In The Matter Of:

Bortugno v.
Midland & Schindler

Dr. Ali Guy & David Rosenberg
March 10, 2023

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:
----------x
NICHOLAS BORTUGNO and JOSEPHINE BORTUGNO,

Plaintiffs,

-against- Index: 150623/13

ELEVATOR CORPORATION and MIDLAND ELEVATOR CO., INC.,

Defendants.
----------x
New York County Supreme Court
60 Centre Street
New York, New York 10007
March 10, 2023

B E F O R E: HON. JUDY H. KIM, Justice

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Tal R. Hahn,
Alan Bowin,

THE COURT: This morning I want to address the Order to Show Cause. I understand there is an attorney here? Is it Mr. Gitlin?

MR. GITLIN: Yes, your Honor.

THE COURT: Come up. It doesn't matter.

(Brief pause.)

MR. GITLIN: For reference, your Honor.

(Document submitted.)

THE COURT: Did everyone get a copy of this letter?

MR. SCHIFERL: Yes, your Honor.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: All right. Mr. Gitlin, you could come up.

We are on the record. Today was a return date for the Order to Show Cause that I signed seeking contempt against a subpoenaed witness who hasn't appeared yet for trial, Ms. Celeste Woods.

Can I have your appearances?

MR. GITLIN: Adam Gitlin for the United States Postal Service, your Honor.

MR. KERNER: Sherman Kerner on behalf of the plaintiffs, Nicholas and Josephine Bortugno.

MR. SCHIFERL: Kevin Schiferl on behalf of

the defendants, Schindler and Midland.

THE COURT: Okay. So I received a letter, reviewed the letter that the U.S. Attorney General's office -- I am sorry, U.S. Attorney's Office submitted on NYSCEF. And we discussed off the record a resolution of this matter.

And we are now unable to resolve at this time, correct?

MR. GITLIN: Your Honor, plaintiff's counsel and I have had discussions regarding a possible resolution. I am unable to report that we have come to a resolution regarding this matter right now. I'd have to speak to my client regarding my -- with my client regarding any possible resolution. And, therefore, the USPS reiterates its request, respectfully, to have an extension of time to respond to the Order and to potentially seek a resolution.

THE COURT: Okay. Well, I am going to grant you the adjournment. However, it's not going to be March 17th. The -- as I said, the trial has been pending since last Thursday and it was my understanding that plaintiff intended to rest today. However, under that schedule obviously we may have to open up the plaintiff's case again, or call somebody out-of-turn if it turns out that Ms. Woods comes to trial. So, in any

event, I will give you until Monday to put in opposition papers. Or to resolve the matter.

Okay. Thank you.

MR. GITLIN: Thank you, your Honor. And if I may, your Honor?

THE COURT: Yes.

MR. GITLIN: I believe plaintiff's counsel may have wanted to make an application to the Court to discuss something related to potentially resolving the dispute, but I will leave it to --

MS. GOMEZ: I do not have an application at this time.

THE COURT: Okay. All right. Well, hopefully we could figure something out. But, you know, please be in touch with each other and also with Ms. Woods because she could potentially be coming in at some point.

MR. GITLIN: Thank you, your Honor.

THE COURT: You don't wish to be heard on this, right, counsel?

MR. SCHIFERL: Your Honor, I don't think I have a dog in that fight given there is no resolution yet. We'd just like to be kept abreast of what is happening and counsel has done a great job of that and I very much appreciate that.

THE COURT: Okay. Thank you. So we will then continue with plaintiff's case.

(Whereupon, Adam Gitlin, Esq., exits the courtroom at this time.)

MR. KERNER: The plaintiffs call Dr. Ali Guy.

MR. SCHIFERL: Your Honor --

THE COURT: Not yet. Before you call the jury in, is there something you need to address?

MR. SCHIFERL: Yes, your Honor. Before counsel was kind enough to show us some exhibits he would like to intend to use with Dr. Guy. And I want to make sure we address this with the Court beforehand. And that is why I raised this.

So Dr. Guy is a physiatrist who did a one time evaluation in 2019 of Mr. Bortugno. He did not do any certification on him whatsoever. You know, he is not a surgeon. The chart I was shown that they would like to use is a chart of a surgery and pictures, I believe, of surgeries. And I just believe that is inappropriate. He is not a treater.

In fact, he doesn't do shoulder surgery at all and I don't know why that would be something that would come in because he would be testifying about a surgery he didn't do, we don't have the opportunity to cross-examine the person that did do the surgery, and

so I wanted to alert the Court to that. I don't know where the boards went.

MR. KERNER: They are back here.

THE COURT: Wait. One at a time. Are you finished, Mr. Schiferl?

MR. SCHIFERL: I don't know where the boards went, but you will see, when and if they are shown to you, are boards that are depicting a shoulder surgery that Dr. Guy did not do.

MR. KERNER: Your Honor, I just would like to have these marked as exhibits so that --

THE COURT: Okay.

MR. KERNER: -- so there is some record of them.

THE COURT: Sure.

MR. KERNER: I think Plaintiff's 38 or 37. 38 and 39 for identification.

(Whereupon, Plaintiff's Exhibit 39 and 39 were marked for Identification at this time.)

COURT OFFICER: All right. They've been marked.

THE COURT: Okay. I will hear you.

MR. KERNER: The operative report is in evidence, your Honor. In fact, it was put in evidence by defendants. The -- it's Defendant's Exhibit Q in

evidence. It's a disk that was shown to Dr. Choueka. And, in any event, it's something that has been exchanged.

These boards are just demonstrative evidence of a surgery that Dr. Choueka testified about. He didn't do the surgery either. And I don't think until you hear Dr. Guy's experience it's proper to preclude him from testifying as to what the surgery was. I mean, it's one thing to say that he didn't do the surgery but it's another thing to say a physiatrist can't testify as to having read the report of the surgery that is in evidence, and to give a helping hand to the jurors with this demonstrative board.

And Part 1 is Plaintiff's 38 and Part 2 is 39. It just indicates what is, you know, in the report that is in evidence. I don't know why I wouldn't be able to -- it would be helpful to the jurors and it's demonstrative. I don't intend to move them into evidence. I just intend to show them to Dr. Guy as he explains the surgery that was performed. And, as I said, the operative report is in evidence.

(Brief pause.)

THE COURT: Anything further?

MR. SCHIFERL: Yes, your Honor. Dr. Guy has a website. He is not a surgeon. He specifically says

he doesn't do surgeries. And this is really a backdoor attempt to have someone that is hired to do an evaluation, talk about prior care and treatment that others have done where you don't hear from those others.

And the reference to Dr. Choueka is I guess totally missing -- Dr. Choueka is qualified as a shoulder surgeon. He talked about what would cause those injuries and not cause those injuries. The report is in evidence. And they could ask about that all they want. But to demonstrate or have someone here to -- to be a mouthpiece for some other surgeon that -- when he didn't do the surgery, isn't a surgeon, I think is inappropriate. And that is my objection. I think this may also pertain to some other records as we go along of other treaters.

For those reasons and the reasons stated, your Honor, along with the reasoning that you applied earlier with doctor -- earlier demonstratives of medical, I think those should stay out.

THE COURT: Okay. At this time I am agreeing with the defense counsel. It doesn't seem to be -- well , I will leave it at that.

You could renew your request to show it to -- with the jury after I hear some more testimony from the

doctor. But at this time I agree, they are not demonstrative evidence, really. Okay.

MR. KERNER: Exception, your Honor.

THE COURT: Well, he's going to be using it to explain what the operative report is, illustrative?

MR. KERNER: Yes.

THE COURT: So that is the ruling. Yes. Thank you.

Anything else?

MR. SCHIFERL: No, nothing from the defendant, your Honor. That is all I have been presented with that he will use.

THE COURT: Okay. Thank you.

COURT OFFICER: All set, Judge?

THE COURT: Yes.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury panel entered the courtroom.)

THE COURT: All right. Please be seated. Good morning everyone. We are going to continue with the plaintiff's case this morning, today.

Call your next witness please.

MR. KERNER: The plaintiffs call Dr. Ali Guy.

COURT CLERK: Please raise your right hand.

A L I G U Y, M. D, called by and on behalf of the

plaintiffs herein, having been first duly sworn, was examined and testified as follows:

COURT CLERK: In a loud voice, state your name and address for the record.

THE WITNESS: Yes. My name is Dr. Ali Guy, A-L-I, G-U-Y. Office address is 7 Gramercy Park, New York, New York, 10003.

COURT CLERK: Thank you. You may be seated.

THE COURT: Hold on a second. Good morning.

THE WITNESS: Good morning, your Honor.

THE COURT: Have a seat. Just a few instructions. As you could see, we have a court reporter here to take down everything that is said at this trial. Please speak loudly, clear and a bit slower than you normally do. In addition, please let the question be fully asked before you respond. And also, if you hear an objection, please do not answer until you hear from me.

I have to make a ruling first.

THE WITNESS: Yes, your Honor.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. KERNER:

Q Are you a licensed physician in the State of New York?

A Yes, sir, I am.

Q And are you licensed in other states other than New York?

A Yes, Pennsylvania.

Q And what is your specialty, Doctor?

A Physical medicine and rehabilitation, known as physiatry.

Q How long have you been practicing physiatry?

A Since 1989.

Q And where did you go to medical school?

A University of Northeast Dominican Republic.

Q When did you graduate?

A 1981.

Q And when did you -- and you became a licensed physician in New York in 1989?

A 1985.

Q Okay. And tell us about once you became a licensed physician, tell us about your experience as a physician in the State of New York.

A Yes. Well, I did three separate residencies. I did eighteen months of internal medicine at Mount Sinai School of Medicine, Mount Sinai Medical Center. I did one year of general surgery at Cabrini Medical Center. I did a three year residency training program in the field of physical medicine and rehabilitation. I am

board-certified in the field of physical medicine and rehabilitation. I am a clinical assistant professor of physical medicine at N.Y.U. School of Medicine, N.Y.U. Medical Center where I teach other doctors.

I am also the Director of the Pain Service at the North Queens Surgery Center in Queens where I supervise the work of approximately fifty other doctors that do interventional pain management procedures. I reviewed their work, I teach them. I teach the nurses. I make sure the quality of work is up to par. I am also a Director of the Rehab Medicine at Medalliance in the Bronx which is an Article 28 facility. Article 28 facility is like a mini-hospital. We have about fifty doctors, four operating rooms, about two hundred employees. My job is to teach the house staff, the nurses, the physician's assistants. I am also in charge of the quality assurance, which means if a mistake is made it comes to my attention, I review it, and I teach -- and if I have to discipline, my job is to discipline whoever made that mistake.

And I also teach at New York State Pain Society where there is approximately two to three hundred doctors that come once per year we gather. We present different lectures. I teach medical students and other doctors at that facility. So that is essentially what I do.

Q And have you ever had any publications?

A Yes. Over thirty publications.
Q And what type of -- give us a little flavor for what your publications have entailed.
A Interventional pain management procedures. All types of medical topics. One interesting topic we had was a topic where an anesthesiologist injected lidocaine into the vein, the patient developed seizures in the recovery room. They did not think that was a seizure. I argued with them that it was a seizure. We sent the patient to the hospital, drew the patient's prolactin level. It's a hormone that gets elevated within the first thirty minutes of the seizure. I proved that that was a seizure. I published the article and it got published immediately, peer reviewed, et cetera.
And we had another article that was very interesting; two sisters, twin sisters that took Motrin. They developed complications and developed renal failure, both at the same time. It was very, very unusual. So this is a sample of some of the cases I had.
And also another one, a jewelry came to my office and complained of pain in his foot and ankle and I asked him three questions. Do you have --
THE COURT: Counsel, could we move on?
MR. KERNER: Okay.
Q Dr. Guy, are you board-certified?

A Yes, sir, I am.
Q And what are you board-certified in?
A Physical medicine and rehabilitation.
Q And that is physiatry?
A Yes.
Q Tell us as a practitioner, as a physiatrist, what do you do?
A As a physiatrist, first of all, our training is in many, many different specialties. We have training in internal medicine, general surgery, cardiology, pulmonary, neurology, neurosurgeon, orthopedic surgeon, interpretations of X rays, MRIs, CT scans, disability and evaluations. And interventional pain management, epidural, nerve blocks, trigger point injections, radio frequency ablations where you burn the nerve to give the patient relief of pain. And so it's probably the most comprehensive of all the different medical specialties. That is why you have to have training in the fields other than physical medicine and rehabilitation, preferably internal medicine general surgery.
So what I do, I treat patients covering all kinds of problems head-to-toe. I take care of work related accidents, car accidents, nerve problems, pain management problems. Things of all -- coverage the whole body from head-to-toe.
Q And describe how physiatrists deal with traumatic

injuries.
A Well, first we take a good history, physical examination. We do the appropriate diagnostic studies to see exactly what is wrong with the patient, such as MRIs, X rays, EMG. EMG stands for electromyography. It's a test done by myself. And we refer patients to physical therapy, different types of procedures. If this doesn't work we go step by step. First there is physical therapy, pain medication and then comes the interventional pain. Management procedures like epidural, facet injections, select nerve blocks, microdiscectomy.
MR. KERNER: I move to qualify Dr. Guy as an expert in the field of physiatry.
THE COURT: Any objection?
MR. SCHIFERL: No objection.
THE COURT: Okay. He is qualified.
Thank you.
Q Now, Doctor, did there come a time when you saw Nicholas Bortugno?
A Yes, sir.
Q And you could refer to your notes to refresh your recollection, not to read them, but --
A Yes.
Q And can you tell us when you saw Mr. Bortugno for the first time?

