   to ensure that all parties can trust in your complete  
5                   impartiality as jurors. And I know it's uncomfortable.  
6                   Sometimes you might bump face to face with someone, you  
7                   might want to smile and nod. Just turn and walk away.

8                   If a lawyer, party or witness does not acknowledge  
9                   you, it's not them being rude. They're simply following my  
10                  instructions not to speak with you. The parties and  
11                  attorneys involved in the case or those working with them  
12                  may look at a juror's public website, social media post,  
13                  blogs or your publicly accessible social media profiles.  
14                  Now, this could happen during jury selection and may also  
15                  occur during the trial, during deliberations and after the  
16                  trial concludes.

17                  While the parties and attorneys can review your  
18                  public media, they're not allowed to communicate with you  
19                  through any public media or other means during the trial or  
20                  during deliberations. In fact, nobody's allowed to  
21                  communicate with you about the case for any reason in any  
22                  way during this trial or while you're deliberating and if  
23                  you believe anyone has tried to communicate with you in any  
24                  way about the case, let me know it immediately. You should  
25                  not discuss the case with anyone other than me or the court

1 officer.

2 Now, during this trial, there may be times when a  
3 juror needs to bring a matter to my attention. If that  
4 happens, please notify the court officer either orally or  
5 with a note that you need to speak to me and I'll give you  
6 further instructions. Do not discuss the matter with any  
7 other jury or with anyone else.

Now, under the law, only 6 jurors will deliberate on this case and we have selected additional jurors because at some point during the trial, a juror might be unable to continue service due to an emergency. All of you are expected to pay the same careful attention during the trial so that each of you will be fully familiar with the case. The presence of extra jurors does not mean any juror out of the first six is free to excuse himself from his her duties as sworn jurors. It is you're responsibility to be available and attentive throughout the trial and that means the alternates because if one of the primary six is not able to continue or is discontinued for some reason, the alternates will slide right into that position and we fully expect that they are fully informed as to all of the evidence that has been presented in this courtroom up to that moment.

Now, if you wish, you can take notes and we will provide note-taking materials. Whether or not you take

## Jury Instructions

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1       notes, you should know that the court reporter records  
2       everything said in the courtroom and any part of the  
3       transcript can be read back to you upon your request during  
4       your deliberations. If you do take notes during the trial,  
5       ensure that your note taking does not distract you from the  
6       proceedings. Any notes taken are only for your personal use  
7       and should serve as a memory aid.

8               If there's a discrepancy between a juror's  
9       recollection and their notes, it should be resolved by  
10       asking to have the court reporter's transcript read back on  
11       that issue. The official court transcript, not your notes,  
12       should guide your deliberations and decisions. Your notes  
13       are not a substitute for the official record or the legal  
14       principles. I will explain during and after the trial.  
15       Your notes are confidential and will be collected and  
16       secured at the end of each session and destroyed after the  
17       trial. That's if you take notes. We're almost done.

18               If any of you has a question you wish to ask a  
19       witness or the Court, please write the question on a piece  
20       of paper which the court officer will bring to me. I will  
21       decide whether and how the question may be asked and what  
22       procedure to follow.

23               Now, the description of the trial process and the  
24       rules governing your conduct and the legal principles I've  
25       explained to you will, I believe, make it easier for you to

## Opening - Plaintiff

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1 understand how the trial unfolds and to reach a fair  
2 decision at its end.

3 With that said, unless there's anything that is  
4 amiss or the Court overlooked, we will start with opening  
5 statements.

6 MR. HERBERT: Thank you. Thank you, Your Honor.

7 THE COURT: You may proceed, Counsel.

8 OPENING STATEMENT

9 BY MR. HERBERT:

10 MR. HERBERT: May it please the Court, good  
11 morning, Your Honor, good morning, Counsel, good morning  
12 Counsel, good morning, City of New York, good morning,  
13 Darcy Bottex, good morning, Ladies and Gentlemen of the  
14 Jury.

15 This is a case about an egregious refusal to accept  
16 responsibility for one's own action and you are going to  
17 learn that the individuals failing to accept responsibility  
18 for their own actions are the defendants, the City of New  
19 York, and that is why we are all here today.

20 You are going to learn that on September 7th, 2021,  
21 September 7th, 2021, the motor vehicle accident happened  
22 between Darcy and the City of New York. You're going to  
23 learn on the date of the accident Darcy was working as a  
24 foreman for a construction site and actually, in some of the  
25 photographs, we're going to see his construction sites in

## Opening - Plaintiff

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1                   the corner of some of the photographs. They were on around  
2                   12 or 15 at the time of the accident in the construction  
3                   site as they were building it and we're going to see the  
4                   structure they're building to the side of some of the  
5                   photographs. It's so close to the location of the accident.

6                   We're going to learn on the date of the accident  
7                   that Darcy was a foreman at this location site. Darcy had  
8                   worked for years, about 13 or 14 years, before the accident  
9                   in the construction field and has worked his way up from  
10                   laborer, so on so forth, covering different projects.  
11                   That's how serious Darcy takes his employment.

12                   We're going to hear on the date of the accident,  
13                   September 7th, 2021, the accident took place at the location  
14                   of Lincoln Avenue and Bruckner Boulevard getting onto the  
15                   Third Avenue Bridge. Let's break it down for a second.  
16                   Lincoln Avenue, at the location of the accident, is a  
17                   two-way street. Lincoln Avenue is a two-way street with  
18                   lanes going in each direction. At Lincoln Avenue, it's  
19                   perpendicular to Bruckner Boulevard and Bruckner Boulevard  
20                   after Lincoln Avenue turns into the Third Avenue Bridge.  
21                   We're going to see photographs. We're going to see maps.  
22                   We're going to see everything regarding the location of the  
23                   accident and what it looked like around the time of the  
24                   accident.

25                   So Lincoln Avenue is a two-way street with traffic

## Opening - Plaintiff

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1           in both directions. Perpendicular to Lincoln Avenue is  
2           Bruckner Boulevard and turns into the Third Avenue Bridge.  
3           We're going to learn at the time of the accident Darcy was  
4           taking a little break, getting a bottle of water and he went  
5           to the store to get some water. He drank some water. He  
6           was done. He was heading back to the construction site.

7           You're going to learn at the time of the accident,  
8           Darcy saw the traffic light for him to walk, had the  
9           intersection at the crosswalk, was wearing a bright orange  
10          shirt that they're supposed to wear on a construction site  
11          location, had a hardhat on, had one of those walkie-talkies  
12          put on through his shirt over here, had his cellphone in his  
13          pocket, earbuds, and had the walkie-talkie clipped on to his  
14          shirt and then strapped around for the construction site.

15          As Darcy was walking in the crosswalk with the  
16          light in his direction, with the walk signal, with the  
17          orange shirt, with the crosswalk with him for traffic, a  
18          sanitation truck, a sanitation truck, 60,000 pounds-plus  
19          sanitation truck was making a left from Lincoln Avenue on to  
20          the Third Avenue Bridge, and we're going to see a video of  
21          this accident at some point during this trial. It's a  
22          little scary but you're going to see it.

23          The sanitation truck that was making a left. So if  
24          I'm the sanitation truck on Lincoln Avenue, I'm coming  
25          towards Darcy, the sanitation truck comes out, makes a left

## Opening - Plaintiff

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1 and hits Darcy as Darcy's walking in the crosswalk with the  
2 orange shirt, with his walk signal. Hits Darcy on the arm,  
3 sends him flying. We're going to learn Darcy was around 270  
4 pounds at the time of the accident. Big boy. He's about 38  
5 years old at the time of the accident. Goes flying as a  
6 result of the sanitation truck hitting him. His stuff goes  
7 flying everywhere. He's shaken up. He's -- what just  
8 happened there? He's upset. He sees the sanitation truck a  
9 few seconds before the accident occurred. He's just  
10 thinking the sanitation truck is not going to turn left into  
11 him. We're going to see the sanitation truck just coming,  
12 just coming, just coming, and knocks over into Darcy as if  
13 he didn't see him there. It was about 3:00, 3:15 p.m. in  
14 the afternoon on a workday with the light for Darcy in an  
15 orange shirt. He just didn't see him.

16 Do I think the defendant did this on purpose to  
17 hurt somebody else? Absolutely not. This was not  
18 intentional. I'm sure the defendant is a nice guy but the  
19 defendant, the City of New York, caused this accident and  
20 that's why we are all here.

21 This case comes down to this right here. This one  
22 factor. Taking responsibility for one's actions. The  
23 defendant, the City of New York, came crashing into Darcy's  
24 life with a 60,000 pound-plus sanitation truck, threw him on  
25 to the ground, caused injuries for the rest of his life and

## Opening - Plaintiff

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1           that is why we're all here. It all goes back to taking  
2           responsibility for one's own actions. The defendant, the  
3           City of New York, had a duty and obligation and  
4           responsibility not to come crashing turning left at a light  
5           when somebody's in the crosswalk with the signal for  
6           walking.

7           MR. DISTLER: Judge, I'm going to respectfully  
8           object. Legal principles has to come from Your Honor.

9           THE COURT: Overruled. Just stick to what you're  
10           going to show.

11           MR. HERBERT: You're going to learn that at the  
12           time Darcy was crossing in the crosswalk with the light for  
13           him to travel in an orange shirt in broad daylight was when  
14           he was smashed into by the sanitation truck.

15           Now, we are going to learn a lot about Darcy. We  
16           are going to hear him on the stand hopefully on Wednesday  
17           regarding his testimony. We're going to learn that Darcy  
18           had worked his way up in the construction industry. First,  
19           he started off as a laborer, and then he's an assistant  
20           foreman and eventually became a foreman. As a foreman, he  
21           also has to help out the guys. He works with a crew of  
22           approximately, sometimes 15 to 30 men that he's responsible  
23           for. Darcy takes his job extremely serious. He's the first  
24           one on the job site every day. He opens up the job site and  
25           most times he works until the end of the job site to close

## Opening - Plaintiff

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1                   the job site down with overtime proving to his workers and  
2                   his company that he can become a foreman and he took his job  
3                   very seriously. He takes pride in his work.

4                   We're going to learn and we're going to see  
5                   photographs on the date of the accident Darcy took of his  
6                   arm. When I first saw these photographs I said, wait, I  
7                   don't understand. I don't see anything in -- where's the  
8                   injury? Where's the black and blue? And I realized that  
9                   I'm looking at the photographs, and you're going to see  
10                   these in evidence, that his entire arm --

11                   MR. DISTLER: Objection, Your Honor.

12                   MR. HERBERT: It's in evidence.

13                   THE COURT: It is in evidence but the picture  
14                   stands for itself and it depicts what it depicts. You don't  
15                   have to characterize it. Sustained. Just generally speak  
16                   to what you believe you're going to demonstrate there.

17                   MR. HERBERT: You're going to see these photographs  
18                   taken after the date of the accident on the date of the  
19                   accident with his arm black and blue throughout his arm.  
20                   You're going to see him cut, blood, arm black and blue.

21                   He gets up from the accident. He's says, what just  
22                   happened there? What just happened there? He feels himself  
23                   getting, you know, shocked, scared, angry, frustrated. How  
24                   could this truck just hit me when I'm crossing over? He  
25                   approach approaches the driver. The passenger of the

## Opening - Plaintiff

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1 sanitation truck comes out. They talk. He's upset. He's  
2 like I'm going to get out of here before a bad situation  
3 comes up. He tells his superiors and tells his employers  
4 what just happened there and he's like, listen, I have to  
5 get home, I'm not feeling right right now.

6 He goes home for the day. He's home. He's trying  
7 to relax. He's trying to fight with the pain. The next  
8 morning he wakes up even worse than what he was the day  
9 before. His mom sees him, says what are you doing, you have  
10 to get to the hospital. You have to get to the doctor.

11 Darcy hates doctors. Darcy hates medication.  
12 Darcy hates drugs. He hates all of that stuff. He was 270  
13 pounds. He didn't want to deal with this. He thought he  
14 could fight it off but he couldn't. He goes the next day in  
15 the morning because of dedication to his job site and says,  
16 look at my arm, I can't work, I can't function. His job  
17 said, you have to go to the hospital. He goes to the police  
18 precinct to report the accident and then goes to the  
19 hospital right there from work and we're going to see the  
20 hospital records are in evidence. At some point you're  
21 going to see the hospital records and you'll see he  
22 complains of his arm, neck and back from the accident and  
23 we're going to see in the records that they conform and that  
24 and they also talk about the bruising on his arm and they  
25 use medical terms for his bruising on his arm.

## Opening - Plaintiff

44

1                   We're going to learn that recently Darcy starts now  
2                   treating with doctors. He starts seeing Dr. Wert,  
3                   Dr. Gerling for the injuries and we're going to hear from  
4                   them. We're going to hear from Dr. Gerling this afternoon.  
5                   Dr. Gerling is a spine surgeon. Dr. Wert is an orthopedic  
6                   surgeon. You're going to hear from him on Thursday morning.

7                   He starts seeing Dr. Wert about a week, two weeks  
8                   after the accident. He starts complaining about his  
9                   shoulder, neck, back. He starts doing physical therapy  
10                   MRIs, treatment. Eventually, it's too much. He's got tears  
11                   in his shoulder, his rotator cuff and his labrum and we're  
12                   going to learn a lot of the shoulder from Dr. Wert on  
13                   Thursday but just generally, the shoulder is a joint made up  
14                   of the humerus, which is the arm bone, the scapula, which is  
15                   the shoulder blade, and the clavicle, which is the  
16                   collarbone. These three bones that make up your shoulder  
17                   are held together by muscles and tendons that make up your  
18                   rotator cuff. These muscles and tendons that allow your arm  
19                   to move and rotate and lift your arm. They're like cables  
20                   or rubber bands.

21                   You're going to learn as a result of is this  
22                   accident Darcy suffered a tear in those muscles and tendons  
23                   of his left shoulder. That's why immediately after the  
24                   accident, he was complaining about left shoulder pain and we  
25                   are going to see the photographs documenting it. He treats

## Opening - Plaintiff

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1       with Dr. Wert and eventually he has shoulder surgery with  
2       Dr. Wert to try to repair the rotator cuff tear to Darcy's  
3       left shoulder.

4                   We're going to learn that Darcy also injured his  
5       neck and back as a result of this accident. Now, the neck  
6       and back, Dr. Gerling is going to talk about the spine but  
7       I'm going to go into it a little bit for a little education.  
8       The spine is nature's shock absorber and between each level,  
9       a stack, is a cushion or cartilage called a disc. So it's  
10      vertebrae and in between the vertebrate is a disc and this  
11      disc is like a donut and the outside of the donut is fibrous  
12      cartilage filled with the soft material often described as a  
13      cooked lobster. It's called a nucleus pulposis. It's  
14      what's inside the disc. So it's vertebrae in your spine and  
15      in between the spine and the vertebrae are discs is like a  
16      jelly donut and too much pressure is applied on the disc  
17      from those vertebrates, let's say, from a car accident or  
18      sanitation truck coming barreling into you, your disc can  
19      pop. A herniation is what that's called. If it just pushes  
20      out on the jelly donut, that's a bulge and if the jelly  
21      comes out the donut, that's called a herniation. You're  
22      going to learn as a result of this accident Darcy sustained  
23      numerous herniations through his neck and back that  
24      Dr. Gerling is going to talk about this afternoon.

