SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM, PART LL1

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YESTER CASTILLO,

Plaintiff,

Index. No. 522504/2018

-against-

Jury Trial

1248 ASSOCIATES, LLC,

Defendant.

----------X

May 3, 2024
Kings Supreme Court
360 Adams Street
Brooklyn,New York 11201

B E F O R E :
DEVIN COHEN,
Supreme Court Justice

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

For the Plaintiff:
GORAYEB & ASSOCIATES, P.C.
100 William Street, 19th Floor
New York, New York 10038
BY: CHRISTOPHER VARGAS, ESQ.

For the Defendant:

CULLEN & DYKMAN, LLP.
One Battery Park Plaza, 34th Floor
New York, New York 10004
BY: KENNETH BUFFALOE, ESQ.

John Cardillo
Senior Court Reporter

THE COURT: We are on the record in Castillo against 1248. Counsel appearances remain the same. Yesterday, on the record, outside the presence of the jury, as is my custom, I asked Counsel whether they each had been present during jury selection whether the jury was acceptable to both sides.

Defense counsel had stated after some ongoing objections but not objections to the current makeup, based on Batson or challenges just whatever standing objections he had made to, I assume, to Judge Garson.

(At this time a discussion was held off the record.)

THE COURT: So there were no challenges of the jury makeup itself was acceptable to Defense counsel, but there had been an outstanding objection that I had overruled to the method of using challenges.

Other than that the panel was acceptable to Defense Counsel, correct?

MR. BUFFALOE: Yes.

THE COURT: And as we understood the panel had been acceptable to plaintiff's counsel. It turns out now that you recall that there is a discrepancy in the panel as seated, right?

MR. VARGAS: I mean, Counsel says he took notes and he remembers that she was excused and I excused her.

THE COURT: We are referring to Juror Number 6.

MR. VARGAS: Juror Number 6.

THE COURT: You don't have a strong recollection one way or another?

MR. VARGAS: I don't. And I don't remember her being controversial from what I remember.

THE COURT: I want to ask again.

MR. BUFFALOE: Do we know her name?

THE COURT: We can find out. Can you get me Number six's name?

THE CLERK: Simone F. Dovefan. That is the correct juror.

THE COURT: Against her?

MR. BUFFALOE: Yes. Which one do we have, Jose Rodriguez or David Hernandez?

THE COURT: Can you get us the list, and we can look at it all together?

(At this time a discussion was held off the record.)

THE COURT: It appears that administrative screwup in the impaneling, we ended up with Simone Dovefan, who we believe had been excused in place of David Hernandez, who we believe had been selected.

Now, in fairness, Mr. Hernandez never came back. So I don't know what he was told or whether he was, you

know, I have no idea what he was told or whether, you know, either flaked out or was not told to come back or what, but we don't have him.

The jury sworn includes Miss Dovefan. It doesn't include Mr. Hernandez. We am going to ask since we are a date into trial. I will accommodate whatever preference you have. I want to read the options to you, as I see them. One is we proceed with the jury that's been already seated. As I think you have said, you don't have any particular objection to it.

MR. VARGAS: Yeah, because I just undo it all and it is.

THE COURT: I just want to say that that's my understanding about your feeling.

Second option one suggestion is we proceed with the jury that has been sworn. Second option is we sub Miss Dovefan out and sub in one of the alternates on the basis that Miss Dovefan was excused and shouldn't have been sworn.

Third is that, which I don't think is preferrable but I will certainly leave it as an option, that if you believe that the inclusion of Miss Dovefan, and the exclusion of the other gentleman has been some way significantly prejudicial, you know, I would entertain a motion. I can't tell you I would grant it, I would grant

a motion for a mistrial. Curtain A, B or C, gentlemen?

MR. VARGAS: In the Court, according to his notes, he didn't have a problem with her, and I don't remember her being that controversial to me. It was just a matter of choosing between her and Mr. Hernandez, and so I am fine with it.

MR. BUFFALOE: Just in case, you are waiving any objections?

MR. VARGAS: I am waiving.

MR. BUFFALOE: I think I am okay with that.

THE COURT: Okay. Thank you very much. We are going to leave the jury as seated, and we will never tell Miss Dovefan she was our second choice.

(At this time a sidebar conference was held between both counsels off the record.)

(Sidebar over.)

THE COURT: All right. We were, at this point, ready for the jury, but I understand we have one or two housekeeping matters.

It is it my understanding that rather than have your client go through cross exam, now, your intention is to bring in?

MR. VARGAS: Mr. Mejia.

THE COURT: Is he a subpoenaed witness or a voluntary witness? But a coworker of the plaintiff's.

MR. VARGAS: Correct.

THE COURT: And I understand, Mr. Buffaloe, that you have had a previous objection to his testimony to begin with, but you also have an objection with respect to scope, and before we go, you want to request an offer of proof outside of the presence the jury, voir dire of the witness, correct?

MR. BUFFALOE: Yes.

THE COURT: Let me ask you, sir, what is it that you believe Mr. Mejia is here to testify generally about, in sum and substance?

MR. VARGAS: Just the mechanism of the accident, and the mechanism of injury, and what he observed. Nothing more.

THE COURT: Not about training practices or anything else. Noting. Nothing related to liability?

MR. VARGAS: No.

THE COURT: Just how did the accident happen? What's the mechanism of the injury, what he personally observed?

MR. VARGAS: Yes.

THE COURT: With that representation I will let Mr. Mejia testify. If we get too far afield, it would be permissible on damages. I am sure you will renew your objection, Mr. Buffaloe, and we will take it up. If you

need to, let's stand up and get the jurors in.

Mr. Buffaloe, your courtesy on the scheduling piece of this, is in no way a waiver of your cross exam rights of the plaintiff. I want to make sure that is on the record.

MR. BUFFALOE: I don't think he actually mentioned this to me.

THE COURT: Oh? When we talked about the scheduling yesterday, whether we should go straight into cross, I want to say it, one of the things I want to say, we discussed in scheduling was, because Mejia was expected at 9:30.

It was not sure how long we could have him. It was part of why I was asking you, would you prefer to do all your cross in one shot either by having it broken up by a break in the day? That is part of why I asked you twice to make sure you want to cross.

MR. BUFFALOE: I must have been blanked out on the part. Mr. Mejia, I don't have any objection.

THE COURT: Apparently my understanding is plaintiff represented to us yesterday that Mr. Mejia's testimony would be quite brief. So I think that is why Mr. Mejia also needs a --

MR. VARGAS: -- Spanish interpreter.

(At this time a discussion was held off the

record.)

THE COURT: I'm ready for the jury.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jurors enter the courtroom and the following occurred:)

THE COURT: All right. You can all being seated. Good morning. I hope you had a good evening. Welcome back. As I mentioned yesterday, at the end of the day or as plaintiff's counsel mentioned, and I sort of laid out for you this morning, we are going to hear testimony from a coworker of the plaintiff's that we anticipate to be fairly brief, but we are going to take him out of order to accommodate his schedule, because he is a nonparty.

After that we expect to get back to the testimony of the plaintiff, because Mr. Buffaloe is entitled now to cross-examination and then, this afternoon we think we have?

MR. VARGAS: Dr. Andrew Merola.

THE COURT: So assuming that all proceeds according to pace, that's our expected plan for the day. Obviously, we are off for the weekend and back up on Monday, and we will talk about that again, as we get closer to the end of the day. Thank you very much. Call your next witness.

MR. VARGAS: I call Abimael Mejia to the stand.

THE COURT: Mr. Mejia will be testifying with a Spanish interpreter, and none of you should substitute your own translation for the official Court interpreter translation. Mr. Mejia, would you remain standing? Raise your right hand?

A B I M A E L M E J I A, having been called as a witness by and on behalf of the People in this case, having first been duly sworn was examined and testified as follows:

THE WITNESS: Yes.

THE CLERK: Yes, you may be seated. Mr. Mejia, In a loud, clear voice, please give your name and address for the record.

THE WITNESS: Abimael Mejia Norma Miranda. 90-33 198th Jamaica, Queens Village.

THE COURT: Thank you. All right. Your witness, sir.

DIRECT EXAMINATION

BY MR. VARGAS:

Q Good afternoon, Mr. Mejia. Could you start off by telling the jury your date of birth?

A January 20th, 1993.

Q And are you presently employed?

A Yes, I do work.

Q And who are you working for now?
A In construction.
Q Is it a company or someone?
A It's a company.
Q And the name of it?
A Century Fugal.
Q What kind of work is it?
A Foundation. Foundation building and we build buildings.
Q Okay.
THE COURT: One second, Senor.
Q Today, were you served a subpoena to come here today?
A Yes, the investigator called me and he said that I had to show up today.
Q And you are missing a day of work, correct?
A Yes, I am missing a day of work.
Q And is my office compensating you for your loss of work today?
A Yes, I was told that I was going to being compensated with the day rate.
Q And how much do you make a day?
A Three hundred dollars a day.
Q I want to take you back to September 27th, 2018. Can you tell the jury where you were that day?
A We were at work. We were working. I used to work

with my friend. We were at work and we were getting the materials and the tools prepared for the work.

Q And who were you working back then for in 2018?

A I don't remember. I almost don't remember but it was for Rinaldi.

Q What kind of work were you doing that day? What was being built?

A We were framing the area of the elevator.

Q And at around 11:45 a.m., what specifically were you doing?

A At that moment we were working and that's when the accident happened.

Q As you know, we are here for a lawsuit involving a Mr. Yester Castillo. Do you know Mr. Castillo?

A Yes, we are like friends.

Q And were you working with Mr. Castillo back on September 27th, 2018?

A Yes, that's where I was with him together. We were working together and that's when the accident occurred.

Q And can you describe for the jury what happened when the accident occurred? What were you and Mr. Castillo doing?

A We were lifting some plywood sheets, and he was lifting them up from the floor, and I was taking them in the high area.

Q Were you above Mr. Castillo?

A Yes, I was about ten-feet up.

Q And as he raised up the plywood that day, can you tell the jury what happened?

A He extended the plywood up to me, and when I had it already in my hands the plywood got away from me and it went and it fell and it fell on his face.

Q And the plywood, what were the dimensions of the plywood?

A The dimensions of the plywood are four-by-eight length.

Q And how thick?

A Three quarters.

Q And approximately how much does it weigh?

MR. BUFFALOE: Objection.

THE COURT: Overruled. Hold on. Once there is an objection stated then you have to wait for just a second while I answer the objection.

Sir, do you work with these four-by-eight sheets of plywood on a regular basis? On a daily basis?

THE WITNESS: Yes.

THE COURT: And are you familiar with the general weight of a four-by-eight by three-quarter-inch sheet of plywood?

THE WITNESS: We are --

THE COURT: The question is just are you

familiar?

THE WITNESS: Yes.

THE COURT: Then, your objection is overruled.

Q Can you estimate for the jury how much the plywood weighed?

A Seventy pounds.

Q And was the plywood dry or wet?

MR. BUFFALOE: Objection.

THE COURT: Overruled. Something that he personally experienced whether the plywood was dry or wet?

MR. BUFFALOE: Yes.

THE COURT: No, overruled.

Q Was the plywood dry or wet?

A On that date the plywood was wet. It was heavy. I think that --

Q Sorry?

A That's it.

Q When the plywood is wet, does it make it even heavier?

MR. BUFFALOE: Objection.

THE COURT: Overruled. That is leading but overruled.

A It is heavier.

Q And after it hits Mr. Castillo, what happens next?

A Then when the plywood slipped away from me, I saw

that it hit his face.

Q And then, what did you do after it hit him?

A Okay.

Q After it hits him, what do you do next?

A I got down quickly from there, and I went to see him. And I would ask him questions and to see if he would respond and he did not answer. And his face was completely covered with blood.

Q Did he, at any time, ever make any complaints to you?

MR. BUFFALOE: Objection.

THE COURT: Just to that question is answer no.

MR. BUFFALOE: Can we approach on this?

THE COURT: Just as to a yes or no answer about whether he made any complaints immediately following the accident; hold on. Is your objection hearsay?

MR. BUFFALOE: Yes.

THE COURT: Overruled.

Q Did he make any complaints to you?

MR. BUFFALOE: Objection.

THE COURT: Overruled. Pause. Let's go.

MR. BUFFALOE: Approach, please.

(At this time a sidebar conference was held between both counsels off the record.)

(Sidebar over.)

THE COURT: Without getting into the details of

it. There is a series of hearsay objections by Defense counsel. First of all, with respect to this question, which was a yes or no question, did the plaintiff ever make a complaint without asking for the sum and substance of such a complaint that was made, that is not subject to hearsay anyway.