A The first time I saw him was on December 10th, 2019.
Q And, Doctor, when you saw him for the first time did you tell us a history -- did you take a history of his complaints and of his physical issues?
A Yes, sir.
Q And why is it important to take a history?
A Seventy percent of a doctor's working diagnosis comes from an appropriate history. Ten percent comes from a physical exam. The other twenty percent is confirmed by other diagnostic studies or medical records such as MRIs, EMGs, operative reports.
Q And what was the history that you took for Mr. Bortugno?
A First time I saw him, the history was he was forty-five years of age at the time, right-handed. On 1/19/12 he was working on the job as a satellite installer. He was pushing a heavy cart filled with objects, and a vertical door -- gate hit him on top of the head, injured his neck and head. He was taken to Brookhaven Memorial Hospital by his wife. He was treated and released. He was getting some medications and then he saw many, many different doctors. He had many epidural injections, many select nerve blocks, medial branch blocks, a lot of physical therapy, seen by many different

doctors. And he had surgery to his neck from C3/C4, C4/C5, C5/C6, and he had a right shoulder arthroscopic surgery by Dr. Finuoli.

When he came to see me he complained of neck pain mostly shooting down his right arm with numbness and tingling. Right shoulder pain. The other areas you told me to leave out, not to mention.

Q And let's just focus in on the right shoulder.

A Yes.

Q And, now, did you examine his right shoulder?

A Yes, sir, I did.

Q And can you tell us in 2019 what was your findings concerning his right shoulder?

A He had three well-healed arthroscopic surgical scars. The area was tender. Range of motion was diminished, shoulder flexion, which is zero to one hundred eighty was zero to one hundred fifty degrees. So it was abnormal. And internal rotation and external rotation was seventy-five degrees out of ninety degrees. Backward extension was sixty degrees out of ninety. Abduction was forty degrees out of sixty. Muscle power was four plus out of five. Normally it's five over five. Then comes five minus over five, so it was about two grades weaker than normal. That was the right shoulder.

Q And, now, I just wanted to confirm something. How

many times in total did you see Mr. Bortugno?

A Twice.

Q When was the next time you saw him?

A January 3rd, 2023.

MR. SCHIFERL: Your Honor, we object. No disclosure. 3101.

THE COURT: It's overruled. Can you answer? Was there a pending --

MR. KERNER: No, there was an objection after the answer.

THE COURT: Okay.

Q Anyway, I just want to be clear, can you look at your records and check just to make sure when Mr. Bortugno had his fusion surgery.

A August 31 -- August 9th, 2021.

Q And that was disc replacement, correct?

A Yes. And fusion.

Q Now, you indicated there was certain findings that you made of his right shoulder when you saw him in 2019, correct?

A Yes, sir.

Q Okay. And can you tell us just focusing on the right shoulder what was the significance of the findings that you determined for his right shoulder?

A Well, we are dealing with an injury that is

approximately ten years old. And in the medical field anything that has lasted more than two years is considered permanent. So ten years or more is definitely considered permanent. And the shoulder and the neck share a lot of similar muscles. So the shoulder aggravates the neck, the neck aggravates the shoulder. So each area aggravates each other.

Q Now, I want you to assume for the sake of this -- well, yes. And did you -- withdrawn.

Did you reach a determination within a degree of medical certainty what injuries, just to his right shoulder, that Mr. Bortugno sustained, or Nicholas sustained on January 19th, 2012?

MR. SCHIFERL: Objection.

A Yes.

MR. SCHIFERL: Foundation.

THE COURT: Okay. Sustained.

Q Doctor, did you also receive -- did you also review medical records?

A Yes, sir. Right here in front of me.

Q Can you tell us the medical records that you reviewed?

A Well, there is a lot of them. So I reviewed the medical records from the Brookhaven Medical Center. I reviewed the MRIs of the right shoulder taken on June

18th, 2012, MRI of the brain, MRI of the cervical spine taken on January 26th, 2012.

MR. SCHIFERL: Excuse me. Can I understand what he is reading from?

THE COURT: Are you reading from something?

THE WITNESS: From my report.

THE COURT: That is in evidence, correct?

MR. SCHIFERL: No.

MR. KERNER: No.

THE COURT: You can't read from any documents you might have brought with you today. You could refresh your recollection and review and let me know when you are ready to respond. You can't read --

THE WITNESS: Okay.

A I reviewed approximately twenty-seven different medical records. It's impossible to remember all of them. So basically I reviewed the MRIs of the brain, the shoulder, the cervical spine, the operative report of the cervical spine performed by Dr. Arien Smith, MRI -- sorry, the operative report of the right shoulder performed by Dr. Finuoli, and records from Dr. Finuoli, different P.T. records, different neurology reports, records from the Long Island Spine and Orthopedics group.

THE COURT: Sir, again, do not read the responses. You could refresh your recollection. And I

think you answered the question that he looked at nearly twenty-seven records.

MR. KERNER: Right.

THE COURT: Next question.

Q And these records, sir, these records were treatment for Nick Bortugno?

A Yes, sir.

Q Now, after you read these records and after you examined Nick, did you come to a conclusion about what injuries he sustained to his right shoulder on January 19th, 2012?

A Yes, sir.

THE COURT: Sir, please put away your documentation. Let me know when you need to refer to something.

THE WITNESS: I put them away.

THE COURT: What is the response?

MR. SCHIFERL: Objection. Sorry. Hearsay and foundation.

THE COURT: Let me hear the question again.

(Whereupon, the question was read back by the reporter.)

THE COURT: Overruled. You could answer.

A Yes. He had right shoulder interior glenoid labral tear, partial biceps tear, exacerbation of his

normal natural aging arthritis of the shoulder. He had a Bankart lesion, and Hill-Sachs deformity.

Q Okay. Now, I want you to assume for the sake of this question, Doctor, that Nick was in the James Farley post office on September 19th, 2012. And he was there --

A Yes.

Q And he was there to install some satellite equipment.

A Yes.

Q And he put the equipment that he was going to use on to a cart and he was pushing the cart into a freight elevator. And his testimony is as he pushed the cart into the freight elevator his hands were forward on the cart and outstretched, and when the elevator struck his head his body twisted down and to the right with his hands still on the cart and his right arm jammed into the handle of the cart.

Assuming those facts, sir, do you have an opinion within a reasonable degree of medical certainty whether the injuries that you say Nick sustained -- that the accident as described is a competent producing cause of those injuries?

MR. SCHIFERL: Objection; foundation.

THE COURT: It's an assumption. Overruled.

What is your opinion, sir?

A Yes, my opinion is that, yes, it was casually

related.

Q And what is the basis of your opinion?

A Based upon a history, the fact that he was completely asymptomatic prior to this episode. He was completely functional, installing heavy equipment and no problems with his right arm. And the MRIs show the abnormalities and the operative finding showed the additional abnormalities requiring arthroscopic surgery and he is left with weakness in his right shoulder now and decreased range of motion.

Q Now, you mentioned one thing. You mentioned in your answer his asymptomatic condition before the date of January 19th, 2012; is that correct?

A Yes.

Q What is the importance of the fact that he was asymptomatic before that date?

A If he had any prior significant injuries, or conditions, he would not have been able to do the heavy duty job that he is doing as a satellite installer, carrying heavy equipment, going up ladders, on top of the roofs. When you go up a ladder you need strength and both hands. So he was able to do all those things prior to this injury.

MR. KERNER: Your Honor, can I just have the Brookhaven medical record, which is Plaintiff's 21 in

evidence?

Q Sir, did you review the Brookhaven medical records?

A Yes, sir.

Q Let me just hand them to you now. Plaintiff's 21 in evidence.

(Exhibits submitted.)

Q I just want you to look at them again.

(Witness complies.)

A Okay.

Q Okay. Doctor, in those medical records that you reviewed, were there any complaints concerning plaintiff's right shoulder?

A No, sir.

Q Were there any findings of pathology concerning plaintiff's right shoulder?

A No, sir.

Q I wanted you -- withdrawn.

Doctor, I want you to assume that there's been testimony in this case that -- and opinion in this case that Nick had right shoulder labral tear prior to his going to Brookhaven Hospital on January 19th, 2012.

Do you have an opinion within a reasonable degree of medical certainty whether the hospital would note some pathology or seen some pathology of his right shoulder on

that date if he had a prior labral tear?
MR. SCHIFERL: Objection. Foundation. Hearsay.
THE COURT: Overruled.
A The answer is yes, they would have found it and documented it in the medical records.
Q And what is your -- the basis of your opinion?
A If you are asking me to only talk about the medical records, there's nothing in the hospital emergency room records indicating any problem or any finding to the right shoulder when you first presented to the emergency room.
Q And in terms of the same thing, if Nick had a pathology in terms of a torn biceps, which you say he sustained on January 19th, 2012, if he had a prior -- if he had it prior to that date, would there be a finding in the hospital record concerning that condition in Nick's right shoulder and arm?
A Yes.
MR. SCHIFERL: Objection. Leading. And foundation.
THE COURT: Yes. Overruled.
Q Do you have an opinion, sir, within a reasonable degree of medical certainty if an individual Nicks's age, thirty-seven, came into the hospital, Brookhaven on January

19th, 2012, whether there would have been pathology in his right arm if he had a torn biceps?
A They would have noticed it, yes.
Q And tell us what the pathology of that torn biceps would have been.
A When you have a torn biceps, the function of the biceps is the shoulder flexor and supraspinatus. This is the supraspinatus. And on physical exam they would have noticed it, especially with a complaint of head trauma and neck pain radiating down the right arm. They would have examined the entire right arm. It's normal triage.
Q And let's go back to the labral tear. If there was a preexisting labral tear, preexisting January 19th, 2012, and Nick came into the hospital, what, if any, pathology would they have at least seen or noted in the record when they examined his right arm?
A They would have found decreased muscle power and decreased range of motion in his right shoulder.
Q And in the examination of Nick's right arm at Brookhaven Hospital, is there any note of any decreased muscle power or range of motion in his right arm?
A No, sir.
Q And now in terms of incubation of an injury, can you explain with a reasonable degree of medical certainty what incubation of an injury is?

A You mean incubation period?
Q I apologize. What incubation period is, Doctor.
A In the medical field everything has an incubation period, which means from the time of exposure to the time of symptomatology. May I give a couple examples?
Q Sure.
A For example, the common cold, the incubation is two to three days. The incubation for HIV is three to six months. Hepatitis type A, approximately sixty days. Trauma, the incubation is three weeks to several weeks later. You don't see everything right away. Nerve injuries take at least fourteen to twenty-eight days, the minimum, to manifest themselves.
Q Okay. So, now, I also want you to look at the hospital records and see, Doctor, can you determine or state what the diagnosis was that the hospital determined?
A Yes.
(Brief pause.)
THE COURT: Is there a page you want him to look at?
MR. KERNER: Yes. May I help the Doctor?
THE COURT: All right. Take it back.
MR. SCHIFERL: Counsel, may I see the page once you find it?
THE COURT: Yes.

MR. KERNER: Absolutely.
(Brief pause.)
MR. KERNER: Your Honor, it's page 6 of 6.
THE COURT: Okay.
(Exhibit submitted.)
THE COURT: After you reviewed it, you could let us know.
Q In the middle of the page, Doctor.
A Yes, I see it.
Q What is the diagnosis?
A Cerebral concussion and cervical radiculopathy.
Q And is that significant, Doctor?
A It is.
Q Why is that significant?
A Well, when you have a cervical radiculopathy that means damage in the nerve roots and the neck, and you have to find the cause. Usually the cause is either a fracture or disc herniations, or maybe both. And an MRI would confirm that. Cerebral concussion is trauma to the head. It could be something or it could lead to permanency down the road. So further diagnostic workup has to be pursued there as well.
Q Now, we also have in the record -- that is okay. You could take that away.
COURT OFFICER: No problem.

(Brief pause.)
Q Now, we also have in the record a Dr. Matthews' report that I'd like to show the doctor.
COURT OFFICER: You have the number, counselor?
(Brief pause.)
MR. KERNER: Plaintiff's 29 in evidence. Let's put the date of 1/24 on the screen.
(Exhibit displayed in open court.)
Q Doctor, could you read that from where you are?
A Yes.
Q I just --
THE COURT: What is the question?
Q Doctor, do you see what it says about current complaints?
A Yes.
THE COURT: If you can't, give him the hard copy.
Q I will give you the hard copy. Maybe it's easier.
(Documented submitted.)
THE COURT: This is Exhibit 29 in evidence?
MR. KERNER: Yes, it is.
COURT OFFICER: In front of the witness.
THE COURT: Thank you.
Q And what is the date of that -- what is the date

of that, Doctor?
A January 24th, 2012.
Q And, Doctor, do you see what the complaints are?
A Yes.
Q And do any of the complaints concern his right arm?
A He's complaining of neck pain which radiates to both shoulders with pain and stiffness made worse with any neck movement. There is --
THE COURT: Sir, don't read from the document.
Q Don't read it. Let me show you then another one, also from Dr. Matthews. The report from the doctor of 1/30/12. Please look at that.
A Okay.
Q Do you see where his current complaints are?
A Yes.
Q And are those complaints significant, Doctor?
A They are.
Q Can you tell us what complaints Nick had on January 30th, 2012?
A Neck pain, radiating down the right arm with numbness, tingling and the burning sensation. And also balance. Headaches and dizzy spells.
Q And why are those complaints significant, Doctor?

A When you have neck pain which radiates down the right arm, it's called radiculopathy. The cause is damage to a nerve root, probably from a disc herniation. So now as a treating physician you have to do an MRI and EMG to investigate and confirm your working diagnosis.
Q Now, Doctor, we've had some -- I think you mentioned it before yourself. You indicated that when you asked Nick and examined his records he a Bankart lesion, correct?
A Yes.
Q Can you describe what a Bankart lesion is?
A I brought with me a model of the shoulder if I may be allowed to use it.
THE COURT: Go ahead.
A Okay. So this pertains to the left shoulder. This is the scapula, this is the collar bone or the clavicle. This is the humerus. So a Bankart lesion is found usually in front of the patient and inferior, which means below, right at the border of the labrum. The labrum is the ring that holds the shoulder in place. It's like a little shock absorber. It's soft tissue, cartilage. So a Bankart lesion would be here as opposed to a Hill-Sachs deformity which is found like a -- it's like a dimple in a ping pong ball. So these are the two different lesions.

