

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF BRONX: CIVIL TERM: PART IA-22  
3

4 CHARLES SARMIENTO,  
5

6 Plaintiff,  
7

8 -against-  
9

10 Index No.  
11 804481/2021e

12 HP RIVER CREST HOUSING DEVELOPMENT FUND COMPANY,  
13 INC., 1 RIVER TERRACE, LLC, J. EQUITIES II, LLC,  
14 MADDD EQUITIES, LLC, JOY CONSTRUCTION CORP.,  
15

16 Defendants.  
17

18 Testimony:  
19

20 Dr. A. Merola 851 Grand Concourse  
21 Dr. S. Touliopolis Bronx, New York 10451  
22 October 21, 2025

23 B E F O R E:  
24

25 HON. MARISSA SOTO,  
1 Justice of the Supreme Court  
2

3 A P P E A R A N C E S:  
4

5 GJELAJ LAW, PLLC  
6 Attorney for the Plaintiff  
7 40 Wall Street, 21<sup>st</sup> Floor  
8 New York, New York 10005  
9 BY: NICK GJELAJ, ESQ.  
10

11 LEWIS, BRISBOIS, BISGAARD & SMITH, LLP  
12 Attorneys for the Defendants  
13 7 World Trade Center, Floor 11  
14 250 Greenwich Street  
15 New York, New York 10006  
16 BY: JAMES WHALEN, ESQ.  
17 BY: AARON T. SMALLETS, ESQ.  
18

19 ALSO PRESENT:  
20 Majelie Smith-Ortiz  
21

22 Valerie E. Monaco  
23 Senior Court Reporter  
24

25

## Proceedings

1                   \*\*\*    M  O  R  N  I  N  G    S  E  S  S  I  O  N    \*\*\*

2                   COURT OFFICER: All rise.

3                   THE COURT: Good morning. You may be seated.

4                   I believe that we are still waiting on one juror.

5                   Oh, I'm sorry, two jurors. But we did have just some  
6                   administrative things to go over and I figured we could use  
7                   this time to do so.

8                   We were alerted last night, after we had wrapped,  
9                   that juror number three has disclosed that they will not be  
10                   able to be here on Friday. So that presents a question to  
11                   us, clearly, as to what we want to do with that  
12                   information. Do we want to go down on Friday? Do we want  
13                   to replace juror number three with an alternate? You know,  
14                   there are benefits and risks on both sides depending on  
15                   which way we proceed to do it. So I definitely want to  
16                   give you guys as much notice as possible so that way you  
17                   can begin to have your conversations.

18                   Counsel Gjelaj?

19                   MR. GJELAJ: I have two witnesses scheduled for  
20                   trial Dr. Shah, who's a lifecare planner, but he's also a  
21                   practicing doctor at various hospitals. I have  
22                   Dr. Macagno, who's a spinal surgeon. I would prefer if we  
23                   take one of the alternates and slide them in.

24                   MR. WHALEN: I would prefer to keep the juror. I  
25                   mean, I'll take it under advisement because I understand

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1 the difficulty that counsel is going to have.

2 THE COURT: Okay. So, yes, and just to be clear,  
3 this was the Court's assessment of it was everyone here is  
4 aware that November 3<sup>rd</sup> is the last day that the Court is  
5 available until I believe November 14<sup>th</sup> or 15<sup>th</sup> which would  
6 put us out a week-and-a-half of down time.

7 I recognize that if we go down on Friday, that  
8 could mean that that pushes us past that  
9 November 3<sup>rd</sup> date. In the Court's mind,  
10 November 3<sup>rd</sup> -- the safest position for us to be in is  
11 that at most we're looking at deliberation on  
12 November 3<sup>rd</sup>.

13 And so clearly, if we go down Friday, that  
14 presents a risk as to that. But that leaves us with four  
15 alternates and, hopefully, those four would provide us with  
16 the minimum of six. We would need to continue when I  
17 return.

18 However, if we don't go down Friday, and instead  
19 use the alternate, then that could put us potentially in a  
20 better situation to totally wrap by the 3<sup>rd</sup> and not have to  
21 worry about the additional but both have uncertainty.

22 So I understand that those require some  
23 deliberation on your part. I'm not looking for any  
24 concrete answer but just know that the Court is also aware  
25 that there's no really pat right answer to this because

## Proceedings

1 there are risks and benefits on both sides.

2 So there was that issue, and then the other goes  
3 to the closing charges and the verdict sheet.

4 The Court has received the plaintiff's iteration  
5 of the closing charges and verdict sheet. I believe  
6 yesterday Counsel Gjelaj mentioned that he was going to  
7 supplement the closing charges, I believe, by at least one.  
8 However, this Court's normal way of operating is that the  
9 parties should exchange their closing charges and verdict  
10 sheets, identify what are the points of contention and  
11 deliver to the Court unified with the points of contention  
12 identified. And then what we would do is based on the  
13 number, we would either schedule a charging conference, if  
14 necessary, or if there are only a few items that remain, we  
15 would fill in gaps when we're waiting on jurors or when we  
16 don't have a witness and use that time. But the Court is  
17 looking at the combined iteration of exactly what remains  
18 outstanding in contention between the parties by the 28<sup>th</sup>  
19 which is Tuesday I believe.

20 MR. GJELAJ: One more thing, Your Honor, in  
21 regards to the first item, the juror that can't be here on  
22 Friday. Not only would it affect those two witnesses, and  
23 I have no idea when they'll be able to testify again, it's  
24 going to affect my Monday testimony because Monday I have  
25 the economist coming in who I really can't have before my

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1 lifecare planner. I mean, I could subject to connection  
2 but it's not ideal. So if counsel can think about that. I  
3 think --

4 MR. WHALEN: I will. Subject to connection  
5 wouldn't be an issue for me. But I have other people that  
6 I have to answer to.

7 THE COURT: Okay. So at this time, the two  
8 jurors have still not arrived. I had hoped by the time we  
9 had wrapped up with our administrative affairs that they  
10 would have shown up. But that is not the case. So I will  
11 allow the parties to talk about the issue as to juror  
12 number three. Again, I'm not coming back on the bench and  
13 expecting an answer. But I would say, hopefully, by this  
14 afternoon after lunch we should have a plan as to what  
15 we're going to do going forward.

16 MR. GJELAJ: Thank you, Judge.

17 THE COURT: Okay. Thank you very much.

18 (Whereupon, there was a pause in the  
19 proceedings.)

20 COURT OFFICER: All rise.

21 THE COURT: You may be seated.

22 COURT OFFICER: All rise, jury entering.

23 (Whereupon, the jury enters the courtroom.)

24 THE COURT: You may be seated. Good morning.

25 THE JURY: Good morning.

1 THE COURT: I just want to again thank the jurors  
2 for being here today. And to again stress that your  
3 participation is essential to us being able to continue.  
4 And I want you to know it is a weighty responsibility but  
5 it's a responsibility that was given to each of you because  
6 you have represented in voir dire that you would be an  
7 impartial juror in this action, and the parties have that  
8 faith in you that you would be able to perform this  
9 function. And I just want you to know that it is  
10 appreciated when you show up every day in order to do so.  
11 The courts and the parties are really relying on you in  
12 order to resolve this dispute.

21 So, again, I just want to thank you for being  
22 here today. And again, really stress for you the  
23 contribution that you're making in showing up every day and  
24 participating in this process. So thank you.

25 Counsel Gjelaj?

Dr. Merola - Plaintiff - Direct

1 MR. GJELAJ: Plaintiff calls Dr. Merola to the  
2 stand. Dr. Andrew Merola.

3 (Whereupon, the witness enters the courtroom.)

4 COURT OFFICER: Raise your right hand.

5 A N D R E W M E R O L A M D, a witness  
6 called on behalf of the Plaintiff after having been first  
7 duly sworn and having stated his address as 567 First  
8 Street, Brooklyn, New York, took the witness stand and  
9 testified as follows:

10 COURT OFFICER: Can you please state your name  
11 and business address for the record.

12 THE WITNESS: Andrew Merola. M-E-R-O-L-A.

13 567 First Street, Brooklyn, New York.

14 COURT OFFICER: The witness is sworn, Judge.

15 THE COURT: Thank you.

16 You may be seated.

17 Counsel, you may inquire.

18 MR. GJELAJ: Thank you.

19 DIRECT-EXAMINATION

20 BY MR. GJELAJ:

21 Q. Good morning. How are you?

22 A. Good morning.

23 Q. We're referring to you as Dr. Merola.

24 Are you a physician duly licensed to practice medicine  
25 in the State of New York?

Dr. Merola - Plaintiff - Direct

1 A. Yes, I am.

2 Q. For how long have you been so licensed?

3 A. Since 1992.

4 Q. Can you please briefly tell the jury your educational  
5 background, any awards, honors, basically bring them up to date  
6 as to who you are today?

7 A. I graduated from Howard University, College of  
8 Medicine in 1990. After I graduated from medical school, I went  
9 to State University of New York in Brooklyn where I did an  
10 internship in general surgery. I then did an orthopedic  
11 residency for four years. I then did an additional year of  
12 training in spinal surgery at the University of Colorado in  
13 Denver. And then I returned to New York City to practice  
14 orthopedic surgery.

15 Q. What is orthopedic surgery?

16 A. It's that branch of surgery that deals with your bones  
17 and your joints.

18 Q. Do you have a subspecialty within orthopedic surgery?

19 A. Yes.

20 Q. What is that subspecialty, please?

21 A. My subspecialty is neck and back.

22 Q. Okay. Are you board certified?

23 A. Yes, I am.

24 Q. Please explain to the jury what it means to be board  
25 certified?

Dr. Merola - Plaintiff - Direct

1           A.    Board certification is a two-step process.  After you  
2 complete your residency training, you take a written examination  
3 in your field.  And then after you've been in practice for two  
4 years, you do a subsequent oral examination and then when you  
5 have passed both of those exams you're board certified.

6           Q.    Is that certification up to date currently?

7           A.    Yes.

8           Q.    Do you teach?

9           A.    Yes.

10          Q.    Tell us about that.

11          A.    So I have an opportunity to teach medical students and  
12 residents, orthopedic residents, fellows, and medical students  
13 in orthopedic surgery.

14          Q.    Do you have any hospital privileges?

15          A.    Yes, I'm at SUNY Downstate Medical system and also at  
16 New York Presbyterian.

17          Q.    Okay.  Do you have a practice?

18          A.    Yes.

19          Q.    What's the name of your practice?

20          A.    It's my name.

21          Q.    Andrew Merola?

22          A.    Yes.

23          Q.    And do you operate?

24          A.    Yes.

25          Q.    What body parts do you operate on?

Dr. Merola - Plaintiff - Direct

1 A. Neck and back.

2 Q. About how many surgeries do you do a year?

3 A. It can vary but anywhere between 150 to 200 or so.

4 Q. Okay. Doctor, I'm going to be asking you some  
5 questions about Mr. Sarmiento. If I stop you at some point, I'm  
6 not being rude, but you're the first medical witness here and I  
7 may want you to explain a term to the jury. Okay?

8 A. Yes.

9 Q. Now, are you here today pursuant to subpoena?

10 A. Yes.

11 Q. You were given a subpoena fee?

12 A. I don't know.

13 Q. Are you being compensated at all by my office or  
14 anybody else for your time here today?

15 A. No.

16 Q. Have you and I spoke before this morning?

17 A. No.

18 Q. You spoke to my office about scheduling though; right?

19 A. Yes.

20 Q. Okay. Now, did there come a time when Mr. Charles  
21 Sarmiento came to your office for the first time?

22 A. Yes.

23 Q. Do you have your records in front of you?

24 A. Yes.

25 Q. I'm going to give you your records that have been

Dr. Merola - Plaintiff - Direct

1 entered into evidence as Exhibit 3.

2 (Handed to the witness.)

3 Q. You use that to refresh your memory at any point.

4 It's in evidence, so you can read from it, Doctor.

5 Tell us about the first time that you saw Mr. Charles  
6 Sarmiento?

7 A. My first visit was on November 20, 2020.

8 Q. Okay. And did you take a history from him?

9 A. Actually, you know what? This is University of  
10 Orthopedics.

11 Q. Oh, did I give you the wrong one?

12 A. Yes, you did.

13 Q. I'm sorry. That's the afternoon witness, sorry.

14 A. And I don't even have my glasses on.

15 Q. Sorry about that, Doctor.

16 MR. GJELAJ: What exhibit is that, Officer?

17 COURT OFFICER: Exhibit 5.

18 Q. Okay. The officer just handed you up Plaintiff's  
19 Exhibit 5 which is your chart.

20 When was the first date that you saw Mr. Sarmiento?

21 A. The first time I saw Mr. Sarmiento was March 15, 2021.

22 Q. Did he give you a history?

23 A. Yes.

24 Q. What history did he give you?

25 A. He had sustained a fall in August of 2020.

Dr. Merola - Plaintiff - Direct

1           Q. And I want you to assume for purposes of your  
2 testimony that Mr. Sarmiento testified yesterday that prior to  
3 seeing you he underwent physical therapy, chiropractic, and  
4 injections. What, if anything, is the significance medically of  
5 that testimony?

6           A. Those are forms of what we would consider conservative  
7 or non-surgical care.

8           Q. And, Doctor, in medicine, especially in your role as a  
9 spinal surgeon, does medicine go from most conservative to most  
10 invasive?

11          A. In general that's true; yes.

12          Q. Can you explain that to the jury?

13          A. Under normal circumstances where patients have an  
14 issue that can hopefully be treated with a non-invasive  
15 treatment, that is to say conservative care or non-invasive  
16 care, you start that first essentially to give the body an  
17 opportunity to recover. Should that fail to relieve symptoms,  
18 you get progressively more invasive depending upon the nature of  
19 the patient's particular problem.

20          Q. Okay. Did you perform a physical examination?

21          A. Yes.

22          Q. On March 15, 2021 to be specific?

23          A. Yes.

24          Q. Can you please tell us about the examination you  
25 performed and the findings, if any?

Dr. Merola - Plaintiff - Direct

1           A.    Sure.  So it was a musculoskeletal and spinal  
2 examination to look at the patient overall.  And he demonstrated  
3 what we call an antalgic and a kyphotic gait pattern which  
4 basically means that he had had a limp with a pitched forward  
5 low-back posture.

6           The examination of his neck revealed that he had a  
7 test called a Spurlings maneuver which was positive and that  
8 reproduced spasm in the neck with radiating pain into the arms  
9 and hands.  He had some weakness in his right wrist, ability to  
10 extend or lift the wrist upwards towards the sky.  And he also  
11 had some sensory loss in addition to something known as a  
12 Hoffmann's sign which is a sign of nerve and spinal cord  
13 irritation.

14           Q.    Okay.  Are you familiar in a medical sense of the  
15 terms objective versus subjective?

16           A.    Yes.

17           Q.    Can you please explain to the jury what that is?

18           A.    Subjective is essentially what a patient tells you.  
19 So it is, for example, a complaint or a symptom.  Something that  
20 is objective is something that is in some way measurable and not  
21 under the patient's control.

22           Q.    So if something is objective, can a patient fake that?

23           A.    Typically not, no.

24           Q.    The test that you just told us about that you did  
25 involving the neck, were those objective or subjective tests?

Dr. Merola - Plaintiff - Direct

1           A.    Objective.

2           Q.    So the spasm, for example, was that objective?

3           A.    Yes.

4           Q.    These tests were of the type that the patient couldn't  
5    fake?

6           A.    Yes.

7           Q.    What other tests did you perform?

8           A.    A low-back examination where his extension was  
9    restricted to 10 degrees, that's the ability to bend backwards  
10   in your low back area. And beyond that what was known as a  
11   Positive Spinal Phalen's test was appreciated which is where  
12   spasm is reproduced and then pain travels down into the legs.  
13   He had a straight-leg raise which is a method for examining the  
14   sciatic nerve that goes down your leg to see whether or not  
15   there's irritation and that test was also positive.

16           Q.    In regards to the test that you performed on his  
17   lumbar spine, were those tests objective, subjective, some  
18   combination thereof?

19           A.    Well, everything is, in essence, a combination of  
20   subjective and objective but in terms of the response given and  
21   during the physical exam, objective.

22           Q.    Okay. I'm trying to move quickly. I don't want to  
23   move too quick. We're using some terms that I'd like to define  
24   for the jury.

25           A.    Yes.

Dr. Merola - Plaintiff - Direct

1 Q. Cervical is your neck?

2 A. Correct.

3 Q. Lumbar is your back?

4 A. Yes.

5 Q. When he came to you that first visit, was he wearing  
6 any assistive devices?

7 A. Yes, he did have bilateral knee braces on his knee.

8 Q. So he had knee braces on both knees?

9 A. Correct.

10 Q. Okay. After your exam, what did you do?

11 A. I reviewed MRI films of both his neck and his back.  
12 And then based on the MRIs, and his symptoms, and his physical  
13 findings, made some recommendations for treatment.

14 Q. Before we get to the treatment, you stated that in  
15 your notes that the patient manifested severe radiculopathy.

16 Can you please define for the jury what that means?

17 A. Radiculopathy is a term that means irritation in a  
18 nerve. And when you're talking about nerve irritation with  
19 respect to the neck and back, it's irritation in the nerves that  
20 are coming from either your neck or your back.

21 Q. You also mentioned myelopathy, can you define that for  
22 us?

23 A. It typically refers to a condition where there is a  
24 weakness and signs of spinal cord irritation such as a  
25 Hoffmann's sign or motor loss that is muscle weakness.

Dr. Merola - Plaintiff - Direct

1 Q. Okay. You said that you reviewed the MRIs personally?

2 A. Yes.

3 MR. GJELAJ: All right. Can we put it up,  
4 please?

5 How do we do this, Judge? This is the first time  
6 we're using it.

7 THE COURT: It should just be the same as on her  
8 computer. You should be able to use the same functions.

9 MR. GJELAJ: I mean, with the witness? Do you  
10 want the witness to go there? I have a laser.

11 THE COURT: Oh, that's up to you.

12 Q. Doctor, I have a laser pointer here if you want.

13 A. Sure.

14 Q. Okay. What is that that we put up --

15 MR. GJELAJ: What exhibit is that?

16 MR. SMALLETS: I don't know what you have up  
17 there.

18 Q. Doctor, what is that? While I look at the exhibit  
19 number for the record.

20 A. This is an MRI image, side view image of a cervical  
21 spine.

22 Q. And what, if anything, were your findings when you  
23 reviewed it?

24 A. So if you look at this image and you're basically --  
25 the laser pointer disappears inside this thing so I can't really

Dr. Merola - Plaintiff - Direct

1 point to it with the laser pointer very well.

2 Q. I'll point. You tell me where.

3 A. Sure. So if you look at the squares, those are the  
4 vertebral bodies. If you start at the top with the pointy one,  
5 that's the second one. Next down is three, four, five and six.  
6 If you go between the C5 and the C6 vertebral bodies, there's --  
7 what's in between those areas is disc material in the spinal  
8 canal area, one right above your finger. That's it; correct.  
9 Yes.

10 THE COURT: Counsel. The doctor can approach.

11 The only issue would be the court reporter would need some  
12 kind of amplification. So is that screen active?

13 MR. GJELAJ: It is, Your Honor.

14 THE COURT: So if you flip that screen, he can  
15 use that microphone and then the court reporter will be  
16 able to pick it up while he is actually much closer to the  
17 screen.

18 So, Dr. Merola, you can approach it if you feel  
19 that's necessary. I just ask that you keep that microphone  
20 close enough so that your audio can be picked up.

21 MR. GJELAJ: My microphone?

22 THE COURT: Yes.

23 MR. GJELAJ: Okay.

24 A. Is it possible to scroll one more shot?

25 MR. GJELAJ: Scroll one more, please.

Dr. Merola - Plaintiff - Direct

1 THE COURT: I'm sorry, Counsel Gjelaj, Counsel  
2 Whalen is also trying to see so he's going to be coming  
3 around.

4 MR. GJELAJ: That's fine.

5 A. So let's -- if we just look in between the bones  
6 starting at the top this is number two, three, four. This is  
7 five, and six. Five and six are the two squares. Beyond five  
8 and six there's an area where there's disc material coming into  
9 the area where the nerves and the spinal cord are that travel  
10 down into the wrist and hand area. And if you've also noticed  
11 in this area the neck should have a typical C shaped curvature  
12 to it where it tilts backwards. And this has flattened itself  
13 out. And to a certain extent it's also tipping forward a little  
14 bit here at C5-C6.

15 Q. That's what's typically called a herniated disc,  
16 Doctor?

17 A. Herniation refers to disc material that's -- yes,  
18 beyond the confines of the vertebral bodies.

19 Q. Have you ever heard the disc analogized as a jelly  
20 doughnut?

21           A.     It can be considered like a jelly doughnut if you want  
22 to picture it; yes.

23 Q. So the jelly doughnut popped and the fluid came out  
24 there?

#### A. The inner jelly-like material and the outer crust area

Dr. Merola - Plaintiff - Direct

1 are protruding; correct.

2 Q. Is that a condition associated with pain?

3 A. Yes, it can be.

4 Q. Okay.

5 MR. GJELAJ: Put up the lumbar, please, while  
6 you're up there.

7 Q. What is that, Doctor?

8 A. This is a side view of the lower back. Once again,  
9 the squares are the vertebral bodies and everything that's in  
10 between the vertebral bodies are the discs. And all the way at  
11 the bottom where the lower back meets what we call the sacrum or  
12 the pelvis, there's an area where there's disc material  
13 protruding or herniated so that would be between L5 and S1.