Second of all, since, as I understand your question, sir, you are not asking did he ever make a did he make a complaint in the immediate aftermath of the plaintiff's accident, correct?

MR. VARGAS: Correct, your Honor.

THE COURT: With that limitation of that scope in time, you are not asking about said days and weeks after the accident, but only the plaintiff's present sense immediately following the accident, or we can say excited state following the accident.

MR. VARGAS: Yes.

THE COURT: Both of those things are not subject to hearsay, and the objection is overruled.

MR. BUFFALOE: Please note my exception.

THE COURT: Your exception is noted.

Q Mr. Mejia, what complaints did he make to you?

THE COURT: Did he answer yes or no?

Q Yes.

A When I went down to see him, and I touched him he did

not respond. He was unconscious. Around a minute afterwards that's when he reacted and he would scream out to me saying, my nose. It seems to be hanging off of me. He would complain and he said, my neck. My shoulder.

Q And which shoulder?

A Left one.

MR. BUFFALOE: Objection.

THE COURT: Overruled. When he indicated. Overruled.

Q And any other complaints?

A Yes, he would complain a lot about his neck.

THE COURT: You are referring now to the day of the accident?

MR. VARGAS: Just the day of the accident.

Q After he made those complaints, what did you do next?

A I waited there for a minute for him to be able to relax a bit, and then, because they did not want us to lift him, in any way, because he was complaining a lot about his neck, his shoulder, and his nose.

Q And eventually, was he moved?

A Yes. Automatically then they lifted him up and took him into the office.

Q And after he left, did you ever see Mr. Castillo, again, other than today?

A No.

MR. VARGAS: No further questions, your Honor.

THE COURT: Okay. Cross exam?

CROSS-EXAMINATION

BY MR. BUFFALOE:

Q Good morning, Mr. Mejia. Are you familiar with the law firm of Cullen and Dykman?

A No.

Q We haven't met before today, correct?

A No.

Q Now, plaintiff's counsel asked you whether or not you had seen Mr. Castillo since the date of the accident. Have you been in touch with him since the date of the accident, by any means?

THE COURT: Other than today you mean?

Q Other than seeing him in court today.

A I was only called and told that I would have to come to the courtroom.

Q That is not what I asked you. I asked you whether or not you have been in contact with Mr. Castillo since September 27, 2018?

THE COURT: Directly? You mean not contacted by an investigator or somebody else?

Q That's right. Directly.

A No.

Q So you described him during the course of your

direction as your friend.

A Yes.

Q And you have had no contact with him since September 27, 2018 at all?

A Once in a while but hardly very much.

Q Okay. What's once in a while, sir?

A I have only seen him -- sorry. I have only been in contact with him only perhaps once in a while since I live far from him.

Q So when you say you live far from him, are you talking about actually seeing him in person?

A To see him in person.

Q How many times have you seen him in person since September 27, 2018 approximately?

A Around four or five times.

Q Okay. And has it been in your home or his home or someplace else?

A Someplace else.

Q And how many times have you guys talked on the phone over the years?

A Around two times.

Q And do you have any contact with the rest of his family?

A No.

Q And during the course of -- to refresh your

recollection that you have had contact with him since 2018, correct?

A Yes.

Q Have you gone on any trips with him, by the way, to Honduras or anyplace else?

A No, not at all.

Q And during the course of these years that you have had contact with him, have you discussed this lawsuit with him?

A He has talked to me about the processes in it but hardly very much.

Q Okay. And has he talked to you, as well, about what his complaints are, about what his claimed injuries are?

A Yes, he has told me about everything that has happened to him.

Q All right. Mr. Mejia, during the course of these years, when was the first time a representative of his attorneys talked to you, an investigator or somebody else?

A It's almost the first time today that I was called.

Q Almost the first time or the first time?

A It is the first time.

Q And when did they contact you?

A This week.

Q And, by the way, it is fair to say that Mr. -- withdrawn.

How long have you lived at that address in Jamaica?
A Eight years.
Q It is fair to say that Mr. Castillo has known where you've lived those entire eight years, correct?
A Yes.
THE COURT: You mean his address or just generally that he lives in Jamaica?
MR. BUFFALOE: No, his address.
A Yes, that is the address where I live.
Q And Mr. Castillo knows that address, correct?
THE COURT: You mean for the last eight years?
MR. BUFFALOE: For the last eight years, yes.
A Yes, but two-years ago I moved and that address that I gave recently, that is the new one.
Q Okay. But Mr. Castillo has known your address for the entire eight years, correct?
A Yes.
Q Now, you mentioned you were contacted by plaintiff's counsel's office. When was that?
A It was this week that I was called, and they said that I had to present myself.
Q When you say "this week," are you talking about Monday, Tuesday? Today is Friday. Which day of this week?
A Monday of this week.
Q And was an investigator who contacted you, did they

identify themselves?

A Yes. It was an investigator the one that called me.

Q When they called you, did you have a conversation about the case?

A Yes.

Q And did you discuss your testimony that you were going to give today?

A No, not at all.

Q Did you discuss your testimony with the plaintiff's attorneys before you got on the stand today?

A Yes, I am the witness of the person.

THE COURT: The question was, did you discuss, and I don't mean to step on your question, Mr. Buffaloe, that wasn't the question that he asked you.

The question that he asked you, did you discuss the substance of your testimony with an attorney from the plaintiff's office before today or at any time?

THE WITNESS: Could you repeat the question?

THE COURT: Sure. Did you discuss, at any time, the substance of your testimony with the attorneys or any of the attorneys for the plaintiff?

THE WITNESS: Yes.

Q When was that?

A That was when I receive the call this week.

Q So when you received the call from the investigator

was a lawyer on the phone as well?

A No, he only told me that I had to come in.

Q So it was a separate phone call with the lawyers?

A There were only two phone calls. The phone call from the investigator.

THE COURT: Sir, did you get a call from the attorneys, not from the investigator, from an attorney?

THE WITNESS: From the attorneys, no. The only call that came in was the one from the investigator who said that I should present myself.

Q You said there were two calls.

A And yesterday they also called me again. This was supposed to be a second phone call from an investigator saying that I had to present myself here.

Q During the course -- at any time prior to your taking the stand today, did you discuss your testimony either with an investigator, the plaintiff's counsel, plaintiff's attorney or anyone as a representative of the plaintiff?

THE COURT: Means not that you, just that you would come here, but what your testimony would be. Is that a fair para-position?

MR. BUFFALOE: Yes, your Honor.

A No.

Q Mr. Mejia, do I understand you correctly to say that the first time that Mr. Vargas or any attorney representing

the plaintiff heard your testimony that this plank was wet, that the plank was wet, that the plaintiff was unconscious briefly that he spoke to you at the location, the first time you are hearing that was this morning?

THE COURT: You mean from him?

MR. BUFFALOE: Yes.

Q From him.

A That's so. That is the first time.

Q When you got a call from the investigator, did you call up Mr. Castillo?

A No.

Q So how did the investigator get your phone number?

A A friend gave it to the investigator.

Q A friend. Not Mr. Castillo?

A It was -- I was only told it was a friend.

Q And when you got this phone call, did they ask you about Mr. Castillo? You didn't call Mr. Castillo and ask him who these people were?

A Yes, I did call. But he told me that -- I asked and explained to him that I had been called, and he said to me that perhaps it was one of his attorneys and that he spoke with me, and he said if they call you then you show up.

Q So now, you remember talking to Mr. Castillo afterwards; is that right?

A Yes, that was this week that I had contact with him.

Q And when you talked to him after this investigator called, did you discuss your testimony with him?

A Oh, no.

Q No?

A No.

Q All right. Mr. Mejia, you mentioned that you were holding -- Mr. Castillo had just passed the plywood plank to you, correct?

A I'm sorry. Can you, please, repeat the question?

Q That Mr. Castillo had just passed the plywood plank to you before the accident occurred?

A Yes, that day, yes. Because I was there at that moment at the accident.

Q And when you were above him, correct?

A Yes, I was about ten-feet high.

Q Okay. And the plywood plank itself was eight-feet long, correct?

A Eight-feet high by four feet.

Q And as you was -- as he was passing it up to you, he was passing it lengthwise so the eight feet was stretching across the two of you, correct?

A Yes, he was lifted it towards me.

Q And when you grabbed the plank, did you grab it along the top or along the sides?

THE COURT: Or something else.

Q Or something else.
A By the sides.
Q And when you grabbed it, were your hands near the top of the plank?
A I was receiving it and I was adjusting myself with it.
Q Did you grab it at the top?
A No, on the sides. It was, at that moment, when I was grabbing the plywood by the sides was when it slipped from me and it hit him in the face.
MR. BUFFALOE: Move to strike as nonresponsive.
THE COURT: No, denied.
Q Mr. Mejia, did you grab the plank at the top?
THE COURT: He has answered that now three times. He said I grabbed it on the sides and I was adjusting it.
MR. BUFFALOE: Right. But that's where? I am asking him where on the sides?
THE COURT: That's not what you keep asking.
MR. BUFFALOE: I will rephrase the question.
Q When you grabbed it on the sides, was it near the top?
A No, on the sides.
Q Was it --
THE COURT: May I ask how far down the side?

THE WITNESS: Yes. It was close to the top. I grabbed it from the top. What happened was, was that I grabbed the plywood by the sides, and since the difference between us was about ten feet, I adjusted it a couple of times and in one of those occasions that is when the plywood slipped.

Q Okay. And when you grabbed the plywood, was Mr. Castillo still holding onto it?

THE INTERPRETER: I'm sorry. Can you repeat that?

Q When you grabbed the plywood, was Mr. Castillo still holding onto it?

THE COURT: When he first grabbed it?

Q When he first grabbed it.

A No, he stretched it towards me and then I grabbed it. When I grabbed it he let it go, and I was -- and I was adjusting it and on one of those occasions it slipped and --

THE COURT: Let's take a quick second.

(At this time a sidebar conference was held between both counsels off the record.)

(Sidebar over.)

THE INTERPRETER: The witness has requested a break.

THE COURT: We are going to take five. Sir, you are still under oath, and you may not discuss your

testimony with anyone.

COURT OFFICER: Jurors, please rise.

(Whereupon, the jurors exited the courtroom and the following occurred.)

THE COURT: Don't speak amongst yourselves or with anyone else about the case.

(Whereupon, there was a recess, after which the following occurred.)

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jurors enter the courtroom and the following occurred:)

THE COURT: All right. Thanks. You can all be seated. Mr. Buffaloe.

Q Mr. Mejia, after you -- when the accident occurred, what did you do with the plank?

A After the accident the plywood was just over to the side, but I was not worried about it. I was worried about my friend who had been hurt.

Q After the accident occurred -- withdrawn.

When you grabbed the plank, were you wearing gloves?

A Yes.

Q And it is fair to say that you were wearing a hard hat and glasses, as well, correct?

A Yes.

Q There was --

A The glasses, the hard hat, the gloves, all of that.
Q Okay. That was standard equipment for every Rinaldi employee of the site, right? You were required to wear those?
A Yes, all the equipment that we would be needing when we would be working.
MR. BUFFALOE: All right. Nothing further.
THE COURT: Redirect?
REDIRECT EXAMINATION
BY MR. VARGAS:
Q Mr. Mejia, did anyone tell you to come here and not report what you observed on the day of the accident?
MR. BUFFALOE: Objection.
THE COURT: Overruled.
A Could you repeat the question?
Q When you came here today, did anyone threaten you and tell you not to tell the truth?
MR. BUFFALOE: Objection.
THE COURT: Yes, to the characterization of threatened. I don't think there was any implication on cross that he was threatened.
Q What you told us today, is that what you observed on the day of the accident?
A That is so.
Q Did anyone tell you to say otherwise to make up any

other story?

MR. BUFFALOE: Objection.

THE COURT: Overruled.

A No, I'm explaining what happened at the accident.

MR. VARGAS: Okay. No further questions.

THE COURT: Thank you. Any recross?

MR. BUFFALOE: No, your Honor.

THE COURT: Thank you. Sir, you are excused.

(Witness exiting.)

THE COURT: Since we just had a break, I am going to ask that you go straight back into cross. All right?

THE COURT: Great. I would ask that Mr. Castillo please take the stand.

(Witness entering.)

THE COURT: You were already placed under oath and you remain under oath.

THE WITNESS: Yes.

CROSS-EXAMINATION

BY MR. BUFFALOE:

Q Good morning, Mr. Castillo.

A Good morning.

Q Mr. Castillo, let's start out with, you speak and understand English, correct?

A Yes, a little. A little. But for something like

this I need an interpreter.

Q I understand. So, in fact, did you testify in 2014 in connection with your other accident that you communicated in English on the job site, correct?