Q Now, in terms of the Bankart lesion -- the Bankart situation and the Hill-Sachs lesion, Bankart deformity and the Hill-Sachs lesion, can you tell us please what, if any, significance they have to whether Nick had a prior torn labrum before January 19th, 2012?
A If you have a Bankart lesion it would cause shoulder inability, decreased range of motion and weakness. So the patient did not have the weakness in the during the emergency room. And when the patient went to the emergency room his range of motion and loss of power to the shoulder were all normal. So that goes against any thoughts of any preexisting problems. If he had these problem it would be physically not possible for him to do the kind of heavy work he was doing as a satellite installer.
Q Now, that is true for both the Bankart deformity and Hill-Sachs lesion?
A With the Hill-Sachs lesion you could get away with it but not with a Bankart.
Q Why not? Why is there a difference?
A Because the Bankart shows shoulder instability. Where the Hill-Sachs deformity is inside, inside the glenoid facet, which is attached to the scapula. So if you have a little dimple, so what? It causes no problems. But a Bankart lesion would cause significant problems.

Q And, Doctor, you viewed his medical records; is that correct?
A Yes.
Q And did any of his medical records indicate that this Bankart lesion was causing him any significant problems prior to January 19th, 2012?
A No, sir.
Q Okay. And did you, in fact, see any records at all that indicated any treatment for Nick's right shoulder prior to January 19th, 2012?
A No, sir.
Q And what is the significance, if any, of the fact that Nick did not have any prior shoulder, right shoulder treatment before January 19th, 2012?
MR. SCHIFERL: Objection; foundation.
THE COURT: Overruled.
THE WITNESS: Do I answer?
THE COURT: Yes.
A So the fact that he had no prior treatments to his shoulder, no prior problems to his right shoulder, it's assumed in the medical field that it was casually related to this accident, not from prior preexisting conditions.
Q Now, I want you also to assume that there's testimony in this case that Nick had right shoulder

dislocation sometime in approximately -- when he was fourteen years old. And he also -- there's testimony in the case that he had this Bankart lesion and -- I mean, this Hill-Sachs lesion and this Bankart deformity, and that with a reasonable degree of medical certainty that meant that he had a labrum tear prior to January 19th, 2012.
Do you have an opinion within a reasonable degree of medical certainty whether those conditions meant that he had a labrum tear prior to January 19th, 2012?
A No, sir. He may have had Hill-Sachs deformity as I explained earlier because that does not cause any significant problems. But from a Bankart lesion of any significant caliber, that would cause pain, decreased muscle power and decreased range of motion. None were present.
Q Okay. And how about the biceps tear, we've had opinion testimony in this case, in this courtroom that with the Bankart deformity, the Hill-Sachs lesion and the dislocated shoulder at the age of fourteen, that with a reasonable degree of medical certainty one could conclude that Nick had a biceps tear prior to January 19th, 2012.
Do you have an opinion within a reasonable degree of medical certainty whether that is true and accurate?
A I would most respectfully disagree for the reasons I gave earlier.

Q Could you just repeat those reasons?
MR. SCHIFERL: Objection. Asked and answered.
THE COURT: Yes. Move on.
Q Now, Dr. Guy, do you have an opinion within a reasonable degree of medical certainty whether patients who have pain in their neck and shoulder in close proximity, that they often confuse the origin of the pain?
A Happens very frequently, yes.
Q And what is the basis for that opinion, Doctor?
A Because they share very similar muscles together, and as a treating physician that deals with neurology and traumatology, any good physician, every time there is a problem with the shoulder you have to check the neck too. Anytime there is a problem with the neck you have to check the shoulder as well.
Q Okay. Now, there came a time, Doctor, when Nick had surgery on his right shoulder, correct?
A Yes, sir.
MR. KERNER: Your Honor, these records are already in evidence.
THE COURT: Which ones?
MR. KERNER: They are Defendant's Q, which is a disc.
THE COURT: Okay.

MR. KERNER: I would like to mark this paper copy.
THE COURT: Can you show it to counsel?
(Documents submitted.)
MR. SCHIFERL: Are you asking for the records or films? There is two separate.
(Brief pause.)
MR. KERNER: I misspoke. The operative report -- I would just like the paper copy of Dr. Finuoli's records to go into evidence, your Honor.
THE COURT: Are you marking something now for identification?
MR. KERNER: Yes. Plaintiff's 40, I think.
MR. SCHIFERL: Your Honor, some of this I don't object to because I think it's in evidence already. Some of it I would object to on redaction.
THE COURT: Are you aware -- can you just tell him what it --
MR. SCHIFERL: I told him it's Exhibits N, O, P and Q.
THE COURT: Counsel, try to use those exhibits in evidence.
MR. SCHIFERL: I am not sure if this is any different than those.
THE COURT: Neither am I. Take a look at N,

O, P and Q. If it's what you wanted to put in separately, he's not agreeing to it.

MR. KERNER: The operative report is N, your Honor.

THE COURT: Thank you.

MR. KERNER: We will work off of that.

THE COURT: You could show it to the witness. Is that what you wanted?

MR. KERNER: Yes.

THE COURT: Okay.

(Exhibit submitted.)

COURT OFFICER: Exhibit N is in front of the witness, your Honor.

THE COURT: Thank you.

Q Doctor, you see what -- Defendant's N in evidence is?

A Yes, sir.

Q And what is that, Doctor?

A This is the operative report performed on the patient on 4/17/13.

Q And can you say -- can you tell us what the operation on Nick's right shoulder was on 4/17/2013?

A The diagnosis or the surgical procedure?

Q Why don't you tell us the diagnosis.

A Diagnosis, yes, sir. We have a right shoulder

labral tear. We have impingement syndrome, we --

THE COURT: Excuse me one second. Is this the redacted version that is up on the screen?

MS. GOMEZ: Your Honor, I am sorry. I didn't realize it was on.

THE COURT: We will strike everything and restart it.

MR. KERNER: Sorry, your Honor.

THE COURT: Disregard any testimony.

(Whereupon, the testimony was read back by the reporter.)

Q We have --

A We have a right shoulder labral tear. We have a large anterior glenoid labral tear. We have a partial biceps tendon tear. We have acromioclavicular joint arthritis and chondromalacia facet. These are the pertinent findings.

Q And, Doctor, do you have an opinion within a reasonable degree of medical certainty whether the diagnosis and the injuries listed there were casually related by the accident of January 19th, 2012?

MR. SCHIFERL: Objection. Hearsay. And foundation.

THE COURT: Overruled. You can answer.

A Yes, sir.

Q And what is that opinion, Doctor?

A That is -- that it's casually related based on the history, the physical exam and the reasons I gave earlier this morning.

Q Now, Doctor, without reading, without reading it, tell us generally what was the -- what was the operative -- the operation that was performed on April 17th, 2013?

A It was an arthroscopic surgery with three portal holes; here, here, and from the back to visualize the proper anatomy. And the doctor shaved the jagged edges of the labrum to make it smoother, make it more functionable, and he corrected the impingement syndrome. And also he manipulated the shoulder while the patient was under anesthesia. Manipulation means he forcefully moved the shoulder, moved it to different ranges of motion to the shoulder. These were the essential things that was done during the surgery.

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Q Okay. Now, Doctor, can you show us, using your little left-arm model, what the surgery entailed?

A Yes.

So, as I said, the labrum is in the front and inferior portion of the shoulder (indicating). So the arthroscope has a scope; you could see, and at the end it has suction, it has water for irrigation and it has scissors. The surgeon goes in from different areas. When he visualizes the pathology, he debrides, or cuts away, makes it smooth.

To give an example, if you break your fingernail, it's jagged; it gets caught on different objects; it bothers you. Same thing with the labrum. So the surgeon shaved it away to make it smoother. And, also, he did the same with the -- the fossa, the glenoid fossa, which was abnormal and not smooth; he made it smoother by shaving it. And then he did the manipulation under general anesthesia.

And the partial tear of the biceps, he cut away portions of the fibers that were torn away, to make it smoother.

MR. KERNER: Your Honor, I'd like to make an offer of proof outside the presence of the jury.

THE COURT: Okay. I'll excuse the jury.

COURT OFFICER: All rise. Jury exiting.

(The jury left the courtroom.)

THE COURT: Okay, sir, I'm going to ask you to step out, also.

MR. KERNER: Well, I do want the doctor here to testify about the -- you know -- the demonstrative --

THE COURT: Outside the presence of the doctor, counsel.

THE WITNESS: Yes. I'll step out, yes.

THE COURT: Don't talk to anyone about the case, sir, while on this break --

THE WITNESS: Yes, your Honor.

THE COURT: -- because you're on the stand.

THE WITNESS: Yes, your Honor.

(The witness left the courtroom.)

THE COURT: Okay, Mr. Kerner.

MR. KERNER: Yeah.

Your Honor, I -- again, the doctor's described the surgery; he's given his history of what he's done; he's involved deeply in surgery and oversight of surgery, all sorts of surgery; he has training in surgery.

These (indicating) are --

THE COURT: He doesn't have training in surgery. When did he say that?

MR. KERNER: He said he had a year of general surgery, your Honor, and -- and -- he testified he had the year of general surgery, your Honor, and so he's had --

THE COURT: No, but he's qualified as an expert in physiology.

MR. KERNER: Well, I mean, he oversees -- he says he oversees -- an institution that has 50 surgeons and he oversees their work.

THE COURT: No, but his work, the main work that he does, is in rehab.

MR. KERNER: Yes. The main work he does may be in rehab, but that doesn't mean that he can't --

THE COURT: How can he describe the surgery that he did not do? Why is he the best person to be doing that?

We already had the doctor come testify as to what he did.

MR. KERNER: Your Honor, this -- in New York, it's a practice; it's just a general practice, for many years, that when, for whatever reason, the surgeon or the treating doctor does not come in -- for whatever reason -- that it's allowed that people hire ME's, medical examiners, to --

THE COURT: Was he the IME doctor?

MR. KERNER: No, he wasn't the IME doctor.

THE COURT: Okay.

MR. KERNER: But why is an IME doctor allowed to come in and testify and not him?

THE COURT: He isn't the IME doctor. He doesn't fit that scenario counsel, right?

MR. KERNER: Well, I take exception.

I think it does fit --

THE COURT: Does he say, even, any of this in his 3101(d)? I don't think so. In fact, his main testimony is about what the patient needs after, in terms of care; correct? We haven't even gotten to that part.

MR. KERNER: Well, your Honor --

THE COURT: Right?

MR. KERNER: -- I think, at page -- on -- on page 2 of his December 10, 2019, report, he indicates that the patient underwent this surgery, and the 3101(d) indicates that he says that it's causally related.

THE COURT: The accident is causally related, not the -- what does that have to do with the surgery?

Okay. Anyway, would you like to be heard, Mr. Schiferl?

MR. SCHIFERL: I think we were heard before, your Honor, but I just would say the same things.

THE COURT: Well, make the record.

MR. SCHIFERL: Okay. Okay, I will do that.

Your Honor, for the record, for the reasons I stated earlier, which I incorporate, before the witness took the stand, about the use of demonstratives by someone who didn't do the surgery being allowed to testify about the surgery.

And, as your Honor pointed out as well, under 3101(d), the submission of the report, there was nothing in

here (indicating) at all about the causality. You overruled me on a lot of questions; fair enough. But to keep going on with this, I think, just compounds the situation inappropriately.

MR. KERNER: I think it's just a help for the jurors, your Honor. That's why these things are allowed in: because it's having an expert testify as to facts and information that a layperson cannot possibly understand without a little help.

THE COURT: Yeah. Well, if it was the own doctor [sic], and we already went through this testimony; we said what portions of the prior exhibits could be used as demonstrative evidence during his testimony and how the surgery occurred. That was Dr. Smith. With the redactions, it was permitted.

MR. KERNER: Right.

THE COURT: But in this case, I don't think that, for those reasons, it should be used. Okay?

Yes?

MR. SCHIFERL: I didn't want to interrupt before he (indicating) was done.

I would ask, just for purposes of this record, that we mark as a Court exhibit the five-page report, because that's part of this whole offer, too.

MR. KERNER: Well, your Honor --

THE COURT: Whose five-page report?
MR. SCHIFERL: I'm sorry. I'm sorry. I haven't made it clear.
Dr. Guy. I think you were even referencing with regard to the 3101(d), and that's why I'm just making sure we have it in the court record.
MR. KERNER: I have no problem with marking that in the court record; but, also, his supplemental exchange should also be marked.
(Pause.)
THE COURT: I don't think these things have to be marked as Court exhibits. What should be marked as the Court exhibit, I guess, is the actual evidence that you wanted to use as demonstrative evidence.
MR. KERNER: Okay. We can do that later, your Honor.
THE COURT: Okay. They're going to the bathroom right now.
MR. KERNER: Oh, okay. You want to do it now, your Honor?
THE COURT: Off the record.
(Discussion off the record.)
THE COURT: So, back on the record.
What we're discussing is what we premarked as Plaintiffs' Exhibits 38 and 39 today.

MR. KERNER: Thank you, your Honor.
THE COURT: Thank you.
When the jury's back, we can bring them in.
MR. SCHIFERL: Your Honor?
THE COURT: Yes.
MR. SCHIFERL: May I be heard on an issue, too?
THE COURT: Yes.
MR. SCHIFERL: Okay.
The witness has testified that he saw Mr. Bortugno on December 10, 2019, and we well knew about that, and we well knew about that because we were provided the report with the 3101(d).
We've never been provided with any report about a second visit that was allegedly made. We were provided with a 3101(d), in the attorney's words, not the doctor's words, about the second visit; and I believe it's inappropriate, without us knowing what it is that the doctor was going to -- has done on that visit and what he concludes from that, to allow testimony on that subject. This is just fair game, of us being put on notice of what that is.
And, certainly, again, we were put on notice with the December 10, 2019, visit (indicating), but then we just, otherwise, have attorney words and nothing else. And we hear a lot of testimony about causality and all this, years later, from this Dr. Guy that was hired to review records,

providing no treatment.
So I want to make an objection to testimony about that second visit, because we're entitled to, you know, due process and knowing what it is, the opinions that the doctor's going to offer, from the doctor's words.
And, as well, we're also entitled to -- as a fundamental matter, not even dealing with exhibits -- to have an idea of the doctor's opinions.
And for those reasons, we take exception to questions -- we would object to any questions -- about a second visit that was allegedly made early this year with the patient.
THE COURT: Mr. Kerner?
MR. KERNER: Yeah, your Honor. This --
Can I just have it (indicating), Kevin? Can I just have that? I just want to look at that for a second. This (indicating) is only my copy.
MR. SCHIFERL: Oh (handing).
MR. KERNER: I'll give it right back to you. No problem.
So we sent a 3101(d) on February 2nd, 2023. And everything we said, at this point, is also put on the ECF site. That's how we exchanged discovery --
THE COURT: NYSCEF?
MR. KERNER: NYSCEF.