25                   You're also going to learn at the time of the

## Opening - Plaintiff

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1                   accident, Darcy was 38 years old. Could you get injured  
2                   from other things, from other accidents, from old age from  
3                   wear and tear, from -- absolutely. But you wouldn't expect  
4                   to find these injuries in a 38 year old with no prior  
5                   injuries, no prior surgeries. He had a prior car accident  
6                   20 years before 2021, maybe 2000 or 2002, had a prior car  
7                   accident. No treatment, no injuries, no documented  
8                   injuries, no problems. His whole life, no injuries. No  
9                   neck, no back, no shoulder problems. For somebody 38 years  
10                  old to have these injuries now start.

11                  You're going to learn as a result of this accident  
12                  there's months and months of physical therapy, MRIs. Darcy  
13                  ultimately will to have three spinal procedures. Two of  
14                  them with Dr. Gerling that we're hear about this afternoon,  
15                  called spinal fusions. When they go through and they  
16                  actually fuse your spine together. These are major  
17                  operations.

18                  You are going to learn about the first surgery  
19                  Darcy had regarding his spine. He goes to the hospital for  
20                  the surgery, this spinal fusion surgery. It's supposed to  
21                  be overnight in the hospital and out the next day. You're  
22                  going to learn as a result of this accident with a  
23                  sanitation truck, there was a complication with the surgery.  
24                  It happens. It's rare. He had to spend five nights in ICU  
25                  after this surgery because of the complication.

## Opening - Plaintiff

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1                   You're going to learn he wakes up, they bring him  
2                   into the room and say, okay, you're feeling fine and then  
3                   all of a sudden they say we need to rush you back into  
4                   surgery. Okay. Okay. The next day he wakes up and he  
5                   says, oh, how long was that, like 15 minutes 20 minutes?  
6                   They said no, you've been out unconscious. We kept you  
7                   unconscious for a whole day. A whole day passed and he  
8                   didn't realize is it because of his surgery. We're going to  
9                   hear from that from Dr. Gerling. Ultimately, he had another  
10                  lumbar discectomy and then another cervical fusion.

11                  You're going to learn that Darcy has not worked  
12                  since the date of this accident. Has not worked since the  
13                  date of this accident. A man who loves work, who worked his  
14                  way up over years to become a foreman. A foreman is not  
15                  somebody who sits in his desk and just sit there and does  
16                  paperwork. That's not him. He would help out his men.  
17                  Help out his team of 15 men, 30 men on a job sites as much  
18                  as he can. He would get there first in the morning to open  
19                  up the job site and stay there to the end to close the job  
20                  site. That's how much he took from his job. He has not  
21                  been able to work since the date of the accident. He's  
22                  tried other jobs. He's tried to do stuff but he can't.

23                  We're going to learn that now he's approximately  
24                  42, 43 years old. He's not 70 or 80 years old sitting in a  
25                  bed. I'm going to show you Facebook photos from the last

## Opening - Plaintiff

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1       few years of Darcy living. Darcy goes on vacation. Darcy  
2       hangs out with his friends and his family. You're not to  
3       feel bad for him. He's putting his best foot forward,  
4       trying to live his life and not stay in bed for the rest of  
5       his life. I'm going to show you Facebook photos of him out  
6       with his friends and his family and his loved ones trying to  
7       live life. He likes to dress well. He likes to have a good  
8       time. Absolutely. But there's a difference between being  
9       outside to have a Facebook and what you're really going  
10      through internally and your pain and what's behind the  
11      photograph and social media that everybody puts out there in  
12      the world and what's really going on.

13           You're going to learn that this is a man with no  
14       prior problems, no prior injuries, who to pride in his work,  
15       who got hit smashed by a sanitation truck while in the  
16       crosswalk in an orange shirt and his life has never been the  
17       same.

18           At the end of this case, I'm going to ask you to  
19       finally hold the accountable, responsible, liable, the  
20       defendants for this accident and all the pain and suffering  
21       and surgery and loss of work that Darcy has from the date of  
22       the accident until today and from today for the rest of his  
23       life. Thank you, Ladies and Gentlemen of the Jury. I  
24       appreciate your time. Thank you, Your Honor.

25           THE COURT: You're welcome. Now, we will hear the

## Opening - Defense

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1 opening statement from the defendants.

2 MR. DISTLER: Thank you, Your Honor.

3 THE COURT: Good afternoon.

4 MR. DISTLER: Good afternoon.

5 THE COURT: Almost in two minutes. Go ahead.

6 OPENING STATEMENT

7 BY MR. DISTLER:

8 MR. DISTLER: Good morning, folks. Sometimes they  
9 say a picture's worth a thousand words and you're going to  
10 see and hear certain testimony as we get going in the trial,  
11 folks.

12 You're going to see a video of the incident. Now,  
13 we spoke last week and I told you from the get-go that  
14 Mr. Bottex was walking in the crosswalk. He did have an  
15 orange shirt on. The truck made a left and it was contact  
16 between the left side of his body and the truck.

17 Now, thankfully that impact did not prevent  
18 Mr. Bottex from getting right back up. Getting right back  
19 up. You're going to see the video, folks. You ladies and  
20 gentlemen as the triers of the fact and I want to ask you  
21 when you see that video, folks, he gets right back up and  
22 never reached for his back or neck in pain. He got right  
23 back up, Ladies and Gentlemen. So, again, I'm not denying  
24 there was contact but the contact that supposed to be a  
25 barreling and crashing didn't prevent him from getting right

## Opening - Defense

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1                   back up and picking up something from the ground and walking  
2                   over to the truck, folks, because the truck, it's making a  
3                   left at the entrance of the Third Avenue Bridge and the  
4                   truck stops right on the ramp.

5                   I'm going to ask you at the end of the case and the  
6                   evidence is going to show that the impact is not the  
7                   barreling and the crashing and the catastrophic running into  
8                   him that the plaintiff is making out. You're going to see  
9                   the video, folks. You're going to have an opportunity to  
10                  see the video.

11                  Now, that video, folks, again, September the 7th,  
12                  2021 at about 3:00 in the afternoon. Mr. Bottex was walking  
13                  towards you in the crosswalk. The truck is making a left  
14                  turn. He's got something in his ear that causes him to turn  
15                  to the right. I know we're all New Yorkers. I know we're  
16                  all on the cellphone. I know we do that and there's nothing  
17                  illegal about walking with a cellphone but I think you have  
18                  to ask yourself at the end of the case, and this is what the  
19                  evidence is going to show, did what was in his ear when he  
20                  looked to the right prevent him from maybe taking a maneuver  
21                  and avoiding this impact to some extent because if that's  
22                  the case, you can't solely point the finger at the truck.  
23                  You'll see the video. You're going to have an opportunity  
24                  to see the this video.

25                  No request for medical attention. Now, don't

## Opening - Defense

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1                   forget, this is Tuesday, September 7th, 2021 at about 3:00  
2                   in the afternoon. So what is the evidence going to show?  
3                   Mr. Bottex gets back up, he walks over to where the truck is  
4                   now stopped on the ramp. You're going to learn that there's  
5                   some words exchanged between Mr. Bottex and the driver.  
6                   He's probably understandably upset but he walks over to that  
7                   driver, talks to him and then what does he do? Request for  
8                   medical attention? Requests for an ambulance? My back is  
9                   bothering me, my neck. This truck just knocked me down.  
10                  That's not what the evidence is going to show. He goes back  
11                  to the job site because the job site is on the other side of  
12                  the intersection where he was walking on Lincoln. He goes  
13                  back to the job site. We're still Tuesday the 7th of  
14                  September, 2021.

15                  What does he do after he goes back to the job site?  
16                  I'm not disputing that he's a hardworking man. He goes back  
17                  to the job site. Requests for medical attention? No.  
18                  Request for an ambulance? No. He lives in Brooklyn. He  
19                  drives home to Brooklyn. This is Tuesday. He's not driving  
20                  down the block. He drives to Brooklyn. He's able to drive  
21                  and move his neck and change lanes and get on a highway and  
22                  get on the streets to go to Brooklyn. Tuesday. No request  
23                  for medical attention. Tuesday afternoon.

24                  What about Wednesday, folks? What about Wednesday?  
25                  You would think the impact, I'm irreparably damaged, I'll

## Opening - Defense

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1 never be the same, I was permanently injured by this. You  
2 would think maybe just maybe, and the evidence will show,  
3 that on Wednesday when he wakes up, I slept wrong, my back,  
4 my neck, I can't drive back to the Bronx.

5 On Wednesday, he drives back to the Bronx again.  
6 Back on a highway in the streets and driving and turning  
7 lanes on Wednesday. No request for medical attention. No  
8 request for ambulance. Goes to the police station. Goes to  
9 a local police station and tries to work out whether or not  
10 he's going to file a report. Wednesday.

11 Then after checking in at the job site in the Bronx  
12 and going to the police station, drives back to Brooklyn on  
13 Wednesday afternoon. This is the 8th at about 2:00 in the  
14 afternoon and goes to Kingsbrook Jewish Hospital on  
15 Schenectady Avenue in Brooklyn and the hospital records  
16 portray in detail what his complaints were twenty-three  
17 hours later. Twenty-three hours later.

18 I'm going to ask that you folks take a look at the  
19 hospital records that were based on this man's complaints  
20 the following day after he slept, drove back to the Bronx  
21 and then back to Brooklyn. I expect that the evidence is  
22 going to show you that those medical records on Wednesday,  
23 he denied neck pain. He said I did have some pain on my  
24 upper left extremity and I did have some bruising on my left  
25 upper extremity. He was in that hospital for a little more

## Opening - Defense

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1 than three hours and they did detailed X-rays and took  
2 X-rays. They didn't test his neck because he didn't  
3 complain of any pains to his neck. There were no broken  
4 bones. He wasn't bleeding. He wasn't stitched up. And I'm  
5 going to ask you folks at the end of the case to keep this  
6 in context about how devastating and barreling and crashing  
7 this was because this guy's in the hospital on Wednesday and  
8 he doesn't even have a stitch. He's not even bleeding.  
9 There's nothing broken. Those hospital records are what  
10 they are, folks. This is Wednesday.

11 The hospital records paint the picture that's  
12 consistent with what you're going to see on the video  
13 because it's not an earth shattering. I never said for one  
14 second there wasn't contact but keep this in perspective.  
15 Let me get back up. Let me walk over this to this guy. Let  
16 me go check in with my men. Let me go home to Brooklyn.  
17 Let me sleep and put an ice pack or hot towel on and the  
18 next day, let me go back to the Bronx and see if I could  
19 take care of some administrative stuff at a police station,  
20 and then I'm going drive back to the Brooklyn and when I get  
21 there and they do a thorough workup of me at the hospital,  
22 I'm not even complaining of neck pain.

23 Pictures speak a thousand words. Pictures speak a  
24 thousand words. I don't mean to yell but pictures speak a  
25 thousand words because these Facebook pictures that have

## Opening - Defense

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1       been eluded to, I'm going to tell you, are going to show a  
2       guy living his life. He's not laid up at home. He is not  
3       disabled. He made an excellent recovery and the pictures  
4       are going to speak for themselves as to whether or not he's  
5       out, he's socializing, he travels, he goes on vacation.  
6       Come on. You're permanently injured? He'll never be the  
7       same? That's not what the evidence is going to show, Ladies  
8       and Gentlemen. That's not what the evidence is going to  
9       show.

10       Excuse me one second. Pardon me one second. I  
11       mean, you're going to hear from hired experts that he can't  
12       do this, he can't do that, he can't bend down, he can't live  
13       his life. I'm going to ask you folks to hold off because  
14       the experts may testify before you get an opportunity to see  
15       the pictures and a picture's worth a thousand words because  
16       at the end of the case, we're here to determine whether or  
17       not they can prove that this injury has had the affect on  
18       him that he's claiming and it hasn't, so I'm going to did  
19       ask you to just wait.

20       I'm going to get out of your hair in one second.  
21       Darcy Bottex comes into this courtroom. He's an interested  
22       witness. He's involved in a lawsuit. He has certain  
23       motivations to try to sell you folks something about what  
24       happened in and the affect it's had on him, Ladies and  
25       Gentlemen. The evidence is going to show you folks that

## Opening - Defense

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1                   he's embellishing and making more of this than it is.

2                   That's for you folks to determine and I suggest a picture  
3                   speaks a thousand words. Thank you for listening to me this  
4                   morning. I appreciate your time. Thank you, Your Honor.

5                   THE COURT: You are very welcome. Normally I would  
6                   say call your first witness. Is your witness available?

7                   MR. HERBERT: At 2:00 p.m., Your Honor.

8                   THE COURT: Okay. I hate down time because we  
9                   have -- well, we have 50 minutes before one. You're going  
10                   to get an extended lunch break. I expect you back here at  
11                   2:15 sharp. There's not going to be administrative delays.  
12                   Once we get you all lined up and in here, there will be a  
13                   medical expert testifying. In the meantime, go enjoy the  
14                   sumptuous cuisine that 161st Street has to offer and we'll  
15                   see you at 2:15.

16                   COURT OFFICER: All rise. Jury exiting.

17                   (Whereupon, the sworn jurors exit the courtroom.)

18                   THE COURT: Gentlemen, is there anything we need to  
19                   consider? Nothing? See you at 2:15 then.

20                   MR. HERBERT: Thank you, Your Honor.

21                   MR. DISTLER: Thank you, sir.

22                   MR. SAUCEDO: Thank you, Your Honor.

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

24                   COURT OFFICER: All rise. Jury entering.

25                   (Whereupon, the sworn jurors enter the courtroom

Dr. M. Gerling - Plaintiff - Direct

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1 and take their respective seat.)

2 THE COURT: Welcome back. Please be seated. I  
3 trust you had a delicious lunch somewhere in one of the fine  
4 establishments in the area. We have Jamaican, we have  
5 chicken, Spanish but no French or Thai. That said, welcome  
6 back and we thank you for your time. Plaintiff go ahead and  
7 call your first witness

8 MR. HERBERT: Thank you, Your Honor. At this time,  
9 I'd like to call Dr. Gerling to the stand, Your Honor.

10 THE COURT: Doctor, please approach the witness  
11 stand. Make good use of the microphone there after you  
12 follow the instructions of the court officer.

13 (Whereupon, the witness takes the stand.)