A Almost all of us who work in construction they are -- we are all Spanish speakers.

Q That's not what I asked you, Mr. Castillo. Yes or no, did you testify previously at your deposition on July 28th, 2014, that at your prior job, you communicated in English on the job site?

A Well, I don't remember but if it's written down there.

Q Okay. Let me ask you. Mr. Castillo, how long have you lived at 6605 13th Avenue?

A I have there for a number of years. I think it has been around nine years.

Q Do you also reside at 81 Bloomingdale Road in Levittown?

A Levittown, Long Island? That is my daughter's address. My license has the address of my daughter's house. I drive around and something could happen to me on the road, and they would be able to -- with that to be able to contact her immediately.

Q All right. You anticipated my next question. Which is, your driver's license is registered at that Levittown

address, correct?

A In the driver's license that address it does appear in Levittown, Long Island.

Q And the vehicle that you own is also registered in Levittown, at the Levittown address, correct?

A Yes, that's correct.

Q And now, you mentioned that you drive around. Do you drive from your Brooklyn address to the Levittown address?

A Sometimes. Sometimes I go.

Q And, in fact, you have renewed your license at least twice since September 27, 2018, correct?

A Yes, one occasion, because it was already in no longer -- it had expired and on another occasion, because I lost it.

Q And your driver's license has no restrictions on it, correct?

A No.

Q Was it arising out of the accident on January 13th, 2009? That lawsuit you were represented by the same counsel you are represented by here, correct?

A Correct.

Q And during the course of that lawsuit you gave deposition testimony, correct?

A Yes, sir.

Q And that testimony was under oath in the same way

that you are under oath today, correct?

A Yes, sir.

Q Do you recall in that lawsuit testifying -- withdrawn.

In that lawsuit you were treated by a Dr. Thomas, correct?

A I don't remember.

Q Do you recall complaining at the time about left shoulder pain in 2012, in October of 2012 to Dr. Thomas?

A No, I don't think so. Because I have had problems always with my right shoulder.

Q Mr. Castillo, I am reading from your deposition dated February 3rd, 2020. Page 75, line 22.

QUESTION:

Q I'm sorry. The date of the deposition?

THE INTERPRETER: Yes, please.

Q February 3rd, 2020?

THE COURT: Are you about to read from it?

MR. BUFFALOE: Yes.

THE COURT: Do you have a copy for the Court?

MR. BUFFALOE: I do.

THE COURT: You are about to hear testimony read to you from an Examination Before Trial. In an Examination Before Trial is testimony given under oath outside, generally outside of the courthouse, but it is

entitled to be treated as though it was given under oath here on the stand.

Does this relate to this case?

MR. BUFFALOE: Excuse me?

THE COURT: This testimony is from this case, correct?

MR. BUFFALOE: Yes.

THE COURT: It is testimony in this case that was given under oath outside the courthouse on an earlier date, but it is entitled to be treated with the same weight, as it was here. Page and line?

MR. BUFFALOE: Before I start reading, I want to ask one more question.

THE COURT: Sure.

Q Mr. Castillo, do you recall complaining to Dr. Thomas about pain in your neck before, I'm sorry, in October of 2012?

A I don't remember having spoken about the neck, but I expressed to him that I did feel pain that radiated up to this part of my -- yes, here on my neck at the end.

Q All right. Mr. Castillo, do you recall being asked these questions and giving these answers?

MR. VARGAS: Page 75?

THE COURT: Yes.

Q Reading from page 75, line 22.

"QUESTION: Medical records states subjective note. Mr. Castillo continues to have pain and stiffness in the shoulder with limited motion. Pain radiates to the right side of the neck, and he has limited motion here, as well, secondary to pain.

Now, my question is this. Do you remember making a claim of neck pain to any physician after your first accident but before your second accident?"

ANSWER: Yes. The one I remember is that I complained about pain?

THE COURT: To my right.

Q To my right shoulder and then it would go to my neck. I remember saying that."

MR. VARGAS: Your Honor, I object. That's the answer he just gave. This is not inconsistent.

THE COURT: No, I am not sure that it is.

MR. VARGAS: He said it is radiating, and he indicated his neck in front of the jury. It is on the record.

THE COURT: Can I ask the reporter please to read back the answer that preceded Mr. Buffaloe reading into the record? Let's see whether he had radiating pain to his neck.

(Whereupon, the record was read back by the court reporter.)

THE COURT: Okay. Objection sustained.

Q And, Mr. Castillo, when did you first start having pain in your neck?

A The following day after the accident.

MR. VARGAS: I object to form. Are we talking about this accident or the prior accident?

THE COURT: At any time, when was the first time he complained about pain to his neck; is that right?

MR. BUFFALOE: Yes.

A Well, I went to the hospital at Mount Sinai, and they treated me there. There was no translator there. I was attended by a physician, without having had or seeing a translator. I explained to the doctor that I felt pain, in my face, in my shoulder, and in my neck.

MR. BUFFALOE: Move to strike as nonresponsive.

THE COURT: Sustained, yes, granted.

Q Mr. Castillo, you just admitted on the record that you complained about neck pain before your 2018 accident.

My question is, when was that?

A After my accident in 2018.

Q Is your testimony now that you never complained about neck pain before the September 27th, 2018 accident?

A Before the accident 2018?

Q Yes.

A Before the accident I had not complained about my

pain to my neck or to my left shoulder.

Q Mr. Castillo, I just read your testimony where you admitted that you told your doctor that you had pain in your neck before the second accident.

MR. VARGAS: I am going to object, your Honor. That was not an inconsistent statement. We addressed that. It is not about him reading it. He testified that it had radiated up to his neck. It is not a complaint of pain in his neck. It is a pain going to his neck.

THE COURT: I believe that is what he testified to on the stand. Sorry. I do believe that is what he just testified to on the stand, and the question is how to interpret his answer.

For example, on page 76 of the deposition that I believe was read, which I believe you read this, but this is just page 76 line ten. Yes, the one I remember is that I complained about pain to my right shoulder and then, it would go to my neck. I remember saying that, and I think it is a semantics question about whether he says and then, it would go to my neck if he is complaining about neck pain or shoulder pain that radiates.

I think that may require more medical expertise than we have. At the risk of sounding like Solomon, maybe you are both right, but I would let him answer the best he can now, and the record speaks for itself.

Q Mr. Castillo, did you complain about pain in your neck to any doctor after your first shoulder surgery, your right shoulder surgery?

THE COURT: You mean whether it is pain originating from his neck or pain radiating to his neck?

MR. BUFFALOE: Anywhere.

THE COURT: Any complaint of pain that ended up in his neck, in any way?

MR. BUFFALOE: Yes.

A I always complained about pain to my neck after the accident.

THE COURT: After the earlier accident?

THE WITNESS: No, the first, no. I am not understanding. The first accident or the second accident. I would like things to be clear for me. Then, I can answer correctly.

THE COURT: Sir, you had an accident at one point that resulted in surgery to your right shoulder.

THE WITNESS: Yes, correct, the right shoulder.

THE COURT: And Mr. Buffaloe has just read you recently testimony that you gave that, I think as far as it is stipulated that you gave in connection with this case but discussing that other case in which, and I just read it back to you in which having been asked about complaining about neck pain before this accident you

answered yes.

The one I remember is that I complained about pain to my right shoulder and then it would go to my neck. I remember saying that. Page 76, lines ten through 13.

So I think Mr. Buffaloe's question is, without meaning to do his job for him, just so we can move on. Do you remember, at any time, complaining about pain to your neck? Whether that was shoulder pain that radiated to your neck or pain that started in your neck or any other pain involving your neck?

Do you recall that you had -- whether you had complaints about that type of pain, about location of pain?

THE WITNESS: Yes, sir.

THE COURT: And that happened -- that pain happened before this accident?

THE WITNESS: Correct.

THE COURT: We are back on track?

MR. BUFFALOE: I think you said after this accident.

THE COURT: No, I said after the other accident but before this accident, but I will certainly give you the latitude to ask again.

I am just trying to get it back on track. It is already noon, and we have to finish in time to do the

doctor's testimony this afternoon. So I am trying to move this along.

MR. BUFFALOE: I understand. I appreciate that.

Q When did you complain to the doctor about the pain in your neck that you were experiencing before the 2018 accident?

A I don't remember but it must have been close to the beginning.

Q Did you complain after you had your first right shoulder surgery?

A Yes.

Q Now, Mr. Castillo, isn't it true that you experienced difficulty sleeping before the 2018 accident as well?

THE INTERPRETER: I'm sorry. The time frame again?

Q 2018.

A Yes, sir.

Q And that difficulty sleeping persisted up to the date of the 2018 accident, correct?

A No, sir. That changed, because after the accident I started to work again in 2013. Then, I returned to have the same ability to move to do the work and then for that reason I was able to sleep more better.

Q Okay. Mr. Castillo, referring again to the February 3rd, 2020 deposition. Reading from page 90. Line 17.

"QUESTION:"

THE COURT: Page line, what line? 17?

MR. BUFFALOE: Page 90.

THE COURT: Ninety.

MR. BUFFALOE: Yes.

Q "QUESTION: Would those occasions where you were would sleep three or four hours, did that remain constant up to the second accident?

ANSWER: Yes."

Mr. Castillo, does that refresh your recollection that you did, in fact, suffer sleep disruption, difficulty sleeping up until the second accident?

A Yes, sir. The difference was that if I slept three-hours straight through I would wake up, and then, I would be able to return to sleep for an additional three hours.

Q Reading from your February 23rd -- February 3rd, 2020 deposition again. Page 89, line 16. Do you remember being asked these questions and giving these answers?

"QUESTION: After your first accident but before the second accident, did you ever experience difficulty sleeping?

ANSWER: Yes.

And when did those difficulties begin following your first accident?

ANSWER: Sometimes I would only sleep three or four hours, but I really couldn't tell you if that was, because of the accident, because I never went to see a doctor to treat that.

At the time you gave that testimony, you didn't say that you slept three or four hours, and then, you would go back to sleep and sleep another three or four hours. You could only sleep three or four hours a night and sleep was disrupted, correct?

MR. VARGAS: Objection, form.

THE COURT: I'm sorry. Try it again. Just repeat. Let the reporter do it. Please read back the last two sentences.

(Whereupon, the record was read back by the court reporter.)

THE COURT: Overruled. That's fine. You can answer that, meaning not every single night that on occasions he could only sleep three or four hours a night. Is that your question?

MR. BUFFALOE: I don't know how often his sleep was disrupted. His sleep was disrupted. So --

THE COURT: You said sometimes, right?

MR. BUFFALOE: Sometimes.

THE COURT: So that's it. I am trying to understand what plaintiff's objection was. If the

objection was that there was some implication he never ever slept more than three or four hours a night before this accident that would be fine, but I don't think that is your implication.

MR. BUFFALOE: That is definitely not what I asked.

THE COURT: I don't think so either.

THE INTERPRETER: Your Honor, can I please have the question read back?

(Whereupon, the record was read back by the court reporter.)

THE COURT: And you will adopt my characterization that you don't mean that four hours a night every night just on those nights that he had difficulty, correct?

MR. BUFFALOE: Yes, I am not asking that, correct.

A Correct.

Q Now, by the way, you mentioned that you went back to work in 2013; is that correct?

A Yes, sir.

Q Now, when you went back to work, you were still having difficulty with your right arm, correct?

A Yes, sir.

Q And, in fact, in order to work you needed an

accommodation, correct?

A Could you repeat that question, please?

Q When you returned to work, in order to -- because you were still having problems with your right arm, you needed to be accommodated, correct?

A Yes, sir.

Q And, in fact, that accommodation was whenever you needed to lift something heavy, you would have someone help you, correct?

A Yes, correct. Since we work in a group of eight or six people, we all help each other mutually.

Q This accommodation wasn't ordinary help, correct? In fact, your fellow employees complained about the fact that you needed help.

A Yes, that's correct.

Q And, in fact, during your testimony you testified that it was the other Hispanic employees were the most vocal when complaining, correct?

A That's correct.

Q Now, by the way, in connection with your earlier suit, lawsuit, arising out of the 2009 accident, you claim that you would need future treatment, correct? You claim you would need future treatment, correct?

A Correct.

Q In fact, you claim that you would need that future

treatment for the rest of your life, correct?

A Yes, that's correct.

Q And arising out of that first 2009 accident, this future treatment that you claimed you would need for the rest of your life, included pain medication, correct?

A Yes, sir.

Q Physical therapy for the rest of your life, correct?

A Physical therapy, no.

Q You don't remember claiming that you would have to have physical therapy twice per week for six months and then twice a month for the rest of your life?

