

In The Matter Of:

*ERWIN HERRERA & LAUTERIA HERRERA, v.
KENT AVE PROPERTY, J.E. LEVINE J&A CONCRET, et al*

*DR. BRISSON, DR. KAPLAN
October 1, 2024*

*Lorraine Ramsey
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1 SUPREME COURT OF THE STATE OF NEW YORK
 2 COUNTY OF BRONX : CIVIL TERM : STP

3 -----x
 4 ERWIN HERRERA & LAUTERIA HERRERA, : Index:
 5 : 304215/2013E
 6 Plaintiff(s).:

7 -against- :

8 KENT AVENUE PROPERTY III, LLC, J.E. LEVINE
 9 BUILDER, INC., and J & A CONCRETE CORP.,

10 Defendant(s).:

11 -----x
 12 J & A CONCRETE CORP., :

13 Third-Party Plaintiff(s).:

14 -against- :

15 NEW CASSEL CONSTRUCTION CORP.

16 Third-Party Defendant(s).:

17 -----x
 18 851 Grand Concourse
 19 Bronx, New York 10451
 20 October 1, 2024

21 B E F O R E:

22 THE HONORABLE ASHLEE CRAWFORD,
 23 Justice of the Supreme Court & jury

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

25 THE PLAINTIFF:

GORAYEB & ASSOCIATES, P.C.
 100 Williams St. 19th floor
 New York, NY 10038
 BY: FRANK V. KELLY, ESQ.

THE DEFENDANT:

LAWRENCE, WORDEN, RAINIS, BARD, PC
 175 Pinelawn Road
 Melville, NY 11747
 BY: MATTHEW RAINIS, ESQ.

1 THE DEFENDANT AND THIRD-PARTY PLAINTIFF

2 CERUSSI & SPRING
One North Broadway, Suite 1000
3 White Plains, New York, 10601
BY: CHRISTOPHER B. ROBERTA, ESQ.
4

5 THE DEFENDANT THIRD-PARTY DEFENDANT

6 BAXTER & SMITH, P.C.
99 North Broadway
7 Hicksville, NY 11801
BY: ROBERT C. BAXTER, ESQ.
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Lorraine L. Ramsey
Senior Court Reporter

1 THE COURT OFFICER: All rise, part STP is now in
2 session, the Honorable Ashlee Crawford, presiding.

3 THE COURT: Do you have anything to talk to me
4 about before I bring the jury in?

5 MR. ROBERTA: I want Your Honor to know that I
6 found --

7 THE COURT: Off the record.

8 (Whereupon, the court and counsels confer off the
9 record.)

10 THE COURT: All right, let's bring them in the
11 jury.

12 THE COURT OFFICER: All rise, jury entering.

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

15 THE COURT: Okay, everyone have a seat. Good
16 morning and welcome back.

17 THE JURORS: Good morning.

18 THE COURT: I did want to let you know you're
19 permitted to bring drinks in. So, just nothing that's in a
20 container that's going to spill all over the place. If you
21 want to bring water, that's perfectly fine. Okay?

22 Okay, so let's get started.

23 MR. KELLY: Plaintiff calls Doctor ball better SAUN
24 Your Honor.

25 THE COURT: Mr. Better SAN or Dr. Better SAN come

1 on up here and have a seat please.

2 THE COURT OFFICER: Raise your right hand.

3 D O C T O R P A U L - M A R I E B R I S S O N , a
4 witness called by and on behalf of the PLAINTIFF, upon being
5 duly sworn, testified as follows:

6 THE WITNESS: Yes, I do.

7 THE COURT OFFICER: In a loud, clear voice, please,
8 state your name and address for the record.

9 THE WITNESS: Sure. Paul-Marie Brisson, BRISSON.
10 51 East 25th Street, 6th floor, New York, New York 10010.

11 THE COURT: Before we get started just a reminder
12 that everyone should have their phones and anything that
13 beeps switched off.

14 And Mr. Brisson, I can already tell you're a fast
15 talker, so just make sure you keep it a little slow for my
16 court reporter.

17 THE WITNESS: I will do my best. I may sometime
18 break the rules.

19 THE COURT: We'll slow you down.

20 DIRECT EXAMINATION

21 BY MR. KELLY:

22 Q Good morning, Doctor Brisson.

23 A Good morning, sir.

24 Q Can you tell the jury find kindly what is your
25 profession?

1 A I'm Board Certified Orthopedic Surgeon.

2 Q And would you kindly tell the jury a little bit about
3 your educational background?

4 A I am from Montreal. That explains the accent, by the
5 way. And I went to medical school back home. Did practice
6 after my internship three years in the remote location of
7 Canada, as a primary care physician, and that's called Magadalen
8 Island, and thereafter I came back to do orthopedic surgery
9 training which is the required four year to become an orthopedic
10 surgeon, and after I performed two more years of spinal surgery
11 fellowship which is training for spinal care and spinal surgery.

12 Q Are you board certified, doctor?

13 A Yes, I am.

14 Q Tell the jury, if you would, what does that mean to be
15 board certified?

16 A Certification, first it's an exam. And it has a
17 so-called gauge. It offers a gauge for the public for
18 accrediting agencies, as to knowledge, competency.

19 Q And you are board certified, correct?

20 A Yes, I am. I recertified last year.

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

23 A Yes, I am.

24 Q Can you tell us about your professional affiliations
25 and hospital affiliation, doctor?

1 A The current ones are New York Presbyterian, lower
2 Manhattan Hospital, and I have affiliations in three hospitals
3 in New Jersey.

4 Q Are you in engaging in the private practice of spinal
5 surgery?

6 A Yes, I am.

7 Q Tell the jury a little bit about the private practice
8 of spinal surgery?

9 What is it that you do? Things like that?

10 A Well, private in this case make reference to hospital
11 employed physicians. So, I'm on my own and self-employed
12 individual professional. And spinal care in this case means
13 seeing patients in the office, offering consultancy opinions,
14 posing medical judgement.

15 For your information, most patients do not require
16 surgery. And as indicated based on this exercise and my
17 experience knowledge and judgment, I will recommend spinal
18 surgery to a few patients.

19 Q In our case, Doctor, Mr. Herrera, was struck by an
20 excavator at a construction site suffering injuries to his neck,
21 back and shoulder and ankle.

22 Did you have experience in treating patients and
23 applying your professional skills to problems of Mr. Herrera's
24 kind?

25 A Well, each trauma descriptions like we heard is unique

1 by itself. But orthopedic surgeons are inherently treating
2 individuals who have for the most part trauma and injuries.
3 Occupational, support, domestic, whichever, but we certainly
4 exposed to trauma.

5 Q And you were previously qualified as an expert in New
6 York State courts?

7 A Yes, I have.

8 MR. KELLY: Your Honor, I offer Doctor Brisson as
9 an expert in spinal surgery.

10 THE COURT: Any objection?

11 MR. RAINIS: I don't think it's required that he be
12 offered, but I have no objection.

13 THE COURT: Okay, so certified.

14 DIRECT EXAMINATION

15 BY MR. KELLY:

16 Q Doctor, I'm going to ask you during the course of your
17 testimony for a series of opinions. Those opinions need to be
18 to a reasonable degree of medical certainty. Is that okay with
19 you?

20 A It's understood. Correct, okay.

21 Q And I may not say the magic words every time, but every
22 opinion you have has to be to a reasonable degree of medical
23 certainty.

24 Did there come a time when you encountered Mr. Herrera
25 in your practice as a patient?

1 A Yes, I have.

2 Q And when was that, that you encountered Mr. Herrera's,
3 as a patient in your practice?

4 THE WITNESS: Your Honor, can I refer to my notes?

5 Q Doctor --

6 THE COURT: No.

7 Q We have subpoenaed records here. I will get the
8 subpoenaed.

9 MR. KELLY: Your Honor, can I get him subpoenaed
10 record?

11 THE COURT: First of all, I didn't really see --
12 step up.

13 (Whereupon, there is a discussion held at side bar.
14 Off the record.)

15 Q Doctor, we've previously marked certain records for
16 identification, in this case. Including your office records and
17 the surgical records. I'm going to hand them to you now.

18 A All right, counsel.

19 MR. KELLY: May I approach?

20 Q Take a moment, if you would, doctor, and go through the
21 records. I just handed you Plaintiff's 15, for identification
22 is the record of the hospital facility at which you provided
23 care for to Mr. Herrera, and Plaintiff's 16 is your office
24 notes, which I assume is the same as what you brought into court
25 today.

1 A At first glance the answer's yes, counsel.

2 Q I'm sorry, I didn't hear?

3 A At first glance the answer is familiar documentation,
4 correct.

5 MR. KELLY: Since we're going to be using those,
6 Your Honor, I move them into evidence. They are subpoenaed
7 records, I return?

8 THE COURT: I need to see them. I need to see
9 them.

10 MR. KELLY: Sure. Can you hand them to the Judge,
11 please.

12 THE WITNESS: Which ones?

13 MR. KELLY: I'll do it. 15 and 16, yes.

14 (Whereupon, there is a pause in the proceedings.)

15 THE COURT: Any objection?

16 (Whereupon, the item referred to, previously
17 Plaintiff's Exhibit 15, 16 was marked received in evidence.)

18 THE COURT OFFICER: So marked Plaintiff's 15 and
19 16, in evidence.

20 THE COURT: Wait Mr. Kelly.

21 MR. KELLY: That's a good point, Judge. I was
22 going to go chronologically. 17 is the second surgery.
23 I'll hand them to the doctor now.

24 THE COURT: Any objection to Plaintiff's 17 coming
25 in that's admitted.

1 MR. RAINIS: No objection.

2 MR. ROBERTA: No objection.

3 THE COURT: Thank you.

4 DIRECT EXAMINATION

5 BY MR. KELLY:

6 Q Doctor, you've had an opportunity to review
7 Plaintiff's 15, 16 and 17.

8 Do those records indicate your course of care and
9 treatment and reflect the care and treatment to Mr. Herrera in
10 this case?

11 A They do.

12 Q Did there come a time, doctor -- and you can refer to
13 any of the records you wish to now.

14 Did there come a time when you encountered Mr. Herrera
15 in the course of your practice?

16 THE COURT: Doctor Brisson, Mr. Kelly.

17 (Whereupon, there's a pause in the proceeding.)

18 Q So, doctor, did there come a time when you encountered
19 Mr. Herrera, in the course of your practice, as a patient?

20 A Yes.

21 Q Okay. Can you tell us a little bit about that initial
22 encounter? When it was and so on?

23 A The encounter was December 16, 2013.

24 Q 2013? All right. And at that time, did Mr. Herrera
25 make any kind of complaints to you?

1 A He did.

2 Q Tell the jury, if you would, what complaints Mr.
3 Herrera made back in December of 2013.

4 A He had two areas of complaints, pertaining to the field
5 of expertise I have, which were cervical pain, cervical
6 condition, and lumbar pain, lumbar condition.

7 Q Okay. So, just for nonmedical people, when we say
8 cervical, is that the neck, and lumbar is the back?

9 A Correct.

10 Q Okay, did you take what's known as history or get a
11 story about what happened from Mr. Herrera?

12 A I have an annotation as to what happened to him.

13 Q Okay. Can you tell the jury what Mr. Herrera told you
14 what happened to him?

15 A The understanding of what I annotate is that he was
16 working next to heavy machinery, when the injury occurred.

17 Q Did you form a physical examination of Mr. Herrera at
18 that period of time?

19 A Yes I have.

20 Q Tell the jury a little bit about what your standard
21 physical examination entailed, and what finding you may have
22 had?

23 A Of this particular visit, the emphasis or the way he
24 described himself indicated a more active and more acute
25 cervical condition and the physical examination was focused on

1 the cervical area. And it showed findings regarding spinal cord
2 irritation, it showed weakness, it showed numbness, and it
3 showed a positive sign of spinal cord irritation.

4 Q All right. And did you review any records at the
5 initial encounter?

6 A I had the opportunity to review an MRI, the imaging
7 study that was conducted. The service was rendered April 30th,
8 2013, and that MRI showed multiple level disc herniations. More
9 pronounced in the two lower discs.

10 Q Did you send Mr. Herrera for any further imaging at
11 that time?

12 A At that particular time, no. But I did request further
13 nonsurgical care.

14 Q Okay, tell the jury what that means nonsurgical care?

15 A Nonsurgical care means that we propose a care program.
16 That we proposed a program of care that have -- that are not
17 related to surgery. That could be injections, it could be
18 physical therapy, it could be medication, it could be
19 chiropractic care. In this case it was physical therapy.

20 Q And tell us a little bit about the course of physical
21 therapy? Was it three times a week, two times a week, an hour?
22 What did we do?

23 A Typical course that most patients, if they want to get
24 better, will get better 8 weeks, 3 time a week. And that's what
25 I requested.

1 Q With respect to your initial encounter with Mr.
2 Herrera, did you make any significant findings?

3 A The significant finding is what I implied partially is
4 what we call myelopathy which is medical word describing spinal
5 cord dysfunction.

6 Q And tell the jury what spinal cord dysfunction means?

7 A We have let's say a main cable or main data
8 transmission system in our body which carries signals or
9 instructions to your body move our hand and move our feet, so
10 forth, and so on spinal cord.

11 The spinal cord in the cervical segment in the neck
12 part for Mr. Herrera, on physical examination had signs and
13 features of irritation or inflammation or partial dysfunction.
14 And that's what we could see on the physical examination.

15 Q Did you form an initial diagnosis with respect to Mr.
16 Herrera?

17 A He had definitely discs herniations. What we call
18 cervical myelopathy.

19 Q And you've already told the jury what cervical
20 myelopathy is.

21 Did you form a treatment plan which included the
22 physical therapy and anything else?

23 A On this first visit no additional recommendations,
24 further observation.

25 Q Well, tell us about that. Did Mr. Herrera continue to

1 follow with you for treatment?

2 A Yes, he did.

3 Q With what kind of frequency did he follow-up with you
4 for treatment?

5 A Well, in time, as he in time as he failed to improve
6 when cause tingling, weakness, physical findings, I did propose
7 and recommended spinal surgery.

8 Q And in the initial face of the treatment for Mr.
9 Herrera, what was your diagnosis?

10 A Again, the focus was on cervical area, although I was
11 made aware of lumbar condition. But the more acute, the more
12 pressing aspect of his condition was the neck, with the
13 myelopathy. And that's where we -- that's where I put my focus
14 initially, and then at that point, as I said, post traumatic
15 cervical myelopathy.

16 Q So, assume that Mr. Herrera was a 49 year old man
17 working in construction with no prior back, neck, right shoulder
18 complaints. And he had an accident where he's struck by an
19 excavator while working in construction. He was working without
20 restriction at the time, and had know prior treatment to the
21 neck or back.

22 Do you have an opinion with a reasonable degree of
23 medical certainty whether or not being struck by the excavator
24 caused Mr. Herrera condition?

25 A Yes, based on history, made aware of the fact that he

1 had no prior complaints or signs and symptoms prior to the dates
2 specified, the answer to your question is yes.

3 Q All right. And do you have an opinion, to a reasonable
4 degree of medical certainty, whether Mr. Herrera's complaints of
5 pain were the result of the accident?

6 A It would be the same answer, counsel.

7 Q All right, and do you have an opinion to a reasonable
8 degree of medical certainty, whether or not the need for
9 treatment to Mr. Herrera was the result of the accident?

10 A Yes, the cervical myelopathy is not something we live
11 well with, if we have it. And, therefore, your answer to the
12 answer to your question is yes.

13 Q Okay. Did there come a time during the course of your
14 treatment let me --

15 So, did Mr. Herrera follow your instructions and
16 follow-up with you?

17 A He did.

18 Q All right, and did there come a time when you altered
19 the treatment plan in some way?

20 A We were closing in to the so-called one year
21 observation period, regarding his neck condition. And yes, I
22 did propose spinal surgery at that point.

23 Q Okay. And what kind? Was it neck surgery? Was it
24 back surgery at this time?

25 A Cervical neck surgery.

1 Q And where was the -- was the surgery ultimately
2 performed?

3 A Yes, it was.

4 Q Okay, and it was performed by you?

5 A Correct.

6 Q Tell the jury, if you could, was there any risks in the
7 performance of this surgery?

8 A I'm sure the jurors know that any surgery, even some
9 perceived as very simple, have a risk.

10 Neck surgery certainly has a risk. And there's a
11 gambit of scenario that could be mentioned. The one we think
12 the most about, the most alarming is additional neurological
13 tissue injury. But actually there's other risks. Swollen
14 issue, failed fusion, infection, damage to nerve that takes care
15 of the vocal cord. These are the commoner ones.

16 Q And your indication for Mr. Herrera for surgery that
17 was the surgery was due to the accident; is that correct?

18 A I will put it this way. The indication was based on
19 the fact that he had deep neurological signs following a trauma
20 as understood in this described, which was compelling reason to
21 perform spinal surgery.

22 Q And to a reasonable degree of medical certainty, your
23 surgery is related rather -- withdrawn.

24 To a reasonable degree of medical certainty, your
25 surgery to the neck was caused by the accident to Mr. Herrera;

1 is that correct?

2 A That's correct. Based on the fact that I don't believe
3 he had any exiting issue prior to the trauma.

4 Q Doctor, we've developed some demonstrative aids in the
5 course of earlier sections of this litigation, which I've
6 disclosed to counsel. And, obviously, you've had an opportunity
7 to so them, correct?

8 A Yes, I saw those. Yes.

9 Q Do those demonstrative aids fairly and accurately
10 represent the state of your cervical intervention with respect
11 to Mr. Herrera?

12 A Correct.

13 Q Would those demonstrative aid to assist us in
14 describing the cervical surgery to the jury?

15 A I believe so.

16 MR. KELLY: Your Honor, may we use the
17 demonstrative aid for the balance for Doctor Brisson's
18 testimony for the surgery?

19 THE COURT: Any objections.

20 MR. RAINIS: No, no objection.

21 MR. ROBERTA: No, Judge.

22 THE COURT: Go right head, Mr. Kelly.

23 (Whereupon, there is a pause in the proceedings.)

24 DIRECT EXAMINATION

25 BY MR. KELLY:

1 Q Doctor, I am going to ask you to come down and utilize
2 the demonstrative aid in order to describe the nature of your
3 surgery to the jury.

4 Would you like a laser pointer or marker?

5 A Thank you.

6 Q Okay, doctor, if you would kindly orient us a little
7 bit with respect to the demonstrative aid?

8 Can you tell the jury what it is we're looking at and
9 the anatomy and the function, and so on?

10 A So, this let's start with the -- so, the preoperative
11 anatomy vignette is the one to work with.

12 You have what we call side-view. We use the term
13 sagittal. And the medical artist's depiction, the finding based
14 on MRI image, which is not shown on this template, but the
15 patient had an MRI. And what you have here is a demonstration
16 of loss of containment of this. Like we like to talk about
17 disc. The patient is having a soft core and outside that is
18 fibrous and tight.

19 When you lose containment, the soft part of the discs
20 will get pushed backward, and we call that a discs herniation.

21 For your information the disc is labeled by virtue of
22 the vertebra above and below, that sandwiches it.

23 So, here you have the cervical 4/5 disc herniation
24 depicted and the same for C-5/6.

25 Working diagnoses power cord. We have a cervical disc

1 herniation case. He has a few more discs, but these are the
2 principle ones. The ones that could explain the myelopathy so
3 that's the focus of care.

4 Based on new one year persistence of symptoms and
5 signed. Surgery was determined warranted and I performed the
6 surgery as depicted here on these additional vignette.

7 The first one shows an incision, so it's, of course,
8 it's interior neck access.

9 Q What does that mean, interior neck access?

10 A It means literally that. The way to get to those type
11 of pathology, it's from the interior approach. Not from the
12 back of the neck.

13 The cord cannot be retracted. It can only be observed.
14 So, we have to approach it from the front. And what you have at
15 this particular vignette, discectomy is carried out at C-4/5,
16 C-5/6 is a view of the fact that the exposure got. The surgeon
17 in this case myself, to the bone level of the neck. I
18 identified the right vertebra, we do that with x-ray during the
19 procedure. Can't do the wrong level. And proceeded to do what
20 I called top down, remove disc material to take the disc
21 material that was in the neurocanal. And that's done with a
22 microscope an intraoperative microscope.