14 D R. M I C H A E L G E R L I N G, a witness  
15 called by and on behalf of the Plaintiff, upon being duly  
16 sworn, testified as follows:

17 COURT OFFICER: Please have a seat. Please state  
18 your name and your business address.

19 THE WITNESS: Dr. Michael Gerling, 740 Park Avenue.

20 THE COURT: Okay. Plaintiff, you may inquire.

21 Dr. Gerling, you seem like a gentleman of soft  
22 speech. I'm going to ask you to project so that my jury can  
23 hear you. That's why I'm moving closer to you. Don't feel  
24 any nerves about that. I'm sure this is not your first  
25 rodeo.

Dr. M. Gerling - Plaintiff - Direct

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1 Go ahead, Counsel.

2 MR. HERBERT: Thank you, Your Honor.

3 || DIRECT EXAMINATION

4 BY MR. HERBERT:

5 Q Doctor, you are licensed to practice medicine in the  
6 State of New York?

7 A Yes.

8 Q When did you become so licensed?

9 A 2006.

10 Q Dr. Gerling, are you licensed to practice medicine in  
11 any other states other than New York?

12 A New Jersey.

13 Q Doctor, where did you attend college?

14 A In California at UC Berkeley.

15 Q You graduated with a degree in what?

16 A Molecular cell biology.

17 Q Did you graduate with honors?

18 A Yes.

19 Q What is that, Doctor?

20 A It's a heightened degree. If you have high grades and  
21 also if you do an honors thesis and then you present it to  
22 faculty and its thresholds.

23 Q Where did you graduate from medical school?

24 A University of California, San Diego.

25 Q When was that?

Dr. M. Gerling - Plaintiff - Direct

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1 A 2000.

2 Q And after completion of medical school, what did you do  
3 next professionally?

4 A In the world of medicine, we have to go and do some  
5 type of training after medical school which we call a residency  
6 program. So we do an internship for about a year but then a  
7 residency which is where you learn a craft, some type of  
8 specialty. In my world, it was musculoskeletal medicine called  
9 orthopedics so I did that for five years until 2005 and then  
10 after that, you can go into practice if you want to or you can  
11 do next level specialty training within the world of  
12 musculoskeletal medicine, so I did an additional year in  
13 Cleveland Case Western Reserve with one of the godfathers of  
14 spine surgery and did a full year of spine at two major  
15 facilities. One is the Metro Health System which is one of the  
16 largest level trauma centers in North America. That's where you  
17 see spine trauma and that's why I wanted to train there and then  
18 also in the university and the VA Medical System there and the  
19 VA system there was the first spinal cord injury system in North  
20 America and so I had a blend of degenerative or arthritic or  
21 aging spine conditions that I studied and then traumatic  
22 injuries to the spine. So things like major fractures, disc  
23 herniations, patients who are helicoptered in from other  
24 locations.

25 Q Doctor, you mentioned the word orthopedics, what is

Dr. M. Gerling - Plaintiff - Direct

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1 generally the study of orthopedics?

2 A Studying musculoskeletal issues. So, things like joint  
3 problems, bone problems. It can be nerve problems. Certainly,  
4 there's some overlap with the nerves because the nerves run  
5 inside the bone, so we treat mostly bony disorders so everything  
6 from pediatric, children's disorders of the bones, muscular  
7 dystrophy type things, scoliosis, that type of thing, to spine  
8 surgery, joint reconstruction. So if you wanted to have a knee  
9 replacement or hip replacement, that's a specialty. Trauma,  
10 which is where people get injured in large accidents and so on.  
11 Hand surgery, foot, ankle surgery. There's all different  
12 specialties within it and I'm a specialist in the spine.

13 Q Doctor, you mentioned earlier that you did a fellowship  
14 or more additional training, do you have to do a fellowship as a  
15 doctor, as a surgeon?

16 A No, but in the world of spine surgery, fellowship  
17 training is recommended because it is very complex and in  
18 general, when you're doing your general studies in the residency  
19 program, you will see each specialty but you won't see the  
20 complex, more challenging cases and so doing a fellowship really  
21 gives you an additional area of expertise.

22 Q Are you a board certified physician?

23 A Yes.

24 Q In what specialty or specialties of medicine are you  
25 board certified?

Dr. M. Gerling - Plaintiff - Direct

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1 A Orthopedics.

2 Q What does it mean to be board certified, Doctor?

3 A It means I took the examination for board certification  
4 and then did an oral test thereafter where specialists within  
5 the field will actually look at my cases and determine whether  
6 or not I have physical skills as well as the knowledge to be  
7 board certified.

8 Q And you passed that test, correct?

9 A Twice because I did it when I initially came out of  
10 training and then I recertified at ten years.

11 MR. HERBERT: Your Honor, I'd like to qualify  
12 Dr. Gerling as an orthopedic surgeon.

13 MR. DISTLER: No objection, sir.

14 THE COURT: So certified. He's qualified as an  
15 expert in orthopedic surgery. Go ahead.

16 Q Doctor, did there come a time where you entered private  
17 practice?

18 A Yes.

19 Q Approximately when was that?

20 A Formally in 2014.

21 Q Is there any specialty or specialty of medicine for  
22 your practice? That was a bad question.

23 What is your specialty for your practice, Doctor?

24 A It's orthopedics, and I primarily treat spinal  
25 disorders.

Dr. M. Gerling - Plaintiff - Direct

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1 Q Doctor, have you had any teaching positions at any  
2 med -- sorry.

3 Doctor, have you had any teaching positions in any  
4 medical schools or hospitals?

5 A Yes.

6 Q Can you describe that for the jury?

7 A Yes. From the beginning, when you go into training,  
8 you are surrounded by other professionals that are either above  
9 you or below you. Everybody sort of trains people that are  
10 below them so throughout my training, I was exposed to other  
11 people that I trained.

12 Then once I finished with my training, I became an  
13 assistant professor at SUNY Downstate, which is the State  
14 University of New York. I worked there for four years. I  
15 became the chief of spine surgery there. I was their chief of  
16 research as well and so I had six residents per year and for  
17 five years. That's 30 residents that I trained both in the art  
18 of treating patients with spinal disorders and also in research.

19 Then after that, I moved and became an NYU faculty  
20 member and I was there until recently where I was essentially  
21 training fellows, residents and then other affiliates, for  
22 example, like nurse practitioners.

23 Q Doctor, are you a member of any medical societies?

24 A Yes.

25 Q Can you explain what that is?

Dr. M. Gerling - Plaintiff - Direct

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1           A     Within the world of orthopedics, almost any medical  
2 field will have specialty societies. Those societies typically  
3 are responsible for education of doctors. Also, they're forums  
4 for you to communicate new technologies and just collaborate as  
5 a profession. And within the spine world, there are specialty  
6 societies, subspecialty societies, because spine is a part of  
7 orthopedics and in the general field of orthopedics, we have  
8 societies as well.

9                   I'm a member of The American Academy Of Orthopedics.  
10          I'm actually a fellow from there and I have been ever since I  
11          trained. It is the biggest organization. It's the primary  
12          organization for orthopedic surgeons. I teach courses and  
13          symposiums there every year to other spine surgeons, to other  
14          surgeons. Sometimes general orthopedic surgeons come as well.  
15          So I'm very involved in the education there.

16                   I also was involved in the Federation of Spine  
17          Associations at the academy which was where the largest  
18          societies within the spine world would come together and do  
19          educational specialty days and I actually became the president  
20          of that society, the Federation of Spine Associations.

21                   And so then outside of the general realm, I also have  
22          been a member of the Cervical Spine Research Society ever since  
23          I was in fellowship, which is the world of neck disorders, and  
24          it is by far the most prominent spine society there is in the  
25          neck, basically.

Dr. M. Gerling - Plaintiff - Direct

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1                   There are other worlds of spine societies but they  
2 don't specialize in the neck and that is really one of these  
3 societies that focuses on it so I've been a member there. I was  
4 the chairman of education at that society so I've been there  
5 ever since I trained and then I'm a member and I give courses.  
6 I'm on the committee. I'm at the North American Spine Society  
7 meeting next month where I'm on the continuing medical education  
8 committee, et cetera. So I'm involved in the education of other  
9 surgeons, residents, et cetera.

10                 Q     Thank you, Doctor. I appreciate it.

11                 Doctor, have you had occasion before to testify in  
12 court?

13                 A     Yes.

14                 Q     Would you be able to approximate how many times you've  
15 testified in court prior to today?

16                 A     I would say that somewhere between 40 and 50. Maybe a  
17 little more.

18                 Q     Why do you testify in court?

19                 A     When my patients have some type of dispute and I'm  
20 asked to come and appear in court, I'll come to represent.

21                 Q     Prior to today, have we ever worked on a case together?  
22 Have you ever testified for me on a case, Doctor?

23                 A     I think so. Like, a long time ago. Many years ago.  
24 Maybe one case.

25                 Q     Doctor, can you describe your current practice today?

Dr. M. Gerling - Plaintiff - Direct

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1           A     So about a year ago, a little more than a year ago, I  
2 was offered a position as the director of musculoskeletal care  
3 in a hospital system in New Jersey which is where the majority  
4 of my patients are right now. I have a practice in Manhattan,  
5 and then I do have patients still in Queens and in the boroughs  
6 but I have three offices now in New Jersey. I have been caring  
7 for a lot of patients out there recently and so it was a real  
8 honor for me to be offered this position at the new hospital  
9 system in Hudson County and so that's the county that's right  
10 beside Manhattan. So I'm right now in the Hudson system and  
11 then also Jersey at the Barnabas system which is Jersey City  
12 Medical Center so that's where I'm mostly involved with from an  
13 administrative standpoint. I left NYU a year and a half ago for  
14 that position and the practice is still similar in terms of the  
15 types of patients I see.

16           I see spine related patients. A large proportion of  
17 them have degenerative problems and a large proportion of them  
18 have traumatic injuries of the spine. A smaller proportion of  
19 them have some type of deformity or a problem with curvature of  
20 the spine so the practice is all spine, for the most part. I do  
21 see some orthopedic issues that are general like shoulders and  
22 knees but the majority of it is spine.

23           Q     Doctor, what would you be doing if you were not  
24 testifying before the ladies and gentlemen of the jury here  
25 today?

Dr. M. Gerling - Plaintiff - Direct

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1       A     I would be in the operating room or I would be seeing  
2 patients in the office.

3       Q     Doctor, are you being compensated for your time here  
4 today away from your practice?

5       A     Yes. And for canceling all my patients.

6       Q     Do you know how much you're being paid?

7       A     I think it's \$8,000.

8       Q     Doctor, there came a time when you saw Mr. Bottex?

9       A     Yes.

10      Q     Do you have your chart with you here today, Doctor?

11      A     Yes.

12      Q     Doctor, those records are kept in the ordinary course  
13 of your business, correct?

14      A     Yes.

15      Q     And you drafted those records at the time you saw Darcy  
16 as a patient, correct?

17      A     Yes.

18      Q     And you maintained those records as part of your  
19 practice as an orthopedic surgeon, correct?

20      A     Yes.

21            MR. HERBERT: Your Honor, I'd like to move those  
22 records. They've been shown to counsel prior to just now.

23            MR. DISTLER: May I ask just a few questions on  
24 voir dire?

25            THE COURT: Go ahead.

Dr. M. Gerling - Plaintiff - Direct

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1 VOIR DIRE

2 BY MR. DISTLER:

3 Q Good afternoon, sir.

4 A Good afternoon.

5 Q The records were made contemporaneously with your  
6 visits with Mr. Bottex, yes?

7 A Yes.

8 Q And you -- and those records, just timeframe wise,  
9 would be from March of 2022 up until the beginning of 2025?10 A I believe that I saw him all the way up until September  
11 of '25.

12 Q That was the most recent visit you had?

13 A Yes.

14 Q But your initial visit would have been March of 2022?

15 A Yes.

16 MR. DISTLER: Okay. Thank you.

17 THE COURT: No objections?

18 MR. DISTLER: No objection.

19 THE COURT: Hearing no objections, I'll ask one  
20 question.21 Doctor, is there any report in there that you  
22 prepared just for the purposes of this litigation?23 THE WITNESS: There is one report that says  
24 narrative at the top which I performed in conjunction with  
25 an office visit when I was seeing him because I was asked to

Dr. M. Gerling - Plaintiff - Direct

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1 comment on his condition and so in a more formal sense,  
2 rather than just having a -- some people would look at an  
3 office note and not necessarily understand the big picture  
4 of it and so I did a summary note.

5 THE COURT: Is there still no objection?

6 MR. DISTLER: Judge, can I just off tail on that  
7 for a second?

8 Q The September 19th report, that was a compilation or  
9 summary of all your visits going back to March of 2022?

10 A Well, this is a very thick chart so, yes, in a larger  
11 scale, mile high perspective, yes.

12 Q But that report, that September 19th, 2025 report, was  
13 prepared at the request of a lawyer in connection with  
14 litigation, yes?

15 A If I'm treating a patient for as long as I'm treating  
16 Mr. Bottex and I'm seeing them in the office in September of  
17 2025 but I've been seeing them for three years and they have a  
18 complicated history, it's very difficult for a jury or anybody  
19 to look at the notes from when any one visit and understand the  
20 context of it so when I was asked by the attorneys to do a  
21 summary, I generated this note during that office visit in  
22 conjunction with that office.

23 Q At the request of the attorney?

24 A Yes, when I was made aware of the fact that, you know,  
25 we would appreciate a summary. Yes.

Dr. M. Gerling - Plaintiff - Direct

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1 MR. DISTLER: So, I think that the last report  
2 might be --

5 MR. HERBERT: It's been exchanged.

6 THE COURT: Was that exchanged with the CPLR  
7 3101(d)?

10 THE COURT: Was that report prepared during a  
11 periodic follow up to treatment of Mr. Bottex?

12 THE WITNESS: Yes. He was seen other days before  
13 and after that visit as well. Yeah.

17 MR. DISTLER: Can we step for one second?

18 (Whereupon, the following discussion takes place at  
19 sidebar among the Court and Counsel outside the hearing of  
20 the sworn jurors.)

21 MR. DISTLER: Thank you. I'm going to withdraw the  
22 objection to the September 19th, 2025 narrative report that  
23 Dr. Gerling compiled.

24 THE COURT: Hearing that, the doctor's chart will  
25 be marked in evidence. I believe that will be Plaintiff's

Dr. M. Gerling - Plaintiff - Direct

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1 14; is that correct?

2 MR. HERBERT: Yes, your honor.

3 THE COURT: Of course, subject to any redactions  
4 during any break we have if they are necessary.

5 (Whereupon, Dr. Gerling's records, previously  
6 Plaintiff's Exhibit 14 was received in evidence.)

7 COURT OFFICER: So marked.

8 MR. HERBERT: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. HERBERT:

11 Q Doctor, now that the records have been marked in  
12 evidence, that means that you're allowed to read from them or  
13 talk for them. The jury could see them ultimately down the  
14 road. They're in evidence so feel free to refresh your  
15 recollection or read off the records because they're in evidence  
16 at this point.