14 Q. Doctor, have you ever heard of something called the  
15 straight-edge method?

16 A. So if you're looking at the edges of the vertebral  
17 bodies, you would want to see disc material lined up behind all  
18 of the vertebral bodies.

19 Q. So is it fair to say, Doctor -- you tell me if I'm  
20 doing it right -- there's nothing supposed to be on the right of  
21 this paper that I'm holding?

22 A. Yes; correct.

23 Q. And is there something there?

24 A. Yes.

25 Q. What is that?

Dr. Merola - Plaintiff - Direct

1 A. Disc material.

2 Q. Is that a herniation?

3 A. Yes.

4 Q. Okay. Thank you.

5 You can go back and sit down.

6 THE COURT: Oh, I'm sorry. The court officer  
7 made it clear that some of the jurors couldn't see what you  
8 had just demonstrated.

9 Q. Sorry, I don't mean to -- Doctor, I'm trying to speed  
10 things up.

11 So, Doctor, for the benefit of the jury, I asked you  
12 before if you're familiar --

13 THE COURT: Oh, it unplugged.

14 Q. Okay. Dr. Merola, for the benefit of the jury, I  
15 asked you before if you were familiar with the straight edge  
16 test and you said yes. Then you told the jury what you saw. I  
17 then -- how about you do it then, and explain to the jury.

18 A. So if you take anything that has a straight edge on  
19 it, a piece of paper or a ruler or what have you, and you place  
20 it up along the boarders of the vertebral body, and if you see  
21 anything that goes beyond the boarders of the vertebral bodies,  
22 that would be outside the normal area where discs should be and  
23 that would be a protrusion of the disc material or herniation.

24 Q. Is the word "protrusion" and "herniation"  
25 interchangeable?

Dr. Merola - Plaintiff - Direct

1           A. Yeah. Protrusion means sticking out herniation means  
2           asymmetrically sticking out.

3           Q. Thank you.

4                   After examining Mr. Sarmiento, taking a history,  
5           performing the tests, did you formulate a diagnosis?

6           A. Yes.

7           Q. What was that diagnosis?

8           A. Radiculopathy cervical and lumbar with some  
9           myelopathy.

10           Q. And did you request for approval or a certain type of  
11           procedure?

12           A. Yes.

13           Q. What type of procedure?

14           A. What's called a cervical discectomy and spinal fusion,  
15           which is basically removing the disc, taking pressure off the  
16           nerves, and then fixing the bones so that they don't continue to  
17           cause any more nerve compression.

18           Q. How do you fix the bones?

19           A. You put a device in between the bones to hold them  
20           apart, and then you hold the bones together to clamp them  
21           together by putting a small clip with several screws.

22           Q. So this is hardware in the neck?

23           A. Yeah, implants, yes.

24           Q. And is that something that Mr. Sarmiento will require  
25           for the rest of his life?

Dr. Merola - Plaintiff - Direct

1 A. Yes.

2 Q. Did you eventually get approval for that surgery?

3 A. Yes.

4 Q. Why did you focus on the neck prior to the back?

5 A. The neck showed an area of weakness in his arms and  
6 hands. So he had symptoms in addition to weakness. So those  
7 are neurological deficits and nerves can have a lot of problems  
8 getting better if they have deficits to them.

9 Q. Okay. You saw him again on April 26<sup>th</sup>?

10 A. Yes.

11 Q. Okay. Was the exam similar to the first or anything  
12 different?

13 A. It was essentially the same in April as it had been in  
14 March.

15 Q. And you were still waiting for approval for the  
16 cervical fusion?

17 A. Yes.

18 Q. Did you eventually get approval for it?

19 A. Yes.

20 Q. Did you perform the surgery?

21 A. Yes.

22 Q. Tell us about the surgery you performed?

23 A. Surgery was done on May 11, 2021. And it involved a  
24 removal of the disc between C5 and C6 to take pressure off of  
25 the spinal cord and the nerve roots with a process called fusion

Dr. Merola - Plaintiff - Direct

1 in order to lock the C5 nerve root -- C5 bone and C6 bone  
2 together to prevent any collapse or damage in that area.

3 Q. Is this a serious surgery?

4 A. Any type of surgery is quote-unquote "serious"  
5 depending upon what your definition of serious is, but it's  
6 certainly a surgical procedure.

7 Q. Is it an open surgery?

8 A. It is -- it does involve making an incision, yes.

9 Q. Opening up the neck?

10 A. Correct.

11 Q. Visualize it?

12 A. Yes.

13 Q. Performing whatever you did as a doctor. I don't know  
14 the technical terms.

15 A. Yes.

16 Q. Where is this done at?

17 A. This was done at New York Methodist Hospital.

18 Q. When did you see him for the first time post surgery?

19 A. The first postoperative visit was on May 24, 2021,  
20 about a week or so after surgery.

21 Q. Tell us about that.

22 A. That's a first postoperative visit to make sure that  
23 there were no issues regarding the surgery itself and the  
24 examination on this day showed that he was healing appropriately  
25 after surgery.

Dr. Merola - Plaintiff - Direct

1           Q.    Okay. After a cervical fusion, is a patient required  
2 to wear a cervical collar for a period of time?

3           A.    I typically don't use a collar. It's only used for  
4 what we call PRN basis for comfort.

5           Q.    Let's go to the next visit, Doctor. June 15, 2021?

6           A.    Yes.

7           Q.    Okay. What did you do on that date?

8           A.    So that's a placement of what's called an  
9 electronic -- an external. That means on the outside --  
10 electronic bone growth stimulator. That's a device that it's  
11 really a battery that sets up like a magnetic current or field  
12 around the area of your neck that stimulates the healing  
13 process. So it helps to make sure that the healing process  
14 proceeds normally.

15           Q.    Okay. And your next visit with him was?

16           A.    So let's see. June 15<sup>th</sup> and then I saw him on  
17 August 2<sup>nd</sup> of 2021.

18           Q.    Okay. So tell us about that August 2<sup>nd</sup> visit,  
19 please.

20           A.    So that was really the third postoperative visit. And  
21 at that time, surgery was helpful in decreasing what we call  
22 radiating pain. As his neck got better, I had indicated that  
23 his lower back felt worse.

24           Q.    All right. You have used the term "radiating" a few  
25 times. I want to make sure that the jury understands.

Dr. Merola - Plaintiff - Direct

1           Is radiating pain pain that goes down an extremity?

2           A. Yeah. Another term would be traveling. So pain that  
3 travels down either your arms and hands or legs and feet.

4           Q. So if you have a problem with your cervical spine,  
5 would the pain radiate or travel down your arms?

6           A. Yes.

7           Q. And if you had a problem with your lumbar area, your  
8 lower back, would the pain radiate down your legs?

9           A. Yes.

10          Q. Did both of those things -- was he complaining about  
11 both of those pain going down his leg and down his arms?

12          A. On his initial visit, yes.

13          Q. Okay. Continue with this visit, please.

14          A. So here his lower back was most prominent. And so the  
15 examination on this visit showed that he was healing  
16 appropriately with respect to his neck and the surgery that had  
17 been done in his lower back, his extension went from 10 degrees  
18 to 5 degrees with a continued positive spinal Phalen's test.

19          Q. Is that an objective test?

20          A. Yes.

21          Q. And continue, please.

22          A. And he also continued to have a straight leg raise,  
23 which was positive, on his right side. So there was evidence of  
24 nerve root irritation in the lower back between L5 and S1.

25          Q. And on that visit, did you review the lumbar MRI?

Dr. Merola - Plaintiff - Direct

1 A. Yes.

2 So I reviewed the MRI of the lumbar spine, which  
3 showed herniation at L5-S1 and then I further recommended a CT  
4 scan of the lumbar spine to get a closer look at the bones.

5 Q. What is the difference between an MRI and a CT scan?

6 A. An MRI is a very good way of looking at the softer  
7 tissues, for example, nerves and discs and things like that. A  
8 CT scan can give you more definition and detail with respect to  
9 bone and bony structures.

10 Q. Okay. Do you know if he had a CAT scan?

11 A. Yes.

12 Q. Did you review the CAT scan yourself?

13 A. Yes.

14 Q. Before I ask you that, are you qualified to read MRIs  
15 and CAT scans?

16 A. Yes.

17 Q. How so?

18 A. It's part of orthopedic training. Because when we see  
19 and treat patients, we have to not only see and treat and  
20 evaluate the patient, but then we look at diagnostics in order  
21 to compare the diagnostics and the patient.

22 Q. How many MRIs, CAT scans and x-rays do you review on  
23 an average week?

24 A. Typically, for every patient. So if I see 30 patients  
25 a week or so, then I look at least 30 MRIs or so, if not more.

Dr. Merola - Plaintiff - Direct

1           Q. Tell us about your review of the CAT scan and the  
2 findings, if any.

3           A. So the CAT scan was basically done to make sure that  
4 there wasn't a condition called a lysis, which is basically a  
5 defect in the way the bones come together. So it did not show  
6 any evidence of lysis or any pathological bony condition which  
7 would influence the way you treated the patient. It did show a  
8 persistent disc protrusion at L5-S1.

9           Q. Did you formulate an impression plan after that?

10          A. Yes.

11          Q. What was that?

12          A. One of the things that I thought would have been  
13 helpful, just to get a better idea of what the nerves themselves  
14 were doing, was to get what's called a nerve test.

15          Q. Was a nerve test done?

16          A. Yes.

17          Q. What were the results?

18          A. The nerve test did show electrical instability in the  
19 muscles of the lower legs that correlated to the disc at L5-S1.

20          Q. What, if anything, is that indicative of?

21          A. So a nerve test tests the way the nerves are  
22 functioning in the muscles. And so it tells you whether or not  
23 there's an abnormality in that nerve as it relates to the  
24 muscles of the legs, and it correlated with the patient's  
25 symptoms and the disc herniation. So it was further indication

Dr. Merola - Plaintiff - Direct

1 that at this point in time surgical intervention would be  
2 offered.

3 Q. What kind of surgery?

4 A. Basically, what we call a decompression surgery which  
5 is, once again, removing any portions of disc material that are  
6 pressing up against the nerve in order to relieve pressure on  
7 the nerve to decrease nerve symptoms.

8 Q. This is an open surgery?

9 A. Yes.

10 Q. Is it similar to the fusion?

11 A. Well, it's different because it does not involve  
12 locking any of the bones together. It's a simple procedure to  
13 only remove pressure from the nerves to give the nerves an  
14 opportunity to heal.

15 Q. Why did you feel that he needed a laminectomy to his  
16 back as opposed to fusion for his cervical spine, which you told  
17 us you performed?

18 A. So they're really two different animals, the neck and  
19 the back. In the neck, the discs are extremely important in  
20 terms of maintaining the distance between the bones and  
21 maintaining normal anatomy. So if you remove a disc in the neck  
22 and you don't do a fusion, the bones will collapse and then  
23 cause more damage. In the lower back, by only removing portions  
24 of the discs that are touching the nerves, the bones themselves  
25 can still maintain stability so you don't have to do a fusion.

Dr. Merola - Plaintiff - Direct

1 So the standard surgical philosophy is to do the least amount of  
2 surgery for the most potential benefit in order to decrease any  
3 potential complications.

4 Q. Did he agree to undergo the lumbar surgery for the  
5 back surgery?

6 A. Yes.

7 Q. Did you perform it?

8 A. Yes.

9 Q. Tell the jury about it, please.

10 A. So that was done on June 14<sup>th</sup> of 2022. And it  
11 involved essentially making an opening in the area on the  
12 backside of the lower back in the area where the nerve or that  
13 portion of the sciatic nerve is that was getting punched up by  
14 the disc to basically remove any disc material that was touching  
15 that nerve.

16 Q. Where was that surgery done?

17 A. That was done at Lower Manhattan Hospital.

18 Q. Okay. When did you see him for the first time after  
19 the surgery?

20 A. So the first postoperative visit after that operation  
21 was on June 27, 2022.

22 Q. Okay. At that visit, did you write down in your notes  
23 your opinion as to whether or not he was disabled?

24 A. Yes.

25 Q. And what did you write?

Dr. Merola - Plaintiff - Direct

1 A. That he was disabled from his occupation.

2 Q. Did you write that he was 100 percent totally  
3 disabled?

4 A. Yes.

5 Q. You wrote in these notes to within a reasonable degree  
6 of medical certainty this patient's spinal injuries are causally  
7 related to the accident of record.

8 What does that mean, Doctor?

9 A. Yeah, that was -- that's a requirement for those  
10 particular follow ups in order to basically indicate that we're  
11 treating the patient under a particular peer-reviewed process.

12 Q. Do you have an opinion, based on your notes, do you  
13 have an opinion within a reasonable degree of medical certainty  
14 what the competent producing cause of the condition in his neck  
15 and his back were?

16 A. Based on the information available to me and on the  
17 information that I had, the neck and back injuries were  
18 secondary to the fall.

19 Q. Okay. At that first postop visit after the back  
20 surgery, did you come up with an impression and plan?

21 A. So after the first postoperative visit subsequent to  
22 the lumbar surgery, he was healing appropriately from his low  
23 back surgery.

24 Q. Okay. Did you give him any restrictions post surgery?

25 A. Avoid repetitive motion and to avoid bending, lifting,

Dr. Merola - Plaintiff - Direct

1 and twisting.

2 Q. When was the next time you saw him?

3 A. January 23, 2023.

4 Q. Okay. Did you perform an exam on him?

5 A. I did.

6 Q. Tell us about the exam.

7 A. So on that visit -- let's see. He still had an  
8 antalgic and a kyphotic gait pattern. He had some difficulty  
9 with heel-to-toe raising. In his neck, the Sperling's maneuver  
10 was negative. The compression distraction maneuver was  
11 negative. He did have some residual spasm and he had no  
12 progressive neurological deficits.

13 Q. Oh, I'm sorry.

14 A. Go ahead. I'm sorry.

15 Q. That's okay. I thought you were done.

16 A. I was going to move on to the lower back where  
17 extension this time had gone up to 30 degrees, and he was able  
18 to flex to 40. Right and left bend to 40, and right and left  
19 rotate to 35 and 40 degrees. And his straight leg raise on this  
20 examination was negative. He did have some Achilles tendon  
21 reflex loss and some residual L5-S1 sensory loss.

22 Q. Going back to your physical examination, Doctor.

23 For the cervical spine, your note says that cervical  
24 spine upper extremity arms and hands demonstrate chronic  
25 permanent residual sixth nerve root deficits with residual

Dr. Merola - Plaintiff - Direct

1 Hoffmann signs.

2 Can you explain that note to us?

3 A. Sure.

4 Basically, it means that he had some wrist extensor  
5 weakness and some sensory loss with what's known as a Hoffmann  
6 sign. Preoperatively and postoperatively, it remained  
7 essentially stable.

8 Q. Is that permanent based on your notes?

9 A. Based on the note as of that day, yes.

10 Q. Okay. Just quickly, because you gave us the range of  
11 motions before that you noted.

12 Can you give the range of motions again as opposed to  
13 a normal range of motion each?

14 A. Sure. So a normal extension is 65. So he was 30.

15 Q. So that's less than 50 percent?

16 A. It's about 50 percent, correct.

17 Q. Okay.

18 A. Normal flexion is 60. He's at 40.

19 Q. So he lost a third of that?

20 A. Normal bending is 45. He's at 40.

21 Q. Okay.

22 A. Normal rotation is at 80 and he's one side 35 and one  
23 side 40.

24 Q. Okay. Also in your note you stated that you counseled  
25 the gentleman. The gentleman obviously is Mr. Sarmiento,

Dr. Merola - Plaintiff - Direct

1 Doctor?

2 A. Yes.

3 Q. But you consulted Mr. Sarmiento regarding his current  
4 injuries and that given his young age, it's more likely than not  
5 that over the course of time future surgeries would be  
6 necessary. Did you tell him that?

7 A. Yes.

8 Q. Okay. And in your note, there it says that it's more  
9 likely than not; right?

10 A. Yes.

11 Q. Okay. And your note says surgeries. Plural; correct?

12 A. Yes.

13 Q. Thank you. Next visit?

14 A. June 5, 2023.

15 Q. Quickly tell us about the exam and your findings,  
16 please.

17 A. So on that examination, he maintained a negative  
18 Spurling's test and a negative compression distraction test.  
19 Neurologically, he was stable with respect to his neck.

20 His lower back did show some spasm with extension on  
21 this visit at 15 degrees. Flexion of 30, right bending of 30,  
22 left bending to 40, right rotation to 35, and left rotation to  
23 40. Straight leg raise remained negative. Some Achilles tendon  
24 reflex loss and some sensory loss in L5 and S1.

25 Q. Did he remain disabled?

Dr. Merola - Plaintiff - Direct

1 A. Yes.

2 Q. What percentage?

3 A. I indicated a hundred percent from his occupation.

4 Q. And you wrote in your note that prognosis is guarded.

5 What does that mean?

6 A. That he continued to require treatment.

7 THE COURT: Counsel Gjelaj, if we could find a  
8 breaking point?

9 MR. GJELAJ: I could do it right now.

10 THE COURT: Okay. Let's just take a ten-minute  
11 break.

12 COURT OFFICER: All rise; jury exiting.

13 (Whereupon, the jury exits the courtroom.)

14 THE COURT: You may be seated.

15 (Whereupon, there was a recess taken.)

16 COURT OFFICER: All rise.

17 THE COURT: You may be seated.

18 COURT OFFICER: All rise; jury entering.

19 (Whereupon, the jury enters the courtroom.)

20 THE COURT: You may be seated.

21 So just as we are going into the second half of  
22 the morning, the Court will break at 12:45 for lunch.

23 MR. GJELAJ: I am almost done.

24 Q. Doctor, before we broke, what date were we up to in  
25 your records?

Dr. Merola - Plaintiff - Direct

1 A. I believe we were on June 5, 2023.

2 Q. Before we get to that, I'm going to show you what's  
3 been put into evidence.

4 Please put it up, Ms. Ortiz. Am I'm blocking anyone?

5 What is this, Doctor?

6 A. That's an x-ray side view cervical spine.

7 Q. Was this x-ray taken after the fusion was done?

8 A. That's correct. That's a postoperative x-ray.

9 Q. Is there any bone here in that section?

10 A. Yeah. That's the area where the fusion is. So that's  
11 between C5 and C6. And that's the --

12 Q. Sorry?

13 A. That's basically the clip that's holding the two bones  
14 together at C5 and C6.

15 Q. Is this a screw?

16 A. Yes.

17 Q. Is that a screw?

18 A. Yes.

19 Q. All right. June 5<sup>th</sup>, tell us the exam that you  
20 performed and the findings, if any, that you came up with?

21 A. So on that examination, his neck was essentially  
22 stable. Negative Spurling's maneuver. Negative compression  
23 distraction maneuver. In the lower back, he had straight leg  
24 raising, which remained negative. His extension had decreased  
25 to 15 degrees, though.

Dr. Merola - Plaintiff - Direct

1 Q. Okay. And did you come up with an impression and  
2 plan?

3 A. Yes.

4 Q. What was that?

5 A. At that time, because of some increase in low back  
6 stiffness and loss of motion at that 15 degree mark. I had  
7 suggested an updated MRI.

8 Q. Was he still disabled?

9 A. Yes.

10 Q. What percentage?

11 A. I had indicated a hundred percent from his occupation.

12 Q. Was his prognosis still guarded?

13 A. Yes.

14 Q. Next please. August 7<sup>th</sup>.

15 A. Yes.

16 Q. Okay. Tell us about the exam that you performed and  
17 the findings, if any?

18 A. Same type of examination. Once again, the neck was  
19 stable. Negative Spurling's test. Low back extension had  
20 improved to 30 degrees. Straight leg raising had remained  
21 negative. Some residual L5-S1 sensory loss and some residual  
22 Achilles tendon reflex loss.

23 Q. You had said at the last visit or you wrote at the  
24 last visit that you suggested updated MRIs.

25 Did he, in fact, have those done?

Dr. Merola - Plaintiff - Direct

1 A. Yes.

2 Q. And did you review the films?

3 A. Yes.

4 Q. And in order to just speed things along, did you  
5 personally review them?

6 A. Yes.

7 Q. To speed things along, can you tell the jury what your  
8 findings were?

9 A. Sure.

10 So that MRI that was done postoperatively showed that  
11 there was some collapse in the area of the disc space between L5  
12 and S1. So a little like, you know, if you could picture like a  
13 bed of a flat tire, how a tire would kind of flatten out a  
14 little bit. So that's what the L5-S1 segment looked like.

15 Q. Okay. And he still remained a hundred percent  
16 disabled?

17 A. Yes.

18 Q. And the prognosis was still guarded?

19 A. Yes.

20 Q. Can you read the portion of your notes right below  
21 "prognosis is guarded" beginning with "patient understands"?

22 A. "Patient understands, given his young age, more likely  
23 than not over the course of time future surgeries to both the  
24 neck and back regions would be indicated and warranted and we  
25 will continue to follow him from a surgical perspective

Dr. Merola - Plaintiff - Direct

1 accordingly."

2 Q. Doctor, have you ever seen any medical record  
3 involving any back or neck pain or complaints or treatments from  
4 prior to this accident involving Mr. Sarmiento?

5 A. I have not, no.

6 Q. Did you ask him if he ever had any prior accidents?

7 A. On the initial visit in his surgery, the only  
8 surgeries and surgical or medical history that he had given was  
9 right knee surgery but nothing else.

10 Q. Okay. Next note November 6, 2023.

11 A. Yes.

12 Q. Okay. Did you do the same tests that you told us  
13 about?

14 A. Yes.

15 Q. Did you have relatively the same findings that you had  
16 on prior exams?

17 A. Yes.

18 Q. Did you come up with a plan or a prognosis at that  
19 time?

20 A. Yes.

21 Q. What was that?

22 A. Guarded.

23 Q. Okay. Now, in your findings in page two of your note  
24 for November 6<sup>th</sup>, the last sentence, first paragraph, can you  
25 read that to us?