23 When accomplished, proceeded to fill the space with
24 implants. Those implants are called in laymen terms orthopedic
25 particular, but they are biocompatible.

1 You know they are part of this new health care with bio
2 engineer products. And they're hollow. You put in the lumen of
3 the implant which is size and angle of the way you want with
4 graft material.

5 The subsequently to that, one complication of those
6 type of surgeries could be displacement of the implant. We
7 avoid it by applying what we call a buttress plate. So, that's
8 what you see depicted here. Plate that would go in the front
9 here, screws in the bone, and here you have the side-view of the
10 surgical intervention, that's spans C-4 to C-6.

11 Q All right, the preoperative diagnosis which is depicted
12 in demonstrative aid is Plaintiff 17, was that condition that we
13 see in that demonstrative aid was that caused by the accident to
14 Mr. Herrera?

15 A The answer will be the same. It refers to the fact
16 that he has complaints, symptoms and signs that I did not hear
17 existing prior to trauma. The answer's yes.

18 Q And the surgery that you performed, which is depicted
19 in plaintiff's exhibit -- Plaintiff's Demonstrative Aid 27, was
20 that process and procedure caused by the accident to Mr.
21 Herrera?

22 A The surgical treatment proposed is in reference to the
23 condition that we know occurred to Mr. Herrera. The answer's
24 yes.

25 Q And is there any post surgical pain involved in this

1 procedure?

2 A Like any procedure there is pain. Unfortunately, neck
3 pain after spinal surgery the neck is not terrible.

4 You may know relatives or friends who had it. It's
5 less than lumbar, but there is pain.

6 Q That condition that's depicted in plaintiff's
7 demonstrative aid 27, is that a permanent condition?

8 A You mean the fusion of the two levels.

9 Q Yes?

10 A Yes, this is permanent.

11 Q And when those two levels are fused is there anything
12 that happens to the adjacent vertebra?

13 A The answer to question, there's a potential to have
14 what we call junctional issues. Junctional quote-unquote
15 arthritis, at the levels next to the fusion level.

16 Q And do we expect Mr. Herrera to get junctional
17 arthritis, as a result of this surgery, as he ages into his now
18 60?

19 A The real answer to this, based on the opinion, is that
20 he's higher risk of having it, but it's not a secure risk of
21 getting it.

22 Q For purposes of this exhibit, doctor -- you can retake
23 the stand. Thank you.

24 Now, doctor, post surgically, did Mr. Herrera have to
25 wear any devices or anything like a neck collar?

1 A Yes, he did.

2 Q It tell us why?

3 A This type of surgery is in summary way that I can
4 conceive is that we're doing race here between metal and
5 biology.

6 Successful surgery for this type of fusion depend on
7 the bone healing. Not so much the implants supporting the spine
8 and so on and so forth. So, in order to promote the healing, in
9 addition to bone grafting plating, we ask the patient to wear
10 color treat 3 to 4 months after the surgery.

11 Q 3 to 4 months. Okay. And is there any particular way
12 he has to sleep does. He have to sleep sitting up, can he lay
13 down right after surgery anything like that?

14 A Typically not. So, sleeping could be to his wish.

15 Q Did Mr. Herrera have any complications after this
16 surgery with respect to his neck, did he have any issues with
17 breathing?

18 A No, counsel.

19 Q Did Mr. Herrera continue to follow with you for
20 treatment?

21 A Yes, he did.

22 Q And what kind of treatment did you prescribe for Mr.
23 Herrera, as follow-up, for his cervical surgery?

24 A Typical Tremont. Postoperative assessments. And in
25 the case of orthopedic fusion like this one, of course, will

1 require x-rays, which he did get.

2 Q And will Mr. Herrera require medical management for his
3 lifetime due to this accident and this subsequent surgery?

4 A There's a statement that is valid whereby anybody who
5 gets spinal surgery is improved at the time of his surgery, if
6 you want or care. But that individual's at risk of needing more
7 care for that area of their body, thereafter, in their life.

8 So the answers is a yes, to some extent.

9 Q And are there costs associated with that lifetime care?

10 A Of course there's cost to health care. The answer is
11 yes.

12 Q And again Mr. Herrera's post surgical condition is
13 permanent; is that correct?

14 A The fusion you see there is forever for life.

15 Q Did you form a prognosis and describe for the jury what
16 prognosis means? And did you form a prognosis for Mr. Herrera?

17 A Prognosis is a medical term that describes a best
18 judgment opinion to the wellness and maintenance of wellness or
19 for that matter disease regarding a particular condition.

20 So, in the case of cervical surgery, the prognosis in
21 regards to his neurological signs and symptoms recovery, and the
22 maintenance of that recovery, if it comes. And also the
23 maintenance of that recovery over years and years to come
24 forward.

25 Q And can we anticipate -- withdrawn.

1 Mr. Herrera, if he needs to continue to make some
2 complaints of postsurgical pain despite the fact that they are
3 diminished due to surgery, can we expect Mr. Herrera to suffer
4 pain over his lifetime?

5 A It would be sort of expected to have this patient
6 complain of some symptoms in the cervical spine despite surgery,
7 correct.

8 Q All right. And has Mr. Herrera permanently disabled?

9 A Disability in reference to what, counsel?

10 Q I'm sorry?

11 A Disability in reference to what?

12 Q Oh, I'm sorry. Yes, is Mr. Herrera able to go back to
13 his job in construction where he lives and carries heavy items?

14 A Disability of course is relative to the tasks that is
15 demanded. For him certainly, and in general patients having
16 spinal surgery are not, are not ideally exposed to very heavy
17 tasks. Otherwise, they have a high risk of reinjury.

18 Q Okay, and doctor, we've already talked about Mr.
19 Herrera continuing under your care.

20 Did Mr. Herrera make any further complaints to you of
21 anything?

22 A And that's not unusual by the way for patients to sort
23 of prioritize their history, based on the experienced symptoms.
24 And I say so because as his neck condition improved, he started
25 to talk to me about his low back issues.

1 Q All right. And did you, in fact, note in your record
2 that Mr. Herrera started to complain to you of lower back
3 issues?

4 A Correct.

5 Q And I think you said it, but maybe you need explanation
6 for jury. So, if Mr. Herrera's complaining of greater pain to
7 the neck that would perhaps mask the lumbar condition?

8 A I mean what you say exist, there's also the fact that
9 he has deep neurological symptoms, deep dysfunction of his
10 spinal cord. As his spinal cord function improves, signals to
11 the brain are coming with less noise, if you want. And the
12 patient will start focusing on other part of their body. In
13 this case, the lumbar spine.

14 Q Okay, the lumbar spine means the lower back, right?

15 A Correct.

16 Q Tell us what complaints Mr. Herrera made to you with
17 respect to his lower back?

18 A Somewhere a few months after neck surgery and I'll make
19 reference to October 4, 2014, note. He did describe to me more
20 details, his experience of pain regarding his lower back area.
21 But again, pain is subjective, pain is your pain, my pain. What
22 are we talking about it's hard to measure. But the impact of
23 pain on function is something more tangible for clinician, and
24 that's the part of questionnaire that we elaborated on.

25 He had numbness to his legs, especially the left one.

1 He tripped over his own feet. He didn't seem to ambulate freely
2 he would make use of a cane. He had strict limitations to
3 bending, and so on sitting, for example. And that's where the
4 functional impact move his lumbar condition was assessed as best
5 we could.

6 Q Okay. So, these symptoms and complaints he made to
7 you, to reasonable degree of medical certainty, doctor, are they
8 subsequent with and accident described to you by Mr. Herrera?

9 A In the same answer counsel. I am not aware of any
10 preexisting condition or care rendered for any spinal issues
11 before day of trauma.

12 Q And did you form a treatment plan with respect to Mr.
13 Herrera's lumbar complaints?

14 A At one point I did.

15 Q All right, and did Mr. Herrera follow his treatment
16 plan?

17 A He did.

18 Q And your instructions? Okay. And did there come a
19 time when Mr. Herrera was subsequently exhausted his
20 conservative care and had to go for surgery?

21 A Based on the severity of his clients, the complaints,
22 the answer is yes.

23 Q And, doctor, we've developed a demonstrative aid with
24 respect to the lumbar surgery. Like we've done with the
25 cervical display, I'm going to ask would the lumbar

1 demonstrative aid assist you in describing for the jury the
2 nature of the surgery?

3 A Yes, counsel. Yes.

4 MR. KELLY: Your Honor may we use Plaintiff's
5 Exhibit Demonstrative Aid I think it's marked as 28.

6 THE COURT: It's marked Plaintiff's 28. Any
7 objections?

8 MR. RAINIS: No.

9 MR. ROBERTA: No.

10 THE COURT: Okay.

11 DIRECT EXAMINATION

12 BY MR. KELLY:

13 Q Okay, Doctor, again we have Plaintiff's Exhibit
14 demonstrative aid 28.

15 Can you tell the jury what we're looking at in this
16 exhibit?

17 A So, we're looking at an artist rendering, again, based
18 on the imaging at least when it comes to this vignette it's
19 called preoperative anatomy one. Two, surgery plan surgery plan
20 to correct his lumbar condition that he has had, understood and
21 identified based on history physical examination imaging. And
22 that's about two years after his trauma.

23 Q So, what we're looking at in the preoperative display
24 where it's preoperative anatomy, can you tell us where his
25 trouble spots were?

1 A He had at L-4 and L-5. Again, this discs are
2 sandwiched by the vertebra. So, the L/4-5 disc and the L5/S1
3 disc were deemed abnormal, based on the MRI.

4 And we know from imaging that the L/4 vertebra, over
5 L-5 had slipped forward little bit. There was evidence of
6 instability.

7 Q And the condition we see in the preoperative diagnosis
8 is that caused by the accident?

9 A Well, what we have here is as I put hypertrophic
10 changes which is a way to describe large facet. A large facet
11 can occur for any reason including getting older. By itself the
12 large facet does not mean trauma, but it certainly guides us as
13 to find the abnormal level.

14 The one that I would have put more -- that I put more
15 weight to, is the one that is not shown on this side view of the
16 MRI reproduction. Because when we get an MRI were flat, we're
17 below gravity. But the vertebra of L/4 and L/5 was moving too
18 much, was moving forward. So, he had in stability at L/4-5.

19 Q And if Mr. Herrera had no prior complaints, no prior
20 treatment with respect to that condition, do you have an opinion
21 to reasonable degree of medical certainty whether or not the
22 accident caused Mr. Herrera's complaints of pain and radicular
23 symptoms like numbness and so forth?

24 A Same answers, counsel. The answer's yes.

25 Q Yes. All right. So doctor, could you kindly tell the

1 jury a little bit about your surgery can you sort of walk us
2 through it?

3 A Very well. Contrary, not contrary, but in reference to
4 cervical surgery you know about when it comes to lumbar surgery
5 there's a few ways that one can adopt and in terms of surgical
6 technique. So, this is one that I adopted.

7 The concept here, especially for a patients very well,
8 they to do an anterior approach in order to remove the damaged
9 discs but also to struck well with a good size implant,
10 therefore, securing the success of the fusion of the L/4-5 and
11 L5/S1 level. The interior approach as depicted on this
12 particular viewer here.

13 Surgery's creating planes of access. To get to the
14 spine anteriorly from the abnormal wall, especially para central
15 is not particularly difficult.

16 What requires attention, though, especially when it
17 comes to the L-4/5 level, is we have major vessels. We have the
18 vessels that go to our leg. The common area we have vessels,
19 symptoms and they need to be taken care of, of course. Because
20 is that could be catastrophic bleed on the table. Especially
21 when it comes to the vein.

22 So upon securing a field to the vertebra levels, as you
23 need to get to, the disc level, one proceed to diskectomy. So,
24 here you have an instrument happened to be called pituitary, you
25 remove the disc material.

1 Analogous to cervical spine, of course, larger size
2 implant, you have the lumbar implants that are inserted at each
3 level. You have the L5/S1 depicted here already. The L/4-5, is
4 depicted. So, the delayed.

5 So, when the implant are in place, I proceed in this
6 case there's integrated implants. Those days I didn't have
7 those. What I did do often someone else does to put a little
8 screw washer to prevent the in-plate -- not the in-plate, but
9 implant to move out, get exposed. That's the anterior surgery.

10 Get the height, get the disc tissue out, get a good
11 foot print to your fusion.

12 One complication of fusion that you want to avoid is
13 failed fusion. Especially for patients who is of certain age.
14 Then in this case in the same day, same sitting I make after
15 closing the abdomen incision, I make a second incision after
16 repositioning the patient to the midline of the back, and
17 proceed to the screws and rods that I'm sure you heard a lot
18 about.

19 So, that's what's depicted here in the frontal view and
20 in the side-view. And the purpose here is to make all these
21 facets, these little facets that you can almost touch when you
22 put your finger, to make them well and to eventually have them
23 correlate and become one bigger bone. So, we call that 360
24 anterior posterior lumbar fusion. That particular technique at
25 least in my hands secure a fusion at very high level, and this

1 is what you have to depicted here.

2 So, screws in the bone, rod attached to screws,
3 bone-graft material securing the anterior work in a way that the
4 L/4-5 and L5/S1 level are locked.

5 Q Thank you, doctor. Take a seat.

6 Is the condition after your surgery a permanent
7 condition?

8 A Yes.

9 Q Was your surgery caused to Mr. Herrera by the accident?

10 A Based on history, the same answer counsel.

11 Q Did I just say is it permanent?

12 A Yes. I said yes to that too.

13 Q I'm losing track.

14 A We'll help you.

15 Q Did Mr. Herrera come back to you after the surgery for
16 follow-up?

17 A Yes, he did.

18 Q And did he follow your instructions diligently and
19 appropriately?

20 A Yes, he did.

21 Q And whether Mr. Herrera, require medical management for
22 the his lumbar spinal surgery for the balance of his life?

23 A Most likely the answer's yes.

24 Q To a reasonable degree of medical certainty, will Mr.
25 Herrera require medical management for his lumbar surgery for

1 the balance of his life?

2 A Correct, yes. The answer's yes.

3 Q And assume that Mr. Herrera makes diminished but
4 continuing complaints of pain after the lumbar surgery. Do we
5 anticipate that pain condition will continue for the balance of
6 his life?

7 A Correct. I agree with that.

8 Q Are there costs associated with Mr. Herrera's lifetime
9 medical management for the lumbar surgery?

10 A Yes.

11 Q Do you have a prognosis for Mr. Herrera's lumbar
12 surgery?

13 A Yes, I do.

14 Q Tell us, please? Please, what it is?

15 A Prognosis is in reference to his functional level and
16 pain experience the prognosis is not good at that point.

17 The other one also in regards to functional issues
18 particularly at L-3/4 level that is at risk of becoming an
19 arthritic level; and, therefore, potentially not for sure, but
20 potentially could be requiring additional surgical care.

21 Q And is that junctional complaint is that the competent
22 producing cause of pain?

23 A No, I would surmise it only by that. There are many
24 reasons including the disuse of the lumbar muscles tissue, it
25 capsular tissue. And as much as I think I do so-called control

1 surgical techniques, surgery's still in away controlled trauma.
2 So, you have consequential impact on soft tissue with surgery.

3 Q And there's post surgical pain involved in the surgery,
4 correct?

5 A Correct.

6 Q And is Mr. Herrera permanently disabled from his
7 working in construction, as a result of the accident?

8 A Yes, I don't believe that this type of treatment is
9 compatible with heavy, heavy, construction work.

10 Q And assume Mr. Herrera had no prior treatment to his
11 lower back, no prior back complaints and worked in heavy
12 construction without restriction.

13 Do you have an opinion, to reasonable degree of medical
14 certainty, whether or not your lumbar surgery was caused by the
15 accident to Mr. Herrera?

16 A Counsel, same answer. I have no other knowledge or
17 details to view with you considering his pretraumatic situation,
18 as far as I know he had nothing. The answer's yes.

19 Q And the future care, the future medical care and costs
20 to Mr. Herrera are the result of the accident; is that correct?

21 A The answer would be yes.

22 Q Doctor, if weren't here with us today, what would you
23 be doing?

24 A Today's Tuesday. Today would be an office day.

25 Q Okay, and when you say office day, tell the jury what

1 that means?

2 Do you see patients? What do you do?

3 A Office day means seeing patients, yes.

4 Q And are you charging a fee to be here today?

5 A I do.

6 Q Tell the jury what it is please?

7 A The fees \$15,000.

8 Q And you and I have worked together twice before over
9 the last ten years or so?

10 A I got to know you this way, counsel, correct a few
11 times.

12 Q And did you do a report in this case?

13 A Yes I have.

14 Q Okay, and did you charge for that as well?

15 A I did.

16 Q Okay, and can you tell us what the fee for that was?

17 A Probably \$1,500.

18 Q All right. Doctor I have no further questions for you.
19 Thank you very much for your time.

20 CROSS EXAMINATION

21 BY MR. RAINIS:

22 Q Good morning, Doctor Brisson.

23 A Good morning, sir.

24 Q I'm going to ask you a series of questions, and I'm
25 going to ask you to, if possible, answer them yes or no. If you

1 can't answer them yes or no tell me that, and I'll either move
2 on to another area, or ask you a different question. Okay?

3 A I'll do my best, sir.

4 Q Now, you said that your opinion, as to whether the
5 surgeries that you performed were caused by the accident, were
6 based upon the history that Mr. Herrera gave you, correct?

7 A Yes.

8 Q And it's true, is it not, that people, workers, who
9 particularly those who do heavy labor, and have a smoking
10 history, are more likely to develop wear and tear degenerative
11 changes of the spine, correct?

12 A Uhm, I don't know if I can answer on a yes.

13 The wear and tear you're referring to is age related
14 for the most part. Not entirely, I should not much by virtue of
15 the occupation.

16 Q I'm sorry?

17 A So, in other words, if we weigh the factor of disc
18 changes that you alluded to, age related disc changes, the
19 latest I can think about is that 80 percent of our so-called
20 disc change is a function of the fact that we are human beings
21 and are prone to get it. Ten, 20 percent maybe due to exposure,
22 but you don't have to be construction worker to have painful
23 discs conditions. You can be leaning over to grab a sheet of
24 paper and be in trouble.

25 Q Okay. So, all people regardless of the type of work

1 they may do develop as they age wear and tear degenerative
2 change in their spine, correct?

3 A Yes, correct.

4 Q And someone who does heavy labor, is at a greater risk
5 of developing those changes more quickly than others, true?

6 A Again, I don't want to answer yes or no in this one
7 but, if I may. I think what counsel's trying to hear -- not
8 hear, but ask me is when doing very heavy work more expose to
9 become symptomatic from these situations, and I would say yes to
10 that.

11 Q Okay. So, while all of us develop these change, people
12 who do heavy labor are more likely to develop complaints related
13 to those change, correct?

14 A Some do, correct. There's, there's a logical way to
15 look at it that --

16 Q And now when you make a determination that because
17 someone hadn't sought treatment or made complaints -- I'll
18 withdraw the question.

19 When you say your opinion as to causation is based upon
20 the history, you're relying upon the history being accurate, of
21 course, correct?

22 A Correct.

23 Q And if the history is inaccurate, then your opinion
24 could be inaccurate, correct?

25 A Oh, it could change.

1 Q And it's certainly possible that Mr. Herrera was
2 working with back pain and neck pain prior to this accident,
3 correct?

4 MR. KELLY: Objection, speculation calls for facts
5 not in evidence.

6 THE COURT: You can answer, if you know.

7 A Can you -- I count hear you Judge.

8 THE COURT: Sustained.

9 MR. RAINIS: I'm sorry?

10 THE COURT: Sustained.

11 Q So, let's talk about Mr. Herrera's neck. He had
12 degenerative disease at multiple levels. I think it was from
13 C-6 to C-2, correct?

14 A Counsel, correct. I'll just phrase it differently. He
15 had multiple disc level changes.

16 Q And those disc level changes would be consistent with
17 the type of wear and tear degeneration we're talking about,
18 correct?