17 Let's go to the first visit. I believe the first visit  
18 is March 10th, 2022, correct?

19 A Yes.

20 Q Could we just walk through that visit? First, we'll  
21 talk about the mechanism of injury. Can you describe what that  
22 means and what was the findings?

23 A Mechanism of injury, when we describe that, if somebody  
24 has some type of force to their body, it causes damage. It can  
25 create an injury which then causes symptoms and a problem that

Dr. M. Gerling - Plaintiff - Direct

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1 I'm treating, so it's very relevant and we don't always have a  
2 great history of how something happens but usually it has to do  
3 with a force being imparted on your body.

4 In this case, we took a history and the most important  
5 initial issue is just to understand why the patient is seeing  
6 you. So the first part of your examination is really a history  
7 so where we try to find out why are you here and what happened  
8 and, you know, they're normal questions that you would ask  
9 somebody and then some of them are technical.

10 In this case, we discussed the fact that he had been in  
11 involved in an accident on September 7th, 2021 when he was hit  
12 by a garbage truck while he was crossing the street. So that  
13 was the mechanism. How his body hit. He was hit by the truck  
14 and then he also landed on the ground. And so he injured  
15 several different body parts including his neck, his left  
16 shoulder, his arm, his back and his knees and that the pain  
17 radiated to the left arm and that his back pain caused tingling  
18 in his right leg. So like when you have some type of tingling  
19 or weird sensation in your leg.

20 He had an accident a long time ago. I actually used  
21 the words remote MVA. I don't know exactly what year but it had  
22 happened where he had required some physical therapy and  
23 acupuncture for his back which had completely resolved so his  
24 back symptoms had resolved at that point.

25 In the office, we took a history where he said he was a

Dr. M. Gerling - Plaintiff - Direct

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1 38 year old. He said that his neck pain was his most severe  
2 symptom and that it had been getting worse since the accident,  
3 that he wasn't able to work at the time. He was a foreman on a  
4 construction site and that it was causing difficulty with sleep.

5 We went into details about how severe the symptoms  
6 were. On a scale of one to ten where ten is the absolute worst  
7 pain you can imagine and zero is no pain, he had a seven for his  
8 neck pain and the pain that shot into his left arm was a seven  
9 out of ten with the numbness. He also had a back pain which he  
10 rated eight out of ten. It made it difficult for him to walk  
11 two blocks at a time and if he bent over, it got worse.

12 We talked about what kind of treatment he had received  
13 which included physical therapy which is one of the baseline  
14 treatments you have for a neck or back problem and he had been  
15 doing that for five months, I believe, since the time of the  
16 accident. He had been doing a home exercise program. He had an  
17 injection so sometimes a doctor will take a needle and inject it  
18 into the spine to try and help with the symptoms because you can  
19 put medicine in there directly into the spot where you need it.  
20 He had taken medication orally. He said that before the  
21 accident he had no symptoms in the neck. He had a prior history  
22 of high blood pressure and also of ulcer problems in his  
23 stomach, and then he also said that he never smoked cigarettes  
24 or you used any type of drugs or anything like that.

25 Q Should we start generally about the neck? Do you want

Dr. M. Gerling - Plaintiff - Direct

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1 to go generally to explain the anatomy of the spine and then  
2 we'll go into findings?

3 MR. HERBERT: Your Honor, this is marked already.

4 I can show with the counsel. It's in Plaintiff's Exhibit 9  
5 for demonstrative purposes. Can I approach the witness or  
6 ask the witness to step down?

7 THE COURT: Either way.

8 MR. HERBERT: So I'm handing Dr. Gerling what's  
9 been marked as Plaintiff's Exhibit 9 dated 10/20/25.

10 Q Dr. Gerling, can you explain generally what we're  
11 looking at in the anatomy of the spine?

12 A Yes. So obviously this is a cartoon. The reason that  
13 cartoons are made is because obviously it would be really  
14 difficult to understand the context of things if you had just  
15 the bones or if you had just -- so this is helpful because when  
16 you see an X-ray later or you see MRIs and things like that, you  
17 understand sort of where things are in space.

18 So, you know, if you're looking at somebody's neck,  
19 normally the skin would be here but deep inside everybody knows  
20 that there are bones that are holding up your head, right? The  
21 bones in the spine, this is called the cervical spine because  
22 it's a part of the neck. Once you get to the ribcage, that  
23 becomes the thoracic spine because that's the thorax in this  
24 area. When you get below the ribcage, it's called the lumbar  
25 spine and the reason we use those names is so that if I'm trying

Dr. M. Gerling - Plaintiff - Direct

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1 to describe to you a spot in the spine, I can tell you exactly  
2 where it is.

3 In fact, we get even more detailed because each one of  
4 these bones in the cervical spine needs to be described as well,  
5 so the way that we kind of describe them is by numbering them.  
6 So starting at the very top, the first bone in the neck would be  
7 called the first cervical vertebrae or C-1 because this is the  
8 cervical spine and so each one is another level so C-2, C-3, C-4  
9 and so on.

10 In between those bones, there's movement, right? Just  
11 like your knee moves, it's a joint and it's in between two  
12 bones, well, there's movement between each of these bones and  
13 that's why we're able to move our head around and flex and move  
14 the neck, right? So the joints that are inside the neck are  
15 fairly complex and in the front it's called a disc. That's like  
16 a shock absorber. And in the back you have these joints called  
17 facet joints. Between those different joints, the spine is able  
18 to move between them and in order to describe those joints, we  
19 use the numbers of the bones around them so the disc that's  
20 between the C-3 and C-4 bone would be called C-3/4 disc. If you  
21 wanted to describe the joint between the C-5 and the C-6 bone,  
22 you'd call it the C-5/6 disc. Does that make sense? So the  
23 levels are numbered.

24 Now, also what's not obvious in this picture is that  
25 inside the spine is a canal. Everybody's heard of spinal cord.

Dr. M. Gerling - Plaintiff - Direct

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1       The spinal cord controls the body and the nervous system, right?  
2       And coming from the brain inside the head is this sort of super  
3       highway of the spine and, in fact, that would help me if I had  
4       that.

5                    MR. HERBERT: Your Honor, this is marked  
6                    Plaintiff's Exhibit 12 dated 10/20/25.

7       A        This exhibit shows what one of those bones in the neck  
8       looks like if you were just looking at it from above. If you  
9       look at it from above, you could see the area where that disc is  
10      in the front and those facet joints I was telling you about in  
11      the back and in the middle is this canal that's formed between  
12      the bones. This is the bump that you'd feel in the back of your  
13      neck when you touch the back of your neck or if you touch your  
14      back, you'd feel that bump back there. This is called the  
15      spinous process.

16                   So inside the middle of the canal of the spine, that's  
17      where the sensitive spinal cord lives and the spinal cord  
18      controls the function of the body so it communicates between the  
19      brain and the limbs and there are other sensitive structures in  
20      here as well including blood vessels where blood goes from the  
21      heart all the way up to the brain to feed the brain with  
22      information.

23                   So as the spinal cord comes down, clearly it needs to  
24      talk to the arms. It can't stay inside the canal. So what it  
25      does is it sends off these nerve roots, that's what those yellow

Dr. M. Gerling - Plaintiff - Direct

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1 things are that go out the holes in the spine. Each one of  
2 these areas or zones of your extremities is controlled by one of  
3 these nerve roots. So each nerve root is numbered. So the same  
4 way we talked about it before, if the very top one is the C-1  
5 nerve root, as you go down, it's C-1, 2, 3, 4, 5. Makes sense.  
6 So that's just a way for us to be able to describe things so  
7 that everybody knows very clearly what we're discussing. So if  
8 I'm telling you that there's a disc damaged at the C-5/6 level,  
9 you know exactly which one I'm talking about. If I tell you  
10 it's pinching the nerve at the C-5 nerve, you know exactly what  
11 nerve that is and each nerve has a characteristic distribution  
12 of where it goes but it's not the same in every single person  
13 because we're all a little bit different. Different color hair,  
14 different, you know, different shapes of this and that but the  
15 bottom line is that there are very characteristic ways that  
16 these nerves work and where they typically go.

17 In the arm, there are very typical patterns of where  
18 the nerves control and they control sensation so if you touch  
19 your limb, it controls the signal that goes up through that  
20 nerve root into the spinal cord and into the brain. So that's  
21 how you feel things.

22 Similarly, if you want to control the muscle there, the  
23 spinal cord sends a signal through the nerve root to the muscle  
24 here and tells the muscle to contract and lift up your arm and  
25 each controls certain muscles and certain skin. So if you have

Dr. M. Gerling - Plaintiff - Direct

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1       numbness, it's usually because the signals are not able to get  
2       through that nerve root and into the spinal cord and into the  
3       brain.

4               Similarly, if you have weakness, it's because the  
5       signals from the brain are trying to make your arm move but  
6       those signals aren't getting there and most of the time it's  
7       because the nerve root is being pinched or the spinal cord is  
8       being pinched and everybody's heard of a pinched nerve or a disc  
9       herniation. You've heard of sciatica. Well, those are all  
10      symptoms of when the nerves are being somehow pushed on or  
11      irritated and a disc can touch a nerve and create irritation  
12      without necessarily tightly compressing it. When it's  
13      irritated, that's when you'll usually feel pain in that area.  
14      When it's numb, it's usually because it's being pinched.  
15      Usually. It's not always true, but it usually is true. I think  
16      that's the majority of what we need to know.

17            Q       Let's -- so do you -- let's go more specific.

18            A       There's just one quick thing I would also explain.  
19        There's some other words that we're going to use. If you damage  
20       or irritate a nerve root, we call it a radiculopathy. If you  
21       damage or irritate the spinal cord, we call it a myelopathy  
22       because in greek, myel refers to the spinal cord and opathy  
23       means sickness so myelopathy is sickness of the spinal cord.  
24       Radiculopathy means sickness of the nerve root and one of the  
25       main ways that gets damaged or irritated is by what we call a

Dr. M. Gerling - Plaintiff - Direct

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1 herniation. So if one of these discs gets herniated, that means  
2 it's damaged and it's pushing outwards in a weird way and it's  
3 pushing on the nerve or the spinal cord and it's creating those  
4 issues like radiculopathy or myelopathy. So a disc herniation  
5 is like a rupture of the disc.

6 Q Thank you, Doctor.

7 MR. HERBERT: Thank you, Your Honor.

8 Q Now, Doctor, let's go now specifically to Darcy. On  
9 this visit, did you review MRI films during this March of 2022  
10 visit?

11 A Yes, I did.

12 Q And you had findings with the March of 2022 visit,  
13 correct?

14 A Yes.

15 Q What were your findings, Doctor?

16 A That there were three discs in the neck that were  
17 damaged and pressing on the spinal cord.

18 Q And what were those discs?

19 A C-3/4, C-4/5 and C-5/6.

20 Q Are you able to directly visualize that damage on the  
21 MRI films?

22 A Yes.

23 Q Silly question: Can somebody fake an MRI study or a  
24 film?

25 A No.

Dr. M. Gerling - Plaintiff - Direct

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1 Q Doctor, can you show the ladies and gentlemen of the  
2 jury that MRI film that you read during that March 2022 visit?

3 A Yes.

4 MR. HERBERT: Your Honor, may I have the Doctor  
5 show the jury the film?

6 THE COURT: Yes, you may. Any objection?

7 MR. DISTLER: I just want to make sure it's March  
8 15th of 2022, sir.

9 MR. HERBERT: No. The visit is March 10th, 2022.  
10 The film is from October 3rd, 2021. You know that.

11 MR. DISTLER: You're going to show a film now from  
12 October 3rd, 2021 of Mr. Bottex's neck?

13 THE WITNESS: Yes, sir.

14 MR. DISTLER: Thank you, sir.

15 THE COURT: How is this being published?

16 MR. HERBERT: We have the film in evidence and the  
17 doctor is going to show from his laptop.

18 THE COURT: So it's not something you're going to  
19 project here?

20 MR. HERBERT: He has a Mac and I'd rather just save  
21 time. I think they can see it. If they can't, we will  
22 spend time doing it over there.

23 THE COURT: I understand. Let's do it.

24 A Unfortunately, the studies couldn't stay loaded so I  
25 have to quickly reload them. It won't take more than a second.

Dr. M. Gerling - Plaintiff - Direct

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1 Q Can you just explain to the jury what we're looking at  
2 and what this is dated?

3 A Just to give context so people can see what I'm  
4 referring to, we can look at the X-rays that were also viewed  
5 that day of the neck which are from March 15th, 2022. So if you  
6 look at the neck from the side -- now, this is not a carton.  
7 This is the actual X-rays. You could see the brain, the skull  
8 and you could see the bones in the neck and you could see the  
9 discs in between the bones.

10 Q This is actually Darcy's X-ray?

11 A This is Darcy's X-ray from March 15th, 2022 after the  
12 accident. It's the first time I saw him in the office and you  
13 can see that there are discs there. Normally the spine has a  
14 nice curvature to it. In this case, it had lost the curvature  
15 because it was flexed forward and that is an indication usually  
16 of muscle spasm in the neck.

17 If we go to the MRI now, okay, now you understand a  
18 little bit of context. This is looking at the neck from the  
19 side. So here's the brain up above and this is like a slice  
20 through the middle of the spine. You could see the spinal cord  
21 coming down the middle of the spine. Normally there's this  
22 white fluid around it. That's a normal kind of cushion barrier  
23 that the spine will have. Here are the discs that are in  
24 between the bones.

25 Now, if you look carefully, you could see that the

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1 spinal cord here is sort of a gray dark color and as it  
2 approaches this area, you can see that the there's no space for  
3 the spine. In fact, this disc is pushing backwards and  
4 squeezing the spinal cord.

5 Q Can you show everybody?

6 A Okay. Now, I'm going to zoom in on this just so that  
7 everybody can sort of see it a little bit better. Let me just  
8 see if I can get it in. So when I zoom into this area here, you  
9 can very clearly see that the spinal cord is being squeezed  
10 there at this level, at this level and this level. So you see  
11 how much space is very narrow for the spinal cord so where  
12 signals would normally be going through the spinal cord, they  
13 can't get through as well anymore and if I scroll up and back  
14 and forth, you could see that the disc is pushing backwards in a  
15 couple of different places. You could see it right there. And  
16 the spinal cord goes from being wide to narrowed.

17 If I look at the spine from that other picture that we  
18 were showing you before, if we look at it from above, here's the  
19 spine again. I'm going to go to a normal level.

20 THE COURT: While he's rebooting that, if any you  
21 of has a cellphone not on silent mode, please place it on  
22 silent mode now. We shouldn't be hearing it throughout the  
23 trial.