THE COURT: Okay.
MR. KERNER: I get confused.
THE COURT: And what are you talking about? You served a supplemental?
MR. KERNER: Plaintiffs' expert exchange, yes --
THE COURT: Okay.
MR. KERNER: -- supplemental, based on a further examination by Dr. Guy.
And so, your Honor, that's -- in New York practice, that's how exchanges are done; 3101(d). We provided it --
THE COURT: Can I see the second, supplemental?
MR. KERNER: Sure.
(Said document handed to Court from Mr. Kerner.)
MR. KERNER: And, also, I just want to say, there was no demand by defendants for his report. I never received any complaint about this exchange until this morning, today.
THE COURT: Okay. And did he issue a report?
MR. KERNER: He may have issued a report, your Honor.
THE COURT: Are you introducing it into evidence?
MR. KERNER: No, I'm not introducing that report into evidence.
THE COURT: Okay. But you're questioning him as to what you outlined in the supplemental (handing). Well, it's

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not marked "supplemental," so I'm referring to the one that's dated February 2, '23 (handing).

MR. KERNER: So far, all the questions have been in reference to his -- to the earlier exchange --

(Said document handed from Court to Mr. Kerner.)

MR. KERNER: Thank you.

-- which was done with his report, and the earlier exchange was done on --

THE COURT: November 23, 2002, correct.

And in it, he does say, his opinion is going to include that all of the diagnoses were causally related to the accident.

MR. KERNER: Right.

THE COURT: Mr. Schiferl?

MR. SCHIFERL: I, 100 percent, agree with what your Honor just said: --

THE COURT: Okay.

MR. SCHIFERL: -- in that report.

And you just asked a very important question: Did he do a report after the visit he made more recently? And I heard the answer on the record, which was, maybe. We've never been provided or seen anything like that. And so, to therefore put into the record that he saw him a second time, which was allowed to be stated, but not provide us with that report to be able to question him, that's the fundamental

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problem we have. Because under 3101(d), even with this disclosure -- and I would take exception to what he said is standard practice --

THE COURT: Well, what I heard was, there might be a report. Is there a report or is there not a report? And is he going to be questioned on it?

MR. KERNER: I haven't -- I -- I -- as an officer of the court, I think there is a report, your Honor.

THE COURT: Okay. And was that exchanged?

MR. KERNER: The report itself was not exchanged, but a 3101(d) was exchanged.

And I don't know -- I don't know what law Mr. Schiferl was citing to that says I have to exchange the report of the doctor. If there's some case law that he'd like to cite to, okay. I know that the CPLR calls for a 3101(d) exchange, where you cite to the opinions of the expert. If there's something else that I'm not aware of, I can -- I can always be educated, but I'm not aware of any such thing.

THE COURT: Well, is the opinion -- how is the opinion different from his current report?

MR. KERNER: It wasn't different, your Honor. It's the same opinion. He was sent there just to make certain that there was an update in terms of physically examining him and seeing if his condition had remained the same.

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There's no differences in his opinion; he's not changing his opinion.

And, in fact, just to be clear, every question that's been asked so far has been directed towards his 2019 report, which was exchanged, you know, two, three years ago.

THE COURT: Okay. Well, I think he's within what he's submitted for 3101(d). Normally, you do exchange the report in advance of trial. It can be, in advance of trial.

So, if there's a report, give it to Mr. Schiferl's side.

MR. KERNER: Okay.

THE COURT: And, for now, I think it's permissible that he can discuss what you were notified of within a 3101(d). As to whether this -- he's going to be able to give his opinion now that is substantially different or not to what he's already given, then we'll discuss it again and address it.

MR. SCHIFERL: Thank you, your Honor.

I'm told by Mr. Sabatino that it is a local rule that reports are to be exchanged.

THE COURT: Yeah. It's just in advance of trial, so --

MR. SCHIFERL: The important part of this is: Look, it may be the same; it may be different. We don't know because we've never seen it. And so it --

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THE COURT: Okay.

MR. SCHIFERL: I don't know how I cross-examine on something I've never seen.

THE COURT: Okay.

Well, give him a copy of the 3101(d).

He was given it, right?

MR. KERNER: I'm giving him a copy of a January 3rd, 2023, report by Dr. Guy (handing).

THE COURT: Okay.

MR. KERNER: It's a three-page report.

THE COURT: All right. So we're still on direct, and let's call them back in.

MR. SCHIFERL: Can I go to the restroom?

THE COURT: You want to go to the restroom?

MR. SCHIFERL: Yes.

THE COURT: Sure. We'll wait another five minutes.

MR. SCHIFERL: I'm going to read this (indicating) as I walk.

(Recess.)

(The witness resumed the stand.)

THE COURT: All rise. Jury entering.

(The jury entered the courtroom.)

THE COURT: Okay. Please have a seat, everyone.

Doctor, I just remind you, you're still under oath.

THE WITNESS: Yes, your Honor.

THE COURT: Okay, Mr. Kerner.
MR. KERNER: (To reporter) Can you just read back --
Could the court reporter just read back the last question and answer, please?
THE COURT: Sure.
(The reporter read back the requested portion of the record.)
DIRECT EXAMINATION CONTINUED
BY MR. KERNER:
Q What was the purpose of the anchors that were placed into Mr. Bortugno's right shoulder?
A To --
MR. SCHIFERL: Objection.
THE COURT: Hold on one second.
MR. SCHIFERL: Objection; foundation.
THE COURT: Yes, sustained.
Q Do you have an opinion, with a reasonable degree of medical certainty, why a surgeon would place two anchors in a right shoulder when performing the surgery that was performed on Nick on April 17th, 2013?
MR. SCHIFERL: Objection; foundation --
THE COURT: Sustained.
MR. SCHIFERL: -- and speculation.
Q Do you have an opinion, with a reasonable degree of

medical certainty, why anchors are placed in the shoulder?
A Yes.
MR. SCHIFERL: Same objection, your Honor.
THE COURT: Sus --
All right, sustained. Strike the answer -- question and answer.
Rephrase your question, counsel. It's direct exam.
MR. KERNER: Okay.
Q Can you just tell us: Were any anchors involved in the surgery performed by Mr. -- Dr. Finuoli?
A Yes, sir.
Q And where were those anchors placed?
A Can I review my notes?
THE COURT: Yes. You can reference something and refresh your recollection. Let me know when you're finished.
A Yes. Into the labral tip.
Q Okay. And what type of anchors were placed?
THE COURT: Excuse me.
What are you reading from, sir?
THE WITNESS: The operative -- it's in evidence. The operative report.
THE COURT: Okay. What exhibit is that; N?
THE WITNESS: N. Thank you, your Honor. Yes.
THE COURT: So, read it and let me know when you're

finished and ready to answer the question.
A It's called the ArthroCare OPUS Labral Repair System.
THE COURT: Okay, I'm going to remind you again, sir, you can't read from the document. You can use it to refresh your recollection, then put it away and tell me you're ready to respond.
THE WITNESS: Yes, your Honor.
THE COURT: And then you can answer.
THE WITNESS: Yes.
THE COURT: Next question.
BY MR. KERNER:
Q Have you ever been involved in performing a similar surgery?
A I assisted in many of these procedures when I was doing my general surgical rotation at Cabrini.
Q And when you assisted in doing those surgeries, in any of those surgeries, were there anchors placed in the patient's shoulder?
A Yes, sir.
Q And to your understanding, when you did that, what was the reason for placing the anchors in the patients' shoulders?
A To increase the stability and the strength; the strength of the shoulder joint.
Q Okay. Now, in terms of further treatment, after his surgery, which was done on April 17th, 2013, did you read

additional -- did you read any other records indicating additional treatment for Nick's right shoulder?
A Yes. After this surgery, he had physical therapy; he had many different types of injections: nerve blocks, etcetera.
Q What type of injections did he have?
A He had cervical epidural injections. He had medial branch block injections. These are the ones that I remember from the top of my head, without reviewing all these (indicating) records.
Q Can you tell us what an epidural is?
A Yes.
Epidural is an injection of -- if it's in the cervical spine (indicating), it's with normal saline and steroids. When you give steroids into the epidural space, you have much more power than giving it by mouth. For example, one milligram of morphine into the epidural space (indicating) equals 100 milligrams by mouth. If you give a patient 100 milligrams of morphine by mouth, you will kill him; but one milligram into the epidural space (indicating), they get adequate relief of pain. Same with steroids. So you would use 40 milligrams of steroids into the cervical spine (indicating). That gives the patient relief -- long-lasting relief -- of pain and inflammation to the nerve roots.
Q Okay. And did he also receive trigger shots?
A Yes, trigger-point injections.

Q Okay. And what is --
Have you ever assisted in giving trigger-point injections?
A I've done hundreds of thousands, myself.
Q Okay. And what is the purpose of a trigger-point injection?
A A "trigger point" is defined as an area of muscle ischemia or muscle fibrosis. On physical examination, when you touch the muscle (indicating), you feel a little knot, like a little, tiny marble. So the blood supply to the area becomes cut off. So you inject it with a local anesthetic to numb the area and you needle it -- twelve o'clock three times, three o'clock three times, six o'clock three times, nine o'clock three times (simulating) -- to break up all the scar tissue, and the surrounding muscle fibers forms new muscle tissue and, hopefully, gives the patient some relief of pain.
Q And this was done for treatment of his right shoulder?
A Yes, sir.
Q And, also, the epidural's for treatment of his right shoulder?
A For the right shoulder and the neck, as well.
Q Okay. Now, Doctor, when you saw him in 2019, you examined his right shoulder; correct?
A Yes, sir.
Q And you reached the conclusion that he had sustained

certain injuries that you told us about: a labrum tear and a biceps tear, back on January 19th, 2012; correct?
A Yes, sir.
Q Okay. Do you have an opinion, with a reasonable degree of medical certainty, what the prognosis is for Nick concerning just his right shoulder?
MR. SCHIFERL: Objection; foundation.
THE COURT: Sustained.
Q When you saw Nick in 2019, did he still have pathology concerning his right shoulder?
A Yes, sir.
Q Do you have an opinion, with a reasonable degree of medical certainty, if a person still has pathology approximately seven years after the trauma, what the prognosis for that portion of the body is?
MR. SCHIFERL: Objection; leading, and foundation.
THE COURT: He asked an opinion question. Can you answer it?
THE COURT: Yes, your Honor.
Q And what is your opinion?
A So this is a permanent, progressive injury, meaning that you cannot cure this condition; it's going to worsen over time, with further traumatic arthritis setting in, further weakness to the shoulder, further reduction of range of motion.
Q Okay. And just to be clear --

MR. KERNER: Okay, let me withdraw that.
Q In terms of --
Now, we've had testimony in this case -- we've had testimony in this case from a neuropsychologist -- that Nick sustained injuries involving his brain, and that he has problems with his comprehension and memory and cognitive skills.
We've also had testimony in this case from a neurosurgeon who indicates that, in his opinion -- and this is all the doctor's opinion -- that Nick sustained cervical trauma and herniations at three levels as a result of his January 19th, 2012, occurrence with the elevator gate.
We also have the hospital record, as you've seen, and from Dr. Smith, as well, that Nick sustained a concussion and a post -- has postconcussion, and he also indicated that he has no head trauma.
Now, based on --
A I'm sorry? I didn't hear.
Q And head trauma.
A Oh. I thought you said, "no head trauma."
Q No; head trauma.
THE COURT: Sir, this is not a conversation.
THE WITNESS: I'm sorry.
THE COURT: I'm going to sustain the objection [sic]. I don't understand the question myself. Go ahead.

MR. KERNER: Okay. Well, let me just finish the question, your Honor.
BY MR. KERNER:
Q Do you have an opinion, based upon the fact that these doctors have described the multiple injuries to multiple parts of Nick's body and the right shoulder; as well as, do you have an opinion, with a reasonable degree of medical certainty, whether Nick will need a multidisciplinary team approach for the treatment of his injuries?
A Yes, I do.
MR. SCHIFERL: Objection; leading. And it's bolstering.
THE COURT: No speaking objections, okay? It's sustained.
Again, Doctor, I'll remind you: Do not answer the question, if you hear somebody object until, I let you answer.
THE WITNESS: Okay.
Q Doctor, do you have an opinion, with a reasonable degree of medical certainty, whether Nick needs a multidisciplinary team for treatment involving his injuries?
MR. SCHIFERL: Objection; foundation.
THE COURT: It's not an opinion. Counsel, it's direct examination. The objection is sustained.

Q Do you have an opinion, with a reasonable degree of medical certainty --

Doctor, based upon your review of the records, based upon your review of the surgeries, based upon your review of the pain-management records, do you have an opinion, with a reasonable degree of medical certainty, whether Nick needs a multidisciplinary team approach for the treatment of his injuries?

MR. SCHIFERL: Objection; vague as well.

THE COURT: Sustained.

Direct examination, counsel, and then ask him his opinion.

Q Doctor, do you have an -- okay.

Doctor, do you believe that Nick needs a multidisciplinary team approach for his injuries?

THE COURT: You can answer.

A Yes, sir, he will.

Q And what is that opinion based on, Doctor?

A Because -- based on the history, the physical exam, the nature of his injuries.

Q Okay. And are you familiar with the medical indications for certain tests and procedures?

A Yes, sir.

Q And how are you familiar with them?

A I order them; I teach them; I follow through with them.

It's my job to know them.

Q And what -- tell us: What do you mean by "medical indications"?

A What is medically appropriate for a patient's symptomatology and physical exam findings.