19 A The problem with the question is not the fact that that
20 question is asked. It's that there's no way to define a pattern
21 of disc change degeneration. Disc space on exposure to
22 construction verses working as a white collar in an office, so
23 there's no way to differentiate it.

24 Q But no my point is, and maybe I -- let me rephrase the
25 question.

1 The fact that he had this multiple level changes is
2 very consistent with our natural aging and degeneration process
3 we've been talking about, right?

4 A Yeah, that's unfortunately our -- yeah.

5 Q And the difference between a disc bulge and a disc
6 herniation is one of the degree, in general, correct?

7 A Again, clinically this position is not valid. Although
8 the question is asked properly. First, we end up in semantic
9 battles. Disc herniation, disc bulges. I went through those
10 many, many times. Ultimately what is the key part for someone
11 like myself, at least, is the consequences that I can make
12 reference to the images in patient's experience signs and
13 symptoms.

14 So, a bulge can be resulting in serious neurological
15 injury or problems; herniation could be asymptomatic, so that's
16 why we need to pay attention to the patient's description and
17 the physical examinations. It -- there's no absolute in this
18 field, unfortunately. I wish there were some. It would be
19 easier.

20 Q The fact, when you do reviews, of course, of MRIs and
21 CT cans, correct?

22 A Correct, counsel.

23 Q And even you have -- your opinion can vary about the
24 significance of findings on the same -- on the same MRI,
25 correct?

1 A Counsel is correct. We can have variations of opinions
2 among professionals. Even if you refer to my notes you can see
3 that I at one point considered other levels problematic and then
4 rescinded assuming they were, for example.

5 Q So, in the beginning looking at the MRI you thought
6 that C-5/C-6, was the least involved, correct?

7 A I would have to refer. I thought it was C-3/4,
8 counsel. But the point is I did at one point try to centralize
9 or create a better focus, as to what I believe caused the
10 myelopathy.

11 The answer is correct. The question's correct, I
12 meant.

13 Q And the surgery that you performed on Mr. Herrera's
14 neck was successful, correct?

15 A The answer, as far as I can tell, is yes.

16 Q And, in fact, I'm looking at -- you have it in your
17 report, dated April 8, 2017.

18 A April 8, 2017, counsel.

19 Q It's the report you wrote for the attorneys?

20 A Oh, I don't have that with me. I don't have it in my
21 hand.

22 Q All right, let me do it this way. The surgery on Mr.
23 Herrera's neck was in May of 2014, correct?

24 A Correct.

25 Q And by October of 2014, and you can check your notes,

1 for October 4th of 2014?

2 A Okay, I'mma get to it. I got it.

3 Q You got it?

4 A Yup.

5 Q You examined him then, correct?

6 A Yes, I have, counselor.

7 Q And with respect to his neck, there was no redness or
8 swelling, correct?

9 A Correct.

10 Q And he had full range of motion, and he was
11 neurologically intact, correct?

12 A Just minor corrections, but it's rotation left and
13 right. Was not full, but the flexion was full. He could chin
14 on chest --

15 Q Does your note say the range of motion was full?

16 A Uh, he had full chin on chest, meaning chest. But the
17 range of motion is flexion, extension, rotation, lateral
18 bending. So the rotation was limited. Turning the head left
19 and right was limited.

20 Q Well, there's going to be a certain amount of limited
21 range of motion just because you used two levels at that point,
22 correct? Correct?

23 A Yeah but five -- turning left and right, which is the
24 rotation referring to at five degrees, that could be a function
25 of wearing a collar for four months.

1 I mean you would expect a little more rotation at one
2 point. So, but the point is that he could put his chin down to
3 his and chest and there's good because he didn't have limit sign
4 he didn't have the neurological sign he had preop.

5 Q And does your note say that he had full range of
6 motion?

7 A Counsel, I don't argue on this. He has full flexion
8 chin on chest. Period. Period. Like little dot.

9 THE COURT: Mr. Brisson, just answer the question.

10 THE WITNESS: He know, but it's many times.

11 Q You now, so if he's got good motion and nowhere and
12 he's neurologically intact that shows a good result from the
13 surgery, right?

14 A Yes. The answer's a yes. Let me help you a little
15 bit. The fact that you can chin on chest without having learned
16 sign, which is spinal cord irritation that he had, when he chin
17 on chest before is a very good sign.

18 Q So, he had a good recovery by five months after your
19 surgery, right?

20 A Neurologically the answer's yes.

21 Q Okay, and neurologically is what causes the pain,
22 right?

23 A I mean --

24 Q Nerves cause pain irritation to the nerves?

25 A Well, you can have overcome neuropathic, the nerve

1 tissue is the site where the pain comes from or you can have
2 other causes of pain which the nerve transmit.

3 He had spinal cord compression which was transmitted by
4 nerve, but he could have pain from other areas, as well.
5 Including the muscle stiffness, whichever, surgery. I mean the
6 answer's yes, partially.

7 Q So, as of October, he had made a very good recovery
8 from your operation to the neck, right?

9 A Yes, remembering that the key reasons for surgery was
10 the myelopathy. That part was improving, that's the key part.

11 Q And then you turned your attention to his low back
12 complaints, correct?

13 A Correct, counsel.

14 Q And a low back Mr. -- at the office visit of
15 January 25, 2014, got that one?

16 A January 25, 2014? Or January 27, 2014?

17 Q Okay.

18 A I could be.

19 Q Okay, I'll adopt that, but you reviewed the lumbar MRI
20 that had been taken on April 30th of '13, correct?

21 A Yeah, I see what counsel's talking about.

22 Q And that showed condition called facet hypertrophy at
23 L-4 and -- L-4/L-5; and L-5/S-1; correct?

24 A Correct.

25 Q And facet hypertrophy is part of that wear and tear

1 syndrome that all people develop, correct?

2 A Correct.

3 Q And he had no spondylosis, correct?

4 A Not quoted, correct.

5 Q And he had no spondylolisthesis, correct?

6 A Yes.

7 Q Okay, so as of April of 2013, which would have been a
8 month or so after his accident, he didn't have those conditions,
9 and that was the condition of his spine, based on your
10 interpretation of the MRI, correct?

11 A We with one correction. The answer's yes with one
12 thing though. The MRI patient is supine gravities removed. The
13 slip can be seen or the spondylolisthesis seen afterwards on an
14 x-ray as the patient is getting x-rays, because they are
15 standing, dealing with gravity. But everything else is correct.

16 Q And then on an office visit I think it's October 1 of
17 2014? You have that office visit?

18 A I have it, counsel.

19 Q And you reviewed another lumbar MRI that was done in
20 September of 2014, correct?

21 A Correct, counsel.

22 Q Yes?

23 A Yes, I'm sorry.

24 Q Okay. Uhm, in the ensuing one and a half years between
25 a month after the accident and now a year and a half after the

1 accident, in addition to facet hypertrophy which was present in
2 April of '13, he now has developed spondylosis of the L-4/5.
3 L/4 and L-5, correct?

4 A Spondylodesis, is that what's written spondylosis,
5 counsel.

6 Q Okay?

7 A Sorry because I had spondylodesis here. Maybe there's
8 another type --not typo, but you mind if I help you here, that's
9 all.

10 Q Bear with me. Spondylolisthesis was not there in April
11 of 2013, just a month after the accident, correct?

12 A That not reported, correct.

13 Q Spondylolisthesis that develops in the same location,
14 and at the same time as the facet hypertrophy, certainly seems
15 to be caused by the degenerative process continuing over that
16 ensuing year and a half?

17 A I mean, it's hard to dispute the statement the
18 gentleman presented.

19 Q So, during your operation on the lumbar spine, you
20 found osteophytes, right?

21 A Correct.

22 Q And that would be a finding consistent with the
23 degenerative changes of wear and tear as we age, correct?

24 A Correct.

25 Q Those are not caused by trauma, correct?

1 A I mean, they can be subsequently seen. But osteophytes
2 acquire overtime. By the way, for the jurors, osteophytes are
3 bones, spurs that come at the edge of the discs.

4 Q And sometimes on when orthopedic surgeons talk about
5 ossification, that's bone formation, correct?

6 A Correct.

7 Q So, bone can grow? In fact, when you do the fusion,
8 one of the things you want to happen is ossification? You want
9 the bones to fuse together, correct?

10 A Correct.

11 Q And you grow new bone there?

12 A Pardon me?

13 Q And you grow new bone there?

14 A Correct.

15 Q And that takes time, correct?

16 A Months, correct.

17 Q And if so if there's ossification present in an
18 orthopedic injury, that would indicate that that injury
19 developed over time and not traumatically, correct?

20 A I mean you have a moment one which is the injury time,
21 and then you ever developing findings over time due to trauma.
22 So, as I reason your question, I would say to you an injury can
23 lead to long-term consequences. Again, the issue here was
24 spinal care, and this issue is there's you cannot say yes or no
25 to any of these types of question. Everything is possible,

1 counsel.

2 Q So, when you say everything's possible, in treatment of
3 the spine conditions and spinal surgery, it's possible that Mr.
4 Herrera's condition will not get worst over time, correct?

5 A Yeah, and I just used my term clearly for the jurors.
6 We're talking about epidemiology which is the signs of
7 predicting developing of conditions over time.

8 Epidemiology individuals getting spinal surgery at risk
9 of having more trouble in the future. I didn't say a hundred
10 percent, but there are higher statistical risks.

11 Q Now, by June when is the last time you saw Mr. Herrera?

12 A I believe August 8, 2018.

13 Q Okay. So, you haven't seen Mr. Herrera in over six
14 years, correct?

15 A Correct.

16 Q So you can't comment -- having not seen him in six
17 years, it would be -- you'd be unable to talk about what his
18 condition is today, correct?

19 A Correct.

20 Q And you'd be unable to give an accurate prediction of
21 what his condition is likely to be in the future, correct?

22 A Not entirely, but to some point.

23 Q And by June 15th of 2016, your visit of that date, you
24 had told -- if you could find it?

25 A I will, sir. I will.

1 Q You had told Mr. Herrera that he didn't need to
2 follow-up. That he only needed to follow-up with you as the
3 need arose, correct?

4 A Correct.

5 Q And because he had reached maximum medical improvement
6 at that point, correct?

7 A Correct, counsel.

8 Q And while he came back to you a couple of times I
9 think. I think you said until August of 18, you haven't seen
10 him since then, correct?

11 A Correct, counsel.

12 Q And so, apparently, he didn't, as far as you know, the
13 need hadn't arisen, correct?

14 A In my role as surgeon, he hadn't come back to see me,
15 correct.

16 Q Okay. Now, Mr. Herrera, followed all your instructions
17 correct?

18 A He has. He did.

19 Q And he didn't decline to undergo any treatment that you
20 recommended to him for financial reasons, correct?

21 A I wouldn't be able to answer the question. I just know
22 he's compliant patient.

23 Q I'm sorry?

24 A I just know no that he is a compliant individual,
25 compliant patient.

1 Q Right, right. What all I'm saying is during the years
2 that you treated him which was from about 2014 to 2018, those
3 four years, he never declined any treatment you recommended for
4 financial reasons, correct?

5 A As far as I know.

6 MR. KELLY: Calls for speculation how.

7 THE COURT: Rephrase it.

8 MR. KELLY: Sorry.

9 THE COURT: Sustained, rephrase it.

10 Q Well, he didn't decline any treatment that you
11 recommended, correct?

12 A Correct.

13 Q And because Mr. Herrera's future course is unknown, it
14 would be impossible to state with any accuracy, what that future
15 care, that future unknown care would cost, correct?

16 A I mean I get the gist of your question, counsel. To be
17 fair, since we are talking about human experience and biological
18 issues, not mechanical issues, it's hard to know what would
19 bring him to necessitate specific type of care. As you can not
20 be sure about the specific one required.

21 But, as I said to you before, compared to us, at least
22 myself, places at a higher risk of needing care in the future,
23 that I can tell you. What it could be, could be pain
24 management, it could be physical therapy, it could be surgery.
25 It could be just about everything he went through or it could be

1 nothing. I don't think I'm disputing that position either.

2 Q So, for someone to predict what care Mr. Herrera might
3 need in the future, they would be engaging in a large degree of
4 speculation at this point, correct?

5 MR. KELLY: Objection mischaracterizing testimony.

6 THE COURT: I couldn't hear you, Mr. Kelly.

7 MR. KELLY: Miss characterized the testimony. He
8 didn't say that.

9 THE COURT: Read back the question, Lorraine.

10 (Whereupon, the Court Reporter reads back the
11 requested testimony.)

12 THE COURT: Overruled, you can answer the question.

13 A The topic you read, as I said to you before, the type
14 he could need I cannot say. I may not even tell you if he will
15 need something. I just know that statistically, I think in
16 terms of a population. I think in -- not think in terms of
17 individual. But if you take a large number of individual like
18 Mr. Herrera, put them in a pool, observe them for 10, 20,
19 30 years that pool of individuals will have more care rendered
20 to them than for someone like me who yet has not have surgery of
21 his spine. That's the answer.

22 Q Okay. But in order for someone to come in and give an
23 opinion that certain care is necessary, and it's going to be
24 necessary on this date regularity and this basis, that they are
25 going to be engaging in speculation to do that because we don't

1 know, correct?

2 MR. KELLY: Objection. He answered the question,
3 he's arguing with him now about the answer.

4 THE COURT: Asked and answered. Move on. Don't
5 answer the question.

6 Q Now, how many times in your career have you testified
7 in court, in personal injury cases?

8 A I've been doing this for 37 years. How many times
9 counsel, I cannot give you an exact number but I will put it in
10 the 60, 70 range.

11 Q And of those how many times were for Mr. Herrera's
12 lawyers at the Gorayeb firm?

13 A The Gorayeb firm, I was -- I treated patients that came
14 that were under their so-called guidance, and testified. It has
15 to be over ten times.

16 Q Okay, and addition to the testifying, there were a lot
17 of other parade of clients that you prepared reports for
18 correct?

19 A Correct.

20 Q And it never came to you coming to court like today to
21 testify, correct?

22 A I would say so, yes.

23 Q And how many reports have you prepared for Mr.
24 Gorayeb's office?

25 A I would double, triple the amount of times I had to

1 come to court.

2 Q When was the last time you testified in court?

3 A It was a few months ago, counsel.

4 Q It was for Mr. Gorayeb's firm?

5 A It was for Mr. -- no, I had one more testimony recently
6 actually for a case in New Jersey. But for Mr. Gorayeb's firm
7 it was a few months ago.

8 Q You know how Mr. Herrera was referred to you?

9 A I don't have it annotated directly. We ask the patient
10 to put it down, too. I'm not sure. I think it's Doctor Kaplan
11 that sent the patient to me.

12 Q Now, you talked a little about conservative therapy
13 that Mr. Herrera had before your operation. Remember talking
14 about that?

15 A Yes, sir.

16 Q Did you prescribe that therapy?

17 A I don't have my prescription pages with me, but I can
18 tell the jurors that on a few times, for example, when I'm out I
19 am asking about authorizing physical therapy, my assumptions are
20 I prescribed them physical therapy. But most care that he got
21 in terms of the pain, the pain was not from my prescription.
22 None of which would be, for example, medication.

23 THE COURT: Excuse me one moment.

24 (Whereupon, there is a pause in the proceedings.)

25 Q You said that Mr. Herrera because of his condition is

1 unable to work as a heavy laborer, correct?

2 A Correct.

3 Q But he certainly can do, I'll say much more sedentary
4 work, correct?

5 A Well, then based on your question, you asked me before,
6 we got in the 6, 7 year period, I haven't seen him, it's hard
7 for me to answer that question.

8 Q Okay. So, while you can say that he in your opinion he
9 can't engage in heavy labor, you have no opinion about whether
10 he can engage in more sedentary work, correct?

11 A I think that's correct, counsel.

12 Q You mentioned a bunch of complications that could
13 arises from the type of surgery you performed on Mr. Herrera.
14 He didn't develop those complications, correct?

15 A No, counsel.

16 MR. RAINIS: That's all I have. Thank you.

17 CROSS EXAMINATION

18 BY MR. ROBERTA:

19 Q Good morning, doctor. I believe you testified as to
20 with regard to the cervical spine of diagnosis of post traumatic
21 cervical myelopathy; do I have that, correct?

22 A Yeah, correct.

23 Q And post traumatic's another way of saying after an
24 accident?

25 A Correct.

1 Q And that post traumatic cervical myelopathy was a
2 reason for the cervical surgery, correct?

3 A Correct.

4 Q Do you have a copy of your operative report for the
5 cervical surgery in front of you, doctor?

6 A I have it, counsel.

7 Q Looking at both the preoperative diagnosis and the
8 postoperative diagnosis, contained on your operative report for
9 the cervical spine, isn't it correct that post traumatic is not
10 listed in either of those diagnoses, doctor?

11 A Directly speaking you're correct.

12 Q It's not listed, correct?

13 A You have disc herniation was specified.

14 Q With regard to the lumbar spine, you had performed
15 surgeries at these L4/L5 level; and the L5/S1 level; is that
16 correct, doctor?

17 A Correct, counsel.

18 Q Did you have the chance to see the radiological reports
19 from the emergency room, on the date of incident?

20 A I don't recall.

21 Q Would you like to see them?

22 A Whatever you want, sir.

23 MR. ROBERTA: Can I give a copy, Your Honor. These
24 are from the subpoenaed records room.

25 THE COURT: What is that marked?

1 MR. ROBERTA: We have them there. Whatever you
2 prefer, Your Honor.

3 THE COURT: What exhibit? What is it marked?

4 MR. RAINIS: Plaintiff's 10, it's marked from
5 Bellevue Hospital.

6 THE COURT: Okay. Is that in on consent?

7 MR. KELLY: I'm sorry?

8 MR. ROBERTA: Yes, Your Honor.

9 MR. KELLY: He wants to use subpoenaed records
10 rather than whatever you're handing him.

11 THE COURT: Can I see those for a second Mr.
12 Roberta.

13 MR. ROBERTA: Yeah, it's literally a direct copy
14 from the subpoenaed record with certification on top of it,
15 everything.

16 THE COURT: This copy wasn't marked. Where's the
17 court's copy.

18 MR. ROBERTA: I can get that.

19 THE COURT: That's what I want you to show him.

20 MR. ROBERTA: You want me to take that?

21 (Whereupon, the item referred to previously
22 Plaintiff's Exhibit 10, was received in evidence.)

23 THE COURT: Yeah.

24 (Whereupon, there is a pause in the proceedings.)

25 THE COURT OFFICER: All rise, jury exiting.

1 (Whereupon, the sworn jurors exit the courtroom for
2 a brief recess.)

3 THE COURT: Okay, bring them in, please.

4 THE COURT OFFICER: All rise, jury entering.

5 (Whereupon, the sworn jurors enter the courtroom
6 and take their respective seat.)

7 THE COURT: Be seated.

8 CROSS EXAMINATION

9 BY MR. ROBERTA:

10 Q Sir, it's correct that you performed the lumbar
11 surgeries at the L-4/5 and the L-5/S1 level, correct?

12 A Correct.

13 Q And now I'm going to hand you what's been marked as
14 Plaintiff's Exhibit 10, they are subpoenaed records from
15 Bellevue, which was the ER. Actually, I queued up the right
16 pages for you to make it quicker.

17 Looking at those records, Doctor, isn't it correct that
18 the diagnostic imaging from the E.R. found degenerative
19 conditions at the L-4, L- 5 level?

20 A That's the terminology they used, counsel.

21 Q So, that's a yes, correct?

22 A I'm reading it.

23 Q And also at the L-5/S-1 level, it also says
24 degenerative disease, correct?

25 A That's what they wrote, correct.

1 Q And those are the two levels that you performed surgery
2 on?

3 A This is correct.

4 MR. ROBERTA: Thank you. I have no further
5 questions.

6 MR. BAXTER: I have no questions.

7 THE COURT: Okay. Redirect examination.

8 REDIRECT EXAMINATION

9 BY MR. KELLY:

10 Q So, doctor, just to pick up, I guess, where counsel
11 left off there. So, on the date of the accident, Mr. Herrera
12 has taken in a spineboard and neck collar to Bellevue where they
13 do radiology on him and find that he has a degenerative
14 condition, right?

