In The Matter Of:

McGill092624 v.

Turner

September 26, 2024

Karen Mangano

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 5
----------X
RICHARD MCGILL,

Plaintiff,

-against- INDEX NO: 158766/2015

WHITNEY MUSEUM OF AMERICAN ART and TURNER CONSTRUCTION COMPANY,

Defendant.
----------X
New York Supreme Courthouse
80 Centre Street
New York, New York 10007
September 26, 2024

B E F O R E:
THE HONORABLE HASA A. KINGO,
J U S T I C E

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

PETER S. THOMAS
Attorney for the Plaintiff
108-18 Queens Boulevard, 5th Floor
Forest Hills, New York 11375
BY: PETER S. THOMAS, ESQ.

COZEN & O'CONNOR
Attorney for the Defendant
45 Broadway, 16th Floor
New York, New York 10006
BY: PATRICK SARDINO, ESQ.
ERIC BERGER, ESQ.

Karen Mangano, CSR
Anne Brown, CSR
Senior Court Reporter

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THE COURT: Let's get the jury.
THE COURT OFFICER: All rise. Jurors entering.
(Whereupon, at this time the jury entered the courtroom.)
THE COURT OFFICER: Please be seated.
THE COURT: Okay. Good morning, members of the jury. Thank you so much everyone for being here. We had to deal with a few housekeeping items, but we are now ready to proceed.
Before we do, true to my word as I mentioned at the beginning of this trial, I wanted to make sure that I kept you abreast of any scheduling issues as they are raised either by your fellow jurors or by the attorneys to give you the most accurate picture of what the continuation of the trial will look like. So tomorrow, we do have and expect a full day of trial tomorrow starting with at 9:30 and concluding at 4:30.
On Monday, we will be receiving testimony as scheduled; however, due to an accommodation, we are going to break at noon rather than 1:00 just for the morning session to accommodate an appointment at that time.
Separately, on Wednesday which is the date preceding the two days of the latter part of next week, Thursday and Friday when we will not be in session, we will be concluding at 1:00 to make an accommodation and then we

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won't be resuming in the afternoon for any additional testimony. So your afternoon on Wednesday will be free after 1:00 and we will resume the trial the following week on October 7th with the understanding that we will start at 9:30 on that date, conclude at 4:30.
And just for clarification, with respect to Monday, although we are breaking at noon for the lunch hour and then resuming -- we will resume in the afternoon at 2:15 for the continuation of the trial on Monday.
So I just wanted to keep you abreast of all of that, and if you have any other concerns, you can raise them with my officer, but I believe we are ready to proceed.
Mr. Thomas.
MR. THOMAS: Yes, Judge. I believe I'm still cross-examining Mr. Thomann. Maybe we can get him back in here.
THE COURT: Well, the direct of Mr. Thomann. We will get Mr. Thomann back.
MR. THOMAS: Did I say cross? I apologize. Sorry, Judge.
(Witness resumed the witness stand.)
THE COURT: Okay. Good morning, and you've already been sworn in. Please be seated, Mr. Thomann, and please be seated everyone else in the courtroom.
Thank you, Mr. Thomann, for making the

Mr. Thomann - by Plaintiff - Direct Page 603

accommodation to come back to resume the -- your testimony here before the Court. I'll remind you again that you are under oath. And Mr. Thomas, whenever you're ready, you may inquire of the witness.
MR. THOMAS: Thank you, Judge.
A N D R E W T H O M A N N, having been previously duly sworn, resumed the witness stand and continued his testimony as follows:
CONTINUED DIRECT EXAMINATION
BY MR. THOMAS:
Q Good morning.
A Good morning.
Q Since we last met, have you done any research or looked up any information on codes, rules, regulations?
A I have not.
Q You have?
A I have not.
Q Or Labor Law, Industrial Code, any of those questions that I was asking you before that you said you were unfamiliar with? Did you inform yourself between last time and now?
A I have not.
Q Now, if I remember correctly, the last thing we talked about before we broke was that safety was paramount to Turner on all its job sites.
A Correct.

Q Nothing has changed there.
A Correct.
Q And part of keeping a safe job site is accurate record-keeping.
Would you agree with that?
A Yes.
Q And as we said earlier, when an accident happens, you do a full investigation so that you find out what happened, but you also use it as a learning opportunity to avoid similar instances; correct?
A Correct.
Q So again, record-keeping is really important. Would you agree?
A I agree.
Q And you saw the accident report that Harry Harriendorf prepared in this case; correct?
A Correct.
MR. THOMAS: Your Honor, I'm sorry. I don't know if I marked that what exhibit it is. I know it's in evidence.
MR. SARDINO: Three.
MR. THOMAS: Can we have Plaintiff's Exhibit 3. You can show it to the witness.
Q Now you've seen this accident report; correct?
A Correct.

Q And you know that it was Harry Harriendorf the site safety manager that filled it out; correct?
A Correct.
Q And you also see there are some mistakes on this report; correct?
A Correct.
Q So I want to just focus on the section that says party -- "Involved Party Information."
Do you see that?
A Yes.
Q And you understand that this is information that the site safety manager put down on this report after doing at least an initial, if not a complete investigation? Would you agree with that?
A I agree.
Q And it's important that this information be accurate; correct?
A Correct.
Q So where it says "Employee Job Title," he wrote or he typed initially "Iron Worker," and then that was crossed out; correct?
A Correct.
Q So that was a mistake when he typed it.
A Correct.
Q Below that it says the employer name was "Tower." And

that was crossed out; correct?
A Correct.
Q And then it says below that, the shop steward was Kevin Crowley and that was crossed out.
A Correct.
Q So your site safety manager Mr. Harriendorf who is responsible for getting information and accurately reporting an incident report, at least in the "party involved" information made three mistakes that would be not small mistakes. Would you agree?
MR. SARDINO: Objection.
THE COURT: Overruled.
A I guess it depends on what context, but they were mistakes.
Q Well, they were significant mistakes.
If you have the job title of the injured worker as being an iron worker when in fact he was a glazier, that's a big difference; right?
MR. SARDINO: Objection.
THE COURT: I'm going to sustain it as to form. That's a compound question.
Q How would you describe the difference, the job titles of an iron worker versus the job title of a glazier?
A Iron worker deals with iron, steel as it's known today and glazier deals with glass.

Q And the employer name, that's the subcontractor; correct?
A Correct.
Q So there was a subcontractor on the job called Tower?
A It was a sub-tier of Permasteelisa.
Q And he wrote "Tower."
A Correct.
Q But in fact, it was Permasteelisa.
A Correct.
Q The fact he wrote that there was a shop steward named Kevin Crowley when in fact there was no shop steward at all, you would say that's a significant difference; wouldn't you?
MR. SARDINO: Objection.
THE COURT: Overruled.
A It's certainly a difference, yes. A mistake.
Q So this is the safety safety manager who wrote this report.
Did he have an obligation or duty to report to anyone else about this accident other than in this incident report?
A He has an ability to report to the project team and to his -- his safety department.
Q Does he also keep what's called a site safety manager's log?
A He does.
MR. THOMAS: Your Honor, I believe this document is

also in evidence.
THE COURT: It is.
MR. THOMAS: I believe it's number six.
THE COURT: Yeah. Plaintiff's Exhibit 6, Manager's Site Safety Log's received in evidence.
Q Mr. Thomann, if you could look at that Site Safety Log and specifically the day of this accident, August 16, 2013.
A August 16; correct.
Q August 16, 2013?
A Got it.
Q You got it?
A Yes.
Q I have a copy here as well.
So this is the Site Safety Managers's Log; correct?
A Correct.
Q And what's the purpose of this document?
A It's to log in what took place on the project, the current state of project, the trades on site. It's a requirement by the Department of Buildings.
Q And this information should also be true and accurate by the person who's entering this information; correct?
A Correct.
Q So the project was the Whitney Museum of American Art; correct?
A Correct.

Q The safety manager was Harry Harriendorf; correct?
A Correct.
Q The weather in the morning was about 68 degrees and sunny; correct?
A Correct.
Q The weather in the afternoon was about 82 degrees and sunny?
A Correct.
Q And then SSM number 1643. What's that?
A That would be Harry Harriendorf, site safety managers's number.
Q And below that the day was a Thursday?
A Yes.
Q And the date as we've said, 8/16/2013?
A Correct.
Q Hours worked. Now, whose worked ten hours according to this document?
A It's most likely with the job site. You know, how long the job site was open.
Q How long the job site was open; not how long Harry Harriendorf was working?
A I do not know.
Q But is it fair to say this is a document that's filled out at the end of the day?
A Yes.

Q And it's supposed to indicate the events of people working on the site during the course of this day; correct?
A Correct.
Q So continuing to the next "Daily safety activities, locations, observations and/or unsafe conditions, personal company notified, date notified, date corrected."
Do you see that line?
A Yes.
Q Okay. "Signs posting in place." What does that mean?
A This would be the signage for DOT permits, DOB, etc.
Q "Shed." What does that mean shed?
A That's the sidewalk shed. You see it often throughout New York City as far as its protection for pedestrians for overhead work going on.
Q Below that it says "hoist."
A Yes. That's a temporary construction hoist.
Q Below that, "trades on site."
A Yes.
Q So on that day, you had steam fitters; correct?
A Correct.
Q Iron workers; correct?
A Correct.
Q "Plumbers, tin smiths, electrician, carpenters, laborers, operator."
Do you see that?

A Correct.
Q No specific designation for glaziers.
A Correct.
Q Does that mean they weren't on site?
A No. It could have been an oversight.
Q Next line, "Cranes on site, all documents in place."
What does that mean?
A I'm not certain.
Q Next deal with crane. I'll keep moving forward. "Fifth floor." This accident didn't involve the fifth floor.
Go to the second page.
A Okay.
Q The second page -- well, first of all, this is Harry Harriendorf's signature; correct?
A That's what it appears to be.
Q And the second page starts, "Date and location where horizontal and vertical netting have been installed, replaced and/or repaired."
Do you know what that means?
A If there was a deficiency with the netting and whether its been installed in place or replaced or repaired.
Q Does it say where the netting was installed, replaced or repaired?
A It does not.

Q The line before it, "The date horizontal safety netting is removed."
Does it say where it was removed?
A No.
Q Below it says, "Date when building reaches height of 75 feet."
What does that mean?
A That means when the -- it's a steel structure building, so once it hits a site -- a height of 75 feet as the building gets erected, 75 feet in the eyes of the Department of Buildings kicks off a few things. You need temporary standpipes and things of that nature.
Q Let's look at the next line. It says, "Accidents, none."
Do you see that?
A I do.
Q That's not true; is it?
A If that accident happened on the 16th, that would not be true.
Q The accident happened in the morning on the 16th; correct?
A Correct.
Q And this report was filled out at the end of the day on the same day; correct?
A Correct.