Q And in this particular case, based upon your review of the records and examination of Nick, did you come to a conclusion about what treatment the medical indications are -- require?

MR. SCHIFERL: Objection; vague.

THE COURT: Overruled.

MR. KERNER: I'll repeat the --

THE COURT: Overruled.

You can answer.

A Yes, sir, I am [sic].

Q And what treatment do you believe that Nick will need in the future?

A Since these injuries are permanent and progressive, which mean they will worsen over time, he will need to see a neurosurgeon or a spinal surgeon, Dr. Ariel -- such as Dr. Arien Smith, at least three times per year, to monitor the spinal injuries, to make sure there's no adjacent segmental pathology, which means that there's no recurrent herniations above or below the levels of the surgery; to make sure the hardware is intact; to make sure the metal clips and the screws are not loose.

These are some of the things that the surgeon has to do.

He will see -- he will need to see -- a neurologist at least six to eight times per year to monitor the neurological injuries.

He will need to see an interventional pain-management doctor at least 12 times per year for -- to give the patient epidurals, trigger-point injections, radiofrequency ablation procedures and other interventional pain-management procedures, and also including medications for pain such as what he's taking right now, oxycodone.

And he will need to see a physiatrist, like myself, at least 12 times per year to monitor the patient's overall musculoskeletal condition, to assess the need for physical therapy, diagnostic studies, referral to other specialists.

And he will need to see a psychiatrist at least six times per year for evaluations for his cognitive deficits, psychotropic medications.

And he will also need to see a psychologist for psychotherapy sessions once a week.

And can I refer to my notes, just to refresh my memory?

THE COURT: Go ahead.

Q That's up to the judge.

(Pause.)

A So the patient also needs periodic MRIs of the brain, the cervical spine, the right shoulder (indicating) to make sure

there's no further problems going on. That should be done at least once every two to three years.

EMG's of the upper extremities are indicated, at least once every one to two years, to assess the extent of nerve damage.

And medications will be required for pain, spasm, and inflammation.

Blood tests will be done every four months to monitor the potential side effects of these medications, such as a CBC, basic chemistry profile.

He would need urine/drug toxicology screens at least once every six months to ensure compliance with the opiate rules and regulations mandated in New York State law.

And he would need further surgeries to his neck, because the typical surgeries that he's had, they have a life span of about seven years, plus or minus two years.

And, also, a home health aide would be of benefit, to assist him with household chores that he should not perform, at least 30 hours per week.

This is essentially it.

Q Do you know what the cost of these items are, Doctor?

A I am [sic].

Q And what are those costs?

A The cost of each of these doctor's visits are approximately $200 per visit; however, the neurosurgeon visit is

much higher, is about three hundred to four hundred dollars, depending on the amount of time spent with the patient.

The cost for physical therapy is about $150. That should be done at least once per week.

And the cost of MRI's, for each area, is 1,500.

The cost for EMG is about $2,000.

The cost for a home health aide is about twenty-five to thirty-five dollars per hour.

The cost for surgery to the cervical spine -- he will need not only a three-level fusion; you have to go above it; he will require a four-level fusion. The surgeon's fee will be about 45,000 to $100,000, depending on what is found during the surgery.

A one- to two-day hospital stay would be anywhere from one hundred thousand to two hundred thousand dollars.

Anesthesia is about $3,000.

Intraoperative evoked potential studies, to monitor the spine during surgery, is about $3,000.

Postsurgical bracing would be $1,000.

And then we have postsurgical pain management, usually in the form of oxycodone, ten milligrams, three to four times per day. Each milligram is one, so if he's taking 40 milligrams, that would be $40 per day.

And postsurgical physical therapy would be three times a week for four to six months.

And I believe I covered all of them.

Q Okay. Now, you mentioned a lot of things.

A Yes.

Q Are you involved, in your practice, with preparing these type of plans?

A Yes, sir.

Q And how often do you prepare these type of plans?

A Every week, I would say, anywhere from two to ten.

Q Okay. And who do you prepare them for?

A For the people that ask for them; usually, the patients' attorneys and/or disability facilities.

MR. KERNER: I have no further questions.

THE COURT: Thank you.

Do you need a break or you're ready, Mr. Schiferl?

MR. SCHIFERL: I'll need to get my easel.

MR. KERNER: Well, could I have a minute and a half, your Honor?

THE COURT: Excuse me?

MR. KERNER: A minute and a half break, just quickly.

THE COURT: We're on cross-examination.

MR. KERNER: Okay, no problem.

THE COURT: All right.

(Pause.)

(Easel with blank pad placed in well of courtroom.)

CROSS-EXAMINATION

BY MR. SCHIFERL:

Q Still morning; five minutes.

Good morning, Doctor. How are you?

A Yes, sir. Good morning, sir.

Q I heard you talk for the last hour and a half or so, on questions by counsel, but I want to establish a few things, if we could, about your role in this case. Okay?

A Okay.

Q We know that -- and I think you reflected it in the history that was given to you -- that the event that Mr. Bortugno's in this courtroom for happened on January 19 of 2012; right?

A Yes, sir.

MR. KERNER: Your Honor, I'm going to object to Schiferl --

THE COURT: Okay, I'm sending the jury out.

COURT OFFICER: All rise. Jury exiting.

(The jury left the courtroom.)

THE COURT: Sir, I'm going to have you step out, as well.

(The witness stepped down and left the courtroom.)

THE COURT: What's the objection?

MR. KERNER: The objection is, Mr. Schiferl has a thing where he writes on the board (indicating). To me,

that's demonstrative evidence. It's not different than when I present a board and I try and make it more real to the jury. If I can't do it, then Mr. Schiferl shouldn't be able to do it, either, except in some limited opportunities that each of us have had with models for the shoulder and so forth.

It's just a demonstrative piece. It's not going to be marked in evidence. It's just to emphasize what he's asking. He can ask the question verbally and then he can get the answer. If he writes it down, then it's just no more than a demonstrative piece of evidence. And I have not been allowed to use very many of those in this case.

MR. SCHIFERL: I'm not sure what the objection is. I'm not marking it as a demonstrative piece of evidence. I'm using it to establish a timeline, your Honor. This -- I teach at ABOTA --

THE COURT: I understand it's your style of it, but essentially, it's really not necessary. They can listen to a timeline without seeing it written out.

MR. SCHIFERL: Actually, your Honor, if I may be heard on this ...?

THE COURT: Yes.

MR. SCHIFERL: I teach trial tactics at ABOTA, at Harvard; I've never heard an objection to this. One of the things we're allowed to do on

cross-examination is have some leeway to establish timelines. And some people are visual learners; other people are not. We already heard that about Mr. Bortugno. So I'm establishing a timeline with the witness' testimony; not my testimony, the witness' testimony.

It's not a demonstrative; it's not an exhibit. I would agree with that. But this is stylistic.

And I don't know what the objection is. Is it a form -- I mean, I literally don't understand it. I mean -- I guess, I could fumble papers; that's my style. I mean --

MR. KERNER: I understand.

But, basically, what it does is, it -- it -- it -- I'm trying to think of the right way -- it puts down in writing what the testimony is. That's what it does. It basically is a recording of -- a written recording -- of what he's going to get from whatever the witness says. And that is not being written down into evidence, it is not evidentiary, and it's not something that should be allowed. The evidence comes from what the court reporter writes down.

And if he wants to use it on closing to make arguments, to make -- to list things, that's where it's appropriate. It's not appropriate to present it so that the jury is constantly seeing it. So it's like a repetition of what the witness said: Five minutes later, they can still see what the witness said.

THE COURT: Anything further?

MR. SCHIFERL: I have nothing further, your Honor.

THE COURT: You know, I don't find that it's going to be helpful. I don't think it stymies your cross-examination in any way. So I'm going to grant his application for you not to use it, as emphasizing what the witness is saying.

It's all in the record. If they need to be read back the record, they can do that. Okay?

MR. SCHIFERL: So that I'm clear --

THE COURT: You can obviously use it as a demonstrative of what the evidence says at the time of closing.

MR. SCHIFERL: So that I'm very clear on this --

THE COURT: Sure.

MR. SCHIFERL: -- what is the objection that was granted?

THE COURT: He does not want you to write down responses you receive in a diagram, or chart, on this -- on the easel, or poster board.

And, in fact, you're not actually writing down accurately what the testimony is; you've summarized it.

MR. SCHIFERL: Right now (indicating) -- Well, I'm not going to argue.

THE COURT: Not on this one (indicating), in the

past.

MR. SCHIFERL: Actually, your Honor, for the record, I'll mark these (indicating), because I take exception to the comment. I do want a record on this.

THE COURT: Okay.

MR. SCHIFERL: You said I didn't write it down accurately. The first page I wrote down read, at the top: "105, 1/19/2012." And then the witness' testimony: "No evidence of gate problems, [501]; no evidence of gate, [501.]"

THE COURT: Well, that's summarizing what he said. You said there's no evidence of it, but you didn't write down exactly what he said; correct?

You're presenting it as what he said.

MR. SCHIFERL: Your Honor, I am an officer of the court, and your comment was that I wrote down something that's not accurate and I take exception to that. And I think I would like the records in the record to show that what I wrote down was not inaccurate or misrepresentative in any way, shape or form, because that's the comment that I received from your Honor: that I have done that.

THE COURT: No, I didn't say it was inaccurate. What I said is, you didn't take down exactly, word for word, what the -- what the witness testified to. What you did was characterized it as saying there was no evidence prior or

after the timeline.

MR. SCHIFERL: Okay.

THE COURT: Okay?

MR. SCHIFERL: Your Honor, I'm going to take -- I would like to take exception to the highly prejudicial break, and now the jury will see that what I was doing is somehow not being allowed.

And I don't, again, understand the objection that was made to it. But we'll move on.

THE COURT: There was nothing prejudicial about what they saw. It was a blank easel that you had set up. Okay?

Any further objections before he even starts the cross?

MR. KERNER: No, your Honor.

THE COURT: Okay.

(Recess.)

COURT OFFICER: Judge, the witness is in the room.

THE COURT: Okay.

(The witness resumed the stand.)

(Continued on next page.)

COURT OFFICER: Judge, would you like the jurors?
THE COURT: Yes, please.
COURT OFFICER: All rise.
(Whereupon, the jury panel entered the courtroom.)
THE COURT: Okay. Please be seated. Members of the jury, thank you for your patience. We will resume Cross-examination.
Mr. Schiferl.
MR. SCHIFERL: Yes.
Q Dr. Guy, are you being paid for your services in this case?
A I am being compensated for being out of my office, for being here today.
Q What is that?
A Five thousand for half a day.
Q With regard to the work that you did with your visit on December 10th of 2019 with Mr. Bortugno, were you paid for that?
A For that visit, yes, sir.
Q And how much were you paid for that?
A For the life care plan, three thousand.
Q Are there any other charges you incurred?
A For the updated report of 1/3 and the evaluation,

fifteen hundred.
Q Now, I want to make sure we establish some facts about what your role is here.
Would you agree with me that an event happened on 1/19/12, correct?
A Yes, sir.
Q And then from that date we go into 2013, correct?
A Yes, sir.
Q And after that there is 2014, correct?
A Yes.
Q And then there's 2015, correct?
A Yes.
Q Then there's 2016, correct?
A Yes.
Q And then there's 2017, correct?
A Yes, sir.
Q And then there's 2018, correct?
A Yes, sir.
Q And then there's 2019, almost to the end of it when you first saw Mr. Bortugno, correct?
A Yes.
THE COURT: Counsel, don't get any closer to the bench or the witness stand please.
Q In those seven and a half years from the event until you first saw him, is it true that you provided no

care or treatment to him?
A Yes, sir. Correct.
Q And all of the testimony you were talking about with regard to shoulder surgeries and other surgeries, those were done by other people, correct?
A Yes, sir.
Q And then after you saw Mr. Bortugno on December -- in December of 2019, we are now here in 2023, right?
A Yes, sir.
Q So there's 2020, 2021, 2022, and just now the third month into 2023, right?
A Yes, sir.
Q And in that time have you provided any treatment to Mr. Bortugno?
A No, sir.
Q Okay. So your retention in this case, let's talk about that, was by counsel, correct?
A Yes, sir.
Q And no doctor referred Mr. Bortugno to you, correct?
A No, sir, that is correct.
Q And when you did your work you didn't talk to any of the doctors, correct?
A Correct.
Q When you did your work you did it on records that

were sent to you by counsel, correct?
A Yes, sir.
Q When you received those records from counsel, did you ask if there were anymore?
A I did not.
Q So your information base was provided to you by an attorney, correct?
A Correct.
Q No doctor provided you records directly?
A No, sir.
Q No doctor talked to you about what they did, correct?
A No, sir.
Q You would agree with me the best source of what someone did would be that person talking to us?
A No, sir. I would disagree with you for a very good reason.
Q So when you got all these records did you ask if there's anything more?
A You asked me that question. The answer is no.
Q Okay. So the world of what you relied upon was what was provided to you again by counsel. Is that true both before your report of December 10, 2019, along with what was after December 10th of 2019?
A Yes, sir.