24 A So I'm going to zoom in on that area there. Again, you  
25 recognize the disc in the front and the bones in the back. This

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1 is the space where the spinal cord lives and right now, this is  
2 a level where the spinal cord is being squeezed. If we go to  
3 another area where the spinal cord is not being squeezed, you  
4 could see the spinal cord with white fluid around it. When we  
5 go down to where the spinal cord is being squeezed, you could  
6 see that there there's something squeezing it and it's  
7 absolutely being crushed and flattened. That thing that's  
8 pushing backwards is that disc that's pushing backwards. It's  
9 the herniation.

10 When we go to this level here, you could see the disc  
11 pushing backwards here at this level and squeezing the nerve as  
12 it goes into the left arm. That's a very large disc herniation  
13 that's crushing that nerve that goes to the left side. So that  
14 would cause left arm and shoulder pain right here in that area.

15 And I'm going to go to the next level below. You can  
16 see it again the spinal cord being squeezed and the exit hole  
17 where the nerves exit is being narrowed.

18 And then one last time right here you could see a disc  
19 pushing backwards, and it's actually squeezing the nerve that's  
20 exiting through that hole there. When we go to the level below  
21 that, you could see there's actually a lot of space around the  
22 spinal cord so that's not a level that needed to be fixed or had  
23 a problem. And the exit hole where the nerves could leave is  
24 pretty good there so that level did not have a problem so that's  
25 an example of a more normal level and this is an example of

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1 where the nerve is being squeezed as it exited and this is a  
2 more traumatic one right here. You could see that disc pushing  
3 backwards and squeezing the nerve as it exits and squeezing the  
4 spinal cord.

5 Do you want me to show what I -- anything -- any more  
6 details and imaging? I have imaging of after I fixed it.

7 THE COURT: I will remind you, Counsel, that at  
8 4:45 we have to be out. I don't want your doctor to have to  
9 come back tomorrow.

10 MR. HERBERT: Okay.

11 Q Doctor, real quick I want to go to a topic and then  
12 we're going to jump back into your notes. It was talked about  
13 and they're in evidence, the Kingsbrook Medical Center, the  
14 hospital, on the date after the accident, it was talked about  
15 that Darcy went the next day after the accident to the hospital.  
16 Is that surprising to you? Does that change any of your  
17 findings? Does that change any of your opinions that you're  
18 going to get to the ladies gentlemen of the jury?

19 MR. DISTLER: Objection.

20 THE COURT: Restate the question.

21 Q You've treated patients for decades at this point,  
22 right, Doctor?

23 A Yes.

24 Q Have you seen patients that they've gone to the  
25 hospital or doctors the next day after the accident?

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1 A Oh, definitely.

2 Q Would that change any of your opinions regarding your  
3 testimony to the ladies and gentlemen of the jury?

4 A No.

5 Q Why is that, Doctor?

6 A No.

7 Q People that have damaged discs, there are all different  
8 reasons why they may go to a Doctor at a certain time. It may  
9 be that they have lived a life where they have a very high  
10 threshold for pain. Some people will go to the doctor the first  
11 time they start sneezing while other people won't go to the  
12 doctor ever for a cold. People who have pain, sometimes their  
13 threshold for pain is pretty high and they say, you know what, I  
14 think it's going to go away, you know, I've never experienced  
15 this type of thing before, I don't know what it is, but I'm  
16 going to see what happens, you know, and see how it goes. And  
17 then for them to go the next day, that's not a very long time.  
18 I mean, I see people who go a week later to the hospital. It's  
19 a matter of how much you can tolerate.

20 Some people don't like doctors. Some people don't want  
21 to go to the emergency room because they're worried about COVID  
22 or worried about -- you know, there are lots of reasons why  
23 somebody might not rush to the emergency room the moment they  
24 get hurt. They may have a child that they need to take care of  
25 at home.

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1 MR. HERBERT: Your Honor, I'd like to show the  
2 doctor Plaintiff's Exhibit 1 in evidence dated 10/20/25.  
3 May I approach the Doctor?

4 THE COURT: You may. What is it?

5 MR. HERBERT: Kingsbrook Hospital records.

6 THE COURT: It's identified today.

7 MR. DISTLER: I got you.

8 THE COURT: Thank you. Let's move along.

9 MR. HERBERT: Thank you, Your Honor.

10 Q I'm looking at Page 95. There's hundreds of pages  
11 here. I just want to show you. If you look at this part --

12 A Yes, I see it.

13 Q Can you read that?

16 MR. HERBERT: It's in evidence.

17 THE WITNESS: Do you want me to describe it?

18 MR. DISTLER: I have the Kingsbrook records. I  
19 just need --

20 MR. HERBERT: It's Page 95.

21 Q Can you read that section?

22 A In here it describes what the nurse wrote down when he  
23 entered the hospital and it basically said that the patient is  
24 in obvious mild discomfort of the left arm, chest and upper back  
25 noting ecchymosis, which is bruising on the left upper arm.

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1 Pedestrian struck by garbage truck yesterday. Denies head  
2 injury so he didn't hit his head.

3 Q Is that consistent with your findings what's stated the  
4 next day in the hospital records, Doctor?

5 A Yes.

6 Q Can you explain that?

7 A It's very common for people who injure discs in their  
8 spine where they've had some type of herniation or rupture of  
9 the disc, it's very common for them to have progressive symptoms  
10 and it's also very common for them to just have neurologic  
11 symptoms and not necessarily neck or back symptoms.

12 So you've heard of people that have sciatica or have  
13 pain shooting down their leg or into their arm. Often times,  
14 that's coming from a disc herniation that's in the neck or in  
15 the back. It just isn't presenting with neck pain.

16 Now, that being said, when you have rupture to a disc  
17 in the neck or back, it frequently does refer to the upper back  
18 and chest area so that's really quite common and the fact that  
19 it was shooting into the arm in the same distribution where the  
20 nerve is being compressed in the neck, it is completely  
21 consistent with it. It makes perfect sense.

22 Q And that word -- I'm going to butcher it. Ecchymosis.

23 A Ecchymosis.

24 Q What does that mean?

25 A It's bruising. They actually saw physical evidence of

Dr. M. Gerling - Plaintiff - Direct

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1 the fact that the patient had been injured before.

2 MR. HERBERT: Thank you. Can I take that back?

3 THE WITNESS: Yes.

4 Q We have to go a little faster because of time reasons.

5 In your opinion, Darcy, how is he as a treater? You  
6 made a comment about your chart. Is he a good treater? Is he a  
7 bad treater? There's a lot of records here.

8 MR. DISTLER: I respectfully object. I'm not  
9 sure --

10 THE COURT: You're not sure what? Just note your  
11 objection.

12 MR. DISTLER: A good treater?

13 THE COURT: Can you rephrase the question?

14 Q Has Darcy treated with you consistently since the  
15 accident?

16 A He's been what we call a very compliant patient. That  
17 means somebody who comes on a regular basis. They follow their  
18 directions. They follow our recommendations. We don't have to  
19 chase after them. If we order an MRI or an X-ray or something  
20 like that, he goes and gets it done and comes back.

21 Q Let's jump ahead. And your records are in evidence so  
22 the jury could see those. Let's just jump ahead to the first  
23 surgery June 27th, 2022. Ultimately, Darcy had his first  
24 surgery with you on June 27th, 2022. It's in evidence, correct,  
25 Doctor?

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1 A Yes.

2 Q Can we go to that record?

3 A Yes.

4 MR. HERBERT: Those records are also in evidence,  
5 Your Honor, dated Plaintiff's Exhibit 13 dated 10/20/25.  
6 That's the date that they're marked in exhibits, not the  
7 date of the records.

8 Can I approach this doctor just in case he needs  
9 to -- they're in evidence.

10 THE COURT: You may approach.

11 MR. HERBERT: Thank you, your honor.

12 Q Let's walk through what was the surgery, what took  
13 place. Thank you, Doctor.

14 A So when somebody has a pinched nerve, it's my job to  
15 try to get them through without surgery and if we believe that  
16 they need surgery, to perform the surgery. I'm the surgeon so  
17 in this case, he was not getting better with nonoperative care.  
18 He had severe symptoms and the spinal cord was being damaged.  
19 The nerves going into the arm I believe were being damaged.  
20 There was a risk of him getting worse. He had already gotten  
21 worse, you know, at the time when I saw him so that's why we  
22 recommended surgery.

23 We explained to him all of the risks and benefits of  
24 surgery. In other words, how can this help you and how can this  
25 hurt you. Those are very standard protocols that all surgeons

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1 have. In fact, we're required to actually make a patient sign a  
2 form called a consent form which means that they give us  
3 permission to do the surgery and during that process we're  
4 required to explain to them all of the risks of the surgery, why  
5 they're having the surgery and what the alternatives to surgery  
6 are.

7 In this case, because we were fixing the neck, I  
8 described the surgery in detail and this is exactly what I did.  
9 After anesthesia, I made a cut on the front of the neck. I  
10 retracted the tissues in order to get past all the sensitive  
11 structures in the neck. So in the neck, you have the throat.  
12 Everybody's heard of the tube that you breathe through and also  
13 the tube that you eat through in the middle here. Everybody's  
14 heard of the blood vessels like the corroded artery and the  
15 jugular. Those are all in there as well. So we have to protect  
16 those structures and actually pass through them to then expose  
17 those discs in order to take out the discs.

18 So the surgery itself risks damage to all of those  
19 structures including the blood vessels that can cause  
20 significant, severe or even lethal bleeding and then you can  
21 also, of course, have damage to the structure that you swallow  
22 through, the trachea that you breathe through and you can have  
23 problems with the muscles. You can have a lot of different  
24 complications from the surgery. Wound complications such as  
25 infections can occur and patients also can have anesthesia-type

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1 complications because they have to go under and have quite a bit  
2 of medication in order to stay still during the surgery.

3 So after exposing the spine, you have to actually take  
4 out the discs. Taking out the discs is sort of like if a  
5 dentist is doing a root canal where they're trying to remove all  
6 the dead parts or bad parts of a tooth. We actually have to  
7 remove all of the disc that I showed you, those exact discs are  
8 exactly how we remove them. It is exactly the site that we  
9 remove the discs at so those discs that were pressing on the  
10 spinal cord, I literally had to pull them back and scrape them  
11 out and then make a nice space for it to heal.

12 So we put in implants to stabilize it and hold it in  
13 one position and those are implants that I can show you are very  
14 obvious on an X-ray. Then after we put those in, the patient  
15 has to have a drain that comes out and we have to close the  
16 wound. When I'm in there and I'm taking out the disc and the  
17 bone, I am working literally on the spinal cord so it's sort of  
18 like if you can imagine a worm in a log and you're trying to  
19 remove all of the bone around or the wood around that worm to  
20 get it out from where it's being squeezed and literally  
21 protecting it and making sure it doesn't get thicker or more  
22 angry or more damaged during the surgery.

23 So, of course, there's risk to the blood vessels in the  
24 area that's around the spine just like I showed you, but also  
25 there's a spinal cord and the nerves that can get damaged as

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1 well so you could be paralyzed or have some type of neurologic  
2 problem from the surgery.

3 Q Can you explain what you actually did?

4 A Once we took out the disc at the three levels, C-3/4,  
5 4/5 and 5/6 disc, I put in the implant that hold it still which  
6 I can show you on X-ray and then I removed the retractors, put  
7 in a drain that came out and then that was the end of the  
8 surgery and he was doing quite well. We brought him to the  
9 recovery room and his vital signs, his blood pressure,  
10 everything had been stable during the surgery even though he has  
11 a history of high blood pressure.

12 Q What took place next when you saw him after the surgery  
13 in the hospital?

14 A Unfortunately, this is actually quite rare but he, when  
15 he woke up from the surgery, started having higher and higher  
16 blood pressure and we were trying to control it and anesthesia  
17 was giving him medications for it and as the blood pressure went  
18 up. It was alarmingly high where we were concerned about things  
19 like stroke, he could have a problem with the blood vessels  
20 going to his brain but in this case, it actually caused bleeding  
21 inside the wound so sites which had been not bleeding before, at  
22 the end of the surgery everything was dry there was no bleeding,  
23 started bleeding and the way we knew that was because it started  
24 coming out in the drain. And also, we knew it because he  
25 started having difficulty breathing. He could feel the fact

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1 that there was something pressing on his trachea and that's not  
2 that common but when it happens, it is definitely a life  
3 threatening emergency because as the blood starts building up  
4 inside the wound, it can start pressing on the ability to  
5 breathe and you can actually be cut off from your airway.

6 In this case, we had a drain in but it just wasn't able  
7 to pull out the blood quickly enough to keep the pressure off of  
8 the spinal -- the trachea so we had to bring him back. We had  
9 to put a tube back inside his lungs and put him back to sleep,  
10 bring him back to the operating room and actually clean out that  
11 area where the bleeding had occurred.

12 Q How long did he have to stay unconscious with the  
13 tracheal tube inside of his throat?

14 A For a couple of nights, I believe, and he was in the  
15 hospital for five days where he normally would have gone home  
16 that next day or within 24 hours.

17 Q Can you show the jury the postoperative X-rays, what it  
18 looks like with the hardware in Darcy's neck after the first  
19 surgery?

20 MR. HERBERT: Your Honor, can he step down and show  
21 the jury?

22 THE COURT: Yes, he may.

23 A This exam is actually called a CT scan and the reason I  
24 want to show that to you is that it is the most -- it's the  
25 easiest thing to evaluate the healing of the bone and to look at

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1 the implants and really see them but it's not in three  
2 dimensions though. It's sort of like an MRI where it slices  
3 through the spine but it's very helpful for you to be able to  
4 understand and see what's happening. So inside the spine here,  
5 you could see the bones again with the discs in between. This  
6 is Darcy Bottex's CAT scan from May 30th, 2023 and I'm going to  
7 zoom in on them a little bit just to make them a little bit more  
8 obvious to you.

9 THE COURT: Doctor, use that microphone as much as  
10 you can.

11 THE WITNESS: I'm sorry, it's behind me.

12 A You can see on the very front of the spine there's a  
13 plate and the screws are going into the bone and in between the  
14 bones are disc. That disc has been removed and now there's an  
15 implant in there. At this level, there's an implant. In this  
16 level, there's an implant so these levels are now locked  
17 together.

18 At one year, we usually get a CAT scan because that's  
19 when we can see whether or not the bone has healed together and  
20 in this case, even though the bone had started healing together  
21 at these two levels, you can see there's no bone in between  
22 these two levels here. So the C-3/4 level, for some reason the  
23 bone didn't heal and it's not because Darcy did anything wrong.  
24 Just sometimes the bone doesn't heal and there are a lot of  
25 opportunities for things to go wrong with these surgeries and

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1 that's one of them where the bone doesn't heal properly and when  
2 it doesn't heal properly, at first you feel better because the  
3 thing is taken off of the spinal cord and you feel better  
4 because your nerves feel better but you -- and also the bones  
5 are stable so the implants in there are nice and tight because I  
6 just put them in there. Over the course of time, as you're  
7 moving around, those structures slowly start loosening up so  
8 it's kind of a race between the implant loosening and the bone  
9 healing and in the vast majority of people, they heal well but  
10 when you do three levels, there is a higher chance that one of  
11 those levels is not going to heal properly. Sometimes none of  
12 them heal properly. In this case, two of them healed properly  
13 and one of them didn't and that's why subsequently we had to put  
14 in another implant at this level in order to help it heal so you  
15 could see the facet joints there, how they're not touched when I  
16 go through the front. You see how they don't have anything in  
17 between them.