MR. VARGAS: Objection. That is not something he has testified to.

THE COURT: Tell us the question. Counsel, have a quick sidebar.

(At this time a sidebar conference was held between both counsels off the record.)

(Sidebar over.)

THE COURT: With the understanding that you can clarify later, the question is not, will the plaintiff -- whether the plaintiff ever testified to it, but whether a claim was made on his behalf to that. The question is overruled and you can move forward, Mr. Buffaloe.

Q In connection with the suit arising out of the 2009 accident, you also claimed that you would require steroid

injections for the rest of your life.

THE COURT: Meaning it was claimed on his behalf, right?

MR. BUFFALOE: Claimed. Claimed.

THE COURT: As part of the action?

MR. BUFFALOE: Yes.

THE COURT: Not that he personally --

THE INTERPRETER: Your Honor, the question to be repeated, please.

THE COURT: As part of the earlier lawsuit, that the claim was made on his behalf, that he would require steroid injections for the rest of his life, a frequency of Mr. Buffaloe, I don't remember at what frequency.

MR. BUFFALOE: I didn't say.

THE COURT: Oh, I thought you said a certain type of months.

MR. BUFFALOE: I think for the earlier one, not this one.

A Yes.

Q And you also claimed that the shots you mentioned, the Ortho V shots, you claimed arising out of the 2009 accident, that you would need those for the rest of your life, as well?

A I don't remember but a doctor, whose name was Joseph on 14th Street in Manhattan. The last time I saw him, I

don't know if it was 2017 or 2018 before the accident. I don't remember.

Q So the answer is yes?

A Yes, sir.

Q Okay. And you also claim that you would require diagnostic testing, what is it, every five years for the rest of your life, correct?

A I don't remember, sir.

Q Now, by the way, you had mentioned that you were treated by Dr. Kaplan after 2018, correct?

A After 2018?

Q Yes.

A Yes, sir.

Q You also treated with him after the 2009 accident as well, correct?

A Yes, sir.

Q And when you treated back with him as early as 2011, you complained to him that you had limited cervical motion, correct?

A Sorry. Could you repeat the question?

Q In 2011, when you were treating with Mr. Kaplan, you complained to him, at that point, that you had limited cervical motion, correct?

A From the neck?

Q Yes, from the neck.

A No, sir.
Q You don't recall telling Dr. Kaplan that in 2011?
A In 2011, well, it's been 13 years since that. Sometimes I don't even remember where I park the car.
Q You remember telling Dr. Mendelbaum in 2017, that you were experiencing shoulder pain, at that point, before the 2018 accident, because you had been overcompensating for the 50 percent loss of use of your right arm?
A Dr. Mendez?
Q Mendelbaum?
A Dr. Balm, yes, correct.
Q And taking you to the date of the accident, at the time the accident occurred, you were wearing a hard hat, correct?
A Excuse me? Of what accident are you referring?
Q The 2018 accident.
A 2018, yes, sir.
Q And at the time of the accident you were wearing glasses on your face, safety glasses, correct?
A Yes, sir.
Q And it's true that after the plywood plank hit you on your nose, you did not fall to the ground, correct?
A Correct.
Q Now, after the accident occurred, you didn't leave the building immediately, correct?

A Excuse me?

Q Let me rephrase it. After the accident you didn't go to Mount Sinai Hospital right away, correct?

A No, it was -- it was not like that. My coworkers came and they were there with me. I was bleeding a lot, and they took me down to the first floor.

Q Now, by the way, talking about that, you were on the roof of the building at the time of the accident, correct?

A Yes, it was almost at the end, but I was on the roof.

Q And you were -- the building was 32-stories tall, correct?

A Correct. And then the roof itself would be on the 33rd floor.

Q So, if I recall your testimony correctly, as well as Mr. Mejia's testimony, you were constructing the elevator shaft at the time of the accident, correct?

A Correct.

Q So when you got up, did you go down the stairs yourself?

A No, sir.

Q Is your testimony that someone carried you 32 stories?

A No, sir. There was an elevator. It is called a hoist, which is located on the outside of the building, and when a construction is being done and during construction it

will go all the way up to the second or third floor just below where the construction is being done.

Q Did you take that hoist down to the first floor?

A Yes, sir.

Q And when you got to the first floor, you stayed in the building for more than an hour, correct?

A No, more than an hour, it was less than. Less than an hour. An hour or less, I don't remember.

Q All right. Mr. Castillo, reading from your September 23rd, 2021 deposition. Page 60.

THE INTERPRETER: I'm sorry, the year.

MR. BUFFALOE: 2021.

THE COURT: This is a different transcript than the one I have.

MR. BUFFALOE: Yes.

THE COURT: Page 6-0?

MR. BUFFALOE: Yes.

THE COURT: Line number?

MR. BUFFALOE: Sixty-one. Sorry. Not 60. Reading from line 3.

Q "QUESTION: Mr. Castillo, how long did you remain at the job site after the accident before leaving for the hospital?

ANSWER: Approximately an hour. They were trying to decide what to do. I don't know."

Does that refresh your recollection that you were there for about an hour?

A One hour or less. I was there for some time, a little time.

Q And, as a matter of fact, by the time you left the building to go to the hospital, your nose had already stopped bleeding, correct?

A It was still bleeding.

MR. BUFFALOE: Can I have this marked for identification?

THE COURT: Sure. You want to show it to him first, please.

MR. BUFFALOE: He has agreed to stipulate in evidence.

THE COURT: That's fine. What exhibit number are we up to? Defendant's A.

(Whereupon, the photograph referred to was marked in evidence as Defendant's Exhibit A by the Court Reporter.)

THE COURT: This just, as a heads up, we are at 12:30.

MR. BUFFALOE: Can we briefly talk about that?

THE COURT: Yes.

(At this time a sidebar conference was held between both counsels off the record.)

(Sidebar over.)

A Yes, this is at the hospital.

Q On the date of the accident, correct?

A Yes, sir.

Q It is fair to say in that photograph your nose is not bleeding, correct?

A While I was on the train I was traveling on it, and there was a lady, an African American lady who offered me her handkerchief, because I was still bleeding.

MR. BUFFALOE: Move to strike as not responsive.

THE COURT: No, overruled.

Q Mr. Castillo, looking at that photograph that has been marked as Defendant's Exhibit A, is it fair to say at the time that photograph was taken your nose wasn't bleeding anymore?

A Yes, my nose did bleed. It did bleed. I had blood all over me.

Q I'm asking you, Mr. Castillo, you mentioned that that photograph was taken while you were in the hospital, correct?

A That's correct, yes. And, in fact, they were the ones that put that on me so that it would avoid the bleeding.

Q So you had -- when you say that you are talking about the bandages in the photograph, correct?

A Yes.

Q So, again, Mr. Castillo, at the time that -- let me

ask you another question. Let me step back for a second. Who took the photograph?

A I think I did myself.

Q And you used your phone to take the picture.

A I don't remember if I did it myself or it was my coworker Rebecca.

Q By the way your coworker Rebecca, does she speak Spanish.

A No, sir.

Q She speaks only English?

A Yes, sir.

Q How did you communicate with her to ask her to take the photograph?

A Well, as I said from the beginning, I speak some English a little. I can say something like can you take a picture?

Q Did she use your phone take the photograph?

A I don't remember.

Q Do you know if any other photographs were taken?

A No, sir.

Q Now, you mentioned you took the train to the hospital?

A Yes, sir.

Q Now, when you got to the hospital, you spoke in Spanish, correct?

A Rebecca was the one who spoke.
Q Did any of the hospital personnel speak to you?
A No.
Q Mr. Castillo, referring again to the September 23rd, 2021 deposition. Beginning from line page 83, line 16.
"QUESTION: Did Mount Sinai provide you a translator, or was the person that was speaking with you able to do so in Spanish?
ANSWER: No, I remember one of them was there who spoke Spanish.
QUESTION: Did they provide you a Spanish interpreter, someone who could help you communicate with the hospital staff?
ANSWER: I don't know. It was there.
QUESTION: Did he help you communicate with the hospital staff?
ANSWER: Yes.
Mr. Castillo, which testimony is accurate, the testimony you gave today or the one you gave in 2021?
MR. VARGAS: I have to object. What he read was inconsistent. He said someone.
THE COURT: He wasn't provided a translator. Someone spoke Spanish.
MR. BUFFALOE: He also testified that Rebecca spoke to them.

THE COURT: The objection is sustained. He has already testified. I am going to remind the jurors that the fact that the witness speaks some English does not mean that he is not entitled to use a Spanish language translator for things he finds to be complicated or difficult or legally significant or important to him. That's number one. I see that you are like gesticulating. I am making a ruling.

Secondly. It is not -- it wasn't an inconsistent establishment that requires a question like, which time you are you telling the truth? For him to say that he found someone who spoke some Spanish, that he wasn't provided with a translator we have more than one translator in the room a few minutes. Okay? We have one Spanish translator in the room. That means there aren't other people in the room that speak upon information and belief.

MR. BUFFALOE: That is not what he said. He said they didn't communicate to him at all. They spoke to Rebecca.

THE COURT: That's not how I understood the question but go ahead.

MR. VARGAS: That was one of his questions. Then that followed it up, did they provide you with a translator and he read these questions and --

MR. BUFFALOE: I did not ask that it that way. Did they provide you with a translator? Did you at one point?

THE COURT: It was a translator and he said no and you said didn't you say that you had someone who spoke Spanish? And that's when he objected, and I agree with you, the objection meaning that the fact that there was someone who spoke Spanish does not mean there is someone who was a translator. I speak, you know, Kindergarten Spanish or the rough equivalent. I am definitely not a Spanish language translator.

MR. BUFFALOE: I will ask a different question, Judge.

THE COURT: Sure.

Q Mr. Castillo, does that refresh your recollection that you did, in fact, communicate at the time you were in the hospital at Mount Sinai with the Mount Sinai staff on your own behalf?

A When I arrive at emergency there was no one there who spoke Spanish. Afterwards when I was in the room where I was being seen, there was a young man who arrived, and he spoke to me in Spanish. He spoke Spanish that was, more or less, understandable. More English than Spanish but I did understand what he said to me.

Q Now, Mr. Castillo, after you were discharged from the

hospital, you went back to the work site, correct?

A Correct, yes.

Q And you mentioned that you went to pick up your tools. You also went to pick up your backpack, correct?

A I would return to work to pick up my tools and such, but my coworkers had already stored my tools.

Q You arrived that morning with a backpack that had your work clothes and your hard hat, your glasses, your vest, correct?

A No, sir. No, sir. The hard hat and the harness, those are all stored in a room, storage room, where one also can store one's tools.

Q When you arrived at work, you changed from your everyday clothes into your work clothes, correct? Pair of jeans, work boots, a T-shirt?

THE COURT: Can you actually let him answer the question first?

A Yes, sir.

Q And when you went back to the work site after you left the hospital, by the way, let me step back for a second. When you left the hospital, you took the train back to the work site, correct?

A Yes, I did return with my coworker, Rebecca, yes.

Q When you got to the work site, did you -- forget about the tools for a moment? Did you go back to get your

backpack?

A Yes, I went more to find my tools and in reality my backpack stayed behind.

Q So are you saying your left your backpack at the work site on the day of the accident?

A My tools and my backpack stayed behind there in the shanty, as they call it.

THE COURT: The question is, when you came back to the job site is the time frame we are asking about. When you came back to the job site with your coworker, did you take your tools and your backpack or just your tools or just your backpack or something else?

THE WITNESS: No.

A No.

THE COURT: No, what? You took something?

THE WITNESS: I did not pick up anything. The tools were left behind there, and I never returned for them.

Q Mr. Castillo, I'm not asking you about the tools --

THE COURT: But I created that problem by trying to clarify whether this is a tools backpack, both or neither.

Q I am just asking specifically about your clothing and whatever else you had in that backpack after you changed out of those clothes into your work clothes. Did you take that?

A No, my bloody clothes remained there, and when I went to the hospital I had this shirt on. We work with T-shirts. They're either orange or green.

Q Mr. Castillo, I am asking again about a specific time frame. After you left the hospital, when you went back, you took the train you went back to the work site. Did you pick up your backpack then?

A I am saying to you, no.

Q Okay. Did you change out of your work clothes into your not work clothes?

A Yes, my coworkers assisted me in changing into this shirt, that you can see here.

Q So that was before you went to the hospital.

A Correct.

Q So you changed your clothes before you went to the hospital during that hour or approximately hour that you were there before you went to the hospital?

A No, sir.

Q By the way, when you were at the hospital you didn't mention anything any complaints about your neck or your shoulder, correct?

A I was focusing on my face.

Q Is that a yes?

A I said I did not do it.