15 A Correct.

16 Q So, essentially, Mr. Herrera is primed for catastrophe
17 when he get blasted into by excavator; isn't that correct?

18 A Right.

19 Q And that is, in fact, what happened in this case, isn't
20 it?

21 A Correct.

22 Q Now, counsel asked you a question about you take the
23 history from the patient's that come to you, correct?

24 A Correct.

25 Q And you've been doing that for many years, is that

1 correct?

2 A Right.

3 Q Has it been your experience, doctor, that when people
4 come to you and you're going to rip open their throat and back
5 to drill into their spine that they lie to you?

6 A I believe not, counsel.

7 Q Doctor, I'd like you to assume that Mr. Herrera is
8 going to get on the stand later in this trial and he's going to
9 tell you that he has continuing complaints of pain, continuing
10 limitations, and continuing, though diminished, issues of
11 radiculopathy and so on.

12 Do you have a reasonable degree -- do you have an
13 opinion, within a reasonable degree of medical certainty,
14 whether Mr. Herrera's physical condition is going to continue
15 that way for the balance of his life?

16 MR. RAINIS: Objection.

17 THE COURT: Sustained.

18 MR. KELLY: He's an expert, Judge.

19 THE COURT: Sustained. Speculation.

20 MR. KELLY: He's an expert and I asked him to
21 assume. Can we go in the back?

22 (Whereupon, the following discussion takes place in
23 the robing room among the Court and Counsel, outside the
24 hearing of the sworn jury.)

25 THE COURT: Can you read the question back to me,

1 please.

2 (Whereupon, the Court Reporter reads back the
3 requested testimony.)

4 THE COURT: We are on the record in the robing
5 room. The jury's outside of our hearing.

6 We had a brief discussion off the record. I want
7 you to rephrase the question.

8 MR. KELLY: All right, Judge.

9 THE COURT: Okay, I'll let you ask that, but the
10 way you asked it was I think very misleading and unfair it
11 sort of indicated that he definitely was going to testify
12 with respect to certain symptoms.

13 MR. KELLY: He will.

14 THE COURT: And well --

15 So, the objection is sustained. Just rephrase it.
16 Let's go back out.

17 (Whereupon, the following takes place in open
18 court, in the presence of the defendant and the sworn jury.)

19 THE COURT: The objection is sustained. Don't
20 answer the question. The jury is to disregard.

21 REDIRECT EXAMINATION

22 BY MR. KELLY:

23 Q Doctor, I would like you to assume that Mr. Herrera is
24 going to come and take the stand later in this case.

25 I'd like to you further assume that he's going to

1 testify to the jury that he has continuing and ongoing pain at
2 the time that he testifies to you.

3 Based upon those assumptions, do you have an opinion,
4 to a reasonable degree of medical certainty, whether Mr.
5 Herrera's pain will continue for the balance of his life?

6 A I have an opinion.

7 Q Tell the jury what the opinion is, please?

8 A So, he's still symptomatic with pain now years after
9 spinal surgery or care. The likelihood of him having pain for
10 the rest of his life is essentially very, very high.

11 Q And, doctor, with respect to chronic pain management
12 and lifetime medical management, would you defer to a physician
13 in that specialty, in terms of his lifetime care plan?

14 A Evidently, counsel. The answer's yes.

15 MR. KELLY: I have no further questions. Thank
16 you.

17 RE-RECROSS EXAMINATION

18 BY MR. RAINIS:

19 Q Doctor, you were asked a question about whether the
20 fact that the Bellevue Hospital radiology studies taken right
21 after this accident showed degenerative conditions, and you were
22 asked whether that made him prime for disaster, in the event of
23 an accident. Words to that effect. Do you remember that?

24 A That's the question asked. I heard it, yes.

25 Q But those x-rays and those radiological studies were

1 taken after the accident already?

2 So, if you develop something in the future, it was
3 related perhaps to the degenerative disease but not to the
4 accident, correct?

5 A I don't it know if I can answer yes or no to that, sir.

6 Q I'm sorry?

7 A I don't know if I can answer either yes or no to that
8 question.

9 Q Now, you were also asked whether if Mr. Herrera was
10 going to testify that he has continued pain, okay.

11 Without having seen Mr. Herrera in six years, it would
12 be impossible for you to know whether his continued pain is due
13 to further degeneration of his spine, due to age and wear and
14 tear or whether it's related to the accident that you say it's
15 related to, fair enough?

16 A I think it's related to all the above; to all the
17 elements you described.

18 Q But you wouldn't be able to say how much of it's --
19 without examining him, you -- it would be impossible to say that
20 what conditions he -- what pain he may complain about is related
21 to the accident, and what his just -- what is just a natural
22 course of degeneration as we age, true?

23 A Well, I'm degenerative, I don't have pain. So, it's
24 again it's hard yes or no answer, sir. I don't know.

25 Q It's impossible to say, true?

1 A Well, it's a continuum from what I understood from date
2 of injury thereabouts until now and not surprised to hear that
3 he's under pain management now. I cannot opine. I haven't seen
4 him in years. So, everything can be factored in, sir. I cannot
5 really say yes or no to that.

6 Q It would be impossible to, right?

7 MR. KELLY: Objection.

8 A Pardon me.

9 MR. KELLY: How many times he going ask him? He
10 want him to say impossible.

11 THE COURT: Overruled. Answer the question.

12 A I don't know if impossible is the word, sir, because
13 the predictor of care for the future is a lot of function of the
14 past, and the past is continuum, since day of injury. So, it's
15 hard to just unlink the pain experience he has today from the
16 trauma, and related to entirely to aging. I just can't answer,
17 sir. I just can't.

18 Q The question can't be answered by you anyway?

19 A Well, it's, it's clinical experience, it's scenario,
20 it's human beings. It's not a yes or no answer.

21 Q I understand you have an opinion about what might be
22 the case, but without seeing him, without examining him, without
23 knowing where his pain is located, the nature of his pain, all
24 these things, you can't have an opinion about what's causing it,
25 true?

1 MR. KELLY: Objection, argumentative. Fifth time.

2 THE COURT: Overruled.

3 A My sense is they were talking about spinal issues. As
4 far as I know that's what it is in this case I'm not surprise
5 that he has pain still. Unless there's another condition that
6 I'm not aware of.

7 MR. RAINIS: That's all I have. Thank you.

8 RE-RECROSS EXAMINATION

9 BY MR. ROBERTA:

10 Q Sir, when you just referenced a product of the past as
11 well, that would also include the degenerative conditions, would
12 it not?

13 A I mean, well aging. I mean I'm not sure what your
14 question is. I heard the word maybe. You want to make it so I
15 can answer.

16 Q So, you had said when you were opining as to where the
17 pain could be, you gave a starting point of the accident; is
18 that correct?

19 A Yes, based on history, yes.

20 Q But the starting point would be prior to the accident
21 because it would include those degenerative conditions, is that
22 correct?

23 A You can't -- I'm degenerative for sure and I don't have
24 a day of symptoms. So, in a world far apart at one point,
25 that's the whole thing about spinal care. Images don't tell you

1 what the patient experiences. You could have perfectly looking
2 anatomy, you can have a lot of pain. You can have bad looking
3 anatomy and have no pain. It's a difficult field, sir, that's
4 why the history of the patient matters more than anything else
5 and the physical examination. So, the past yeah he's 50 years
6 old, thereabouts, when I gets hurt. Of course, he's going to
7 have gradual changes, that doesn't mean these changes are
8 painful. If they are, it's hard to separate them from the prior
9 ones that were painful from trauma. I can't answer those
10 questions.

11 Q But past history of degenerative changes would factor
12 into future care, is that correct?

13 A Uh, I mean I guess to some extent it's possible.

14 MR. ROBERTA: No further questions.

15 MR. BAXTER: Still no questions.

16 MR. KELLY: May I look at Plaintiff's Exhibit 10.

17 MR. ROBERTA: Objection, Judge.

18 THE COURT: You'll get another chance.

19 (Whereupon, the following discussion takes place in
20 the robing room among the Court and Counsel, outside the
21 hearing of the sworn jury.)

22 MR. ROBERTA: Well counsel has asked for the
23 Bellevue records, Exhibit 10 I believe it is.

24 THE COURT: Plaintiff's 10.

25 MR. RAINIS: And the way I understand is that on

1 re-redirect where ever we're at it's got to be responsive to
2 things that were raised on the questioning by the other
3 attorneys immediately preceding those questions. Mr.
4 Roberta used the Bellevue records --

5 MR. ROBERTA: On cross.

6 MR. RAINIS: Before on cross and Mr. Kelly has
7 already had an opportunity to do redirect after his cross.

8 MR. KELLY: Wait this is my round directly after
9 you used it.

10 MR. ROBERTA: No it's not.

11 MR. KELLY: I don't think so.

12 MR. BAXTER: He only asked two questions. It's 100
13 percent there were intervening rounds. You did the whole
14 smash by the excavator thing in the intervening round.

15 MR. KELLY: If that's the case, then my apologies
16 and you're right and I won't use these.

17 THE COURT: He's right.

18 MR. KELLY: Okay, I didn't realize. I won't use
19 these.

20 THE COURT: Okay, are we done?

21 MR. KELLY: Sure.

22 THE COURT: With this witness?

23 MR. KELLY: I have maybe one more question.

24 THE COURT: Without exhibits.

25 MR. KELLY: I don't need the exhibit.

1 THE COURT: Okay, let's go back out.

2 (Whereupon, the following takes place in open
3 court, in the presence of the sworn jury.)

4 THE COURT: Comeback on.

5 MR. KELLY: Thank you, Judge.

6 RE-REDIRECT EXAMINATION

7 BY MR. KELLY:

8 Q Doctor, the radiology used at Bellevue was CT and
9 x-ray; is that correct?

10 A Correct.

11 Q Okay, and Mr. Herrera's complaints deal with nerve
12 compression and soft tissue injuries; is that correct?

13 MR. RAINIS: Objection, he's referring again to --

14 THE COURT: Step up.

15 MR. RAINIS: Same issue as we've just had.

16 THE COURT: Overruled, overruled. Go back.

17 Q Doctor, the CDs and x-rays, show the soft tissues or do
18 you need an MRI for that?

19 A MRIs are better techniques. They can't point
20 specifically to the CAT scan, but MRI is the way to show soft
21 tissue.

22 MR. KELLY: Nothing further.

23 MR. BAXTER: No questions.

24 THE COURT: Thank you, doctor.

25 MR. KELLY: Your Honor, our next witness is

1 scheduled for 2:00 p.m.

2 Your Honor, I'm going to read the deposition
3 transcript.

4 MR. KELLY: Your Honor, plaintiff intends to call
5 Angelo Montero by deposition testimony. And to present that
6 in a more understandable manner for the jury, I'm going to
7 ask questions and I'm going to have a responding reader take
8 the stand, if that's okay?

9 THE COURT: Have a seat. Jurors, as I instructed
10 you at the beginning of this trial, this is going to be EBT,
11 or deposition transcript testimony that was taken from Mr.
12 Montero previously under oath.

13 So, you're to treat this testimony, as if Mr.
14 Montero is sitting here with us in the courtroom. Okay.

15 (Whereupon, the attorneys are reading deposition
16 testimony into the record.)

17 MR. KELLY: Beginning at page 5, line 9.

18 DEPOSITION EXAMINATION

19 BY MR. KELLY:

20 Q Please, state your name for the record?

21 A Angelo Montero. 129 Elm Street, Yonkers, New York
22 10701.

23 MR. KELLY: Page 11, line 19.

24 Q Do you recall where you were working, if anywhere,
25 March 2013?

1 A Brooklyn.

2 Q Do you recall the address of the site I were working at
3 in March of 2013?

4 A No.

5 MR. KELLY: Page 12, line 2.

6 Q If I said One North 4th Place would that sound about
7 right?

8 A Yes.

9 Q Who are you working for at that site?

10 A I am not sure what you mean.

11 Q Have you ever heard of a company called New Cassel
12 Construction Corps?

13 A Yes.

14 Q Who do you know them to be?

15 A An organization who gives us jobs.

16 Q Is that the entity you were working for at the
17 North 4th Place job?

18 A I believe so.

19 Q For how long did you work at that site?

20 A I'm not sure.

21 Q Was it more than three months?

22 A Yes.

23 Q Was it more than six months?

24 A Maybe.

25 Q Was it more than a year?

1 A No.

2 Q What type of work did you do at the North 4th Place job
3 in Brooklyn, in March 2013?

4 A Generally construction.

5 Q And, again, at that particular site, what did that
6 mean?

7 A Cleaning up the site, that's about it.

8 Q And how would you clean up the site?

9 A Sweeping multiple things. I don't know. Sweeping,
10 picking up debris.

11 Q How would you transfer the debris you picked up?

12 A By hand.

13 Q Did you carry it in your hands?

14 A Yes.

15 Q The garbage bags, did you use other containers,
16 something else?

17 A We could use garbage bags and fill them in a container.

18 Q Could you describe what the property looked like in
19 March 2013, when it was tall building?

20 MR. RAINIS: You skipped pages.

21 MR. KELLY: Oh, I'm sorry. Page 14.

22 THE COURT: Page 14, line 4.

23 Q Can you describe what the property looked like in
24 March 2013, whether it was a tall building or something else?

25 A No, still on foundation.

1 Q What do you mean by that?

2 A Dirt and gravel everywhere.

3 Q Did there come a time that you learned of a witness or
4 witnessed an accident involving Erwin Herrera?

5 A Yes.

6 Q Tell me what you saw that date, whatever date that was?

7 A Me and Erwin were picking up this -- were walking up
8 this hill with garbage bags and debris. As we are walking up
9 the planted hill, a machine did a 360 and hit Erwin Herrera.

10 Q When you say you were walking up a little hill was that
11 in the construction site?

12 A Yes.

13 MR. KELLY: Page 15, line 3.

14 Q Where was the body bottom of the hill located and where
15 you were walking up to?

16 A Okay, there was a huge hole of the job that was still
17 going on. So, we had to grab debris out of there and bring it
18 out of the site.

19 Q How far down did this ramp go beyond surface?

20 A More than ten feet down.

21 MR. KELLY: Line 23.

22 Q At the time of the accident, where were you in relation
23 to Mr. Herrera?

24 A Right next to him.

25 MR. KELLY: Page 16 line 3.

1 Q Where were you two his right, to his left, someplace
2 else?

3 A To his left.

4 Q At the time of the accident, where on the ramp was Mr.
5 Herrera? Bottom, top, middle or something else?

6 A Middle, close to the top.

7 Q And what happened?

8 A As we are heading up with bags of debris, I heard a
9 loud thump, and all I see is Erwin rolling down the hill.

10 Q Did you see at some point what caused Erwin to role
11 down the hill?

12 A Yes, the machine that hit him.

13 MR. KELLY: Page 17, line 2.

14 Q So, let's go back. Were you and Erwin walking down the
15 hill, up the hill or something else at that time?

16 A We were walking up the hill.

17 Q What, if anything, was Erwin carrying?

18 A Garbage bag full of debris.

19 Q How was he carrying that? One hand down the side over
20 the shoulder like a sack, or something else?

21 A Over his shoulder.

22 Q And what were you carrying at that time, if anything?

23 A A garbage bag full of debris.

24 Q Were you carrying that over your shoulder, as well?

25 A Yes.

1 MR. KELLY: Page 18, line 15.

2 Q You said the ramp was in front of you, as the
3 excavation was in front of you, as you were walking up the hill,
4 right?

5 A Right.

6 Q So, as you were walking up the hill you were coming up
7 out of the hole?

8 A Yes.

9 Q So, where was hole, as you were walking up the hill?

10 A Behind us.

11 Q And as you were coming up the hill, what machine did
12 you see that eventually struck Erwin?

13 A I am not a 100 percent sure what it's called, but it
14 has a huge back-end where it is, as it's turning. I am not sure
15 the guy who was driving can see what is behind him.

16 MR. KELLY: Page 19, line 9.

17 Q What part of the entire piece of equipment -- oh, what
18 withdrawn. What part is the entire piece of equipment turning
19 or just the cab or something else?

20 A The entire piece of equipment turns, the legs stay
21 planted, but?

22 Q Did it have wheels, legs or something else?

23 A No. It didn't have anything. It's just it has wheels,
24 of course. But what I am saying the back of it it's huge. I
25 don't know how to describe it. I'm sorry.

1 Q Do your best because that's what we are all going to
2 ask you to do.

3 A A huge yellow machine. I thought it was an excavator,
4 but there is multiple, and that has a huge back-end.

5 MR. KELLY: Page 20, line 2.

6 Q Does the machine have an arm and bucket on it?

7 A Yes.

8 Q Was that arm an bucket anywhere near the ramp at the
9 time of the accident?

10 A No.

11 Q Where was the arm and bucket?

12 A In front of machine doing something else. Another
13 project going on.

14 Q What part of the machine is it that you say came over
15 and hit Erwin?

16 A The back.

17 Q And you were walk-up the hill out of the I excavation,
18 did you see this machine at all, until it hit Erwin?

19 A Yes.

20 Q Was it directly in front of you, through? One of your
21 sides or something else?

22 A Directly in front of us.

23 MR. KELLY: Page 21 line 3.

24 Q At anytime prior to Erwin getting hit, did you see the
25 back of the machine move towards Erwin?

1 A Yes.

2 Q How long before he was hit, did you see that?

3 A Two seconds, maybe.

4 Q What, if anything, did you do, when you saw it?

5 A I ran to Erwin.

6 Q I'm talking about when you first saw the machine coming
7 towards you, until the time he is hit, did you do anything?

8 A No.

9 Q Did you yell out at all or anything else?

10 A Okay, the machine didn't move, it moves in the 360
11 almost. It doesn't move forward or back.

12 Q I understand.

13 A So, as it's doing the 360, this is when he got struck.

14 MR. KELLY: Page 22, line 22.

15 Q When you saw Erwin get hit, describe what you saw?

16 A I heard a loud noise. I turned around to my right, and
17 I see Erwin stumbling down the hill. As he is stumbling down
18 the hill, I dropped what I have and tried to assist him.

19 MR. KELLY: Page 23 line 11.

20 Q Describe what you heard?

21 A He was to my right with a bag. We were both walking up
22 the hill. The machine's just turns around hits him and he -- I
23 hear just a loud crash sound with bags and everything.

24 Q When you heard the sound and turned around, did Erwin
25 still have the bag with him?

1 A No.

2 Q Where was the bag?

3 A Spilled all over the place.

4 Q When you heard the thud and the sound and turned
5 around, what if anything did you do with the bag that you had?

6 A I dropped it.

7 MR. KELLY: Page 24, line 10.

8 Q At anytime during the day had you noticed any workers
9 standing around the machine with any type of flag directing the
10 people?

11 A No.

12 Q How many times did you see that machine from when you
13 first arrived that day until the time of Erwin's accident?

14 A All day.

15 Q At any point did you see any flagman or anyone else
16 directing people around the machine?

17 A No.

18 MR. KELLY: Page 25, line 11.

19 Q When you worked the die before, did you see any flagman
20 around the machine?

21 A No.

22 MR. KELLY: Page 26 line 7.

23 Q At any point from when you started working at the site,
24 until the time of Erwin's accident, did you ever see any flag
25 people or anyone working around that machine to keep people

1 clear of it?

2 A No, I was a flagger for that job for a couple of
3 months.

4 MR. KELLY: Page 27, line 16.

5 Q Had you ever worked as a flagger for this machine on
6 that site?

7 A No.

8 Q Had you ever seen any flaggers within the site around
9 this machine?

10 A Not that I remember.

11 Q When you worked at the site, as a flagger, what type of
12 equipment was it for?

13 A Cement trucks.

14 MR. KELLY: Page 28, line 19.

15 Q Prior to Erwin's accident, had you seen any other
16 instances where equipment was being operated without flagging at
17 people?

18 A No.

19 Q Was it just this piece of machinery that didn't have
20 flaggers? They didn't have flaggers for when you saw it being
21 operated?