Q And you've worked with the Gray & Gray law firm before, correct?
A No, sir, I have not.
Q So is it your testimony to this Court that you haven't prepared reports for Worker's Compensation --
MR. KERNER: Objection, your Honor.
Q -- patients --
THE COURT: Question is stricken. The jury will disregard.
Q I want to make sure I am clear. When you say you haven't worked for Gray & Gray, you haven't worked for Mr. Kerner or the law firm?
A The law firm I do not know. For Mr. Kerner, I saw him for the first time today.
Q Just so I am very clear, my question didn't begin with Mr. Kerner. I will ask it in a clear fashion.
You worked for Gray & Gray and provided reports, correct?
A It's possible.
Q In fact, you are a frequent testifier in courts, correct?
A I testify an average eight to nine times per year. Sometimes less, sometimes more. I don't consider that being frequent.
Q If I had three hundred eighty-eight periods of

testimony in the last decade and an average of 11.7 appearances a year, would you disagree with that?
A I would certainly disagree with you, yes.
Q And when you are paid by an attorney to do the information, or to review information and examine a patient, that is when you do a report like you did here on December 10, 2019, correct?
A Yes, sir.
Q And this report, do you know, did it go to any doctors?
A No, sir.
Q Did it go to anyone you suggested at the end of your testimony here a lot of care and treatment that you believed was needed; is that correct?
A Yes.
Q And have you told any doctors that?
A I wasn't required to. That was outside the scope of my evaluation.
Q Have you told Mr. Bortugno that?
A In those exact details, no, sir. I told him I would prepare the report and his attorney would review my report with you.
Q You -- when you did your report and came up with these projections, let me ask you, did you see -- well, you did. You saw records from before you did your report from

the period of the injuries that allegedly occurred on January 19th of 2012, up to December 10th of 2019, right?
A Yes, sir.
Q And when you saw those reports is it your testimony to this Court that those doctors that did the work early, that they were committing malpractice in any regard?
A No, sir.
Q None of those things that you recommended happened between the time of January of 2012 up until December of '19, correct?
A The answer is yes for a very good reason.
Q And none of those things that you projected in your report of December 10th of 2019 have happened to date?
A Again, for a very good reason.
Q So these recommendations that you made to an attorney haven't gone to any doctors or Mr. Bortugno to actually put them into effect?
A Again, the answer is yes with a very good reason.
Q Well, did you tell this jury that it was your reason to a reasonable degree of medical certainty that these things were needed?
A Yes, sir.
Q Okay. So if they are needed that would mean not providing them would be non-appropriate practice of

medicine, correct?
A No, sir. The patient has to have the funds to cover those services. If they don't obviously they are not going to take those services.
Q Strike that. Now, the records you were provided, you listed in the report the information that was sent to you by Mr. Kerner, correct?
A Yes, sir.
Q And I think you told this jury, if I wrote it down right or remembered right, that when you do your work, when you are paid as you were here by an attorney to evaluate records and look at someone, that seventy percent of what you do is based upon the history that the person provides you?
A The diagnosis, not the way you phrased it. I said diagnosis.
Q Well, any diagnosis you are making was not for purposes of treatment; is that correct?
A Diagnosis is diagnosis regardless of whether it's for treatment or not.
Q I am sorry. I am not sure you answered my question.
Any diagnosis you made was not for purposes of any treatment because he provided none, right?
A The way you phrased the question could not be

answered with a yes or no. It could be answered with an explanation.
Q Sir, let me ask you this; any diagnosis you made was not used by you for purposes of treatment of Mr. Bortugno, correct?
A I did not treat the patient.
Q And when you did this you relied upon, for that purpose, the seventy percent of the diagnosis, to use your terms, was based upon the history that the patient presented to you, correct?
A Yes, sir.
Q And I take it when you were obtaining that history, you wanted to know everything you could about the event that happened back some seven and a half years ago, correct?
A Whatever is pertinent.
Q As well as what might have happened in those interim seven years?
A Again, yes. Whatever is pertinent.
Q Well, you can't determine what is pertinent until you first know the information, correct?
A That is correct.
Q So you have asked open-ended questions of the patient, please tell me your history of what happened and how have you been since?

A I asked a lot more in detail than that.
Q In fairness, I was summarizing.
A Okay.
Q But that is the type of thing you do in taking the history?
A Yes.
Q And with regard to the history of the event that was given, was anything conveyed to you at all about the circumstances of the incident?
A What do you mean?
Q Well, you know the claim is that Mr. Bortugno was struck on the head, or, his head came in contact with a closing gate of an elevator, correct?
A Yes.
Q Do you know anything about the elevator gate?
A No.
Q Do you know anything about the speed or Mr. Bortugno's speed?
A No, sir. Outside the scope of a physician. I am not an investigator.
Q Just asking. But you did review records that Mr. Bortugno over time had talked about over time to other doctors, correct?
A Yes.
Q And I take it you reviewed those and looked at

those to see if it was consistent with the history provided to you?
A Yes, sir.
Q And in those histories did you see that Mr. Bortugno indicated that he was hit by a door that weighed one thousand pounds?
A I seen that.
Q Did you see at some other points that he talked about being hit by a door weighing seventeen hundred pounds?
A I didn't see seventeen hundred. I saw one thousand.
Q I will represent to you it's in the record. If it's in there, would you have reviewed those records?
A Yes.
Q And do you know if that is accurate?
A I don't know if it is or if it's not.
Q In other words, do you know if the historian, and the -- when you are asking Mr. Bortugno's history is accurate or not when you take it?
A It is confirmed by the other medical records and the operative findings. So I find it to be corroborated by medical facts in evidence by the medical records.
Q Well, as a physician I take it you are aware of things that exist in your field about impacts to heads and

what type of level of impact would be injurious versus non injurious?
A Yes, sir.
Q What is that called?
A The source of trauma and mechanism of injury.
Q Is there a thing called head injury criteria as well?
A If the patient loses consciousness, there is a Glasgow Coma Scale. When you have a serious traumatic brain injury.
Q And so you know, and I guess we know Mr. Bortugno didn't lose consciousness here, right?
A That is correct.
Q And because those would be the things that would trigger whether something was -- rises to the level of injurious or not to cause brain injury, correct?
A Yes.
Q But in all the records you were provided and the history that was given to you, did Mr. Bortugno ever talk to you -- strike that. I don't want to be compound.
In the history that Mr. Bortugno gave you, did he tell you that he fell down a flight of stairs in October of 2012?
A No, sir.
Q Did he tell you that when he fell down the flight

of stairs in 2012 that he lost consciousness?
A That never came up.
Q Did he tell you when he fell down a flight of stairs in 2012 and lost consciousness, that he went to the Brookhaven Medical Center?
A That never came up.
Q You were given records from the Brookhaven Medical Center from 1/19 and 1/20; is that correct?
A Yes.
Q Did Mr. Kerner ever provide you records with the October visit that his client made when he lost consciousness falling down the stairs?
A Never saw them.
Q You can't determine then whether it's pertinent or not, correct?
A That is correct. Unless I see it.
Q When people fall down flights of stairs and lose consciousness they also impact other portions of their body; is that correct?
A Yes.
Q Shoulders?
A It can be.
Q The shoulder surgery Mr. Bortugno had in this case was in 2013, correct?
A Yes, sir.

Q All right.
MR. KERNER: I have an objection, your Honor.
THE COURT: Overruled.
Q So going back to the job that you were tasked with doing, you were never asked to provide care or treatment to Mr. Bortugno; is that correct?
A That's right. That's correct.
Q You were asked to evaluate the records that were sent to you by counsel, correct?
A Yes.
Q And you were asked then to do an evaluation of Mr. Bortugno, correct?
A Do a life care plan.
Q But you saw him, you did a hands-on exam?
A Yes.
Q Okay. And I think your report says when you did you hands-on exam Mrs. Bortugno was there in the room as well?
A Yes.
Q What did that take, forty-five minutes?
A I don't recall. I don't clock the evaluation.
Q Okay. Well, hour, two hours? You have no approximation of how long your exam is?
A I am not sure, no.
Q Well, how long do your typical exams run?

A It varies. Patient to patient, it varies. Sometimes one hour, sometimes you could take longer.
Q And when you evaluate them, not just once and saw him, but again saw him in 2012 --
A '23.
Q Sorry. In January, couple months ago, right?
A Yes.
Q At no time did he tell you about a fall down the stairs, did he?
A No, sir.
Q At no time did he tell you he lost consciousness, a fall down the stairs?
A No, sir.
Q Would you agree with me that that is important information for you to know?
A It can be.
Q And not knowing it at all until I am talking to you about it now, you couldn't have factored it in your opinions one way or the other?
A Yes, sir.
Q And when you saw him in January 2023 you did a report on that occasion as well, correct?
A Yes. Yes, sir.
Q And one of the things that had happened in the meantime from when you saw him in 2019 until when you saw

him very recently was that he had some surgery with Dr. Smith, correct?
A Yes, sir.
Q And you again were provided some records about that?
A Yes, sir.
Q And in the report you made you just have a short area saying that the patient had advised you about that surgery, right?
A Yes, sir.
Q Did you look at any of the records from that surgery?
A Yes, sir.
Q And isn't it true that Mr. Bortugno told you in January of '23 that that surgery that Dr. Smith had done was still helping him?
A A little bit, yes.
Q And I will represent to you that in this courtroom in that chair Mr. Bortugno sat there and told this jury that the surgery that Dr. Smith provided to his neck only provided him relief for about a month. That would be different than what he told you, correct?
A Yes. That's correct.
Q And were you aware of that?
A I was not.

Q And would you agree with me that surgery that is undertaken, certainly a three level disc surgery that is undertaken for someone, that only provides a limited period of relief of one month is what doctors call a failed surgery?

A It depends on the -- on a lot of factors. They can call it a failed neck surgery but every surgery is functional -- not every surgery is functional. Not every surgery works the way the patient or physician wants. So some work and some do not.

Q And, again, that information was not known to you when you did your report and stepped into this courtroom, correct?

A The fact that it only helped him a little bit, yes, that was known to me.

Q Doctor, I think that is all I have at this time. Thank you.

THE COURT: Thank you. Any Redirect?

MR. KERNER: Yes.

REDIRECT EXAMINATION

BY MR. KERNER:

Q Doctor, you were asked on Cross about a fall down the stairs in October of 2012, correct?

A Yes.

Q In your records when was the MRI of plaintiff's

right shoulder done?

A Okay. June 18, 2012.

Q So that would have been before the fall in October of 2012, correct?

A Yes, sir.

Q And in that MRI which was done in June of 2012, was there any pathology noted?

A Yes, sir. There was -- very important, there was synovitis, inflammation of the joint which is indicative of a recent trauma that was present. In fact, the radiologist made a note that that is casually related to a recent trauma. And there was also the labral tear. There was also mention of the impingement syndrome and a partial rotator cuff tear. And erosion of the greater tuberosity which is the Hill-Sachs deformity.

Q Clearly all those findings were prior to 2012; is that correct?

A Yes.

Q And I just want to be clear, clear about this surgery that Dr. Smith performed in 2021.

Do your notes indicate that -- in 2023 when you saw Nick, does it indicate that he was in a little bit of pain, a lot of pain? What do your notes indicate?

A In 2013 --

Q No, in 2023.

A His pain level was eight out of ten.

Q And in terms of examining him, in terms of his right shoulder, you also did another examination of him in 2023?

A Yes, sir.

Q And what were your findings generally about his right shoulder then?

A The shoulder flexion went from one fifty to one seventy. There was some improvement. The rotation, external rotation slightly improved. Extension slightly improved.

MR. KERNER: Thank you very much. No further questions.

THE COURT: Any Recross?

RECROSS-EXAMINATION

BY MR. SCHIFERL:

Q Doctor, regardless of when MRIs were taken or anything of the sort, at no time before October of 2012 did any doctor recommend any shoulder surgery, correct?

A To my knowledge, I don't have any records from the October 2012 injury. So I couldn't answer that question.

Q Well, actually, I think you can. You looked at all the records, I know you don't have it for the fall that happened in October with the loss of consciousness and the

flight of stairs and all that, I know you don't have those, but my question has nothing to do with those records.

My question is this, at any time before October of 2012, isn't it true that no doctor recommended shoulder surgery for Mr. Bortugno?

A None that I could see in the records.

MR. SCHIFERL: Thank you.

THE COURT: All right, Doctor. Thank you for your testimony here. You are excused from the witness stand.

(Witness excused.)

THE COURT: Counsel, my understanding is your next witness is at 2:00 today?

MR. KERNER: Yes, your Honor.

THE COURT: Members of the jury, we will have an early lunch. We will break now. Please do not discuss the case with each other. Please don't discuss the case with anyone. And also don't do any independent research on your own about the case or anybody related to the case.

Okay? Thank you so much.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury panel exited the courtroom.)

THE COURT: See everyone after lunch.

(Whereupon, a luncheon recess was taken at this time.)

COURT OFFICER: All rise. Come to order. Please silence your phones. Thank you.

THE COURT: All right. Do you have your witness, Mr. Kerner?

MR. KERNER: Yes, your Honor. He is outside in the hall.

(Brief pause.)

COURT OFFICER: All rise.

(Whereupon, the jury panel entered the courtroom.)

THE COURT: Be seated. I hope you had a good lunch. We will resume with plaintiff's case.

Your next witness?

MR. KERNER: The plaintiffs call David Rosenberg to the stand.

THE COURT: Thank you.

D A V I D R O S E N B E R G, called by and on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

COURT CLERK: In a loud voice, please state your name and address for the record.

THE WITNESS: David Rosenberg, 5 Stuyvesant Lane, Smithtown, New York.

THE COURT: Good afternoon. As you could see, there is a court reporter, so please keep your voice up and speak a little slower than normally and clearly. Two people can't talk at once. Please wait for the question to be fully asked before you answer. And if you hear someone making an objection, don't respond until after I make a ruling. I will let you know if you could respond or not.

THE WITNESS: Got it.

DIRECT EXAMINATION

MR. KERNER:

Q Okay. Mr. Rosenberg, keep your voice up so I could hear you and everyone in the courtroom could hear you. Okay?

A Yes.

Q And Mr. Rosenberg, did you receive a subpoena to be here today?

A I did.

Q And do you have an understanding of why you are here?

A Yes, I do.

Q What is your understanding of why you are here?

A A colleague of mine was involved in an accident regarding an elevator hitting him on the head.

Q Okay. And do you know the name of this colleague?

A Nick Bortugno.

Q And when you say "colleague", what do you mean by colleague?

A We work together.

Q And tell us what your profession has been or your business has been for let's say twenty years or so?

A Audio visual installations, installing television and Direct TV systems, et cetera.

Q When you say Nick was a colleague, could you just tell us what you mean by that a little more?

A He was also an installer.

Q Can you describe what job you would have to do, just generally what work you would have to do.

A That requires a lot of wiring, to get lines from one point to the other. Doing Direct TV, dish installation, installations. So you put a dish on the roof, run the lines down to where the demarkation was and install receivers and get the whole thing working.

Q And that was what the job was back in 2012; is that correct?

A Yes, correct.