Q After you left the work site you went home, correct?

A Yes.

Q When you went home with the train?

A Yes, sir.

Q Now, you mentioned that you sought treatment for the first time after Mount Sinai about a week after the accident, correct?

A Yes.

MR. BUFFALOE: By the way, Judge, do you mind if we publish Defendant's A to the jury?

THE COURT: No, not at all. It is in evidence.

(Defendant's A being published to the jury.)

Q During that week between the accident and when you first went to get medical treatment after Mount Sinai, you consulted your lawyers as well, correct?

A No, sir.

Q Reading from page 91, line seven?

THE COURT: Of the 2021 transcript?

MR. BUFFALOE: Yes, September 23rd, 2021 deposition of Mr. Castillo.

THE COURT: Okay.

Q :QUESTION: The next time you went to receive treatment, which was approximately a week after your accident had occurred, where did you go?

ANSWER: I came to this lawyer's office.

QUESTION: Did you come to this attorney's

office before you next sought treatment?

ANSWER: Can you repeat the question?

QUESTION: My question to you is, did you go to this attorney's office before you next sought treatment approximately one week after your accident?

ANSWER: The truth is I don't understand that question.

QUESTION: When did you hire your attorneys to file this lawsuit?

ANSWER: One week after my accident."

Does that refresh your recollection that you went to your lawyer's one week, within one week after this accident?

A In reality I went on October 24th of 2018.

Q So are you saying that the testimony here on September 23rd, 2021 is not accurate?

A If it is written there, perhaps, I don't know if I was affected my nerves, and I said that but in reality it was on October 24th of 2018.

THE COURT: Is the day that you retained Gorayeb and Associates for this case you are saying?

THE WITNESS: Yes, sorry you translated from Spanish to Spanish?

THE INTERPRETER: I'm sorry. The answer is yes.

Q Reading from your deposition of September 23rd, 2021. Page 91, line 24.

"QUESTION: When you say you went to the attorneys, are you referring to Gorayeb and Associates?

ANSWER: Yes.

QUESTION: Did they refer you to a medical treatment doctor?

ANSWER: Yes.

QUESTION: What's the name of that facility?

ANSWER: I don't know. It's Dr. Kaplan and Dr. Grimm."

Does that refresh your recollection that you went to see Gorayeb and Associates one week after the accident, and they referred you to Dr. Kaplan and Dr. Grimm in connection with this accident?

A Well, sir, I went to Dr. Kaplan,'s because he had done a good job on my left shoulder.

THE COURT: Right. He is indicating his right.

A When they did the -- but they did to me and my right shoulder in 2019 they did a good job, and my hand and in my shoulder.

MR. BUFFALOE: Move to strike as nonresponsive to my question.

THE COURT: It is not nonresponsive and it is 1:00. We will see you back at 2:15. Don't have any outside contact. Don't discuss the case with anybody else. Consider being back between a little after two, so

you have time to get your coats off and cover whatever else before we get back to the courtroom. Sir, you are reminded you are under oath and you cannot discuss your testimony with anyone.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jurors exited the courtroom and the following occurred.)

THE COURT: You can step down of.

(Witness exiting.)

(A luncheon recess was taken at this time.)

* * *

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

* * *

(The following then occurred in open court out of the presence of the jury:)

A N D R E W M E R O L A, Doctor, having been called as a witness by and on behalf of the People in this case, having first been duly sworn was examined and testified as follows:

THE WITNESS: Yes, I do.

A Please state your name and address for the with the.

THE WITNESS: Andrew Merola. A-N-D-R-E-W. M-E-R-O-L-A. 567 First Street, Brooklyn, New York 11215.

THE COURT: Thank you very much you may be seated.

MR. VARGAS: It's an illustration of the cervical fusion that Dr. Merola performed on August 10th 2021.

THE COURT: Marked as Plaintiff's Number 1. Note that the jury is not present. Okay.

DIRECT EXAMINATION

BY MR. VARGAS:

Q Doctor, is the illustration a fair and accurate representation of the surgery you performed?

A Yes.

MR. VARGAS: That's, as far as I know, your Honor.

THE COURT: Okay. Would you like to ask some additional questions perhaps?

MR. BUFFALOE: Yes, your Honor.

VOIR DIRE EXAMINATION

BY MR. BUFFALOE:

Q So, Dr. Merola, these illustrations are not to scale. Are these considerably blown up, to the actual size of Mr. Castillo's spine, correct?

A Yes.

Q And regarding the cage implants that are seen on here and the incision, those are also exaggerated, correct?

A Well, they're larger than normal, yes.

Q And the incision that is depicted there is

considerably larger than the incision that is made during the course of the surgery?

THE COURT: Proportionately larger to the illustration or larger in centimeters or inches?

Q One thing is his head is about the size of a human head on this illustration?

THE COURT: Are you asking?

Q Yes. Is that incision that is depicted on that, this illustration, is that bigger than an incision that is made during the course of the surgery?

A You mean, I think the whole thing is a bit bigger. I mean the whole blowup is.

Q And, as far as the tools that are depicted here, are those the tools that are used during the course of the surgery?

A Yes.

Q And are those considerably bigger than what they are in reality?

A They are larger, yes.

THE COURT: Are they all proportional to counsel's question? If that head is approximately the size of Mr. Castillo's head, which I am not saying, you think it is I am saying, if it were, would those incisions be proportional in size to the size of Mr. Castillo's head, or are they somehow disproportionate to the

illustration?

THE WITNESS: The incision, your Honor?

THE COURT: Yes.

THE WITNESS: Yeah, the section is a midline incision over the cervical vertebrae.

THE COURT: The question, sir, is the incision --

THE WITNESS: -- proportional to the head.

THE COURT: Proportional to the side of the anatomy it intends to depict. If Mr. Castillo's head were that size and his neck were that size, would that incision fairly and accurately represent the incision that was made?

THE WITNESS: By about plus or minus 30 percent.

THE COURT: Okay. And why is that? How large is the incision normally?

THE WITNESS: Typically incision is about that large when you put the retractors in, it does expand. When you take the retractors out, it does --

THE COURT: The retractors are shown in the exhibit now?

THE WITNESS: Yes.

THE COURT: Would that reflect essentially the proportion of space compared to let's say the diameter of the neck that is shown in that picture?

THE WITNESS: Yes.

THE COURT: Okay. Then, I am going to say I am not going to ask the next question, because plaintiff has to ask what that question is. Do you have any other?

MR. BUFFALOE: No, your Honor.

THE COURT: Do you have any others to ask?

MR. VARGAS: No.

THE COURT: No?

MR. VARGAS: He testified to it fairly and accurately in his representation.

THE COURT: He did do that. Hold on. No, no as to proportional he doesn't have a problem. There is a missing question without the exhibit it can't be used. It be can be used for identification. It can't be shown to the jury, because it is a demonstrative exhibit. It has to meet certain other criteria.

MR. BUFFALOE: Thank you.

THE COURT: I want you to take five minutes and figure out what you forgot to add. Take a minute.

Q Doctor, does this exhibit, was this based on your operative report?

A Yes.

Q And is it accurate to what is in your operative report?

A Yes.

Q This illustrates exactly how you did the surgery, correct?

A Yes.

MR. VARGAS: Your Honor, I don't know what else you want.

THE COURT: I get that you don't know what else you are supposed to ask. This is something you are supposed to ask in the presence of an objection.

If there was no objection, nobody would care. If there is an objection there is other stuff you have to ask about a demonstrative exhibit. I am really trying hard to offer you a five-minute recess to go look it up. Do you want to try again?

MR. VARGAS: Thank you.

THE COURT: Sure.

Q Doctor, would this illustration be helpful in you explaining to the jury how to perform the procedure?

A Yes.

THE COURT: Great. You can use it.

MR. BUFFALOE: Note my exception.

THE COURT: Your exception is noted. I am going to have you go back to the audience, and I will ask you to take the film down from the public view while we get the jurors into the room.

MR. VARGAS: I was going to mark the Lenox hill

CD, which is in this computer.

THE COURT: Was it pursuant to a subpoena?

MR. VARGAS: Yes.

THE COURT: So Plaintiff's 2.

MR. VARGAS: In evidence. And then Dr. Merola brought his chart. We are going on mark this half of it into evidence. He reviewed some New York Ortho records, which are also in his chart. We are going to mark them in for identification.

THE COURT: Let's mark the whole thing, the whole chart in evidence subject to redaction and that will be easier and without separate exhibit numbers for the same exhibit. All right. Meaning Dr. Merola's chart will be marked 3 in evidence subject to redaction, and whatever papers that you may have questions about that were incorporated into his records, we can pull back out if they turn out that they don't belong in the chart.

MR. BUFFALOE: Note my objection.

THE COURT: Doesn't matter. It is not going to be shown to the jury until we discuss what pages need to go in, but the chart itself, if it was at one point the authorization was given for it. If there is a representation that the pages that are Dr. Merola's and the pages that are extra were all incorporated into the chart then the whole chart will be admissible. It will be

subject to the normal hearsay objections of things that were incorporated in.

If there were, meaning hearsay on hearsay, then it would be subject to those objections, and I will take those up. Let's go ahead and get the jurors.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jurors enter the courtroom and the following occurred:)

THE COURT: You can be seated. Plaintiff is ready to call, in order to accommodate the schedule of a witness. Sir, I understand you need to call a witness out of order before the completion of cross exam, correct?

MR. VARGAS: Correct.

THE COURT: Who do you want to call as your next witness?

MR. VARGAS: Dr. Andrew Merola.

THE COURT: Calling Dr. Merola.

THE CLERK: Please raise your right hand.

A N D R E W M E R O L A, Doctor, having been called as a witness by and on behalf of the People in this case, having first been duly sworn was examined and testified as follows:

THE CLERK: Please give your name and address for the record.

THE WITNESS: Andrew Merola. M-E-R-O-L-A. 567

First Street, Brooklyn, New York 11215.

THE CLERK: Thank you.

THE COURT: All right. Your witness, sir.

MR. VARGAS: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. VARGAS:

Q Good afternoon, Dr. Merola. If you can start out. Can you tell the jury how long have you been a doctor?

A I have been in the active practice. I graduated medical school in 1990. I finished my training in 1996. I have been doing this for about 24 years now.

Q And your educational background?

A I went to Howard University College of Medicine, graduated in 1990. Kings County Hospital Downstate Medical Center for Orthopedic Surgery. University of Colorado in Denver for a spinal surgical fellowship, and then, I came back to New York City after that in 1996.

Q And do you have your own practice?

A Yes, I do.

Q And what would you be doing if you weren't testifying today?

A I would be seeing and taking care of patients, and actually today, I had some surgeries scheduled, which I had to reschedule.

Q Are you being compensated for your time for being

here today?

A Yes.

Q How much are you being compensated?

A $10,000.

Q What does board certification mean?

A Board certification starts when you finish your training. You take an examination. It is a written exam for orthopedic surgery. And then after you pass that written examination, you then wait two years, where you collect all of your orthopedic surgical cases.

You put those cases together, and then, you sit in front of literally a Board of Examiners, that ask you questions about your surgery. When you pass both of those portions of the exam, part one and two, you become board certified, and then you recertify every ten years.

You need to keep taking exams during those ten-year intervals. You need to keep up with the continuing medical education. You need to resubmit your recertification cases to the board, and a recertification process is every ten years.

MR. VARGAS: I would ask that Dr. Merola be deemed an expert in spine surgery.

MR. BUFFALOE: I think that is for the jury to decide, Judge.

THE COURT: No, it's not up for them to decide whether he is accepted by the Court, as an expert. It is

up to the weight they give their testimony. You can consent or not consent. I don't mind.

MR. BUFFALOE: I don't have any objection.

THE COURT: Without objection, he is accepted as an expert in the field of spinal surgery.

MR. VARGAS: Thank you, your Honor.

Q And, Doctor, did there come a time when you examined a Mr. Yester Castillo?

A Yes.

MR. VARGAS: With, your Honor's, permission, if we can have his, Dr. Merola's chart, be marked into evidence.

THE COURT: Thanks. That was Exhibit 3, I believe. Plaintiff's 3 subject to redaction.

(Whereupon, Plaintiff's Exhibit was marked in evidence, as Number 3.)

Q Doctor, when did you first see Mr. Castillo?

A March 29th of 2021.

Q And when you see a new patient, is there a usual procedure you follow?

A Sure. You sit down with the patient, and you speak with them to find out why they are seeing you, to get some idea of what it is that you might be able to do for them.

Q Is that usually referred to in the health care profession as a history?

A Yes.

Q And did you take a history from Mr. Castillo?

A Yes.

Q What was that history?