Dr. Merola - Plaintiff - Direct

1 A. Last sentence, first paragraph?

2 Q. You may.

3 A. Oh, yes, yes, yes, I see it.

4 He has chronic permanent residual, neurological  
5 deficits as a consequence of an injury sustained and he has  
6 evidence of mechanical and axial low back dysfunction.

7 Q. What does that mean?

8 A. Low back pain.

9 Q. What does the chronic part mean?

10 A. Longstanding.

11 Q. And permanent?

12 A. Yes.

13 Q. Means he's going to have that forever?

14 A. At least as of this note, correct.

15 Q. Okay. Now, you are aware at some point, and we'll get  
16 to your last note, that he transferred his care to Dr. Macagno?

17 A. Yes.

18 Q. Dr. Macagno will be testifying Friday here.

19 Do you know Dr. Macagno?

20 A. Yes.

21 Q. Is he a good doctor?

22 A. Yes.

23 Q. Let's go to your last office note, okay?

24 A. Yes.

25 Q. March 25, 2024.

Dr. Merola - Plaintiff - Direct

1 A. Yes.

2 Q. Tell us the tests you performed and the findings, if  
3 any, on that date?

4 A. So on that day, his cervical spine showed a negative  
5 compression distraction maneuver and a negative Spurling's  
6 maneuver. He had cervical extension of 35 and normal to 60.  
7 Flexion of 40. Normal to 60. Right lateral bending 40. Normal  
8 45. Left lateral bending 40. Normal 45. Right lateral  
9 rotation 45. Normal 80. Left lateral rotation 40. Normal 80.  
10 He had some left-sided and right-sided upper extremity wrist  
11 extensor weakness, but non-progressive. Some 1.25 centimeter  
12 atrophy on his left side.

13 Q. What is atrophy, Doctor? That's the first time you're  
14 using the word.

15 A. Shrinkage of the muscle.

16 Q. What is that due to?

17 A. It can be due to several things. And in this case,  
18 typically, just neurological issue.

19 Q. Okay. Continue, please.

20 A. And a residual Hoffmann's sign.

21 Q. The test that you mentioned before, were those  
22 objective or subjective?

23 A. Objective.

24 Q. Could he fake those?

25 A. No.

Dr. Merola - Plaintiff - Direct

1 Q. You mentioned the word "spasm." And I apologize I  
2 didn't have it defined earlier.

3 Can you please explain to the jury what spasm is?

4 A. Spasm in a muscle is an abnormal contraction of the  
5 muscle. So it's like a Charlie horse.

6 Q. Did you come to an opinion as to his functional  
7 capabilities?

8 A. Yes.

9 Q. On that date, obviously?

10 A. Yes.

11 Q. What was that opinion?

12 A. Well, he was able to lift and carry up to an  
13 occasional 10 pounds. Push and pull up to an occasional  
14 10 pounds. Sitting and standing and walking, could all be on an  
15 occasional basis. Sustained climbing or kneeling, bending,  
16 stooping or squatting on another basis. Using arms and hands to  
17 grasp, manipulate all on an occasional basis. Reaching overhead  
18 or below shoulder level on an occasional basis. Driving on an  
19 occasional basis. Operating machine to be avoided as well as  
20 temperature extremes and environmental hazards, which should be  
21 avoided.

22 Q. Higher up on your office note there's a question there  
23 that says "Has the patient reached maximum medical improvement?"

24 What is maximum medical improvement?

25 A. So typically about a year or so subsequent to surgery,

Dr. Merola - Plaintiff - Cross

1 you can come to a conclusion about what the maximum benefit of  
2 that surgical procedure was.

3 Q. Okay. And you answered this question yes?

4 A. Yes.

5 Q. What did you mean by that?

6 A. That he was, in my opinion at that time, had achieved  
7 his maximum benefit.

8 Q. So the range of motion restriction that you told us  
9 about in the neck and in the back, given the passage of four  
10 years plus from the time of the accident, would it be fair to  
11 say that those restrictions were permanent?

12 A. As of that date, yes.

13 Q. Okay. So they can't get better; right?

14 A. Well, we're making an assessment based on that period  
15 of time at that particular date, yes.

16 Q. Okay. Doctor, thank you.

17 A. Thank you.

18 THE COURT: Counsel, I just ask since we're  
19 breaking at 12:45, do you want the court to notify you or  
20 will you monitor your own time?

21 MR. WHALEN: I appreciate it if you monitored me,  
22 Judge.

23 THE COURT: Okay.

24 CROSS-EXAMINATION

25 BY MR. WHALEN:

Dr. Merola - Plaintiff - Cross

1 Q. Good morning, Dr. Merola.

2 A. Good morning.

3 Q. We have met before today?

4 A. Yes.

5 Q. Correct?

6 A. Yes.

7 Q. And I think our last time we were doing this was in  
8 Kings I believe?

9 A. Yes.

10 Q. You testify frequently, Doctor?

11 A. About six times or so per year.

12 Q. You also told the jury earlier you do somewhere  
13 between 150 to 200 surgery a year -- is that correct? -- or  
14 thereabouts?

15 A. Yes.

16 Q. You didn't have Mr. Sarmiento as a patient before this  
17 accident; correct?

18 A. Correct.

19 Q. And the first time you saw him obviously was after the  
20 accident; correct?

21 A. Yes.

22 Q. And in seeing Mr. Sarmiento, you had some history as  
23 to how the accident happened; is that fair to say?

24 A. Yes.

25 Q. And for that, you were relying on Mr. Sarmiento;

Dr. Merola - Plaintiff - Cross

1 correct?

2 A. Yes.

3 Q. You had no other source of information but

4 Mr. Sarmiento; correct?

5 A. Yes.

6 Q. And Mr. Sarmiento, in sum and substance, told you that  
7 he was at a construction site and fell from a ladder; correct?

8 A. Yes.

9 Q. Okay. And you took him at his word; correct?

10 A. Yes.

11 Q. Okay. And you had no idea if he fell one foot or  
12 10 feet. Is that fair to say?

13 A. Yes.

14 Q. Okay. And you had no idea about whether or not he  
15 slid down the ladder or fell backwards off the ladder from a  
16 distance; correct?

17 A. Yes.

18 Q. Okay. And that's true with all your patients. You  
19 have to rely on their truthfulness; correct?

20 A. Yes.

21 Q. In treating Mr. Sarmiento, you reviewed these MRIs;  
22 correct?

23 A. Yes.

24 Q. Okay. And I'd like to bring back up the lumbar spine  
25 and cervical spine MRIs and talk to you a little bit about them

Dr. Merola - Plaintiff - Cross

1 with you. Okay?

2 A. Yes.

3 Q. So this is the cervical spine as we know; correct?

4 A. Yes.

5 Q. And this is a sagittal view; correct?

6 A. Yes.

7 Q. And for the purpose of jury, that's from the side;  
8 correct?

9 A. Yes.

10 Q. Okay. And it shows the various discs and what is disc  
11 desiccation, Dr. Merola?

12 A. So disc desiccation refers to the disc, which is the  
13 cartilage in between the bones, and desiccation is a term that  
14 refers to a loss of water content. An MRI looks at the water  
15 content of your tissues of what you're made out of. And so  
16 radiologists use the term "desiccation" to indicate a loss of  
17 signal or loss of color on the MRI to indicate some drying of  
18 that area.

19 Q. And drying would be indicated by darkness?

20 A. Correct. So things that are full of water are  
21 brighter or lighter, more white. Things that are absent water  
22 are darker or more gray.

23 Q. And that would be a sign of what?

24 A. That's a sign of loss of water in those tissues. Some  
25 tissues normally should have no water in them. For example, the

Dr. Merola - Plaintiff - Cross

1 trachea is that large black void. So there shouldn't be any  
2 water in there. Otherwise, you're drowning. So that's normal  
3 for the trachea.

4 The tissues that your body is made out of contain  
5 water and so a loss of water typically happens over time and  
6 that's a process called "degeneration."

7 Q. And Mr. Sarmiento is a young man here, but there's  
8 significant degeneration there already. Is that fair to say?

9 A. So I believe he's -- this is 2020. I think he was  
10 born in 1990, if I'm not mistaken. So he's about 30 years old  
11 here.

12 Q. And there's significant disc desiccation. Is that  
13 fair to say?

14 A. There is disc desiccation, yes.

15 Q. Another word for disc desiccation, besides part of  
16 that aging process, is arthritis part of that process?

17 A. Arthritis, typically, refers to the inflammation that  
18 can occur in joints.

19 Q. You did that flat edge test here. This is this, and  
20 if I'm pointing to it wrong, please correct me, Doctor, this is  
21 the spinal cord right here; is that correct?

22 A. Correct.

23 Q. That gray area on the film?

24 A. Yes.

25 Q. I'll move over a little.

Dr. Merola - Plaintiff - Cross

1                   And these are disc -- these are the vertebrae, the  
2 bones; correct?

3 A. Yes.

4 Q. Okay. And this is the disc we were talking about;  
5 correct?

6 A. Yes.

7 Q. And these discs down here seem a lot lighter than the  
8 discs up here and that's because the aging process has been  
9 affecting them. Is that fair to say?

10 A. Yes.

11 Q. Okay. Would it also be fair to say that right here  
12 throughout the cervical spine there doesn't appear to be any  
13 compression on the nerve root. Is that fair to say?

14           A. Well, this is the -- so this sagittal view is looking  
15           at the mid portion of the cervical spine in the area of the  
16           cord. So we're actually missing the roots on this particular  
17           cut.

18 Q. Okay. With a reasonable degree of medical certainty  
19 the condition of this spine is aging above and advanced for his  
20 various age. Would that be fair to say?

21 MR. GJELAJ: Objection, Your Honor.

22 MR. WHALEN: What part of the spine is he  
23 referring to?

24 MR. GJELAJ: Cervical spine.

25 THE COURT: I'm sorry. Okay. There's an

Dr. Merola - Plaintiff - Cross

1                   objection as to form. The court is sustaining that  
2                   objection as to form.

3                   Counsel, please rephrase.

4                   Q. Regarding the cervical spine and the various discs in  
5                   the cervical spine, is the desiccation an indication of the  
6                   aging process?

7                   A. Dessimination is an indication of the aging process.

8                   Q. And what are the affects of this disc desiccation on  
9                   his nerves?

10                  A. It depends. So desiccation can have varying affect on  
11                  the nerves.

12                  Q. Let me get to the surgery you did here and -- C2; is  
13                  that correct?

14                  A. Go up to the one that's really pointy. That's C2.

15                  Q. C3?

16                  A. Correct.

17                  Q. C4?

18                  A. Yes.

19                  Q. C5?

20                  A. Yes.

21                  Q. C6?

22                  A. Yes.

23                  Q. So between five and six was the fusion; correct?

24                  A. Yes.

25                  Q. Okay. And this disc material here was taken out;

Dr. Merola - Plaintiff - Cross

1 correct?

2 A. Yes.

3 Q. Okay. And this disc material between five and six is  
4 blackish and showing desiccation; right?

5 A. Yes.

6 Q. Part of the aging process on this young man?

7 A. Yes.

8 Q. More advanced than an individual you see at this age?

9 A. Thirty-year olds is when you start to see it. So he's  
10 right around that age.

11 Q. Do you see on this film any indication of traumatic  
12 injury?

13 A. So there were no fractures or dislocations or bleeding  
14 appreciated on that MRI.

15 Q. So that would mean no?

16 A. Correct.

17 Q. Okay. If we can go to the lumbar spine.

18 By the way, we were going to that, Doctor.

19 Both of the surgeries that you performed was on an  
20 outpatient basis, correct?

21 A. Yes.

22 Q. Okay. That means Mr. Sarmiento came in some time  
23 during the day you performed -- he got prepared for the  
24 operation, you did the operation, and then he went home that  
25 same day; correct?

Dr. Merola - Plaintiff - Cross

1 A. Yes.

2 Q. By the way, do you know what pain medication  
3 Mr. Sarmiento is on now, if any, for his spine?

4 A. I do not know.

5 Q. You haven't prescribed at your last visit any pain  
6 medication; is that correct, though?

7 A. Correct.

8 Q. And you didn't suggest any further treatment to either  
9 his neck or spine; correct?

10 A. Yes, correct.

11 Q. The lumbar spine?

12 A. Yes.

13 Q. Correct. Okay. I need your help again, Doctor, but  
14 I'm going to go from the bottom S1-L5?

15 A. Actually, you know that's -- he's got an interesting  
16 anatomical variant called the transactional junction, which  
17 means there's actually a disc down there. So if you look at  
18 that last square -- go up one -- that's the sacrum right there.  
19 That's S1. So that's -- and that's L5.

20 Q. Okay. This would be a defect here, Schmorl's node?

21 A. Yeah. Schmorl's node refers to disc beyond the area  
22 of what's called the vertebral endplate on the inside of the  
23 vertebral body and he does have a tiny small node there,  
24 correct.

25 Q. That's a genetic defect?

Dr. Merola - Plaintiff - Cross

1           A. It's, you know, you could -- it's a developmental  
2 condition. So it's something that you're born with.

3           Q. Nothing to do with trauma in this instance, though;  
4 correct?

5           A. Correct.

6           Q. Okay. And that Schmorl's node has caused a -- it  
7 looks like an adjustment or a defect into the vertebral bone; is  
8 that; correct?

9           A. Yeah. So there's an abnormality in what's called the  
10 endplate of the vertebral body, right. So, you know, it's that  
11 bottom portion of the vertebral body is a bit invaginated. So  
12 there's a disc in that zone inside the vertebral body.

13           Q. And this is the spinal canal here also?

14           A. That's correct.

15           Q. And you performed your surgery at L4 and L5; is that  
16 correct?

17           A. L5 and S1.

18           Q. L5 and S1?

19           A. Correct. That's L5 and then below S1, yes.

20           Q. Was this something you had to deal with in your  
21 surgical procedure, this Schmorl's node?

22           A. No.

23           Q. In fact, the disc remains there; is that correct?

24           A. Yes.

25           Q. Okay. And what you did was -- well, tell us what you

1 did.

2 A. Sure.

3 So if you go to the right side of the MRI, go a little  
4 bit further, yeah, keep going, right.

5 So that's the area of the spinal lamina, the covering  
6 of the spinal canal. That's the area that's underneath the skin  
7 and muscles of your back. And that's the zone and the region  
8 where the nerves are exiting their normal exit holes. So you  
9 access the disc area and the nerve area from the backside in the  
10 lower back area in order to basically make room for the nerves.  
11 So you enlarge the area of nerve exit by basically shaving away  
12 some bone and then removing any disc material that's impinging  
13 on the nerve.

14 Q. Did you find any disc material back here in the bone  
15 when you were doing the laminectomy?

16 A. Not inside the bone, but if I just -- if I go to the  
17 op report -- hang on.

18 There's some disc material that was removed at the  
19 L5-S1 segment. And that's typically down in the area where the  
20 nerve is so it's closer to the canal. So that area is open that  
21 you're pointing to, but you access the canal by removing the  
22 roots out of the way, and then the disc material's down in that  
23 zone next to where the nerve roots are.

24 Q. So I'm going to try and simplify this surgery.

25 So this was to give the canals or the tunnels that the

Dr. Merola - Plaintiff - Cross

1      nerves are going through a little more room?

2      A.     Yes.

3      Q.     Because would it be fair to say that either disc  
4      material or bony material had developed that was pressing and  
5      was continuing to develop and pressing on these nerves?

6      A.     Correct. Basically, pressure on the nerves and the  
7      procedures decompression or a procedure to remove pressure,  
8      that's right.

9      Q.     Not from trauma?

10     A.    Well, you know that's based on the patient's history.

11     Q.    What the patient told you; right?

12     A.    Yes, correct.

13     Q.    Told you about his fall off the ladder and everything  
14    like that?

15     A.    Yes.

16     Q.    Okay. You haven't seen him since -- when was your  
17    last appointment? I think 2024?

18     A.    Yeah, my last visit was --

19     Q.    I believe it was December '24?

20     A.    Yeah, I'm almost there. March 25, 2024.

21     Q.    And at that time, you weren't prescribing him any  
22    medication; is that correct?

23     A.    Correct.

24     Q.    You weren't prescribing any physical therapy, correct?

25     A.    That's correct.

Dr. Merola - Plaintiff - Cross

1 Q. You weren't prescribing any future visits; correct?

2 A. Yes, correct.

3 Q. And no future MRIs; correct?

4 A. Right.

5 Q. No x-rays; correct?

6 A. Yes.

7 Q. Or CAT scans; correct?

8 A. Yes.

9 Q. People recover from cervical fusions, don't they?

10 A. Yes.

11 Q. And people go on to have a normal life after having  
12 cervical fusion; is that correct?

13 A. They can, yes.

14 Q. Okay. And I'm not talking about everybody.

15 Everybody's different? Is that a hesitation?

16 A. Certainly, we are all different, yes.

17 Q. Professional athletes, after having a cervical fusion,  
18 can return to their sport. Is that fair to say?

19 A. In certain instances, yes.

20 Q. With Peyton Manning won a Super Bowl after having a  
21 fusion. Are you familiar with that?

22 A. Yes.

23 Q. Tiger Woods became -- yeah, had some more difficulty  
24 but --

25 A. Everyone's had some more difficulties.

Dr. Merola - Plaintiff - Cross

1 Q. Won a big tournament after a lumbar fusion; correct?

2 A. Yes.

3 Q. And, in your last report, Mr. Sarmiento can work;  
4 right?

5 A. Yes.

6 Q. You know what kind of work he did in construction?

7 A. No. I don't know the specific job title but I know he  
8 was involved in heavy construction.

9 Q. And that's because that's what he told you?

10 A. Yes.

11 Q. Okay. How would you define or could you define heavy  
12 construction?

13 A. Heavy construction is typically anything that involves  
14 lifting, carrying, pushing or pulling greater than 50 to  
15 75 pounds with repetitive motion to the neck and back, with the  
16 requirement to be able to get into different positions in order  
17 to perform those activities.

18 Q. But he would work I believe you said in your last  
19 report sedentary work?

20 A. Yes.

21 Q. And he's completely capable of doing that; correct?

22 A. Yes.

23 MR. WHALEN: Thank you very much.

24 THE WITNESS: Thank you.

25 MR. GJELAJ: May I, Your Honor?

Dr. Merola - Plaintiff - Redirect

1 THE COURT: Yes, you may proceed.

2 REDIRECT-EXAMINATION

3 BY MR. GUJELAJ:

4 Q. Doctor, just a few questions.

5 A. Yes.

6 Q. Have you ever seen any records whatsoever indicating  
7 that Mr. Sarmiento was injured in any other way besides falling  
8 from a ladder on the date of his accident?

9 A. No, I haven't.

10 Q. Okay. Now, you got to know Mr. Sarmiento treating him  
11 for all those years. Is that fair?

12 A. I had treated him for a number of years, yes.

13 Q. Have you ever had any reason to disbelieve him when he  
14 told you things?

15 A. I did not, no.

16 Q. You were shown the film here. We'll get to that in a  
17 second.

18 Have you ever heard the following phrase in a medical  
19 sense "medicine is like putting the pieces of the puzzle  
20 together"?

21 A. Yeah. Treatment is like putting puzzle pieces  
22 together, yes.

23 Q. One of the pieces is a history; right?

24 A. Yes.

25 Q. A clinical exam?

Dr. Merola - Plaintiff - Redirect

1 A. Yes.

2 Q. That's what you told us earlier about the different  
3 tests that you did that were objective; right?

4 A. Yes.

5 Q. That's part of it?

6 A. Correct.

7 Q. Films?

8 A. Yes.

9 Q. Anything else?

10 A. Those are the essential parts of a history and a  
11 physical and a determination for what a diagnosis is.

12 Q. Would you ever treat a patient or operate on a patient  
13 solely based on a film?

14 A. No.

15 Q. Okay. This film right here --

16 MR. GJELAJ: Withdrawn.

17 Q. You mentioned before the word age-appropriate changes.

18 A. Yes.

19 Q. Remember that?

20 A. Yes, I think we talked about --

21 Q. So as we get older, our bones, in this case the spine,  
22 it loses water; right?

23 A. Yes.

24 Q. That's for everybody; correct?

25 A. Yes.

Dr. Merola - Plaintiff - Redirect

1 Q. Somebody, such as myself and Mr. Whalen, we have lost  
2 probably a lot; right?

3 A. Yes. That's a fair guess.

4 Q. Okay. Does that mean that we need surgery?

5 A. No.

6 Q. Does that mean that we're in pain?

7 A. No.

8 Q. Does that mean we need MRIs?

9 A. No.

10 Q. Does that mean that we need physical therapy?

11 A. No.

12 Q. Somebody like Ms. Ortiz, for example, given her youth  
13 age, probably has no age-appropriate change; correct?

14 A. May not, correct.

15 Q. Okay. So we all go through this; is that correct?

16 A. Yes.

17 Q. Is there anything in that lumbar MRI there to indicate  
18 just based on that that he needed surgery?

19 A. Just based on the prognosis? No.

20 Q. Correct. All right.

21 Was it important for you to elicit the --

22 MR. GJELAJ: Withdrawn.

23 Q. Was it important to you to correlate that film by the  
24 tests that you performed on Mr. Sarmiento in your office?