Q So that is inaccurate based on the accident report that we have from that day that indicates the accident happened at around 8:00 a.m.; correct?
A Correct.
Q Did anybody ever check to see whether the site safety managers's logs were accurate?
A I don't recall.
Q Can you explain to this jury sitting here now how an accident can occur where first-aid is rendered and the person who writes the accident report is also writing a Site Safety Managers's Log and doesn't indicate that there was an accident on that day?
Can you explain to the jury how that could happen?
A It could be various reasons. It could be an oversight.
Q You agree that Turner Construction's concern, oversights can cause harm or even death.
Do you agree with that?
MR. SARDINO: Objection.
MR. THOMAS: I will withdraw the question.
MR. SARDINO: Relevance as to paperwork. He is talking about something else.
MR. THOMAS: I will withdraw.
Q You would agree that oversights could cause hazards on the job site?
Do you agree with that?

A Yes.
Q And those are safety concerns that Turner has; correct?
A Yes.
Q So when its own site safety manager has an oversight in his official record-keeping about reporting an accident, was he ever reprimanded or consulted about this, if you know?
MR. SARDINO: Objection. Relevance.
A I don't recall.
THE COURT: Overruled.
A I don't recall.
Q As you're sitting here today and you're learning that Harry Harriendorf who was told of Mr. McGill's accident, supposedly investigated this accident, wrote a report, rendered first-aid and then didn't properly fill out his own Site Safety Managers's Log to report that there was an accident, that would be a violation of at least Turner's internal policies. Would you agree?
A I would agree.
Q And Mr. Harriendorf is still working as a site safety manager for Turner; correct?
A He is.
Q It says below that "Safety meetings."
Do you see what it says next to "safety meetings?"
A Yes.
Q It says none; correct?

A Correct.
Q Do you know if -- do you know what "Tool Talk" is?
A Toolbox Talk.
Q Toolbox Talk.
What is that?
A It's a -- comes in the form of a white paper, if you will, single sheet, and it talks about a particular safety topic to keep an eye out for. It may not be relevant to a certain issue, but it's just a reminder of be careful of a particular topic.
Q Did you see any minutes from any toolbox talks for the day of this accident?
A I don't recall.
Q Safety meetings should happen every day; shouldn't they?
MR. SARDINO: Objection.
MR. THOMAS: I will withdrew the question.
Q How often should safety meetings occur?
A There is pre-task. It depends on -- well, meeting, it should happen every day, yes.
Q And the fact that there were no site safety -- there was no safety meetings that day that Mr. McGill claims he fell because he slipped on silicone that was on the mid-rail of the scissor lift, that would be the kind of condition that a site safety meeting would help to avoid. Would you agree?

MR. SARDINO: Objection. Calls for speculation.
THE COURT: Sustained.
Q Would you discuss making sure that the equipment that's going to be used that day is clean and in proper working order?
A That could be a topic, yes.
Q And would you agree if there was a site safety meeting that addressed those concerns that this is an accident that might not have happened? Would you agree with that?
A It could have, yes.
Q And then again, the date 8/16/2013; correct?
A Correct.
Q Nobody else signed this manager's log; correct?
A Correct.
Q So this was all on Harry Harriendorf.
A Correct.
Q Do you know how many workers were on the job site on the day of the accident?
A I don't recall.
Q Do you know what an FDNY Daily Report is?
A A little familiar with it.
Q And I believe it's -- also part of the Site Safety Managers's Log is a document called a FDNY Daily Report. You've seen these before?
A I have.
Q And again, this is again for the Whitney; correct?

A Correct.
Q The day of the accident, August 16, 2013?
A Correct.
Q "Workers oriented and fire safety trained documentation up to date."
Do you see all this information?
A Yes.
Q What is this document supposed to be?
A Almost -- it's almost similar to a Site Safety Managers's Log in the way that certain safety measures need to be put in place where it's a checklist of sorts.
Q And again, this is a document that was signed by Harry Harriendorf?
A Correct.
Q Do you know if he did any of the -- there is a bunch of boxes checked off.
Do you know if he did any of the work that he checked off in these boxes?
A I do not know.
Q Do you know if there was any system in place to confirm that Harry was doing his job?
A Not that I'm aware of.
Q Now, sir, you at your deposition drew a diagram of the monitoring system at the Whitney; correct?
A I did.

MR. THOMAS: Maybe we can mark this as Plaintiff's Exhibit 22.
THE COURT: That's correct. We are up to 22. It will be so marked.
THE COURT: Consent?
MR. SARDINO: Yes, Judge.
THE COURT: Okay. Then it will be marked and received in evidence as Plaintiff's Exhibit 22.
(Whereupon, the aforementioned document was marked as Plaintiff's Exhibit 22 in evidence as of this date by the Reporter.)
Q Mr. Thomann, do you remember being asked to draw a diagram at your deposition?
A I do.
Q And do you remember what was your diagram supposed to be of? What was the diagram of?
A It was -- from what I recall to describe the roof monitoring system.
Q And so you drew the eighth floor here; correct?
A Correct.
Q The eighth floor?
A It's the ninth floor roof actually.
Q So it was a mistake when you wrote "eighth floor?"
A It is.
Q And again, I'm not commenting on your artistic ability,

but this was just meant to be a rough diagram of the configuration of the monitoring system; correct?
A Yes. Very rough.
Q So glass on the up and down.
A Correct.
Q Steel on the angle and then glass on the up and down. Steel on the angle. Is that consistent on through each?
A Correct.
Q And then in between the -- in between the steel and the next pane of glass, it says here "gutter."
A Yes.
Q Tell the jury what's a gutter.
A Gutter is a building component to collect rain water and divert it elsewhere.
Q Could a worker stand in a gutter to do work?
A I don't recall.
Q Well, was there anything preventing a worker from standing in the gutter to do work?
A I don't recall.
Q It wasn't made of paper; right?
A It was not made of paper.
Q What was the gutter made of?
A The substrate -- I don't recall what the substrate was, but ultimately, the last piece of material would be some sort of roofing material.

Q And a worker could stand in the gutter if they needed to. It would support the weight of the worker. Would you agree?
A I don't recall.
Q Well, if the gutter wasn't strong enough to support the weight of a worker, then a heavy rain, it might not be able to support either. Would you agree with that?
MR. SARDINO: Objection. Calls for speculation.
THE COURT: I'm going to sustain the objection.
Q Tell the jury what you know about the ability -- the gutter's ability to support the weight of a person.
A I don't know what -- the ability to support the weight of a person, but it usually is calculated to support the weight of a rain storm or even snow load.
Q Were there any meetings that said do not stand in the gutter; it will not support you or something to that effect?
A I don't recall.
Q Now, do you remember when I asked you whether there were any other photographs or videos or other recordings of the job site as it existed around the time of the accident? Do you remember that?
A I do.
Q And the photographs that we have here are the only ones that you recall; is that fair to say?
A Yes. Yes.

Q Sir, isn't it true there is videos posted on-line of the Whitney project as the work was ongoing?
A Yes. There was a video. They call it Earth Cam. It's a camera from an adjacent building, and it's set on to the Whitney.
Q Is that the only video that you're aware of?
A Yes.
Q Sir, tell this jury isn't it true you gave an interview while the work was going on?
A I stand corrected.
Q And recorded?
A Yes, I stand connected.
Q And actually posted on-line?
A Yes.
Q And you are in that video?
A I am.
Q And that video was 11 years ago; correct?
A Approximately.
Q And this accident was 11 years ago; correct?
A Correct.
Q And the condition or the work at the time that you gave that video was around the time that this accident happened; isn't that correct?
A I don't recall.
Q Well, if I tell you that the video shows the monitoring

system -- at points in the video, it shows the monitoring system with no glass and no steel, that's the condition -- that was the stage of the monitoring system at the time of the accident; correct?
A Yes.
MR. THOMAS: Your Honor, I have a video that I'd like to offer into evidence and show the jury. I've showed counsel. There is specific portions of the video that I want to focus on.
THE COURT: Any objection?
MR. SARDINO: Yes, Judge. I am going to object. Foundation. We don't know if this is before the accident, after the accident.
Q Let me ask you, sir. Do you know if the video that you're appearing in where you're narrating and being interviewed on the job site of the Whitney was before August 16, 2013 or after August 16, 2013?
A I don't recall.
Q But if you saw that video and you saw that it was in the same stage of work as it was at the time of Mr. McGill's accident, you'd be able to see the difference; right?
MR. SARDINO: Objection. Calls for speculation.
THE COURT: I will allow it.
Q You would be able to tell the difference; correct?
A Can you repeat the question?

Q I'm sorry if I confused the question.
You understand at the time of the accident the monitoring system on the ninth floor consisted of steel beams?
A Yes.
Q One at an angle, one vertical and with the gaskets in place but no glass and no steel; correct?
A Correct.
Q And the video that -- in which you're speaking shows portions of the site in the same condition.
Are you aware of this video that I'm talking about?
MR. SARDINO: Objection. Again, there is no foundation.
MR. THOMAS: My question is are you aware of this video that I'm talking about.
THE COURT: Overruled.
MR. SARDINO: Perhaps, Judge, a hypothetical would be more appropriate.
Q Do you remember being interviewed on site?
A I do.
Q Have you seen the video after they produced it?
A I have.
Q And so I'm going to show this video to the jury. Okay?
A Okay.
Q I'm going to run it through and then I'm going to stop it at a certain point.

MR. THOMAS: Your Honor, I wish to introduce this video. This is Plaintiff's Exhibit 23.

THE COURT: It will be 23.

MR. SARDINO: Judge, I am going to object. The witness has said he doesn't know whether this video was made before or after the accident and until the witness can lay that foundation, I would object to publication to the jury.

THE COURT: I'm going to overrule the objection. Ultimately, members of the jury, the weight to afford the video and whether or not in your parlance you determine whether it occurred before or after the accident is for you to determine. I am going to receive it in evidence and you afford it whatever weight you decide to afford it.

MR. SARDINO: Thank you, Judge.

(Continued on the following page.)

MR. SARDINO: Judge, I would also object to the audio portion except for that portion that may be Mr. Thomann himself. But any other audio would be complete hearsay.

THE COURT: Let me ask Mr. Thomas. Are you --

MR. THOMAS: Yes, Judge.

THE COURT: And I think the -- I assume the video has audio. Are you -- are you offering it with the intention of publishing the audio portion to the jury?

MR. THOMAS: Well, yes, Judge. It's a promotional video, and Mr. Thomann is in the video and he's narrating and speaking in the video, so I think it puts it in context. It might also refresh his recollection as to whether it was before or after the date of the accident.