22 A Yes.

23 MR. KELLY: Page 29, line 4.

24 Q After you heard the thud, and went over to Erwin, what,
25 if anything, did you do next?

1 A Try and help him.

2 Q How?

3 A Try to list him up at first.

4 Q Did it that work?

5 A No.

6 Q Why not?

7 A He immediately shouted in pain.

8 Q What did he shout?

9 A That he couldn't get up.

10 Q So, what, if anything, do you do next?

11 A I screamed out for my foreman.

12 Q What was the foreman's name?

13 A Julio.

14 Q And then what happened?

15 A Julio then called the safety manager, safety guy. And
16 I believed he immediately called the ambulance.

17 Q Do you recall who the safety guy's name is?

18 A Fred.

19 Q Did you ever talk to Erwin at all while, he was on the
20 ground, other than what he told you do not try and him up?

21 A Yes, I asked him if he is okay? If there's anything I
22 can do?

23 Q How did he respond?

24 A He didn't. He was just crying.

25 Q At any point did Erwin tell you what happened?

1 A No.

2 Q At any point did you hear Erwin tell anybody what
3 happened in his accident?

4 A No.

5 Q Did you prepare any paperwork, as a result of Erwin's
6 accident?

7 A No.

8 Q Did you tell Julio what happened?

9 A Yes.

10 MR. KELLY: Page 31, line 3.

11 Q What did you tell him?

12 A I told him as we were walking up, the machine hit him.

13 MR. KELLY: Page 32, line 16.

14 Q Do you know the name of the company that was using this
15 piece of equipment, when it struck Erwin?

16 A Levine Builders, maybe.

17 Q What makes you say that?

18 A Because of the logo in front of the job site.

19 MR. KELLY: Page 44, line 9.

20 Q Did anyone provide you instructions that morning in the
21 shanty, as to what you were going to be doing that day?

22 A Yes.

23 Q Who was that?

24 A Julio, our foreman.

25 Q What did Julio tell you with respect to what you and

1 Mr. Herrera were going to be doing that day?

2 A Just to head down there and clean up.

3 Q Nothing more specific?

4 A No, we were doing it days before, so we already knew
5 what to do.

6 MR. KELLY: Page 52, line 24.

7 Q While you're walking up the ramp, as you were walking
8 up the ramp with the garbage bags, did you happen to have
9 occasion to see the machine spinning?

10 A Yes.

11 MR. KELLY: Page 53, line 5.

12 Q Was there any procedure in affect either that affect
13 that either making eye contact with the operator or anything
14 else which would warn you that the machine was about to move, as
15 you were walking up the ramp?

16 A No.

17 Q Was there any alternative group route to get?

18 MR. RAINIS: Where are we?

19 Q To get to the garbage begins, besides walking up the
20 ramp and walking around the excavator machine?

21 A No.

22 THE COURT: Hold on, that was line 19. That was a
23 big jump just make it clear.

24 MR. RAINIS: I see. Thank you.

25 THE COURT: Repeat the question.

1 MR. KELLY: Pages 53, line 19.

2 Q Was there any alternative route to get to the garbage
3 begins besides walking up the ramp and walking around the
4 excavator machine?

5 A No.

6 MR. KELLY: Page 55, line 18.

7 Q On this job did you ever attend any safety meetings?

8 A Yes.

9 Q Who would conduct the safety meetings?

10 A Fred.

11 MR. KELLY: Page 56, line 6.

12 Q Do you recall how many safety meetings you went to
13 prior to the accident?

14 A I may have been to two meetings.

15 Q At any of these meetings, were any safety issues
16 regarding the excavation machine discussed?

17 A No.

18 MR. KELLY: Line 21.

19 Q Were there any toolbox or gang-box meetings?

20 A Yes.

21 Q Did you ever attend any of those in connection with
22 this job site?

23 A No.

24 Q Were you provided any handouts, papers or manuals
25 regarding safety?

1 A No.

2 MR. KELLY: Page 57, line 7.

3 Q So, the only safety instructions you had were the
4 verbal meetings you attended?

5 A Yes.

6 MR. KELLY: Line 20.

7 Q Did you hear the excavator machine in operation, as you
8 were walking up the ramp, just prior to Mr. Herrera's accident?

9 A Yes.

10 MR. KELLY: Page 58, line 4.

11 Q And can you describe what you saw or heard, when you
12 were walking up the hill just prior to the accident?

13 A Just the machine, the loud noise of that machine, and a
14 lot of noise going on it's really --

15 Q When you say loud noise and the condition, was the
16 machine always making a loud noise, did the machine make loud
17 noises when it was about to spin?

18 A No, as you say turn the engine on that normal sound.

19 Q Had you seen the machine spin around before?

20 A Yes.

21 MR. RAINIS: Where are we?

22 MR. KELLY: Page 64, line 9.

23 Q As you are walking up the hill, did you make any eye
24 contact with the operator?

25 A No.

1 Q Did you have any discussion with the operator of the
2 excavator?

3 A No.

4 Q Were there any barriers around the excavating machine?

5 A No.

6 MR. KELLY: Page 67, line 15.

7 Q Just prior to the impact, when you heard the thud, did
8 you hear any shouting, screaming, warning, somebody yelling,
9 anything?

10 A No.

11 Q So, when you saw the excavator spinning, and then the
12 next thing you heard the thud of the machine striking Mr.
13 Herrera?

14 A Yes.

15 MR. KELLY: Page 68, line 4.

16 Q What did you observe next? You heard the thud, what
17 did you see next?

18 A I heard the thud and there was Erwin tumbling down the
19 hill.

20 MR. KELLY: Line 11?

21 Q When you say tumbling down the hill, how was he
22 tumbling?

23 A Rolling.

24 Q Head over feet?

25 A Yes.

1 MR. KELLY: Page 69, line 13.

2 Q Now, after Mr. Herrera came to a stop, what did you do?

3 A I immediately ran to Erwin.

4 MR. KELLY: Line 25.

5 Q What was the first thing, if anything, that he said to
6 you or you said to him?

7 A He didn't say anything. He was -- he was just crying,
8 and in pain.

9 MR. KELLY: Page 70, line 6.

10 Q So, Mr. Herrera was lying on the ramp, and he was
11 crying in pain, I assume?

12 A Yes.

13 MR. KELLY: Line 17.

14 Q How long was it before someone else came to your
15 assistance?

16 A Five minutes.

17 MR. KELLY: Page 71, line 7.

18 Q And how much time was it from the time you got to Mr.
19 Herrera, to the time that Julio got to Mr. Herrera?

20 A Five minutes.

21 Q Within that five minutes that you were with Mr.
22 Herrera, did he say anything?

23 A No.

24 MR. KELLY: Line 20.

25 Q Was he crying in pain?

1 A He was in pain. Yes, crying.

2 Q Was he holding any body parts?

3 A Yes, he was holding -- he was just sitting down crying.
4 I don't know.

5 Q So, he wasn't lying flat, he was sitting up?

6 A When he first rolled down, he was lying flat and we
7 assisted him up.

8 Q How long was he lying flat?

9 A Like a minute.

10 MR. KELLY: Page 72, line 12.

11 Q When you were assisting him up did he say anything?

12 A He shouted. He couldn't get up.

13 Q That's what he said, he couldn't get up?

14 A No. He, when he shouted, as I tried to help him, I
15 noticed -- that's when I just let him go.

16 MR. KELLY: Line 24.

17 Q Was he touching his shoulders, grabbing his shoulders?

18 A No, he was just in pain. He was more traumatized.

19 MR. KELLY: Page 73, line 14.

20 Q Now, when Julio came, did Mr. Herrera say anything to
21 Julio?

22 A No.

23 Q And then Fred the fire safety person came?

24 A Yes.

25 Q Did Mr. Herrera say anything to the fire safety person?

1 A No.

2 Q And then what happened next?

3 A Fred called the ambulance.

4 MR. KELLY: Page 74, line 4.

5 Q How long was it from the time of the accident, until
6 the time the ambulance came?

7 A Maybe 10, 15 minutes.

8 Q During that 10 to 15 minutes, did Mr. Herrera say
9 anything regarding the accident or his injuries?

10 A He said his back, he was holding his back. He
11 couldn't get up.

12 MR. KELLY: Line 25.

13 Q How is Mr. Herrera taken from the place where he was
14 sitting down to the ambulance?

15 A We assisted.

16 Q When you say you assisted, did you help him up and he
17 walked? Or something else?

18 A Me and Julio helped him to the front of the job site.

19 Q Did Mr. Herrera walk with your assistance?

20 A We were carrying him, so no. We were both assisting
21 him, so.

22 MR. KELLY: Page 79, line 16.

23 Q And eventually the ambulance arrived?

24 A Yes.

25 Q And what happened next?

1 A The EMS came out assisted him, and I was sent back to
2 go to work.

3 Q Was he placed on a stretcher or gurney?

4 A I believe so, yes.

5 MR. KELLY: Page 8, line 17.

6 Q Have you ever spoken to Mr. Herrera after he was taken
7 away in the ambulance?

8 A No.

9 Q Did you speak to anyone either at New Cassel or anybody
10 else investigating this accident, as to what happened on that
11 day?

12 A No.

13 MR. KELLY: Page 85, line 16.

14 DEPOSITION EXAMINATION

15 FROM MR. ROBERTA:

16 Q My name is Christopher Roberta. I'm am with Cerrusi
17 and Spring. I represent defendant J and A in this action.

18 You indicate on the date of the accident your foreman
19 assigned you to do those tasks; is that correct?

20 A Yes.

21 Q Did he specifically direct you use the ramp that you
22 and Erwin were using at the time of the accident?

23 A It's the only way up.

24 MR. KELLY: Page 86, line 13.

25 Q Is it your testimony that there was no other way out of

1 the excavation other than that one ramp?

2 A Yes.

3 MR. KELLY: That concludes my reading, Your Honor.

4 MR. RAINIS: I'd like to read some, as well. I
5 don't have someone to --

6 THE COURT: You're just going to read it yourself.

7 MR. RAINIS: It's not that much more, but a little
8 bit. Your Honor, some of the questions I need to reread,
9 but preceding question and then the part that I may need to
10 add.

11 THE COURT: Just make clear what you're reading
12 into the record.

13 MR. RAINIS: Sure. Deposition beginning at
14 page 20, line 15.

15 DEPOSITION EXAMINATION

16 BY MR. RAINIS:

17 Q As you were walking up the hill out of the excavation,
18 did you see this machine at all until it hit Erwin?

19 A Yes.

20 Q Where did you see it at that point, as you are coming
21 up the ramp?

22 A The same spot on top of the ramp.

23 MR. RAINIS: Continuing at page -- beginning at
24 page 23, line 23.

25 Q When you heard the thud, and the sound and turned

1 around, what, if anything, did you do with the bag you had with
2 you? --

3 MR. RAINIS: I'm sorry. I withdraw that. I read
4 that already. Beginning page 21 beginning at line 15.

5 Q I'm talking about when you first saw the machine coming
6 toward him, until the time he is hit, did you do anything?

7 A No.

8 Q Did you yell out at all or anything else?

9 A Okay, the machine didn't move. It moves in the 360
10 almost. It doesn't move forward or back.

11 Q I understand.

12 A So, it's doing a 360, this is when he got struck.

13 Q Did you see it turning in the 360 before it hit him?

14 A No. Sorry. That's okay.

15 Q How long was it, if at all, that you first saw it
16 turning before it actually struck him?

17 A Half way us going up the hill.

18 Q That's when you notice the body of the machine was
19 turning?

20 A Yes.

21 Q What, if anything, did you do, when you saw the machine
22 turning that way?

23 A I went another route, around the machine heading up.

24 MR. RAINIS: At page 24, line 3.

25 Q Had you seen the machine that eventually struck Erwin

1 at any point earlier that day?

2 A Yes.

3 Q Was it located in the same spot throughout the day?

4 A Yes.

5 MR. RAINIS: Page 28, line 15.

6 Q Was anyone else with you and Erwin, as you were coming
7 up the ramp just before his accident?

8 A No.

9 MR. RAINIS: Page 32, line 11.

10 Q Prior to the day of Erwin's accident, had you
11 complained to anyone about machinery being operated without any
12 flagging people around?

13 A No.

14 MR. RAINIS: Page 35, line 6.

15 Q And do you recall seeing Mr. Herrera, looking down at
16 his feet, as he was walking up the ramp just prior to the
17 incident?

18 A Yes.

19 MR. RAINIS: Page 36, line 3.

20 Q But do you specifically recall a flagger being in front
21 of the machine?

22 A I don't remember.

23 THE COURT: Hold on clarify. You're missing a
24 sentence there in that question.

25 MR. RAINIS: I'm sorry, did I not say answer?

1 THE COURT: Line 3, question: But do you
2 specifically recall a flagger being in front of the machine
3 just prior to the accident?

4 Answer: I don't remember.

5 MR. RAINIS: Sorry.

6 THE COURT: Next.

7 Q This affidavit was only given three months ago. Do you
8 recall -- did you recall back in June that there was a flagger
9 in front of the excavation machine?

10 A I don't remember if there was a flagger.

11 MR. RAINIS: Page 38, line 14.

12 Q March 3rd, 2013, you were employed by New Cassel
13 Construction, correct?

14 A Yes.

15 MR. RAINIS: Page 39, line 18.

16 Q Prior to the day of the accident, were you basically
17 doing the same type of job, removing debris or garbage from the
18 excavation?

19 A From the excavation?

20 Q Yes.

21 A We were moving debris out of the foundation job that
22 was going on, yes.

23 MR. RAINIS: Page 40, line 20.

24 Q How long had you been removing garbage or debris from
25 the excavation prior to this accident?

1 A Maybe a week.

2 Q And that was true of Mr. Herrera, as well, he was doing
3 it, removing debris from the excavation about a week before the
4 accident.

5 A Yes.

6 MR. RAINIS: Page 41, line 15.

7 Q What time did you report to work on March 5, 2013?

8 A 7:00 a.m.

9 Q Was there a particular place you reported to, when you
10 went to the job site, in the morning?

11 A We have our shanty, and we go in just to just to get
12 ready for work.

13 MR. RAINIS: Beginning at page 44, line 24.

14 Q Does Mr. Herrera speak English?

15 A Occasionally.

16 Q Were you able to converse with him?

17 A Yes.

18 Q In English or Spanish?

19 A Both.

20 Q When Julio gave you instructions, did he provide them
21 to you and Mr. Herrera in English or Spanish?

22 A Both.

23 MR. RAINIS: Page 45, line 19.

24 Q Now, in the excavation area, you would fill up the
25 garbage bags with debris?

1 A Yes.

2 Q How many garbage bags would you be able to carry up the
3 ramp at one time?

4 A One.

5 Q Where are you taking the garbage or debris to?

6 A To a dumpster.

7 Q Where was the dumpster located?

8 A Maybe in front of the job. I am not a 100 percent.

9 MR. RAINIS: Going to line 48, beginning at
10 line 25.

11 Q Now, the excavation machine that struck Mr. Herrera,
12 that was on the top of the ramp, is that correct?

13 A Yes.

14 Q So there is excavation pit, and then on top of the
15 excavation pit starts the ramp? Or is the ramp going down into
16 the pit?

17 A Okay, there's an excavation going on right here, for
18 example. (Indicating.) And here is the ramp. (Indicating.)

19 So, we are in this pit bringing up debris going up this
20 ramp and here is where the excavator is.

21 Q Would that be ground level?

22 A Yes.

23 Q So, the excavation machine is at ground level?

24 A Yes.

25 MR. RAINIS: Page 50, line 1 -- I'm sorry, line 2.

1 Q What was the ramp made out of?

2 A It wasn't made out of anything.

3 Q It was dirt?

4 A Yes.

5 MR. RAINIS: Page 51, line 9.

6 Q Do you recall how many trips you made from the
7 excavation pit to the bin located near the front of the job site
8 prior to Mr. Herrera's accident on that day?

9 A I don't remember how many trips.

10 Q It was more than one, right?

11 A Yes.

12 MR. RAINIS: Continuing at page 51, line 22.

13 Q And on those occasions, can you describe the route you
14 took?

15 You were going up the ramp, and the excavator machine
16 was on top of the ramp, correct?

17 A Yes.

18 Q Can you describe which way you went next?

19 A We would have to go to the left of the machine, so
20 around the machine, basically.

21 Q Was the excavator machine wider than the ramp?

22 A No.

23 Q So, if you could walk to the left side of the ramp,
24 going up the hill, and not -- if you were walking straight up
25 the left side of the ramp, would you come in contact with the

1 excavator machine?

2 A Close. Yes.

3 Q Close, but you could walk around it?

4 A Yes.

5 Q On those prior trips, at any time during the week
6 before did you ever have occasion to observe the excavator
7 machine spinning or turning?

8 A Yes.

9 THE COURT: Continuing.

10 MR. RAINIS: Continuing at page 53, line 11.

11 Q As you are walking up the ramp just before the
12 accident, are you walking to the left side of the ramp, the
13 right side of the ramp or somewhere else?

14 A Left side.

15 Q Because that is the way you would go around the
16 excavation machine?

17 A Yes.

18 Q Was there any alternate to get to the garbage bins
19 besides walking up the ramp and walking around the excavator
20 machine?

21 A No.

22 Q During that one week period that you were removing
23 garbage from the excavator pit, did the excavator move the at
24 all the one at issue?

25 A I don't recall if it's been moved before this.

1 MR. RAINIS: Continuing at page 54, line 17.

2 Q If you can look at your affidavit again in the last
3 paragraph it says, quote. "We were not provided with proper
4 protection and safety on this construction site" close quote.
5 Can you describe what you meant by that?

6 A We would have to buy our own gloves.

7 Q Anything else?

8 A That's all I remember.

9 Q Did this job site have a safety officer?

10 A Yes.

11 Q Who was the safety officer?

12 A His name is Fred.

13 MR. RAINIS: Beginning at page 57, line 25.

14 Q Where were you looking just prior to his accident?

15 A I was looking up the hill.

16 Q And can you describe what you saw or heard when you
17 were walking up the hill just prior to the accident?

18 A Just the machine, the loud noise of the machine. A lot
19 of noise going on. It's really --

20 Q When you say loud noise of the machine, was the machine
21 always making a loud noise? Or did the machine make a loud
22 noise, when it was about to spin?

23 A No. As you turn the engine on, that normal sound.

24 Q Did the machine make a loud sound or different sound,
25 as it was moving or spinning?

1 A No.

2 Q You had seen the machine spin around before?

3 A Yes.

4 Q What, if any, precautions did you and/or Mr. Herrera
5 take, as you were walking up the ramp to make sure that the
6 machine wasn't spinning, as you were walking close by?

7 A We would wait for our opportunity to go in front of the
8 machine and throw out our garbage.

9 MR. RAINIS: Continuing line 59 -- page 59,
10 line 15.

11 Q Did you actually see the back end of the machine
12 striking Mr. Herrera in the head or not?

13 A No.

14 MR. RAINIS: Going to page 60, starting at line 24.

15 Q Does that photograph refresh your recollection, as to
16 how far from the machine was in relation to the end of the ramp
17 on the date of the accident?

18 A Yes.

19 Q How far was the end of the machine from the ramp?

20 A Maybe ten feet looking at this image now.

21 Q When you walked up the ramp, on occasions prior to the
22 accident, you would walk as far to the left at possible to avoid
23 getting hit by the machine?

24 A Yes.

25 MR. RAINIS: Going to page 61, line 18.

1 Q You said you didn't actually see the machine striking
2 Mr. Herrera, correct?

3 A Correct.

4 Q So, how do you know which part --

5 Mr. Roberta: Yes, you did? Or yes, you didn't?

6 A No, I didn't see him get hit. Yes, this was the part
7 of the back of the machine that hit him.

8 Q How do you know that?

9 A Because this is what was doing the 360, as we were
10 walking up the hill.

11 MR. RAINIS: 63, line 9.

12 Q You were looking at the excavator, as you were walking
13 up the hill?

14 A Yes.

15 Q And you saw it starting to spin?

16 A Yes.

17 Q From the first time you saw the excavator spinning,
18 until the time it struck Mr. Herrera, how much time went by
19 would you say?