18 In the spine, during the first surgery, I only did the  
19 discs in the front and most of the time that's enough and that's  
20 why I don't do anything more in the back. If we go to the next  
21 study though, this is the last CAT scan that was done in the  
22 cervical spine on December 18th, 2024. It's going to take a  
23 second to load. So then you can see there's implants in the  
24 front. You see how the bones there in between those bones  
25 starting to go between. At this level, that's where the bone

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1 hadn't been growing together so what I did was I made two cuts  
2 in the back of the neck and I went into the back of the spine on  
3 him and in that procedure, I put these implants that are right  
4 here in between those facet joints.

5 Q Now, you're talking about the second surgery?

6 A That's the third surgery because the first surgery  
7 required me to do a second surgery to take out the blood, that  
8 was the same day, and then a year later we had to go back in and  
9 do these little guys in the back of the neck so he had a third  
10 surgery where I went into the back and if you look here now from  
11 the side, you could see those facet joints and here are those  
12 open facet joints but do you see this one how it has the metal  
13 implant in there in the back? And that's on both sides so we  
14 had one here and one there and you can see that the bone started  
15 to heal back there where I did that so it did work okay to go in  
16 through the back to heal it.

17 Q So I know you talked about it but just so it's clear,  
18 the third surgery was on December 21st, 2023, correct?

19 A Yes.

20 Q Doctor, do you have an opinion within a reasonable  
21 degree of medical certainty as to the cause of the cervical  
22 spine herniations that necessitated the three cervical spine  
23 surgeries you performed?

24 A Yes. It was when he was struck as a pedestrian by the  
25 truck.

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1 Q What is your basis for your opinion, Doctor?

2 A Because the history of the injury coincides with the  
3 appropriate symptoms that would correlate with that and with all  
4 the findings by myself and other medical professionals both in  
5 the history and in the physical examination and in the MRIs and  
6 CAT scans and imaging that were performed on him. Everything  
7 fit together.

8 When we look at an injury and a patient goes from  
9 having no symptoms to having severe symptoms and neurologic  
10 problems and their history coincides with an injury and their  
11 physical examination shows the results of that injury and then  
12 we perform imaging like an MRI as in this case and X-rays that  
13 goes and demonstrates exactly what's going on in a very textbook  
14 fashion, then it's obvious.

15 And then beyond all of that, I actually went into the  
16 spine and took out those discs. I saw with my own eyes the disc  
17 herniations that were compressing the spinal cord in the nerves  
18 so I know that he had a herniation at three different levels. I  
19 know that he had an injury that started the symptoms and that  
20 caused those problems in the left arm. So all of those things  
21 go together to make it really a textbook case, an obvious case  
22 of somebody who has a severe injury that requires surgical  
23 intervention. In this case, three surgeries in order to try and  
24 fix and in order to try and help him.

25 Q And just to finalize that point, the accident was in

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1 September of 2021, the first MRI you saw that the you just  
2 showed to the ladies and gentlemen of the jury showing the three  
3 herniations were one month later in October of 2021, correct?

4 A Yes.

5 Q He's not walking around with these three herniations  
6 before the accident without documented any complaints of pain?

7 MR. DISTLER: Objection.

8 THE COURT: Sustained. A little leading.

9 MR. HERBERT: Okay. I'll rephrase it.

10 Q We just showed the jury the accident was September of  
11 2021, correct, Doctor?

12 A Yes.

13 Q And you showed the jury the MRI scans from October of  
14 2021, about a month after the accident, with the herniations,  
15 correct, Doctor?

16 A Yes.

17 Q I want you to assume that there's no documented any  
18 injuries for Darcy before our September 2021 accident, is that  
19 consistent with your findings?

20 A Yes.

21 Q Is if somebody had these injuries, these three  
22 compressing injuries on their spine, would there be  
23 documentation prior to September of 2021?

24 MR. DISTLER: Objection.

25 THE COURT: Sustained. Rephrase.

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1           Q     Could somebody be walking around with these three  
2 herniations prior to September of 2021, Doctor, without  
3 complaints of pain?

4           A     That's very theoretical. It's very unlikely.

5           Q     Doctor, we're going to get to the end but I know you  
6 have a lot of records there and they're in evidence but should  
7 we just go through the dates just for completeness? Just go  
8 through the dates of treatment and then we'll just go to the  
9 end.

10          A     That's fine. Can I just finish my answer from before?

11                    MR. DISTLER: Sorry, Judge, but can we just  
12 approach for a second?

13                    THE COURT: Sure you can.

14                   (Whereupon, the following discussion takes place at  
15 sidebar among the Court and Counsel, outside the hearing of  
16 the sworn jurors.)

17          Q     Can you finish what you were saying, Doctor?

18          A     Yes. The end of my answer to the question was that I  
19 think that also we need to keep in mind that Darcy was not just  
20 walking around. Before this accident, he was working in a  
21 pretty complex, intense world in the labor world where people  
22 have to have coordination, where they have to be able to  
23 concentrate. They can't be on medications easily. You have to  
24 be able to function and so I think it's not just him walking  
25 around before the injury but he actually was functioning at a

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1 very high level as a foreman on a construction site.

2 Q Yes. Thank you, Doctor.

3 Just for completeness, let's just go through all the  
4 records. They're in evidence so the jury could look at them,  
5 and I could talk about it later and then we're going to go to  
6 the end.

7 You saw Darcy on December 1st, 2022. Should we just go  
8 through the dates of service? We don't need to go through each  
9 record and then we'll just wrap everything up at the end just to  
10 show consistency of treatment throughout the course.

11 A I saw him five times between March and December of  
12 2022.

13 Q Okay. And then 2023?

14 A I saw him four times.

15 Q Okay. And then 2024?

16 A I saw him five times.

17 Q And then 2025?

18 A I saw him five times. Well, he was seen in my office  
19 five times.

20 Q And then the last visit was I believe was September  
21 19th, 2025, correct, Doctor?

22 A Well, with me, yes. He also was seen on September  
23 30th, 2025 with my nurse practitioner.

24 Q Okay. Do you have an opinion with within a reasonable  
25 degree of medical certainty as to whether Mr. Darcy Bottex has

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1       suffered a disability as a result of this accident?

2       A      Yes.

3       Q      More specifically his cervical spine?

4       A      Yes.

5       Q      And what is your opinion, Doctor?

6       A      He's lost significant use of his neck.

7       Q      Okay. One thing we didn't touch upon. Should we just  
8 talk about range of motion, Doctor? Can you explain what range  
9 of motion testing is generally and then specifically with Darcy?

10      A      Well, in general we measure how much a joint moves in  
11 order to help us understand how much loss or function that joint  
12 has and so there are guidelines by which a person normally can  
13 move their neck or their back and those guidelines can be  
14 compared against our patients so that we know whether or not a  
15 patient is normal range of motion or abnormal or how much loss  
16 there is. In this case, we measure the range of motion in the  
17 office using the American Medical Association Guidelines.

18      Q      Are you looking at the last one?

19      A      I was going to refer to the last or his office visit.

20      Q      Would it be safe to say throughout the course of your  
21 years of treatment with Darcy you've taken range of motion tests  
22 with Darcy, correct?

23      A      Yes.

24      Q      And how were your findings in your last test in  
25 September of 2025?

Dr. M. Gerling - Plaintiff - Direct

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1           A     He has substantial loss of motion.  We found that he  
2 had some spasms still and tenderness in his neck.  Spasm is when  
3 the muscles contract without control.  Tightness, everybody  
4 who's had a stiff neck or stiff back.  That would be a form of  
5 spasm.  It usually indicates that there's something in there  
6 that's irritating the nerves or the bone.

7           In this case, he had something called the Spurling sign  
8 so when you move your neck, you can actually make it a little  
9 bit tighter for those nerve roots and it can actually aggravate  
10 the symptoms that go into the arm and that's called a Spurling  
11 sign.  It's very sensitive for the nerves being irritated in the  
12 neck.

13           When we measure the range of motion, there are  
14 different degrees or ways that you would move that we measure.  
15 Forward is called flexion.  Backwards is called extension and  
16 then there's rotation to each side and flexion is normally 60  
17 degrees.  That means you go from 0 down all the way to 60  
18 degrees.  In his case, he could only get 45 degrees.  He lost  
19 about one quarter of his motion in the flexion and then in  
20 extension where you normally would go back to 75 degrees, he can  
21 only go back to 30 so he has less than half of the normal  
22 extension of the neck.  When he rotates, normally you'd be able  
23 to rotate almost 90 degrees.  He can only rotate to 55 degrees  
24 to the left and 60 degrees to the right.

25           Q     So in September of 2025, you took four range of motion

Dr. M. Gerling - Plaintiff - Direct

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1 tests of Darcy's neck and he had decreased range of motion in  
2 each one of the those four range of motion tests of his neck,  
3 correct?

4 A Substantial.

5 Q Substantial decreased range of motion?

6 A Yes.

7 Q Doctor, do you have an opinion within a reasonable  
8 degree of medical certainty as to whether Mr. Bottex has  
9 suffered a permanent consequential limitation of the use of his  
10 cervical spine?

11 A Yes, he does.

12 Q What's your opinion, Doctor?

13 A That he has.

14 Q Can you just elaborate on that?

15 A Yes. He has permanently lost the use of three of the  
16 joints in his neck. Those joints are not ever going to come  
17 back. They're locked together and fused and then thereafter, he  
18 is developing arthritis at the level below which frequently does  
19 happen in the scenario. So when you have an injury, it can  
20 cause problems with the discs. Certainly, some of them need to  
21 be treated right away and in some cases when you treat those  
22 discs such as this, the discs are very stiff and because of that  
23 stiffness, all of the motion in the neck has to occur through  
24 the other joints beside it so the other joints wear down at a  
25 much quick rate than you'd normally expect. So at the level

Dr. M. Gerling - Plaintiff - Direct

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1 below, he's already developing quite a few problems with that  
2 disc.

3 Q Doctor, you mentioned you took out the disc. That's  
4 permanent, right? The disc doesn't grow back, correct?

5 A Correct.

6 MR. DISTLER: Objection.

7 MR. HERBERT: Withdraw.

8 Q Does the disc grow back once you take it out?

9 A No.

10 Q Doctor, you talked about adjacent disc disease. Can  
11 you explain what that means in terms of Darcy more specifically?

12 A Well, because of the stiffness and the damage to the  
13 discs that we had to treat, he now has been developing worsening  
14 problems at the level below. We call that adjacent level  
15 because it's below it or beside it. Adjacent level disease.  
16 And that's a very commonly described entity. It's something  
17 that we're keeping an eye on with him but if it continues to  
18 worsen, he will require surgery to remove that disc as well so  
19 it's called adjacent level disease so that's the reason why  
20 people ultimately end up requiring more surgery in the future.

21 Q Doctor, do you have an opinion within a reasonable  
22 degree of medical certainty as to whether Mr. Darcy Bottex has  
23 suffered a significant limitation of the use of a cervical  
24 spine?

25 A I believe that he has.

Dr. M. Gerling - Plaintiff - Direct

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1 Q What is your opinion, Doctor?

2 A That he has lost significant use of his spine.

3 Q And how is that conjunction with your range of motion  
4 tests you just took in September of 2025?

5 A If you look it at it in the big picture of things, from  
6 a mild high perspective he's lost about half of the normal  
7 motion of his neck.

8 Q Doctor, do you have an opinion within a reasonable  
9 degree of medical certainty regarding the scarring on  
10 Mr. Bottex's neck because of those three surgeries you  
11 performed? Are those scarring permanent?

12 A Yes, they are.

13 Q Doctor, do you have an opinion within a reasonable  
14 degree of medical certainty as to whether Mr. Darcy Bottex will  
15 need future medical treatment?

16 A Yes.

17 Q What is your opinion?

18 A Well, he's going to need ongoing visits just like he's  
19 been seeing us every year four or five times per year. It's not  
20 just me, it's other medical professionals such as physical  
21 therapists.

22 MR. DISTLER: I'm going to object at this point as  
23 far as the doctor's expertise.

24 THE COURT: Sustained. Narrow your answer to what  
25 you believe based on your experience with the plaintiff he

Dr. M. Gerling - Plaintiff - Direct

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1           will need going forward.

2           A     So the treatment of patients with spinal disorders,  
3     musculoskeletal disorders and particularly injuries to the neck,  
4     I oversee all of them so I send my patients out for physical  
5     therapy. I send them for pain management and they come back and  
6     report to me how they're doing and I modify their prescriptions  
7     the same way a physiatrist would be modifying or supervising the  
8     physical therapy for a patient that's getting physical therapy.

9           I am also supervising the results of injections and I  
10    perform injections myself in my own office so I'm very familiar  
11    with what the conservative, nonoperative necessary treatment  
12    will be for somebody before surgery, after surgery, after  
13    revision surgery. I'm performing the full scope of care on  
14    these patients. I don't do hands on physical therapy with my  
15    hands, neither does a physical therapy doctor or rehab doctor.  
16    They actually send the patient to their therapist who then  
17    perform that treatment. So, I mean, I'm very familiar with the  
18    different modalities that are used to treat pain. I mean, I  
19    prescribe the medications myself. I perform injections myself.  
20    In the office we do different evaluations and even treatment.

21           Q     Let's go specifically for Darcy. What future medical  
22    treatment for Darcy do you anticipate?

23           A     So I expect that he's going need at least two or three  
24    injections in the neck and back every year. I believe that he  
25    will require bracing every two to three years for the neck and

Dr. M. Gerling - Plaintiff - Direct

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1 back because the braces wear out and they get soiled or damaged  
2 or they start falling apart.

3 The physical therapy, it's been his history and it is  
4 normal for people to require two sessions per year of physical  
5 therapy I'd say on average whereby they'd have six to twelve  
6 weeks of physical therapy Sessions three times per week.

7 Medication wise, we would typically expect him to  
8 require different levels of medication as time passes but  
9 overall, over the course of the year, I would expect to  
10 prescribe an antiinflammatory such as Celebrex probably between  
11 three and six months per year. I would expect him to be on  
12 those medications depending on whether it was a good month or a  
13 bad month.

14 For lingering neurologic symptoms, he would be on  
15 Neurontin, which is a very, very common nerve medicine that  
16 helps with nerve pain and then I would expect him to have muscle  
17 relaxers. Cyclobenzaprine is very common.

