SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK : PART 37

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ILDO LOPES,

Plaintiff

Index No. 605044/2018

- against -

COUNTY OF SUFFOLK and
GIBSON & CUSHMANE CONTRACTING LLC,

Defendants.

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Cont'd Testimony of Dr. Merola

Friday, November 8, 2024
Suffolk County Supreme Court
Riverhead, New York

B E F O R E: **HONORABLE JOSEPH FARNETI**
Acting Supreme Court Justice

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THE CLERK: Case on trial continued.

THE COURT: Plaintiff ready to proceed?

MR. THOMAS: Yes, your Honor. I have an application.

THE COURT: Defense ready to proceed?

MR. GRILLO: Yes.

THE COURT: What is your application?

MR. THOMAS: Plaintiff will request permission to suspend testimony of Mr. Lopes and allow Dr. Merola, who has come all the way from the city, to finish his testimony. And not that one is more important than the other, Judge, but in terms of accommodating the doctor, Mr. Lopes can obviously reschedule his continued testimony, although if we are quick we can possibly do both of them today, but I would like to start with Dr. Merola.

THE COURT: I'm hopefully going to complete both today. I just need to check with my clerk with respect to the availability of the interpreters.

I'm assured that we will have the interpreters available for as long as we are scheduled today. Mr. Grillo, Mr. Puzo, do you need to be heard on the application?

MR. GRILLO: Your Honor, I would request we continue with Dr. Merola's testimony.

MR. PUZO: Agreed.

THE COURT: Let me bask in this unit of unanimity.

Have a seat in the gallery, Doctor, second row. And let's bring the panel in.

THE COURT: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: All the jurors are present. Does counsel waive roll call?

MR. THOMAS: So waived.

MR. GILBERT: So waived.

MR. GRILLO: So waived.

THE COURT: Let the record so indicate. Gallery may be seated. Counsel may be seated.

It is my understanding that we are going to proceed with continued cross-examination of Dr. Merola by defense counsel Emilio Grillo.

Dr. Merola, please stand up. And given the amount of time since the separation, Dr. Merola will be re-sworn.

COURT OFFICER: Remain standing.

CLERK: Do you swear or affirm the testimony you are about to give in this case shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: Yes, I do.

CLERK: Thank you. Be seated.

THE COURT: Because we do have a new reporter, if you can state your business address again.

THE WITNESS: 567 First Street, Brooklyn, New York

11215.

THE COURT: Your full name.

THE WITNESS: Andrew Merola.

THE COURT: Thank you, Doctor.

Mr. Grillo.

MR. GRILLO: Thank you, your Honor.

CROSS-EXAMINATION BY MR. GRILLO: (Continued)

Q Good afternoon, Dr. Merola.

A Good afternoon.

Q Thank you for coming back to court today. I appreciate it very much on behalf of all the parties. I am just going to follow up on some of questions where I left off on the day that you were here. I think it was last Friday, if I'm not mistaken.

A Yes.

Q Dr. Merola, when you were here last Friday, I asked you questions about your billing records, correct?

A Yes.

Q Remember that?

A Yes.

Q Can you confirm, sir, that as of today you still don't have your billing records here in court, fair statement?

A I have not brought in any records. My understanding is that they should be here.

Q But I told you last week that we had served a subpoena and that there were no records received?

MR. THOMAS: Objection.

THE COURT: I will allow it. I am assuming this is prefatory to a question. I will allow it.

Q Do you remember me inquiring about that?

A Yes.

Q But, you didn't bring any billing records with you here today, correct?

A Yes.

Q Can we agree, sir, that as you sit here today on November 8, 2024 you still don't know, you can't tell this jury how much you charged for your services relative to the surgery and treatment of Mr. Lopes, correct?

A I would have to look at the bill.

Q So if we had the billing records, we would know that, correct?

A Yes.

Q But we don't?

THE COURT: Is there a question?

MR. GRILLO: I will withdraw that.

THE COURT: Thank you.

Q Now, last Friday you testified about the fact that you received patients from numerous sources, do you remember that testimony?

A I do get patients from a number of different sources, yes.

Q And one of those sources being law firms that represent plaintiffs, plaintiffs' law firms like Sacks & Sacks, correct?

A Yes.

Q Do you also receive referrals from a law firm known as Gorayeb & Associates?

A I'm familiar with the name, yes.

Q Not if you are familiar, do you receive referrals from them? Do they call you and say, Dr. Merola, we have a client we would like you to look at, examine, and treat?

A I don't recall any direct phone calls from Gorayeb, no.

Q Have you had occasion, in your experience, to work or to treat patients who are simultaneously represented by the law firm Gorayeb & Associates?

A I would have to check my records. As I said, I recognize the name.

Q Have you testified in court in personal litigation of plaintiff as treating physician for patients who were represented as litigants from the law firm of Gorayeb & Associates?

MR. THOMAS: Your Honor, I will object.

THE COURT: Overruled. I will allow it.

Please answer, Doctor.

A I believe I have, yes.

Q And you believe you have. You have done that for many years?

A I have been testifying for many years.

Q For the Gorayeb firm?

A I don't know how many cases I have testified for on the Gorayeb firm.

Q Can we say more than ten?

A I wouldn't be able to guess because I don't know the number.

Q How about the law firm of Wingate, Russotti?

MR. THOMAS: Objection, your Honor.

THE COURT: I will allow it.

Q Have you received referrals in your career from that plaintiff's law firm, Wingate Russotti?

A I'm familiar with the firm.

Q Again, Doctor, I'm not asking whether or not you are familiar, I'm asking a direct question.

MR. THOMAS: Objection.

THE COURT: It's appropriate, given the response.

MR. GRILLO: Thank you.

Q I'm asking you a direct question. I know you are familiar with the firm. Have you received patients directly by introduction from the Wingate, Russotti firm?

A I can't answer that because I don't have any specific patients in mind, so I don't know if I've had any specific referrals for them on any specific cases.

Q You worked with them in the past, have you not, sir?

A I have had patients that were represented by Wingate,

yes.

Q And you have come to court and testified, have you not, sir, in courts all over the city and all over New York on behalf of the Wingate's firm, have you not?

A I have testified for patients that were represented by Wingate, yes.

Q So, okay. So then lastly, how about the law firm of Bangel, Cohen & Falconetti, have you received referrals from that law firm, Bangel, Cohen, Falconetti?

A So I can't say specifically, but they do represent injured workers that I have also taken care of.

Q Are you aware, sir, that they are a Workers' Compensation law firm?

A Yes.

Q They represent injured people in Workers' Compensation proceedings?

A Yes.

Q Would it surprise you to learn that Bangel, Cohen, Falconetti is actually Mr. Lopes' Workers' Compensation lawyer in this case?

A No.

Q So in essence, you are basically working for two different law firms when you testify here today?

MR. THOMAS: Objection.

THE COURT: Sustained at this point for lack of

foundation.

Q Are you aware of the fact that Bangel, Cohen, Falconetti is Mr. Lopes's Workers' Compensation lawyers?

A I have to look at the paperwork. If you can refresh my recollection or I can take it on your say as well, since they are comp attorneys, yes.

MR. GRILLO: Can I get a stipulation from counsel that Bangel, Cohen, Falconetti are in fact Mr. Lopes's Workers' Compensation lawyers?

THE COURT: I would have to allow you to confer with counsel in that regard.

MR. THOMAS: Judge, may we approach on this issue?

THE COURT: If there is no stip, there is no stip.

MR. THOMAS: I'm trial counsel to this office.

THE COURT: I understand. With respect to any stip, if you are not able to stipulate, that's fine.

MR. THOMAS: I'm not able to stipulate.

THE COURT: That's fine.

MR. GRILLO: I will go back to that.

Q Do you know who Howard Borowick?

MR. THOMAS: Objection.

THE COURT: I will allow it.

Can you spell that?

MR. GRILLO: B-O-R-O-W-I-C-K.

THE COURT: I believe the doctor answered he was

familiar. Next request.

Q Last Friday we talked about the lawyers from Sacks & Sacks who you had actually testified in cases with?

A Yes.

Q And Mr. Borowick was in fact one of those lawyers as well whose name I did not include last Friday. So that is another lawyer from Sacks & Sacks who you testified for in court?

A Yes.

Q Now, we spent a lot of time last Friday talking about cases that go to trial. Can we agree, sir, that based on your, I think you said 32 years of practicing --

A I guess maybe it's been a 30 years or so.

Q Call it 30.

A Yeah, 30 is good.

Q Thank you, Doctor.

-- your 30 years of practicing, can we agree that I think you have knowledge of the fact that only a small percentage of cases actually go to trial and get to this stage?

MR. THOMAS: Objection, your Honor.

THE COURT: I will sustain it as to form. Sustain the objection as to form only.

Q Doctor, are you aware as to only a small percentage of law litigation going to trial, are you aware of that?

A I don't know the specific numbers, but I know less likely go to trial than do.

Q That's what I was trying to get at. Thanks for expanding on that.

As a matter of fact, there are hundreds of patients that you have who are actually involved in litigation that may not go to trial, correct?

A I would have to take a look at all of patients that I'm treating to give you that answer.

Q Would you be able to give me an estimate of how many -- withdrawn.

How many patients do you currently have that you currently treat?

A I don't know. I would have to go look at all of my files.

Q More than a hundred?

A Sure.

Q More than 200?

A Over 30 years, yes.

Q No, I'm talking at present.

A At present, I don't know.

Q More than a hundred?

A There are presently likely more than a hundred patients under my care, yes.

Q More than 200?

A Once again, guessing is not --

THE COURT: Don't guess.

A I can't guess, so I can't give you a number.
Q Would it be more than 500?
A That would be a guess.
Q Doctor, can we agree or can you agree with me, Doctor, that you currently have patients you are treating right now, November of 2024, who are involved in active personal injury litigation?
A Sure.
Q What percentage of your practice is made up of personal injury litigants?
MR. THOMAS: Objection.
THE COURT: I will allow it, if he knows.
A I do not know.
THE COURT: Next question.
Q Is it more than 50 percent of your practice or less?
A I do not have a number, I don't know.
Q Doctor, what is spondylosis?
A Spondylosis refers -- is a general term that refers to a degenerative conditions involving the vertebrae.
Q And can you maybe expand exactly when you say general condition, what do you mean by that?
A Degenerative.
Q Sorry. What do you mean by that?
A Typically associated with a normal aging process.
Q I think we talked about this on Friday. By the age of

30, your spine starts to degenerate?

A Yes, 30 is a good age, plus or minus ten years or so is about reasonable.

Q Now, Doctor, as far as Mr. Lopes is concerned, can we agree, sir, that he was diagnosed with spondylosis before you saw him?

A Yes.

Q Can we agree, sir, Dr. Merola, that Mr. Lopes was diagnosed with impingement syndrome prior to you seeing him?