THE COURT: Let me just have counsel approach for one moment.

MR. THOMAS: With the video?

THE COURT: No. No.

(Whereupon, a side-bar discussion was held amongst the Court and counsel.)

(Open court.)

THE COURT: Okay. So, members of the jury, after a brief bench conference, Mr. Sardino raised an objection to the introduction of audio portions of the video that are from declarants who are not the declarant who is presently

on the stand, Mr. Thomann.

Those statements, in the Court's purview, I do agree with Mr. Sardino would constitute hearsay, and I believe the prejudice in offering it for its truth would -- would disadvantage defendants.

And so I have instructed Mr. Thomas to play the video, publish it for you, but to not play the portions of the audio that are not statements made by the witness who is presently on the stand.

So Mr. Thomas will do his best to accomplish that feat, and that will be the reason why you will only hear audio that relates to what Mr. Thomann says in the video.

MR. THOMAS: Thank you, Judge. But, again, I'm going to play the entire video. I'm just going to silence it while -- after he speaks.

THE COURT: Understood.

(Whereupon, a portion of the video was played.)

MR. THOMAS: Okay.

Q. Having viewed what's been marked as Plaintiff's Exhibit 23, the video in which you are featured, does that refresh your recollection as to what stage of the project it was when you gave that interview?

A. It does.

Q. When was that?

A. Oh, what stage? It was during the steel erection

phase.

Q. And was that before or after August of 2013?

A. It would be before August of 2013.

Q. And there's another video, which I'd offer as Plaintiff's Exhibit 24 in evidence, called "A Hardhat Tour." Are you familiar with that one?

A. I'm familiar with many.

Q. There were many --

A. Many hardhat tours. I'm not familiar with the video.

Q. Well, if I show you the hardhat tour video that I -- that I want to mark as Plaintiff's Exhibit 24 into evidence and you -- and I ask you to specifically focus on those parts of the video that show the 8th and 9th floor, the monitoring system, can we do that?

A. Yes.

Q. Okay. And I want to tell you that there are -- there's four different sections of this video that -- that you can see the portions which are the subject of this litigation. I'm going to run the video through, and then I'm going to go back and stop it at those portions and have some questions for you. Okay?

A. Okay.

MR. THOMAS: Your Honor, with the Court's permission, Plaintiff's Exhibit 24?

THE COURT: So you want it -- it's -- you're not

offering it --
MR. THOMAS: I'm offering it into evidence. I'm not going to play any sound; it's merely for what it shows.
I'd like to run it through so the witness can understand the state that that's at, and then I want him to concentrate on those portions of the video that show the area where this accident happened, and then I'll go back and isolate those sections.
THE COURT: Any objection?
MR. SARDINO: So, Judge, I would object to it being into evidence until the witness can testify as to the proper state. I don't have an objection to showing the witness in order do that.
THE COURT: Okay.
MR. THOMAS: Fine. So for identification, I would like to show the witness.
And then when we're done, I will have some questions for you.
THE COURT: So it's not yet received. This is for identification purposes, subject to the follow-up questions that counsel has.
MR. THOMAS: Thank you.
(Whereupon, a portion of the video was played.)
Q. Mr. Thomann, after having seen that video, first let me ask you this: Did you see yourself in that video at all?

A. I did not.
Q. Okay. Do you recognize what was shown in that video?
A. I do.
Q. What was shown in the video?
A. The construction of the Whitney Museum, some of the ownership that was involved with the project, the architect. That was most of it.
Q. And do you know what stage that video showed the progress of the work?
A. It was during the enclosure phase, because you saw the facade starting to take shape.
Q. Do you know if that was before or after August of 2013?
A. I don't know.
Q. Okay. Did you see portions in that video that showed the 8th floor to the 9th floor with the monitoring system that is the area where this accident occurred?
A. I did.
Q. And did you see that a condition of -- or the process that it was in at the time that this accident happened?
A. I saw the state that the roof monitoring system was in, yes.
Q. And that's the same state that it was in at the time of this accident, correct?
A. I didn't -- there could be some portions of glass that was being installed at the time of the accident versus -- I

didn't necessarily see the glass installed at that point.
Q. Okay. I'm going to go back. I'm going to go to 40 seconds into the video.
But, again, does this fairly and accurately represent this state or this stage of the construction process at the Whitney Museum approximately 11 years ago?
MR. SARDINO: Objection. In 2013 or some particular time in between?
MR. THOMAS: I said 11 years ago, but let me be more specific.
Q. Around summer of 2013, does it fairly and accurately show the state of the work?
A. Just going through some memories about when we started and when the project was getting closed.
Q. Don't think out loud. Think to yourself. Okay?
A. Sure.
Yes, it does.
MR. THOMAS: Okay. Your Honor, at this time I wish to offer Plaintiff's Exhibit 24 into evidence based on the foundation and testimony of the witness.
THE COURT: Any objection?
MR. SARDINO: Judge, I object. Even the summer of 2013 gives six weeks before the subject accident and six weeks post-accident. And to the extent that there's anything in this video that is post-accident, that's not

relevant in this case.
THE COURT: Okay. Over counsel's objection, I am going to receive Exhibit 24 in evidence. And as I did with Exhibit 23, members of the jury, ultimately the weight to afford the video is ultimately for you to determine.
MR. THOMAS: Thank you, Judge.
(Whereupon, the above-referred-to video was marked into evidence as Plaintiff's Exhibit 23, as of this date.)
Q. Sir, I'm going to show you the segment that's 40 seconds to 59 seconds in, and then I'm going to stop and I'll have a question for you. Okay?
A. Okay.
Q. All right.
(Whereupon, a portion of the video was played.)
Q. Do you recognize what was shown in those few seconds of the clip that I just ran?
A. I do.
Q. What is shown in that?
A. The roof monitoring system and then the space, the 8th floor space.
Q. The 8th to the 9th floor, correct?
A. Correct.
Q. Okay. And going back to, let's say, 54 seconds into the video.
What are we looking at at 54 seconds into the video?

A. Structural steel beams and then the roof monitoring system.
Q. And the roof monitoring system has no glass in it, correct?
A. It doesn't appear to be.
Q. And it doesn't have the steel plates in them, correct?
A. The steel plates?
Q. On each side of the monitoring system --
A. No, it doesn't.
Q. -- one side is glass and the other side is steel, right?
A. No. It does not.
Q. And if I'm able to zoom in.
And I'm zooming in. Do you see what appears to be gaskets or seals along the monitoring system?
A. Yeah. Appears to be some sort of a gasket or seal.
Q. What color is it?
A. It's black.
Q. And those black seals go around where the glass would be placed, correct?
A. Yeah. In that vicinity, yes.
Q. Okay. And showing 57 seconds into the video.
Do you see any scissor lifts on the 8th floor?
A. I do.
Q. How many scissor lifts do you see?

A. I see two.
Q. If I told you there's two red, orange, and one blue --
MR. SARDINO: Objection. Counsel is testifying.
MR. THOMAS: Based on what I see in the photograph, Judge.
MR. SARDINO: Right.
THE COURT: I'm going to sustain the objection.
Q. Do you see what appears to be a blue scissor lift in the far left corner?
A. That could be a scissor lift.
Q. Do you also see a ladder?
A. Yes.
Q. Do you know whose ladder that is?
A. I do not know.
Q. You told us when you first took the witness stand that Turner's "Ladders Last" policy was to use scissor lifts before you use a ladder.
Do you remember that?
A. Yes.
Q. Can you explain for the jury why in this video that was a hardhat tour of the job site, there's both scissor lifts and ladders in this image?
A. I don't know for certain why that's the case.
Q. Do you know where the ladder's -- where it's placed and where it's leading to?

A. It's placed on the 8th floor and it appears to be going up to the 9th floor roof.
Q. And that would be a means of access for a worker to go from the 8th floor to the 9th floor? Would you agree with that?
A. Or to get to a location at the roof monitoring system, yes.
Q. Let's take a look at 1 minute and 58 seconds to 2 minutes and 15 seconds into the video. I'm going to run this, and then I'll stop it and I'll have some questions. Okay?
A. Okay.
(Whereupon, a portion of the video was played.)
Q. Stopping at 2 minutes and 15 seconds into the video.
Again, shows the monitoring system?
A. Yes.
Q. And in this video, do you see the orange fence?
A. I do.
Q. And the orange fence is in place, correct?
A. Correct.
Q. And you saw on the site safety manager's log the day of the accident, they had replaced the fence.
Do you remember that notation?
A. On the site safety manager's log? Let me just...
Where do you see that in the site safety manager's log?
Q. Earlier we talked -- we looked at the -- right. And we started discussing what was done that day and talked about the

fencing; replacing, repairing.
Do you remember that?
A. Correct, yes.
Q. So this is the way the fence is supposed to be; is that fair to say?
MR. SARDINO: Objection as to what time.
MR. THOMAS: When it's in place, that's how it's supposed to look.
THE COURT: I will allow it.
A. Yes. With the exception over to the right, it's drooped down a bit.
Q. But the photographs that were presented in evidence with the two workers on the roof; remember that?
A. Yes.
Q. The fence was not in the position that it is in this video, is it?
A. Correct.
Q. Okay. And if the fence is in the position that is in this video, a worker taking the scissor lift up to the roof would have a difficult time getting onto the roof, correct?
A. Correct.
Q. So in order to get onto the roof, the fence would have to come down, correct?
A. Correct.
Q. That would be a violation to remove that fence,

wouldn't you agree?
A. I don't re- -- I don't know.
Q. Well, that fence is there to protect somebody from falling off 14 feet down to the floor below, correct?
A. Yeah, there are instances where it can be removed to perform work.
Q. I want to continue 2:48 into the video.
Do you see that?
A. I do.
Q. Do you know what this -- this area that I just focused in on seems to be a scaffold-looking image in the photo.
Do you see that?
A. I do.
Q. What is that?
A. It's a scaffold.
Q. Is there anything that prevented Turner from putting a scaffold like is shown in this still frame on this video, 2 minutes and 48 seconds into the video, on the 8th floor so workers could access the 9th floor? Was there anything stopping them from doing that?
A. Not that I recall.
Q. Okay. Now I'd like to go to 3 minutes and 22 seconds in.
That's not you in this video with the hardhat, is it?
A. It is not.

Q. Family member, maybe?
A. Looks a little -- John Stanley, it looks like, from the Whitney.
Q. Do you know who it is?
A. Yeah, I do. It's John Stanley of the Whitney Museum. Not a family member.
Q. A doppelganger, maybe?
A. I guess so.
Q. Okay. Again, from looking at 3 minutes and 22 seconds to 3 minutes and 24 seconds.
Sorry, I think I jumped. 3:22. Okay. Sorry, I wasn't quick enough.
This image at 3 minutes and 23 seconds into the video, again, what does it show?
A. It shows structural steel members and the roof monitoring system.
Q. About the same stage that it was in at the time of the accident?
A. Approximately.
Q. Without the glass, without the steel panels, correct?
MR. SARDINO: Objection.
THE COURT: Sustained.
Q. If you know.
A. I guess it comes down to the different -- what you perceive as approximate. Within several months.