25 A. Yes.

Dr. Merola - Plaintiff - Redirect

1 Q. Okay. And you told us about all those tests; correct?

2 A. Yes.

3 Q. And those are all objective tests that you could not  
4 fake; correct?

5 A. Yes.

6 Q. You noted spasm on every single visit. Is that fair?

7 A. Yes.

8 Q. Spasm is an involuntary reflex. Is that fair?

9 A. Yes.

10 Q. You can't fake that; right?

11 A. Yes.

12 Q. It's the body's reaction to pain?

13 A. Yes.

14 Q. Okay. Did the Schmorl's node -- what is it? How is  
15 it pronounced?

16 A. Schmorl's node.

17 Q. Schmorl's node. Does that have anything to do with  
18 the surgery that you performed?

19 A. No.

20 Q. Did it have anything to do with the pain that he was  
21 experiencing?

22 A. No.

23 Q. Did it have anything to do at all with the treatment  
24 that he required?

25 A. No.

Dr. Merola - Plaintiff - Redirect

1                   MR. GJELAJ: Put up the cervical, please. I mean  
2 the other one.

3                   Q. You were asked questions about the cervical spine,  
4 Doctor.

5                   Was there anything here to indicate that solely based  
6 on the film that that man needed surgery?

7                   A. No.

8                   Q. You were asked about the levels of desiccation; right?

9                   A. Yes.

10                  MR. WHALEN: I'm only doing this so the jury can  
11 see, Judge. I'm sorry. I'm trying to speed this up.

12                  Q. This is C1?

13                  A. C2, C3.

14                  Q. C2, C3?

15                  A. Yes.

16                  Q. Those are a little blacker. Is that fair?

17                  A. Yes.

18                  Q. There is some age-appropriate changes there?

19                  A. Sure.

20                  Q. Which level did you operate on?

21                  A. Right there.

22                  Q. Okay. That's not as black, is it?

23                  MR. GJELAJ: Withdrawn. I will ask it a  
24 different way.

25                  Q. The disc that I'm pointing at, the level where you

Dr. Merola - Plaintiff - Redirect

1 formed the fusion, that's pretty hydrated; isn't it?

2 A. It's got some shades of gray within it, yes.

3 Q. But it's not like the ones above it that are pretty  
4 dark?

5 A. It is different from the other one, yes.

6 Q. You didn't operate on these, did you?

7 A. Correct, I did not there.

8 Q. These dark ones?

9 A. No, I didn't.

10 Q. You operated on this one; correct?

11 A. The one above that.

12 Q. The one above that right there?

13 A. Yes, correct.

14 Q. Okay. You were asked if there was any sign of trauma  
15 there.

16 If there had been fractures in his spine, that would  
17 have been picked up at the hospital; isn't that fair?

18 A. Typically, yes.

19 Q. If he had a fracture in his spine, that's a major,  
20 major event; isn't that?

21 A. Depending upon the type of fracture.

22 Q. It could lead to paralyze; right?

23 A. Depending upon the type of fracture.

24 Q. And there was no bleeding you said, too; right?

25 A. Yes.

Dr. Merola - Plaintiff - Redirect

1 Q. If there was bleeding there, would that have been  
2 picked up at the hospital?

3 A. Depends on what kind of bleeding he would have  
4 suffered.

5 Q. So if he had fractured something in his spine or was  
6 bleeding from the spine, that would be a catastrophic injury;  
7 correct?

8 MR. WHALEN: Objection, Your Honor. Improper  
9 redirect.

10 THE COURT: Beyond the scope. I'm sorry.  
11 What's --

12 MR. WHALEN: Improper redirect.

13 THE COURT: Based on?

14 MR. WHALEN: I didn't discuss that.

15 THE COURT: Beyond the scope.

16 MR. GJELAJ: Well, he discussed, Your Honor, the  
17 non traumatic finding there.

18 THE COURT: Madam Court Reporter, can you read  
19 back the question.

20 MR. GJELAJ: I'll withdraw the question, Your  
21 Honor, just to move things along.

22 Q. Did you need a catastrophic event in the spine in  
23 order to require a fusion?

24 A. Not necessarily, no.

25 Q. Okay. Somebody falling with their feet 9 to 10 feet

Dr. Merola - Plaintiff - Redirect

1 above the ground who stands 5-foot-7 -- are you with me?

2 A. Yes.

3 Q. -- and falls from a height, is that the type of  
4 mechanism that could lead to a herniated disc in the neck and in  
5 the back?

6 A. It can, yes.

7 Q. Have you treated patients that have fallen from those  
8 heights before?

9 A. Sure.

10 Q. Many times?

11 A. I'm sure over the course of my career, yes.

12 Q. Okay. And those are the types of falls that can lead  
13 to those kind of injuries, right, a herniated disc in the neck  
14 and in the back; correct?

15 A. Yes, they can.

16 Q. You testified on your direct that within a reasonable  
17 degree of medical certainty that the competent producing cause  
18 of the condition in his neck and his back was the accident, the  
19 fall from the ladder. Have any of Mr. Whalen's questions caused  
20 you to change that opinion?

21 A. No.

22 Q. Do you still believe that the competent producing  
23 cause of the herniated disc in his neck and the herniated disc  
24 in his back, which led to two surgeries, was the accident of  
25 November 18th -- excuse me -- August 18th, 2020?

Dr. Merola - Plaintiff - Redirect

1 A. Yes.

2 Q. Okay. You're a medical doctor; right?

3 A. Yes.

4 Q. So medically from a spine surgeon's perspective  
5 Mr. Sarmiento can do some sedentary work; correct?

6 A. Yes.

7 Q. You're not a vocational rehabilitation specialist;  
8 right?

9 A. No.

10 Q. You don't know, for example, his education level, how  
11 well he can write, how well he can add things like that; right?

12 A. Yes.

13 Q. So you're saying from a purely physical standpoint,  
14 you as a spinal surgeon, you feel that he could perform  
15 sedentary work; right?

16 A. Yes.

17 Q. Now, you treated his neck and his back; fair?

18 A. Yes.

19 Q. Are you aware that he had three other surgeries?

20 A. I know that he was being treated by orthopedics for  
21 other injuries, yes.

22 Q. By Dr. Touliopolis?

23 A. Yes.

24 Q. And Dr. Touliopolis performed three surgeries on him.  
25 I want you to assume that there was testimony

Dr. Merola - Plaintiff - Redirect

1       yesterday by Mr. Sarmiento that Dr. Touliopolis performed three  
2       surgeries on him.

3               Your opinion doesn't even take into account those  
4       surgeries; right?

5       A.     Yes.

6       Q.     Just the two surgeries that you performed?

7       A.     Yes.

8       Q.     Correct?

9       A.     Yes.

10      Q.     Now, you were asked about future treatment -- oh,  
11     excuse me --

12               MR. GJELAJ:   Withdrawn.

13      Q.     When you operated on his back, did you remove a  
14     specimen?

15      A.     Yes.

16      Q.     What does that mean?

17      A.     In the op report, I indicated that I removed disc  
18     specimen and sent it to pathology.

19      Q.     Why did you do that for?

20      A.     You know, typically, depending upon the institution,  
21     some institutions have varying rules and regulations regarding  
22     pathology reports, but we typically remove stuff that we find.

23      Q.     And were you told by the lab what the results were?

24      A.     There should be a lab report for that, yes.

25      Q.     And were you told that it was a herniated disc?

Dr. Merola - Plaintiff - Redirect

1 A. I don't have the report with me.

2 (Handed to the witness).

3 THE COURT: Counsel, is this an exhibit?

4 MR. GJELAJ: It's already in evidence, but I'm  
5 trying to speed things up.

6 THE COURT: Okay.

7 A. Yes. This is my operative report, but this is not the  
8 pathology report.

9 Q. Well, it says there that you were advised that that  
10 specimen was a herniated disc at L5-S1?

11 A. I dictated that I removed the pathological specimen,  
12 herniated disc from L5-S1, yes.

13 Q. You did do the same thing for the cervical surgery?

14 A. I did.

15 Q. What was the result of that?

16 A. Specimen was sent to pathology.

17 MR. GJELAJ: One more thing. Sorry.

18 Q. Doctor, at some point in your notes, did you recommend  
19 that he treat with physical medicine with a physiatrist?

20 A. Yes.

21 Q. Did you recommend that he treat with any other  
22 specialties?

23 A. Physical therapy following up with orthopedics as best  
24 I can recall. I'd have to look at my notes for anything more  
25 specific.

Dr. Merola - Plaintiff - Recross

1 Q. That's fine. Dr. Macagno will come in Friday and fill  
2 in the blanks.

3 Thank you very much, Doctor.

4 A. Thank you.

5 THE COURT: Counsel Whalen.

6 MR. WHALEN: A couple of things.

7 RECROSS-EXAMINATION

8 BY MR. WHALEN:

9 Q. Mr. Gjelaj asked you about objectivity and  
10 subjectivity of some of your tests just again now. Do you  
11 recall that?

12 A. Yes.

13 Q. When you ask Mr. Sarmiento in this case to rotate  
14 their neck or elevate their arm or bend their back or neck,  
15 you're relying on the truthfulness of the patient in this case  
16 Mr. Sarmiento when they say it hurts or they can't move it;  
17 correct?

18 A. Yes.

19 Q. Okay. And that would make it subjective?

20 A. Part of that component, yes.

21 Q. The pathology reports, the pathology reports regarding  
22 the cervical and the lumbar operations are not contained in  
23 those notes; correct?

24 A. Yes, correct.

25 Q. So I don't know if the pathology report says

Dr. Merola - Plaintiff - Recross

1 desiccation or something else; correct?

2 A. I'd have to refer to the report, yes.

3 MR. WHALEN: Thank you, Doctor. That's all.

4 THE WITNESS: Thank you.

5 THE COURT: Okay. So it's 12:22, slightly  
6 earlier than we had thought, but I think this is a good  
7 breaking point before lunch. So we will break and resume  
8 again at 2:00 p.m. Thank you.

9 THE WITNESS: Thank you.

10 COURT OFFICER: All rise; jury exiting.

11 (Whereupon the jury exits the courtroom.)

12 THE COURT: You may be seated. Okay.

13 I'm sorry. Before we break, however, I would  
14 like juror number three to come down so we can ask about  
15 Friday's schedule and get as clear an answer as possible.

16 (Whereupon, juror number three enters the  
17 courtroom.)

18 THE COURT: Okay. Juror number three, first, I  
19 just want to say that I don't want you to be nervous that  
20 we called you. This is just so that we can get some  
21 information from you so that we can figure out the trial  
22 schedule going forward.

23 We understand that you have a life and you have  
24 commitments and that some of those commitments you may not  
25 have anticipated during the voir dire. And so right now --

Dr. Merola - Plaintiff - Recross

1 so again I'm just saying this to you because I don't want  
2 you to feel like we're putting you on the spot or feel as  
3 though you're in trouble.

4 We were informed that you weren't going to be  
5 able to make it on Friday. And so what we're trying to  
6 figure out now is whether or not and, again, I say this to  
7 say it's absolutely fine if you have a commitment that  
8 prevents you from coming here. We're just trying to figure  
9 out is it that level where it's a commitment that you have  
10 that you really can't move around without experiencing a  
11 real detriment to your life or is it something that you  
12 could move. Because one of the things we're considering is  
13 if you can't make it on Friday, what we might do is have  
14 one of the alternates take your spot that way we can  
15 continue on Friday.

16 Again, we understand that you have commitments  
17 and you things in your life so this is not meant to put  
18 pressure on you one way or another. It's just meant to  
19 give us the most information so that way as we proceed  
20 we're proceeding in the best light possible. So given  
21 that, do you think that you can make it Friday or is it  
22 somebody that's not possible?

23 JUROR NUMBER THREE: I could try to reschedule it.  
24 I'm just getting my real ID renewed because I'm traveling  
25 for my birthday November the 15<sup>th</sup>. So I'm just trying to

Dr. Merola - Plaintiff - Recross

1 get it renewed now so by that time it's renewed and I can  
2 leave like that. I can see if I can make it earlier in.  
3 It's at ten or see if I can reschedule. It's nothing. If  
4 you guys -- if I need to be here I could be here.  
5 Basically, this can be rescheduled.

6 THE COURT: Okay. So how about this? How about  
7 you see if you can reschedule it today and then we'll talk  
8 tomorrow to see if you can -- because if you can't get an  
9 appointment before your November 15<sup>th</sup> travel date, then  
10 clearly it doesn't make sense for you to reschedule because  
11 then that will be putting your trip in jeopardy. I'm  
12 assuming you're scheduling online with DMV.

13 JUROR NUMBER THREE: Triple A.

14 THE COURT: Okay. Can you see if that -- can you  
15 do that online some time today?

16 JUROR NUMBER THREE: Yes, I can.

17 THE COURT: Okay. So then if you can let Court  
18 Officer Garcia know and he can communicate to us or if you  
19 think it makes sense for you to speak with us in more  
20 detail about it, you can also let him know that. But,  
21 again, I just want you to know it is 100 percent just for  
22 purposes of keeping the trial moving. We don't want to put  
23 any undue pressure on you or make you feel as though we're  
24 trying to move you one way or the other. We just do want  
25 to understand.

Dr. Merola - Plaintiff - Recross

1 JUROR NUMBER THREE: Okay, no problem.

2 THE COURT: If you can find that out.

3 JUROR NUMBER THREE: One question. Do you have  
4 the schedule for next week? So if I need to, I can move it  
5 to a day next week.

6 THE COURT: So we do know that this Thursday is a  
7 down day.

8 JUROR NUMBER THREE: Okay.

9 THE COURT: So on Thursday none of the jurors  
10 will be here. In terms of next week?

11 MR. GJELAJ: I don't know.

12 MR. WHALEN: Neither do I, Judge.

13 THE COURT: We don't know yet. But, Counsel  
14 Whalen, do you think you would have some idea by the end of  
15 the today or --

16 MR. WHALEN: Yes.

17 THE COURT: -- something. Okay.

18 So we'll also try to get more clarity, but if you  
19 can figure out what the availability is because, again, if  
20 you look and you see there's no dates available between now  
21 and the 15<sup>th</sup>, then that answers the question even if he  
22 don't know exactly what the schedule is next week. So if  
23 you could just endeavor to do that, we would be very  
24 appreciative.

25 JUROR NUMBER THREE: Okay. No problem.

Dr. Merola - Plaintiff - Recross

1 THE COURT: Thank you so much.

2 I also understand your employer is causing some  
3 confusion and some stress for you.

4 JUROR NUMBER THREE: They keep emailing me and  
5 emailing me all the time like where am I? They want more  
6 proof. Like they just -- I tried to give them your number  
7 multiple times. I have proof in the email. They never  
8 call, but they're still emailing all the time. I think  
9 because of the switch last week, because it was supposed to  
10 be the 15<sup>th</sup>. I went to work the 15<sup>th</sup>, I got proof that  
11 I went to back the 15<sup>th</sup>, then it changed to yesterday  
12 which I was here and they're not trying to hear it, but I  
13 did give them your number. I emailed them.

14 THE COURT: So we do a letter sometimes for  
15 jurors to basically say that we are on trial. So we'll do  
16 another one and that will also include the chambers, my  
17 chamber's number, as well as the courtroom number. So then  
18 your employer will have two methods of reaching the court.

19 PROSPECTIVE JUROR: Okay. But they did provide  
20 the letter and I did send it to them as well.

21 THE CLERK: She received two letters. All right.

22 THE COURT: All right. So it's not that. Okay.  
23 So please keep the court officer apprised if it continues.  
24 And we will try to assist you if that is the source of your  
25 stress.

## Proceedings

1                   JUROR NUMBER THREE: They're just short staffed.

2                   So I'm the only one in the building right now so that's why  
3                   they're doing that.

4                   THE COURT: Okay. All right. Thank you. Have a  
5                   good lunch.

6                   JUROR NUMBER THREE: Thank you. Thank you Your  
7                   Honor.

8                   THE COURT: Thank you. Okay. Thank you. So  
9                   we're breaking for lunch now.

10                  (Whereupon, a luncheon recess was taken at 12:30  
11                  p.m.)

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

13                  (Whereupon, the proceedings resumed at 2:11 p.m.)

14                  COURT OFFICER: All rise.

15                  THE COURT: You may be seated.

16                  So we have all the jurors. They're in the  
17                  process of coming down. I did want to provide an update as  
18                  to juror number three. She said that it is possible that  
19                  she may be able to reschedule.

20                  So Counsel Whalen, once you have the update as to  
21                  what the schedule will be next week, we can provide that to  
22                  her so that she can then verify that --

23                  MR. WHALEN: I was justing looking for my  
24                  paralegal but that's why I turned around.

25                  Oh, there she is. I will talk to her and then

## Proceedings

1 I'll provide it to you, Judge. I don't want to hold  
2 anything up.

3 THE COURT: Okay, perfect. So where it stands  
4 right now is that she will be able to continue with us on  
5 Friday and she is endeavoring to reschedule the DMV  
6 appointment or whatever agency she's going through in order  
7 to get her Real ID by her travel date.

8 So I'm assuming Dr. Touliopolis is here?

9 MR. GJELAJ: Yes, Your Honor.

10 THE COURT: Okay. Perfect.

11 (Whereupon, CD's of x-rays were marked as  
12 Plaintiff's Exhibits 18 and 19 in evidence.)

13 COURT OFFICER: All rise, jury entering.

14 (Whereupon, the jury enters the courtroom.)

15 THE COURT: You may be seated.

16 So Counsel Gjelaj, before you call your next  
17 witness, I believe that the parties have agreed to admit  
18 additional exhibits into evidence?

19 MR. GJELAJ: Yes, we have, Your Honor.

20 We have admitted Plaintiff's 18 and 19 both of  
21 which are CD discs of x-rays taken by Dr. Touliopolis.

22 THE COURT: Okay. And Counsel Whalen, you  
23 consented?

24 MR. WHALEN: Yes.

25 THE COURT: Thank you.

1 Dr. Touliopolis - Plaintiff - Direct

2 Counsel Gjelaj, you can call your next witness.

3 MR. GJELAJ: Plaintiff calls Dr. Touliopolis to  
the stand.

4 (Whereupon, the witness takes the witness stand.)

5 COURT OFFICER: Can you raise your right hand?

6 S T E V E N T O U L I O P O L I S, M. D, a  
7 witness called on behalf of the Plaintiff after having been  
8 first duly sworn and having stated his address as  
9 23-25 31<sup>st</sup> Street, Astoria, New York 11105, took the  
10 witness stand and testified as follows:

11 COURT OFFICER: Please state your name and  
12 business address for the record.

13 THE WITNESS: My name is Steven John Touliopolis.  
14 My address is 23-25 31<sup>st</sup> Street, Astoria, New York 11105.

15 COURT OFFICER: The witness is sworn, Judge.

16 THE COURT: Thank you.

17 You may be seated.

18 Counsel, you may inquire.

19 DIRECT-EXAMINATION

20 BY MR. GJELAJ:

21 Q. How are you, sir?

22 A. I'm well. How are you?

23 Q. I'm good. Thank you.

24 Are you a physician duly licensed to practice medicine  
25 in the State of New York?

Dr. Touliopolis - Plaintiff - Direct

1 A. Yes, I am.

2 Q. For how long have you been duly licensed for?

3 A. I became licensed in 1993.

4 Q. Okay. Can you please tell the jury briefly about your  
5 educational background, any kind of honors, fellowships,  
6 basically bring them up to date so they know who you are?

7 A. Sure. I attended college at Columbia University. I  
8 majored in chemical engineering. I stayed on at Columbia  
9 University and received a Masters in Bioengineering before  
10 entering medical school at SUNY Downstate in Brooklyn.

11 After completing my residency, I did an additional  
12 year of training called a fellowship in sports medicine at  
13 Lennox Hill Hospital and finished that in 1997. And after that  
14 point I started my private practice. I'm board certified both  
15 in orthopedic surgery as well as orthopedic sports medicine.

16 Q. Now, this morning Dr. Merola testified and he told us  
17 that he was board certified in orthopedic surgery also.

18 Is there a subspecialty in which you're board  
19 certified vis-a-vis orthopedics?

20 A. Yes, and that's a separate examination.

21 Q. What's your specialty?

22 A. I practice both orthopedic as well as orthopedic  
23 sports medicine.

24 Q. Are you familiar with the term extremities?

25 A. Yes.

Dr. Touliopolis - Plaintiff - Direct

1 Q. Appendages?

2 A. Yes.

3 Q. What are they?

4 A. It's basically your arms and legs. So my practice is  
5 focused on treatment of extremity injuries. So basically from  
6 the shoulder to the wrist, from the hip to the ankle. These are  
7 areas that I treat and manage. I ordinarily do not treat  
8 disorders of the spine.

9 Q. And do you maintain a practice?

10 A. Yes.

11 Q. What's the name of your practice?

12 A. University Orthopedics of New York.

13 Q. Are you an active surgeon?

14 A. Yes, I am.

15 Q. About how many -- in a typical year about how many  
16 surgeries do you perform?

17 A. I would say on average -- I haven't counted recently  
18 since COVID, but it used to be in the range of five to 600 a  
19 year.

20 Q. And those are shoulders?

21 A. Again, it could range from shoulder, elbow, wrist,  
22 hip, knee and ankle. But the majority would be shoulder, hip  
23 knee and ankle.

24 MR. GJELAJ: Okay. Can I have these marked for  
25 identification only, please?

Dr. Touliopolis - Plaintiff - Direct

1 THE COURT: Yes.

2 (Whereupon, a model of the knee was marked as  
3 Plaintiff's Exhibit 20 for identification.)

4 (Whereupon, a model of the ankle was marked as  
5 Plaintiff's Exhibit 21 for identification.)