A He had been struck by a piece of plywood on September 27th of 2018. He had surgery to his nose and his extremities subsequent to the accident. He had been treating with Dr. Matthew Grimm and Dr. Kaplan. Dr. Grimm referred him to me for an opinion regarding potential surgery to the neck.

Q And when you saw Dr. -- or when you saw Mr. Castillo, did you do an exam of him?

A I did.

Q And what were the findings of that exam?

A On that examination he had spasms in his neck, which was palpable. He also had restrictions in motion. So his extension was 25 degrees. His inflexion was 30 right and left lateral bending were 30 degrees each, and right and left lateral rotation were 35 degrees and 30 degrees.

He also had what's called a positive spurlings maneuver. S-P-U-R-L-I-N-G-S. Spurlings maneuver, which is a test where you compress the head and neck, in accord, to see whether or not there is rotation of the head and neck to see if there are any spurlings.

Q When you are doing an exam of a patient, is there

such thing as a finding that are either objective or subjective?

A Yes.

Q Can you explain to the jury the difference?

A Subjective is whatever the patient essentially tells you. I have pain in my neck that travels down into my arms and my hands. That is a subjective complaint.

And an objective test is when you are examining a patient if you palpate something that is not under their control. For example, spasm for loss of reflex or pathological reflex. Those are signs of objective findings.

Q And is a spasm a significant finding for an exam?

A Yes.

Q And why is that significant?

A Spasm is a muscular reaction. In order to prevent your body part from being placed into a position that would cause harm or pain.

Q And, at the time of the exam of Mr. Castillo then, did you review any records?

A I did. I was able to take a look at Dr. Grimm's records.

Q And was there anything that was significant in those records?

A Sure. They indicated that he had what we consider a course of conservative treatment. That is not operative

treatment, that included activity modifications, medications, therapy, and he also had a series of injections that were done by Dr. Grimm, injections of steroid, which is a medication to decrease swelling and to try to decrease pain.

Q And did you review any radiological films at that time?

A I did. I saw an MRI of the neck from April 8th of 2019.

MR. VARGAS: Your Honor, with your permission, if we could put up on the screen that MRI.

THE COURT: Okay.

MR. VARGAS: It is Plaintiff's 2. It needs a tag though. At least the envelope with your permission, your Honor, can I move this over?

THE COURT: Yeah.

MR. VARGAS: And also with your permission, if the doctor can step down, if he can explain to the jury.

THE COURT: I will remind you the reason why you are not sitting on the stand. You can stand down there.

(Doctor exiting the stand.)

Q Doctor, can you please explain to the jury what we are looking at?

A Sure, this is a side view image of the cervical spine of Mr. Castillo. So it is as if he was looking at the wall with his back, his neck and his back to the far wall.

The squares are the vertebral bodies of the cervical spine, and in between each of the vertebral bodies are the disks. And to the right of the vertebral bodies in the disks is this gray line, and this gray line is the spinal cord.

So it lies deep into the area of the bones of the disks. And if you count down the bones to, three, four between C5 and C6, you will see some protrusion of disk that is indenting the cover of a spinal cord area, and that area itself was correlative. In other words, it lined up with the objective physical findings on his exam, producing a positive spurling maneuver with pains traveling down his arms, which is the C5 and C6 nerve distributions.

Q Now, nerve distributions, is this different distributions for different levels or something else?

A Sure. So each one of these bones has a number associated with it, and there are nerves that exit the spinal cord at each level of the spine, and they travel into your arms and hands, and they do different things. The fifth and sixth roots typically travel down into your thumb and your index finger, the seventh is off the back of your hand, and these are areas that nerves are responsible for feeling sensation. They are responsible for moving your nerves and your hand and your fingers around.

Q And after looking at this film, did you have a diagnosis at that time?

A So the basic diagnosis for which this patient was suffering is a cervical, because it like belongs to the neck radiculopathy, which means there is a problem with the nerve in the cervical spine, and it was pretty much located in here at this C5 C6 level, because that is the level that corresponded to the pain distribution going down his arms and hands with his restricted motion, as well as a loss of sensation.

Q Did you have a recommendation at that time?

A So this MRI was done in 2019, and what I wanted to do was, this was done on April 8th of 2019. My recommendation was this is a patient who has a problem with his neck and pain is traveling into his arms and hands. I wanted to get an updated MRI film.

Q And this is an MRI you ordered on April 3rd, 2021.

A Yes, same view. So side view image we are looking at the bones. And so here at C5 C6. We continue to see the protrusion of disk material between C5 and C6. At C6 and C7, which was previously not quite protruded, we are starting to see there is some more protrusion of disk material. There we also start to see a little collapse at C5 and six, C6 level and a bit of tilting toward on C6 and C7. These areas started to tip a bit. This updated MRI shows that a persistent problem at C5 and C6 there is somewhat of an increasing problem at C6 and 7.

Q At this time, did you have a recommendation for Mr. Castillo?

A At this time, this was after the second visit when he had come back to me, and I just wanted to pull up my note so that I can take a look at that. I had recommended some nerve tests. These are called EMGs, nerve tests, specifically tests the way the nerves that exit the area of the cervical spine behave in the muscles.

So your nerves can do different things. They can feel sensation. They can work your reflexes, and they also move your muscles around, and the EMG or the nerve conduction test is a test of how those nerves are functioning within your muscles.

Specifically, that's the end part of the EMG. It means muscular. It is important, because when nerves start to not function properly in muscles, this can lead to muscular weakness, and when there is nerve damage with muscular weakness, that can sometimes be irreversible. If the EMG shows us there is a nerve problem within the muscles themselves, that is a concerning situation, that tells us having failed conservative treatment that the patient would otherwise be a surgical candidate.

Q Doctor, were you aware that someone else had recommended surgery prior to him seeing you?

A Yes.

Q Do you know who that was?
A Dr. Weinstein.
Q Dr. Weinstein is also a spinal surgeon?
A Yes.
Q Do you know if he had the same findings?
MR. BUFFALOE: Objection.
THE COURT: Subject to connection. Overruled.
Q Do you know if he had the same findings?
A He had similar findings and I believe he had made a recommendation for addressing the C5 C6 level, based on his previous exams of the patient, which were done a little bit earlier on than when I had seen the patient.
Q Two years prior to you, correct?
A Yes.
Q By two years, after two years of passing it had gotten progressively worse by the time you saw him?
MR. BUFFALOE: Objection.
THE COURT: Sustained. Let the doctor testify.
MR. VARGAS: Okay.
Q At this point after reviewing this MRI and after reviewing the EMG, do you have a recommendation?
A Yes, looking at the EMG, it was positive, which meant that this did show a problem with the nerves, particularly in this area at 5, 6 and 7, and because he had been symptomatic and had nerve damage at this time, the recommendation was for

a surgical procedure to take some pressure off these nerves and then to stabilize this area so that it no longer caused any further damage.

Q And was that surgery performed?

A Yes.

Q And do you remember the date of that?

A I have to check the exact date. This was done on August 12th of 2021.

Q I think we can take this down, right?

A Sure.

MR. VARGAS: I will take the illustration up with, your Honor's, permission Plaintiff's 1?

THE COURT: For identification.

MR. VARGAS: Right, for identification. That can't be published yet. It is for identification.

Q Doctor, this illustration, is it a fair and accurate representation of the surgery you performed?

A Yes, it is.

Q And would this illustration assist you in explaining your procedure to the jury?

A Yes.

MR. VARGAS: Your Honor, I ask that I be able to publish this.

THE COURT: You can ask that it be admitted into evidence.

MR. VARGAS: Or I am asking that it be admitted into evidence.

THE COURT: Your exceptions were previously noted. It can be admitted into evidence for demonstrative purposes. This exhibit, which is Plaintiff's 1, Number 1, yes --

MR. VARGAS: Yes.

THE COURT: -- is a demonstrative exhibit and it may include some proportional calls of some radiological films. It may include some illustrations that are to scale and some that aren't to scale, and it's not being offered, as though it is an illustration particular or non-particular. They photograph -- they are illustrations that are designed to help the doctor explain what he did.

Q Doctor, if you could explain to the jury what we are looking at here.

A Sure. So this is an illustration of this particular surgical procedure, which is known as anterior, that means through the front cervical, that means the neck. Discectomy, which means removal of these disks that are damaged, C5, 6 and C6-7, and spinal fusion. Fusion basically means stabilization over the bones so they no longer cause further damage in the area of the spinal cord and nerves.

And its operation that you do by making exposure or being able to come through the skin down onto the area where

the actual bones and disks are, so that you can visualize them directly and then thereby take pressure off of the nerves and the spinal cord.

Now, once you have done that, in order to stabilize everything, so that you can be up and about and walking and moving around without causing further damage, you need to do what's known as the fusion portion or the stabilization portion of the procedure, because the differences have been removed.

We replace the disks with these little devices that are basically like shims, but they are specially made to sit in between bones, and we fill them with some bone graft. Bone graft is essentially taken from the areas that we shave away. They save that bone. We mix it up with a little more bone glue, and we put it into these devices so that becomes one solid piece of bone as the fusion happens over time, and that was done at C5 C6 and C6 and C7?

In order to make sure that it all stays together, while it continues to heal, we insert a titanium plate that we attach to the bones with these three screws and that is illustrated in the x-ray. That shows the final product or the final reconstruction in the neck.

Q Doctor, you can take the stand.

(Doctor entering the stand.)

Q After the surgery, did you see Mr. Castillo?

A I did.
Q And when was the next time you saw him?
A His first postoperative visit was on August 16th of 2021.
Q And did you examine him, at that time?
A I did.
Q And what were your findings?
A I did what's known as a standard post-operative exam. An exam to make sure that the patient didn't have any complications from the surgery and was otherwise healing well, and, at that time, he was neurologically intact and stable, which meant that his neurological condition was stabilized, and the incision itself was healing. There were no signs of infection, and there were no other signs of issue with anesthesia or his surgery.
Q And after that visit -- I'm sorry. Were there any complaints at that time?
A Nothing significant. He had no, what we call, acute complaints.
Q And the next time you saw Mr. Castillo?
A His next visit was for a bone growth stimulator placement, which happened at the end of August. August 31st.
Q And what exactly is that?
A That's a device that helps the bones to heal. It is an electrical device that sets up basically like an

electromagnetic field inside your neck and electromagnetic stimulates your bone cells. It heals. It helps with the healing process. It helps to basically grow new bone.

Q Is it a permanent device or is it a temporary?

A It's an external temporary device that is utilized for about nine months after the surgery.

Q And the next time you saw Mr. Castillo?

A February 28th of 2022.

Q And, at that time, did you do an exam on Mr. Castillo?

A Yes, on his exam he did continue to show spasm in his neck. His range of motion have somewhat improved. His extension was up to 35 degrees. His inflexion was 40. His right and left bends were both 40, and his right rotation was 35 and his left rotation was 40. Neurologically he continued to remain stable, which is some loss of sensation. Basically in the sixth nerve roots, as we said before, and somewhat is the seventh roots.

Q And for a surgery such as this, when will be your expectations as to how long before you know the success of it or the failure of it?

A Yes, so typically with these kinds of surgeries, if patients are improving in the acute postoperative period and they continue to show improvement, even though this is gradual in the course of time, we typically see a maximum

improvement at about anywhere between nine months to a year or so.

Q And the next time you saw Mr. Castillo?

A The next visit was in May of 2022.

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

A I did.

Q And your findings?

A On that examination the findings were essentially pretty much stable to the previous findings. There were no significant changes.

Q And now, this is about the nine-month period, correct?

A Yes.

Q Did he have any complaints of pain or discomfort?

A The most of his complaints and symptoms are what we call mechanical symptoms. Mechanical symptoms are pain and symptoms that are within the neck area itself, and that's typically related to difficulty with the muscles in your neck's ability to really maintain head and neck positional over time, and essentially kind of stress and strain to the head and neck area. A majority of his neck's were called mechanical neck pain.

Q And he was still complaining of headaches, correct?

A Yes.

Q And can you explain to the jury why headaches are

connected to an injury to the neck?

A Sure. Headaches can be connected in several different ways.

MR. BUFFALOE: Objection.

THE COURT: Overruled.

A Headaches can be connected in several different ways. Most of what happens with headaches is that they are, because your head is resting on your cervical spine, if there is a problem with the structure of your cervical spine, you can have some collapse in the upper portions of the spine where the nerves are that travel up into the back of your head area and that can cause some headaches.

So instability in your neck, chronic neck pain that has been present for a long time, these are all issues that are specifically related to the neck that can result in headaches.

THE COURT: You are talking about this -- about this patient, or patients in general?

THE WITNESS: This particular patient.