Q. Well, can you tell this jury, if I zoom in, and it looks like the black gaskets are all in place on the monitoring system.
Do you see that in this photo?
MR. SARDINO: Objection as to characterization.
Q. What would you --
MR. THOMAS: Sorry.
THE COURT: Sustained.
Q. I'll rephrase the question.
What are these -- what are the black lines that we see on the monitoring system?
A. It could be a few things. It could be a gasketing system; it could be something called a weatherbreak that prevents the cold air from condensing into the warm air.
Q. But it's some sort of a seal or a barrier between the metal beam and the glass that's going to be attached to it, correct?
A. That's what it appears to be.
Q. And do you understand at the time of the accident, Mr. McGill was checking and inspecting those seals?
Do you understand that?
MR. SARDINO: Objection. Foundation.
Q. Well, you've testified already --
THE COURT: Overruled.
Q. -- that Mr. -- you understood this accident happened

when Mr. McGill was checking or inspecting those seals, correct?
A. Yes.
Q. Do you know how long these gaskets or seals were in place without the glass or the steel?
A. I do not recall.
Q. Days? Weeks? Months? Years?
A. Could be months.
Q. So if these gaskets were exposed to the weather for months, you'd want to check the seals before you put the glass on. Wouldn't you agree?
A. Yes.
Q. They could shrink, they could expand, they could crack, they could come loose. Any number of things, correct?
A. Correct.
Q. Even more reason that when you inspect them, you got up close, able to touch them, make sure they're not loose. Would you agree with that?
A. Yes.
Q. You couldn't just stand on the 8th floor, look up, and say, "The seals are fine; put the glass in." That would be a mistake, correct?
A. Correct.
Q. And you understand that Mr. McGill's task on the day of the accident was to inspect these seals even so far as to putting his hand on them to make sure there's no cracks and no

ruts and no loose portions of gasket.
You understand that?
A. That's what I understand.
MR. THOMAS: Thank you, Judge. That's all I have for the video.
THE COURT: Okay.
Q. Mr. Thomann, after sitting here and me asking you questions about this accident and showing you some of the documents and exhibits in evidence in this case, can you say with 100 percent certainty that there were no safety violations on this job site in August of 2013 when Mr. McGill had his accident?
MR. SARDINO: Objection as to form. "100 percent certainty."
THE COURT: I'm going to sustain as to form.
MR. SARDINO: Thank you.
Q. Can you say within a reasonable degree of construction certainty, as your expertise is construction, that there was no violations on this job site at the time of Mr. McGill's accident?
MR. SARDINO: Objection. Are we talking any violation or something relevant to the facts of this case?
MR. THOMAS: Starting with any violations based on anything he's seen in the world of information in this case.
THE COURT: Overruled. Overruled.

A. Could you repeat the question one more time?
Q. Yes or no; you've observed or now come aware -- become aware of violations on the job site at the time of Mr. McGill's accident?
MR. SARDINO: Objection.
A. Correct.
MR. SARDINO: At about the time. Not on the date of the accident or...
MR. THOMAS: Judge, based on all the information that's been presented.
Q. Not every photograph was taken at the time, at the minute of Mr. McGill's accident, correct?
A. Correct.
Q. So based on the information that you've had, the evidence in this case, yes or no, you have observed or now come to learn there are violations on this job site?
MR. SARDINO: Same objection.
THE COURT: Overruled.
A. Yes.
Q. And those are the kind of violations that could be dangerous to workers? Yes or no.
A. Yes.
Q. And those kind of violations not just dangerous to workers, but could cause serious injuries or even worse? Yes or no.

MR. SARDINO: Objection. Calls for speculation.
THE COURT: Overruled.
A. Yes.
Q. And if Turner failed in its duties and obligations to have its contractors inspect the equipment to make sure it was free from hazards, Turner is still responsible, correct?
MR. SARDINO: Objection. Calls for a legal conclusion.
THE COURT: Sustained.
Q. Based on Turner's internal rules and regulations for inspecting work and subcontractors' equipment, Turner is always responsible, correct?
MR. SARDINO: Objection. Calls for a legal conclusion.
THE COURT: Sustained.
Q. Turner has a duty to make sure its subcontractors provide adequate safety equipment to the workers on the job site, correct?
MR. SARDINO: Objection. Calls for a legal conclusion.
THE COURT: I'm going to sustain the objection.
Q. Sir, what duties and obligations does Turner have to keep the subcontractors and those employees safe while on the job site?
A. To communicate the rules. To make certain that the

workers are following the rules.
Q. How about providing the proper safety equipment so that they could do their job without accident or injury?
MR. SARDINO: Objection.
THE COURT: Overruled.
A. Yes.
Q. And if you don't provide the proper safety equipment like a ladder, a ramp, a scaffold to get from the 8th floor to the 9th floor and you only give a scissor lift, that could be a potentially hazardous condition -- situation, correct?
MR. SARDINO: Objection, Judge. No foundation that -- any of these other things that he mentioned.
THE COURT: I'm going to ask that you break it up, Counsel.
MR. THOMAS: Sure.
Q. Turner allowed in August of 2013 a scissor lift to be a people-mover to get workers from the 8th floor to the 9th floor, true?
MR. SARDINO: Objection.
THE COURT: Overruled.
A. 8th floor to the 9th floor location, yes.
Q. And if a worker had to get onto the 9th floor, they had to get out of the basket of the scissor lift, true?
A. Yes.
Q. And getting out of the basket of the scissor lift is a

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potentially dangerous event to that worker while it's in the -- while the scissor lift is extended and in the air, correct?
A. Potentially.
Q. And the scissor lift had to go up 14 feet or about 14 feet to get to the 9th floor, true?
A. True.
Q. And so a worker should be -- it should -- Turner -- Turner has to make sure that the workers have all the safety equipment they need so if they take a scissor lift up from the 8th floor to the 9th floor and get out of the basket, they're able to do that safely, correct?
A. Correct.
Q. Based on all the world of information you have in this case and the fact that Mr. McGill had his accident the way he claims he did, and if that is the case, Turner's responsible for violating their own safety rules and regulations, true?
MR. SARDINO: Objection.
THE COURT: Overruled.
A. Correct.
MR. THOMAS: Thank you. I have no further questions.
THE COURT: Okay. Mr. Sardino?
CROSS-EXAMINATION
BY MR. SARDINO:
Q. If Mr. McGill had performed his work by standing on the

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platform of the scissor lift, there would have been no reason for him to get up, correct?
MR. THOMAS: Objection. Speculative. "If."
THE COURT: Sustained.
Q. Do you know if Mr. McGill had to get out of the scissor lift to perform his work?
A. I do not know.
Q. Do you know that a worker on a job site is supposed to stand on the platform of the scissor lift while doing their job?
A. Yes.
Q. So it's the scissor lift -- yes, you have to move from the floor up to the ceiling, but you also do your work on the platform of that cage, correct?
A. Correct.
Q. Now, when did this project start?
A. If it's -- the start is from -- the excavation and foundation phase started 2011, approximately September 2011.
Q. And when was it completed?
A. It was approximate the first quarter of 2015.
Q. And would it be fair to say that on the days when construction activity was occurring, the job site would look different day to day to day to day, correct?
A. Generally, yes, correct.
Q. And as of August 16th of 2013, there was still a year and a half of construction left to do on this project, right?

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A. Correct.
Q. Including on the 8th floor, correct?
A. Correct.
Q. Including the 9th floor, correct?
A. Correct.
Q. Including the canopy system, correct?
A. Right.
Q. The photos that you had seen earlier, do you know who took those photos?
A. I do not, no.
Q. Do you know when they were taken?
A. I'm sorry. Which photos? There was a video, but I guess the photos?
Q. No, the photos the other day, 1 through A through G. Do you remember those photos?
A. I do.
Q. Do you know when they were taken?
A. I do not, no.
Q. When did you first hear of a silicone being involved in this accident?
A. During the deposition.
Q. And that was in 2020, approximately?
A. Approximately.
Q. Now, you were shown the incident report.
MR. SARDINO: Do you still have the marked exhibit?

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MR. THOMAS: Sure. Oh, the marked exhibit? I have it. You want me to put it up?
MR. SARDINO: No. That's okay.
MR. THOMAS: Okay.
Q. Everything contained except for the preformatted type, everything that's typed into this form is done after an accident already occurred, correct?
A. Correct.
Q. And wouldn't it be good business practice that if there -- if there was a mistake in paperwork, that you try to remedy it the best you can?
A. Correct.
Q. Now, do you know how many employees there were onsite on this day?
A. I don't recall.
Q. On the site safety manager's log, does it say?
A. From what I see, it does not.
Q. On the FDNY report that you were shown earlier, is that part of that?
A. It is not.
THE COURT: It is not?
THE WITNESS: Well, let me just see. Oh, yes, here it is.
A. Yes, it is. It's here.
Q. Does it say how many employees were onsite that day?

A. It doesn't appear to.
MR. SARDINO: May I approach, Judge?
THE COURT: You may.
Q. At the third line on the FDNY report, what does -- what does that refer to?
A. The third black line heading "FDNY Communications and Inspections."
Q. The third line on top?
A. Oh, "Workers" -- I'm sorry. "Workers orientated and fire safety trained. Document up to date and filed today, 222 total."
Q. So what does that reference? What's the reference of 222?
A. That would be the quantity.
Q. Quantity of what?
A. Of the workers. Of the workers onsite that day.
Q. And you're aware through the incident investigation report there was no witnesses to this accident?
A. No, there was not.
MR. SARDINO: Nothing further.
THE COURT: Okay. Thank you, Mr. Sardino.
Any redirect, Mr. Thomas?
MR. THOMAS: Mr. Thomann, would you be upset with me if I didn't have any questions for you?
Nothing further, Judge.