6 Q. Doctor, is it fair to say that you treated  
7 Mr. Sarmiento with regards to his knee and his ankle?

8 A. Yes.

9 Q. Let's begin with the knee, please.

10 Can you please explain to the jury the anatomy of the  
11 knee? And you if need to use the model, please do so.

12       A.     Sure.   This is a model of the right knee.   And the  
13       knee is made up of three bones.   So it's the kneecap, which is  
14       here.   The lower part of your shinbone, which is the femur.   And  
15       the upper part of your shinbone which is the tibia.   And when we  
16       walk, we walk on articular cartilage.   So the covering of the  
17       bone is -- it's not actually below, it's this white shiny  
18       substance.   If you're not a vegetarian, if you're eating a  
19       chicken leg, the end of the chicken leg you can see a white  
20       covering, that's the cartilage that you walk on.

21 And in addition, you have -- in the knee you have a  
22 meniscus which is a disc of cartilage that makes like a C and  
23 helps cushion the knee. It helps make the contacting surface  
24 more symmetrical to the other side. And to hold the knee  
25 together you have ligaments.

Dr. Touliopolis - Plaintiff - Direct

1           You have four main ligaments. The collateral  
2 ligaments, which are on the side of the knee. And the cruciate  
3 ligaments which are in the center of the knee, they're called  
4 cruciate because they make a cross which are the anterior and  
5 posterior cruciate ligaments. That helps the knee in place.  
6 Without the ligaments, the knee can be unstable.

7           Q. Doctor, the cushion that you were referring to just  
8 now, Dr. Merola told us this morning about the disc and how it  
9 acts as a cushion. Is that similar to the disc?

10           A. It -- it is --

11           Q. The way it functions.

12           A. The idea is similar, yes.

13           Q. Okay. So did there come a time when you first saw  
14 Mr. Charles Sarmiento?

15           A. Yes.

16           Q. And if you could reference the notes if you need to,  
17 this is marked as Exhibit 3 in evidence also.

18           What was the date of that first visit?

19           A. Let me just pull up my records. I believe the first  
20 time that I saw the patient -- he was initially seen by another  
21 physician in my practice. But the first time I saw the patient  
22 was January 5, 2021.

23           Q. Okay. You said that he was seen by another physician  
24 in your practice. Is that something that's customary in your  
25 practice?

Dr. Touliopolis - Plaintiff - Direct

1           A. Yes, usually there's more than one physician in the  
2 practice.

3           Q. Who saw -- which physician?

4           A. Dr. Charles DeMarco.

5           Q. He is an employee of your company?

6           A. Yes, he is.

7           Q. Is he board certified?

8           A. Yes, he is.

9           Q. In what?

10          A. In orthopedic surgery and orthopedic sports medicine.

11          Q. And what was done at that first visit?

12          A. The first visit with myself or with Dr. DeMarco?

13          Q. The first visit that he came with Dr. DeMarco. The  
14 first time he came to your practice on November -- oh, wait a  
15 minute. That's not the date.

16          A. November 20, 2020.

17          Q. Correct.

18          A. Dr. DeMarco obtained a history through a translator  
19 and -- for injuries of his knees sustained in an accident. He  
20 had complaints of clicking, popping and buckling of his knees,  
21 difficulty with prolonged walking and standing and heavy lifting  
22 as well as going up and down steps. He reported the pain as  
23 being persistent and debilitating. He also reported injury of a  
24 right ankle for which he was seeing another doctor. And the  
25 pain was both on the front as well as the inside of both knees.

Dr. Touliopolis - Plaintiff - Direct

1 He denied any prior history of injuries to the knees prior to  
2 this accident. The accident occurred while working as a  
3 construction worker.

4 Q. When he came into the office that first time and  
5 Dr. DeMarco saw him, was he using any kind of assistive devices?

6 A. I'm reviewing Dr. DeMarco's note. Dr. DeMarco did  
7 recommend the use of a cane.

8 Q. If you look down under assessment and plan towards the  
9 bottom, does it say there the patient ambulates with the use of  
10 a cane?

11 A. Yes.

12 Q. Okay. It also says that he had an unsteady gait. Can  
13 you describe to the jury -- excuse me. Can you explain to the  
14 jury what unsteady gait means?

15 A. Basically when he walks, it maybe be a little wobbly  
16 and in this patient it would be the result of his knees not  
17 being stable.

18 Q. Was there a physical examination done by Dr. DeMarco?

19 A. Yes.

20 Q. What did he do? And what, if anything, did he find?

21 A. He noted range of motion of the knees. The extension  
22 was 0 degrees which is normal. The flexion was limited to  
23 100 degrees. So normal is about 135 to 140. There was  
24 tenderness along the patella which is the kneecap, as well as  
25 medial and lateral joint-line tenderness and pain with the

Dr. Touliopolis - Plaintiff - Direct

1 anterior drawer test.

2 Q. What is that test, Doctor?

3 A. It's a test performed by the examiner to assess of the  
4 anterior cruciate ligament. It's -- it's -- again, it's one of  
5 the four ligaments I noted earlier and it's one of the main  
6 stabilizing ligaments to the knee.

7 Q. Were there any x-rays done that day?

8 A. Yes.

9 Q. What did the x-rays reveal?

10 A. That there's good alignment, good medialization, no  
11 fractures, no dislocations.

12 Q. Okay. Did you bring a copy of the x-ray with you  
13 today?

14 A. Yes.

15 Q. Okay. This morning, Dr. Touliopolis, Dr. Merola came  
16 here and demonstrated to the jury whatever he wanted. Is that  
17 something you'd want to do or are you okay from the stand?

18 A. I could point something out quickly.

19 Q. Hold on. I could give you a laser pointer. Is that  
20 okay?

21 A. Yes.

22 Q. Oh, will the laser pointer catch on here? He couldn't  
23 do it on the MRI.

24 A. We can try. I can try.

25 Q. Oh, okay. You did it.

Dr. Touliopolis - Plaintiff - Direct

1                   Doctor, first of all, to lay the foundation, what are  
2 we looking at here?

3                   A. So this is an x-ray of both knees. It's an AP x-ray,  
4 anterior/posterior, so in other words, the x-ray is taken in  
5 this direction from the front to the back of the knee. And,  
6 again, you could see this bone which is the lower end of the  
7 thighbone. This bone is the upper end of the shinbone. And  
8 this is the joint. And it's a fairly clean joint. There's no  
9 signs of any arthritis. The spaces between the bones are  
10 maintained, there are no bone spurs noted. So these x-rays  
11 initially are fairly normal.

12                  Q. Okay. The height there, is it maintained in between  
13 the two bones?

14                  A. Yes, the height is maintained and it's fairly  
15 symmetrical between both sides.

16                  Q. If someone hypothetically had degeneration in their  
17 knee, what would this x-ray show?

18                  A. It could show osteophytes which are bone spurs. We  
19 call those productive changes, as well as Sclar changes where  
20 the bone becomes thicker. You can get cysts in the bone under  
21 the joint line, and you can get narrowing of the joint spaces,  
22 so the space between the bones where the cartilage is.

23                   So this space between these blue areas is cartilage  
24 which it does not show up on the x-ray. But when the cartilage  
25 is damaged, you can tell that on the x-ray because the space is

Dr. Touliopolis - Plaintiff - Direct

1 more narrowed. And initially these x-rays had no evidence of  
2 any joint space narrowing.

3 Q. Is this x-ray, and your interpretation of it,  
4 consistent with a 29-year-old knee?

5 A. Yes.

6 Q. Okay. Were there any MRIs done?

7 A. Yes.

8 Q. Tell us about that.

9 A. The -- I'm just pull up the date of the MRI scan.  
10 With reference to the right knee there was an MRI scan that was  
11 performed on October 28, 2020.

12 Q. What did it reveal?

13 A. It revealed a tear of the medial meniscus on the  
14 report. And also when I reviewed the images, it also revealed  
15 partial tearing of the anterior cruciate ligament.

16 Q. Using the knee model, can you explain to the jury  
17 where the tear was that you visualized?

18 A. Yes, so the medial meniscus tear, medial means inside.  
19 So it will be this disc that was torn but more in the back of  
20 the knee. And once torn, the patient loses that area of  
21 cushioning and, again, this is an area that later does develop  
22 arthritis on the inside of the knee. And this is the ligament,  
23 the cruciate ligament that was partly injured.

24 Q. Now, Mr. Sarmiento testified yesterday that prior to  
25 seeing you he had undergone various conservative methods for the

Dr. Touliopolis - Plaintiff - Direct

1 ankle. As of this date, had he begun physical therapy for the  
2 knee yet?

3 A. Therapy was prescribed by Dr. DeMarco when he was  
4 first seen on this date. I believe he had already been  
5 receiving it though.

6 Q. So when a patient comes to you at first and he's  
7 exhausted --

8 MR. GJELAJ: Withdrawn.

9 Q. Is that something that's considered a conservative  
10 measure?

11 A. Physical therapy, yes.

12 Q. So a patient comes to you having exhausted  
13 conservative methods, you do an x-ray, shows good alignment, you  
14 look at an MRI that shows a torn meniscus, do you automatically  
15 recommend a surgery for that patient?

16 A. Yeah, so it varies patient to patient. So the patient  
17 had -- you individualize your treatment for the patient. So if  
18 the patient has therapy, still had pain, had a large tear of his  
19 meniscus, that is something that would likely need surgery and  
20 would be discussed earlier than later.

21 But, again, when he saw Dr. DeMarco he did recommend  
22 some additional therapy.

23 Q. Did he continue to treat with you?

24 A. Yes.

25 Q. With your facility? When I say you, I'm referring to

Dr. Touliopolis - Plaintiff - Direct

1 your facility.

2 A. That's correct.

3 Q. When did your facility see him next?

4 A. I saw the patient on January 5, 2021.

5 Q. And that on that date you saw him yourself; right?

6 A. Yes.

7 Q. Okay. Can you tell us about that examination?

8 A. Yes, he had complaints of knee pain. The right knee  
9 was worse than the left with episodes of his knee buckling and  
10 giving out, difficulty kneeling, squatting and bending, going up  
11 and down steps, difficulty turning and pivoting. And he did not  
12 respond to physical therapy as well as the use of the cane.

13 Examination of the knee revealed a limited flexion to  
14 105 degrees actively and 120 passively on the right knee with a  
15 positive Lachman's test, a positive anterior drawer test and a  
16 positive pivot shift test.

17 Q. What, if anything, is the significance of that?

18 A. So those are the three main exams for testing the  
19 anterior cruciate ligament. The knee instability is really it's  
20 a clinical diagnosis made more in the office then by MRI. And  
21 when a patient complains of buckling of the knee or giving out  
22 of the knee, there is obviously suspicion that there's injury to  
23 a ligament. These are tests that are performed by the examiner  
24 for their basically objective tests where the examiner pulls on  
25 the knee and assesses how much motion there is. And if the knee

Dr. Touliopolis - Plaintiff - Direct

1 is unstable, there is more translation, more motion to the knee.

2                   The pivot shift test is a test performed by first  
3 bending the knee and rotating it and then slowly extending the  
4 knee. And basically what happens is the knee goes from a  
5 position where it's actually not completely in place because of  
6 the knee injury and pops into place. And when that test is  
7 positive, it basically makes the diagnosis that the anterior  
8 cruciate ligament is not working properly.

9                   Q. And you said that this was an objective test.

10                  Dr. Merola testified this morning about the difference between  
11 objective and subjective.

12                  These tests that were objective, they can't be faked  
13 by the patient; is that fair?

14                  A. Yes, an objective test cannot be faked by the patient.  
15 Sometimes an objective test can be limited by pain. So you may  
16 be limited. So you may end up getting a false negative because  
17 of pain. But when it's positive, there's really no patient  
18 input for that.

19                  Q. Okay. And did you formulate an impression after that  
20 visit?

21                  A. Yes.

22                  Q. What was your impression?

23                  A. That of bilateral knee anterior cruciate ligament  
24 which I will call ACL insufficiency, rule out meniscal tearing  
25 and further internal derangement.

Dr. Touliopolis - Plaintiff - Direct

1 Q. And did you formulate a plan?

2 A. Yes.

3 Q. What was your plan?

4 A. I did recommend right knee surgery based on his  
5 ongoing symptoms despite his treatment and the review of the MRI  
6 images. And the surgery would be that of an arthroscopy where  
7 we go in the knee with a camera, we assess the knee. The  
8 surgery with the arthroscopy where you go in with a camera and a  
9 lens and you watch it on T.V. is really the gold standard to  
10 figure out what's really going on inside the knee. The MRIs can  
11 have false positives and false negatives. But with the  
12 arthroscopy, I should look at things with your own eyes and  
13 actually probing them with a probe.

14 So the first thing that is done is a diagnostic  
15 arthroscopy which was recommended. And either depending on what  
16 was found, either a repair of the meniscus tear or a debridement  
17 of the meniscus tear which is called a meniscectomy as well as a  
18 possible ligament reconstruction of the ACL injury.

19 Q. Did he eventually have this surgery?

20 A. Yes.

21 Q. Can you please tell -- and you performed the surgery,  
22 Doctor?

23 A. Yes, I did.

24 Q. Can you please tell us what you did during that  
25 surgery?

Dr. Touliopolis - Plaintiff - Direct

1           A. Yes, the surgery was performed on January 18, 2021 and  
2 it involved the arthroscopy, the reconstruction of the ligament  
3 of the anterior cruciate lig -- with a graft that was taken from  
4 part of his own knee, as well as a meniscectomy. So the  
5 meniscus tear was fairly large and complex and was not something  
6 that could be repaired and was treated with the removal of the  
7 torn fragments of the meniscus.

8           Q. What did you do to repair it?

9           A. To repair the ACL it's really called a reconstruction.  
10 So we took a piece of -- to use the model again -- the patient's  
11 own disc tendons, it's called the patella tendon. It attaches  
12 the kneecap to the shinbone. So basically we take the  
13 third middle of the tendon with a piece of bone from the kneecap  
14 and a piece of bone from the shin, and we use that to make a new  
15 ligament, a new ACL ligament. And we drill holes in the bone.  
16 We pass that ligament through the holes, and then we secure it  
17 with a two metal screws.

18           Q. Was the surgery a success?

19           A. The surgery went well without complication and I would  
20 call it successful initially; yes.

21           Q. And did he come back to see you after the surgery?

22           A. Yes.

23           Q. And tell us about the -- when was that?

24           A. So the surgery was January 18<sup>th</sup>.

25           Q. Direct your attention to your January 22, 2021 note,

Dr. Touliopolis - Plaintiff - Direct

1 Doctor.

2 A. Okay. That was done by Dr. DeMarco.

3 Q. What's that?

4 A. I have Dr. DeMarco's notes separate. If you can just  
5 let me know --

6 Q. You know -- you can look at that.

7 A. Okay. Sure.

8 Q. That's actually in order.

9 A. Okay. I will do that.

10 Q. That's the same order I'm looking at too.

11 So I direct your attention to January 22, 2021.

12 MR. GJELAJ: What exhibit was that, Officer?

13 COURT OFFICER: Three.

14 MR. GJELAJ: So when I mentioned -- just so the  
15 record is clear, when I said to the witness he could look  
16 at that, I was referring to Plaintiff's Exhibit 3 in  
17 evidence.

18 A. Yes, I have the note.

19 Q. Okay. Please tell us about that visit, that first  
20 postop visit.

21 A. So this was just a few days after the surgery. He  
22 presented with his wife with his brace following the surgery.  
23 He was put into a fairly large brace that he's to walk on. And  
24 he was complaint with use of the brace. He had some swelling as  
25 well as ecchymosis which is bruising which are normal findings

Dr. Touliopolis - Plaintiff - Direct

1 following surgery. And he reported that his pain was tolerable.

2 On examination his motion was obviously very limited.

3 He just had a knee reconstruction. He had extension of  
4 0 degrees and flexion of only 20 degrees. There was a moderate  
5 effusion in the knee which is a moderate degree of water inside  
6 the knee, as well as some bruising around the knee but no signs  
7 of infection.

8 Q. You mentioned extension and what was the other one?

9 A. Is flexion.

10 Q. Okay. I have been wondering what that is and I'm sure  
11 the jury has, too. What is flexion?

12 A. So flexion is bending your knee back.

13 Q. Like this? (indicating)

14 A. Yes.

15 And extension is straightening the knee.

16 Q. The way I am right now? (indicating)

17 A. Right. So normal extension is about 0 degrees. Some  
18 people can hyperextend but usually normal is 0. Flexion is  
19 usually back to about 135 to 140 degrees.

20 Q. Thank you, Doctor.

21 When is the next time that he was seen in your  
22 practice?

23 A. February 26, 2021.

24 Q. Please tell us about the exam, assessment and plan?

25 A. Again, he's being followed up after his surgery. He

Dr. Touliopolis - Plaintiff - Direct

1 was compliant with home exercises. He was compliant with the  
2 use of his postoperative brace. The knee exam revealed healed  
3 incisions. His extension was still 0 degrees. His flexion had  
4 already improved to 100 degrees. And there were no signs of  
5 instability which is a good finding considering that he had a  
6 reconstruction of his ligament.

7 Q. So he was doing pretty well postoperatively; is that  
8 fair?

9 A. He had some initial -- yes, he did respond quickly  
10 following the surgery.

11 Q. When did you see him again?

12 A. April 6, 2021.

13 Q. What did you -- tell us about your exam, your  
14 assessment and your plan?

15 A. Again, he was complaint with the use of his brace and  
16 his exercises. He had started physical therapy. His motion was  
17 again from 0 degrees to 100 degrees. The Lachman anterior  
18 drawer test was stable. The meniscal signs was diminished. He  
19 did have some atrophy on the right thigh. And the plan at this  
20 point was continued physical therapy, home exercises and  
21 antiinflammatory medication. He had also had complaints to his  
22 right ankle and left knee.

23 Q. And in your note you said that in the next visit once  
24 he's feeling better that you were going to focus on those two?

25 A. For him to be evaluated.

Dr. Touliopolis - Plaintiff - Direct

1 Q. Did you comment on his level of disability at that  
2 exam?

3 A. So his level of disability at this point would still  
4 be total following his surgery.

5 Q. Okay. When did you see him again?

6 A. On July 20, 2021.

7 Q. Okay. Tell us about the physical exam that was done?

8 Before you answer, Doctor, every office visit that  
9 you -- that Mr. Sarmiento came to your office for, did you  
10 perform the same physical exams?

11 A. The body parts could vary from visit to visit  
12 depending what the focus of the visit was.

13 Q. Well, how about for the knee, were those exams the  
14 same each time?

15 A. The exams were -- were -- were -- there may be some  
16 variation but fairly consistent, yes.

17 Q. So then tell us about the exam that you performed, any  
18 positive findings, assessment, plan?

19 A. Yeah, so his knee exam his flexion improved to  
20 110 degrees. The knee -- there were no signs of knee  
21 instability. The meniscal signs were diminished. Overall,  
22 again, all positive findings. There was atrophy of the right  
23 thigh of approximately two to 3 centimeters compared to the  
24 left.

25 Q. Is that significant?

Dr. Touliopolis - Plaintiff - Direct

1           A. It is a moderate to significant degree of atrophy;  
2 yes.

3           Q. Okay. Continue, please.

4           A. And left knee exam revealed motion from 0 to  
5 110 degrees with positive meniscal signs, a positive anterior  
6 drawer test, the Lachman test. And right ankle exam revealed  
7 tenderness along the anterior lateral joint line. A positive  
8 anterior drawer test and a positive Talar tilt test.

9           Q. Doctor, this is the first time that we're talking  
10 about the ankle today and in this trial. Can you please, using  
11 the model that's in front of you, show the jury what you mean?

12          A. Yes. So this is a model of the ankle. And -- of the  
13 ankle is made up basically three bones. The small bone, which  
14 is the fibula. The big bone is the tibia. This is a -- this  
15 bone actually goes all the way up to the knee. So the upper  
16 part of this bone makes up the low part of the knee. And the  
17 low part of this bone makes up the upper part of the ankle and  
18 the talus, which is this bone in here. And basically the talus  
19 is held in place by the ankle mortise which is made up by the  
20 bones. So the fibula and the tibia bones as well as the  
21 ligaments around the ankle that help hold the ankle in place,  
22 make the ankle stable. And a fallen-ankle injury involving the  
23 ligaments the ankle can become unstable. And some of the  
24 symptoms can include rolling where you slip on a crack and the  
25 ankle kind of rolls on you. Again, that's something that's

Dr. Touliopolis - Plaintiff - Direct

1 initially treated with physical therapy. But if it doesn't  
2 respond, it may require surgery.

3                   And on examination to test for the ligaments there are  
4 tests that we do that are similar to the knee where we actually  
5 hold the bones and pull on the ankle. One is the anterior  
6 drawer test where we kind of pull the ankle forward. And if  
7 that reveals no motion in the ankle, that usually signifies that  
8 the ATFL, which is the Anterior Talo-Fibular Ligament, has been  
9 injured. And the other is called the Talar Tilt test where the  
10 ankle is rolled this way. And if that reproduces the pain and  
11 produces a laxity, it signifies injury of the CFL which is the  
12 calcaneofibular ligament, the ligament that goes from the  
13 calcaneus to the fibula. So on examination both those ligaments  
14 were found to be loose.

15               Q. Did you come up with an assessment at this visit?

16               A. I'm sorry, I lost my page.

17               Okay. Yes, the assessment was that -- well, on the  
18 injuries requiring right knee surgery, as well as right ankle  
19 lateral ligament tearing, rule out chondral injury.