18 Q What about future surgery or future treatment?

19 A We use topical patches which also are expensive and  
20 then we also do surgeries. So there was different stages of  
21 care. There's therapy, medications, injections and then after  
22 that, if all of that fails and he starts to really have  
23 significant breakdown at the disc below and above, that's when  
24 we would go back in and do a revision surgery where I would  
25 actually literally take out the disc below and lock that level

Dr. M. Gerling - Plaintiff - Direct

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1 together, too.

2 Q And is it your opinion within a reasonable degree of  
3 medical certainty that Darcy is going to going to need future  
4 revision surgery as a result of this accident?

5 A Yes.

6 Q Why is that, Doctor?

7 A Because, I mean, I treat patients like Darcy every day.  
8 Thousands of patients like Darcy and the typical pattern is  
9 where they will function at a certain level that is adequate for  
10 a period of time but over time, those results will tend to wear  
11 down and they will often times require a revision surgery.

12 He's had three levels removed and he's a relatively  
13 young man so his disc that's symptomatic below where he had his  
14 surgery is extremely likely to require being removed and that  
15 would be called a revision surgery where we go back in and  
16 actually another surgery on top of the prior surgery.

17 Q Doctor, can you give a breakdown of the costs for each  
18 one of these you just discussed?

19 MR. DISTLER: Objection.

20 MR. HERBERT: It's in his report. It's all  
21 documented. It's his practice. He does these surgeries.  
22 There's no basis to object.

23 THE COURT: Well, how about a foundation as to his  
24 experience with the pricing and cost of such things.

25 Q Let's start from the beginning. Doctor, these

Dr. M. Gerling - Plaintiff - Direct

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1 different future --

2 THE COURT: Sustained, just for the record.

3 Q These future prognosis for Darcy that we just talked  
4 about, this is part of your care generally, not saying for  
5 Darcy, in your practice that you treat patients over the years,  
6 correct?

7 A Yes.

8 Q And this is not hypothetical. This is not -- this is  
9 part of your practice and part of your specialty with treating  
10 patients, correct?

11 A It is a part of my practice.

12 Q And part of your practice is performing revision  
13 surgeries, correct?

14 A Yes.

15 Q Part of your practice is you perform injections,  
16 correct?

17 A Yes.

18 Q And part of your practice is MRIs and sending physical  
19 therapy you just talked about, correct?

20 A Yes.

21 Q Can you break down the cost of each within of the these  
22 that we just talked about?

23 A Yeah. So in all fairness, the you know, costs can vary  
24 from hospital to hospital, from MRI center to MRI center. There  
25 are different price points but there's a general range that is

Dr. M. Gerling - Plaintiff - Direct

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1 understood and would be anticipated. You know, in real day  
2 dollars right now, I think that it would be expected that if we  
3 do a revision surgery on him in the near future, you know,  
4 without inflation costs and all those things, I would expect it  
5 to be between 120 to 150, maybe \$130,000. When you consider all  
6 of the costs associated with it, with anesthesia, with the  
7 hospital fees, all the implant costs, the extended stay, and he  
8 may have to stay in the ICU, all of those things are very, very  
9 expensive and then he has to pay for myself but also for an  
10 assistant surgeon. There's probably somebody that's going to be  
11 taking the blood and processing the blood. There's a whole host  
12 of things that is are very expensive with the surgery and that's  
13 just the surgery itself and he needs to have therapy and  
14 treatment afterwards and medications and bracing and all those  
15 different things so I think a 130 to \$150,000 is a reasonable  
16 cost estimate for the revision surgery that he would likely  
17 have.

18 And then after that revision surgery, the hope is that  
19 lasts him for a good amount of time but, you know, every 10 to  
20 15 years, we're going to be looking at him to see whether or not  
21 he needs another revision surgery.

22 The MRIs and advanced imaging, I would say at that it'd  
23 be reasonable to expect to pay 1,000 to \$1,500 for those  
24 studies. The bracing would be about 600 to \$800. That's a fee  
25 that is paid to us by Workman's Compensation, for example, so

Dr. M. Gerling - Plaintiff - Cross

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1 I'm very familiar with that.

2 Injections, when I perform an injection on him, that  
3 includes the facility because I have to have a sterile room with  
4 a machine. That's a very expensive imaging machine. I don't do  
5 it in the hospital. I do it in the facility like an ambulatory  
6 center or in my own injection suite. Just the facility itself  
7 is very expensive and then I have to be paid as well for doing  
8 that service so I would expect the injections to cost \$1,500 to  
9 \$2,000 each and that's if he doesn't even require anesthesia for  
10 it. If he requires anesthesia, that will be another \$1,000 for  
11 that injection.

12 Then the last component also is all the medications  
13 that he's going to require. Just the Celebrex alone is probably  
14 50 to \$100 a month. The other medications I would say, you  
15 know, ballpark between 60 and \$80 each.

16 MR. HERBERT: Thank you, Your Honor. At this time  
17 I have no further questions.

18 THE COURT: Thank you. Cross-examination.

19 MR. DISTLER: Thank you.

20 CROSS-EXAMINATION

21 BY MR. DISTLER:

22 Q Good afternoon, sir.

23 A Good afternoon.

24 Q You never saw the video of the incident, is that true?

25 A No, I've seen it.

Dr. M. Gerling - Plaintiff - Cross

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1           Q     The video doesn't depict Mr. Bottex's head hitting the  
2 ground, true?

3           A     He's so far away. I don't know that it's -- I could  
4 definitely not say that. I don't know. He's pretty far away  
5 and you could see the energy by which he's struck and it's -- I  
6 don't even know that I saw the actual collision of his body with  
7 the truck. I saw the truck and him being thrown pretty far and  
8 landing on the ground. I would guess that it's 50 feet away, 60  
9 feet away. It's hard to know and it happens very quickly. I  
10 didn't see it in slow motion.

11          Q     The video didn't prevent him from getting right back  
12 up?

13          A     The video?

14          Q     Where you show in the video, he got right back up?

15          A     Correct.

16          Q     He walked out the entrance of the ramp on the Third  
17 Avenue Bridge?

18          A     I did see him get up and walk. I didn't see where he  
19 walked.

20          Q     We can agree you didn't see him wince, grab his neck or  
21 back on the video?

22          A     I mean, I don't recall specifically what he did with  
23 his arms. I mean, he didn't -- I mean, he looked like somebody  
24 who had just been plowed pretty hard.

25          Q     But not plowed hard enough to go back to the job site,

Dr. M. Gerling - Plaintiff - Cross

111

1 yes?

2 MR. HERBERT: Objection. He did go back to the job  
3 site.

4 MR. DISTLER: That's what I'm saying.

5 THE COURT: For one, sustained.

6 Doctor, do you know what he did after the footage  
7 in the video?8 THE WITNESS: I know that he didn't go to the  
9 hospital. I don't know exactly what he did that day.10 Q You know, sir, that he didn't request medical attention  
11 on the day of the accident, you know that?12 A Honestly, in the video, I see the truck. It does look  
13 like they stopped.

14 Q Yes, sir.

15 A It does look like they stopped so I presume that they  
16 asked him if he was okay. I don't know and I don't know whether  
17 an ambulance came. I don't know whether he actually refused  
18 service or whether he just didn't, you know, have the  
19 wherewithal to go for it. I don't know.20 Q Now, with respect to the ambulance, you compiled the  
21 report on 9/19/25, yes?

22 A Yes.

23 Q And that was at the request of the attorney?

24 A Yes.

25 Q And in your report, that report and all reports, you

Dr. M. Gerling - Plaintiff - Cross

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1 try to be as accurate as you can?

2 A Yes.

3 Q Because before rendering your opinion to the jury, you  
4 want to make an accurate notation as far as the patient's  
5 concerned?

6 A Yes.

7 Q If I could direct your attention of Page 2 of your  
8 report from the 9/19 of '25?

9 A Page 2, you said?

10 Q Yes, sir. Page 2 and three lines from the top.

11 A Yes.

12 Q You had noted that the patient was struck by a car as a  
13 pedestrian walking on the street, yes?

14 A Yes.

15 Q And then you wrote, after the accident they went to the  
16 emergency room by ambulance for care.

17 A Yes.

18 Q I am unclear. You didn't read an ambulance report.

19 A No, I don't think he did. I think that that's just an  
20 error that my office made. I mean, I know he went to the  
21 emergency room but I don't know when -- I don't know how he got  
22 there. I don't know if he took an ambulance the next day.

23 Q You wrote in your report and you knew that report could  
24 be used in litigation before a jury, correct?

25 A I mean, it is accurate. He did go to the emergency.

Dr. M. Gerling - Plaintiff - Cross

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1 Q Not by ambulance.

2 A Well, I don't know whether he did. I don't know why it  
3 said that. I assume it's true, but I don't know but I know that  
4 he went to the emergency room.

5 Q The next day, on Wednesday?

6 A Which is after the accident, right?

7 Q A hundred percent.

8 A That's what it says.

9 Q He didn't take an ambulance. He drove himself to the  
10 hospital in Brooklyn.

11 A I don't know that's true.

12 Q Did you review his deposition?

13 A No.

14 Q So you don't know whether or not on Tuesday, the  
15 accident, what he did, true?

16 After the accident, you don't know if he went back to  
17 the job site, drove home to Brooklyn, drove back to the Bronx  
18 and then drove to the hospital the next day; you're not aware of  
19 any of the those details?

20 A I can't document all of those things in my chart.

21 Like, I don't -- I'm not -- when, a patient comes into my  
22 office -- this is actually a very, very detailed thorough note,  
23 my office visits, believe it or not. For me to have this much  
24 data in my chart is a lot so I'm not going to sit there and  
25 detail every single moment of a patient's journey from the time

Dr. M. Gerling - Plaintiff - Cross

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1 they had some type of injury to the time they sought care. We  
2 do our very best, but I can't document it all and I can't  
3 remember -- it's not even -- it's not clinically relevant for me  
4 to remember those details you're talking about so that's  
5 probably the reason why they don't appear in my chart.

6 THE COURT: Counsel, make use of the microphone  
7 please.

8 Q He didn't tell you he went to the hospital by  
9 ambulance, did he?

10 A I don't remember specifically how we documented that,  
11 whether he told my nurse practitioner when we were in the office  
12 together, whether he told me directly but we documented that.

13 Q Fair enough. Now, you mentioned that it wouldn't be  
14 unusual for somebody to wait to go to the next day for  
15 treatment, true?

16 A That's true.

17 Q But if somebody did go for treatment, what is written  
18 down in those records would be important, no?

19 A It is very helpful, extremely helpful, yes, and you  
20 hope that they really did a thorough and accurate job as well.

21 Q You're aware that Mr. Bottex went to the hospital the  
22 next day on a Wednesday at about 2:15 in the afternoon?

23 A Obviously, I mean, I just saw the emergency room  
24 record. I didn't memorize that time when he arrived and what  
25 day it was.

Dr. M. Gerling - Plaintiff - Cross

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1 Q You don't know?

2 A It was the day afterwards. I don't know the time that  
3 he arrived, no.

4 Q Did you review those records, sir?

5 A I just looked at it but I didn't memorize what time he  
6 arrived.7 Q Can we agree that those records show that he denied  
8 neck pain?

9 A It does say that.

10 Q It says denied neck pain?

11 A Yes.

12 Q And it says pain is improving?

13 A It says he's in mild obvious discomfort and that he has  
14 pain in his left arm and upper back. Can you show me where it  
15 says that he's improving?

16 MR. DISTLER: Yes, sir. Judge, may I approach?

17 THE COURT: You may.

18 A That's not the report I was looking at earlier.

19 Q That's Kingsbrook, yes?

20 A That's not the same report. Is this the same note  
21 from -- what is this?

22 Q This is Kingsbrook Hospital the next day, yes?

23 A This is not what I was looking at before but it looks  
24 like it's the hospital record, yes, and the date is 9/8/21.

25 Q And they said that he was improving and he denied neck

Dr. M. Gerling - Plaintiff - Cross

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1 pain?

2 THE COURT: Counselor, I want you to make sure the  
3 jury is hearing your question as well as the court reporter.

4 MR. HERBERT: Yes, sir.

5 THE COURT: So don't engage in an intimate  
6 conversations with the doctor.7 Q Doctor, on 9/8/2021, which would have been the  
8 Wednesday after the accident, he goes to Kingsbrook Hospital in  
9 Brooklyn. They write in the hospital as part of their  
10 evaluation that his pain is improving and he denied neck pain,  
11 yes?12 A Well, what they documented is -- and I'm going to just  
13 be clear about it just out of fairness, they said that he  
14 presented with left upper extremity, that's the left arm, and  
15 midsternal pain that occurred during the fall and that it was  
16 improving so it doesn't really specify if his chest pain was  
17 resolving or improving or whether the arm symptoms are. It  
18 doesn't really go into -- just like I was saying, I try to put a  
19 lot of details in my notes. It doesn't have details of whether  
20 or not the patient -- you know, whether or not they had  
21 specifically improving arm symptoms.

22 Q But they wrote improvement.

23 A Yes, but it doesn't at all specify and, you know, they  
24 would be concerned about him having a heart attack of course if  
25 he has midsternal pain. That's what they use that for. I'm

Dr. M. Gerling - Plaintiff - Cross

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1 just trying to read.

2 Q He didn't have a heart attack.

3 A Right. So that's what they were trying to sort of  
4 clarify because obviously that would be a big deal. They'd have  
5 to do a whole cardiac workup on him if he was having a heart  
6 attack.

7 Q Thankfully, he didn't have a heart attack?

8 A Not that I know of, no.

9 Q That says he denied neck pain, yes?

10 A Yes.

11 Q Okay. Thank you, sir. I just want to jump ahead.  
12 Then it said on December 21st, 2023 was the procedure when you  
13 went into the back of his neck, yes?

14 A I don't remember the date. I can look it up if you  
15 want. I believe you.

16 Q Yes, sir. I think you said you fixed it. I'm going to  
17 call this the third procedure because you did two in June of  
18 2022?

19 A Correct.

20 Q One was the three level fusion?

21 A Yes.

22 Q Where you took out the three discs?

23 A Yes.

24 Q And then you put in the replacement material?

25 A Right.

Dr. M. Gerling - Plaintiff - Cross

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1           Q     But there was no plate put in in June of '22. The  
2 plate you put in December of '23?

3           A     No, there was a plate in the front after the first  
4 surgery, yes. So we put in the implants and then the plate on  
5 the front and then in subsequent surgery a year later, we did  
6 the surgery from behind.

7           Q     And put the plate in the back?

8           A     No plate, just the interbody implants.

9           Q     Is that the D tracks?

10          A     The implants were put in the back of the neck, yes.

11          Q     You said you fixed it. The repair was successful?

12          A     It was successful and the implants are in excellent  
13 position.

14          Q     Yes, sir. Are these fairly common procedures? The  
15 fusion nowadays, they are fairly common?

16          A     Well, having this type of anterior cervical surgery is  
17 one of the most common surgeries in the world. So, in other  
18 words, knee replacement is pretty common so people have  
19 breakdown of the knee and the injury to the knee. These  
20 injuries to the neck are one of the more common problems people  
21 have, yes.