THE COURT: Okay. Thank you very much. Mr. Thomann, that concludes your testimony. Once again, thank you for returning to conclude your testimony. And you are excused at this time.
THE WITNESS: Thank you very much.
THE COURT: You may step down.
Counsel, approach for a moment.
(Whereupon, a side-bar discussion was held amongst the Court and counsel.)
(Open court.)
THE COURT: Okay. Members of the jury, after a brief bench conference, I wanted to address scheduling. As I had mentioned yesterday, we have two witnesses testifying today, both of whom you've already heard from. We just concluded Mr. Thomann's testimony, and counsel have some issues that they need to work out before we're ready to have our next witness testify, but our next witness is scheduled to be here and ready to testify in the afternoon at 2 o'clock.
So at this time we will be breaking for lunch. I'd just ask that you be back, to the extent possible, especially given our early break, at 2 o'clock so that we can get started right away at 2:15 when we go back on the record. Okay? Thank you very much.
COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the courtroom.)
THE COURT: And, Counselors, you don't need me to, while you're working out the issues with the exhibits. I mean, if you do, I'm around, so just -- if there's any objection or anything that we need to raise --
MR. THOMAS: I'm just wondering if I can speak with you alone, Judge, with the permission of the defendants.
MR. SARDINO: No objection, Judge.
THE COURT: No objection? All right. I guess maybe the best place to do it will be my chambers, so why don't we do that.
Thank you.
(Whereupon, a lunch recess was taken.)
* * *

A F T E R N O O N S E S S I O N
* * * * *
(Whereupon, the aforementioned photographs were marked as Defendant's Exhibits C and D in evidence as of this date by the Reporter.)
(Whereupon, the aforementioned documents were marked as Defendant's Exhibit E and F for identification as of this date by the Reporter.)
THE COURT OFFICER: All rise. Jury entering.
(Whereupon, at this time the jury entered the courtroom.)
THE COURT: Okay. Good afternoon, members of the jury. We are ready at this point to resume the continuation of Dr. Merola's testimony. You previously heard from Dr. Merola, and he is returning today for purposes of Mr. Sardino being able to complete his cross-examination and any additional questioning that Mr. Thomas may have.
So do we have the witness available outside?
MR. THOMAS: Yes.
THE COURT: Let's bring the witness in.
(Witness resumed the witness stand.)
THE COURT: Okay. Please be seated everyone.
Dr. Merola, thank you for returning for the continuation of your testimony from where we left off the other day.

Mr. Sardino, whenever you are ready, you may inquire.

And Doctor, I'm just going to remind you that you are still under oath.

CONTINUED CROSS-EXAMINATION

BY MR. SARDINO:

Q Dr. Merola --

A Hello.

Q -- good afternoon.

Doctor, the procedure that you performed on Mr. McGill of May 26 of 2021, it was for the purpose of stabilizing the cervical spine?

A Stabilizing, decompressing, yes.

Q Okay. Is it true that the stabilization of the cervical spine does not mitigate or change the normal degenerative process that Mr. McGill or any other person would have?

A So would you clarify that for me, please?

Q Sure. Mr. McGill had degenerative changes before your operation?

A Yes.

Q Your operation would not have multigated or changed the normal degenerative process that was ongoing.

A In all of the other portions of the spine, correct, or his body per say.

Q Would it change the degenerative process within the portion of the spine that you did the surgery?

A Well, it will stabilize that area so that area then becomes one piece of bone and so it becomes something different than it was previously, so that stabilization is stabilizing that particular region or that particular zone. But of course, the degenerative processes occur everywhere else, you know, irrespective of what you've done surgically.

Q Okay. I thought you had Exhibit 20, but I will get Exhibit 20.

THE COURT: Okay. The witness is being shown what is already in evidence as Exhibit 20.

Q In Exhibit 20 are your office notes; correct?

A Yes.

Q Doctor, since you were here the last time did you do anything with regard to your office to see if you had any other records other than what's contained in Exhibit 20?

MR. THOMAS: Objection, your Honor. He wasn't asked to do such.

THE COURT: Overruled. You can answer.

A I haven't, no.

Q Okay. Can you refer to your operative report in Exhibit 20, Doctor.

A Yes. Yes, I have it.

Q Okay. And the procedure with Mr. McGill was on May 26, 2021; correct?

A Yes.

Q And what time did it start?

A I don't know if there is a start time on the op report. It gives you date of service at 5/26/21, 9:38 a.m. is logged in as the time, but that's the dictation. That's when the dictation -- I'm sorry.

Yeah, so it says 9:38, but I don't know if you have the start and stop on the op report itself.

Q Are there any other records within Exhibit 20 that would show the start and stop time?

A No.

Q Would the hospital records show the start and stop time?

A Yes.

Q Where was the procedure done?

A New York Presbyterian.

Q Okay. And you reference a time of 9:38 a.m. And just looking at Page 4 of the operative report, that appears to be a time that you dictated your operative note?

A Yeah. It says date of dictation, 5/26/21, 9:38 and then a date of transcription, same date 10/16/48.

Q Then you signed the operative note electronically on May 27 of 2021; correct?

A Yes.

Q Okay. Did you have any assistants with you in the -- during the surgical procedure on Mr. McGill?

A Yes.

Q And who was that?

A Dr. Cerabona.

Q And is Dr. Cerabona in your practice?

A No.

Q Dr. Cerabona work for New York Presbyterian Hospital?

A He is another private practice spine surgeon who has privileges at Presbyterian.

Q Dr. Cerabona has his own practice somewhere else?

A Yes.

Q With privileges at New York Presbyterian?

A Correct.

Q And with this type of procedure, you needed to have at least one assistant with you?

A Yes. It's always helpful.

Q And what's the purpose of having assistants with you?

A You get two sets of eyes and two sets of hands to be able to work on the patient to increase your efficiency, safety and outcome.

Q And presumably during the surgery there were other nurses in the operating room.

A Yes.

Q They are not listed on your operative report; correct?

A No.
Q Would those names be contained in the New York Presbyterian Hospital records?
A Yes.
Q Doctor, looking at the first page of your operative note --
A Yes.
Q -- did you perform an anterior cervical interbody arthrodesis at C5, C6, C7 vertebral segments?
A Yes.
Q Explain to the jury what that is.
A It's a -- basically, it's called a fusion or a gluing together or all those segments of bones in order to stabilize them and have them become one piece of bone.
Q Did you perform a partial vertebral corpectomy with resection of 50 percent of the C6 vertebral body?
A Yes.
Q Explain to the jury what that is.
A It's a removal of the top portion and the bottom portion of the middle bone in addition to decompressing the spinal cord and the nerve roots in between the C5/C6 and C6 and C7 segments.
Q Did you perform a decompression of the spinal cord nerve roots at C5/6?
A Yes.

Q Can you explain to the jury what that is?
A Taking it -- going into the spinal canal in the area where the spinal cord and nerve roots are to take off any impediment or pressure that they might have.
Q Did you perform a decompression of the spinal cord nerve roots at C6/7?
A Yes.
Q Can you explain to the jury what that is?
A Same thing at a separate level basically going into the spinal canal and the area where the nerve roots are in between C6 and C7 to make sure that there is no significant pressure on the spinal cord or the nerve roots.
Q Did you perform a placement of a biomechanical device at C5/6?
A Yes.
Q Did you perform a placement of a biomechanical device at C6/7?
A Yes.
Q Can you explain to the jury what the biomechanical device was?
A Sure. Those are -- basically, they are made out of carbon fiber and they go into the space in between C5 and C6 and in between C6 and C7. They contain bone graft that we mix together to get everything to heal together, and they help maintain the alignment of the bones.

Q Did you perform an autogenous locally harvested bone graft, allo bone graft?
A Yes.
Q Can you tell the jury what that is?
A Autogenous bone graft means bone removed from the patient, and in this case it would be in the areas where we scooped out the C6 vertebral body.
You save that bone and then you mix it with allo bone graft. Allo bone graft is donated bone, and in this case it's cryopreserved or frozen -- fresh frozen bone cells.
So you mix all of that together, and it acts as kind of like a super glue to stimulate healing in between all of the bones that you're trying to stabilize and fuse.
Q And where did the bone graft -- what part of the -- strike that.
It was part of the cervical spine that you used for the autogenous locally harvested bone graft?
A Correct.
Q That would have been the part of the corpectomy that you performed?
A Yes.
Q And you indicated the other day and again just now that you would then grind up that bone to mix in with allograft to then put back into the body.
A Yes.

Q Do you use all of the vertebral body that you removed during the corpectomy during this procedure?
A Yeah. For the most part you use as much bone as you can pack into the area in order to get bone to grow into everything, so you use as much as you possibly can.
Q Would there be a reason that you wouldn't use all of it?
A Only if it didn't fit.
Q Okay. Do you have a recollection one way or the another if it all fit in with regard to Mr. McGill's procedure of May 26, '21?
A No, I don't.
Q If there was autogenous locally harvested bone graft that did not fit, would you maintain what you did not use as part of a specimen?
A Sometimes sent off as specimen, yes.
Q In this case was any bone that was removed or corpectomy part of the procedure preserved as a specimen?
A So in the op report, I dictated pathological specimens sent, herniated disc 5/6 and herniated disc C6/7.
Sometimes when you're removing the disc, bone can be also attached to the disc, so it's also possible that some bone came in with the disc itself. And when you're also doing the corpectomy because you are going into the back of the spinal canal, there are also areas that -- where there are some

ligament and disc material that are stuck to the ligaments in the area that you are doing the corpectomy itself. So sometimes bone can be stuck to that as well.

Q What happened to those specimens?

A They typically go to the pathology department and then they look at them.

Q Do they generate a report?

A Yes.

Q And with the records of that pathology -- strike that. Did you have any records of that pathology within Exhibit 20?

A I don't believe, no.

Q Would those be contained in the New York Presbyterian records?

A Yes.

Q Did you perform a placement of separate and distinct structurally supportive anterior spinal instrumentation consisting of locking plate, screw, anterior spinal instrumentation construct placed specifically across the C5, C6, C7 vertebral segment for inherent stability and not merely to hold the biomechanical device in place?

A Yes.

Q Can you explain all of that to the jury?

A Sure. If we think back to that little model that we were looking at before, there is a green -- it looks like a

plate on the front of the spine.

Correct.

MR. THOMAS: Counsel.

Q Do you think the model would help you describe that?

A Sure. Yeah. Thanks. So the model actually shows you just about everything we just spoke about. This green kind of plate right here, that's the anterior spinal instrumentation. Instrumentation is just a fancy word for a plate. And then it's called a locking plate because when you put the screws into the bones, there is a little -- a little bit hard to see, but there is a little silver mechanism right there that you turn to lock the screw so that the screw doesn't back out. Because the person's spine is moving around and you get some wiggle in there, if you didn't lock the screw in place, the screws can kind of wiggle themselves out, but there is a lock. So you lock the screws so it doesn't move, and then this whole thing holds everything together.

Q Did you as part of the procedure performed on your operative note do intraoperative fluoroscopy?

A Yes.

Q What is intraoperative fluoroscopy?

A It's an x-ray that you take during the case to make sure that you are at the right level and that you haven't put anything in the area of the spinal canal.

Q The intraoperative fluoroscopy, do you maintain those

records?

A No.