Q Now, you indicated earlier that you were here because an elevator struck Mr. Bortugno, correct?

A Yes.

Q And, now, where were you when this occurrence

happened?

A Physically?

Q No, I mean -- I wasn't clear. In what building were you when this incident happened?

A I believe the post office building on Tenth Avenue or 9th Avenue.

Q Okay. And was that the main post office building in Manhattan?

A I guess.

Q Okay. And do you remember the date of the occurrence?

A No.

Q Do you remember the year of the occurrence?

A Vaguely. 2012 I think it was. Only because I saw some paperwork.

Q Okay. And when you say you looked at some paperwork, what did you look at?

A I received a subpoena and also I received my deposition and I perused it. Because I was curious about how long ago it was. I didn't recall the exact date, but I remember 2012.

Q Did this incident occur in the building?

A Yes.

Q Okay.

A In the elevator.

Q Can you describe the elevator to us?
A It was a commercial elevator, it had scissor -- whatever you call it, doors that open from the bottom and top. Scissor close. And it was a big, you know, industrial elevator for equipment.
Q I will show you a photograph that has been marked in evidence as Plaintiff's Exhibit 2. And I will ask you, is this the type of elevator, looking at it, that the incident occurred?
A Yes.
Q Had you ever been to the post office before that date?
A Possibly. I don't recall.
Q And what was the reason you were there that day?
A To do the installation of the system.
Q And do you know what time a day the incident occurred?
A It would have to be morning. Morning, a.m. probably 9, 10, 11, I guess.
Q How did you get to the post office?
A I believe I took a train in and met Nick. He had the van with all the equipment.
Q And where did you meet Nick?
A At the garage I believe, at the job site.
Q And you remember what you and Nick did generally

before the elevator struck him?
A We were loading equipment into the elevator. I was actually standing with the person we were meeting, I believe her name was Celeste. And he had the equipment on a pallet, you know, a dolly, four foot dolly, I believe, and I was standing against the elevator wall waiting to come in and he walked in -- with the four foot pallet in front of him and then the door, as he walked in, the door came and hit him square in the head. And he sort of compressed.
Q Before the door came down did you hear any sound?
A No.
Q Did you see any alarms going off?
A No.
Q Did you see any lights flashing in the elevator?
A No.
Q Now, were you standing in the elevator at the time or were you outside the elevator? Tell us where you were.
A I was in the elevator against the wall. Nick would have been entering from my left.
Q Okay. And do you know what side that was, can you describe it, anything more than the left side?
A That would be the garage side.
Q Okay. And were you talking about anybody or engaged with anybody at the time?

A I remember the woman, you know, idle banter, speaking nothing specific. General speaking.
Q And who was this woman?
A I believe her name was Celeste. She was the representative of the post office I assume that we were doing installation for, or the client we were doing installation for.
Q Okay. And as you spoke to Celeste, what was Nick doing?
A Nick was wheeling the equipment into the elevator.
Q And do you know why he was wheeling the equipment into the elevator?
A So we could go install it.
Q And what equipment are we talking about? What equipment --
A Wiring, ladders, tools, drills.
Q And -- sorry. Finish your answer.
A That is it.
Q I apologize. Now, when you -- when Nick was pushing this in, can you describe what this material was on?
A It was on a four foot dolly, you know, the kind that has a pallet that you see on -- in Home Depot, flatbed, you push it forward.

Q And at some time did you see something happen between Nick and the elevator? Did something occur?
A Between Nick and the elevator?
Q Yes. You said the door hit him?
A Struck him on the head.
Q And what part of the head did it strike him on?
A Dead center, boom. Came down, neck compressed.
Q And when you saw Nick being struck by the elevator, what did you -- did you see any reaction or anything happen to his body?
A Yes, he like compressed and his neck went, you know, compressed in. He kept walking. He didn't go down and then was acting, you know, like tweaking himself and he didn't feel right. And then he -- then I believe he stopped -- we stopped and he leaned up against the wall on the other side of the entrance. There was the elevator -- there was a hall entrance and a garage entrance. So I believe he just leaned up against the wall on the second door -- the hallway entrance, and then I believe the woman was talking to him and then she got some other people and they were talking to him.
Q Did you see where Nick went after he was struck by the elevator?
A He went to the hallway, leaned against the wall. Then we went out to the front lobby, and I believe we --

he sat down and I believe they were doing a report or something.
Q And how many people were around Nick at that point?
A I don't recall. At least two or three.
Q And do you know where these people were from, what they were employed by?
A Not specifically. I assumed they were with the building, and the post office. No, I do not.
Q And how long did Nick remain there after the elevator struck him?
A It was probably half hour or so I would say.
Q And --
A More or less.
Q Did these people remain with him during that half hour?
A Yeah. They were talking to him. I wasn't -- I was, you know, just peripherally watching and on my phone or whatever. Not too much involved with what they were discussing with him.
Q Did there come a time when you and Nick left the premises?
A Yes.
Q Now, before you left the premises, did you and Nick complete the job that you had been sent there to?

A No.
Q And to your understanding why did you and Nick not complete the job?
A Because Nick physically couldn't do it, which is odd for him. He doesn't walk off a job.
Q Okay. And how did you leave the premises?
A We drove in Nick's van.
Q Where did you drive in Nick's van to?
A Back to Long Island.
Q And who drove the van?
A I believe -- I believe he tried to drive and then we got in the street and we changed drivers.
Q And did you then drive?
A Yes.
Q Where did you drive the van to?
A Back to Nick's house in Mastic, I believe. Or Shirley. I don't remember at the time.
Q And, now, at that time did you -- without telling us what you said, did you say anything to the individuals who were talking to Nick after this occurrence?
A No.
Q Did you see them -- did you see or hear them, without telling us what was said, did you hear them talking to Nick after this occurrence?
A No, not specifically.

Q Did you see Nick writing anything down?
A I think he was filling out a form.
Q Okay. And did you ever see this form?
A No.
Q How long -- approximately how long after the elevator struck Nick did you and Nick leave the premises?
A I really don't recall, but I will say maybe a half hour. I really don't recall. Could have been longer. Maybe an hour. I am not sure.
Q All right.
MR. KERNER: Let me see if there is anything else.
Hold on one second, your Honor.
THE COURT: Okay.
(Brief pause.)
Q Other than what you described to us, only the description of what you observed, nothing else, did you observe anything else about -- not what he told you, did you observe anything else about Nick's condition after the event other than what you have said to us?
A No. Just that he just wasn't -- wasn't acting right.
Q Did you know Nick before this occurrence?
A Yes.
Q And how would you describe him as a colleague or

worker, prior to January 19th, 2012?
A He's like a pitbull. I mean, he's a strong stocky guy. He wants to work.
Q Okay. Did you ever work with Nick after this occurrence?
A No, I don't think so.
MR. KERNER: I have no further questions.
THE COURT: Okay. Cross-examination.
MR. SCHIFERL: Yes, your Honor.
THE COURT: Okay.
CROSS-EXAMINATION
BY MR. SCHIFERL:
Q Good afternoon, sir. How are you?
A Very well.
Q You said you received a subpoena to be here, correct?
A Yes.
Q And also your deposition?
A Yes.
Q Did you review your deposition?
A Recently?
Q Yes.
A Not really. I may have perused it a little bit. Not really.
Q The incident we are here about happened back in

2012; is that correct?
A Yes.
Q That's eleven years ago?
A Okay.
Q Has your memory faded since that time?
A I am sure it has.
Q And when -- you were deposed in this case back in 2016, correct?
A If you say so, I will accept that.
Q Well, that is the -- I will represent that is the deposition you were provided, the only one I am aware of. Do you have any reason to disbelieve that?
A No.
Q And that was a deposition taken by Mr. Kerner, correct?
A I believe so.
Q So Mr. Kerner asked you questions then, right?
A Yes, he did.
Q And among one of the very first questions he asked you was how you got there on this particular day. You remember that?
A Yes.
Q And isn't it true that you told him that you drove there with Mr. Bortugno?
A That is not true.

MR. SCHIFERL: May I approach, your Honor?
THE COURT: Sure.
(Document submitted.)
MR. SCHIFERL: I will hand the witness page 14 of his deposition, line 7. With the question through line 9.
Q If you could read that to yourself and let me know when you are done reading it to yourself.
(Witness complies.)
Q Did you finish reading line 7 through 9?
(Brief pause.)
THE COURT: Don't answer. Are you finished reading it?
THE WITNESS: Yes.
THE COURT: Thank you.
Q And having read lines 7 through 9 on page 14 of your deposition, did it refresh your recollection that, in fact, when Mr. Kerner asked you a question back in 2016 about how you got there, you said you drove him?
A It does refresh my memory. We did drive.
Q And with regard to the time of when this event happened I will represent to you Mr. Bortugno said it happened in the early afternoon.
Do you have any reason to disbelieve what he said in this courtroom?

A No, we probably arrived in the late morning, so probably late -- early afternoon.
Q When you went there to do this work, you went to the loading dock area at some point in time?
A Yes.
Q And, now, with regard to the work you did, when you pulled in to go to the loading dock area, did you -- in this van you drove, did you stop at a guard shack at all?
A I don't recall. There was a guard shack, I don't know if we stopped at it.
Q Well, other than the person who had called you from you post office --
A Right.
Q -- did you have any knowledge or understanding that the building knew you were going to be there?
A Um, yes, they did know we were going to be there.
Q How -- other than the person from the post office, did you talk to the building to tell them you were going to be there?
A I didn't specifically speak to the building, but they were aware we were coming. You know what, I don't know if the building was aware, I know my client was aware.
Q Sir, I will represent to you that there was testimony yesterday read into the record from a gentleman

named Simon Wynn who is an attorney for the building and he said they had no knowledge that you were going to do any work in the building. Do you have any reason to disbelieve his testimony?
A No.
Q When you got there, do you know where you were going?
A Yes.
Q And how did you know that?
A Because we had setup the job to do it prior to that, days or weeks prior. The office of the company that was contracting the job.
Q And this setup, you knew you had to go in the building but do you know where in the building you had to go to?
A Yes.
Q Okay. And where was that?
A We had to go to the roof and then we had to find a route down to the location where the Direct TV receiver was going to be in an office, I am not sure what floor at the time.
Q That is how -- because how these devices work, they have to have clear air contact --
A No, they are hard wired down to the -- from the roof to the location. It could be one hundred stories,

two stories, however long the line is.
Q As far as getting access to the roof, do you know how you were going to get there or gain access to the roof?
A Specifically, I don't recall that we knew we were going to find out how to get to the roof -- from the -- whoever the contact was was going to get us up there.
Q When you got off the van you unloaded the equipment onto a cart?
A Yes.
Q And when you unloaded it onto a cart what did you do?
A I believe actually -- actually, we tried to go up the elevator prior to the incident, there was a first elevator. We went up and the gentleman that took us up opened it to a door that we didn't -- couldn't access what we needed so we came back down.
MR. SCHIFERL: I'd like to show what has been admitted into evidence as Plaintiff's 4 and 5 to the witness, your Honor.
MR. KERNER: May I see what they are?
THE COURT: Yes.
(Exhibits submitted.)
MR. KERNER: Thank you.
COURT OFFICER: They are in front of the witness, Judge.

THE COURT: Thank you.
Q I have handed you -- the court officer has, sir, Exhibits 4 and 5.
A Right.
Q Do those refresh your recollection at all about the inside of the dock area at the Farley Building?
A A little bit. Yes. I will say yes.
Q And if I can pull up Exhibit 4 first, Mr. Campbell.
(Exhibit displayed in open court.)
Q In Exhibit 4 we are looking at, and the jury sees it here as well, there is freight elevators labeled with 106, 105, and they are right next to each other; is that correct?
A Yes.
Q You would agree with me?
A Yes.
Q And you looked at the photographs. Is one of these two elevators the one you took before the incident involving Nick?
A I would not know. Yes, I assume one of them. Do I specifically remember the number of the elevator, is that what you are asking me?
Q Sure.
A I do not.

Q The first elevator you took, where was it located relative to the incident --
A I believe it was one of those two.
Q I will represent --
A The first two or three elevators.
Q I will represent to you that all the testimony in this case has been that Mr. Bortugno's claimed injury is on elevator 105.
A Okay.
Q So if we accept that as true, that would mean the first place you went was on elevator 106, correct?
A Honestly, I don't recall which elevator we were in up and down. I have no -- I can't recall which elevator. We used two. I don't know which was first and which was second. I know we used two.
Q Well, let's talk about the first elevator you used.
A Okay.
Q Are the two elevators you used similar?
A Yes.
Q Were they both freight elevators?
A Yes.
Q Were they both freight elevators with bi-parting doors that come apart?
A Yes.

Q You mentioned that you used this first one.
A Right.
Q When you used the first one was Nick with you with the cart on the elevator?
A Yes.
Q Apparently some other gentleman?
A Yes.
Q Did you know who this was?
A No.
Q What happened when you got on this other elevator with this other gentleman?
A We went up to one of the floors.
Q And when you got on the elevator, do you remember anything about getting on that elevator?
A Nothing specific.
Q Do you remember any whistles or bells or lights?
A No.
Q When you got on that, not remembering bells or lights, you went up somewhere?
A Yes.
Q Where did you go to?
A We went to a floor we were trying to access, trying to get to a place where we could access the roof. So he took us to a floor but we realized we couldn't access the roof from there, so we went back down.

Q Now, at this point had you made any contact with the person that was there for you to do the work for?
A Um, I don't recall if we had contacted her prior to going up. I don't recall.
Q And so when you got off, did you get off the elevator, the first one then?
A We did.
Q When you got off did you determine that you couldn't do your work there and got back on it then?
A Correct.
Q When you got back on it, what happened?
A We went down.
Q Do you remember hearing lights or bells when you got back on it?
A I don't recall any bells. None specifically.
Q Generally, it's consistent, you don't recall bells or lights on any usage of any elevator on that day?
A Correct.
Q So you came back down then, correct?
A Correct. Right.
Q And when you got back down to the dock side what did you do?
A I believe we came out of the elevator, I think I phoned the contact, me or Nick phoned the contact and she met us down at the loading dock.