Q And, Doctor, the next time you saw Mr. Castillo?

A August 29th of 2022.

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

A I did.

Q And what were your findings?

A So on exam at the time he also had some restrictions

in range of motion, albeit improved from his baseline and neurologically remained stable.

Q By this point, it is a year after the surgery, correct?

A Yes.

Q And how long would you characterize the success of the surgery?

A I would say the surgical procedure was successful and stabilizing his condition and having prevented it from getting any worse.

Q And were you aware, at that time, that a spinal cord stimulator trial had been recommended?

A Yes.

Q And what was your opinion on that?

A After time -- in this particular case with chronic, we will call chronic neurogenic pain, spinal cord stimulators can be helpful for that. It was a good recommendation.

Q And he had already had the trial done; is that correct, by that point?

A Yes.

Q Did he have any -- did he report back to how it was working for him?

A Yeah. There has been benefit from the trial.

Q And the next time you saw Mr. Castillo?

A That was my last office visit with the patient was

August 2022.

Q And as you sit here now, Doctor, do you have an opinion with a reasonable degree of medical certainty as to whether the herniation and subsequent injury to C5 C6 C6 C7 is connected to the accident of September 27th, 2018?

A Yes.

MR. BUFFALOE: Objection.

THE COURT: Overruled.

Q And what is your opinion?

A That it is causally related to the accident of September 27, 2018.

Q And do you have an opinion with a reasonable degree of medical certainty as to whether that injury is permanent?

A Yes, I do.

Q What is that?

A That the injury is permanent.

Q When you say "permanent," what do you mean by that?

A So he has permanent residual deficits in his arms and hands, primarily with the C6 roots and C7 nerve roots, and he has also undergone a reconstruction in order to take pressure off the cords and the roots from preventing that condition from getting worse. From having seen him once a year postop and having that condition would be known to have been permanent.

Q Do you have an opinion as to reasonable degree of

medical certainty as a future prognosis for Mr. Castillo?

A So --

MR. BUFFALOE: Objection.

THE COURT: He is a treating doctor.

MR. BUFFALOE: Not anymore.

THE COURT: He is a treating doctor, yes.

Overruled.

A Sure. The prognosis for this case would be what we call guarded, which means the condition continues to require care and treatment over the course of time having had the reconstruction and spinal cord stimulator replacement.

Q And, Doctor, would you have an opinion with a reasonable degree of medical certainty as to future medical care for Mr. Castillo going forward?

A Sure.

Q What would that be?

A That he should follow-up with an --

MR. BUFFALOE: Objection.

THE COURT: Overruled. He is a treating doctor, and there is no such rule as to whether you are implying if the patient hasn't been treated in a little while, you lose the evidentiary rights to testify as a treating physician. There is just no such rule. Overruled. That is twice now in a row. So let's try to keep it moving.

A So follow-up should be with an orthopedic spine

surgeon at least every two to three years depending upon clinical symptoms. Typically in this case what I would do with this patient is advise them they have an increase in pain symptoms, to come in earlier, otherwise every two years would be reasonable.

He has a spinal cord stimulator in. So that needs to be maintained and monitored, and, in general, with patients that have stiffness and mechanical acts of pain in their neck, if a maintenance physical therapy program is available, that would be helpful, as well.

Q And, Doctor, have you ever heard the term adjacent segment issue?

A Yes.

Q And what is that?

A After a reconstruction, because your making a portion of the spine stiffer than the other portions of the spine, the other areas have to take up extra stress. So they can wear down prematurely. Those are adjacent segments. They are the segments that are connected to the area that have had the fusion or reconstruction.

Q Do you have an opinion with a reasonable degree of medical certainty as to whether that is a concern for Mr. Castillo in the future?

MR. BUFFALOE: Objection.

THE COURT: Overruled.

A Sure. There is a concern for all patients that have had any type of mechanical reconstruction.

MR. VARGAS: Thank you. I have no further questions.

THE COURT: Thank you, cross.

MR. BUFFALOE: Can we approach, Judge?

THE COURT: Of course.

(At this time a sidebar conference was held between both counsels off the record.)

(Sidebar over.)

THE COURT: Let's take a quick recess. Ladies and gentlemen of the jury, if you want to take a bathroom break, you can do that. Don't do any research. Don't discuss the case with anyone else.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jurors exited the courtroom and the following occurred.)

COURT OFFICER: Ready.

THE COURT: Yes.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jurors enter the courtroom and the following occurred:)

THE COURT: All right. Jurors, you can all be seated. Sir, you remain under oath. Mr. Buffaloe, cross-examination.

MR. BUFFALOE: Yes, Judge.

CROSS-EXAMINATION

BY MR. BUFFALOE:

Q Good afternoon, Dr. Merola.

A Good afternoon.

Q Dr. Merola, how many times have you testified this year, so far?

A So what are we in now? In May? It's May, right?

Q Yes.

A Okay. I think I have been to court maybe about three times, or so I want to say maybe three or four times.

Q How often would you say you testified, on average, a year?

A About five or six times a year.

Q And you do spine surgeries, correct?

A Yes.

Q Fair to say that you do in excess of 250 spine surgeries a year?

A I probably do in the neighborhood about 200-some-odd surgeries per year, yes.

Q And the surgery you performed that you described in your direct testimony, that was an outpatient procedure, correct?

A Yes.

Q And by outpatient, we mean as in the patient was not

actually -- did not actually stay in the hospital, correct?

A That's right.

Q So it was he was in in the morning and out by the afternoon.

A Yes.

Q And just so we are clear, the surgery that was done, was there any cameras or any like scope used?

A No.

Q No. So it was all visual?

A Yes.

Q Now, during those, let's take the three times that you have testified this year. They all have been for a plaintiff in a lawsuit, correct?

A Yes.

Q And the five or six times the year before, that was for plaintiff in a lawsuit, correct?

A Yes.

Q And how long have you been coming to court to testify?

A I have been doing this for about 24 years or so now, at least 20 years.

Q Is it fair to say that average of five or six times is always for a plaintiff in a lawsuit, correct?

A Yes.

Q You testified in connection with your examination in

the evaluation of the plaintiff you reviewed records from Dr. Grimm, correct?

A Yes.

Q Dr. Grimm is not a radiologist, correct?

A Correct.

Q Dr. Grimm is not even an orthopedic doctor, correct?

A Correct.

Q He is not a neurologist either, correct?

A Correct.

Q Do you recall who referred the plaintiff to you.

A Yes.

Q Who was that?

A Dr. Grimm.

Q If I remember your testimony correctly, you examined Mr. Castillo for the first time in 2019, correct?

A No, March 29th, 2021.

Q 2021.

A Yes.

Q So you recall the date of the incident that we are here for?

A September 27th, 2018.

Q So that is what? Three, four-years later?

A Yes.

Q And during the course of that time you are where he received treatment from other doctors, correct?

A Yes.

Q You did not review any of his physical therapy records, correct?

A No, I did not.

Q And you did not review any of the -- there was an MRI that was taken before the one you reviewed. What did you say from where -- when was it from the one you talked about? Was it April of that same year?

A April 8, 2019.

Q 2019?

A Right.

Q Where was that from?

A That MRI was done at I believe, let's see, Lenox Hill Radiology.

Q Did you review that MRI yourself?

A Yes, I did.

Q Did you ask to review any prior MRIs?

A When I hadn't seen any prior MRIs, no.

Q Did you ask Mr. Castillo if there were prior MRIs?

A No.

Q So, as you sit here now, you do not know if there was any cervical spine MRI taken of Mr. Castillo before April of 2019.

A Correct.

Q So, Dr. Merola, is it fair to say that when you

evaluate an inpatient, it is important to review all of the medical records?

A I would say the pertinent medical records.

Q We would include a cervical MRI as a pertinent medical records, right?

A Cervical MRI was reviewed.

Q Any cervical MRI of that patient?

A No, I would disagree with any. I would say you want to review the MRI that is most proximate to your examination that is what's happening to the patient when you see them.

Q But you also testified as to causation today --

A Correct.

Q -- right? Is it your testimony that you can evaluate causation without seeing all of the records?

A You can evaluate causation based on -- and I'm happy to review it in this case history of injury with subsequent treatment after that injury. That included injections to the cervical spine with two subsequent MRIs that showed progressive herniations at both C5 and C6, and C6 C7, in addition to an EMG study that showed a worsening myelopathic condition.

Q I appreciate the summary of your prior testimony. That is not what I asked you. I asked you whether or not you can evaluate -- is it important to evaluate causation to see all of the medical records?

A No, it is not. It's only the pertinent medical records.

Q So pertinent medical records would include not an MRI. Was that taken close to the date of the accident, but an MRI, that was taken closer to the date that you happened to see him?

A The MRI that I looked at when I originally saw him was on April 8 of 2019.

Q Is that right?

A Correct.

Q So the earlier MRI is not pertinent, as far as you were concerned.

A The earlier MRI doesn't enter into either of the treatment plan or the causation, at that point in time.

Q I understand, because you didn't know about it.

A No.

Q And you weren't concerned to find out about it, because, as far as you are concerned, it is irrelevant?

A It doesn't have a bearing on this particular case, no.

Q How do you know that, having never seen it? How do you know that doesn't have any bearing on your evaluation having never reviewed it whatsoever?

A The interesting thing about an MRI is it is a bit of a time capsule. It shows you everything that came before.

So the primary indication for an MRI, is to give you an indication that the diagnosis that you suspect, based on your history and the physical examination is the diagnosis that the patient has.

So it is confirmatory in that sense, and it also rules out other issues that can be causing the patient's problem. For example, if the patient has been suffering from a tumor in the past, you would see it on his MRI.

If the patient had a previous fracture you could have seen that on the MRI. If the patient had prior dislocations or infections or any of those issues, you will have seen them on the MRI of April 8th of 2021.

Additionally, causation is based on more of the patient's history of an acute traumatic injury to the head and face with a subsequent significant clinical course of treatment focus on the head and neck.

Q A significant course of clinical treatment that you not did review.

A I reviewed Dr. Grimm's record.

Q Only Dr. Grimm, correct?

THE COURT: You actually have to ask one question at a time. Have the witness answer that one question at a time. Sorry. That's responsive to Counsel standing up to object, which is sustained. You can answer the new question, or if you weren't done answering the

first question.

A I had Dr. Grimm's records as part of the orthopedic records which are part of that chart, which also includes Dr. Kaplan.

Q No other records aside from that?

A None that I had seen when I initially saw him at that first visit.

Q You didn't ask for any further records. You didn't ask for any additional records right?

A The first visit was based on what's happening with the patient and what it is my treatment plan. There was nothing else pertinent to the treatment plan.

THE COURT: The question was, did you see any other records beyond those two records? I assume, at any time.

MR. BUFFALOE: At any time.

A Sure. Preparation for trial. I have looked at other records, as well.

Q Outside of your treatment and evaluation of the plaintiff, as far as your recommendations for surgery and treatment plans, correct? Totally outside specifically for the purposes of this litigation, correct?

A Well, specifically with the knowledge that I am going to be asked about causation, yes.

Q Am I understanding you correctly that your conclusion

of causation is based upon records that are not indicated in your chart?

A My chart is the treatment record of the patient.

Q Yes or no, sir?

A Here's the thing. The chart is a treatment record of the patient. If you are asking me about causation in a medical legal sense, I can determine causation in a medical legal sense based on review of all of the pertinent records, in addition to my treatment of the patient.

Q So the answer is, yes, that your testimony here today or as to causation is based on records that are not actually in your chart, correct?

A My chart is part of my determination of causation, yes, so the answer to your question is, yes.

Q Prior to September 27, 2018, are you aware of any of plaintiff's course of treatment? His care, any prior accidents, his physical condition at all?

A I am not aware of any prior injuries or illnesses affecting his spine before the accident, no.

Q Dr. Merola, would you agree with the statement that neck, shoulder and neck injuries run together?

A Yes, they can, true.

Q Would you also agree with the statement that looking -- that looking at an MRI is like looking at a work of art subject to the eye of the person interpreting?

A Sure.

Q Also, Doctor, I noticed in your testimony, regarding the film that you reviewed, the films you reviewed, so let me ask you a different question.

So you testified about an MRI being like a tells you everything, just one MRI, correct? Tells you the entire history?

A It can tell you a lot about the history of the patient by like being at an MRI, yes.

Q So you testified to that explaining why you didn't need to see any earlier MRIs whatsoever, but you did order another MRI.

A Yes.

Q Right. So those two things those seem to fit together. Can you explain to me why it is that since that one MRI told you, everything you needed to know, and you did not need to see any other MRIs whatsoever, no matter how proximate to the date of the trauma that the plaintiff reported to you, you decided to take another MRI?