Q Are they maintained by New York Presbyterian?

A Yes.

Q Do you know approximately or do you know either exact number or approximately the number of films that you took during the intraoperative fluoroscopy?

A No.

Q Was the fluoroscopy done before you did the corpectomy?

A They are -- yeah. So when you're doing the fluoroscopy, you're kind of taking some images throughout the case so you know where you are and you know where you are not. And then you also want to make sure that what you put in is not in the canal. So you are doing the fluoroscopy basically just to verify.

Q And the fluoroscopy, you can actually take like a still picture?

A Yes.

Q And so you would have done -- you would have taken some fluoroscopic pictures, if you will, prior to doing the corpectomy?

A Yes.

Q Would you have done the fluoroscopy pictures post-corpectomy portion of the procedure?

A Yes.

Q And what is Intraoperative Evoke Potential Monitoring?

A That's -- you're basically -- you have a technician that's connected to a neurologist who is off site who actually wires the patient up. They are wiring up their brain and their nerves to a computer so that you can monitor brain function, spinal cord function and nerve function so that you know when you are in the spinal canal and you are manipulating the spinal cord and the nerves that you are not doing anything bad because these are sensitive -- highly sensitive areas. So while you're working in there, if you're doing something that you are not even aware that you're doing that's causing damage to either the spinal cord or the nerves, Evoke Potential Monitoring alarms will go off and then you can modify what you're doing to not cause any harm.

Q Now, Doctor, I'd like to refer you to Page 2 of your operative note under "Description of Procedure."

A Yes.

Q Doctor, within that section, you indicated that -- in the last full paragraph, can you read that to the jury, please?

A Partial vertebral corpectomy of C6. We resected 50 percent of the C6 vertebral body making sure that the cord and roots were freely decompressed at the C5/C6 and C6/C7 segments. We did this to both direct visualization as well as to the free and clear passage of nerve root probes. We resected as

much bone as was necessary to freely decompress the cord and roots at each successive level.
Q What did you mean, Doctor, when you said that you were making sure that the cord and roots were freely decompressed at the C5/6 and C6/7 segment?
A To make sure that there was no pressure inside the canal on either the cord or the nerves.
Q Was that because the bone was compromising the cord and the roots at that level?
A Bone and disc; correct.
Q Now, Doctor, as part of your practice, once you perform an operative procedure, you billed for those procedures; correct?
A Yes.
Q Did you bill for performing an anterior cervical interbody arthrodesis at C5, C6, C7 vertebral segments?
A Yes.
Q Were you paid for that?
A I'd have to check, but I would believe so.
Q Did you bill for performing a partial vertebral corpectomy with resection of 50 percent of the C6 vertebral body?
A Yes.
Q Were you paid for that?
A I'd have to check, but I would believe that I was, yes.

MR. SARDINO: At this time, Judge, I would like to show the witness what's been marked for identification as Defendant's Exhibit E.
THE COURT: Okay.
Q Do you recognize Exhibit E, Doctor?
A These look like billing records.
Q And on those billing records, does it indicate dates of service of May 26, 2021?
A Yes.
Q And does it indicate for Mr. McGill?
A Yes.
Q And on those billing records, does it indicate that you billed for the anterior cervical interbody arthrodesis?
A Yes.
Q On that bill does it indicate that you billed for the partial vertebral corpectomy resection of 50 percent of the C6 vertebral body?
A Yes.
MR. SARDINO: Judge, at this time I would offer Exhibit E into evidence.
MR. THOMAS: May we approach, Judge, before he does that?
THE COURT: Okay. You may.
(Whereupon, an off-the-record discussion was held.)

MR. THOMAS: Objection, your Honor.
THE COURT: After a brief conference at the bench, the Court having heard counsels's rationale for introduction of the documents, the Court in line with its pretrial rulings and also weighing the probative value and the potential for prejudice of admission of the documents is not going to receive the documents in evidence at this time.
MR. THOMAS: Thank you, your Honor.
Q Doctor, I'm going to show you two images, if you will, that have been marked as exhibit -- Defendant's Exhibit C and Defense Exhibit D.
MR. THOMAS: I'm sorry. What are the numbers?
MR. SARDINO: C and D.
THE COURT: Those are in evidence by prior stipulation.
Q Are those postoperative x-rays of Mr. McGill's cervical spine?
A Yes. Yes, they are.
Q Were those x-rays ordered by you?
A I believe so, yes.
Q Now, Doctor, generally, the level of each disc, say C6 in this case, there is a bony portion of that disc level and a disc portion of that disc level; is that correct?
A I'm sorry. I don't understand. You said C6?
Q Yes. So is there a bone portion and a disc portion?

A Well, C6 is a bone.
Q Okay. And in this case, you did a C 6/7 decompression; correct?
A Yes.
Q Okay. And you removed 50 percent of the C6 vertebral body; correct?
A Yes.
Q That's the bone.
A Correct.
Q Is that shown on either Exhibit C or D?
A So on Exhibit D, that's the side-view image. You see the alignment of the cervical spine, and you're seeing the outlines of the vertebral bodies just like you would on the model if you looked at it the from the side.
So you're seeing the full-on side view of each vertebral body here. And then if you look at C, that's the front to back view. If we look at the model on the front to back view, same thing. You are looking at the area where the plate is, and you are looking at the vertebral bodies. You have to kind of put both of those together to get a better look at that C6 vertebral body to understand how much of it was removed and in what areas it was removed.
(Continued on the following page.)

CONTINUED CROSS-EXAMINATION
BY MR. SARDINO:
Q. Sure. And what is the height of the vertebral body?
A. So when you say "the height," what exactly are you referring to? Because it depends on what portion of the vertebral body you're looking at.
Q. So in Mr. McGill's case, when you say you did a 50 percent -- resection of 50 percent of the C6 vertebral body --
A. Yes.
Q. -- what did you mean by that?
A. So the best way to illustrate it is actually on the model itself. If you look at the vertebral bodies -- it's a little hard to see, I know, because it's small.
But the vertebral body that's in the middle, you'll notice that it has -- there's a side wall on the left side; there's a side wall on the right side, in addition to having a top and a bottom and a front and a back.
A good way to think about it is, is you were thinking about a pint of ice cream, right? If you thought about a pint of ice cream, it's got side walls, front, back, side, side, and it's got a top part and a bottom part, but it's full of ice cream.
The vertebral bodies are kind of like a pint of ice cream because they're filled with what we call "cancellous

bone," but they have sides to them. Top, bottom, front, back, and two sides.
So when you're looking at it, the partial vertebral corpectomy here is a scooping out of the top of the C6 vertebral body back to the level of the spinal canal, where the cord and the roots are. And as I had indicated on my op report, to remove as much bone as was necessary to be able to look at the spinal cord and the nerve roots.
So scooping out the top part of the vertebral body back to the cord and the nerve root levels and then scooping out the bottom part of the vertebral body, once again back to the level of the spinal cord and the nerve roots, so that you could get nerve root probes in there and that you could look directly at the cord as well. So you're scooping out ice cream from the bottom of the pint, you're scooping out ice cream from the top of the pint.
There's a screw in the middle of the vertebral body and while you are doing the procedure there's actually a little pin that you put directly in the middle of the body, so you know where the mid-portion of the body is.
And the reason you put that pin there is you want to hold on to the vertebral body so that it doesn't move while you're doing this scooping out or this resection.
So if you think about it, you're dividing that body into three parts. The pin is in the mid-portion or the middle

third, you get to scoop out the top third, and you get to scoop out bottom third, leaving the middle third intact, leaving the right and left side walls intact as well. So you have a little bit of structural integrity, but you're able to remove enough bone to safely decompress the cord and the nerve roots.
Q. So, Doctor, in Mr. McGill's case, when you say you did a 50 percent resection of the C6 vertebral body, what portions of the vertebral body did you resect?
A. The top scoop, 1/3 of the center portion of that vertebral body, and then the bottom section of about 1/3 of that vertebral body.
Q. And does that not leave 1/2, or is that 2/3?
A. Yeah, that's -- I mean, that's -- you can consider that 2/3 because you're dressing the top and the bottom.
The only caveat to that, right, so that would be 2/3 or 66 and 2/3 percent, right? I'm only an orthopedist, not a mathematician. But the caveat to that is you still have a little bit of the front of the vertebral body left and you have the two side walls.
The side walls, if you look at them, have kind of a U shape on top, and those side walls are directly bordering this tiny little opening here along the side of the vertebral body. That tiny opening contains something called the vertebral artery, so you have to stay away from the side walls.
The scooping is not really -- it's not like an ice

cream scoop; it's a drill. And it's a very high-speed drill, so when you are in the vertebral body and you're drilling, the drill is actually making all that bone go away.
If you come up along the side wall and you perforate the side wall, you will run into the vertebral artery. That will then cause the patient to have a stroke, so you have to stay away from those two side walls.
So that's why the resection is internal, top side and bottom side, with leaving those walls -- side wall right, side wall left, and front -- alone. So the front and the middle can accommodate a screw, and the side walls are left alone to protect the vertebral arteries.
Q. Would you be able to identify the portion of the vertebral body that you resected on an X-ray?
A. Yeah. You can -- like I said, you know, the X-ray is a -- it's a two-dimensional representation of a three-dimensional thing, so you have to look at both views.
And so if you look at the side view, you can see that the side walls remain intact. If you look at the front-to-back view, you can see that the C6 vertebral body as it is in this model is a little bit smaller in the area that it can accommodate that screw.
Q. How much smaller -- what is the measurement of the C6 vertebral body postsurgery?
A. So when you say "measurement," I'm not -- I'm not sure

what you're saying.
Q. You just indicated that it would be smaller.
A. Correct.
Q. So in relation to what?
A. In relationship to the adjacent vertebral bodies.
Q. So in Mr. McGill's case, what's the measurement of the C6 vertebral body?
A. So on the front-to-back view on this projection, if you look at the vertebral body on the top, where the top screw is, you can see that the vertebral body in the middle, the middle portion of that vertebral body is -- you know, we're just qualifying it. We're really not quantifying it.
Q. Make sure everybody can see it.
A. But you can see that it's missing its top third and it's missing its bottom third, and it's middle third is there.
Q. When you say you're qualifying and not quantifying, explain that.
A. Well, I mean, I'm just eyeballing it right now, as I was, of course, eyeballing it during the surgery itself, because we don't really -- we're not using, you know, a ruler while we're working on somebody's spinal cord, but we're taking out everything that we need to take out in order to get everything decompressed whilst leaving that middle portion of the bone and whilst leaving the side walls.
Q. Sure. And when you say you resected 50 percent of the