Q And, now, when the elevator came back down to the dock area and you were making this call, were you still on the elevator or off that first elevator?
A I don't recall. I would assume I was off the elevator, but I have no way of recalling.
Q Well --
A Typically phones go dead in elevators. I am sure we came off the elevator. No way we were sitting in the elevator.
Q Well, you had a conversation before when you couldn't get to where you needed to go?
A With who?
Q With the person you were there to do the work for.
A Yes, I don't recall when we contacted her or whether it was me or Nick who contacted me her. I believe it was me. I am sure.
Q So the elevator comes back down. When the first elevator that you were on came back down, where did you exit it?
A I believe I exited it the garage side, unless the other side opened first. You know, depends on which side opened first. I may have -- I assume I exited the garage side. Unless the other side opened -- you know what, when I met Celeste, I met her on the lobby side, but I am not sure if that was the first or second elevator. So I don't

recall which side. The equipment exited to the garage side, I believe.
Q Well, let me ask it this way. When you were asked questions back in your deposition in 2016, in fact, the very same question I asked you, you told Mr. Kerner that there was one of two possibilities, but you couldn't remember which.
A Right.
Q In fact, you used the word scenarios. Two scenarios that could have happened.
A Yes.
Q Is that true?
A Yes.
Q So even back in 2016 you were uncertain or unclear where you got off from that first elevator and where you went?
A Correct. Because they opened on both sides.
Q Sure. But you do remember meeting Ms. Woods in the hallway area, correct?
A Yes, I believe that -- you know something, I believe that I was on the garage side and she was on the lobby side and I could see her through the elevator because both doors were open. I am not sure if that was the first or second elevator.
Q When that happened you walked to her, correct?

A Through the elevator, yes.
Q Okay. And --
A Now that I recollect that.
MR. SCHIFERL: Real quick, if we could put up Plaintiff's Exhibit 5 on the board as well.
(Brief pause.)
Q We talked about Nick using a cart. Was it a cart you all had brought with you?
A No, I believe they -- it was one of the ones sitting there.
Q That was what I was going to ask you. It was that type of cart that --
A Yes. Correct.
Q Okay. Now, when you went to go meet Celeste Woods you met her in the hallway; is that correct?
A Yes, by the elevator.
Q And you were then the one talking to her, correct?
A Yes.
Q And when you were talking to her, you weren't observing what Nick was doing, were you?
A Not specifically at this point, no.
Q And, well, were you aware, Nick told us, this jury that while you were doing that talking and all he had a cigarette?
A That could very well be. I know he walked away,

I don't know where he went.
Q So you were continuing your conversation, I take it, the conversation you were having was how we get to where we needed to go to do our work?
A I would think so.
Q Now, you talked to us earlier that you didn't do the work that day, you -- isn't is true that you didn't do the work that day because it wasn't approved by the building?
A That is not true.
Q It was approved by the building?
A As far as I was -- I believed so, yes. That is why we were there.
Q So, again, Mr. Simon --
A By the building?
Q Yes.
A You know something, I would not know if it was approved by the building or the client. Is the client the building or not?
Q And you didn't know that?
A I didn't know that.
Q Now, when you met and met Ms. Woods --
MR. SCHIFERL: We could take that down, Mr. Campbell. I am done.
(Brief pause.)

Q I will ask the court officer to hand you Plaintiff's 8.
(Exhibit submitted.)
COURT OFFICER: In front of the witness, your Honor.
THE COURT: Thank you.
Q In evidence. Do you recognize that, sir?
A It looks like one of the elevators facing the hallway, I guess.
Q That has been the testimony. But you recognize that to be the case as well?
A I recognize -- it looks like the type of elevator we were in, correct.
Q And --
MR. SCHIFERL: If we could please put that up for the jury's benefit. I have some questions here.
Q So just to put this straight, this would be taken in -- whoever took this, it was taken from the point of view from the dock looking through the elevator to the hallway; is that correct?
A That is what it appears to be, yes.
Q And so this looks like green carpet. I don't think it's actually carpet.
A Painted floor.
Q This green area here, this is the area, generally

speaking, where you and Ms. Woods were talking to one another; is that correct?
A Initially, yes.
Q And, in fact, when you were talking to her you had your back to the dock side; is that correct?
A Yes.
Q Okay.
A Well, I don't recall.
Q Well, that is where Mr. Bortugno was out there spoking a cigarette with the cart, right?
A I don't recall what he was doing.
Q And so I want to ask a little bit about the elevator.
MR. SCHIFERL: We could take that down.
Q When the elevator -- you were talking with Celeste Woods on the other side of the elevator, did you observe all the movements of Nick Bortugno with the cart?
A While I was speaking to her in the hallway?
Q Yes.
A No, I don't believe so.
Q And you then at some point in time, if we understand your testimony here, you are saying that you actually moved yourself into the elevator?
A Yes. Me and Celeste.
Q Okay. So if Mr. Bortugno on Direct Examination in

this case last week on Thursday told us that when he was pushing the cart into the elevator, you were still in the hallway talking to Ms. Woods, he would be incorrect?
A I think I was in the elevator against the wall talking to Ms. Woods. Not in the hallway. He may be incorrect about that.
Q Okay.
A I am quite positive I was in the elevator.
Q Well, let's also talk about this elevator. I listened intently to the questions that were asked of you by Mr. Kerner and it's your testimony that Mr. Bortugno got hit by the elevator door on his head?
A Yes.
Q And when you say the elevator door, what do you mean?
A It came down and struck him on the head.
Q Okay. And --
(Document submitted.)
Q You have been handed Exhibit 2. Does that show the device that hit --
A Yes, the top device. I am not sure if that is the specific elevator, but that type. Top half of the door, it lowered and hit him in the head.
Q So now we are seeing this and you are saying that what -- what hit Mr. Bortugno on the head is this big

yellow metal thing here?
A Yes, the -- that.
Q This hit him coming down is your testimony?
A Yes.
Q And, in fact, you saw that happen, so that I am clear, maybe the jury is, from the hallway or inside the car?
A Definitely inside the elevator. Me and Celeste were against the elevator wall because the buttons were there and I believe she pressed the button or -- to open or close the door, and when he walked in that door hit him right on the head when it came down.
Q And with regard to this elevator, did you see any other components in the elevator other than the doors?
A Components?
Q Yes.
A Not -- no. Like, I don't know what you are referring to.
Q Well, let me specifically ask you this. Was there a gate inside the elevator?
A I am not sure if there was a gate. There are gates in those elevators sometimes, I believe.
Q And, in fact, again, do you recall being asked that very question by Mr. Kerner --
A I don't specifically recall it, but I don't

recall -- a lot of times there are gates in those types of areas just being familiar with the type of elevator it is.
MR. SCHIFERL: May I approach?
THE COURT: Yes.
MR. SCHIFERL: I am handing the witness page 44 of his deposition.
Q I would ask that you read to yourself and let us know when you are done, line 20 through the end of that page, and then page 45, the first two lines.
(Witness complies.)
A Okay.
Q Also the next two pages of 45, sir.
(Witness complies.)
A Okay.
Q Now, did your reviewing that refresh your recollection about the issue of whether or not there was a gate in the elevator?
A No.
Q Well, in fact, the question that Mr. Kerner asked of you was:
"QUESTION: Was there a gate inside this elevator?
ANSWER: I don't recall but I don't think so."
That was your answer, right?

A Yes, okay.
Q You just read that?
A Yes.
Q And then the next question asked of you by Mr. Kerner:
"QUESTION: Was it one of the upper doors that struck Nick?
ANSWER: Yes."
And you mean one of these doors that we see right here in this picture?
A Correct.
Q Okay.
MR. KERNER: Your Honor, I --
THE COURT: No question.
MR. KERNER: Apologize.
THE COURT: Go ahead. Next question.
MR. SCHIFERL: I am sorry.
Q After this event happened involving Mr. Bortugno, you referenced that there was some people filling out, or he filled out something handwritten and you saw him doing that?
A I believe so.
Q You never seen that, correct?
A What do you mean?
Q You never seen any writing since then?

A No.
Q In fact, isn't it true you never went back to look at the elevator at all that was involved here?
A Correct.
Q You then drove home that day with Nick?
A Yes.
Q In the same van you came in, correct?
A Correct.
Q And you dropped him off at his home?
A Yes.
Q And you have been to his home before as a social guest and friend?
A Not very often. And I don't recall which home it was because he was in Shirley, he was in Mastic. He a few homes. I don't recall which home it was. Mastic, Shirley, I am not sure. But, yes, I have been to his house, that house one or two times.
Q And, Mr. Rosenberg, after this event did you fill out any paperwork or report about this accident with anybody?
A I don't think so.
Q After that day, isn't it true that you didn't see Mr. Bortugno for any time after that?
A I may have seen him once or twice at the office. No, I didn't see him -- no. I didn't see him as far as

work-wise. We never worked together again.
MR. SCHIFERL: Just one moment again.
THE COURT: Sure.
(Brief pause.)
MR. SCHIFERL: Nothing further. Thank you.
MR. KERNER: A little Redirect.
THE COURT: Sure.
REDIRECT EXAMINATION
BY MR. KERNER:
Q Now, Mr. Rosenberg, when you were standing in the elevator, how far were you from Nick when the elevator struck him?
A Ten feet. Seven feet. Whatever the elevator width is. Seven feet.
Q And did you have any warning as you sat there that the elevator, or a portion of the elevator was going to strike Nick?
A No.
Q Did you -- were you alerted to anything before, as you described, with the door -- that the door was going to descend?
A No.
Q Now, you indicated I think that on Direct you said you went home with Nick and you never finished the job, correct?

A Yes.
Q And then you were asked a question about whether you didn't finish the job because it had not been approved by the building; is that correct?
A Yes, correct.
Q And to your understanding why did you and Nick not complete the job that day?
A Because Nick was injured.
Q Did your not completing the job have anything at all to do with the approval by the building for this job?
A Not to my knowledge.
Q And in terms of your memory, and your recollection, is there any doubt in your mind that some portion of this elevator struck Nick right in the head?
A No, there is no doubt.
MR. SCHIFERL: Objection.
A No doubt whatsoever.
Q And in your mind, after this incident happened did you -- was it your understanding that the reason Nick stayed there was to -- well, withdrawn.
After the elevator hit Nick in the head, he remained in the building for a period of time, yes?
A Yes.
Q And he remained with other individuals, correct?
A Yes.

Q And these individuals -- withdrawn. Who were you working for that day, or who were you --
A A company called Satellites Unlimited.
Q And as far as you were concerned were any of these individuals people who were associated with Satellites Unlimited?
A No.
Q Were any of these people associated with anyone you -- anyone that employed you?
A No.
Q Personally?
A No.
Q To your understanding these people were just strangers to you; is that correct?
A Yes. Well, the building people. Yes, strangers to me. Assumed they were building people and people associated with the building.
Q Do you remember who your client was that day?
A I don't specifically recall but I believe the U.S. Postal Office.
Q Did you have any understanding of the relationship on January 19th, 2012, between the post office and the actual owner of the building?
A No.
Q Okay. And as far as you were concerned when you

came there that day, tell us, in your mind, was the job going to be done?
A Yes.
Q Okay.
A Definitely.
Q And the only reason the job wasn't done was why?
A Because Nick got injured.
MR. KERNER: No further questions.
THE COURT: Any Recross?
MR. SCHIFERL: No, your Honor.
THE COURT: Okay. Thank you, sir, for coming in. You could be excused from the witness stand.
THE WITNESS: Thank you.
(Witness excused.)
THE COURT: Okay. Ladies and gentlemen, we've concluded testimony for today. So you are getting out a little early. TGIF.
So, again, we will reconvene on Monday. I will ask you to come in again between 9:45 and 10 in the morning. And just to foreshadow -- I mean, forecast a few things. We are looking to finish on Wednesday in terms of giving you the case for deliberations. Okay? But I am not one hundred percent certain about that yet. Okay? But the anticipation is that on Monday the defendant's case is going to start.

Okay. So between then and now, again, do not discuss the case with anyone. Do not do any independent research about the issues in the case, anyone involved in the case. Please do that, because we want you to have an open mind before you receive all the evidence to deliberate on. Okay? Great. Have a great weekend. Thank you.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exits the courtroom at this time.)

THE COURT: Okay. Is there anything to discuss?

MR. KERNER: There might be, your Honor.

THE COURT: What is that?

MR. KERNER: We got a call from the U.S. attorney. I guess Ms. Gomez could handle that better than I can.

THE COURT: Let me hear her.

MS. GOMEZ: I have just been informed that the U.S. Attorney's office has contacted our office and has -- wants to speak to me after today.

THE COURT: Okay.

MS. GOMEZ: To see if we could probably work something out so Ms. Woods could come and testify. So I will have more news after I leave.

THE COURT: All right. So then it's anticipated she would be at 10:00. Because I will talk to you all at 9:30.

MS. GOMEZ: Okay.

THE COURT: And then you could begin your case.

MR. SCHIFERL: And so I could now more fully answer your question.

THE COURT: Wonderful.

MR. SCHIFERL: We will call no medical doctors. We will call three witnesses. Those will be, and as I said all along, Mr. Halpern, Mr. Cargill, Dr. Cargill, and Mr. Soutar.

THE COURT: And then you intend to rest?

MR. SCHIFERL: I do.

THE COURT: Okay. And that is it, right?

MR. KERNER: Well, from us we are finished with Celeste Woods.

THE COURT: No rebuttal?

MR. KERNER: No.

THE COURT: Okay. So we will be able to -- then all right. So either -- depending on when we end on Monday we could do the charging conference Monday afternoon or Tuesday morning and then you could give your closings on Tuesday morning.

MR. SCHIFERL: You mean Wednesday morning?

THE COURT: The charging conference and then closings on Tuesday.

MR. SCHIFERL: My point is, we have three witnesses. So they may carry over to Tuesday.

THE COURT: Okay. Okay then.

MR. KERNER: Thank you.

THE COURT: Have a good weekend.

MR. SHELBY: You too. Thank you.

(Whereupon, the case is adjourned to March 13, 2023, at 9:30 a.m.)

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