A I don't know. I'm not familiar with his previous impingement syndrome diagnosis.

Q I showed you some records.

MR. GRILLO: May I have Defendant's Exhibit A, your Honor?

THE COURT: I believe those are Dr. Shein's records.

MR. GRILLO: Yes, sir.

THE COURT: In evidence.

Q Now, Dr. Merola, fair to say you have never seen this document before today, correct?

A I think we actually saw them last week, if I'm not mistaken, and I believe I've seen Dr. Shein's records, yes.

Q I didn't show you this one on Friday, I can make that representation.

A Okay.

Q We gave you a sheaf of paper, some about shoulder

injuries, but I can make the representation you did not see that Friday.

THE COURT: Let me correct you. You didn't present it last Friday. Whether or not he saw it, I will have to wait for his testimony.

MR. GRILLO: Yes, sir. Thank you.

Q I did not present it last Friday. Have you seen it since last Friday?

A Since last Friday, no.

MR. GRILLO: May I approach the screen, your Honor?

THE COURT: If you would like to draw the doctor's attention. Just be mindful of the jury's perspective.

Q Doctor, "History: Doctor claims he had seen me before questioning him. He had been assessed in this office by Martha Castro in the past. Martha has been assessing him as having impingement syndrome with spondylosis lumbar spine."

What is impingement syndrome, Doctor?

A Impingement syndrome typically refers to the shoulder.

Q With respect to spondylosis with the lumbar spine, what does that refer to?

A Generalized degenerative changes in the lumbar spine.

Q Now, there is some -- I don't want to talk about the shoulder. Down five lines below, "In followup with Martha, it appears that he has only been followed for his low back. His shoulder symptoms have actually settled down significantly. The

patient is not working. The reason he is not working is because of his low back and his shoulder problem."

So can we agree, Doctor, as of March 1, 2017, Mr. Lopes was not working because of low back problems?

A Yes.

Q Are you aware of the fact that prior to this date, Mr. Lopes had been involved in a motor vehicle accident?

A Yes.

Q And were you also aware of the fact that Mr. Lopes had received trigger point injections in his lumbar spine?

A Yes.

Q Can you tell the members of the jury why trigger point injections are administered?

A Sure. A trigger point, the trigger point referring to an area of muscle that is tender and in spasm. And trigger point injection is generally an injection that is administered in the muscle that is palpated to be painful, spastic, and tender.

Q So we can agree if Mr. Lopes testified about receiving injections to his lower back prior to March 1, 2017, he had back problems before March 1st of 2017, fair statement?

A Yes.

Q Thank you, Doctor.

Now, Doctor, as you sit here today, are you affiliated with any hospitals?

A Sure.

Q Which hospitals are you affiliated?

A New York Presbyterian.

Q You gave an address last Friday where you see patients in Manhattan. Is that a hospital or somewhere else?

A No, it's a building, not affiliated with the hospital.

Q Now, as far as patient referrals, we talked about referrals from plaintiffs' firms. You said you receive them from other sources. What other sources do you receive patients from?

A Hospitals, hospital emergency room, urgent care centers, physiatrists, neurologist, pain management physician, general physician, sometimes non-allied medical healthcare professionals, sometimes friends and family members.

Q Thank you, Doctor.

Now in this case you received a referral from Dr. Hausknecht?

A Yes.

Q And you worked with Dr. Hausknecht on cases in the past. I think you testified to that on Friday where he is the neurologist, you are the spine surgeon, fair enough?

A Yes.

Q And that is what happened here, he referred him to you?

A Yes.

Q Now, when you saw Mr. Lopes for the first time on February 12 of 2018, I believe there contained in your notes you gave an evaluation, correct?

A Yes.

Q Did you tell him on February 12 of 2018, that you, Dr. Merola, wanted to perform surgery on him the day you met him?

A I would have to look at my note to refresh my recollection.

Q So let's stop for a second on the note. You concede, do you not, sir, that your intake sheet that Mr. Lopes filled out, you don't have that?

A Yes.

Q That has been your testimony. And forgive me if I'm wrong, your testimony is that was incorporated into your initial report, correct?

A Yes.

Q And then you threw that out?

A My office staff would be handling papers, so I personally can't tell you whether I did or didn't.

Q Typically when a patient comes to you, though, right, they fill out the questionnaire? Do you have a waiting room? I'm just trying to figure out where they fill out the questionnaire.

A Yes, sometimes in the waiting room, or sometimes in the exam room with me.

Q But they fill it out in their own handwriting, you don't fill it out for them?

A Unless they need help filling it out. There could be multiple ways for them to fill it out. It depends on the patient

and circumstance.

Q But that is the most accurate note, if you will, at the outset of your initial consultation with a patient?

A No.

Q It's not?

A No.

Q As far as the most accurate that is filled out by the patient, it is not?

A Yes.

Q So as far as what is more accurate, your recitation of what you tell them?

A Sure, because I have to combine what they said with my interview with the patient. So there may be, for example, they may miss something. It is not uncommon for a patient to perhaps forget about a certain medicine that they are taking or forget about a certain allergy or a surgery. So I re-elicit a conversation with the patient.

So my note is actually the most accurate portion of what has occurred, because it gives me an opportunity to interact with the patient and then transcribe all of the information that I was able to get from the patient.

Q But the actual initial report is put together by the patient themselves, and then you supplement, it fair enough?

A Like I said, there is an intake sheet the patient typically fills out if they fill out an intake sheet. And some

circumstances they don't even fill out an intake sheet.

Q You don't have a recollection as you sit here today as to whether or not Ildo Lopes filled out an intake sheet?

A Correct, I do not.

Q And you testified on multiple trials on the issue of whether or not you have an intake sheet?

A I have testified as to whether or not there are intake sheets, yes.

Q And you never ever produced an intake sheet in court?

MR. THOMAS: Objection.

THE COURT: I will allow it.

A I honestly do not know.

THE COURT: He is testifying, counsel. If you would like to be sworn, let me know. Next question.

Q I would like to show you the initial report that you generated February 12, 2018, which I believe is already in evidence as Plaintiff's 1.

COURT OFFICER: Plaintiff's 1 to the doctor in evidence.

THE COURT: He has them. My understanding is there is an Exhibit 1 for Dr. Merola's records as well as Exhibit 1A. He is in possession of Exhibit 1A. Next question.

Q You have that in front of you?

A Yes.

MR. GRILLO: May I have it now? I just wanted you

to see it first.

Q Dr. Merola, this is the report that you generated regarding your initial consultation with Mr. Lopes on February 12, 2018, correct?

A Yes.

Q And under past medical history, you see that?

A Yes.

Q You wrote noncontributory?

A Yes.

Q You wrote that despite the fact that he had spondylosis in his low back, despite the fact that he had received trigger point injection in his low back years before you actually saw him, you put down noncontributory?

MR. THOMAS: Objection.

THE COURT: I will allow it. You may answer.

A I wrote noncontributory for his medical history, yes.

Q I want you to assume hypothetically if we had that intake sheet and Mr. Lopes actually filled it out accurately, we potentially could have a different description of his past medical history, could we not?

MR. THOMAS: Objection.

THE COURT: Sustained. Don't answer.

Q And similarly, let me ask you this too, same report, next line down, past surgical history, are you aware as to whether or not Mr. Lopes had any surgery prior to you seeing him on

February 12, 2018?

MR. THOMAS: Objection.

THE COURT: I'm going to overrule the objection at this point but ask for clarification as to what point in time.

MR. THOMAS: What body part?

THE COURT: We will get to that. One at the time.

Q Doctor, when you talk about prior surgical history, that is a general term, isn't it?

A It can be, yes.

Q In this instance when you filled out the report on February 12, 2018, it was a general term, wasn't it?

A Yes.

Q So that is if a patient comes in on your intake sheet, there is a line there, prior surgeries, and they respond?

A Yes.

Q As you sit here today or as you met Mr. Lopes on February 12, 2018, you have no idea what his surgical history was prior to your meeting him, correct?

MR. THOMAS: Same objection.

THE COURT: I will allow it. If you know, Doctor.

A Essentially that is why I put down noncontributory.

Q Thank you, Doctor.

So now in reviewing your notes, and I will give you back the initial note. I asked you a question earlier, Doctor, about the time when you first saw Mr. Lopes if you decided to do surgery

on the first day that you saw him, and you said you --

THE COURT: It wasn't the prior question, counsel. You asked him if he had told Mr. Lopes he wanted to do surgery.

MR. GRILLO: Thank you. I will withdraw and rephrase.

Q Based on my prior question, by reviewing your records, can you determine if you told Mr. Lopes you wanted to do surgery on the first day that you met him?

A I can determine the answer to that question, yes.

Q What is the answer?

A I did not tell him that I was going to do surgery on him the day that I met him.

Q So if Mr. Lopes testified that you told him the first day you met him that you wanted to do surgery on him, his statement would be inaccurate, correct?

MR. THOMAS: Objection.

THE COURT: I will allow it.

A I'm not aware of his testimony.

THE COURT: Thank you. Next question.

MR. GRILLO: Can I have a moment to grab a transcript?

THE COURT: Take as much time as you need.

MR. GRILLO: I may need a couple minutes.

THE COURT: Like I said, take as much time as you

need.

MR. GRILLO: Your Honor, with the Court's permission, I would like to read from the deposition transcript of Mr. Lopes taken on September 25, 2020 via a video conference call in Long Island, New York.

THE COURT: With respect to that, ladies and gentlemen, I believe this is the first time we are actually using the transcript with respect to prior testimony of any witness or party to the case. Ladies and gentlemen, I'm required to give you the following instruction. Mr. Grillo is about to use a deposition, which is an examination before trial, that is an examination wherein a party or a witness is questioned under oath as Mr. Grillo has indicated when and where that occurred, who was present. And the testimony that he reads into the record with respect to this can be used as if that testimony was actually given here in the courthouse from the witness stand.

Whenever you are ready, Mr. Grillo.

MR. GRILLO: Thank you, your Honor.

Q Before I begin, Dr. Merola, I'm about to read from Mr. Lopes's deposition transcript that he gave in this case. Suffice to say we can agree you never reviewed his transcript?

A Yes, correct.

Q Correct, you never have?

A Yes.

Q And as his Honor has pointed out, all parties were present, all represented by counsel. Mr. Lopes was actually represented by David Mayer of Sacks & Sacks, so he had counsel present when asked, and gave this answer.

MR. THOMAS: Can we have the date of the transcript?

THE COURT: September 25, 2020.

MR. THOMAS: Thank you.

Q Reading from background from page 67, line five.

Question to Mr. Lopes. Was that shortly after you started with Dr. Hausknecht?

Answer by Mr. Lopes. It was after Dr. Hausknecht sent me to do MRI. Then after he send me to Dr. Colon -- I mean it was Dr. Merola.