20               Q. What is a chondral injury?

21               A. Again, it's that shiny white structure that covers the  
22 ends of the bones that we walk on.

23               Q. Okay. And did you formulate a plan?

24               A. Yes.

25               Q. What was your plan?

Dr. Touliopolis - Plaintiff - Direct

1           A. At this point we recommended continued physical  
2 therapy for his right knee, especially because of the atrophy  
3 that he had, as well as physical therapy for the left knee and  
4 the right ankle, to follow up with his spine specialist. And  
5 that further intervention may be required in the form of surgery  
6 if his ankle did not get better.

7           Q. Did you provide him with a home exercise program?

8           A. Yes.

9           Q. And tell the jury about that?

10          A. It's basically instructions on what to do at home.  
11 Physical therapy is important but it's something the patient can  
12 only do two, three times a week. We do recommend daily home  
13 exercises when possible. And obviously you're limited at home  
14 with machinery but there are certain exercises that we instruct  
15 the patient that is safe to do at home without equipment.

16          Q. Is that good and accepted practice within the field of  
17 orthopedics?

18          A. I would say yes.

19          Q. Let's go to your note of September 21<sup>st</sup>.

20          A. Yes.

21          Q. We're not going to go over every visit.

22                  Did you perform an examination?

23          A. Yes.

24          Q. Tell us about the exam, any findings, your assessment,  
25 and your plan, please?

Dr. Touliopolis - Plaintiff - Direct

1           A. Yes, the patient came in on September 21<sup>st</sup>. He did  
2 report that his right knee was improving. His chief complaint  
3 at this visit was his right ankle. He had right ankle pain  
4 along the anterior and lateral aspects of his ankle which is the  
5 front and outside of his ankle, as well as clicking and popping  
6 and buckling of the left knee.

7           On examination his right knee exam was fairly  
8 consistent to the previous visit. Again, there was atrophy  
9 noted of his thigh. He was able to do a straight leg raise  
10 which is you ask the patient to lift his leg off the table. He  
11 previously had difficulty doing this. So this was a positive  
12 sign.

13           His left knee exam revealed limited flexion as well as  
14 positive Lachman and anterior test findings. And on right ankle  
15 examination his ankle motion was limited. His dorsiflexion,  
16 which is your ability to bring your ankle up, which is normally  
17 20 degrees, and in this case it was 10 degrees. And plantar  
18 flexion is pointing your toes downward with your ankle. Normal  
19 is 40 degrees and that was limited to 10 degrees.

20           He also had tenderness along the ligaments that I  
21 noted earlier, the ATFL ligament and the CFL.

22           Q. Did you review any MRIs at that visit?

23           A. The September 21<sup>st</sup> visit was by Dr. DeMarco. I -- and  
24 he did refer the patient to me and I did eventually review the  
25 MRI, yes.

Dr. Touliopolis - Plaintiff - Direct

1 Q. Of what?

2 A. Of the ankle.

3 Q. Did you formulate an impression and a plan?

4 A. Yes.

5 Q. Tell us about that?

6 A. My impression was that of a lateral ligament injury.

7 There are three ligaments on the lateral side which is the  
8 outside of the ankle. I believe that two of them were injured  
9 and not working properly, and at this point did require surgery.

10 Q. And did you put in a request for that surgery?

11 A. Yes.

12 Q. Was the request approved?

13 A. Yes.

14 Q. Did you perform the surgery?

15 A. Yes.

16 Q. Tell us briefly the surgery using the model if you  
17 need to.

18 A. Yes. So surgery was performed on November 29, 2021.

19 And, again, once the patient received anesthesia, the first  
20 thing we did is examine the ankle. The benefit of the  
21 examination under anesthesia is that the patient has no pain, so  
22 that is no longer a limiting factor to your examination. So we  
23 performed the same examinations I did in the office. And,  
24 again, they were found to be positive.

25 The first part of the surgery was an arthroscopy where

Dr. Touliopolis - Plaintiff - Direct

1 we go into the ankle with a camera and we looked around at the  
2 cartilage. We did find an area where there was some damage to  
3 the cartilage on the talus that we debrided.

4 Q. What does that mean debrided?

5 A. Basically there -- there are loose flaps of cartilage  
6 tissue that covers the bone and we smooth it out with a shaver  
7 to make it more congruent and less likely to bother the patient.  
8 And then we performed the open surgery.

9 So the surgery had two parts. One was with the  
10 camera, and the other is open where we make an incision on the  
11 outside of the ankle here, and we go down to the ligaments of  
12 the ankle. We found them to be injured. And unlike the knee  
13 where we have to actually make a whole new ligament in the  
14 ankle, we're able to use the patient's own ligament. The  
15 difference is in the knee the ligament's inside the joint and  
16 it's bathed in fluid, whereas, in the ankle it's outside the  
17 joint and it's something that can be repaired, and usually the  
18 repairs are successful. If they don't work, then the patient  
19 may need further surgery with a graft.

20 But in this particular case we're able to repair the  
21 torn ligaments, we use sutures to tighten up the ligaments as  
22 well as anchors to the bone to sew the ligament tears back to  
23 the bone.

24 Q. Doctor, what is an intraoperative photo?

25 A. The intraoperative photos are pictures that we take

Dr. Touliopolis - Plaintiff - Direct

1 with a camera. So when we're performing an arthroscopy, again  
2 as I mentioned earlier, we're using a camera and we're watching  
3 it on T.V. But during the surgery we're able to take pictures.  
4 And I do have pictures of all three surgeries that I brought  
5 with me.

6 Q. We're a little short for time.

7 But did the intraoperative photos show the tears that  
8 you mentioned?

9 A. Yeah, the intraoperative photos for the knee show the  
10 tears. For the ankle, again, the ligaments are outside the  
11 joint so you can't see the majority of the ligament with a  
12 camera. But it did show it on the knees.

13 Q. When you did the knee surgery -- when you performed  
14 the knee surgery on January 18, 2021, the one that you testified  
15 to already, did you also take intraoperative photos?

16 A. Yes.

17 Q. Did those show tears?

18 A. Yes.

19 Q. Was the ankle surgery a success, Doctor?

20 A. Yes, I would -- if you define success as are you  
21 better than before? Then I would say it is successful. He does  
22 have some residual limitation of motion. But overall his pain  
23 level is better and the ankle is more stable.

24 Q. Was the first knee surgery successful? The first  
25 right knee surgery successful?

Dr. Touliopolis - Plaintiff - Direct

1           A. It was initially successful, however, eventually the  
2 graft failed and he required additional surgery.

3           Q. We'll get to that now.

4           In terms of the ankle, did you continue to treat him  
5 for the ankle?

6           A. Yes.

7           Q. Has he had any more surgeries to the ankle other than  
8 that one?

9           A. No, he has not.

10          Q. Has he had physical therapy?

11          A. He had after surgery.

12          Q. Let's go back to the right knee then.

13          At some point was there a change in the level of pain  
14 he was experiencing in the right knee post first surgery?

15          A. Yes.

16          Q. Okay. Tell us about that.

17          A. Yes, so he developed recurrent symptoms to his knee.

18          It was not immediate. Let me just see if I can pinpoint.

19          Yeah, he did report on February 22, 2022 residual pain,  
20 clicking, popping and buckling of the knee. I believe these may  
21 have been some early findings consistent with his recurrent  
22 ligament problem.

23          Q. Is that something that's typical or common or  
24 associated with these types of conditions in the knee?

25          A. Yeah, so I always explain to the patient that with a

Dr. Touliopolis - Plaintiff - Direct

1 reconstruction of the ACL, there is -- there's a 10 percent  
2 failure rate where the ligament graft may not incorporate, it  
3 may get loose again and may need additional surgery. So it's  
4 not -- I wouldn't say it's common but 10 percent is a real  
5 number and it does happen.

6 Q. So it's not rare but it's not common; is that fair?

7 A. I think that's a fair statement.

8 Q. Okay. What did you -- tell us about the examination,  
9 the -- well, tell us about the examination and any findings.

10 February 22, '22.

11 A. Yeah, so on the ankle, the ankle it was stable now.  
12 It was no longer any signs that it was loose. There was some  
13 improvement to his motion, 10 degrees of dorsiflexion and  
14 20 degrees of plantar flexion.

15 And with the right knee, his flexion at this point was  
16 less than previous. It was only 95 degrees. There was  
17 tenderness along the joint lines. There was pain with the  
18 Lachman test which limited that examination. So there was  
19 increased findings on this date for the right knee.

20 Q. Did you have any -- did you perform any x-rays on him  
21 on that date?

22 A. The x-rays were performed, yes.

23 Q. Take a look -- do you still have the laser pointer?

24 A. Yes.

25 Q. Please take a look at Exhibit 18. Is this the x-ray

Dr. Touliopolis - Plaintiff - Direct

1 that was taken on that date?

2 A. I can't see the date.

3 Q. It says 2022/02/22.

4 A. Yes.

5 Q. Okay.

6 A. So again, these are the two screws that were used for  
7 his ligament reconstruction. They're in place, they're inside  
8 the bone, and those are inside the bone, they usually don't  
9 bother the patient. Sometimes they need to be removed later if  
10 they become symptomatic. But now, if you look in the inside of  
11 the knee now, um, it's a little more narrowed then it is on the  
12 outside of the knee. This is the outside and this is the  
13 inside. So he is developing some wear of the cartilage on the  
14 inside of the knee.

15 And when we performed the surgery initially, we did  
16 find an area of grade two to grade three of cartilage damage on  
17 the inside of the knee. And basically -- so a grade 0 is normal  
18 cartilage. A grade one is softening of the cartilage. Grade  
19 four is basically a bare bone, you have no cartilage there. So  
20 he had like grade two to grade three which is moderate degree of  
21 cartilage damage on the -- exactly where the x-ray is showing  
22 some narrowing on the x-ray.

23 Q. And in medical terms, how did it get narrower? I mean  
24 we just saw an x-ray showing good joint space. How could  
25 something like this occur?

Dr. Touliopolis - Plaintiff - Direct

1           A.    So basically when you tear your meniscus, especially  
2 he had a large tear, you lose the cushioning effect of the  
3 meniscus on the inside of the knee. And you also can damage the  
4 cartilage that covers the bone at the time of the accident which  
5 he also had. So I think these two factors contributed to the  
6 development of the arthritis which is really just on the inside  
7 of the knee at this point in time.

8           Q.    Okay. That's in '22?

9           A.    Yes.

10          Q.    Okay. And did you formulate a plan, Doctor?

11          A.    I'm sorry, what was the date of that visit?

12          Q.    February 22<sup>nd</sup> of '22.

13          A.    Okay. It was for home exercises, continued physical  
14 therapy. We did discuss possible further intervention for his  
15 left knee when his right knee was feeling better and repeat  
16 x-rays and a repeat MRI scan of right knee were prescribed.

17          Q.    Did there come a time when you recommended a further  
18 surgery to the right knee?

19          A.    Yes.

20          Q.    Did you request authorization for that?

21          A.    Yes.

22          Q.    Was it granted?

23          A.    Yes.

24          Q.    Did you perform the surgery?

25          A.    Yes.

Dr. Touliopolis - Plaintiff - Direct

1 Q. Tell us about that surgery, please?

2 A. The surgery was performed on September 19, 2022. And  
3 again included the arthroscopy and a revision of the ACL  
4 reconstruction. So this time, because we already used his own  
5 tendon, we used the tendon from a cadaver.

6 Q. What is a cadaver?

7 A. It's basically a dead person. Okay. So this section  
8 of the tendon of the bone from another person was used to  
9 reconstruct the ligament. The old screws were removed and new  
10 screws are put in during the surgery.

11 Q. Was the surgery a success?

12 A. Yes. Following the surgery in the operating room we  
13 found that the knee was very stable and that the ligament was  
14 functioning.

15 Q. Now, I've been asking about the surgeries for both  
16 body parts if they've been successes. Did they cure the  
17 conditions in his knee and his ankle?

18 A. So in the ankle the tear was repaired. So he has a  
19 good result. I don't believe the ankle rolls any more. It is  
20 stiff. So it is a success because it is better than before.  
21 But it's by no means a normal ankle. Right. So he does have  
22 some residual limitation and stiffness of his ankle.

23 And the knee you can stabilize the ligament and you  
24 can clean the meniscus tear. But once there's cartilage damage,  
25 it is something that is -- um, it's progressive. So we did

Dr. Touliopolis - Plaintiff - Direct

1 split out the cartilage damage initially but it's still there  
2 and it's something that will progress over time. So -- and the  
3 arthroscopy is not a surgery that can address that problem.

4 Q. Did you continue treating him?

5 A. Yes.

6 Q. Did he continue coming to your office?

7 A. Yes.

8 Q. Okay. Did he continue physical therapy?

9 A. Yes.

10 Q. All right. I direct your attention to the last time  
11 you saw him. September 19, 2025. Is that in there?

12 A. It's not in here but I have it in my notes. Yes, I  
13 have it.

14 Q. Okay. The last visit was September 19, 2025, Doctor?

15 A. Yes.

16 Q. All right. Tell us about that visit, please?

17 A. So, again, he presented for a follow-up evaluation.  
18 It's basically his right ankle and his left knee conditions were  
19 fairly stable. He presented primarily for his right knee. Even  
20 though he did report some stability, I mean I have that it no  
21 longer gave out on him or buckled, like he had at least to the  
22 same degree as it had prior.

23 He did have residual symptoms of soreness, stiffness  
24 with prolonged ambulation. He was using a knee sleeve. He did  
25 report clicking of his knee. At this point in time he was not

Dr. Touliopolis - Plaintiff - Direct

1 receiving therapy but was compliant with home exercises, and I  
2 reported that he was not working.

3 Q. Okay. Did you perform a physical exam?

4 A. Yes.

5 Q. Tell us about the exam and findings, if any?

6 A. On examination of the knee, at this point he was  
7 walking without a brace, without a cane. His knee extension was  
8 0 degrees. His flexion was limited to 100 degrees. There was  
9 crepitus with knee motion.

10 Q. What is crepitus?

11 A. Crepitus is basically cracking and popping noises when  
12 a joint is moved. And the Lachman test at this point, in my  
13 opinion, was -- was -- was negative. So when I examined the  
14 knee, and I did the three tests, the Lachman test, the anterior  
15 drawer test and the pivot shift test, there were no signs that  
16 the knee was loose again. It didn't -- there wasn't translation  
17 like there was prior to the last surgery. But there was  
18 tenderness along the femoral condyles which is bones around the  
19 knee as well as the kneecap, and along the medial joint line  
20 which is the inside of where he was developing the arthritis.

21 Q. And you also noticed some atrophy?

22 A. Yes.

23 Q. What, if anything, is the significance of that?

24 A. Atrophy is basically when, um, your muscle size gets  
25 smaller. So -- um, and we usually compare it to the other side.

Dr. Touliopolis - Plaintiff - Direct

1 In this case he does have two bad knees. So a comparison can be  
2 a little difficult. But even with the other side being injured,  
3 the right thigh was smaller than the left thigh, meaning that  
4 the muscles were smaller. And that signifies that the muscles  
5 are not being used normally. And, therefore, since they're not  
6 being used normally when walking and going up and down stairs,  
7 they can get smaller than the other side.

8 Q. Did you perform x-rays that day?

9 A. Yes.

10 MR. GJELAJ: Put them up. It's up? Oh, thank  
11 you. Sorry.

12 Q. Doctor, I'm going to show you Exhibit 18. Patient ID  
13 82245; Sarmiento, Charles; study date 2025/09/19. Is this the  
14 x-ray that you took that day?

15 A. Yes.

16 Q. Please tell us what, if anything, you see there?

17 A. So, again, you see the -- oops. I almost blinded  
18 myself. You can see the screws where we used for the second  
19 ligament surgery. These screws I believe are slightly wider.  
20 And then on the far inside of the knee right there you can see  
21 how narrow that space is compared to that area on the other side  
22 of his knee.

23 Q. What, if anything, is the significance of that?

24 A. Again, it's gotten progressively more narrowed over  
25 time. So with this I'm diagnosing the patient with progressive

Dr. Touliopolis - Plaintiff - Direct

1 posttraumatic medial compartment degenerative joint degrees.

2 Q. Arthritis in his knee?

3 A. Yes.

4 Q. And you've shown the jury three sets of x-rays over  
5 the course of about four years; is that fair?

6 A. Yes.

7 Q. Do you see the progression in all three of those?

8 A. Yes.

9 Q. Tell us about that?

10 A. The space on the inside of the knee has narrowed over  
11 time, over the period of those four years in those three x-rays.

12 Q. What is the remedy for that?

13 A. So because the arthritis is on the inside of the knee,  
14 and it doesn't involve the entire knee, eventually the patient,  
15 in my opinion, would be a candidate for a partial knee  
16 replacement.

17 So for a partial knee replacement, you have to have  
18 arthritis as predominantly on the one side of the knee, and in  
19 this case it's the inside. You have to have a knee that's  
20 fairly stable, which he has on this -- at least on this  
21 examination where his ACL felt like it was working. And you  
22 have to have fairly descent knee motion which, you know, he does  
23 have some limitation of flexion, but he does have full  
24 extension. So it's something that's in his future. Obviously  
25 he's only 34-years of age. I don't recommend it now. But it's

Dr. Touliopolis - Plaintiff - Direct

1 something that would be required as he gets older.

2 Q. Why don't you suggest it now?

3 A. Because, again, he's very young. And sometimes you  
4 have no option and you still have to operate and do a knee  
5 replacement on a young person. But at this stage I do recommend  
6 active modification, antiinflammatory medication as necessary,  
7 periodic injections to the knee. And when he gets older, and  
8 his pain gets worse, he will be a better candidate for a knee  
9 replacement.

10 Q. That opinion that he will need a knee replacement, is  
11 that within a reasonable degree of medical certainty within your  
12 field?

13 A. Yes.

14 Q. Can you show the jury, using that knee model, how the  
15 knee replacement is performed?

16 A. Yes, so basically it's an open surgery. It's not with  
17 a camera and the incision is from here to here, and the kneecap  
18 is kind of moved out of the way. And we actually -- as of  
19 recent we're actually using a robot to assist us with the  
20 surgery and pins are put in both bones and an array is set up  
21 and the information is fed into a computer. And basically with  
22 a robot and a saw, we cut off the ends of the bones on this side  
23 of the knee, the inside of the knee, actually on the knee it's  
24 this high, on the inside of the knee. And then we cement on  
25 metal caps on both sides and then put in a plastic liner. So

Dr. Touliopolis - Plaintiff - Direct

1 when a patient walks, he's walking on plastic. He's not walking  
2 on metal.

3 Q. Once that knee replacement is done, what, if anything,  
4 happens to the mobility in the knee?

5 A. Um, it's variable. So you could have a -- you could  
6 have someone that has really bad motioning and gets better  
7 motion with a knee replacement. And you can have patients that  
8 have decent motion before the surgery but because of scar tissue  
9 that develops after surgery during the healing process, you may  
10 end up losing motion and have less motion then you had before  
11 the surgery.

12 Q. And when someone has a procedure such as the one you  
13 just said, is there physical therapy required afterwards?

14 A. Yes.

15 Q. Is there life-long care required afterwards?

16 A. I'm sorry?

17 Q. Life-long care, sorry?

18 A. So after knee replacement, there is a period of  
19 physical therapy and he would need periodic evaluations.

20 Q. Fair enough.

21 Is there a shelf life on the knee replacement?

22 A. There is with all -- with all replacements. Um, um, I  
23 gave the mechanical that they don't last forever. And over time  
24 it can wear out. Um, the plastic can wear out and may need to  
25 be changed. The metal that's cemented to the bone can get loose

Dr. Touliopolis - Plaintiff - Direct

1 and may need to be changed. Um, and, um -- you know, it can  
2 last a certain amount of time but eventually there's a chance  
3 that it would need to be revised.

4 Q. What's the shelf life these days for a knee, for a  
5 total knee?

6 A. Well, this will be a partial knee replacement and I  
7 would say it would be in the ballpark of 12 to 15 years.

8 Q. In other words, once he has this and you've already  
9 told us he needs it, it's going to have to be redone every 12 to  
10 15 years; is that fair?

11 MR. WHALEN: Objection, it's not what he  
12 testified to, Judge.

13 THE COURT: I'm sorry. Wait. Counsel, I didn't  
14 rule on the objection. So are you withdrawing that  
15 question and rephrasing?

16 MR. GJELAJ: I thought you --

17 THE COURT: No, I did not. So I'm going to  
18 answer an objection, it's going to be verbal. It's going  
19 to be on the record one way or the other.

20 So, Counsel Whalen, what was your objection?

21 MR. WHALEN: Objection as to what he just said,  
22 Judge. He testified already what the life of the knee was  
23 and he was just asked again. So it was asked and answered.

24 THE COURT: Okay. So sustained.

25 Q. Once the shelf life of the knee replacement expires --

Dr. Touliopolis - Plaintiff - Direct

1 is that the right word, Doctor?

2 A. Once the -- I would say once the knee replacement  
3 fails.

4 Q. Once the knee replacement fails, do you need to go in  
5 and redo it?

6 A. Ordinarily yes.

7 Q. Okay. Now, do you have an opinion within a reasonable  
8 degree of medical certainty within your field, as to what the  
9 competent producing cause of the condition in both his left and  
10 right knee were?

11 A. Yes.

12 Q. What is that opinion, Doctor?

13 A. As a result of his work accident --

14 Q. Okay.

15 A. -- of August 18, 2020.

16 Q. Do you have an opinion as to what the competent  
17 producing cause of the condition in Mr. Sarmiento's ankle was?

18 A. Yes.

19 Q. What is that opinion?

20 A. The same result of the work accident of August 18,  
21 2020.

22 Q. Do you have an opinion within a reasonable degree of  
23 medical certainty as to whether or not the deficits in his right  
24 knee are permanent?