MR. VARGAS: Objection to form.

THE COURT: Objection. Why? Just one or two words.

MR. VARGAS: That's not what he said.

THE COURT: So it mischaracterizes the testimony. I do think it overstates the testimony, but I

will let the doctor fix that in his own response.

A Yeah, what I said was the MRI for 4/8/2019 tells you about the patient's condition up to 4/8 of 2019. When I saw him on March 29th of 2021, I wanted to have an updated MRI to see if there were any changes between 2019 and 2021.

Q If I am understanding your testimony, there were no marked changes between that period.

A There was one.

Q And that was that C?

A Yes, C6, C6 C7.

Q Dr. Merola, would you agree with the statement that, as you get older at about 30, on an MRI, you start seeing the increasing degrees of degeneration?

A Yes.

Q And that is true for everything, correct?

A Yes.

Q And I note that in your testimony today, you did not mention any observation of degeneration on plaintiff's films that you reviewed.

A Yes.

Q Was there degeneration present in Mr. -- how old was Mr. Castillo when you saw him for the first time?

A Let's see. I have to go back to his date of birth.

Q 1962.

A Pretty close to my age. That would be he was about

55-years old at that time.

Q So 25-years older than 30?

A Yes.

Q Right? So was there degeneration on those films?

A There had to be normal age appropriate degenerative changes, sure.

Q So you noted that when you reviewed those films?

A There are normal age-related change ranges? Yes.

Q Were there normal age-related changes at C5 C6?

A Sure.

Q Were there normal age-related changes at C6 C7?

A Yes.

Q And it is fair to say there were normal age-related changes at every level of the spine, correct?

A Yes.

Q Now, have you seen Mr. Castillo on -- withdrawn.

You haven't seen Mr. Castillo, at all, since when was it, 2021?

A August 2022.

Q You haven't seen him at all?

A Correct.

Q You are not aware of -- don't have any idea what he has been or not been doing since then, correct?

A The only awareness I have is he has been following up for his spinal cord treatment and following up with Dr.

Grimm.

Q How do you know that?

A He, I believe he is monitoring his spinal cord stimulator.

Q How do you know that?

A I couldn't point to a piece of documentation for that but that is my assumption.

Q By the way, you talked about the subjective versus objective testing. It is fair to say a range of motion is subjective, correct?

A Depending on how you measure it. If you measure passively to maximum spasm then you have an objective range of motion measurement.

Q Say that again. Passively to what?

A It depends on how you measure range of motion. Every test depends on how you measure the test. So if you are measuring two types of ways to do a range of motion, one is active, which means the patient does the range of motion and stops where they feel pain, and that is a subjective range of motion test.

The other way to do the range of motion test is for the examiner or the physicians to take the patient through the range of motion and then stop the range of motion that palpates spasm that will make a range of motion test objective.

Q When you say palpate spasm, you are talking about, let's take the neck, for example. You put your hand on the back of someone's neck.

A Yes.

Q No matter what age they might be. And you move their neck backwards, and when you feel the skin tense up, you decide that they can't move anymore?

A No.

Q That's the full range of motion?

A You feel the muscle going into spasm.

Q And spasm is the tightening of the muscle, correct?

A It is like a Charlie horse, yes.

Q So up until that point there's full range of motion?

A Well, the range of motion would be up until the point where you palpate spasm.

Q Up until that point?

A Yes.

THE COURT: The passive range of motion would be up to that point?

THE WITNESS: Yes.

Q And you are saying -- you're suggesting -- you are saying that, because you feel that spasm when you do the range of motion testing that that is an objective range of motion?

A Correct.

Q Are there other reasons why a 55-year-old man might have spasm like, for example, he has issues with his shoulder?

A Well, if you are examining his neck he would be able to differentiate shoulder spasm from neck spasm.

Q It couldn't be spasm in his shoulder be caused -- spasm in the neck be caused by a spasm in the shoulder? They are connected, as you say.

A That can sometimes happen, yes.

Q When you examined Mr. Castillo the first time, did you take any note of muscle atrophy?

A No, I didn't appreciate any atrophy.

Q You didn't find any atrophy?

A Correct.

Q And if I understand -- withdrawn.

The surgery that you performed, are you aware that after he had the surgery with you he complained that his conditions were worse?

A There are times when your pain may get better, may get worse before it gets better, yes.

Q But he continued to complain about it was getting worse. Part of the reason why he got the cervical spinal stimulator was because after he got the surgery you performed, he complained of more pain. Are you aware of that?

A I am not aware of that, no.

Q So, if I understand you direct testimony correctly, your surgery was for the purposes of reviewing a certain type of pain, not all of plaintiff's pain, correct?

A The procedure itself is not typically a pain-oriented procedure. It is a decompression in a stabilization in order to prevent the neurological condition from getting worse, but you can't reverse permanent neurological injury. The fusion process is a stabilization process. So everything we do in that surgery is take pressure off the nerves to prevent nerves from getting worse and then stabilize the segments to prevent them from continuing to cause anymore damage.

Q But you would agree that that natural progression of degeneration continues, correct?

A Sure.

Q So the stabilization does not mitigate or change the normal degenerative process that everybody has?

A Correct.

Q So when you spoke to and you recommended the surgery to Mr. Castillo -- by the way, do you know why he did not take Dr. Weinstein's recommendation for surgery?

A No.

Q When you met with Mr. Castillo, did Mr. Castillo -- did you tell him there was a possibility he would be 50 percent possibility he would be incapacitated from the

surgery?

THE COURT: 5-0?

MR. BUFFALOE: Yes.

A That is an unrealistic complication. I would never tell a patient there's a 50 percent chance of being incapacitated due to a cervical surgery.

Q Did you review Dr. Weinstein's records?

A I did not see Dr. Weinstein's records.

Q By the way, when you spoke to Mr. Castillo, if I understand your records correctly, you spoke to him in Spanish, correct?

A Yes.

THE COURT: You personally spoke to him in Spanish?

THE WITNESS: Yes.

Q Dr. Merola, so plaintiff is not homebound, correct?

A Correct.

Q He is not bedridden, correct?

A Correct.

Q So you don't have any restrictions on him driving a car?

A Correct.

Q Right. He can do that. He doesn't have any problem taking public transportation from place to place, correct?

A Correct.

MR. BUFFALOE: Okay. I have nothing further.

THE COURT: Redirect?

MR. VARGAS: No, your Honor.

THE COURT: Doctor, thank very much. You are excused.

THE WITNESS: Thank you.

(Witness exiting.)

THE COURT: Let's take five minutes. A real five, please.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jurors exited the courtroom and the following occurred.)

(Whereupon, there was a recess, after which the following occurred.)

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jurors enter the courtroom and the following occurred:)

THE COURT: So we have already done sort of two-and-a-half witnesses today, and I can see everyone, by the way, the Court included, is fading a little at the end of the afternoon.

I think we are going to pick up on Monday. We have two other witnesses, but we think we can fit in the rest of the plaintiff's cross-examination on Monday.

We are going to do that. You can start your

weekend a little bit early, and just remember next week we anticipate Monday, Tuesday, Thursday and Friday testimony, and Wednesday you will be off. All right? So that's it. We stand in recess until 9:30 Monday morning.

Don't discuss the case amongst yourselves or with anybody else. Don't do any outside research or have any outside contacts. We appreciate the attentiveness you are all showing so far. We will see you Monday.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jurors exited the courtroom and the following occurred.)

MR. BUFFALOE: So I do have a motion in limine regarding Dr. Gelfan. Dr. Gelfan would be testifying and her testimony from soup to nuts basically is speculation.

No doctor has recommended no basis in the records themselves. She is basically just creating numbers for Dr. Goldman to rely on.

THE COURT: So do you want to be heard on that?

MR. VARGAS: She has consulted all the doctors that are testifying in this case. She has read their narratives and she's talked to them. Any number she has in there is based on what doctors have told her and what they are going do testify to.

THE COURT: The doctor told her certain procedures, but are they based on what those -- withdrawn.

Based on what those doctors say, they are going to recommend a treatment plan?

MR. VARGAS: Yes, exactly.

THE COURT: Because I didn't hear him. I didn't hear this doctor. I heard him say he expected the patient to get adjacent segment syndrome which is common. I didn't hear him say, and, therefore, I expect him to do X number of future fusions to this patient.

MR. VARGAS: Some of this he does have numbers in there. I didn't ask them about them, because it is going to be brought up by Grimm, as well, who makes recommendations for numbers that she also consulted.

THE COURT: We don't make recommendations for numbers. We make recommendations for treatments.

MR. VARGAS: For the cost of the treatment.

THE COURT: You are missing my point. His argument is essentially she can't testify, if she is testifying based on a speculation rather than actual evidence in the case that a patient will have a certain treatment.

So let's say, for example, if she was going to come in on Monday -- sorry, and she was going to come in on Monday, and say I expect the patient to need an adjacent segment fusion, every ten years.

I am making up numbers right for the rest of his

life. What's the basis of that examination? Well, Dr. Merola would do this treatment, and Dr. Merola says such a treatment costs a hundred grand a pop, for each new fusion or 60 grand, if it is outpatient, right?

And then, he would stand up and object and he would say Dr. Merola didn't say any such thing, and I would say subject to review of the transcript he would be right.

MR. VARGAS: Right?

THE COURT: Right? So now the question becomes, unfortunately, you are calling her before you call Grimm, before you call Kaplan, right? Excuse me. So it begs the question of what reasonable expectation do you have that the rest of these doctors are going to actually recommend any future treatments?

MR. VARGAS: I think it is a very high expectation.

THE COURT: Did you expect that Merola was going to testify he was going to do future surgery?

MR. VARGAS: Mainly I was depending on him for the spinal -- the numbers she gives are going to be mainly Dr. Grimm and maybe some from Kaplan, as far as the shoulder. But --

THE COURT: Are those --

MR. VARGAS: And they are in the reports.

THE COURT: That is what I was about to ask. Their in the 31.01 exchange for the reports.

MR. VARGAS: And, Counsel, insisted she testified --

MR. BUFFALOE: I didn't insist on anything. I said I wouldn't waive the idea of calling her since everything that Goldman says depends on what she says.

THE COURT: I am going to deny the motion without prejudice for you to renew the motion depending on what she testifies to, and depending on what comes into the records.

It is unfortunate and all these cases that we sometimes take witnesses out of order. That will be most efficient for the record. I am hope to, looking at the reports on record, I don't want to do it now. I am looking into the reports on Monday, and you can try to show me where you think her stuff is based.

You show me her report and Grimm and Kaplan's reports, and all three of us can look at it together. Not that I am going to coach you. You can show me not dollar for dollar generally, where you think this is coming from, and then, I will have to let you put on the record that her testimony is subject to connection for things that you have a found belief are coming into the record. If not, you know, not. Right? Okay. Anyway that's subject to

renewal.

MR. BUFFALOE: I know what you are going to say. I have to say it anyway.

THE COURT: That wasn't just the fact that I decided it.

MR. BUFFALOE: I have a motion in limine to submit to the Court on this issue.

THE COURT: No, sir. Yeah, because you got her 31.01 how long ago?

MR. BUFFALOE: A while.

THE COURT: I am asking him.

MR. VARGAS: A while.

MR. BUFFALOE: It was some time ago. My point is evidentiary motions have to be made to the trial judge. They can't be made --

THE COURT: They can be. They could have been exchanged to him in time to brief them, and I will tell you, by the way, I know People always act shocked when I say that, but it happens actually. Not all of your colleagues but a number of your colleagues, particularly on heavier cases, they have the motions briefed, and when I get the motion and I say I am not taking these papers there is no time to brief them, they say, oh, no, we got our final trial date. I exchanged these motions, and they have been briefed and here is the whole kitten kabuttal.

Now, it puts a lot of heat on me to get these motions turned around, and I don't have to adjourn the trial, continue the trial for the purpose of a briefing schedule. That is just crazy.

I am not taking your papers. You could have submitted it earlier. None of this is a surprise to you. I am happy to take this up to take up your application, as I said, on a renewed basis if she doesn't actually connect your testimony. You want to tell me about the motion I already ruled on, or you have another motion? Do you have another motion?

MR. BUFFALOE: No, just me note my exception on the record.

THE COURT: Your exception is noted.

(At this time a discussion was held off the record.)

(Whereupon the trial was adjourned to May 6, 2024 at 9:30 a.m.)

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ABOVE-MENTIONED TRANSCRIPT.

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JOHN D. CARDILLO

SENIOR COURT REPORTER

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COURT OFFICER: [11] 118/3 137/2 137/9 172/5 179/6 201/15 201/18 201/20 219/10 219/15 220/9
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