Q: Did Dr. Merola tell you that you needed back surgery on the first date that you saw him?

A: Yes.

So now, given Mr. Lopes's testimony, do you have a recollection as to whether or not you told Mr. Lopes that he needed surgery on the very first day you met him?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer, Doctor.

A I did not tell him that he needed surgery on the first day.

Q So then we can draw the conclusion that Mr. Lopes is not being accurate?

MR. THOMAS: Objection.

THE COURT: As to form only, sustained.

Q Can we agree either you or Mr. Lopes is not being truthful?

MR. THOMAS: Same objection.

THE COURT: Sustained. Don't answer.

Q We can agree, can we not, that Mr. Lopes has given completely opposite testimony than what you gave here today in a prior proceeding?

MR. THOMAS: Objection.

THE COURT: Overruled. You can answer that.

A Can you repeat that?

Q Can we agree -- I just read Mr. Lope's transcript -- can we agree that his testimony regarding whether or not you told him he needed surgery on the first day you met him is opposite of yours, what you said, can we agree on that?

A Yes.

Q You said you didn't tell him he needed surgery. He said on the first day you met him you told him you needed surgery, correct?

A Yes.

Q On the date when you saw him on February 12 of 2018, I will direct your attention to the second page, he had already had an MRI, correct?

A Yes.

Q And you talked about what MRIs were. And one of the findings was a herniation, reading from the top line, magnetic resonance imaging scan of the cervical spine from 10/27/17 reveals herniation at C4/C5 segment. Second sentence, magnetic resonance imaging scan of the lumbar spine reveals lysis deficits, listhesis present, and herniation at L5/S1 producing severe both right and left side foraminal compression and impingement. Am I reading that accurately?

A Yes.

Q So he already had MRI of his neck and back when you saw him, and you had the studies, correct?

A Yes.

Q Isn't it true, Doctor, that in addition to wanting to perform lumbar surgery on him, you also believed he was a candidate for cervical spine surgery?

A Not at this time, no.

Q Did you make an attempt to obtain approval to perform cervical spine surgery before the lumbar spine surgery, yes or no?

A I would have to go back and look at my notes.

Q Which you don't have?

A Not with me, right, right here.

Q I will ask it a different way.

Now, Doctor, as of today, can we agree you never spoken to Mr. Lopes's treating orthopedist Dr. Shein, correct?

A Yes.

Q You have not?
A Correct.
Q And obviously we just talked about his March 1, 2017 report.
Now, in your custom and practice as a spine surgeon, Doctor, it's customary after a procedure is done that there is followup, and that the patient is sent for followup x-rays, correct?
A Yes, depending on their clinical status, but at some periods of time we do obtain post-operative diagnostics, yes.
Q And when you say post-operative, you say you follow them clinically, they come to the office, you speak to them?
A Yes.
Q And then you do an exam, and you talk to them, see how they are feeling?
A Yes.
Q And you make a decision as to whether or not the person needs a follow-up x-ray, correct?
A Sure.
Q After a surgery like this, what is the customary time in which to have an x-ray taken?
A I mean, it can vary. You can go up to a year if the patient isn't having any symptoms, you can go beyond a year if necessary.
Q And then there are cases where you could do an x-ray as

soon as a month later, if not sooner?

A Sure.

Q Right?

A Yes.

Q You don't have an independent recollection as to when the follow-up post surgical x-ray of Mr. Lopes was done in this case, correct?

A Correct.

Q If I told you that the follow-up x-ray was done on October 14, 2020, I can show you your notes if you like, but I can make that representation, can we agree, sir, that it was over a year later was the first x-ray?

A Yes.

Q No other diagnostic test film ordered by you between the date of the surgery until October 14, 2020, correct?

A Yes.

Q Now, I know you talked about there has been some testimony about a broken screw in Mr. Lope, part of that fusion that was done, one of the screws showed a fracturing?

A Yes.

Q I want you to assume that Mr. Lopes talked about the broken screw, that a screw had been broken.

MR. GRILLO: Can we see the x-ray from October 14, 2020, which I think is contained in Lenox Hill x-rays that was shown before.

THE COURT: Exhibit 12 in evidence.

In the meantime, my very capable court officer will retrieve Exhibit 12.

For the benefit of the record, can we have the identifying number in view of the film?

MR. GRILLO: Yes, your Honor.

MR. THOMAS: From Lenox Hill Radiology, taken 10/14/2020. And it's image one of one.

THE COURT: Thank you.

Q Doctor, we can agree, can we not, sir, this is the first radiographic study we have post surgery?

A Yes.

Q We can also agree, Doctor, that the broken screw was already depicted in this very first study after the surgery?

A Yes.

Q As far as the actual hardware that was placed in Mr. Lopes's spine, was there a defective screw that was placed in his spine?

A No.

Q Now, Doctor, as far as your prior testimony on Friday, despite the fractured screw, his spine remains stable, correct?

A Yes.

Q And it was stable in 2020, it is stable today, correct?

A Yes.

MR. GRILLO: Thank you. We can take that down now.

THE COURT: Thank you. You can hand that exhibit back to my officer.

Q As you sit here today, are you aware of the fact that Mr. Lopes has treated with another orthopedic surgery?

A Yes.

Q Who is that?

A I don't recall the name.

Q How do you know that?

A I believe we spoke about it last Friday, if I'm not mistaken.

Q So if I said Dr. Jonathan Abrams, would that refresh your recollection?

A Yes.

Q You never spoken to Dr. Abrams, have you, about his followup or his treatment?

A No.

Q I want you to assume that Dr. Abrams, actually Mr. Lopes visited Dr. Abrams twice over the summer, spring and summer?

THE COURT: This year?

MR. GRILLO: 2024.

THE COURT: Just so we are clear.

MR. GRILLO: Sorry.

Q I want you to assume that Dr. Abrams issued reports and made reference to the fact that there was no interbody utilized in this procedure.

MR. THOMAS: Objection, your Honor.

THE COURT: I will allow it. He asked him to assume certain facts. I'm assuming he has a good faith basis in the form of medical records. Overrule.

Q What is interbody?

A Interbody is a device that is placed in between vertebral bodies.

Q What is the purpose of interbody?

A There would be multiple purposes to using them. They typically increase the stiffness of the area that you happen to be fusing.

Q Whether or not a surgeon uses an interbody, that is a discretionary decision that the surgeon makes?

A Sure.

Q So surgeons could disagree with your protocol and what you did or didn't do with respect to treating a patient?

MR. THOMAS: Objection, your Honor.

THE COURT: Sustained as to form. They might disagree with reach other.

Q Surgeons can agree with one another as to whether or not a procedure is done one way or the other?

MR. THOMAS: Same objection.

THE COURT: Overruled. I will allow it.

A Yes.

Q Now, I want to go back to -- I think you have Plaintiff's

1 and 1A in your possession, Doctor.

THE COURT: We will have to retrieve those. Give us a moment.

While my court officer is extremely efficient, he is very possessive of our record.

COURT OFFICER: Plaintiff's 1 and 1A in evidence presented to the witness.

Q Doctor, I make reference, and take your time, with the Court's permission, I direct your attention to one of your reports dated February 28, 2022.

A Yes.

THE COURT: He has it.

MR. GRILLO: May I see it? Because I don't have it in front of me, and I will give it right back, Judge.

THE COURT: Certainly.

COURT OFFICER: (Handing).

THE COURT: Exhibit being returned to the doctor. Next question, Mr. Grillo.

Q Doctor, I just refer you to the backside of that report, second page, and there is a subheading, exertional. Can you read me that heading?

A Functional capabilities/exertional capabilities.

Q I would like to put it up on the screen with the Court's permission.

THE COURT: And this is from 1 or 1A?

COURT OFFICER: 1A.

MR. GRILLO: Thank you, your Honor.

Q You just read functional capabilities/exertional capabilities, I just want to read it and make sure I'm reading it accurately.

"Lifting and carrying occasional 10 pounds. Pushing and pulling occasional 10 pounds. Sitting occasional. Standing occasional. Walking occasional. Climbing never. Kneeling never. Bending, stooping, and squatting never. Simple grasping frequently. Fine manipulation frequently. Reaching overhead never. Reaching at or below shoulder level occasionally. Driving a vehicle occasionally. Operating machinery never. Temperature extremes and high humidity never. Environment hazards, never. This places this gentleman into a category of sedentary work."

What is sedentary work?

A So those go along with a definitions book regarding the abilities. For example, the occasional and nevers, there is a definition for those. They are all based on an eight-hour workday. So never is less than one-third of that workday, doesn't mean never, just means less than one-third. Occasional means more than one-third. And there are also definitions for types of work that are available. And that includes sedentary, which would be the capacities that are indicated here, including the lifting capacities. And it goes up to a category of light work, medium work, heavy work, or total or full capabilities.

Q I will turn this over to go back to the date. And if you need me to turn it back, let me know.

A Sure.

Q So we can agree, sir, that as of February 28, 2022, you, as his treating orthopedic spine surgeon, classified him as capable of sedentary work, correct?

A Yes.

Q So he could go back to some type of work as of that date, based on your treatment?

A That's correct, yes.

Q Can we agree also, sir, that other doctors may agree with that assessment, and they can very well disagree with it?

MR. THOMAS: Objection.

THE COURT: I will allow it, if he knows. If he is comfortable, he may.

A Sure. Other doctors based upon their specialty or opinion, they can agree or disagree, yes.

Q I know we have seen and the jury has seen a lifecare plan that you formulated in connection with this case.

THE COURT: Exhibit 18 for ID.

MR. GRILLO: Thank you. May we have it?

COURT OFFICER: Shown to the witness?

MR. GRILLO: Yes.

COURT OFFICER: Plaintiff's 18 for ID only presented to the witness.

Q Just look at it, and we can have it back, and I will display it.

A Yes.

MR. GRILLO: With the Court's permission, I will switch out this report to go back that Plaintiff's 1, and we can utilize the other.

THE COURT: In terms of publishing 18 to the jury, it has only been marked for identification.

MR. THOMAS: I offered it into evidence, Judge.

MR. GRILLO: Judge, I'm not looking it publish it yet.

THE COURT: It is not in evidence, so I cannot display it.

MR. GRILLO: I'm not going to display it then, Judge.

MR. THOMAS: Okay, I might change my mind.

MR. GRILLO: I want to ask a couple questions first.

Q Dr. Merola, you put forth a lifecare plan, correct, for Mr. Lopes?

A Yes.

Q And that is a lifecare plan based on your assessment of him as treating orthopedic surgeon, correct?

A Yes.

Q And can we agree, sir that you are not a certified rehabilitation counselor, you have no designations as far as that

is concerned, correct?

A Yes.

Q You're basing this potential lifecare plan just based on your status as an orthopedic spine surgeon?

MR. THOMAS: Objection.