C6 vertebral body, are you indicating that that could be 51 percent or 49 percent or something else?
A. Sure. I mean, because we're not -- we're not making an exact measurement of it, but it's an honest representation of the amount of skill and work necessary to make sure that the cord and roots were decompressed without causing any damage and doing an effective surgery that actually helps the patient and prevents them from getting worse.
Q. But making that note in your operative report of 50 percent, you could then suppose --
MR. THOMAS: Objection.
Q. -- based upon your --
MR. THOMAS: Objection to any supposition, Judge.
THE COURT: Sustained.
Q. Based upon your -- your training and the years of doing these types of surgeries, you wouldn't say 50 percent resection if you had resected, for instance, 40 percent?
MR. THOMAS: Objection.
MR. SARDINO: He just said he doesn't use a ruler, Judge.
THE COURT: Overruled. Overruled.
You can answer.
A. Yeah. I mean, you're making an operative -- it's an operative interpretation of the amount of work that was necessary in order to thoroughly and safely decompress the cord

and the roots by removing both the top and bottom portion of that vertebral body. And it's the time and effort involved and the amount of bone that you have estimated that you have actually removed.
Q. So that -- that's based upon your training and your experience doing the surgeries over many years, correct?
A. As it is for all surgeons, yes.
Q. All right.
Doctor, if I could have you, on --
MR. SARDINO: If you could hand the marker to the doctor.
Q. If you could draw an arrow to the C6 vertebral body on both X-ray C and D.
A. (Witness complying.) It doesn't quite show up. I mean -- yeah, no, it did. It showed up. It's just a little light.
MR. SARDINO: Judge, if I could have those shown to the jury?
THE COURT: You may.
(Whereupon, the photographs were published to the jury.)
THE COURT: C and D are being published to the jury at this time.
COURT OFFICER: Your Honor, both images of the X-ray have been published to the jury.

MR. THOMAS: Your Honor, I know I'm chopped liver, but can I see them too? Thank you.
THE COURT: Of course. Thank you very much. I appreciate it.
Q. Now, Doctor, handing you back Exhibits C and D. Could you mark with the red marker the area of the C6 corpectomy that you performed on May 26th, 2021?
MR. THOMAS: Objection, Your Honor. May we approach?
THE COURT: You may.
(Whereupon, a side-bar discussion was held amongst the Court and counsel.)
(Open court.)
THE COURT: Okay. After a brief bench conference, I heard what counsel did say about making an objection. I'm overruling the objection, and counsel will proceed with my instruction.
MR. SARDINO: Thank you, Judge.
Q. So, Doctor, with the -- with the red marker, if you could make a box around the C6 vertebral body that you performed the corpectomy on.
A. You want me just -- I mean, I put an arrow showing -- or do you want me to show the level of the corpectomy or --
MR. SARDINO: Okay. Strike that.
Q. So the arrow, the red arrow that you made, shows the

actual vertebral body that's in place as of the time of that X-ray, correct?
A. Yes.
Q. And that X-ray is September 15th of 2021?
A. Yes.
Q. Okay. Now I want you to place a box around the -- the bone in the corpectomy area that you removed. And what's left?
MR. THOMAS: Objection, Your Honor. You can't put a box around bone that's been removed.
THE COURT: I'm going to sustain it as to form. If there's another way that we could do it.
Q. Doctor, can you show the jury the area of the C6 corpectomy?
A. Yeah. What I -- I mean, what I can show on the X-rays is where that -- the bone was removed, yeah. I mean, I'm going to put the marker and I'm going to show the level of where those -- that -- the level to the extent of where the bone itself was removed, sure.
Q. Can you place a box around that area?
A. No. You can't really -- I mean, you can't box it. I mean, I would have to show the top border and the bottom border. You can't really -- it's not like -- you can't put that in a box.
Q. Well, it's the width of the vertebral body, right?
A. But it's more than just the width.

Q. Right. There's a top and a bottom.
A. Right.
Q. There is a height and a width.
A. Right.
Q. Okay. On one of the X-rays you can show the height, correct?
A. So -- yes. So what I can do is on the -- on the side view, I can show you the extent of the -- the top vertebral body area where the corpectomy went down to and on the bottom portion of the vertebral body where it went up to.
Q. Right.
A. And then I can do the same on the other view. But I think I can do that by showing it as -- as a line in that area.
Q. Go ahead and do that for us, please.
A. Okay. (Witness complying.)
MR. THOMAS: And just so we're clear, Judge, he's using the same red marker for this indication.
THE COURT: Understood.
And for purposes of making it clear to the jury, I am going to ask that counsel delineate what the lines are referring to and a key so that the jury can properly evaluate it at the appropriate time.
MR. SARDINO: Thank you, Judge. We will make that key and put it on the back of the X-rays.
A. (Witness complying.) Made a little mistake here. Now

nothing's coming out, unless you have an alcohol wipe.
Yeah, the marker was kind of thick, so I made a mistake on the bottom part.
Q. Okay.
A. But you know what? I can fix it by putting another line there. Hang on one second.
MR. THOMAS: Judge, we're going to have to bill for a surgical procedure on this matter.
THE WITNESS: But I need a better tool.
A. Okay. So I got some lines on these things.
Q. And first with regard to -- what's that X-ray you have right there, Doctor?
A. This is the front-to-back view.
Q. On the back, is it -- can you tell me what exhibit number it is? I apologize.
A. C.
Q. Exhibit C.
A. Yes.
Q. Showing the jury what you've just marked with the red marker, same red marker --
A. Right.
Q. -- can you tell the jury what you just placed on there.
A. Yeah. So the top -- there are three lines here because the bottom line -- I was off on the bottom line.
The middle line is the bottom of the vertebral body up

to the area of the resection.
The top line is the top of the vertebral body up to the area of the resection.
So it's the top line, top level of resection; bottom line, bottom level of resection. On this, this is the -- known as the AP view or the front-to-back view.
Q. So on Exhibit C that you have in front of you, the -- the bottom red line --
A. Is a mistake.
Q. -- is a mistake.
A. Yeah, I'm sorry.
Q. And that should be disregarded.
A. That's my bad. Yes.
Q. Just want to make sure that that's clear for the record.
MR. SARDINO: Can we have that published to the jury, Judge?
THE COURT: You may.
And Mr. Thomas, you will have an opportunity to look at this as well.
MR. THOMAS: I appreciate it, Judge. Thanks. I feel very included now.
(Whereupon, the photograph was published to the jury.)
COURT OFFICER: Exhibit C has been published to the

jurors.
MR. THOMAS: Thank you.
Q. Now, Doctor, on Exhibit D, can you also show us -- that's the side view?
A. Yes.
Q. Can you also show us using that red marker the area that you performed the corpectomy --
A. Sure.
Q. -- on Mr. McGill?
A. Sure. So I drew the two lines on the side view as well. And the side view is going to be a little bit different than the front-to-back view because when you have a side view, just like the model, you'd see that the screw here is kind of like in the middle of the vertebral body. But if you look at it from the side, the side view, it looks like the screw is going kind of like across the entire vertebral body. So it's more difficult to put the line on this one, but I put it in the approximate location.
MR. SARDINO: If we could have that published to the jury, Judge.
THE COURT: You may.
(Whereupon, the photograph was published to the jury.)
THE COURT: Exhibit D has been published to the jurors.

MR. THOMAS: Thank you.
Q. Doctor, can you tell the jury why you would take postoperative X-rays.
A. There's a lot of reasons you could take postoperative X-rays. Sometimes patients are having some pain and symptoms, and you may take an X-ray to see whether or not there are any problems with the way the bones have lined up or if there's an issue with the bones at all. Sometimes you may take an X-ray to see whether or not things have fused. So, you know, it depends on what the specific reason is for the X-ray.
Q. In Mr. McGill's case, why did you order a postop X-ray?
A. So let's see. So it looks like I had done a telemedicine with him on August 17th. Hang on one second.
Nope. I want to go to right before this one. Hold on.
So he was -- so when I saw him on September 13th of '21, he was having some stiffness in his neck, which was a little bit concerning. Stiffness is normal and you can have that postoperatively, but there was definitely a concern because he was having some stiffness in his neck.
And as part of that concern, I had wanted to do the X-rays, and I had also requested some physical therapy and pain modalities. So he was having some postoperative symptoms that I wanted to X-ray.
Q. And, Doctor, on Exhibit C, we're able to visualize the partial vertebral corpectomy with resection of 50 percent of the

C6 vertebral body, correct?
A. Actually, when I wrote my note in November, I said that it looked like he had a solid arthrodesis. So at this point in time, he had started to actually heal his partial vertebral corpectomy, and his areas looked like he had started to have some good bone growth in those areas, and everything looked to be pretty solid.
Q. To a trained physician who reads films, such as yourself, you would be able to determine the difference between the bone that was natural to Mr. McGill's body versus the graft in a procedure that you perform, wouldn't you?
MR. THOMAS: Objection, Judge. I don't think I understand the question.
THE COURT: Overruled. I will -- to the extent the doctor does, he can answer it.
A. Yeah, I'm not -- I'm -- honestly, I don't -- is there another way to ask it?
Q. Sure. You can see the postsurgical changes in the X-ray of September 15th, of 2021, correct?
A. Yes, you can see postsurgical changes.
Q. And you can see the procedure that you performed on May 26th of 2021, correct?
A. Yes. You can see the implants.
MR. SARDINO: Okay. Thank you, Doctor. That's all I have.

THE WITNESS: Not a problem. Thank you.
THE COURT: Okay. Mr. Thomas?
MR. THOMAS: Thank you, Judge.
REDIRECT EXAMINATION
BY MR. THOMAS:
Q. Doctor, there's all this talk about C6-C7. Can you tell the jury why there are two numbers to describe the disc as it relates to the vertebral bodies?
A. Sure. So the disc is -- is like the cream filling of an Oreo cookie. One vertebral body is the Oreo cookie on top, the other vertebral body is the Oreo cookie on the bottom, and the stuffing in the middle is the actual disc itself.
Q. And is that why, when you talk about the C6-C7 disc, it's the -- it's the bottom of the C6 vertebrae and the top of the C7 vertebrae? That is the disc that we're identifying?
A. Correct.
Q. And counsel kept asking you questions about the removal of the bone in the anterior portion of the vertebral body, and you said you have to be careful about the side walls.
A. Yes.
Q. The blood supply in that area, tell us again why it's so important to maintain those side walls in the cervical spine?
A. Yeah, it's actually about the blood supply to your brain.
So, you know, your heart puts out your aorta and then

you get these big arteries that come up into your neck. One of them is your carotid artery. So the carotid artery is traveling up into your brain, but there's a branch that comes off of the carotid that travels through this little tunnel up alongside the vertebral bodies, and that's called the vertebral artery. And it's called the vertebral artery because it's actually inside the vertebra, directly adjacent to the side wall of the vertebra. So it's on both sides, right and left.