25 A. Yes.

## Proceedings

1 Q. What is that opinion?

2 A. That the deficits are permanent. And even with  
3 additional surgery, there would be residual and permanent  
4 deficits to his knee.

5 Q. Same question regarding the right ankle.

6 A. With respect to the right ankle, it's my opinion that  
7 he's reached maximum medical improvement, that his ankle  
8 condition would not improve any further from where it is now.

9 Q. Do you have an opinion within a reasonable degree of  
10 medical certainty as to whether or not Mr. Sarmiento is disabled  
11 from employment?

12 A. Yes.

13 Q. What is that opinion, Doctor?

14 A. That he's disabled from his previous employment as a  
15 construction worker. I do believe he is capable of doing  
16 sedentary work where he's able to sit most of the day. I  
17 believe that would not stress his knee unnecessarily. As far as  
18 his ability to sit for prolonged periods of time, I would defer  
19 to the spine surgeon. But I do believe he's capable of  
20 sedentary work.

21 Q. Physically?

22 A. Yes.

23 MR. GJELAJ: Okay. Thank you, Doctor. Nothing  
24 further.

25 THE COURT: Let's take a 15-minute break.

## Proceedings

1                   COURT OFFICER: All rise, jury exiting.

2                   (Whereupon, the jury exits the courtroom.)

3                   THE COURT: You may be seated.

4                   (Whereupon, there was a recess taken.)

5                   COURT OFFICER: All rise.

6                   THE COURT: You may be seated.

7                   Counsel Whalen, do we have any update on next  
8 week?

9                   MR. WHALEN: Do you want me to approach or just  
10 tell you? I have a schedule.

11                  THE COURT: It's up to you. If you want to  
12 share.

13                  MR. WHALEN: I shared it with Nick already.

14                  MR. GJELAJ: Yes. And Ms. Ortiz is actually  
15 plugging it into the calendar that I gave you at the  
16 beginning of the trial.

17                  THE COURT: Perfect. Thank you. That was very  
18 helpful.

19                  MR. WHALEN: Okay. Then you'll have it then.  
20 But we have witnesses for Monday, Tuesday, Wednesday,  
21 Thursday.

22                  THE COURT: So Monday, Tuesday, Wednesday,  
23 Thursday?

24                  MR. WHALEN: Yes. I know there's going to be  
25 some time constraints because Mr. Gjelaj has witnesses on a

## Proceedings

1 couple of those days.

2 MR. GJELAJ: Well, I have Monday only.

3 MR. WHALEN: Yes.

4 MR. GJELAJ: Monday I have Dr. Dwyer and the wife  
5 I could finish that in the morning.

6 MR. WHALEN: Yeah, and I have my guy coming in at  
7 2:00.

8 MR. GJELAJ: Who?

9 MR. WHALEN: Stewart the investigator for the  
10 surveillance.

11 MR. GJELAJ: Okay.

12 THE COURT: Okay. So we expecting -- I'm  
13 assuming then that we're expecting full days Tuesday,  
14 Wednesday, Thursday?

15 MR. GJELAJ: Yes.

16 MR. WHALEN: Yeah.

17 THE COURT: Okay. So then we will be able to  
18 tell the juror Friday. But, again, that would be a day  
19 that we would likely be doing closing arguments and,  
20 hopefully, they begin deliberation.

21 MR. GJELAJ: Right.

22 MR. WHALEN: Right. It could move back a day,  
23 Judge, but we will know better tomorrow. I mean, maybe  
24 tomorrow. We'll see who we have scheduled for Thursday.

25 MR. GJELAJ: Uh-huh.

## Proceedings

1                   MR. WHALEN: And, Judge, one of my witnesses  
2                   Wednesday afternoon, needs a zoom link. I have to do him  
3                   by zoom.

4                   THE COURT: By zoom? So generally --

5                   MR. WHALEN: I don't know why yet, Judge. I'm  
6                   just looking at his schedule. But I've heard that's what  
7                   he's been doing in the past.

8                   THE COURT: So we don't use zoom. The courts use  
9                   Teams. And generally in terms of whether or not we allow  
10                   witnesses to testify via remotely instead of in person is a  
11                   question that's raised to the Court rather than a  
12                   declaration made to the Court.

13                   MR. WHALEN: And I'm raising -- I apologize. I'm  
14                   raising that question. I meant it phrased as a question  
15                   anyway, Judge.

16                   THE COURT: Is there any objection, Counsel?

17                   MR. GJELAJ: No. No objection.

18                   THE COURT: Okay. So then we would need that.  
19                   I'm sorry, you said Thursday?

20                   MR. WHALEN: Wednesday.

21                   THE COURT: Okay. And he's in the afternoon?

22                   MR. WHALEN: Yes.

23                   THE COURT: Okay. So we can set up a Teams link  
24                   for this trial on Wednesday afternoon, the 29<sup>th</sup>.

25                   So when Karen sets it up, counsel will be copied

Dr. Touliopolis - Plaintiff - Cross

1 on it and so then you can forward it as necessary to your  
2 witness so that everyone can join the link. And it will  
3 just be here -- just separate and apart, we should just do  
4 a trial run because we have had some issues with Teams and  
5 the sound. So just to make sure, we should just do a trial  
6 run ahead of time. And we'll figure that out based on when  
7 we have, like, free time when the jurors aren't here just  
8 to run that test run. I just want to make sure that the  
9 court reporter will be able to pick up everything and it  
10 won't be delayed because of that.

11 Are we ready?

12 COURT OFFICER: All rise, jury entering.

13 (Whereupon, the jury enters the courtroom.)

14 THE COURT: You may be seated.

15 Counsel, you may inquire.

16 MR. WHALEN: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. WHALEN:

19 Q. Good afternoon, Dr. Touliopolis.

20 A. Good afternoon.

21 Q. We have met before; correct?

22 A. Yes.

23 Q. Okay. It was this same situation it was last May I  
24 believe.

25 A. I don't remember where and when but I'll take your

Dr. Touliopolis - Plaintiff - Cross

1 word for it.

2 Q. So in 2025, this would be your third time testifying  
3 in the Bronx; is that correct?

4 A. I testified -- I don't recall, um, to be honest with  
5 you. It could be three times.

6 Q. Okay. You testified for the plaintiff back in April  
7 or May when you and I met; do you remember that?

8 A. Again, I don't remember the month.

9 Q. Okay. And two weeks before that you testified for  
10 another patient here in the Bronx also; you don't remember that  
11 either?

12 A. I'm very bad with dates. But, yeah, I'll take your  
13 word for it.

14 Q. Okay. As you were going through your direct testimony  
15 you relied on the notes of some of the other members of your  
16 team; is that fair to say?

17 A. Yes.

18 Q. That Mr. Sarmiento was seen by other persons, doctors,  
19 and otherwise in your office; is that correct?

20 A. That is correct.

21 Q. And that's part of the records of your facility  
22 regarding your treatment to Mr. Sarmiento; right?

23 A. That's correct, yes.

24 Q. Is Dr. DeMarco still with your practice?

25 A. He is, um, no longer with us full time. Um, um, he's

Dr. Touliopolis - Plaintiff - Cross

1 moved on to a different job opportunity.

2 Q. Okay. And Andrew Cruz is he still with your --

3 A. Yes, he is.

4 Q. And Mr. Cruz who saw Mr. Sarmiento many -- a few of  
5 the times, is not a doctor; correct?

6 A. He is a physician assistant.

7 Q. Now, you first -- and please refer to your notes as I  
8 go through this if necessary.

9 Your initial orthopedic exam was on November 20, 2020;  
10 correct?

11 A. Yes.

12 Q. And you kept detailed notes and records regarding  
13 Mr. Sarmiento; correct?

14 A. We do have notes for the visits. He was seen.

15 Q. And at the time of the initial orthopedic evaluation  
16 you provided him with a Spanish -- you put  
17 translator/interpreter here; correct?

18 A. That's correct.

19 Q. And you were going to make evaluations as to the  
20 injuries Mr. Sarmiento was claiming to his knees and his ankle;  
21 correct? That's what he was coming to you for treatment; right?

22 A. Yes, initially he came to us for his knees. I believe  
23 he was under the care of another physician for his ankle injury  
24 but later came under our care also for his ankle injury.

25 Q. Okay. And to assess Mr. Sarmiento's injury, you have

Dr. Touliopolis - Plaintiff - Cross

1 to determine what the mechanism of injury is to hold the  
2 defendant accountable; correct?

3 MR. GJELAJ: Objection.

4 THE COURT: Basis?

5 MR. GJELAJ: Holding defendant accountable?

6 THE COURT: So to form?

7 MR. GJELAJ: Form, yeah.

8 THE COURT: Sustained.

9 Please rephrase, counsel.

10 Q. Doctor, is it necessary in forming your opinions  
11 regarding the injuries that Mr. Sarmiento sustained in  
12 accordance with your records to understand the injury mechanism  
13 or how the accident happened?

14 A. Well, again, we do have that he slipped and fell down  
15 stairs while at work and that he denied any prior history of  
16 injuries to his knees prior to this accident. And based on this  
17 history, I determined that the knees are the result of this  
18 accident.

19 Q. Fair enough. And that's what I was getting to.

20 So Mr. Sarmiento told you he had no previous injuries  
21 to the knee or the ankle; correct?

22 A. That is correct.

23 Q. And he told you, as it is reflected in your records,  
24 that he slipped and fell down stairs; correct?

25 A. Yes.

Dr. Touliopolis - Plaintiff - Cross

1 Q. And on that date, do you know how many stairs he fell  
2 down?

3 A. No.

4 Q. Do you know if it was a steep set of stairs or --

5 MR. WHALEN: Withdrawn.

6 Q. Do you know if it was a lot of stairs or a few stairs  
7 or something else?

8 A. I do not know.

9 Q. But falling down stairs, okay, as he told you, you  
10 relied on his truthfulness; correct?

11 A. Yes, I do rely on an accurate history.

12 Q. And an accurate history is very important for you  
13 determining whether or not the mechanism of injury was present,  
14 okay, to cause these injuries; correct?

15 A. Well, I do rely on an accurate history. If it's  
16 inaccurate, it may alter my opinion.

17 Q. Well, the history allows you to assess whether or not  
18 the history could cause these injuries; correct?

19 A. Yes, I'm relying on the fact that he never had  
20 problems with his knees or ankles before the accident, that he  
21 had this particular accident and the onset of symptoms happened  
22 following the accident.

23 Q. And this accident was a fall down some stairs in  
24 accordance with what he told you?

25 A. That is correct.

Dr. Touliopolis - Plaintiff - Cross

1           Q. During your initial -- your -- and when I say this,  
2 your office's initial contact with Mr. Sarmiento, you asked him  
3 to fill out a patient information Workman's Compensation  
4 accident form; is that correct?

5           A. He filled out an intake sheet; yes.

6           Q. An intake sheet; right?

7           A. Yes.

8           Q. And Mr. Sarmiento filled that out by himself or with  
9 the assistance of the translator?

10          A. Well, again, he doesn't, um, speak English at least at  
11 that point in time. That would have been with the assistance,  
12 I'm assuming, with a translator.

13          Q. And one of the important things that you need to know,  
14 okay, is how the accident happened; correct?

15          A. Yes.

16          Q. And Mr. Sarmiento in filling out that accident report  
17 or the intake sheet, with somebody from your office, said how  
18 did the accident happen? That's the question your form has. He  
19 trips -- tripped on stairs and fell one floor.

20          A. That's correct.

21          Q. And that was important for you to have that in  
22 assessing the forces that were present in causing these  
23 injuries; correct?

24          A. Well, the category of the injury is important to know.

25          Q. Right. So on your first visit is January -- hold on.

Dr. Touliopolis - Plaintiff - Cross

1 I'm sorry. Your first visit is on November 20, 2020, okay,  
2 where he gave you that history.

3 A. Yes.

4 Q. And the course of treatment was, at that point in  
5 time, physical therapy and use of a cane; correct?

6 A. Yes, initially. That's correct.

7 Q. You next saw him on January 5, 2021?

8 A. Yes.

9 Q. And, Doctor, also correct me if I miss a page, I'm  
10 trying to go in order though.

11 And at that point in time there were MRIs taken;  
12 correct?

13 A. Yes.

14 Q. And at that point in time on January 5<sup>th</sup> on his  
15 second visit you felt it necessary where you say in the  
16 follow-up visit the patient fell down stairs and sustained an  
17 injury to both knees. Okay. And at that point in time you were  
18 suggesting surgical intervention; correct?

19 A. That is correct.

20 MR. WHALEN: Just bear with me for a second.

21 Q. By the way, did your office notes or records reflect  
22 that you got the ER records, the emergency room records?

23 A. No, I do not have the ER records.

24 Q. Have you ever seen the ER records?

25 A. No, I have not.

Dr. Touliopolis - Plaintiff - Cross

1           Q.    Okay.  Would the ER records, the records that are kept  
2 the day of the accident, be important to you in assessing  
3 Mr. Sarmiento's injuries and what he claimed to injure and how  
4 he injured it?

5           A.    Well, again, I'm relying primarily on the patient's  
6 history to me.  The ER records may or may not be of assistance.

7           Q.    But you don't know because you've never seen them?

8           A.    I don't know what they say.  That's correct.

9           Q.    Okay.  You diagnosed Mr. Sarmiento with a torn  
10 meniscus; correct?

11          A.    Yes.

12          Q.    Is that painful?

13          A.    A torn meniscus can be painful.  The symptoms can be  
14 variable depending upon the type of tear, the level of activity,  
15 but can vary from day to day.

16          Q.    Well, let's talk about this one.  You told us it was a  
17 significant tear to the medial meniscus; is that correct?

18          A.    Yes.

19          Q.    And a significant tear would produce pain; would that  
20 be fair to say?

21          A.    It can produce pain, um, the timing -- it may not  
22 produce pain right away.  And usually meniscus tears are not  
23 associated with a lot of swelling of the knee, um, unlike other  
24 types of injuries.  So you may not have initial swelling and  
25 stiffness and, again, pain may be a factor of how ambulatory he

Dr. Touliopolis - Plaintiff - Cross

1 is after the accident.

2 Q. What's the mechanism of injury for a meniscus tear?

3 Is it a planting and twisting, something else?

4 A. There are various types of injuries. It could be a  
5 hyperextension, a hyperflexion, axial force, twisting injury.

6 Q. And a fall down the stairs could cause a meniscal  
7 tear?

8 A. Yes.

9 Q. And you also diagnosed -- did he sustain an anterior  
10 cruciate ligament tear, an ACL tear; correct?

11 A. A partial tear; yes.

12 Q. A partial tear.

13 And a partial tear of the ACL would be painful;  
14 correct?

15 A. Again, at the time -- I don't know exactly what the ER  
16 records said but when you have a knee injury, you have to look  
17 at the big picture and what else was injured. This knee injury  
18 may not have been reported initially. It may or may not have  
19 depending upon how much pain he had initially.

20 But like a lot of injuries sometimes the inflammation  
21 doesn't kick in until the day after, the day after that, and you  
22 may not have pain and swelling until you go home or you wake up  
23 the next morning. So the -- he may not have a lot of initial  
24 pain in his knee at the time of the accident. Some patients do,  
25 some patients don't. But these injuries are the result of the

Dr. Touliopolis - Plaintiff - Cross

1 accident.

2 Q. Well, your understanding is that the accident happened  
3 when he went down a bunch of stairs; right?

4 A. Yes.

5 Q. So a torn partial tear of the ACL, a torn meniscus and  
6 you say not all the time would it present with pain; is that a  
7 fair statement of what you just testified to?

8 A. No, I said you have to look at the patient in his  
9 entirety. So there are other areas of injury which are more  
10 painful. His brain at the time may not have been drawn to the  
11 knee injury. So if it was an isolated knee injury, I do believe  
12 it probably would have been presented in the ER as a knee  
13 injury. But when there's multiple traumas, it's something that  
14 may have been missed by the patient as well as the ER staff.

15 Q. When you say "multiple traumas," you're talking about  
16 multiple traumas he would have reported to the ER people?

17 A. I do know he injured his spine in this accident. So  
18 there are other areas of injury.

19 Q. But that wasn't my question.

20 You're testifying that whatever he reported to the ER  
21 personnel is what his complaints of pain were; is that right?

22 MR. GJELAJ: Objection, that's not what he said.

23 Judge, objection.

24 MR. WHALEN: Then he can say it then.

25 THE COURT: Overruled.

Dr. Touliopolis - Plaintiff - Cross

1                   You can answer the question, Doctor.

2                   THE WITNESS: I'm sorry, can you repeat it again?

3                   THE COURT: Would you like it read back, counsel?

4                   MR. WHALEN: Yes.

5                   THE COURT: Madam court reporter, can you please  
6                   read it back?

7                   (Whereupon, the requested portion of the record  
8                   was read by the reporter.)

9                   A. I -- I -- again, I -- I -- I was not treating him as  
10                  an ER doctor but I have worked in the emergency room and it is  
11                  routine that you do to ask a patient what hurts when they come  
12                  into the ER. And you evaluate the areas where he has the most  
13                  complaints, um, or where the physician thinks that are the most  
14                  urgent to be evaluated.

15                  Q. So we can agree that Mr. Sarmiento not reporting pain  
16                  at the ER is significant?

17                  A. Well, I would say it's -- it's -- it's not  
18                  significant. Um, I have seen many a time where patients do have  
19                  an injury to various body parts. They don't present with pain  
20                  in the ER and have pain days or even weeks later.

21                  Q. You said you believed that the ER record reflects a  
22                  report of pain to the spine. Is that what you said?

23                  A. I don't know what the records show. I do know that he  
24                  injured other areas and that he was evaluated in the emergency  
25                  room.

Dr. Touliopolis - Plaintiff - Cross

1           Q.    Would the ER records have been helpful to you in  
2 forming your opinions?

3           A.    I would say I'm relying on a patient's history.  If  
4 something is in the ER records that is significantly different  
5 from that, then I would want to review them.

6           Q.    In your first surgery on -- hold on, I believe it was  
7 September 19<sup>th</sup>.  No, that's not right.

8           A.    January 18, '21?

9           Q.    Right.

10           You were looking -- the complaints suggested that the  
11 plaintiff, Mr. Sarmiento, was suffering from an anterior  
12 cruciate insufficiency and a medial meniscal tear and that was  
13 the premise under which he went to surgical intervention;  
14 correct?

15           A.    That is correct.

16           Q.    While you were in the knee with your camera and your  
17 art -- by the way, this surgery, and all these surgeries, were  
18 outpatient surgeries; is that correct?

19           A.    Yes, they're all ambulatory.  In other words, the  
20 patient did go home the same day.

21           Q.    Okay.  And the arthroscopic surgery that you performed  
22 showed that there was a medial meniscectomy necessary to be  
23 performed; correct?

24           A.    Yes.

25           Q.    And that you did that with a meniscal biter, that's

Dr. Touliopolis - Plaintiff - Cross

1 like a nail clipper that takes away the frayed meniscal?

2 A. The end of it -- that is a good way of thinking of it  
3 actually. I never thought of it that way. But it's like a --  
4 it's a very long instrument that can reach into the back of the  
5 knee. But the end of it does look like the end of a nail biter  
6 where we use that to bite the loose pieces of meniscus.

7 Q. And that was a successful surgery? You brought the  
8 medial meniscus back to -- with some integrity; correct?

9 A. So it was a debridement. So we removed the torn  
10 segments of the meniscus. And we did leave a rim of meniscus  
11 that was not torn in the medial compartment.

12 Q. So there was still meniscal present to act as a buffer  
13 between the thighbone and the tibia, the shinbone?

14 A. There was still some but a lot of it was removed.

15 Q. Okay. Doesn't say how much here, does it in your --

16 A. It was a large tear meaning that it involved a lot of  
17 the posterior horn in the body of the meniscus.

18 Q. Was the meniscus material that you removed sent out to  
19 a lab for examination as to where it came from?

20 A. I usually do not send meniscal tissue for a lab  
21 examination.

22 Q. So without the lab examination you don't know if it  
23 was degenerative or spontaneous or something else; would that be  
24 fair to say?

25 A. Well, an observance of the meniscus tear, there was no

Dr. Touliopolis - Plaintiff - Cross

1 evidence of degeneration. Again, the patient was only 30-years  
2 old so we don't expect degeneration. It appeared to be an acute  
3 traumatic tear of the meniscus.

4 Q. Okay. But you can't tell how long it's been there or  
5 not; is that fair to stay?

6 A. That is fair to say. I cannot date the time of the  
7 tear by looking at it. In other words, I don't know if it's  
8 been there a week or a month or six months. But, obviously, if  
9 it's been there several years, that would be something that I  
10 would be able to tell.

11 Q. And you discussed this a little on your direct, you  
12 noticed that there was some grade one and grade two chondral  
13 changes; is that correct?

14 A. Yes.

15 Q. And what exactly is that again, the chondral changes?

16 A. Grade one is softening and grade two is fibrillation  
17 of the cartilage. Grade three is partial loss of the cartilage  
18 and grade four is complete loss of the cartilage.

19 Q. And is it possible to assess when you're in there  
20 doing this operation and observing this chondral damage how long  
21 it's been there?

22 A. As with a meniscus, you can't put an exact date on --  
23 on -- on the cartilage damage. Again, you rely on the history  
24 and the operative findings to help with that.

25 Q. Regarding the ACL, you found in the course of your

Dr. Touliopolis - Plaintiff - Cross

1 operation that day that you probed the ACL and you found it to  
2 be lax, some laxity?