22          Q     The procedure itself, anterior cervical discectomy  
23 infusion, is it an hour or two? How long does the procedure  
24 take?

25          A     It depends on how much work we have to do and how

Dr. M. Gerling - Plaintiff - Cross

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1 complex the decompression is. I would bet that his surgery took  
2 me two and a half hours, maybe three.

3 Q Do patients usually have a good recovery with this  
4 procedure?

5 A Yeah, typically they'll do well after the surgery.  
6 Yes, it's considered a very successful, very high quality  
7 surgery.

8 Q After you did the procedure in 2023, it was successful  
9 and it was successful enough that Mr. Bottex could now socialize  
10 and go on vacation afterwards, yes?

11 A I think that most people I would not tell them to not  
12 socialize or take vacation.

13 Q Right. And would the usual recovery like a full  
14 recovery on a procedure of this sort take about a year where you  
15 really can get back on your feet full strength?

16 A Yes. As I was describing before, when the bones heal  
17 together, usually patients do have significant improvement of  
18 what they had before the surgery and depending on how much  
19 permanent injury there is to the nerves, how much deformity is  
20 left over, how many other problems with their muscles and joints  
21 they have, they can start returning to more normal activity.

22 Q And before that year within, let's say a month, they  
23 can go back to some light activity, driving, shopping,  
24 typically?

25 A So people have to live their life, right? They have to

Dr. M. Gerling - Plaintiff - Cross

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1 survive so I don't put restrictions on them unless I think that  
2 it's actually dangerous for them to. So whether they're in pain  
3 or not, they're going to drive. Like, for example, he, after  
4 the accident, went back to work and, I mean, it doesn't mean he  
5 was normal, it just that people do what they need to do. We  
6 don't put restrictions on them in, general, in their life unless  
7 we think that they're taking a risk of injuring the site,  
8 whether they're going to make it worse or whether they're a  
9 detriment to others.

10 Q You didn't place any restrictions on Mr. Bottex moving  
11 forward like don't drive, don't lift anything specific? You  
12 know, you basically didn't put on any restrictions on how he  
13 could live his life?

14 A No. We have put restrictions on him, lifting  
15 restrictions, from time to time when we thought it was  
16 appropriate. Once the bone is healed, we really try to get  
17 people moving their joints again and trying to get them active  
18 again so unless there's something dangerous, we let them sort of  
19 self control how much they can do. We give them a home exercise  
20 program to try to integrate them into moving again.

21 Q You didn't see any of Mr. Bottex's Facebook photos, did  
22 you, sir?

23 A No.

24 Q I just want to ask you a couple more questions and I'll  
25 get out of your way. When people get into their 30s, just a

Dr. M. Gerling - Plaintiff - Cross

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1      normal thought of being alive, being human, you can have these  
2      herniated discs and bulging discs just form the natural aging  
3      process, yes?

4      A      Not in their 30s, not typically, and certainly not what  
5      he had.

6      Q      Are you familiar with any literature that says adults  
7      when they get into 30s and 40s, the discs, the shock absorbers  
8      between the bones, they dry out, they atrophy, they shrink? You  
9      get bone spurs just as a matter of being alive. People can have  
10     these herniations and bulges and not know it, yes?

11     A      Right. So there's a natural cascade of aging of all  
12     parts of the body.

13     Q      And Mr. Bottex was involved in a heavy construction I  
14     think 12 years, yes?

15     A      I'm not familiar with him doing heavy construction on  
16     his head. I mean, I think that he was using his arms and legs  
17     but, you know, I don't think that he was doing something that  
18     was heavy for his neck.

19     Q      Heavy lifting?

20     A      I'm not familiar with lifting heavy causing neck  
21     herniations the way he has.

22     Q      Construction can't put wear and tear on your neck?  
23     Lifting rebar, lifting -- all facets of construction can't put a  
24     strain on your neck at all?

25     A      Well, you're not lifting with your head so I don't

Dr. M. Gerling - Plaintiff - Cross

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1 think that that's reasonable to assume that somebody is going to  
2 have herniations because they're doing construction with their  
3 arms and legs and certainly not to the degree that he had. I  
4 mean, that is really outside of the spectrum of normal wear and  
5 tear.

6 Q We can agree that Mr. Bottex made a decent recovery  
7 after our procedure after you fixed it in December of '23, yes?

8 A Well, if we look at the summary report that I did --

9 Q I'm just asking when you fixed them, he made a decent  
10 recovery?

11 A It's all relative. I mean, I think that he's better  
12 off than he was before the surgery definitely. He still has  
13 difficulty walking. He has difficulty -- he's not been able to  
14 return to work. He reports his neck pain seven out of ten  
15 radiating to the upper back and left shoulder with numbness  
16 intermittently. He rates his back pain at five out of ten.  
17 Difficulty walking for more than fifteen minutes or standing for  
18 more than ten minutes without pain. He may have done well with  
19 the surgery itself but he still requires substantial  
20 nonoperative care and still has substantial symptoms.

21 Q But you're saying that he's got restrictions on the  
22 amount that he can walk or stand or bend, but the man is able to  
23 go on vacation, socialize, live his life, yes?

24 A Well, we're using the word restriction. He has  
25 difficulty. He does have a restricted range of motion. He

Dr. M. Gerling - Plaintiff - Cross

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1 doesn't have a formal restriction so it's not like I said you  
2 can't walk for more than four blocks. He said that when he  
3 walks for a certain distance, he starts having pain and he has  
4 to rest, he has to sit down. We see people go to Disneyland and  
5 use a scooter. We see people who go to Disneyland and have to  
6 sit down every 20 minutes when they're walking. They're still  
7 going to go with their kids. They're still going to do stuff,  
8 they just have restriction. That's all they have or they have  
9 limitations. I wouldn't say it's not a formal restriction.  
10 It's more they have limitations that slow down their abilities  
11 and also obviously reduce their enjoyment.

12 Q Well, when he tells you something, that's his  
13 subjective complaints. In other words, if he says I can't bend  
14 or I can't stand for five minutes, you're relying on him when he  
15 says that, yes?

16 A Absolutely. So there's subjective and there's  
17 objective. Subjective is when he tells me things such as how  
18 long he can stand and sit without pain. Objective is where you  
19 measure the function of his muscles, the reflexes in his legs,  
20 the ability to move his head around, all his range of motion.  
21 So there are things that we rely upon for the patient to tell us  
22 and there are some things that we can measure.

23 Q Objective being a spasm or an X-ray or you could see a  
24 bruise, subjective being he's telling us?

25 A Yeah. Even though he may say that he can only sit for

Dr. M. Gerling - Plaintiff - Cross

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1 ten minutes, even though he's saying that, I directly observe  
2 it. I mean, I can see him behind you standing up every ten  
3 minutes, you know, and stretching. Those are things that we see  
4 in the office. Those are things that we observe with our  
5 patients, yes. So it's not just verbal. It's also actually  
6 observed.

7 Q You first see him in March of 2022?

8 A Yes, I think that's correct.

9 Q On the first page of your --

10 A March 10th, '22.

11 Q You had mentioned that he had symptoms present for four  
12 months when you saw him in March?

13 A Yes.

14 Q So four months before March would have been November,  
15 meaning his pain first started in November, yes, sir?

16 A That's obviously not right. I mean, it says that it  
17 started when he had his injury. The math was off. You're  
18 right.

19 Q The math was off on this?

20 A You can tell. I mean, it obviously says that the  
21 symptoms started when he had his accident, right?

22 Q You had indicated that the symptoms have been present  
23 for four months in March which means November, yes?

24 A That's what you said before. Same answer. So, yes,  
25 obviously the math is off. It does say in here that the

Dr. M. Gerling - Plaintiff - Cross

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1       injuries -- that the symptoms started when he had his injury.

2       Q       You mentioned that the compensation that you're  
3       receiving for your time in court today would be \$8,000?

4       A       That's typically what we would charge to cancel or our  
5       patients or our surgery, yes.

6       Q       And you've testified about 40 or 50 times in total?

7       A       Yes.

8       Q       Only for your patients? You've never testified for the  
9       defense?

10      A       Well, I mean, I've testified for the defense in medical  
11       malpractice cases but I don't normally do consulting work as an  
12       expert witness. I normally just -- if I'm asked to testify for  
13       somebody that I've operated on, then I'll go.

14      Q       You'll charge for your time in court and also for  
15       compiling the reports and the examinations?

16      A       So if I spend time compiling a report, then I will  
17       charge for my time doing that and if I have to cancel surgery  
18       and completely inconvenience my entire practice to try and  
19       reschedule patients, I'll lose some of those patients  
20       altogether.

21      Q       To your knowledge, sir, as a result of the incident  
22       that happened on 9/7/21 on that Tuesday, Mr. Bottex did not  
23       sustain any broken bones?

24      A       I'm sorry?

25      Q       No broken bones or fractures?

Dr. M. Gerling - Plaintiff - Redirect

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1 A Broken bones? No. I don't think so.

2 MR. DISTLER: Thank you for your time.

3 THE COURT: Any redirect?

4 MR. HERBERT: Just a few questions.

5 REDIRECT EXAMINATION

6 BY MR. HERBERT:

7 Q Counsel brought up regarding socializing being on  
8 vacation. I want you to assume that there's Facebook photos of  
9 Darcy in 2023, 2024, maybe 2025, living his life, socializing  
10 with friends or family; is that okay? Does that not mean he was  
11 injured from this accident?

12 MR. DISTLER: Objection.

13 THE COURT: You kind of opened the door. Go ahead.

14 Q That means you can answer it.

15 A Absolutely not. It does not mean that he didn't get  
16 injured. I would encourage him to do things as much as he can  
17 with his own limits. It makes me happy to hear that he was able  
18 to laugh and have fun with his friends. It doesn't mean that  
19 he's not on medications in order to do that. It doesn't mean  
20 that he's able to do it at the same rate or frequency that he  
21 normally did. A picture doesn't tell you how he's feeling.22 Certainly, I'm really happy to hear that he's able to  
23 still enjoy life and that's part of the reason why I do what I  
24 do to try and help people restore some of their function.

25 Certainly, it doesn't mean that he's able to go on a job site

Dr. M. Gerling - Plaintiff - Redirect

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1 and work for eight hours continuously in the labor role. So,  
2 you know, I'm glad to hear that. Same time, it doesn't shock me  
3 to hear that he's able to do that. I think he's, you know,  
4 somebody I would expect to have fun with his friends and laugh  
5 and joke around.

6 Q Counsel brought up his age. I believe he was  
7 approximately 38 years old at the time of this accident. What  
8 does that tell you? I think counsel mentioned literature or  
9 said something about his age. What is expected of a 38 year old  
10 to see this significant findings that you found?

11 MR. DISTLER: Objection.

12 THE COURT: Can you rephrase that question?

13 Q Darcy was 38 approximately the time of this accident,  
14 how does age play into your findings regarding this accident  
15 being acute?

16 A Well, 38 is by modern standards pretty young. To see  
17 this extent of injury in somebody's neck is really abnormal and  
18 does not look like it's natural aging.

19 Q Counsel tried to make this connection to being a  
20 laborer or working as a foreman at a construction site and you  
21 were trying to explain that's not the neck or being hit on the  
22 head. Can you just flush it out? You did construction or  
23 laborer as a foreman and as a laborer, as an assistant foreman  
24 for 12 years or 13 years or 14 years approximately, is that what  
25 caused his injury. Is that your opinion or can you explain

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1 that?

2 MR. DISTLER: Objection.

3 THE COURT: Objection is sustained. You're going a  
4 little far afield in terms of what the doctor should be  
5 testifying about and there was no prior foundation as to  
6 what laborers do or don't do. We're just using very vaguely  
7 the term laborer in terms of this context.

8 Q You would agree with me that Darcy has sustained  
9 permanent injury, correct, Doctor?

10 A Yes.

11 Q And you agree with me, Doctor, that Mr. Bottex or Darcy  
12 is disabled and cannot work in his old capacity as to this  
13 accident, correct, Doctor?

14 MR. DISTLER: Objection.

15 THE COURT: That's a little beyond the scope of the  
16 cross-examination and also, we never established what his  
17 old capacity of work used to entail him doing. Sustained.

18 MR. HERBERT: Thank you, Your Honor. Thank you,  
19 Doctor.

20 MR. DISTLER: I just have one question in response  
21 because his medication came up.

22 MR. HERBERT: Wait, I didn't say medication.

23 THE COURT: Just say objection if you have an  
24 objection. Don't talk amongst each other. Talk to me.

25 MR. DISTLER: Judge, I just wanted to ask one

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1                   question about what medication the doctor said that  
2                   Mr. Bottex was on.

3                   THE COURT: That's not what his redirect was about.  
4                   That would be beyond the scope of the redirect. Sustained.

5                   MR. DISTLER: Understood. Okay.

6                   Thank you, sir.

7                   THE COURT: You may step down, Doctor. Thank you,  
8                   Dr. Gerling. You may step down. Have a good day.

9                   (Whereupon, the witness stepped down.)

10                  THE COURT: I think we don't have anything else  
11                  scheduled for today unless we're going to meet after I  
12                  release my jury.

13                  MR. HERBERT: Yes, Your Honor.

14                  THE COURT: Have a seat, Gentleman, for a second.  
15                  I anticipate that tomorrow we will have two witnesses in the  
16                  morning. Both experts. And as my opening statement said to  
17                  you or my opening instructions, sometimes concessions are  
18                  made to take witnesses out of what anyone might perceive is  
19                  the normal order of the trial. In this instance, it appears  
20                  that we are elevating the schedules of experts which have to  
21                  be coordinated with these cases above hearing directly from  
22                  the fact witnesses initially so just be prepared to hear  
23                  from two more expert witnesses in the morning and I believe  
24                  we may have nothing in the afternoon so you're going to get  
25                  a half day tomorrow so you can make good personal use of

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1           that but we'll take things one step at a time. I don't want  
2           to make a promise that I have to break. That said, let's  
3           release the jury and then we'll talk amongst ourselves.

4           COURT OFFICER: All rise. Jury exiting.

5           (Whereupon, the sworn jurors exit the courtroom.)

6           THE COURT: All right. Let's all be seated.

7           Plaintiff, I don't presume there's anything regarding  
8           litigation. That's not what I'm inviting. I did say I  
9           would periodically talk to see about movements. I know  
10           there was a movement. Step up.

11           (Off the record discussion.)

12           THE COURT: I'll see everyone tomorrow at 10:00  
13           a.m.

14           (Whereupon, the trial was adjourned to Tuesday,  
15           October 21, 2025 at 10:00 a.m.)

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