THE COURT: He can answer yes or no.

A Yes.

Q You never conducted a vocational assessment of Mr. Lopes, have you not?

A Correct.

Q So you never had given him a full examination with respect to his capabilities and what available positions are out in the workforce, correct?

A Yes.

Q I want you to assume that yesterday we heard from Mr. Sara Ford, who is a certified rehabilitation counselor, and she came in and talked about economics, but she too did not do a vocational assessment of Mr. Lopes, are aware of that?

A I'm note aware of yesterday's testimony, no.

Q Now, Dr. Merola, I will just double check. I will ask you a series of questions now. I would like you to answer to the best of your ability.

Have you knowingly profited from alleged medical and diagnostic services rendered as part of a fraudulent enterprise including determination of services to be allegedly performed, and

orchestrated the submission of fraudulent claims for healthcare services?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer, Doctor.

A No.

Q Have you ever knowingly profited by furthering a fraudulent treatment protocol by falsely submitted evaluations that opined individuals were disabled when they were not and by performing unnecessary procedures?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer, Doctor.

A No.

THE COURT: Next question.

Q Doctor, have you ever individually or in concert with others knowingly participated in fraudulent purported evaluations and treatment with the intent to subject individuals to medically unnecessary injections and surgery in order to further a fraudulent enterprise?

MR. THOMAS: Objection.

THE COURT: Overalled. You may answer.

A No.

Q Doctor, have you ever individually and or in concert with others knowingly participated in fraudulent statements that alleged injuries are causally related to an alleged incident in order to further a fraudulent enterprise?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer.

A No.

Q Doctor, do you know an orthopedic surgeon by the name of Anton Jorgenson?

A No.

Q Are you aware, sir, as you sit here today, that Dr. Jorgenson has alleged that you have performed --

MR. THOMAS: Objection.

THE COURT: Sustained. Don't answer.

MR. THOMAS: Move to strike.

THE COURT: Motion to strike granted.

Jury will be reminded that a question without an answer is no evidence as all. Next question.

Q Now, Doctor, has a Dr. Grimm, a principal of New York Orthopedics, ever referred injured individuals to you for unnecessary evaluations or surgery?

MR. THOMAS: Objection.

THE COURT: Sustained. Don't answer.

Q Doctor, have you controlled or directed medical services to individuals that included evaluating and performing surgeries that were not medically necessary and not causally related to an accident?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer.

A No.

Q Doctor, have you ever intentionally submitted or caused submission of fraudulent medical documentation by mail, facsimile, and or email to the New York State Workers' Compensation Board and others involved in an injured workers claim for authorization and to seek reimbursement for medical services that were unnecessary, excessive, and or unwarranted and were not causally related to the alleged workplace accident?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer, Doctor.

A No.

Q Doctor, have you ever provided fraudulent medical documentation by mail, facsimile, and or email to other medical service providers knowing that the fraudulent medical documentation would be used or relied upon to render additional medical services that were unnecessary, excessive, and or unwarranted and were not causally related to the alleged accident?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer, Doctor.

A No.

Q Doctor, have you ever provided fraudulent medical documentation by mail, facsimile, and or email to the law firm known as Gorayeb & Associates --

MR. THOMAS: Objection.

THE COURT: Let him finish the question.

MR. THOMAS: Sorry, Judge.

Q -- knowing that the document would be used to falsely bolster and add value to an individual's injury lawsuit, thereby inflating the settlement of such lawsuits?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer.

A No.

Q Doctor, have you profited from reimbursement from alleged diagnostic services that you rendered that were unnecessary, excessive, and or unwarranted and were not causally related to the alleged accident but were rendered in furtherance of a fraudulent scheme?

MR. THOMAS: Objection.

THE COURT: Overruled. You may answer.

A No.

Q Doctor, have you knowingly profited from an increased number of patients who were referred to you?

MR. PUZO: Objection.

THE COURT: With respect to this, I will have to have a brief discussion with counsel outside the presence of the jury.

Ladies and gentlemen, do not discuss any of the case, do not discuss the case amongst yourself. All rise as jury exits.

(Whereupon, the jury exited the courtroom.)

THE COURT: The purposes of the record, Mr. Thomas, and counsel, you are all familiar with my in limine decision in writing on 10 June, 2024, are you not?

MR. GILBERT: Yes, your Honor.

MR. GRILLO: Yes, your Honor.

MR. THOMAS: Yes.

THE COURT: And with respect to that decision, the Court made specific reference to a federal RICO complaint, specifically with respect to paragraphs 176 through 180 of the complaint inclusive, as well as paragraph 319 of the complaint with respect to specific allegations as to the re-insurance and insurance companies' physician who reviewed Dr. Merola's treatment records, with respect to Dr. Jorgenson, are you not?

MR. THOMAS: Yes, your Honor.

MR. GRILLO: Yes, your Honor.

THE COURT: Mr. Grillo, I gave you some leeway in this regard. You are bound by Dr. Merola's answers. That concludes any additional reference in this regard based upon my decision.

MR. THOMAS: Your Honor, may I be heard?

THE COURT: I will give you the last word.

MR. GRILLO: Judge, I have an exception to it.

With respect to this, there is specifically certain findings in my decision with respect to certain sworn allegations with respect to that complaint.

THE COURT: Anything else you would like to add, Mr. Grillo? But I give Mr. Thomas the last word.

MR. GRILLO: Yes, your Honor. You sustained an objection regarding my first -- I have, for the Court's edification. I'm sure you are aware, there are four pending lawsuits involving specific allegations akin to the same allegations that were made in the Roosevelt Road Tradesman litigation involving Dr. Merola as a defendant as well the Gorayeb firm. I appreciate the Court affording me that latitude with respect to that.

Your Honor, we utilized the same good faith rationale behind your order to make reference to specific allegations in the underlying facts of the three other pending litigation specifically against Dr. Merola.

THE COURT: I understand your point, Mr. Grillo. But with respect to the good faith discussion and consideration by this Court of the universe of them existing or at least represented to the Court in conjunction with the in limine motion, the only information of prior litigation had to do with the single RICO suit that was presented to the Court. And my review of the record does not indicate the mention of any additional RICO litigation. It does not indicate the existence of any additional similar lawsuits in whatever jurisdiction that have been brought to this Court's attention in the context of this litigation.

I'm used to dealing with -- I will be careful with my adjectives. The universe that this Court was aware of was as contained in its decision with respect to my rule on 10 June of 2024.

Mr. Grillo, were any of these other allegations in the form of a proactive in limine application either by plaintiff or defendant with respect to the use of any additional lawsuits, any additional allegations ever brought to this Court's attention before today, yes or no?

MR. GRILLO: No, your Honor.

THE COURT: Yes or no?

MR. GRILLO: Not by the defendant.

THE COURT: I believe the answer would be no.

Anything else you would like to add, Mr. Grillo?

MR. GRILLO: Yes, Judge. With respect to my inquiry regarding Dr. Jorgenson, your Honor sustained an objection when I posed an objection, and --

THE COURT: It was the phrasing of the question, sir, that I found objectionable. I know quite well that paragraph 319 of the RICO complaint, the only complaint of which this Court was ever made aware of by anyone, Dr. Jorgenson did form a conclusion with respect to the allegations with respect to expertise concerning whether surgeries were warranted in certain instances based upon medical records and images found in more than one case.

With respect to that, I specifically issued a written decision to define the universe that would be part of the record developed on this trial. You have gone beyond the bounds of that decision without notifying the Court, without discussing it with your adversary of your intention to do so. And I find that, sir, reprehensible.

You have an application, Mr. Thomas?

MR. THOMAS: I want to let him finish.

MR. GRILLO: With respect to you finding it reprehensible, I believe I stayed with the bounds of your reasoning.

THE COURT: With respect to reasoning is one thing. Has this Court had an opportunity to review any of those other lawsuits? Was this Court afforded that opportunity by defense counsel or plaintiff's counsel or anyone else, yes or no?

Other than the case that I reviewed, which was contained in my decision of 10 June, 2024, has anything else ever been brought to my attention of a similar nature or in this regard? Yes or no without explanation? Yes or no, Mr. Grillo?

MR. GRILLO: No by the defendant, your Honor.

THE COURT: Thank you.

Anything else you would like to add?

MR. GRILLO: Yes, I would, your Honor. And

specifically I believe the genesis or the basis of your decision --

THE COURT: I'm glad you can read my mind, and I'm glad you are exercising my jurist discretion.

MR. GRILLO: Not my intention, your Honor.

THE COURT: It may not be your intention, sir. Go ahead.

MR. GRILLO: Not my intention, Judge. However, Judge, with respect to the Court's directive, the decision based on the motion in limine, your Honor, it was a motion that was filed by plaintiff's counsel. I don't believe respectfully, your Honor, that it is incumbent upon me to make -- now I understand the difference of opinion with your Honor. And I'm not taking issue with it, but I don't --

THE COURT: You may.

MR. GRILLO: No, meaning I understand your reasoning your Honor. But I don't see that this -- I believe it is incumbent. It is no secrete, your Honor, for the plaintiff's counsel, it is not as if they are not aware of these other pending litigation.

If you recall, this history of this motion in limine, your Honor, they have Dr. Merola posed to testify on March 15 of 2024. They served their motion in limine the night, the afternoon before. And at that point, we made the application --

THE COURT: I believe it was unanimous consent with respect to taking a step back and determining where we might be as a result of that disclosure.

MR. GRILLO: Correct. But I don't believe, respectfully, your Honor, that it is incumbent upon the defendant to basically seek leave of the Court to inquire as to other litigation if I'm staying within the bounds of your reasoning, your Honor.

Respectfully, Judge, to term it as reprehensible, I don't think that is appropriate because I think you have seen me long enough --

THE COURT: Mr. Grillo, I have nothing but the utmost respect for you. The point I'm trying to make by the use of that characterization is, in my part we put the cards on the table, we put all the cards on the table. It would have been a much better practice, much more politic practice to bring to my attention the intention you may feel it is not legally incumbent upon you, and you may very well be right, with respect to the other, however many of these lawsuits may or may not exist. But in my courtroom I have significant discretion, and with respect to the existence of all these other cases, whether or not Sacks & Sacks or their trial counsel, Mr. Thomas, Mr. Gilbert are even aware of these other cases, is unknown to me. The much better practice, the more politic practice, the standard which may not be a legal

standard but it is a standard that I impose on my trial until I'm told otherwise by an appellate court, we put the cards on the table before we do so.

In terms of the cumulative effect of this, I have been deprived of the ability of looking at the universe of cases and making a determination with respect to, let's say for example, hypothetically there were ten such other cases similar in nature to the one case that I was aware of, do you not think that by posing those questions other than the -- I just want to make sure I get the number right, paragraphs 176 through 180, as well as paragraph 319, that there is not only a quantitative difference when you add God knows how many of the lawsuits, but with respect to basically six paragraphs, to expand that to 16 or 60 has a deleterious effect. I believe I caught it in time in the presence of the jury.