20 A 5, 10 seconds.

21 Q 5 or 10 seconds. During those 5 to 10 seconds, did you
22 call out to Mr. Herrera? Or what, if anything, was done?

23 A No. A slight glance, me walking up. You know, I was
24 walking up the hill. A slight glance not looking at the
25 machine, next thing I know Erwin was hit. The minute I take my

1 eyes off the machine, that's when it happened.

2 MR. RAINIS: Continuing at page 65, line 17.

3 Q How do you know that Mr. Herrera was looking down at
4 the ground just prior to the accident, as you stated in your
5 affidavit?

6 A He was hit by the machine, that's how I know he wasn't
7 looking up.

8 Q Did you actually see his head down? Did you see he
9 wasn't looking?

10 A Yeah, yes. I've seen, I've seen him his head down
11 walking up the hill.

12 MR. RAINIS: Continuing at page 67, line 5.

13 Q There could have been a flagger there otherwise you
14 wouldn't have stated it in your affidavit, right?

15 A Yes.

16 Q So there could have been a flagger there?

17 A Yes.

18 Q Do you recall seeing a flagger that wasn't looking
19 toward the machine?

20 A I don't recall.

21 MR. RAINIS: Beginning at page 68, line 22.

22 Q And, again, what was the distance of the ramp from the
23 base of the ramp to the top of the ramp?

24 A It may have been more than 50 feet.

25 Q But he only, he only rolled down five feet?

1 A Yes.

2 MR. RAINIS: Continuing at page 69, line 13.

3 Q Now, after Mr. Herrera came to a stop, what did you do?

4 A I immediately ran to ear run.

5 Q Was Erwin conscious, when you got to him?

6 A Conscious?

7 Q Conscious, was he awake?

8 A Yes.

9 Q Were his eyes open?

10 A Yes.

11 Q He wasn't unconscious?

12 A No.

13 MR. RAINIS: At page 71, line 15.

14 Q Was he able to speak at all?

15 A Not with us. He didn't say anything to us, no.

16 Q But he was conscious?

17 A Yes.

18 MR. RAINIS: Page 84, line 19.

19 Q Prior to this incident, were there any instances where
20 you would be looking to get the operator's visual permission to
21 proceed so you wouldn't get struck by a spinning excavator?

22 A Say the question again? I'm sorry.

23 (Whereupon the referred question was read back by
24 the reporter.)

25 A Yes.

1 Q And it's fair to say that at the time of this accident,
2 Mr. Herrera was not looking at the excavating machine and was
3 looking down, as he was walking up?

4 A Yes.

5 MR. RAINIS: Page 87, line 6.

6 Q Based upon your review of the pictures and these
7 exhibits, you think the ramp was more than 50 feet wide and 30
8 to 50 feet long; is that correct?

9 A Yes, yes.

10 MR. RAINIS: Continuing at 87, page 87, line 20.

11 Q Did you ever tell anyone the ramp was not in good
12 condition?

13 A No.

14 Q You had testified that there may have been flagman
15 present on the day of the accident, at the time of the accident,
16 correct?

17 A Yes.

18 Q And your affidavit indicates that one flagman was
19 present; is that correct?

20 A Yes.

21 MR. RAINIS: Continuing at page 88, line 23.

22 Q You had testified earlier that when Mr. Herrera was
23 looking down at the ground, when the machine started to spin; is
24 that correct?

25 A Yes.

1 MR. RAINIS: Continuing at page 89, line 9.

2 Q Is it your testimony or did you testify earlier that
3 when you saw the machine go to move, you went a different route
4 around the machine to avoid it?

5 A Yes.

6 MR. RAINIS: Continuing at page 89, line 18.

7 Q Is there any particular reason you were aware of why
8 Erwin couldn't have taken the route that you took?

9 MR. KELLY: Objection, calls for speculation. Move
10 to strike.

11 THE COURT: Overruled.

12 Q Is there any particular reason you are aware of why
13 Erwin couldn't have taken the route that you took?

14 A No.

15 MR. RAINIS: That's all I have. Thank you.

16 MR. ROBERTA: Nothing to add, Your Honor.

17 THE COURT: Okay.

18 MR. BAXTER: I do.

19 THE COURT: You do.

20 MR. BAXTER: Yes.

21 THE COURT: All right Mr. Baxter.

22 MR. BAXTER: I'm just going to read a couple more
23 pages, Judge, if it's okay. Starting at page 27, line 16.
24 And this was read by the plaintiff, but I'm going to
25 continue further.

1 DEPOSITION EXAMINATION

2 BY MR. BAXTER:

3 Q Have you ever worked as a flagger for this machine on
4 that site?

5 A No.

6 Q Have you ever seen flaggers within the site around the
7 machine?

8 A No not that I remember.

9 Q When you worked the site, as a flagger, what type of
10 equipment was it for?

11 A Cement trucks.

12 Q What was the nature of the job? What were you there to
13 do?

14 A Guide them into the job site and make sure they exit
15 safely.

16 MR. BAXTER: I'm going to now go to page 73,
17 line 4.

18 Q Did you see any marks on his head?

19 A No, no. Not that I -- I'm sorry not that I remember.

20 MR. BAXTER: That's all I have.

21 THE COURT: Thank you. Okay. Approach.

22 (Whereupon, there is a discussion held at side bar.
23 Off the record.)

24 THE COURT: We're going to break for lunch folks.

25 We will start backup right at 2 o'clock, so be here -- I am

1 letting you go -- not here, but be where you're suppose to
2 be at 2 o'clock. Thank you.

3 THE COURT OFFICER: All rise jury exiting.

4 (Whereupon, the sworn jurors exit the courtroom,
5 the court take its luncheon recess.)

6 *****

7 (CONTINUED ON NEXT PAGE.....)

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1 MR. KELLY: We're going to pre-mark this as
2 Plaintiff's Exhibit 29, 30 and 31.

3 (Whereupon, the demonstrative aid records were
4 premarked as Plaintiff's Exhibits 29, 30 and 31 for
5 identification by the Reporter.)

6 THE COURT: So, Plaintiff's 11, which is the
7 medical records are admitted. So, Plaintiff's 11 is in,
8 those are medical records from Dr. Kaplan.

9 (Whereupon, the medical records from Dr. Kaplan
10 were marked as Plaintiff's Exhibits 11 in evidence by the
11 Reporter.)

12 THE COURT OFFICER: All rise. Jury entering.

13 (Whereupon, the jury enters the courtroom.)

14 THE COURT: Okay. Have a seat, folks.

15 Everyone, welcome back. I hope you all had a nice
16 lunch and you got to stretch your legs a little bit.

17 Mr. Kelly?

18 MR. KELLY: Thank you, your Honor.

19 Plaintiff calls Dr. Jeffrey Kaplan.

20 (At this time, the witness takes the witness stand
21 and was duly sworn and/or affirmed by the court officer.)

22 THE COURT OFFICER: Please raise your right hand
23 and answer out loud.

24 Do you swear or affirm to tell the truth, the
25 whole truth and nothing but the truth under penalties of

1 perjury?

2 THE WITNESS: Yes.

3 THE CLERK: In a loud clear voice, state your name
4 and address for the record.

5 THE WITNESS: My name is Jeffrey Kaplan,
6 K-A-P-L-A-N. My office is at 160 East 56th Street in
7 Manhattan 10022.

8 THE COURT OFFICER: Thank you. You may have a
9 seat.

10 THE WITNESS: Thank you.

11 J E F F R E Y K A P L A N, called as a witness
12 by and on behalf of the Plaintiff, after having been first
13 duly sworn, was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. KELLY:

16 Q Good afternoon, Dr. Kaplan.

17 A Hi.

18 Q Doctor Kaplan, can you tell the jury, what is your
19 profession?

20 A I'm an orthopedic surgeon.

21 Q Tell the jury kindly a little bit about your
22 professional education.

23 A Educational, I went to college at Yale University.
24 When I graduated from college, I went to medical school here in
25 the city at Columbia University. Following that, I did a

1 training program in orthopedic surgery, it's a five-year
2 training program called an internship and a residency. I did
3 that in a place called The Campbell Clinic, which is in Memphis,
4 Tennessee. It's the first orthopedic training program in the
5 United States. Following that, I'm moved back to New York where
6 I have been in private practice ever since.

7 Q Are you licensed to practice medicine in the State of
8 New York?

9 A Yes.

10 Q Are you board certified?

11 A I am board certified.

12 Q Describe to the jury what board certification means in
13 your medical specialty?

14 A Board certification is similarly an extra qualification
15 that you can get after college, medical school and residency
16 training. You basically take a series of examinations over a
17 number of years. If you complete those examinations, the board
18 of expert physicians who administer that test deems you board
19 certified if they feel you've reached a certain level of
20 expertise and knowledge in orthopedic surgery.

21 Q Have you engaged in any research or made any
22 publications?

23 A I have.

24 Q If can you tell the jury some of those.

25 A I have done research in bone targeted antibiotics. I

1 have done some research having to do with reconstruction after
2 trauma, particularly about the foot and ankle. I have done some
3 additional anatomic research regarding the upper extremities.

4 Q Can you tell the jury please some of your current
5 professional affiliations including hospitals?

6 A I'm on the staff of New York Presbyterian Hospital, as
7 well as Mt. Sinai Hospital Systems in the city. I'm a member of
8 the New York State Athletic Commission in the Boxing Division,
9 I'm the orthopedic surgeon for the Boxing Division. I'm a
10 member of the American Trauma Association.

11 Q And are you engaged in the private practice of
12 orthopedics?

13 A Yes.

14 Q Tell the jury what is orthopedic medicine.

15 A Orthopedics is the study of bones and joints and as to
16 injuries and abnormalities to the bones and joints. And then
17 the treatments of those injuries or abnormalities either with
18 conservative measures, meaning medications, physical therapy
19 injections. Or if those things don't work or inappropriate,
20 then more aggressive things like surgery.

21 Q Do you regularly see patients?

22 A Yes.

23 Q In our case, Mr. Herrera contends he was injured when
24 struck by an excavator and had no prior back, neck, shoulder or
25 ankle complaints before the accident.

1 A Uh-huh.

2 Q Do you have experience in applying your professional
3 skills to people who have Mr. Herrera's type of complaints?

4 A Certainly, yeah.

5 Q Have you been previously qualified as an expert in New
6 York courts?

7 A I have.

8 MR. KELLY: Your Honor, I offer Dr. Kaplan as an
9 expert in orthopedic medicine.

10 THE COURT: I find him qualified, thank you.

11 Q Dr. Kaplan, have you performed subtalar fusions before?

12 A Yes.

13 Q Have you performed calcaneal fusions before?

14 A Yes.

15 Q Did I get that right?

16 A Pretty close.

17 Q Impressive.

18 And you of course have done prior arthroscopic shoulder
19 surgeries; is that correct?

20 A On this gentleman, yes, and many others, yeah.

21 Q Doctor, I'm going to ask you a series of opinions. And
22 all those opinions are to be a reasonable degree of medical
23 certainty whether I say those magic words or not.

24 Is that okay with you?

25 A Absolutely.

1 Q You brought with you today some records and we have
2 records that were suspended into court.

3 Did your office provide the subpoenaed records to the
4 Court?

5 A I believe so, yes.

6 Q Do you have a mirror copy for you to use today?

7 A I believe so, yes.

8 MR. KELLY: Your Honor, may the witness use his
9 records?

10 THE COURT: Yeah. That's Plaintiffs 11, which is
11 sitting right next to you, doctor.

12 Q Did there come a time, Doctor, that you encountered
13 Mr. Herrera as a patient?

14 A Yes.

15 Q Tell us the nature of the -- withdrawn.

16 What's the name of your practice?

17 A It's called New York Ortho, Sports Medicine and Trauma,
18 P.C.

19 Q Did there come a time when New York Ortho encountered
20 Mr. Herrera as a patient?

21 A Yes.

22 Q Can you describe the nature of that encounter when it
23 occurred and so on?

24 A Umm, let me orient myself to this particular batch of
25 records here.

1 THE WITNESS: Would it be possible to use my
2 records just because I have got them tabbed?

3 THE COURT: Nope.

4 Q So, Doctor, the records you brought to court today, are
5 they the records from your office?

6 A They are.

7 Q Are they the records kept in the normal course of your
8 business at your office?

9 A Yes.

10 Q Is it your obligation to keep those reports?

11 A Yes.

12 Q Do those reports accurately and timely reflect the
13 findings and the -- your office matters in the profession of
14 orthopedic medicine?

15 A Yes.

16 Q Are you okay?

17 A Yes.

18 Q All right, okay.

19 MR. KELLY: I was going to ask if he can use his
20 records because they're tabbed, to save us some time.

21 Q But if you're good, you're good?

22 A Yeah.

23 So, Mr. Herrera first came to our office on, looks
24 like, 3/7/13. And he initially saw an associate of mine named
25 Dr. Eric Crone.

1 Q Did Mr. Herrera make any complaints at the time that he
2 initially came to your office?

3 A Dr. Crone's records that he was complaining of right
4 hand pain, pain in the right shoulder, neck pain, low-back pain,
5 pain radiating into the right leg and left ankle pain with
6 walking.

7 Q Did Mr. Herrera give a history of the -- did he give a
8 history?

9 A He did. He indicated that he was struck by a
10 excavator, there was loss of consciousness, that he was
11 initially evaluated through Bellevue Hospital. He indicated
12 past medical history of a muscular injury to his left leg in
13 1995, some renal stones which required surgery in 2008 and 2009.
14 And that he was working in his usual capacity at the time of the
15 accident which occurred on 3/5/13.

16 Q Was a physical examination performed of Mr. Herrera at
17 that time?

18 A Yes.

19 Q Can you tell the jury generally what physical
20 examination in your office consists of?

21 A A physical examination generally consists of taking the
22 history and what the complaints are and then examining the body
23 parts that are having complaints, having trouble. And an exam
24 is usually touching the area, it's called palpating, looking for
25 tenderness, observing the area, looking for any swelling,

1 bruising, abrasions, things like that, if it's a fresh injury,
2 examining the joints for motion and stability, examining the
3 muscles for strength.

4 Q Were any records reviewed at the initial encounter?

5 A It looks like on -- I don't see that Dr. Crone notes
6 whether he reviewed any medical records or not.

7 Q Were there any significant findings made at the initial
8 encounter?

9 A Well, Dr. Crone did find neck and low-back tenderness.
10 He noted some abnormalities of motion in the neck, as well as
11 abnormalities of motion about the shoulder with limited motion
12 in the ability to move the arm up. At the ankle, he noted
13 limited motion, he noted swelling and noted complaints of pain.
14 He noted that there was limited motion of the low-back as well,
15 and some atrophy of lower leg as well.

16 Q Did Mr. Herrera follow-up with your office?

17 A He did.

18 Q Describe for the jury what that means to follow-up with
19 your office; did he come back every week, every month, something
20 else?

21 A Generally -- I haven't noted that, but generally people
22 come back every month, month and a half while they are actively
23 being treated for six weeks.

24 Q Was Mr. Herrera sent for any diagnostic radiology?

25 A He was. He was sent for multiple imaging studies.

1 Initially he had MRI studies performed of the shoulder. He has
2 had MRI studies of the ankle, MRI studies of the neck and the
3 low back as well have been performed.

4 Q Just confining ourselves to the ankle and shoulder at
5 this point, would the findings from examination history and
6 radiology, are they the competent producing cause of pain to
7 Mr. Herrera?

8 A There were multiple findings in the imaging studies of
9 his shoulder as well as his ankle that can be productive of
10 pain, cause pain.

11 The MRI of his shoulder showed a full thickness tear of
12 the rotator cuff. The rotator cuff is a group of tendon --
13 group of tendons that form a cuff around the top of the arm bone
14 and are responsible for moving the arm so that when -- there are
15 four muscles of the rotator cuff, depending on which one fires,
16 the arm moves in different ways and rotates and so they call it
17 the rotator cuff of muscles and tendons. And he had a
18 full-thickness tear noted by MRI.

19 He also had separation of the acromioclavicular joint,
20 that's generally called the AC joint, it's that joint right on
21 top of your shoulder when you talk about a separated shoulder,
22 so he had a separation of that. And he had other tears about
23 the muscles of the shoulder, the biceps where it goes into the
24 shoulder and some cartilages inside the shoulder by MRI.

25 At the ankle, he had findings of what's called an

1 osteochondral defect. The word osteo has to do with bone.
2 Chondral has to do with cartilage. So where the surface of the
3 joint, the cartilage, which is the smooth part of the joint,
4 meets the bone, which is the supporting part of the joint, he
5 had damage to that area. So that's damage to the joint's
6 surface of the ankle and the hind foot which is the part of the
7 foot underneath the leg, the hind foot is close to the forefoot,
8 which is the toes. Those were the major findings on the imaging
9 studies.

10 Q Let me ask you then: Are the findings that you have
11 from Mr. Herrera with respect to the shoulder, do you have an
12 opinion to assume that Mr. Herrera had no prior trauma to the
13 right shoulder, no prior treatment, was working in full capacity
14 and no history of prior shoulder complaints, do you have an
15 opinion to a reasonable degree of medical certainty whether or
16 not the accident where Mr. Herrera was hit by an excavator was
17 the cause of his shoulder problem?

18 A It certainly seems reasonable given his work history,
19 no complaints of pain, with a full-thickness tear of the tendon
20 which limits your motion and strength and is productive of pain,
21 that that likely occurred at the time of the accident since he
22 started complaining about it after the accident, yes.

23 Q With respect to the findings concerning his left ankle,
24 assume that Mr. Herrera had no limitations of work, was working
25 every day in heavy construction and had no prior treatment, no

1 ongoing treatment, no complaints with respect to his left ankle,
2 do you have an opinion to a reasonable degree of medical
3 certainty whether or not the accident was the cause of
4 Mr. Herrera's ankle condition?

5 A I think again it seems reasonable to make an opinion
6 that since he was working in a labor job that required him to be
7 on his feet, to walk around, that the findings, which are
8 significant findings, were likely not present prior to the
9 accident. Certainly I would not expect all of them to be
10 present. There are some arthritic changes, those are probably
11 preexisting, but they weren't limiting his work and his
12 activities.

13 Q And recalling that Mr. Herrera had an accident
14 involving his left leg in 1995, I would like you also to assume
15 at that Mr. Herrera is going to testify later in this trial that
16 prior to this accident, he habitually ran 15 laps around a
17 soccer field to keep in shape.

18 Do you have an opinion to a reasonable degree of
19 medical certainty whether or not the 1995 accident impacted
20 Mr. Herrera's left foot complaint after the accident?

21 A Yeah, I did not see him before the accident, so I don't
22 know what his complaints are, but it would be unlikely that
23 following this accident and with these complaints, especially
24 something we have not talked about yet, which is a nerve injury
25 with a dropfoot, inability to lift his foot up actively, I did

1 not predate the accident, I believe it occurred in the accident.

2 Q How do you know that, what so supports that opinion,
3 Doctor?

4 A An injury that he had with a dropped foot, which means
5 he can't actively lift his foot, causes what's called a slap
6 gait, meaning when you walk your foot slaps down because you
7 have to kick forward in order to get your foot up otherwise you
8 would just trip over the front of your foot. People can't run
9 with that in general, that would be a very, very difficult thing
10 to run with and it would certainly be noticeable to Mr. Herrera.

11 Q Doctor, did your office form a treatment plan for
12 Mr. Herrera?

13 A Yes.

14 Q Describe for the jury what a treatment plan is.

15 A So, a treatment plan is basically just to address in a
16 case with multiple trauma each individual complaint, have the
17 appropriate doctor see the problem, treat it conservatively
18 first. If -- again, if it's not working, if it doesn't respond
19 fully or enough to conservative treatment, then different things
20 like surgery or injections could be applied.

21 Q Tell us a little bit about what we mean when he talk
22 about conservative treatment. What was prescribed for
23 Mr. Herrera?