3 A. Yes.

4 Q. Okay. So it was stretched -- what's the mechanism of  
5 injury for an ACL? Would laxity indicate tear?

6 A. Um, so the mechanism of injury of an ACL is similar to  
7 meniscus injuries where you can have twisting injury, a pivoting  
8 injury, hyperextension injuries. And this particular patient he  
9 did not have a complete tear. He had a partial tear. So part  
10 of the ligament was torn. And the part that was not torn was  
11 stretched. So in other words, he didn't really have any part of  
12 the ACL that was actually working properly. It was either loose  
13 or torn.

14 Q. Going back to your records. Go to December 14, 2023.

15 A. Yes, I have that.

16 Q. Doctor, at the end of all these reports it reflects  
17 that they were electronically signed. And in this particular  
18 report it's signed by you and your physician's assistant  
19 Mr. Cruz; correct?

20 A. Yes.

21 Q. So is it Mr. Cruz who actually sees the patient and  
22 then he reports to you or do you both see the patient; how does  
23 that work?

24 A. So if it's just my name at the bottom of the report,  
25 then I'm the only person seeing the patient.

Dr. Touliopolis - Plaintiff - Cross

1 Q. Of course.

2 A. If it also has Mr. Cruz's name, he was participating  
3 in the treatment of the patient for that visit under my  
4 supervision. So the examination could have been done by him or  
5 it could have been done by myself. But if it is done by him,  
6 it's under my supervision.

7 Q. But under your supervision meaning you review the  
8 report and review his findings, you're not in the same room  
9 together doing it?

10 A. I'm usually in the same room but I'm definitely in the  
11 office.

12 Q. In this December 14, 2023 report you reflect  
13 Mr. Sarmiento was overall improved; correct?

14 A. That's correct.

15 Q. So he gets occasional soreness, stiffness and  
16 discomfort; correct?

17 A. Yes.

18 Q. Okay. No medication was prescribed?

19 A. I do not see anything that was prescribed but  
20 antiinflammatory medications were recommended.

21 Q. Right. I was going to get to that. So Advil?

22 A. Yes, something over-the-counter such as Advil, Motrin  
23 or Aleve.

24 Q. You saw him for the last time in preparation for this  
25 trial. He was sent to your office on September 19, 2025.

Dr. Touliopolis - Plaintiff - Cross

1                   MR. GJELAJ: Objection, Judge. He was sent to  
2 your office?

3                   THE COURT: So as to form?

4                   MR. GJELAJ: Yes, as to form.

5                   THE COURT: Counsel, please rephrase.

6                   MR. WHALEN: I'll withdraw that.

7                   Q. Did you call or send any messages to Mr. Sarmiento to  
8 ask him to come back into your office in September of 2025?

9                   A. I did not personally call him to come in. When he was  
10 seen in April, he was advised to follow up with us again.

11                  Q. April of?

12                  A. In April of 2025 he was advised to follow up in nine  
13 to 12 months time or PRN, meaning as necessary.

14                  Q. In his visit he told you he does not take any  
15 prescription medications for his knee; correct?

16                  A. Let me just pull that report up, I'm sorry.

17                  That is correct.

18                  Q. And at this point in time we're just talking about the  
19 right knee; is that correct?

20                  A. That is correct.

21                  Q. Okay. There aren't any complaints here in your report  
22 on September 19, 2025 regarding the left knee; correct?

23                  A. That is correct.

24                  Q. And there's not any complaints also regarding the  
25 right ankle and foot; correct?

Dr. Touliopolis - Plaintiff - Cross

1 A. That is correct.

2 Q. He told you his right knee no longer buckles and gives  
3 out; correct?

4 A. That's correct.

5 Q. He's not receiving physical therapy but he is  
6 compliant with a home exercise program?

7 A. That is correct.

8 Q. Okay. He ambulates without a brace and without a  
9 cane?

10 A. Yes.

11 Q. You're impression, again, patient is overall improved;  
12 correct?

13 A. Yes.

14 Q. The plan was over-the-counter, it says OTC,  
15 over-the-counter though, antiinflammatory medications; correct?

16 A. Yes.

17 Q. No further MRIs were prescribed; correct?

18 A. That is correct. Actually it was taken but no MRIs  
19 were prescribed.

20 Q. No x-rays were taken?

21 A. X-rays were taken -- x-rays were taken that day on  
22 this visit but no MRIs were prescribed.

23 Q. And no prescriptions were written; correct?

24 A. That is correct.

25 Q. No scheduled future appointments with him; correct?

Dr. Touliopolis - Plaintiff - Redirect

1           A. Um, I did not give a timeframe but I did advise him to  
2 follow up as necessary depending on his decondition.

3           MR. WHALEN: Thank you, Doctor.

4           THE COURT: Maybe let's take a five, ten-minute  
5 break?

6           MR. GJELAJ: I don't have that much time. I'll  
7 finish up.

8           THE COURT: I understand, counsel. But I want to  
9 make sure everybody is engaged for the remainder. So we'll  
10 just take a quick five minute just a leg stretch break.

11           COURT OFFICER: All rise, jury exiting.

12           (Whereupon, the jury exits the courtroom.)

13           THE COURT: You may be seated.

14           (Whereupon, there was a recess taken).

15           COURT OFFICER: All rise.

16           THE COURT: You may be seated.

17           COURT OFFICER: All rise, jury entering.

18           (Whereupon, the jury enters the courtroom.)

19           THE COURT: You may be seated.

20           Counsel?

21           MR. GJELAJ: Thank you, Your Honor.

22           REDIRECT-EXAMINATION

23           BY MR. GJELAJ:

24           Q. Dr. Touliopolis, I'll be brief.

25           You were asked about the time that you've testified in

Dr. Touliopolis - Plaintiff - Redirect

1 the last month or so; do you recall that?

2 A. Yes.

3 Q. Have you ever testified in court for a case where I  
4 was the trial attorney?

5 A. I don't believe so. No.

6 Q. Have you ever testified for my firm? It's called  
7 Gjelaj Law?

8 A. I don't believe so.

9 Q. Are you being paid today?

10 A. No, I'm not.

11 Q. You're here pursuant to a subpoena?

12 A. Yes.

13 Q. You were asked about the mechanism of injury; do you  
14 recall that?

15 A. Yes.

16 Q. There was an interpreter that was speaking to  
17 Mr. Sarmiento; correct?

18 A. That is correct.

19 Q. You don't speak English; right?

20 A. I speak English but I --

21 Q. I'm sorry, you don't speak Spanish. Forgive me. I'm  
22 trying to go quick. It's late in the day.

23 A. My Spanish is extremely bad.

24 Q. So you used the services of an interpreter; right?

25 A. Yes.

Dr. Touliopolis - Plaintiff - Redirect

1 Q. He told you that he fell down the stairs?

2 A. That's what I have in my notes, yes.

3 Q. Are you aware that the word in Spanish for stairs is  
4 the same exact word as the word for ladder; are you aware of  
5 that?

6 MR. WHALEN: Objection, Your Honor.

7 THE COURT: Basis?

8 MR. WHALEN: Knowledge. He's making a statement  
9 as to what is what.

10 MR. GJELAJ: I'm asking if he's aware.

11 THE COURT: Overruled.

12 A. I was not aware of that, no.

13 Q. Do you know that yesterday we had an interpreter here  
14 who got confused as to whether (Spanish word) meant stairs or  
15 ladder?

16 MR. WHALEN: Objection, Your Honor.

17 THE COURT: Sustained.

18 Q. Okay. Mr. Sarmiento testified yesterday under oath  
19 and every single medical record, other than the one that you  
20 were questioned about, states that he fell approximately 10 feet  
21 from a ladder. Is that the type of mechanism that can cause the  
22 injuries to the knees and to the ankle that you testified to?

23 MR. WHALEN: Objection, Your Honor.

24 THE COURT: To form?

25 MR. WHALEN: Every single record.

Dr. Touliopolis - Plaintiff - Redirect

1 MR. GJELAJ: Other than the one you were  
2 cross-examined on, that was my question.

3 THE COURT: Sustained. Please rephrase.

4 Q. Mr. Sarmiento testified that he fell nine to 10 feet,  
5 his feet were nine to 10 feet above the ground when he fell down  
6 to the ground below. Is that the type of fall that could cause  
7 the injuries in the knees and in the ankle that you told us  
8 about?

9 A. Yes.

10 Q. You were asked before about Mr. Cruz. Who did the  
11 surgeries?

12 A. I did.

13 Q. All three?

14 A. Yes.

15 Q. Did Mr. Cruz have anything to do with those surgeries?

16 A. He probably assisted me, but I'm the primary surgeon.

17 Q. You own the practice; correct?

18 A. That's correct.

19 Q. Do most orthopedic surgeons use a physician's  
20 assistant?

21 A. Depending the type of surgery, they usually have an  
22 assistant. It can be a physician assistant or a resident.

23 Q. What about the office visits, do most orthopedic  
24 surgeons use physician assistants in office visits?

25 A. A lot of them do.

Dr. Touliopolis - Plaintiff - Redirect

1 Q. Okay. Has your opinion changed, at all, due to  
2 Mr. Whalen's questions during his cross examination?

3 A. No, it hasn't.

4 Q. Do you still have an opinion within reasonable degree  
5 of medical certainty as to what the competent producing cause of  
6 the condition in both knees and the angle are?

7 A. Yes.

8 Q. What is that opinion?

9 A. The result of this work accident.

10 Q. Okay. You were asked about that last visit on  
11 September 19, 2025. Do you recall that?

12 A. Yes.

13 Q. Subject to connection, are you aware that  
14 Mr. Sarmiento does, in fact, have a follow-up appointment  
15 scheduled with you?

16 A. I just thought -- I don't have access to my computer  
17 system. So he may or may not. I just don't know.

18 Q. You don't do the scheduling, do you?

19 A. I don't.

20 Q. You have somebody that's employed by you that does  
21 that?

22 A. Yes.

23 Q. Now, in that last visit, Mr. Whalen read to you a  
24 portion, again patient is overall improved; do you recall that?

25 A. Yes.

Dr. Touliopolis - Plaintiff - Redirect

1 Q. But there's a continuation to that sentence; isn't  
2 there?

3 A. Yes.

4 Q. Can you please read that for the jury?

5 A. I have that --

6 Q. Under impression.

7 A. Okay. Um, again, the patient is overall improved but  
8 does have residual symptomatology attributed to his chondral  
9 injuries and degree of progressive posttraumatic right knee  
10 degenerative joint disease which appears to be involving  
11 predominantly his medial compartment.

12 Q. And that's what you told us about and told the jury  
13 about when you looked at the x-ray there; correct?

14 A. At the inside of the knee. Yes.

15 Q. So he's overall improved but he's got this permanent  
16 condition; is that fair?

17 A. Yes.

18 Q. And that condition it's going to require a knee  
19 replacement; isn't it?

20 A. Yes, partial knee replacement. Yes.

21 Q. Is that within a reasonable degree of medical  
22 certainty?

23 A. Yes, it is.

24 MR. GJELAJ: Thank you, sir.

25 MR. WHALEN: Just one more.

## Proceedings

1 RECROSS-EXAMINATION

2 BY MR. WHALEN:

3 Q. The partial knee replacement, Doctor, that's a  
4 possibility?

5 A. No, I believe it -- it -- it will be required. I just  
6 can't tell you for sure when. But based on the progression of  
7 the x-rays over the last few years, I do believe that he will  
8 require it in his lifetime.

9 Q. In his lifetime?

10 A. Yes. But I would say it's hard to date it but, um, I  
11 don't think it will be in the distant future.

12 MR. WHALEN: Nothing further.

13 THE COURT: Thank you.

14 Okay. So Dr. Touliopolis, you can step down.  
15 Thank you.

16 (Whereupon, the witness exits the courtroom.)

17 THE COURT: Okay. So at this time we're going to  
18 break for today. We will be up, meaning that there will  
19 be -- the trial will continue tomorrow, Wednesday. We will  
20 be down on Thursday, meaning that no one has to come in on  
21 Thursday and then we'll resume on Friday.

22 We've discussed the schedule for next week. And  
23 it's our understanding that we should be going every day  
24 next week with the expectation that we are going to -- and  
25 with the expectation and goal, I say that because it is not

## Proceedings

1 always 100 percent, things don't always go according to the  
2 schedule, you know, sometimes things might take longer than  
3 what was anticipated and that kind of thing can lead to  
4 delays. But it is anticipated that if we continue at the  
5 pace that we are, that everything should be wrapped up by  
6 Friday. And that means that the closing arguments should  
7 be presented and your deliberations should begin ideally at  
8 the time. Again, this is just so that as you guys are  
9 thinking about how to structure your lives in these coming  
10 weeks, you will have that kind of -- and so the goal is for  
11 us to be done completely by the November 3<sup>rd</sup> day which is  
12 the Monday after next week. So, again, that's the goal.

13 So with that being said, and with us having that  
14 ambitious goal, we're going to begin starting at 9:30  
15 instead of the 10:00 a.m. start time. Again, just to try  
16 to ensure that we are moving along and we are able to wrap  
17 this up as soon as possible.

18 So with that, I hope you guys have a good night  
19 tonight and I'll see you tomorrow morning at 9:30.

20 COURT OFFICER: All rise, jury exiting.

21 (Whereupon, the jury exits the courtroom.)

22 THE COURT: You may be seated.

23 Okay. So I expect that we should hear back from  
24 juror number three definitively one way or the other  
25 tomorrow morning and we can take that issue again with the

## Proceedings

1 additional information after she's had time to process the  
2 schedule update.

3                   Otherwise, I don't believe there are any other  
4 issues that we need to cover. So, again, we discussed it  
5 at the sidebar, but just to confirm, I said the start time  
6 9:30 but we plan on beginning calling witnesses at  
7 10:00 a.m.

8                   (Time noted: 4:23 p.m.)

9                   (Whereupon, Court is recessed and the case  
10 adjourned to Wednesday, October 22, 2022.)

11                   \*       \*       \*       \*

12                   I, Valerie E. Monaco, certify that the within  
13 proceedings are a true and accurate transcript of the  
14 original stenographic record.

15  
16                   \_\_\_\_\_  
17                   Valerie E. Monaco  
18                   Senior Court Reporter  
19  
20  
21  
22  
23  
24  
25

<p>COURT OFFICER: [24] 88/2 91/20 91/22 93/4 93/10 93/14 97/17 120/12 120/16 120/18 154/10 159/14 160/13 161/5 161/11 161/15 176/13 201/1 201/5 204/12 222/11 222/15 222/17 229/20</p> <p>MR. GJELAJ: [60] 88/19 90/20 91/16 93/1 93/18 97/16 102/3 102/9 102/15 103/13 103/21 103/23 103/25 104/4 105/5 120/9 120/23 133/21 133/24 141/25 143/16 144/22 146/1 146/23 148/16 148/20 151/12 152/4 152/17 157/11 160/9 160/19 161/2 163/24 171/8 176/12 176/14 194/10 198/16 200/23 201/14 202/2 202/4 202/8 202/11 202/15 202/21 202/25 203/17 207/3 207/5 207/7 213/22 220/1 220/4 222/6 222/21 224/10 225/1 227/24</p> <p>MR. SMALLETS: [1] 102/16</p> <p>MR. WHALEN: [45] 88/24 91/4 128/21 133/22 141/23 146/10 148/8 148/12 148/14 153/6 154/3 157/12 157/16 159/23 160/24 198/11 198/21 201/9 201/13 201/19 201/24 202/3 202/6 202/9 202/16 202/22 203/1 203/5 203/13 203/20 203/22 204/16 208/5 210/20 213/24 214/4 220/6 222/3 224/6 224/8 224/16 224/23 224/25 227/25 228/12</p> <p>PROSPECTIVE JUROR: [1] 158/19</p> <p>THE CLERK: [1] 158/21</p> <p>THE COURT: [95] 88/3 89/2 91/7 91/17 91/21 91/24 92/1 93/15 102/7 102/11 103/10 103/14 103/22 104/1 106/6 106/13 120/7 120/10 120/14 120/17 120/20 128/18 128/23 133/25 142/1 148/10 148/13 148/15 148/18 152/3 152/6 153/5 154/5 154/12 154/18 156/6 156/14 156/17 157/2 157/6 157/9 157/13 157/17 158/1 158/14 158/22 159/4 159/8 159/15 160/3 160/10 160/15 160/22 160/25 161/16 164/1 198/13 198/17 198/24 200/25 201/3 201/6 201/11 201/17 201/22 202/12 202/17 203/4 203/8 203/16 203/18 203/21 203/23 204/14 207/4 207/6 207/8 213/25 214/3 214/5 220/3 220/5 222/4 222/8 222/13 222/16 222/19 224/7 224/11 224/17 224/24 225/3 228/13 228/17 229/22</p> <p>THE JURY: [1] 91/25</p> <p>THE WITNESS: [6] 93/12 141/24 154/4 154/9 161/13 214/2</p> <p>,</p> <p>'21 [1] 215/8 '22 [3] 188/10 190/8 190/12 '24 [1] 139/19</p> <p>-</p> <p>[2] 87/2 87/8 -against [1] 87/5</p> <p>0</p> <p>0 degrees [5] 167/22 177/4 178/3 178/17 193/8</p>	<p>1</p> <p>1.25 [1] 126/11 10 degrees [5] 100/9 111/17 183/17 183/19 188/13 10 feet [5] 130/12 148/25 224/20 225/4 225/5 10 percent [2] 188/1 188/4 10 pounds [2] 127/13 127/14 100 [2] 178/17 193/8 100 degrees [2] 167/23 178/4 100 percent [3] 116/2 156/21 229/1 10005 [1] 87/16 10006 [1] 87/20 10451 [1] 87/9 105 degrees [1] 172/14 10:00 [1] 229/15 10:00 a.m [1] 230/7 11 [2] 87/19 108/23 110 degrees [2] 179/20 180/5 11105 [2] 161/9 161/14 12 [3] 198/7 198/9 220/13 120 [1] 172/14 12:22 [1] 154/5 12:30 [1] 159/10 12:45 [2] 120/22 128/19 135 [2] 167/23 177/19 14 [2] 218/14 219/12 140 [1] 167/23 140 degrees [1] 177/19 14th [1] 89/5 15 [6] 97/21 98/22 110/5 122/6 198/7 198/10</p> <p>15 degrees [2] 119/21 121/25 15-minute [1] 200/25 150 [2] 96/3 129/13 15th [6] 89/5 155/25 157/21 158/10 158/10 158/11 18 [9] 160/12 160/20 175/1 186/14 188/25 194/12 199/15 199/20 215/8 18th [3] 149/25 149/25 175/24 19 [9] 160/12 160/20 191/2 192/11 192/14 194/13 219/25 220/22 226/11 1990 [2] 94/8 132/10 1992 [1] 94/3 1993 [1] 162/3 1997 [1] 162/13 19th [1] 215/7</p> <p>2</p> <p>20 [6] 97/7 164/3 166/16 179/6 206/9 210/1 20 degrees [3] 177/4 183/17 188/14 200 [2] 96/3 129/13 2020 [10] 97/7 97/25 132/9 149/25 166/16 170/11 199/15 199/21 206/9 210/1</p> <p>2021 [17] 97/21 98/22 108/23 109/19 110/5 110/17 165/22 172/4 175/1 175/25 176/11 177/23 178/12 179/6 184/18 186/14 210/7</p> <p>2021e [1] 87/5 2022 [5] 115/10 115/21 187/19 191/2 230/10 2022/02/22 [1] 189/3 2023 [6] 117/3 119/14 121/1 124/10 218/14 219/12</p> <p>2024 [3] 125/25 139/17 139/20 2025 [9] 87/10 192/11 192/14 205/2 219/25 220/8 220/12 220/22 226/11 2025/09/19 [1] 194/13</p>	<p>21 [2] 87/10 164/5 21st [4] 87/16 182/19 183/1 183/23 22 [7] 87/1 175/25 176/11 187/19 188/10 189/3 230/10 22nd [1] 190/12 23 [1] 117/3 23-25 31st Street [2] 161/9 161/14 24 [1] 109/19 25 [2] 125/25 139/20 250 [1] 87/20 26 [1] 177/23 26th [1] 108/9 27 [1] 115/21 28 [1] 170/11 28th [1] 90/18 29 [1] 184/18 29-year-old [1] 170/4 29th [1] 203/24 2:00 [1] 202/7 2:00 p.m [1] 154/8 2:11 [1] 159/13</p> <p>3</p> <p>3 centimeters [1] 179/23 30 [6] 112/24 112/25 118/14 119/21 119/21 132/10 30 degrees [2] 117/17 122/20 30-years [1] 217/1 34-years [1] 195/25 35 [4] 117/19 118/22 119/22 126/6 3rd [3] 89/10 89/12 89/20</p> <p>4</p> <p>40 [13] 87/16 117/18 117/18 118/18 118/20 118/23 119/22 119/23 126/7 126/7 126/8 126/9 183/19 40 degrees [1] 117/19 45 [4] 118/20 126/8 126/8 126/9 4:23 [1] 230/8</p> <p>5</p> <p>5 degrees [1] 111/18 5-foot-7 [1] 149/1 50 [1] 141/14 50 percent [2] 118/15 118/16 567 [1] 93/7 567 First Street [1] 93/13 5th [1] 121/19 5th on [1] 210/14</p> <p>6</p> <p>60 [3] 118/18 126/6 126/7 600 [1] 163/18 65 [1] 118/14 6th [1] 124/24</p> <p>7</p> <p>75 pounds [1] 141/15 7th [1] 122/14</p> <p>8</p> <p>80 [3] 118/22 126/9 126/9 804481/2021e [1] 87/5 82245 [1] 194/13 851 [1] 87/9</p> <p>9</p> <p>95 degrees [1] 188/16 9.30 [3] 229/14 229/19 230/6</p>
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