So that vertebral artery travels up into the base of your -- through the base of your skull into the bottom portion of your brain to supply your brain with blood that it needs.

So you -- you've got to stay away from those areas; otherwise you'll have a -- you know, a stroke or an infarct or something.

Q. And are those -- is that vertebral artery in the lumbar spine as well, in the low back?

A. No, it is not.

Q. Counsel asked you about the -- the use of the bone that you removed, mixing it with the allograft and then putting it into a cage.

When you take that mixture and you put it into the cage, where does the cage go?

A. So you -- so the -- so that cage has -- there's an opening in the middle, so it's kind of empty in the middle, so you're packing bone in there. And you're also packing bone

below it and above it.

And then what happens with that cage is, in this case -- and you can see it on this model as well -- as you're sliding the cage into the zone, you -- it's called press-fit because you're pressing it to fit it in between the bones up along the area where the inner portion of the walls that you left intact are, so that it stays essentially in that middle zone and it protects the bone graft that's inside, the bone graft that you've put on top, and the bone graft that you've put on the bottom.

Q. Couldn't you just squeeze that cage in and not remove the bone?

A. No. You have to make -- so you -- the problem with just squeezing the cage in and not removing the bone is that if you do that, then you could either throw off where all the other bones are or you could cause more pressure to the cord and the nerve roots.

Q. So you have to remove the anterior portion of the vertebral body to be able to fit that cage in to the space where the disc was.

A. Correct. You have to move vertebral body in order to safely, safely, be able to get that cage in, correct.

Q. And you said you removed the vertebral body on both the top and the bottom of that level.

A. Yes.

Q. And how many cages did you put into Mr. McGill's neck?

A. Two.

Q. And did you remove enough bone to be able to situate the cage with the bone mixture into -- safely and adequately into Mr. McGill's neck?

A. Yes.

Q. Without affecting the vertebral artery?

A. Correct, yes.

Q. Was this medically necessary for Mr. McGill, based on the condition that he presented with?

A. Yes.

Q. And the procedure that you used, was it appropriate for the goal that you were trying to achieve?

A. Yes.

Q. And did you remove enough bone, as I said, to safely put the cages in and still have enough room for these screws to fixate on the -- or stabilize the vertebrae once the bodies were fused?

A. Yes.

(Whereupon, Senior Court Reporter Anne Brown was relieved by Senior Court Reporter Karen Mangano.)

Q Now why is it important to still have bone for the screws?

A Because you have to provide a scaffold in this area so that none of this stuff is going to move around when he gets up and walks. And if you look at the plate, its got a screw directly in the middle of, and putting that screw in the middle of that plate on to the C6 vertebral body makes sure that that area is stabilized and does not cause any damage.

Q Doctor, you were actually in Mr. McGill's neck; correct?

A Yes.

Q You had direct visualization, meaning your eyes were looking at his spinal column.

A Yes.

Q And did you remove -- did you remove adequate bone to successfully perform this procedure?

A Yes.

Q Did you leave enough bone to successfully allow fixation?

A Yes.

Q And was the procedure successful from that point of view?

A Yes.

Q You didn't do more than you needed to do; did you?

A No.

Q You didn't do less than you needed to do; did you?
A No.
Q You did exactly what you needed to do.
A Yes.
Q Would you say the amount of bone that you removed was minimal?
A No.
Q And counsel was asking you about operative interpretation.
Do you remember that?
A Yes.
Q Who is in the best position to make an interpretation of the procedure that you were performing in terms of the disc, the vertebral body, the bone? Who is in that best position to make that decision?
A The operative surgeon.
Q That would be you.
A Yes.
Q And you've done that many times before?
A Yes.
Q Because of your knowledge and experience, this surgery was considered successful in stabilizing Mr. McGill?
A Yes.
Q You didn't heal him; did you?
A No.

Q You didn't put him back in the position he was in before this accident; did you?
A No.
Q And those levels will permanently be fused and never be able to move, twist, turn the way they did before those levels were fused together.
A Yes.
Q And this is permanent in nature; correct?
A Yes.
Q And counsel had you mark x-rays. I believe it's Defendant's C and Defendant's D.
A Yes.
Q You also did MRIs; correct?
A Yes.
Q And the MRIs also show the area where you removed bone and put in a cage and added the plate for the locking screws; correct?
A Yes.
Q So these images are only two views; correct?
A Yes.
Q This is not a 360-degree view of what was done; correct?
A No.
Q And the MRIs give you a different view than what these x-rays show.

A Yes.
Q I don't know if I asked you before, and if I did, I'm sorry.
Can Mr. McGill every anticipate a plate, the screws or the cage being removed from those levels of his cervical spine?
MR. SARDINO: Objection as to Mr. McGill's state of mind or anticipating.
THE COURT: I'm going to sustain as to form.
Q As the doctor who performed this surgery, would you expect to remove these screws, plates and cage that you had implanted into Mr. McGill as a result of the injuries of this accident?
A No.
MR. THOMAS: Thank you, your Honor. I have no further questions.
MR. SARDINO: Just a little bit follow-up, Judge.
THE COURT: Okay.
RECROSS EXAMINATION
BY MR. SARDINO:
Q When you're referring to C6/C7, you're referring -- you're referring to the area in between the C6 vertebral body and the C7 vertebral body; correct?
A Yes.
Q And that amongst other things has the gelatinous disc in it; correct?

A Yes.
Q So the vertebral body that you did the corpectomy on is C6; correct?
A Yes.
Q You did not do a corpectomy on C7; correct?
A Correct.
Q And Doctor, you take x-rays, whether it's pre-op, post-op; you take MRIs, whether it's pre-op, post-op. You do that to see the condition of the spine at that point in time; correct?
A Sure.
Q And as we talked about the last time, you read those films; correct?
A Yes.
Q And radiologists read those films; correct?
A Yes.
Q And you rely on those films to set forth the care and treatment plan among other things for the patient.
A They are helpful to help you know what's happening with your patient, yes.
MR. SARDINO: Thank you very much.
THE WITNESS: Thank you.
MR. THOMAS: Nothing, Judge.
THE COURT: Okay. Thank you, Doctor. That concludes your testimony. You're excused.

MR. SARDINO: May we approach before the witness is excused, Judge?
THE COURT: Okay. Doctor, one moment. I apologize.
Counsel, approach.
(Whereupon, an off-the-record discussion was held.)
THE COURT: Counsel, approach again one moment.
(Whereupon, an off-the-record discussion was held.)
THE COURT: Okay. Members of the jury, at this time the doctor is excused.
(Witness excused.)
THE COURT: And we are going to take a five-minute break.
THE COURT OFFICER: All rise. Jurors exiting.
(Whereupon, at this time the jury exits the courtroom.)
THE COURT: So Mr. Sardino, outside the presence of the jury you wanted to be heard on an issue that you raised at the bench prior to us breaking.
MR. SARDINO: Yes, Judge.
I had -- the Court had sustained an objection to my question with regard to whether Dr. Merola had been paid for his services.

The Court -- had the Court not sustained that objection, I would have shown the witness a canceled check showing Andrew Merola, M.D., For Deposit Only in the amount of $13,064.33, the same amount that was billed pursuant to the records that were certified pursuant to CPLR 3122A on May 2, 2004 (sic) that Dr. Merola testified were in fact his billing records and that amount is the same amount that is shown on the billing records.
THE COURT: Okay. Mr. Thomas, anything you wish to say with respect to that?
MR. THOMAS: Judge, not only would he open the door to the insurance issue, the check has the insurance company Liberty Mutual on it. It would have opened the door to a whole line of questioning as to who paid him and how he submits his billing to Worker's Compensation.
I believe the Court made the appropriate and proper ruling at the time to preclude this because it would have been more prejudicial than probative to allow Mr. Sardino to go through this line of questioning. I ask the Court continue to maintain that position.
MR. SARDINO: Briefly.
I would have redacted any information relative to insurance or anything that would have referenced Worker's Compensation or insurance or --
MR. THOMAS: Judge, he can't -- you can't redact

when it comes to billing codes and how Worker's Compensation billing works. You can't just have your cake and eat it too which is what he wants to do.
You either are all in or you don't do it. It's potentially opening the door and opening the door to the insurance issue. And if that's what they want to do, I'm happy to talk to him about it so we can let this jury know what the insurance coverage is here.
THE COURT: The Court upon hearing outside the presence of the jury counsel's offer of proof adheres to its prior ruling.
In addition to what was previously said when I sustained the objection, I do believe this information would be beyond the scope of what's at issue in this lawsuit and also could engender confusion to the jury that I think would distract to the main issue that are at issue, so I adhere to my ruling after the offer of proof and counsel will proceed accordingly.
I do want to make a note separate from the ruling, we do have the jury here and my understanding from what we discussed yesterday is that Dr. Merola and Mr. Thomann are the only witnesses that are going to be testifying today.
MR. THOMAS: Yes, Judge.
THE COURT: Just if I could turn to the issue of scheduling for a moment for tomorrow. Mr. Thomas, who do

you expect -- anticipate calling tomorrow?
I know from my indication from the previous list that was provided by counsel, I believe we have three witnesses on your list.
MR. THOMAS: Yes, Judge. I believe tomorrow morning we have Mr. Ronald Missun scheduled. In the afternoon it would be Mr. Stein, and of course, we will call the plaintiff.
THE COURT: Okay. Off the record.
(Whereupon, an off-the-record discussion was held.)
THE COURT OFFICER: All rise. Jury entering.
(Whereupon, at this time the jury entered the courtroom.)
THE COURT OFFICER: Please be seated.
THE COURT: Okay. Thank you, members of the jury for your patience and attentiveness.
As I mentioned yesterday, the continuation of the witnesses that you heard from this afternoon and this morning encompass the full testimony that we anticipated hearing today, so we won't have our next witness until tomorrow morning and because of scheduling issues that I discussed with counsel, I'm going to ask that you be here shortly before 11:00 tomorrow so that we can start at 11 with our next witness and then we do anticipate that should

we do so and should we be able to get through it, we may have two witnesses later for tomorrow and we may go into the afternoon as well from 2 to 4:30 after the first witness in the morning.

So 11:00 is when you have to be here so that we can hear testimony from the next witness. Okay?

And other than that, have a wonderful evening and we'll see you tomorrow.

THE COURT OFFICER: All rise. Jurors exiting.

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

THE COURT: Okay, Counsel. So I'll see you all tomorrow at 9:00.

MR. SARDINO: Very good.

MR. THOMAS: Thank you, Judge.

MR. SARDINO: Thank you, Judge.

MR. THOMAS: And thank you for the accommodation.

(Whereupon at this time the trial was continued until September 27, 2024.)

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