Is there anything else you would like to add, Mr. Grillo?

MR. GRILLO: Judge, I'm just again going back to and seeking a little bit of guidance, your Honor, with respect to the allegation which I thought my question was properly posed with respect to the allegations by Dr. Jorgenson, your Honor.

THE COURT: The way you phrased that question. And as I said in decision, I don't give advisory opinions.

MR. GRILLO: I'm not asking for one.

THE COURT: You called for the operation of

Dr. Jorgenson's mind with respect to those assertions.

Now with respect to that, the more important aspect of the way the question was phrased, I understood what you did, and I sustained the objection. You didn't form a fact based question. You formed it in terms of Dr. Jorgenson's opinion. I thought that that was inappropriate formation.

There are certain factual content within paragraph 319. But the question was not appropriately formed, which is why I sustained that objection. And given the status of this record now, based upon what has been placed before this jury, to be quite candid, each of the questions that was posed to Dr. Merola was answered in the negative. They are collateral. You are bound by those answers.

And if we are now going to venture into God knows how many other litigations, I found that politic or well advised to bring this to a halt and have this discussion outside the presence of the jury. My characterization of it as reprehensible, I'm not in the habit of lecturing lawyers that I respect. You are one of them. I'm not going to make any further comment. I will stand by the statements I have already made.

Anything else you would like to add, Mr. Grillo?

MR. GRILLO: Yes, Judge, two things. I would like to have the opportunity to at least pose one question regarding the conduct alleged by Dr. Jorgenson.

THE COURT: Well, at this point I will reserve decision on that application.

Was there a second aspect to that?

MR. GRILLO: And secondly, your Honor, I was told a long time ago not to take things personally, but when a justice like yourself, who I respect utmost, throws a word out there like reprehensible, it may not matter to the Court, and that is fine.

THE COURT: You are misunderstanding me, Mr. Grillo. I can comment further, but I learned a long time ago, when you are digging a hole, you should stop digging.

MR. GRILLO: I will.

THE COURT: I am talking about me now, not you.

But the bottom line is this, I made the statement I made to say I'm not going to add any additional adjectives in terms of what just happened. I will stand on the record, and the chips will fall as they fall. I'm hoping that it doesn't affect our professional and personal relationship, but if it does, I will understand and respect.

MR. GRILLO: No, Judge, I'm not one to hold grudges. But with that said, I want the Court and the record to be clear that I never at any point thought it was my responsibility by way of a potential motion in limine to make an application to the Court in light of the ruling. Again, you had suggested that I was invading your province, I was

not. I was not trying to render an advisory opinion from your writing. I was trying to say as these new litigations are brought in, I simply used your decision as a guideline.

THE COURT: Mr. Grillo, I take you at your word. I take you at your word. But what I am saying to you in doing that, you may have failed to consider one of the factors and variables that I do have to consider in cases such as this, with respect to the cumulative effect of multiple allegations. I was unaware of these additional allegations. The better practice would have been to bring it to my attention. The mere existence of them may or may not have had additional effect of this case beyond the development of this record in terms of, dare I say it, the resolution of this case.

So I understand what you did. I said what I've said. I'm not allowing any additional questioning. Your application with respect to reframing any questions with Dr. Jorgenson, given the way this record has been developed, is denied. I have your exception.

Is there anything else would you like to say to me?

MR. GRILLO: No, your Honor, just that I operated in good faith at all times.

THE COURT: And I don't doubt that, counsel, but I want to do this on the record because it is important that I make this statement. I don't know how many cases are out there. I don't have the tickled in my Law.com or New York Law

Journal or New York Lawyer Tickle emails with respect to Dr. Merola or fraud or anything else, I just don't. I am unaware. And I am now aware for the first time of these additional multiple cases. It's never been brought to my attention before.

MR. GRILLO: Again, excuse me?

THE COURT: No, I'm going to agree with you. It very well may not be your legal obligation to affirmatively move for permission to use those with respect to cross-examination of a testifying fact and or exert witness, and I do not disagree with you in that regard.

Whether or not Mr. Thomas and Mr. Gilbert or Mr. Mayer or anyone at Sacks & Sacks was aware of these additional cases and failed to bring an in limine motion is the other side of the equation, and I don't know yet. Were they filed yesterday? Were they filed today? Were they filed a month ago? Were they filed two months ago? I have no way of knowing.

MR. THOMAS: Or served, Judge. Were they even served?

THE COURT: Well, with respect to notice, I think I have taken the appropriate action with respect to the record, Mr. Thomas.

MR. THOMAS: I'm just waiting to have my say.

THE COURT: I'm just making sure I cleared the air

with Mr. Grillo on a legal level, personal level, and professional.

Anything else?

MR. GRILLO: Nothing at this time. You just have my exception with respect to further inquiry of Dr. Merola regarding Dr. Jorgenson.

THE COURT: Noted.

Mr. Thomas?

MR. THOMAS: I'm a little shellshocked by this, your Honor. I can say this is not personal as to Mr. Grillo, but your choice of words as to reprehensible --

THE COURT: I don't need your approval.

MR. THOMAS: Judge, it is light, the way I'm feeling. I believe that this was a concerted effort. This is in fact a witch hunt against Dr. Merola. This is a concerted effort, as counsel, the way counsel phrased the question to Dr. Merola.

My mother taught me a long time ago, Judge, you point a finger at someone, be careful because there are three more pointed back at you. The very same questions that Mr. Grillo asked Dr. Merola is the very same questions we should ask whoever provided these questions to ask Dr. Merola on the witness stand.

Mr. Grillo is a very competent attorney. I have the utmost respect for him. But the questions went from a

professional approach to then reading what I appeared to see as preprinted questions. And they were phrased verbatim, and he read them verbatim. I ask that the Court take control of those notes to find out where those records came from.

THE COURT: Mr. Thomas, I have zero intention of doing that. I don't think we have to wonder given -- I purposefully issued a written decision on the 10th of June precisely in anticipation of this argument at trial, and for the purpose of preserving the record that may or may not have to be reviewed on appeal if the case is not resolved. And I'm quite happy that I did. Because it clearly defined the universe which I was aware.

I will take, Mr. Thomas, it was my recollection that it was your application in conjunction with Mr. Gilbert that sought to preclude with respect to that RICO suit. I took out of that suit the paragraphs that specifically applied to the conduct of Dr. Merola, included them in my decision together with my reasoning based upon the development of the record. My concern is we began to go beyond the four corners of that decision, and I stopped the proceeding. I don't believe it is fair to continue or to allow counsel to continue with any additional questions. And I have on more than one occasion conducted intra-trial, in limine proceedings, hearings, and applications.

And with respect to this, I can't read your mind,

Mr. Thomas. I can't read Mr. Gilbert's mind. I can't read Mr. Mayer's mind. And I can't read any of the minds of the counsel at Sacks & Sacks. I don't know what the total universe is, but let's just say how I thought this was going to go based on what was presented to me back in June and what we were about to embark on varies significantly and can cause undue prejudice to the plaintiff's case.

MR. THOMAS: And that is exactly what I want to make sure I put on the record. I'm glad that your Honor has voiced accurately and effectively the conduct that we just witnessed, the questions that we just witnessed, and the extent to which counsel has gone beyond the Court's decision.

THE COURT: They were about to, and I put an end to it, counsel.

MR. THOMAS: Your Honor.

THE COURT: And candidly, if we are putting everything on the table, once you knew it, you should have been on your feet with respect to objecting and with respect to the fact that it went beyond my decision. I caught it, I made a sua sponte determination, and I put it to rest. You made objections, but you never voiced to me until it dawned upon me that these questions that were being phrased by Mr. Grillo were going beyond the content of what the four corners of my decision was, but you may not have been aware of it, and I already phrased that for you.

As you said, it may never have been served on Dr. Merola, it may or may not have been. There is a reason he is not in this courtroom right now, because I'm not sure where we are going with this.

It would be my intention at this point to continue with the trial with no further mention other than what has already been placed on the record. And you may make any other application that you may have.

MR. THOMAS: Judge, I don't see how I can't request not just a strong admonition, but that the Court consider granting a mistrial. The prejudice is so outweighed. The probative value is so outweighed. I don't think the plaintiff can survive by these questions. He so planted a seed in the minds of these jurors of fraud and acting in concert to fraud with others.

THE COURT: If I had fallen asleep and allowed it to continue given my decision, given paragraphs 176 through 180, as well as paragraph 319. I'm comfortable with the record at this time. If you are making an application, make it. I would be happy to rule on it.

MR. THOMAS: Your Honor, my recollection is I objected to every single one of these questions that counsel had asked.

THE COURT: Understood, sir. But you cannot -- I cannot say you cannot. Are you arguing to me that while you

were making those objections you realized that the questions that were being posed were not from the complaint as set forth in my decision from paragraphs 176 through 180 through 319?

MR. THOMAS: Absolutely, Judge. If you notice the tone of my objection, it wasn't just a simple objection, I stood up and made a loud and vigorous objection. I didn't want to make a scene in front of the jury and make speeches, because I know you don't like that.

THE COURT: There is a reason I excluded. I can think of a proper way of doing it, whether the jury was present or not. It didn't happen. It happened the way it did. I'm comfortable with the way I handled it so far.

Do you have any applications?

MR. THOMAS: I have an application for a mistrial, your Honor. And I also ask that in the event that the Court does not grant a mistrial and reserves decision, give a very strong admonition to the jury with this line of questioning and attempt to bring out these allegations of fraud. They are mere allegations.

THE COURT: I'm not used to giving guidance to attorneys during their arguments. Maybe I'm being a little obtuse today. There was a decision I issued on 10 June of this year. I intended that you all be guided by it.

Development of the record has seemed to stray from that. We were about to embark on allegations beyond the

corners. Based on what was placed on the record, the content with respect to those allegations is covered in 176 through 180. And I objected as to the form of the question with respect to paragraph 319, Dr. Jorgenson's. And in that regard I'm comfortable with the current status of the record.

Do you have an application at this time, Mr. Thomas, to preclude any additional reference to any matters involving any other litigations or sworn allegations contained in any other complaints or verified complaints or other legal documents concerning these types of allegations against Dr. Merola?

MR. THOMAS: Yes, Judge, that is my application.

THE COURT: That is your first application. We will get to all of them.

Do you wish to respond to that?

MR. GRILLO: Which application, your Honor?

THE COURT: With respect to expanding the formation of questions beyond the universe as contained in my June 10 order.

MR. GRILLO: Your Honor, I think, as I said earlier, I stayed with the bounds of your order.

THE COURT: With respect to those, I believe what pending litigation we're just about to go into, other complaints and other allegations concerning other lawsuits although similar in nature, different complaints and different

sworn verified complaints, because that is my recollection of the record.