24 A Mr. Herrera had physical therapy. He used oral
25 medications. He used a foot brace to keep his foot from

1 dropping. He used a bandage around his foot initially called a
2 stirrup. He had epidural injections about the spine given by
3 the doctors that were treating his spine. He had injections at
4 the ankle and at the shoulder prior to recommending surgery.
5 And having failed conservative treatment, I actually recommended
6 surgery for his shoulder and eventually ending up performing
7 that.

8 Additionally, he had a fairly complex foot problem and
9 I felt he would be better served in the hands of a guy who lucky
10 enough is in New York, he's one of the world experts on this
11 procedure that Mr. Herrera had called a triple arthrodesis.
12 Arthrodesis means fusion, fusing two bones together. A triple
13 arthrodesis is fusing two bones together at three different
14 spots in the foot, and getting that right is tricky.
15 Dr. Scheskier, S-C-H-E-S-K-I-E-R, is -- people come all over the
16 world to see him.

17 Q Did you in fact refer Mr. Herrera to Dr. Scheskier?

18 A I did.

19 Q But you had performed that surgery in the past, have
20 you not?

21 A I have. And I certainly performed -- the trick is
22 getting all three of the joints in the right position and fusing
23 them. I had performed each of those individual pieces, single
24 arthrodesis, many times. But performing a triple arthrodesis is
25 complicated, so I felt it was better done in the hands of

1 someone who does it often.

2 Q Was Mr. Herrera compliant with your treatment plan?

3 A Yes.

4 Q And did there come a time when the treatment plan
5 failed and he was indicated for surgery?

6 A Correct.

7 Q And Dr. Scheskier performed the initial surgery, is
8 that correct?

9 A He performed two surgeries his foot, yeah.

10 Q Did you go through the records of Dr. Scheskier's
11 surgery?

12 A I have.

13 Q Are you familiar with those records and the surgery?

14 A I am.

15 Q We have marked as demonstrative aids Plaintiff's
16 Exhibit 29 and 30 and 31.

17 Would it assist you in describing this surgery to the
18 jury if you utilized the demonstrative aid?

19 A Yes, I think so.

20 MR. KELLY: I would ask that we be allowed to use
21 the demonstrative aid for the balance of the doctor's
22 testimony?

23 THE COURT: Any objection?

24 MR. RAINIS: No objection.

25 MR. ROBERTA: No objection.

1 THE COURT: Those are admitted as Plaintiff's
2 Exhibit 29, 30 and 31 and you can set those up.

3 MR. KELLY: Thank you. May I get the easel?

4 THE COURT: Yes. Can you mark them into evidence?

5 (Whereupon, the demonstrative aid records were
6 marked as Plaintiff's Exhibits 29, 30 and 31 in evidence by
7 the Reporter.)

8 Q Doctor, I'm going to kindly ask you to step down to the
9 demonstrative aid, and if you need a laser pointer or marker
10 just let me know you.

11 A I have a model too.

12 MR. KELLY: We will need to mark that as
13 Plaintiff's Exhibit 32 for identification.

14 THE COURT: Has counsel seen it?

15 MR. RAINIS: No.

16 THE COURT: Well, they need to look at it.

17 MR. KELLY: It's a foot.

18 THE COURT: Just put it down.

19 No objection?

20 MR. RAINIS: I've never seen it. What am I
21 objecting to?

22 MR. KELLY: Looks like a foot. I'm kidding.

23 THE COURT: Am I keeping that? Am I putting that
24 into evidence?

25 MR. KELLY: No, it's not going to be moved into

1 evidence, Judge. It's a demonstrative aid.

2 THE COURT: You don't have an objection?

3 MR. RAINIS: Sorry?

4 THE COURT: Do you want to come up and look at it?

5 MR. RAINIS: Yeah, Judge.

6 THE COURT: Come up and look at it.

7 MR. RAINIS: Is he offering that into evidence?

8 MR. KELLY: No, I'm just asking --

9 (Whereupon, a brief sidebar was held.)

10 Q Doctor, if you would kindly orient us to what we're
11 looking at in Plaintiff's demonstrative A.

12 A So, this is a anatomic drawing of a left foot. You've
13 got one of the slices they call it or plates from the CT scan of
14 the foot. So, basically, the hind foot is made up of several
15 bones. Mr. Herrera had injured the bones and had the
16 osteochondral defect that we talked about in the talus bone.

17 The talus is sort of the center of the ankle and the
18 center of the hind foot. And as such, it has joints that it
19 connects with, the calcaneous which is the heel bone, the
20 midfoot and the major bone at the midfoot, it's called the
21 cubital, as well as the -- it's linked to the toes and the rays
22 that eventually become the toes called the metatarsals.

23 So, if there's only problems in the joint between the
24 talus and the calcaneous, you can do a fusion between those two
25 bones. But oftentimes because all of these joints are linked

1 and especially when you're walking, if you push off, your foot
2 has to twist, push down in multiple ways, you don't just -- it's
3 not just a hinge, pushing down and pushing off.

4 In order to relieve pain because of an injury here, you
5 have to fuse or join together all of the moving parts in order
6 to get pain relief. So, Dr. Scheskier performed this
7 arthrodesis at multiple points in the hind foot all the way to
8 the midfoot in order to try to get some pain relief.

9 Q Doctor, you said arthrodesis, describe for the jury
10 what that means.

11 A Sorry. The term arthrodesis and the term fusion are
12 the same thing. Arthro means joint, like arthritis. Desis
13 means to join together, so it means to join together at a joint.
14 So, it's the same thing. I'll use the term fusion from now on.

15 So, Dr. Scheskier undertook a surgery to make an
16 incision on the side of the hind foot, all the way down, you
17 open up the joints, you scrape off the joint surface, the
18 cartilage joint surface that's -- if you've ever looked at the
19 end of a chicken bone you see that pearly smooth surface, that's
20 a smooth surface that moves inside of the body. If that surface
21 is not smooth, you get -- it's arthritis and you get pain, you
22 get noise, you get swelling.

23 So, here we take off the joint surfaces so we've got
24 raw bone ends. And then with some hardware that's specially
25 designed, we go across the joint and join the joints together

1 and we actually try to pull them together. So, this is a
2 special device, you put two screws on each side of the joint,
3 you stick a little pair of pliers in here and spread this,
4 spread this out so that the joint comes together, it's pulled
5 together.

6 This is a special surgical screw and you can see on
7 both of these screws that there are threads on this end and a
8 head here, so as you're screwing in, this stops, but this keeps
9 pulling and it pulls the bones together, hopefully causing them
10 to fuse to make one solid piece out of this area in an attempt
11 to decrease pain with walking that's a result of this injury.

12 Q The condition we see, the pre-surgical condition to
13 Mr. Herrera's ankle, is that the result of the accident of March
14 5, 2013, in your opinion?

15 A In my opinion, certainly the symptoms and what we're
16 seeing on the CT scan are a result of, again, probably some
17 preexisting arthritis, but not to that disagree.

18 Q And the presurgical condition of Mr. Herrera's ankle,
19 is that the competent producing cause of pain?

20 A Yes, I believe it is.

21 Q Doctor, is the condition shown postoperatively, is that
22 permanent?

23 A It's supposed to be permanent. It's supposed to join
24 these bones together as if they had fractured and then grown
25 together.

1 Q And postsurgically, is there any pain to the patient?

2 A There is pain associated with this surgery. And when
3 you stop the motion of a member of joints, the other joints have
4 to take up the slack for it. So, you're sort of robbing Peter
5 to pay Paul, which means you get rid of the majority of the
6 pain, but you do stress the foot.

7 Q Is that because motion is reduced in the joint?

8 A There is no motion any longer here. Those bones are
9 fused together, there's no joint left. The other joint's still
10 are involved in walking.

11 Q Take your seat, please.

12 Doctor, did Mr. Herrera continue to follow-up with your
13 office?

14 A Yes.

15 Q And was there a plan of treatment for Mr. Herrera when
16 he followed-up with your office?

17 A Yes.

18 Q Was Mr. Herrera diligent in following that plan?

19 A He was.

20 Q And did there come a time when Mr. Herrera started to
21 make more complaints about his left ankle?

22 A Yes.

23 Q Can you describe what those complaints were?

24 A He had continued pain in the ankle and he didn't seem
25 to be getting better, seemed to be progressing even though he

1 had the appropriate surgery. So, I asked him to continue
2 visiting with Dr. Scheskier, who eventually recommended a
3 revision surgery, which means to explore the fusion, see if it
4 was solid and if not, add some bone graft and things like that
5 to it, additional hardware as well.

6 Q Doctor, we have previously marked Plaintiff's
7 Exhibit 30, a demonstrative aid with respect to the hind foot
8 surgery of February 23, 2015.

9 Would it assist you in describing the revision surgery
10 to Mr. Herrera to utilize the muscle?

11 A Yes.

12 MR. KELLY: May we use the demonstrative aid, Your
13 Honor?

14 THE COURT: Yes.

15 Q Doctor, I will kindly ask you to come down again.

16 Why did Mr. Herrera need surgery?

17 A The subtalar joint, which is the joint under the talus,
18 apparently did not have a solid fusion. And again, if the
19 fusion is not solid, had a partial union, that means partial
20 growing together of the bones, then it needs to be refreshed and
21 in this case more bone graft was put in. Bone graft is like
22 seed bone, it causes a reaction to grow together.

23 And so, Dr. Scheskier did two things in the subtalar
24 joint; he freshened up the joint and added bone to it and he put
25 an additional screw across the joint. Sometimes one screw

1 allows some rotation. If you put two screws, there is no more
2 rotation. So, Dr. Scheskier put an additional screw to try to
3 decrease any rotation of that joint that might have been
4 responsible for the partial union.

5 He also supplemented the fusion that he had made
6 between the fourth ray and the cuboid, initially he had put a
7 screw in there. This is that similar compression device where a
8 screw is put on either side of the bone -- either side of the
9 joint rather, and then this is widened this way to bring the two
10 bones together, compress them together. So, that's a
11 supplemental hardware here and here with additional bone graft
12 to try to solidify this fusion.

13 It's a very difficult fusion, as I told you that
14 earlier, it's something that is not frequently done and it needs
15 to be done in the hands of someone who knows what they're doing.
16 And even in those hands, it's tricky.

17 Q So, the presurgical condition of Mr. Herrera's foot, is
18 that painful?

19 A Yes, absolutely. So, you have basically made severe
20 arthritis of the foot hoping it'll grow together and get solid
21 and then there would be no joints and no arthritis. But did not
22 grow together solidly, it was only a partial union and so you
23 basically created severe arthritis in the foot.

24 Q Is this surgery the result of the accident to
25 Mr. Herrera with the --

1 A I do believe that all of these things fall -- I do
2 believe that all of these things followed necessitating the
3 surgery.

4 Q Is this second surgery, is that painful as well?

5 A This, I think, is a more painful surgery, yes.

6 Q Is there a recovery time?

7 A There is a period of immobilization to try to allow the
8 bones to grow together, physical therapy, progressive
9 ambulation, progressive walking, so, yes.

10 Q How long is the immobilization period?

11 A It's usually about 6 to 12 weeks depending on what the
12 X-rays show.

13 Q Now, the condition shown to Mr. Herrera's left ankle
14 post-operatively, is that a permanent condition?

15 A Yes. Again, this is permanent, it's a salvage
16 procedure, you're fusing bones together. There's no way to
17 recreate that joint, nor would you want to at this point.

18 Q Now, is Mr. Herrera going to have any motion in that
19 joint after this surgery?

20 A He has no motion in these three joints, hopefully.

21 Q How does that affect the rest of his body?

22 A Again, it's a situation, as I said, I used the same
23 term, robbing Peter to pay Paul. You freeze one area of the
24 body, the motion there but you continue walking, so you have the
25 compensate with the other joints. And it does have an affect of

1 speeding up the wear and tear on those joints.

2 We all, as I said, get some arthritis over time, we all
3 get some wear and tear, but you're putting extra pressure on the
4 ankle joint, on the forefoot joints, on the additional midfoot
5 joint. And, so, it's likely that he will get arthritis at a
6 quicker pace than he would, say, on the other foot or you and I
7 would.

8 Q Now, post-surgically, can Mr. Herrera run or play
9 soccer?

10 A It would be very difficult to run or play soccer with
11 this just from what is called proprioception, meaning knowing
12 where your foot is in space, because it's not going to move a
13 normal way. So, sports activities are difficult with fusions.

14 Q After this surgery, will Mr. Herrera be disabled from
15 engaging in heavy construction work, walking up and down ramps,
16 on ladders and things like that?

17 A The main restrictions would be walking on uneven
18 surfaces. He won't be able to walk on uneven surfaces because
19 the foot doesn't accommodate to that, won't move, if he steps on
20 something uneven. I usually restrict people from climbing
21 ladders, climbing stairs, working at heights, on having to
22 balance on metal beams or wood beams. So, yes, he would be
23 certainly restricted in that way.

24 Q And is that disability permanent?

25 A Yes.

1 Q Doctor, did Mr. Herrera follow-up with your office
2 thereafter?

3 A Yes.

4 Q Tell us the nature and course of his follow-up
5 treatment with your office after the hind foot revision in
6 February of 2015?

7 A Following the hind foot revision surgery, he continued
8 to follow in our office. I treated -- continued to treat his
9 shoulder, he had treatment for his back. He was sent to
10 physical therapy. And he eventually required a surgery to the
11 shoulder for the rotator cuff tear.

12 Q Did you perform that surgery?

13 A I did.

14 Q Doctor, was there any conservative course of therapy
15 prescribed to Mr. Herrera?

16 A He had extensive physical therapy prior to that. He
17 had injections in the shoulder. He had oral medications, none
18 of those things were sufficient to significantly change the
19 course of his injury.

20 Q Do you recall when he was indicated for surgery?

21 A I'm just trying to find that now in this stack of
22 records.

23 So, he had surgery performed on 9/9/15.

24 Q Was Mr. Herrera making complaints of pain with respect
25 to his right shoulder before the surgery?

1 A Pain, limited motion, difficulty sleeping, yes.

2 Q Do you have an opinion with a reasonable degree of
3 medical certainty, Doctor, whether or not Mr. Herrera's right
4 shoulder complaints were caused by the accident of March 5,
5 2013?

6 A I do.

7 Q Can you tell the jury what that opinion is, please?

8 A My opinion is that given the full-thickness tear, the
9 nature of his injury, I believe his injury occurred at the time
10 of the accident, otherwise, I don't think he would have been
11 able to do the type of work that he was doing which required
12 lifting and pushing and pulling and things like that.

13 Q Tell us, you mentioned the term "full-thickness tear"
14 about three times now.

15 Describe for the jury, if you would, what that exactly
16 means.

17 A So, the rotator cuff is a cuff of tendons that goes
18 around the top of the shoulder bone and is connected to the
19 muscles around the shoulder blade. The tendon is basically a
20 rope that pulls, when the muscle contracts, it pulls on the
21 bone. And so, when the muscle contracts, the bone goes up
22 because it's connected to the tendon. If that tendon is torn in
23 a full way, there's just no connection there, so there's not
24 full motion. It's like cutting the rope on a pulley, you're
25 just not connected anymore. And so, that had to be repaired.

1 Q That was the condition Mr. Herrera was in prior to the
2 surgery?

3 A Yes.

4 Q Do you have an opinion to a reasonable degree of
5 medical certainty whether or not the accident of March 5, 2013
6 caused Mr. Herrera's condition full-thickness tear rotator cuff
7 injury?

8 A Again, I believe it did because I don't think he could
9 have worked comfortably or at full capacity with that injury.

10 Q Doctor, we have a demonstrative aid that's marked as
11 Plaintiff's Exhibit 31 which concerns the arthroscopic surgery
12 to the right shoulder.

13 Would this demonstrative aid aid you in describing that
14 surgery to the jury?

15 A I think it would.

16 MR. KELLY: Your Honor, may I use the aid.

17 THE COURT: Yes. Is that what you mean? What
18 number?

19 MR. KELLY: 31.

20 Q So, Doctor, I would ask you to come down.

21 And I see that you brought another demonstrative aid
22 which is a shoulder?

23 A The right.

24 MR. KELLY: And so the attorneys have had an
25 opportunity to review that.

1 Your Honor, can Dr. Kaplan utilize the
2 demonstrative aid which is a plastic recitation of the
3 shoulder?

4 THE COURT: He may, but I would like to note that
5 it is not being moved into evidence, but it is being shown
6 to the jury on consent of all counsel.

7 Doctor, I think I might have pulled the bone out
8 of the joint, so if I didn't put it in the right way,
9 you'll you take care of that.

10 MR. KELLY: I will pull it out too.

11 A So, it's sometimes hard to figure out the
12 three-dimensional nature of a joint just by looking at
13 two-dimensional pictures.

14 So, this is a model of a right shoulder. The shoulder
15 is made up of the shoulder blade called the scapula; the collar
16 bone, called the clavicle; and the arm bone, called the humerus.
17 So, it sits like that, the collar bone up front, shoulder blade
18 in the back.

19 I was describing this cuff of tendons, it goes around
20 the end of the top of the bone. When these muscles fire,
21 depending on which one fires, the arm moves because it's
22 connected to the muscle by the tendon. If there's a tear, a
23 full-thickness tear of the tendon, you lose the ability to move
24 that bone with that muscle.

25 Now, you do have other muscles that can move it in

1 different directions, but not for the specific direction that is
2 mediating or that that muscle controls.

3 So, Mr. Herrera had a full-thickness tear in the
4 supraspinatus tendon, that's this tendon here above the spine of
5 the scapula, it was torn off. So, when we did our surgery, we
6 found a hole where the tendon was not connected to the bone, by
7 looking inside the shoulder with the telescope through incisions
8 all around the shoulder.

9 Additionally, through these incisions we can put small
10 special tools, we can put a suture or a stitch into the end of
11 the tendon we find and then we can drill a hole in the bone and
12 enter that stitch into the bone with a -- what's called a
13 collagen peek, P-E-E-K, peek anchor, that's something that the
14 bone absorbs and soaks up after the tendon has grown back into
15 bone. So, that was the major part of the surgery, reattaching
16 the tendon to the bone.

17 We also took out some inflamed tissue that was around
18 the joint. That inflamed tissue is just an indication there's
19 an ongoing problem inside the joint that causes inflammation.
20 Inflammation is swelling in the joint which can be painful,
21 usually it's painful. So, that's how we get into the rotator
22 cuff and tack it back in.

23 Q Doctor, the presurgical condition as shown in the
24 demonstrative aid, do you have an opinion whether or not that is
25 caused by the accident to Mr. Herrera on March 5, 2013 when he

1 was struck by the excavator?

2 A I do believe that this tear in the rotator cuff and the
3 supraspinatus tendon was caused by the accident because, again,
4 I don't think he could have done the type of work he was doing,
5 certainly not comfortably, he would have known about it. And
6 so, I do believe it was caused by the accident.

7 Q And the changes made to Mr. Herrera's shoulder as a
8 result of the surgery, are those changes permanent?

9 A There's a -- this hole that's been closed, but he's
10 permanently got a thread anchor in there holding it down.

11 Q Do we need to know anything more about this?

12 A No, I think that's it.

13 Q Tell us a little bit about Mr. Herrera's follow-up with
14 your office after the right shoulder surgery.

15 A After the right shoulder surgery he required additional
16 physical therapy. When you tear this tendon, the muscle is not
17 working so it gets smaller, it does what's called atrophy. And
18 many of my notes I indicate that he has some atrophy of his
19 shoulder girdle, he required additional therapy to try to build
20 that back up and try to regain his motion.

21 Q With respect to Mr. Herrera's right shoulder and left
22 ankle, did you form a prognosis?

23 A I did.

24 Q Tell the jury firstly what prognosis means and what the
25 various prognoses were for the right shoulder and left ankle?

1 A Prognosis means predicting the medical future by what's
2 happened and what you know about the types of treatment, surgery
3 and response to those treatments that he's been able to achieve.
4 And with regard to the shoulder, Mr. Herrera has had continued
5 atrophy as of the last time I saw him, which was a while ago, so
6 he has not had therapy since then as far as I know. Still has
7 atrophy, still has some limitation of motion.