MR. GRILLO: Yes, your Honor.

THE COURT: Am I mistaken in that regard?

MR. GRILLO: No, your Honor.

THE COURT: Thank you. That is fine.

So here is my ruling. I'm going to give you an opportunity. Mr. Thomas, has made an application to the Court to preclude any additional allegations in the nature of those contained in my June 10, 2024 decision with respect to this single RICO lawsuit. And that is what I'm considering now. Do you need to be heard in that regard?

MR. GRILLO: I do, your Honor. And respectfully, I don't think it is incumbent --

THE COURT: I'm agreeing with you, Mr. Grillo. It may not be legally incumbent on you to do so, I agree with that. But in terms of fundamental fairness, whether or not the Sacks firm as represented by these two fine attorneys was aware of that, to even have the ability to move to preclude them, every one was collectively aware of what happened back in March. I don't get the same feeling about the awareness with respect to these other cases. I may be totally wrong, but I needed to put an end to it in the presence of the jury.

MR. GRILLO: Well, your Honor, from my perspective as I said --

THE COURT: I agreed with the fact that you have no legal obligation to investigate or disclose.

MR. GRILLO: And I request the opportunity to continue. I understand the Court has to strike a balance, your Honor. But I painstakingly formulated questions with respect to your ruling, the specific factual, and stayed away from --

THE COURT: I understand what you did, Mr. Grillo, but I applied my reasoning to other factual allegations without giving the Court the opportunity to rule with respect to those other allegations. Not only as to their content, unless you are representing that they were drafted by the same people, that identical language in multiple lawsuits. I do not want an answer to that particular question. But the bottom line is paragraphs you inadvertently failed to consider the cumulative deleterious effect upon the plaintiff, which I'm required to rule upon. I'm aware of your intention to use additional lawsuits. I don't know if there were four, five, or 20.

MR. GRILLO: My recollection, there were four naming Dr. Merola.

What I respectfully request, your Honor, is that you hold any decision in abeyance. I know we have a jury here. I'm happy to give the other three complaints that have been filed. They are online.

THE COURT: Have they been served?

MR. GRILLO: That, I'm not certain. I'm not a party to that litigation, I'm just doing my homework.

THE COURT: With respect to online, are they pacer?

MR. GRILLO: Yes.

THE COURT: In the context of pacer, do they file copies of the service, the affidavits of service which has or has not been served? It's a rhetorical question at this point, but you know where I'm going with it.

MR. GRILLO: I'm willing to hold any further questions. I'm going to abide by your directive. When I say I'm willing, I will abide by any decision your Honor makes. However, I think it will be incumbent upon me, even at this late hour, for me to produce any other pleadings so your Honor can review them.

I can say to your Honor as an officer of the Court who has been practicing for a little longer that I want to say, over 33 years, maybe I take my ethics seriously.

THE COURT: I disagree with nothing you have said.

MR. GRILLO: To me, I'm doing my best to navigate this objectively. Again, I will reiterate the utmost respect I have for your Honor, so I'm not looking to pander the Court, but I think given this development, I will ask the Court to take leave and at least allow me to take leave and allow me to strike a balance.

THE COURT: What I really need you to do now that it's become obvious we are where we are, that you discuss with plaintiff's counsel the universe that exists, where we find ourselves. I have done my intra-trial hearings with respect to information. I know what applications I would be making if I were Mr. Thomas.

Right now he has an application now that we know that there are three additional lawsuits. He is going to modify his application to preclude these three additional lawsuits, any allegations within those three lawsuits. And as a prophylactic, I presume he is going to include any additional applications we may become aware of that are not within the universe of the four cases that we are now aware of.

Would that be your application?

MR. THOMAS: Absolutely, Judge, one hundred percent. Any mention of any of these claims regardless if they have been served or not is highly prejudicial.

Judge, I will once again renew my application for a mistrial. Not only grant the mistrial, but order the defendants to pay our costs. This is ambush. I don't know how else to describe it, Judge.

THE COURT: With respect to where we find ourselves, I can't help but feel this, I do not have the entire universe of participants in my courtroom. And I will leave it at that

for now.

With respect to Mr. Grillo's application, I'm directing Mr. Grillo to provide you with the information concerning the sworn statements that he is attempting to use. And assuming and presuming that they were verified complaints in federal lawsuits, I'm directing that he provide you with that information so that you can properly form your application to preclude. I will reserve with respect to this.

I'm going to prohibit any additional questions in front of this jury until we have had an opportunity to conduct that process.

And with respect to your application for mistrial, I have not heard from Mr. Grillo in that regard.

MR. GRILLO: Your Honor, I would request the Court deny the application for a mistrial.

THE COURT: Mr. Puzo, you need to be heard on any of this?

MR. GRILLO: If I can give additional reasoning?

MR. PUZO: I oppose the application for mistrial.

THE COURT: With respect to anything else you would like to put on the record with respect to the plaintiff's application for mistrial, Mr. Grillo?

MR. GRILLO: Yes, your Honor. I don't think the prejudicial impact of these were simple questions that were denied. Now I can appreciate counsel standing and speaking in

a loud voice, and whether that is histrionics or theater, I'm not sure. But be that as it may, I don't think anything in light of the fact that Dr. Merola denied every allegation, this is consistent with your ruling, your Honor.

THE COURT: I understand that.

MR. GRILLO: So I don't see how this rises to the level that would warrant a mistrial.

THE COURT: But in the abundance of caution, I put an end to the questioning. My instinct was that the last question that you asked, or the one before that may have been from a different case because it sounded different to me with respect to the language.

I'm going to get a copy of the transcript, obviously. I'm going to preclude any additional questioning along these lines for the duration of Dr. Merola's testimony today. I'm going to entertain once the disclosure has been made to Mr. Thomas and Mr. Gilbert, any application they might specifically have with respect to those other three lawsuits. I already ruled on the first. And I will conduct myself accordingly with respect to the application of mistrial. I'm going to deny that application at this time. And you have your exception for the record, Mr. Thomas.

MR. THOMAS: Your Honor, at the very least, some sort of instruction to the jury, some sort of admonishment, some sort of curative instruction. This jury is left with

negative injunction.

MR. GILBERT: I oppose that.

THE COURT: I might be inclined to agree with you, Mr. Thomas, if the June 10 decision didn't exist. What Mr. Grillo, he didn't run afoul of my decision other than there were new cases. And with respect to that decision, they are bound by the answer. Dr. Merola was steadfast in denying it in responding in the negative to each of those questions candidly in number. It was just about to hit number seven, there are six total in my decision. I believe that my sua sponte interjection was timely.

I'm denying your application for mistrial. And until such time as I've had the opportunity to review your application, Mr. Thomas, to preclude any additional mention of any of the allegations contained in these three additional lawsuits or any other lawsuits which may be brought during the pendency of this litigation and this trial, I will address any other issues you might have including, any curative instructions or final instructions on the law to the jury until I have determined that entire universe.

MR. THOMAS: Will the Court consider striking the answer of the defendant in light of the quite egregious conduct?

THE COURT: No, the Court would not.

That having been said, we will go off the record.

(Whereupon, there was a brief discussion off the record.)

CLERK: Remain seated. Come to order. Case on trial continued.

THE COURT: Dr. Merola, you can return to the stand. I remind you, you are still under oath. I will remind you again in the presence of the jury.

Bring in the panel.

MR. GRILLO: Judge, can we approach? I just want to run something by you?

THE COURT: Sure.

(Whereupon, there was a brief discussion off the record.)

THE COURT: Ready for the panel, gentlemen?

MR. GRILLO: Yes, sir.

MR. THOMAS: Yes, your Honor.

THE COURT: Bring them in.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: All jurors present. Counsel waive a roll call?

MR. THOMAS: So waived.

MR. GRILLO: So waived.

THE COURT: Before we allow you to continue, I remind you, you are still under oath.

Before we continue, it's my intention to finish with Dr. Merola today and break for the weekend and have you back here on Tuesday. And hopefully we will be done before five o'clock.

Mr. Grillo.

CROSS-EXAMINATION BY MR. GRILLO: (Continued)

Q Dr. Merola, with respect to your purported lifecare plan, I would like to go back and talk to you about that.

A Sure.

THE COURT: Exhibit 18.

Q Doctor, you made certain assumption,s your alleged lifecare plan is based on that, is it not?

A Yes.

Q As you sit here today, does Mr. Lopes have any future appointments scheduled to see you as you sit here today?

A I don't have the appointment book in front of me, so I don't know.

Q So you can't state definitively as to whether or not he has any future appointment, correct?

A He should be coming back in at least several times per year.

Q But you can't state when that is, correct?

A I don't have the date, no.

Q Again, Doctor, you don't have the scheduled appointment in the future with him that you can confirm, fair enough?

A I don't have the appointment book, no.

Q Now, Doctor, with respect to the need for future surgery, that's an opinion of yours that he needs future surgery, correct?

A Yes.

Q You certainly have no way of forecasting an appointment for that, do you, Doctor?

A I'm not sure I understand what you mean when you say forecasting.

Q You haven't scheduled a future appointment for him to have any future additional surgery on his back, correct?

A Correct.

Q Doctor, I know we talked about MRI, we talked about degenerative spines. Doctor, the fact that a diagnosis can appear on an MRI film as a herniation, is that something that is subject to interpretation by a doctor like yourself?

A Sure.

Q And, Doctor, you are not a radiologist, correct?

A Correct.

Q You are a spinal surgeon?

A Yes.

Q Have you at any point from the moment you met Mr. Lopes back in February 12, 2018 to the present time, have you ever spoken to any of the radiologists who took films of Mr. Lopes's lumbar spine?

A No.

Q During your treatment of Mr. Lopes, did he ever express to you his unwillingness to have surgery?

A Not that I recall, no.

Q Did he ever tell you that he wanted to continue with conservative treatment, and that he did not want to have surgery?

A I mean, I would have to go through all my notes in terms of making a recommendation for surgery. I always have the discussion with the patient and give them an opportunity to express their feelings, and then answer their questions.

Q Doctor, have you ever seen the report of Dr. DaSilva, the plaintiff's psychologist?

A No.

MR. GRILLO: Your Honor, may we have that? I'm not sure which exhibit that is.

THE COURT: Twenty-one.

MR. GRILLO: Thank you, your Honor. Can I see them before they go to Dr. Merola?

THE COURT: Certainly.

MR. GRILLO: Thank you. I'm looking for the initial report of Dr. DaSilva. It doesn't seem to be contained in this exhibit.

THE COURT: Try 21.

Give Mr. Grillo the entire universe of Dr. DaSilva. I believe that is 20, 21, B, C, and D.

If there is another copy available from plaintiffs,

if there is an unanimous agreement for the record. Thank you. Move it.

MR. GRILLO: So this is in evidence, part of the record.

Q Dr. Merola, I'm going to direct your attention to plaintiff's 20, which is part of Dr. DaSilva's records.

THE COURT: It is displayed on the screen.

MR. GRILLO: Thank you.

Q Doctor, suffice to say, you have not seen this record --

A Yes, correct.

Q -- prior to today. And we can agreed that date of evaluation by Dr. DaSilva, December 11, 2018, do you see that in yellow?

A Yes.

Q And then there is a background. This is I want you to know, that plaintiff's counsel read this into the record, portions of it, but the entire document is in evidence. And just down, I will, if I may, this is significant history. This is Mr. Lopes's discussion, with Dr. DaSilva in here. "He has been receiving physical therapy and injection treatments. He is under the care of his neurologist Dr. Hausknecht and also receiving cognitive rehabilitation with Dr. Brown. He reports, Mr. Lopes reports that the doctors want to operate on his back and neck, but that he is very nervous and doesn't want surgery."

That was as of December 11 of 2018. Prior to that point,

Doctor, you had been treating Mr. Lopes with conservative treatment?

A Yes.

Q And by conservative treatment, what kind of treatment were you giving him?

A He was off duty work, taking medications, doing therapy, and going to pain management.

Q And you testified that you don't know if he ever told you that he didn't want surgery, correct?

MR. THOMAS: Objection. Asked and answered.

THE COURT: I will allow it. He is just framing the next question. You may answer it.

A Correct.

Q Yet, would you agree with me, Doctor, that the entries in Dr. DaSilva's notes contradict what you are saying?

MR. THOMAS: Objection.

THE COURT: You can answer any way you would like, Doctor.

A It just says that he is nervous and doesn't want surgery according to Dr. DaSilva's note, yes.

Q So it does contradict what you said, no?

A No. I said that he never told me that he was nervous and didn't want surgery, but he told Dr. DaSilva, according to this note.

MR. GRILLO: Thank you, Doctor. I have no further

questions. Thank you for your time today.

THE COURT: Anything, Mr. Puzo?

MR. PUZO: Yes, I do.

MR. GRILLO: Thank you, your Honor.

THE COURT: Thank you, Mr. Grillo.

CROSS-EXAMINATION BY MR. PUZO:

Q Good afternoon, Dr. Merola.

A Good afternoon.

Q The purpose of Mr. Lopes's surgery was to stabilize his spine, correct?

A Yes.

Q In terms of why it needed to be stabilized or whether it was due to his underlying degenerative disc disease or some traumatic event, that wasn't the most important thing, the most important thing is that in your opinion he needed that surgery to stabilize his spine, correct?

A Yes.

Q And that surgery was successful?

A Yes.

Q And it went according to plan?

A Yes.

Q No complications?

A Yes.

Q And in fact, the x-rays you took over a year afterwards show that his spine was stabilized?

A Yes.

Q Now, in your lifecare plan you state that MRIS are recommended every two to three years, correct?

A Ideally, yes.

Q But he hasn't had an MRI since the time of the surgery, has he, that you are aware of?

A Correct.

Q And it has been five years?

A Yes.

Q You reasonably anticipate he is not going to have another MRI unless something happens?

MR. THOMAS: Objection.

THE COURT: If you can answer that from a medical perspective, you may. If not, let us know.

A Typically MRIs become more frequent as the patients age. They are less frequent over the course of life. It is anticipated that you are going to do it about every two to three years. It is hard to put dates on it, but that is a reasonable expectation.

Q You give a lifecare plan. You could have said next five years, he might need them after that, he is going to need them, but you didn't say that did?

A I was not specific.

Q But that is specific in terms of dollars. So what you put down there is worth more dollars than what you just testified to?

MR. THOMAS: Objection.

THE COURT: I will allow it.

A This is an approximate lifecare plan based on what is optimal of the patient's care and treatment based on what they are able to undergo.

Q And that is based on the patient's actual symptomology, if he is not complaining of anything, not necessary to have future x-rays or MRI, is that true?

A In part, yes.

Q You obviously have many patients that are not involved in litigation or work site incidents, correct?

A Yes.

Q Many of those patients go back to work, correct?

A Yes.

Q And many of those patients are able to actively participate in their usual activities of daily living, correct?

A Yes.

Q Do you ever have any patients that feign symptoms?

A I'm not sure what you mean.

Q Do you have any patients that relate symptoms to you that are not objectively objective or quantifiable or measurable by you?

A Yes.

MR. PUZO: Thank you. I have nothing further.

THE COURT: Anything, Mr. Thomas?

MR. THOMAS: Yes, Judge. Thank you.

REDIRECT EXAMINATION BY MR. THOMAS

Q Dr. Merola, thank you very much for staying late.

Dr. Merola, if we took MRIs of everyone in this room, are we going to find degenerative changes in their cervical and lumbar spines?

A Yes.

Q If you find degenerative changes, osteophytes, degenerative disc diseases, desiccation in anyone in this room, are you doing surgery on them?

A No.

Q Why not?

A It has to have symptoms and a failure of conservative treatment with objective neurological findings and problems that the patients would otherwise have to manifest for surgery to be indicated.

Q So when somebody comes to you and says I have pain, discomfort, limitations and restrictions, I can't do the things I used to do, are those the kind of complaints that mean anything to you?

A Sometimes, yes.

Q And the diagnostic testing that is done, how do you use that in the overall picture for diagnosis and treatment?

A Well, you try to get more specific about what the actual complaint is and what it is doing to the patient and how it is doing that. And then you objectively examine them, and you take a

diagnostic study to see whether or not it correlates with their symptoms and their exam.

Q And you were the surgical consult for Mr. Lopes, correct?

A Yes.

Q So if Mr. Lopes indicated that when he first saw you as a surgeon, you understand why he thought he was going to have surgery?

A Sure.

Q But you didn't do surgery on him the first visit, correct?

A Correct.

Q How about the second visit?

A No.

Q How about the third visit?

A No.

Q How long was it from the time he first consulted with you as a surgical consult to the time he actually had the surgery?

A I believe, I have to go to the operative report. Date of surgery was September of 2019. So I originally saw him in 2000 --

Q I believe the first visit was February 12, 2018.

A So I saw him in '18 and surgery was done in '19.

Q September of '19?

A Correct.

Q More than a year after he first consulted you?

A Yes.

Q Doctor, I want you to assume that counsels for the defense have made arguments in this case that somebody could exaggerate injuries for benefit of getting money from a lawsuit, can you assume that?

A Yes.

Q In all your times of treating Mr. Lopes, did you ever think he was exaggerating or magnifying his symptoms for the purpose of getting more money in a lawsuit?

A No.

Q Dr. Merola, you want your testimony to this jury to be full, fair, and accurate, don't you?

MR. GRILLO: Objection, your Honor.

THE COURT: I will allow it.

A Yes.

Q You wouldn't want to mislead this jury in any way, correct?

A Correct.

Q I want you to recall the question that counsel asked of you on page 292 of this trial transcript last week, Mr. Grillo, page 292, line 18. I will read the question, and then I will have another question.

"Q: And again as you were questioned about your notes about the questionnaire, the intake sheet of Mr. McGill, you said I was instructed by Mr. Thomas not to bring them.

A: No, I don't believe I said that because I don't

think that's what I said, as I recall."

Do you remember being asking that question and giving that answer?

A Yes.

Q And the suggestion was that I told you not to bring your notes?

MR. GRILLO: Objection, your Honor.

THE COURT: I will allow it for purposes of redirect.

A Yes.

Q Now I want to read from the trial testimony of Mr. McGill, page 522 of the trial transcript of Mr. McGill during the cross-examination by Mr. Sardino.

MR. PUZO: Objection, your Honor. Is this testimony?

MR. THOMAS: Your Honor.

THE COURT: I will overrule the objection at this point, which will lead to more clearly explain to the jury where you are.

MR. PUZO: I haven't heard a question.

THE COURT: We are getting there.

Q Dr. Merola, you testified in a case by an individual involving the case of Mr. McGill?

A Yes.

Q And I was the trial counsel for the plaintiff in that

case?

A Yes.

Q And Mr. McGill was your patient?

A Yes.

Q And that trial took place in Manhattan In front of Judge Kingo.

A Yes.

Q And during that trial on page 522 of the trial transcript, these questions and answers were given. I will read them beginning on 522, line two.

MR. PUZO: I object.

THE COURT: Stop. Overruled at this point. Question is posed by whom to whom?

MR. THOMAS: Sorry.

THE COURT: In what portion of the case?

Q Questions posed by Mr. Sardino, the defense attorney to you during, cross-examination, page 522, line two.

"Q: Did you bring your billing records with you, Doctor, in response to that subpoena?

A: No.

Q: And you were directed not to do that by plaintiff's attorney, Mr. Thomas.

Objection, move to strike, your Honor. Totally improper.

THE COURT: I'm going to sustain the objection, and

I'm going to strike that."

MR. PUZO: Objection, your Honor. Where are we?

THE COURT: With respect to that, that is not a finding. Sustained, you made your point.

Ladies and gentlemen, disregard with respect to questions and answers in the McGill trial on that subject as currently presented.

Your application is granted. The jury will disregard.

Q Remember when counsel asked you if you know the name of Mr. Lopes's Workers' Compensation attorney?

A Yes.

Q And you understand that Mr. Lopes had a Workers' Compensation claim?

A Yes.

MR. THOMAS: Your Honor, I would like to offer.

MR. PUZO: Judge, I have an objection.

THE COURT: Sustained. You have a stipulation with respect to the Workers' Compensation file.

If you would like to bring a Workers' Compensation witness in, Mr. Thomas, you are free to do so. Sustained. Change the subject. Change the subject, counsel.

Anything else of substance?

MR. THOMAS: Yes, Judge.

Q Counsel was asking you about your bills. Do you remember

that?

A Yes.

Q Do you know what your bill was for Mr. Lopes and the care and treatment that was rendered to him during the course of the surgery at New York Presbyterian Hospital?

A I have to take a look at the bill itself.

Q Do you know where that bill is?

A There are billing services that then submit the bills for payment.

Q Are those bills contained within that box?

A They should be, yes.

Q So when you were asked if your records were in court, and the entire file is in court, you understand that your records, the billing, everything that is part of your file is in that box?

MR. PUZO: Objections.

MR. GRILLO: Objection.

THE COURT: Sustained.

Jury will disregard. Proper question, proper subject counsel. You made your point, move on. Sustained the objection.

Ladies and gentlemen of the jury, the last question and answer, the last affirmative statement by counsel is to be disregarded by you with respect to the production of the billing records by Dr. Merola.

Next question, Mr. Thomas.

MR. THOMAS: Judge?

THE COURT: Next question, Mr. Thomas.