8 Additionally, he's got this permanent fusion of his
9 hind foot. He's got the weakness part of the footdrop. And so,
10 he has a, what I consider, poor prognosis. Poor prognosis means
11 that he has a permanent problem that certainly in the foot, it's
12 going to be a progressive problem because the other joints are
13 affected. And over time, as I indicated, he'll get some
14 arthritis in a more rapid pace than just normal wear and tear
15 aging.

16 And the same goes for the shoulder, no matter how good
17 a job we do reconstructing the shoulder, the mechanics are
18 different in the abnormal shoulder and the normal shoulder. So,
19 he will probably get some wear and tear changes at a quicker
20 pace on the right than the left.

21 Q And do you anticipate that Mr. Herrera's condition will
22 get worse as he ages?

23 A I do.

24 Q Tell the jury why that would be.

25 A These are moving parts. They continue to get wear and

1 tear. Again, we all get wear and tear. But he's had an injury
2 and these joints move abnormally now. So, they will progress to
3 get wear and tear more quickly than the other side.

4 Q I would like you to assume, Doctor, that Mr. Herrera
5 continues, despite surgery, to make some complaints of pain with
6 respect to his right shoulder and left ankle.

7 Do you anticipate that Mr. Herrera will continue in
8 pain for the balance of his life?

9 A Certainly with the shoulder, I expect he'll have good
10 days and bad days. With the foot, I expect he has pain likely
11 knowing what I know about this type of surgery and procedure and
12 injury he had. He will likely have surgery -- he will likely
13 have pain on a daily basis, some days worse than others.

14 Q Is Mr. Herrera permanently disabled from his profession
15 as a heavy construction worker?

16 A I'm not a vocationalist, but certainly what I know of
17 heavy construction, he cannot climb ladders, climb stairs. With
18 the fusion of the hind foot, the limited motion, he can't walk
19 on uneven surfaces, so gravel, rebar, things like that, he can't
20 balance. He shouldn't be working at heights because of his
21 different -- what's called proprioception, that balance that we
22 normally have. He can't do repetitive overhead activities,
23 lift, push or pull in a normal way with his right shoulder.

24 So, in my opinion, yes, he's disabled a hundred percent
25 from his usual job.

1 Q Do you anticipate, Doctor -- withdrawn.

2 Is it your opinion that Mr. Herrera will require
3 medical management, meaning medical treatment to balance his
4 life?

5 A In my opinion, when he has particularly bad periods,
6 medical management would be perfectly appropriate; injections in
7 the shoulder, modifications to his shoes, physical therapy
8 intermittently. Yeah, absolutely.

9 Q Are there costs associated with that medical management
10 going forward?

11 A Of course.

12 Q Is it your opinion, Doctor, with any future medical
13 costs related to the right shoulder and left ankle, the
14 complaints are caused by the accident to Mr. Herrera of March 5,
15 2013?

16 A That's seems correct to me, yes.

17 Q Doctor, if you were not here with us today, what would
18 you be doing?

19 A I cancelled my afternoon office in order to be here
20 from 11:30 on.

21 Q So, tell us what you would be doing if you were in your
22 office this afternoon?

23 A I would be seeing additional patients that I had
24 scheduled treating people.

25 Q Are you charging a fee for your appearance to be here

1 with us today?

2 A Sure.

3 Q Can you tell the jury what that is?

4 A Yeah. My office charges a fee of \$7,500. Part of that
5 goes to me, part of that goes to the office for the expenses
6 that are not being paid because I'm not there, rent, staff.

7 Q Doctor, over the last ten years or so, you and I have
8 worked together maybe three times before?

9 A Two or three times, yeah.

10 Q So, did you do any reports in this case?

11 A I did do a report a couple of years ago on this, yes.

12 Q And did you charge a fee for that report?

13 A I did.

14 Q Do you remember what it was, can you tell the jury?

15 A At the time, it was probably \$450, maybe as much as
16 \$600, depending on the amount of records and things.

17 Q Doctor, I appreciate your time, I don't have any other
18 questions for you.

19 A Okay.

20 CROSS-EXAMINATION

21 BY MR. RAINIS:

22 Q Hi, doctor.

23 A Hi.

24 Q I'm going to ask you some questions and I'm going to
25 try to ask questions that are going to call for a yes or no

1 answer.

2 You have done this before, right?

3 A I have been an expert witness before, yes.

4 Q And if you can't answer one on my questions yes or no,
5 just tell me and I will either move on to another question or
6 try and rephrase it, okay.

7 A I will do my best and feel free to stop me if I --

8 Q Understood.

9 Let's talk about Mr. Herrera's accident he had in 1995.

10 As part of that accident, he fractured his tibia and
11 fibula, correct?

12 A He may have fractured his fibula, I'm not sure that he
13 fractured his tibia. I understood that he had a surgery having
14 to do with some muscle, but I have never been able to get
15 records regarding that.

16 Q And you've seen the X-rays in your treatment of
17 Mr. Herrera of that old fracture, correct?

18 A I have seen X-rays that do show a fracture in his
19 fibula, yes.

20 Q And there is what's called a malalignment or
21 misalignment of the tibia and fibula?

22 A Not the tibia, no. The fibula is not straight. But
23 the tibia is fine.

24 Q This malalignment over the course of years say from
25 1995 to 2013, when the bones are not aligned -- withdraw the

1 question.

2 Malalignment means the bones are not aligned
3 anatomically the way they were meant to be, correct?

4 A That's right, the bone healed, shifted a bit, yes.

5 Q And one of the things that can happen when bones are
6 not aligned properly is you can develop arthritic changes in the
7 joints at the end of those bones, correct?

8 A This fracture did not occur in the joint and it didn't
9 cause any malalignment of the ankle, that I can tell you.

10 Q But that Mr. Herrera, as a result of that 1995
11 accident, has what's called a soft tissue defect on the front of
12 his leg, correct?

13 A He does.

14 Q Essentially a piece of flesh has been removed from
15 there because of the accident and it was ultimately covered with
16 a skin graft, correct?

17 A Correct.

18 Q And it's something you can easily visually see to the
19 naked eye, correct?

20 A That's right.

21 Q And one of the nerves that goes through that area where
22 this chunk of flesh was removed from is the perineal nerve,
23 correct?

24 A The deep perineal nerve, yes.

25 Q And that's the nerve that controls the dorsiflexion of

1 the foot, correct?

2 A That's correct.

3 Q That's what you were talking about before, the ability
4 to bring your toes towards your knee?

5 A That's correct.

6 Q Okay. And from looking at Dr. Scheskier's records, you
7 know that Mr. Herrera had a footdrop before the accident in
8 March of 2013, from the 1995 events, correct?

9 A He did not have a significant footdrop prior to and now
10 he's back to where he was.

11 Q So, at the present time, his ability to dorsiflex is
12 the same as it was preoperatively?

13 A Preinjury.

14 Q Okay, pre-accident?

15 A Uh-huh.

16 Q So, how much dorsiflexion does he have now?

17 A I haven't seen him in a couple of years, but before --
18 we're talking two different things here though, if I may.

19 You're talking about his muscle ability to work, which
20 is mediated by the nerve, that is improved. And then the amount
21 of dorsiflexion he has because of the joint, that has not
22 improved.

23 Q Right, his hind foot as you showed in the drawings is
24 fused?

25 A Right.

1 Q So, you said that Mr. Herrera -- the fusion --
2 withdrawn.

3 The fusion of the hind foot eliminated the pain
4 associated with the joints in the hind foot, correct?

5 A That's the goal of the surgery. He still has pain,
6 yeah.

7 Q In those joints, though, they're fused so the pain
8 isn't from those joints, correct?

9 A That's correct.

10 Q And that was the goal of that surgery?

11 A Correct.

12 Q So as far as it goes, that surgery was successful?

13 A The second surgery I would say was successful, yes.

14 Q The first one had to be revised or added to?

15 A Yes.

16 Q Now, when you -- there were -- before Mr. Herrera's
17 accident, there were changes in his ankle and foot consistent
18 with a prior injury or osteoarthritis from a prior injury,
19 correct?

20 A There is no way to know what it was from because he's a
21 guy who worked, so he had some changes as I pointed out. But it
22 doesn't -- not necessarily from an injury, just wear and tear
23 changes give you some arthritis, that's normal.

24 Q Did the CAT scan of the ankle done on May 7, 2013 -- do
25 you have that?

1 A I'll find it, give me two seconds.

2 Q How about -- do you have your report that you prepared
3 in this case? Did you come across that in your --

4 A I wasn't looking for that, but I've now zeroed in, I
5 found the MRI and CT scan, I will find it in two seconds.

6 Okay, got it.

7 Q You have it?

8 A Yes.

9 Q Now, that CT scan showed a medial talar dome
10 osteochondral lesion.

11 A Yes.

12 Q You told us that was an injury to the soft tissue, the
13 cartilage on top of the talus bone in the foot, correct?

14 A It's the inner face between the cartilage and the bone,
15 yes.

16 Q And it also showed a subchondral cyst with surrounding
17 sclerosis, correct?

18 A Correct.

19 Q And that cyst didn't form in the, what is it, two
20 months since the accident, correct?

21 A The cyst may have been there his whole life.

22 Q So, the cyst was inconsequential in his treatment?

23 A Correct.

24 Q It didn't -- it wasn't consistent with an old injury
25 that caused the cyst to grow?

1 A I don't understand your question.

2 Q Can a prior injury to the talar dome cause a
3 subchondral cyst?

4 A Can it? Sure. Doesn't seem likely here.

5 Q And how do you know that?

6 A Because what we're talking about is an area where the
7 cartilage was knocked off of the bone. I think the cyst is
8 probably an incidental finding. Again, you can have those from
9 birth.

10 Q And there were also well-corticated -- what does that
11 mean, corticated?

12 A That means the bone is formed.

13 Q So, it's well-formed chronic-appearing fragments by the
14 medial and lateral malleoli with associated osteophytes?

15 A Correct.

16 Q That's talking about evidence of an old injury,
17 correct?

18 A That could be a wear and tear change, that's not
19 necessarily an injury, yeah.

20 Q Other osteophytes are observed throughout the ankle as
21 described, including posterior and plantar calcaneal spurs,
22 osteophytes narrowing the posterior tibiotalar joint, right?

23 A Yes.

24 Q All those osteophytes are very consistent with having
25 had an accident say in 1995 where the foot joints were

1 disrupted, correct?

2 A Again, I disagree with your sequence of events. These
3 are wear and tear changes. They are not necessarily from an
4 injury. This gentleman's injury was up at the knee, as you
5 know, not at the foot.

6 Q When did you last see Mr. Herrera?

7 A I think I last saw him in -- I believe I last saw him
8 in 2021, several years ago.

9 Q I'm sorry?

10 A I believe it was 2021, several years ago.

11 Q So, having not seen Mr. Herrera in three years or so,
12 it's -- would you agree it's difficult for you to accurately
13 describe what condition he is in today?

14 A Absolutely, yeah. What I have tried to describe is
15 what I can be sure of, fusion of the hind foot, weakness of the
16 shoulder.

17 Q But you have not spoken with Mr. Herrera obviously?

18 A I have not, no.

19 Q And in terms of -- at the time -- the last time you saw
20 him, what medication was he taking related to these injuries?

21 A I was not the one prescribing his medication, he was
22 seeing a pain management physician. I can look back through.

23 Q Well, as part of your record, would you record if a
24 patient were taking various medications?

25 A Not necessarily if I weren't giving it to him. But the

1 likelihood is -- let me see if I can find it in Dr. Graham's
2 record. It actually looks like I saw him in 2022 just for the
3 sake of accuracy.

4 Let's see, Dr. Graham, looks like it was for fighting
5 anti-inflammatory medications, which he went over with him.

6 Q No painkillers, correct?

7 A Anti-inflammatory medications are painkillers. No
8 narcotics, yeah, which is what I think you were asking.

9 Q By reducing the inflammation, part of the goal, of
10 course, is to reduce the pain?

11 A Right, it's a pain medicine.

12 Q But that was the only medication that he was taking at
13 the time?

14 A That's a medication, yes.

15 Q Now, you told us that you think Mr. Herrera can't go
16 back to do heavy labor like he used to.

17 Would the condition of his foot and shoulder, as you
18 described it, he would be able to do more sedentary work,
19 however, correct?

20 A Again, I'm not a vocationalist, but, yes, he could
21 certainly sit and do a job with regard to his shoulder and his
22 foot. He has additional disability with regard to his neck and
23 back which I'm sure --

24 Q Even knowing about that he has his neck and back --

25 A I would defer that to the treating physician because

1 that would certainly limit the amount of time he could sit or
2 stand or do sedentary work.

3 Q The ankle mortise, that's the space between the top of
4 the talus and the bottom of the femur, correct?

5 A No.

6 Q What is the -- what is the mortise?

7 A The mortise is the arch made by the end of the tibia
8 and the fibula, which are the bones in the leg as they sit on
9 top of the talus, not the femur.

10 Q And at the Bellevue Hospital Center, the records which
11 are in evidence as exhibit something, 10, I think it is, they
12 did an x-ray of when he came to the emergency room and it talked
13 about a normal alignment of the ankle with congruent mortise,
14 which is a normal finding, correct?

15 A That's exactly why you asked me before if the previous
16 injury affected his ankle and I said no, because, yes, it's a
17 normal finding.

18 Q But it also goes on to say that productive changes
19 inferior to the medial malleolus was consistent with remote
20 injury, meaning a past injury, right?

21 A It's also consistent with wear and tear, yeah. They're
22 saying they don't see a new injury.

23 Q But if there was an osteochondral lesion and a cyst,
24 the mortise would not be normal, would it?

25 A That is not correct.

1 Q Now, Mr. Herrera did follow all of your recommendations
2 for treatment, correct?

3 A Essentially, yes.

4 Q And he didn't refuse to do any of your -- anything you
5 recommended for any reason, correct?

6 A Not that I recall.

7 Q When you last saw the patient, did you ask him to come
8 back after a particular amount of time?

9 A I told him to come back, yeah. If he's having trouble,
10 he's always welcome in my office.

11 Q And because he didn't come back, does that suggest to
12 you that he wasn't having trouble or at least enough trouble
13 that he had to come back and seek further care?

14 A I don't know what his reason is for not coming back.

15 Q Let's talk about the shoulder surgery.

16 Your operative report talks about a complete rotator
17 cuff tear and then a complete supraspinatus tendon tear?

18 A Same thing.

19 Q They're the same thing, it's not two different things?

20 A It is not.

21 Q Your surgery was successful, the shoulder surgery?

22 A We repaired the rotator cuff, that was successful.

23 Q Whatever reduction in range of motion he had after your
24 surgery, it left him with a functional right shoulder which
25 someone -- would be appropriate for use in activities of daily

1 life, correct?

2 A Activities of daily life, certainly.

3 Q I mean, he couldn't pitch in the major leagues, but he
4 could brush his teeth, comb his hair, things like that.

5 A I would hope so, yeah.

6 THE COURT: I can't pitch in the major leagues
7 either, so, just in case you're wondering.

8 MR. KELLY: That's why I'm doing this.

9 Q The crush injury that Mr. -- -- strike that.
10 Your report dated June 2, 2021 says that Mr. Herrera
11 had a crush injury of the left leg, is that from 1995, is that
12 what we are talking about?

13 A No, that's a term that we use for an injury that
14 damages soft tissue, bone. It's just a subsequent term, crush
15 injury.

16 Q So, his foot was not crushed?

17 A His foot was -- he had a concussive force to the foot,
18 which we call a crush injury, it can be caught between two
19 things, it can be struck by things. It's a crush injury. It's
20 just a medical term.

21 Q Prior to today, when is the last time you testified in
22 court?

23 A Two months ago.

24 Q Was that from Mr. Gorayeb's office?

25 A I don't believe so, no.

1 Q Have you testified for his office this year?

2 A I believe so, yeah. Where are we, in September? Yeah,
3 probably.

4 Q I'm sorry?

5 A I was trying to figure out what part of the year we
6 were in. Yeah, I think so.

7 Q Now, Mr. Herrera came to your office just two days
8 after this accident, right?

9 A I believe so, yeah.

10 Q Now -- and he had been examined and discharged from the
11 emergency room on the day of the accident, correct?

12 A That's correct.

13 Q Do you find it unusual that he would be -- withdraw the
14 question.

15 Don't most people, after they have an accident like
16 this, wait a few days to see if it's going to get better, if
17 it's going to go away before they go to a physician?

18 A That's not been my experience. Some people do, some
19 people -- they are always told from the emergency room,
20 follow-up with a physician.

21 Q I'm sorry?

22 A They are always told from the emergency room to follow
23 up with a physician. Some people wait, some people don't. Some
24 people come the same day. I've had people leave the emergency
25 room and come to my office because they had a bad experience in

1 the emergency room.

2 Q Do you know how Mr. Herrera got to the office two days
3 after the accident?

4 A You mean did he take a car or a bus or...

5 Q How he was transported there?

6 A I have no idea. He didn't see me the first day.

7 Q Thank you, that's all I have.

8 CROSS-EXAMINATION

9 BY MR. ROBERTA:

10 Q Doctor, do you know which part of the body Mr. Herrera
11 claims the excavator struck?

12 A I wasn't the initial evaluator, so I don't recall, no.

13 Q So, you don't know if it's his left foot, do you?

14 A I don't recall, no.

15 Q And you don't know if it's his left shoulder either, do
16 you?

17 A I would assume it was his right shoulder, but, no.

18 Q Right shoulder, excuse me.

19 But you don't know either way?

20 A No. I know that he was complaining of those body parts
21 when we first saw him.

22 Q Now, the rotator cuff surgery that you performed,
23 that's an out-patient procedure, correct?

24 A It is.

25 Q And an out-patient procedure means you don't spend the

1 night in the hospital, correct?

2 A You come in in the morning, you go home the same day,
3 that's correct.

4 Q Go home the same day?

5 A Correct.

6 Q Go in, perform surgery, you leave the same day?

7 A You go home the same day, correct.

8 Q Now, at Bellevue Hospital, did Mr. Herrera have any
9 fracture at his left foot the day of the accident?

10 A Not that I recall.

11 MR. ROBERTA: Thank you, Doctor. No further questions.

12 REDIRECT EXAMINATION

13 BY MR. KELLY:

14 Q Doctor, did Mr. Herrera's 1995 accident have anything
15 to do with your care and treatment of him?

16 A Again, he had some wear and tear changes when he came
17 in, but not wear and tear changes that necessitated surgery that
18 we sent him for, nor interfered with his work apparently, which
19 it does now.

20 Q So, all the questioning about the 1995 accident, does
21 that change your opinion with a reasonable degree of medical
22 certainty that Mr. Herrera's right shoulder and left ankle
23 surgery were caused by the accident of March 5, 2013?

24 A No, our initial note notes the 1995 injury. We treated
25 him for the sequelae of this injury, the things that follow this

1 injury.

2 Q Would Mr. Herrera be able to work at his usual and
3 customary profession in heavy construction with the presurgical
4 condition to his shoulder and the presurgical condition to his
5 left ankle?

6 A You mean what occurred at the time of the accident to
7 the presurgical?

8 Q Let me put it another way: If he was banged up the way
9 he was banged up when he went to see you, could he work in heavy
10 construction before that?

11 A Not in my opinion, no.

12 Q And that's as a result of the accident, right?

13 A It is.

14 MR. KELLY: I have nothing further.

15 MR. RAINIS: Thank you, I have nothing further,
16 Judge.

17 MR. ROBERTA: Nothing further.

18 THE COURT: Okay. Thank you, Doctor. Take all
19 your body parts with you.

20 (Whereupon, at this time the witness is excused.)

21 THE COURT: Come up here.

22 (Whereupon, at this time a discussion was held at
23 sidebar.)

24 THE COURT: We're going to break for the day, it's
25 3:43, so go and enjoy every bit of the afternoon. We will

1 start back up 9:30 in the morning.

2 THE COURT OFFICER: All rise. Jury exiting.

3 (Whereupon, the jury exits the courtroom.)

4 (Whereupon, the trial continues on Wednesday,
5 October 2nd, 2024 at 9:30 a.m.)

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