Q On the point of your surgical bill for Mr. Lopes and the hospital stay, if I told you approximately 128,000 --

MR. GRILLO: Objection, Judge.

THE COURT: With respect to that, I have nothing in this record to support that. I have a stipulation with respect to aggregate numbers that we can discuss at the appropriate time, but I'm not quite sure what you are attempted to do right now.

MR. THOMAS: Judge, may I have Exhibit 18 that was marked for identification?

THE COURT: It is ID only at this point.

MR. THOMAS: Yes, I would like to show it to Dr. Merola.

THE COURT: Exhibit 18. Future care plan.

Do you have Exhibit 18 up there, Doctor?

THE WITNESS: Yes, I do.

Q Is that the care plan that you created?

A Yes.

Q How much did you put for future surgery including hospitalization?

A $150,000.

Q That includes how many days in the hospital?

A Three days.

Q I want you to assume that Mr. Lopes testified this morning that he spent multiple days in the hospital after your surgery. Does that comply with your understanding that the number that you put in your future care plan is for multi-day stay?

A Yes.

MR. THOMAS: Your Honor, I wish to move the future care plan into evidence.

THE COURT: Show it to counsel.

MR. GRILLO: Judge, we've seen this. We voiced our objection.

THE COURT: We had the discussion yesterday with respect to this in terms of its connection to testimony. I'm going to allow it over your exception, Mr. Grillo, Mr. Puzo.

MR. GRILLO: Can we have redactions?

THE COURT: I'm going to reserve decision on that until we have had an opportunity collectively to determine if any of the contents should be redacted.

MR. THOMAS: Let me ask another question.

THE COURT: Please.

Q Doctor, all the items that are listed, all the things from the diagnostic testing to the pain management to the therapeutic visits to the surgical procedures, were those all numbers for future care that you created and generated for Mr. Lopes?

A Yes.

Q And are they true and accurate to the best of your knowledge and ability?

A Yes.

MR. THOMAS: Your Honor, once again, I ask to move this into evidence.

THE COURT: Do we have specific items of redactions?

MR. GRILLO: Yes.

THE COURT: Has it ever been discussed with counsel before this minute?

MR. GRILLO: Yes.

THE COURT: What has been discussed?

MR. GRILLO: No resolution.

THE COURT: I will be ruling on it in realtime. At this time I will be reserving decision and admitting it outside the presence of this jury.

Counsel, continue.

Q So your testimony is that he had a traumatic injury to his spine, correct? And your answer was yes. Do you remember being asked that question and giving that answer?

A Yes.

Q From any questions that were asked by Mr. Grillo on cross-examination, did anything make you change your opinion?

MR. GRILLO: Objection, your Honor.

THE COURT: I will allow it.

A No.

Q As you are sitting here now, do you have an opinion as to whether Mr. Lopes sustained a traumatic injury as a result of when he fell off the scaffold?

A Yes.

Q Counsel asked you whether Mr. Lopes can do sedentary work, do you remember that?

A Yes.

Q Do you know what his education level is?

A No.

Q Do you know his proficiency in any other potential area of work?

A No.

Q But he can walk?

A Yes.

Q He can dress himself?

A Yes.

Q He can bathe himself, correct?

A Yes.

Q He is not in a wheelchair?

A Correct.

Q He doesn't need 24-hour nurse care?

A Yes.

Q But he lives with pain?

MR. GRILLO: Objection.

THE COURT: I will allow it, based on the record.

A Yes.

Q When do you anticipate Mr. Lopes can be out of pain?

A It is difficult to make that projection.

THE COURT: Next question.

Q Remember counsel was asking you about how many of your notes didn't say those words "to a reasonable degree of medical certainty, the spinal injuries are causally related to the accident," do you remember that?

A Yes.

Q And other points in time, your notes had that language?

A Yes.

Q Can you tell the jury why that is?

A That was required by the authorities that oversee treatment for injured workers. They have rules and regulations that change during the course of time, and we need to abide by them the way that we write our notes so they are interpreted properly by that regulatory authority.

Q Did you need authorization before you performed surgery on Mr. Lopes?

MR. GRILLO: Objection.

THE COURT: I will allow it.

A Yes.

Q And that authorization was granted?

A Yes.

Q Remember when counsel said that they subpoenaed your

billing records, do you remember that?

A Yes.

Q They never showed you a subpoena, did they?

MR. GRILLO: Objection, your Honor.

THE COURT: Sustained as to form only. There is a better way of asking it.

Q Did you ever see the subpoena that they claim they served for your billing records?

THE COURT: Sustained as to form. Ask a proper question.

Q Were you served with a subpoena for billing records?

THE COURT: I will allow it.

A I don't recall, no.

Q And you said you outsourced your billing?

A Yes.

Q Did you ever hear from the company that does your billing that they ever received a subpoena?

A No.

THE COURT: Anything else, Mr. Thomas?

MR. THOMAS: Sorry.

Q Do you remember when counsel was asking you about myelopathy and spondylolisthesis being a degenerative wear and tear type condition?

A Yes.

Q And Mr. Lopes had these degenerative conditions?

A Yes.
Q Is that why he needed the surgery?
A No.
Q Tell the jury why he needed the surgery, even though he had these preexisting conditions?
A He had an aggravation of his lower back condition that clinically deteriorated over the course of time since the time of the accident.
Q And once again, this accident was the competent producing cause of the worsening of that condition that ultimately led for the need of the surgical intervention?
MR. GRILLO: Objection.
THE COURT: It's proper based on the cross. You may answer.
A Yes.
Q Counsel asked about whether he had any MRI in the past few years, do you remember that?
A Yes.
Q Just because he didn't have them, does that mean he is not going to have them in the future?
MR. GRILLO: Objection, your Honor.
THE COURT: I will allow it.
A No.
Q The fact that he hasn't had the therapy that you suggested in your future care plan, if he hasn't, does that mean he

is not going to need it?

A No.

Q What is going to happen if he doesn't have it, what is going to happen as he gets older?

A As you get older, those normal degenerative changes start to occur during the course of time, and your pain increases.

MR. THOMAS: Dr. Merola, I thank you for staying late.

Your Honor, I have no further questions.

THE COURT: Thank you.

Anything else, Mr. Grillo?

MR. GRILLO: Sure.

THE COURT: What subject?

MR. GRILLO: I will mark this.

THE COURT: I will ask for an offer of proof with respect to subpoena as to who it was served upon and what is indicated in the affidavit of service. I asked a specific question. I presume you have in front of you a subpoena or an affidavit of service concerning a subpoena, with respect to upon whom it was served, what was returned. And we will give you a couple of questions in that regard.

MR. GRILLO: Thank you.

THE COURT: Go ahead.

MR. GRILLO: Your Honor, I have a subpoena dated October 23, 2024 served on Dr. Andrew Merola, 567 First

Street, Brooklyn, New York, made returnable. We command you that all business and excuses be laid aside to produce the following materials before Suffolk County Supreme Court subpoenaed records room, One Court Street, Riverhead, New York 11901, on or been November 13, at 9:00 a.m.

THE COURT: Affidavit of service.

MR. GRILLO: Yes, your Honor. I have the response. I don't believe the actual affidavit of service is included in. What I do have is acknowledgment of a certification from a Brianna Giraldo, Dr. Merola's office. Then I have a signed letter on Dr. Merola's letterhead signed by him dated November 1, regarding Ildo Lopes, which was signed by him.

THE COURT: In response to the subpoena?

MR. GRILLO: Yes, sir.

THE COURT: And specific as to billing records? So where are we going?

MR. GRILLO: Well, Judge, the allegation is that, A, he hasn't seen the subpoena. I want to show him the subpoena. It is it abundantly clear that he doesn't produce his billing records.

MR. THOMAS: Objection.

THE COURT: Strike. Move to strike. Your editorials are not appreciated. If you have a question that you want to ask the doctor, I will give you one or two questions. I believe we covered it sufficiently, but I will

give you one or two questions.

MR. GRILLO: Can we mark this?

THE COURT: Sure.

MR. GRILLO: Defendant's E.

THE COURT: E, ID only. Defendant's.

COURT OFFICER: Defendant's E for identification only presented to the witness.

THE COURT: Next question, counsel.

MR. GRILLO: Thank you.

RECROSS-EXAMINATION BY MR. GRILLO:

Q Doctor, looking at that document that is before you, can you --

THE COURT: Which document?

MR. GRILLO: Defendant's Exhibit E, as in Edward, the entire exhibit.

THE COURT: That is different than a document.

MR. GRILLO: The entire package.

Q Does that refresh your recollection, sir, as to whether or not a subpoena was served by me to produce your billing records here in court?

A Yes.

Q And that was done in anticipation of your testimony, was it not, sir?

A Yes.

Q And you provided, I think you are holding it up now, a

signed letter directing us to a billing facility, correct?

A Yes.

Q That is not identified, correct, just a phone number?

A Correct.

Q And if I told you, I want you to assume --

MR. THOMAS: Objection.

THE COURT: Sustained. Too far afield, collateral.

Q As far as these claims about trauma, the questions about whether this accident caused a traumatic injury to the plaintiff, we can agree, sir, in all the studies you looked at, all the films you looked at, not once was there any edema, meaning any swelling, depicted in any of the fills?

MR. THOMAS: Objection.

THE COURT: It's been called ad nauseam. Don't answer. We are done.

Q Doctor, as far as Mr. Lopes testifying that he spent several days in the hospital following your surgery, can we agree, Doctor, that when you testified last week, you conceded the fact that this was a one-day procedure, it was an outpatient procedure, and that Mr. Lopes did not spend multiple days in the hospital, correct?

A Yes.

MR. GRILLO: I have nothing further. Thank you, your Honor.

MR. PUZO: Nothing further, your Honor.

THE COURT: That concludes the matter.

Dr. Merola, I appreciate your stamina. Safe travels back, and enjoy your weekend, sir.

Ladies and gentlemen of the jury, it is pretty close to five o'clock on a Friday. I'm sure this entire process since your first arrival here in the courtroom has been enlightening in some regards. We are separated for quite a bit of time now. I will see you back here Tuesday morning. Depending on how the record develops, I'm not sure where we are going to be. We need to finish Mr. Lopes's testimony, and then I may have some matters to deal with counsel on.

Please don't speculate, as I indicated in my preliminary injunctions to you. When I exclude the jury, it is for a legal purpose so the matters that don't concern your purview, there are matters concern rulings that I need to make with respect to the record. And I appreciate your patience.

And I'm sure those of you who never served on a jury before, I may have to use that word enlightening again. Enjoy your weekend. Do not form or express any opinion about the case. Don't discuss it amongst yourselves. Don't discuss it with my third parties. Don't deliberate by any means with anyone. Enjoy your weekend. I will see you back here Tuesday morning at 9:40.

All rise as jury exits.

(Whereupon, the jury exited the courtroom.)

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